IN THE COURT OF APPEAL OF BELIZE, A. D. 2016

Criminal Appeal No 8 of 2013

JAPHET BENNETT Appellant

v

THE QUEEN Respondent

———

BEFORE:

The Hon. Mr. Justice Samuel Awich	Justice of Appeal
The Hon Madam Justice Minnet Hafiz- Bertram	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

A Matura-Shepherd for the Appellant
C Vidal, SC, Director of Public Prosecutions for the Respondent

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23 June 2016 and 27 October 2017

HAFIZ-BERTRAM JA

Introduction

[1] On 13 September 2009, Ellis Meighan Sr. ('the deceased') lost his life by gun shot injury at the corner of Banak Street and Central American Boulevard, Belize City. Japhet Bennett ('the appellant') was indicted for his murder on 22 September 2011. He was tried before Lucas J and a jury between 19 February 2013 and 28 February 2013. On 25 February 2013, the appellant was convicted of the offence of murder and on 28 February 2013, he was sentenced to life imprisonment. The appellant appealed against

his conviction and sentence. On 23 June 2016, this Court heard the appeal and reserved its judgment.

The evidence for the prosecution at the trial

[2] The witnesses for the prosecution were Marlon Middleton, Assistant Superintendent Suzette Anderson, Grace Flowers, Daniel Daniels, Dr. Mario Estrada Bran, Sheldon Meighan, Allison McLaughlin, and Manuel Espat.

[3] At the trial, the prosecution was given leave by the learned Lucas J, pursuant to **section 71(2)** of the **Evidence Act, Chapter 95** ('the Act'), to treat Marlon Middleton as a hostile witness. Lucas J admitted his statement in evidence which was read by the recorder of the statement, Assistant Superintendent, Suzette Anderson. The prosecution relied on it to prove its case pursuant to **section 73A (b)** of the Act.

[4] Marlon Middleton, a maintenance contractor was an eyewitness to the crime. He testified that on 13 September 2009 at about 8:40 pm, he was going to his sister's house on Banak Street after playing football. He was riding on the Boulevard over the Belcan Bridge when he heard some gunshots. He noticed a body on the ground near the opposite side of the street which was at the corner of Banak Street and Central American Boulevard close to a mechanic shop. He said that he was about 40 feet or more when he first observed the body. He testified that when he observed the body he continued riding to his sister's house. He testified that, "*Apart from the body I did not observe nothing else."* He said that he remembered giving a statement to the police in this matter but he could not recall whether he told the police that he saw the body. He said that he observed the body for about five minutes after he heard the gunshots. He testified that he could not remember if he signed the statement which he gave to the police.

[5] Middleton was allowed to refresh his memory from the statement he gave to the police which was dated 15 September 2009, pursuant to **section 76(1)** of the **Evidence Act** and he said that he "*think this is the statement I gave to the police* …" He was then asked what he observed on the day in question. He testified "*Just the body*." He said that on the statement he can see that he saw somebody else but he only saw the body. Further, that he did not remember telling the police anything else. He admitted to giving the statement on 15 September 2009 but he could not remember who recorded the statement from him. Further, he could not recall signing the statement which he gave to the police. The prosecution thereafter made an application to deem this witness (Marlon Middleton) as hostile and the trial judge ruled that, "*The witness has manifested by his demeanour and his answers to questions to and by the Crown counsel, Ms. Grant that I am of the opinion that he is hostile to the party, that is, the Crown that call him. The Crown Counsel may cross-examine him in connection with the statement which is recorded from him on 15th September 2009."*

Cross- examination of Middleton after being deemed hostile

[6] Middleton testified under cross-examination by the prosecution and the defence that he did not see a person there and he did not tell the police that the male person had a black handgun resembling a 9 mm pistol. Further, he did not tell the police that the person had the gun in his right hand and that he was 2 feet from the man lying on the sidewalk. He testified that he did not tell the police that the male person was 5 feet 8 inches in height and was wearing a red shirt and he had on a light colour fitted cap and that he was medium built. He denied saying that he was two feet away from the gunman and he could clearly see the person as there was a big lamp post that was well illuminated. He denied that the gunman then jumped on a bicycle and rode off in the company of another male person who was waiting for him and they both head to Partridge Street. Middleton also denied that he told the police that the male person who he saw was Japhet Bennett and he would see him regularly on the Boulevard. Further, that he has known him for more than four months and the last time he saw him was a

week before the incident. Middleton said, "*I have no problem with this man, the prisoner in the box."*

Application to tender previous inconsistent statement pursuant to section 73 A(b) of the Evidence Act

[7] The prosecution made an application to the trial judge pursuant to **section 73 A (b)** of the **Evidence Act** as amended by **Act No. 6 of 2012,** to tender the previous inconsistent statement given by Middleton which was dated 15 September 2009, into evidence through Assistant Superintendent Suzette Anderson ('ASP Anderson'), the recorder of the statement. The statement was admitted by Lucas J and marked "SA 1". The prosecution sought the judge's permission for the recorder of the statement, ASP Anderson to read the statement aloud. The statement was read with the exception of a few words which were not considered necessary. There was no cross-examination of this witness by the defence counsel.

Dr. Mario Estrada Bran

[8] Dr. Mario Estrada Bran was deemed an expert in forensic medicine by the trial judge. He testified that he performed the post mortem on the deceased and in his opinion the cause of death was massive brain damage due to head trauma due to gunshot wounds. In his opinion it was a far distant shot meaning a distance of about 28 to 30 inches caused by a handgun of a medium caliber which is 38 to 9 mm caliber. In cross-examination, he said that the gunshot was from back to front and from upwards to downwards. In re-examination, he testified that the deceased's back was to the assailant.

Sheldon Meighan

[9] Sheldon Meighan testified that she went to the Karl Huesner Memorial Hospital morgue to witness her husband's (the deceased) autopsy.

Allison McLaughlin

[10] Corporal Allison McLaughlin of the Criminal Investigation Branch (at the time of the incident) testified that he went to the Karl Huesner Memorial Hospital Morgue to witness the post mortem examination on the body of the deceased. He said that during the examination he instructed the Scenes of crime Technician, Mr. Jiro Sosa to take photographs of the deceased body and injuries and he observed when he took the photographs. The photographs were tendered by him and admitted into evidence by the trial judge and marked "AM 1-3".

Sergeant Manuel Espat

[11] Sergeant Manuel Espat testified that in September of 2009, he was posted at the Crimes Investigation Branch, Eastern Division. He testified that on 13 September 2009, at about 8.45 pm, he visited the corner of Banak and Central American Boulevard, Belize City, where he saw the motionless body of one Ellis Meighan Sr. (the deceased), whom he knew, with apparent gunshot injury behind the head and on the face, left to the nose. He said that he transported the body of the deceased to the morgue where he was examined. He later returned to the crime scene and he interviewed several persons. On 15 September 2009, a statement was recorded from the appellant. On 26 October 2009, he met the appellant at the CIB office, where he was detained in connection with the alleged murder of the deceased. Sgt. Espat testified that he informed the appellant of the reason for his detention. He further testified that he cautioned the appellant and informed him of his constitutional rights. Patricia Lanza, the appellant's mother was present at the time he was cautioned. The appellant did not reply to the caution. Sgt. Espat swore to an information and complaint and obtained a warrant of arrest. He then formally arrested and charged the appellant with the murder of the deceased. He identified the appellant in the dock as the person he arrested and charged on 26 October 2009.

No case submission and ruling

[12] Counsel for the appellant made a no case submission that there was no evidence that the appellant killed the deceased. The Prosecution submitted that there was sufficient evidence to put to the jury and relied heavily on the written statement of

Marlon Middleton and his testimony on oath during cross-examination of him in relation to the statement. The learned trial judge, Lucas J, ruled that he had looked at the statement and it was proven that Marlon Middleton made the statement. He ruled that:

> "The evidence in this case is direct and circumstantial. It is circumstantial because in the written statement Marlon Middleton did not witness the actual shooting of Ellis Meighan Sr. by the accused. However, it is not speculation if the jury were to accept the statement of Marlon Middleton if the accused (appellant) was the one seen with a handgun in his hand near to Ellis Meighan Sr. whilst he was on the ground shortly after Middleton heard the gunshot in that vicinity.
>
> This is my view, it is good circumstantial evidence if the jury were to accept such statement. The judgment in **Ellis Taibo v The Queen [1996] 48 WIR 74, PC**, a case form Belize is appropriate for me to quote…. The head note says:
>
> > *"On a submission of no case to answer the criterion to be applied by the trial judge is whether there is material on which a jury could without irrationality be satisfied of guilt. If there is, the judge is required to allow the trial to proceed."*
>
> It is my view that the Crown has established a *prima facie* case for me to leave the case for the jury's deliberation. I rule that the accused has a case to answer. That's my ruling."

Dock statement of the appellant

[13] The appellant elected to give a dock statement. He said:

> "First of all my Lord, I did not kill Ellis Meighan Sr. Second of all, I do know Ellis Meighan Sr. I was not even close to Ellis Meighan Sr. at the time they accuse me. I was doing my usual bases at the present time playing with my dogs who I

love the most. I don't know why I would have any intention to kill Ellis Meighan. I wish to say no more, My Lord."

The grounds of appeal

[14] The amended grounds of appeal are as follows:

1. The trial judge erred by not excluding evidence of the previous inconsistent statement of Marlon Middleton, on the basis that its prejudicial effect outweighed its probative value.
2. The trial judge erred when he held that there was a case to answer at the close of the prosecution evidence given that the evidence was plainly insufficient to support a conviction.
3. The trial judge failed to direct the jury adequately on the reliability of and/or the weight to be attached to the statement of Marlon Middleton.
4. The trial judge failed to give an adequate *Turnbull* direction.
5. The verdict was against the weight of the evidence presented before the court such that no jury, acting reasonably, could have convicted the appellant upon it.
6. The life sentence is unconstitutional as the accused was arrested and charged as a minor.

The grounds on prejudicial effect of statement outweighed probative value and insufficiency of evidence

[15] Learned counsel, Mrs Matura Shepherd submitted that this was a fleeting glance case untested by cross-examination and as such the previous statement should have been excluded or since it was admitted, the trial judge should have upheld the no case submission. Counsel submitted that pursuant to **section 73A** of the **Evidence Act**, a previous inconsistent statement proved to have been made is "admissible". However, the judge retains a discretion to exclude the statement in the same manner he has a discretion to exclude any other unfairly prejudicial evidence. Counsel relied on the case

of **Vincent Tillett v The Queen**, Criminal Appeal No. 21 of 2013, CA of Belize at paragraph 41.

[16] She submitted that in the present case, defence counsel for the appellant at the trial below had not opposed the statement being tendered into evidence after the prosecution had cross-examined Mr. Middleton, and as such this was an error on the part of the counsel. Mrs. Shepherd submitted that the appellant should not be punished for the errors of his counsel. Further, the trial judge had an overriding duty to ensure the fairness of the trial and exclude the statement since this was a fleeting glance case without any sworn evidence to support it. She relied on the cases of **Turnbull v R** [1977] 1 QB 224 and Juan **Pop v The Queen,** Criminal Appeal No. 4 of 2009 of Belize **at** paragraph 6.

[17] Mrs. Shepherd argued that there are two other reasons why the statement should properly have been excluded on the basis that it was unfairly prejudicial. Firstly, the statement was incapable of challenge by cross-examination and this mattered since the statement was not clear on all material matters and cross-examination might well have made a material difference. Secondly, Mr. Middleton's sworn evidence contradicted his statement, without the prosecution offering any explanation as to how he departed from his original statement. Further, if the jury were to convict, they could only do so on the basis that Mr. Middleton had perjured himself in his sworn evidence. For these reasons, counsel submitted that the trial judge should have exercised his discretion to exclude the statement and direct an acquittal.

[18] The learned Director submitted that the circumstances within which the witness Middleton viewed the shooter were adequate to enable him to recognize him as someone he had known before. The Court agrees with this position and this is borne out by Middleton's statement. Although he did not state the duration of his view of the appellant on the night of the incident, it is clear that was not a fleeting glance situation. Middleton was able to describe the colour of the handgun, the hand in which the appellant held the gun and the distance he stood from the deceased. Further, he gave

a physical description of the appellant and the clothes that he was wearing at the time of the shooting.

[19] Further, Middleton's identification of the appellant was indeed one of recognition. According to Middleton's statement, he viewed the appellant, whilst he was on his bicycle, from a distance of 40 feet in a well lit area, unobstructed and so he was able to see his face clearly. He had known the appellant before the incident. He said that the appellant lived in the St Martin de Porres area and he would see him regularly on the Boulevard, daytime and nighttime, riding his bicycle. He stated that this occurred every week for a period of more than four months and the last time he saw the appellant was the week before the shooting. As such, it is the view of the Court that the trial judge cannot be faulted for leaving the identification evidence with the jury.

[20] The appellant's position that Middleton's statement was unfairly prejudicial since it was incapable of challenge by way of cross-examination is misconceived. The statement was admitted on the basis that Middleton was deemed a hostile witness. He was in fact cross-examined by the prosecution. There is no evidence which shows that counsel for the defence was prevented from cross-examining Middleton. Further, the Court is in agreement with the learned Director that the statement contained evidence that was highly probative of the prosecution's case and that value was not outweighed by any prejudice that could have been caused to the appellant.

[21] The Court sees no merit in the argument for the appellant that the prosecution failed to offer any explanation for Middleton's departure from the statement he gave to the police. Middleton was deemed a hostile witness by the trial judge. There is no requirement for the prosecution to cough up an explanation for his departure from the statement.

[22] The appellant under ground 2, stated that the trial judge erred when he held there was a case to answer at the close of the prosecution's evidence since the evidence was plainly insufficient to support a conviction. It has been shown above that the quality of

the identification evidence of the appellant was adequate and the trial judge was correct in leaving it to the jury. This was a case of recognition and further, it was not a fleeting glance situation since Middleton was able to see the appellant's face; he gave a description of the clothes he was wearing; the colour of the handgun; and the hand in which he held the weapon. Accordingly, both grounds 1 and 2 are without merit.

Failure to direct the jury adequately on the reliability of Middleton's evidence

[23] Mrs. Shepherd contended that the directions given by the trial judge on Middleton's statement was not adequate for two reasons: (a) the directions failed to point out that the inconsistency of his evidence was unexplained by the prosecution and as such the jury were not to speculate as to reason he had detracted from his written statement and (b) the trial judge failed to point out that if the jury were in doubt as to whether the written statement given by the witness, Middleton, was made truthfully, it had to resolve same in favour of the appellant and acquit him.

[24] The Court has already considered the first point under the previous grounds, that is, the prosecution is not required to lead evidence as to the reason for the departure of the witness from his statement. In relation to the second point, the Court is in agreement with the learned Director that the learned trial judge adequately directed the jury on the approach that had to be taken in relation to Middleton's statement. These directions can be found on pages 26 to 28 of the supplemental record. The learned trial judge said:

> "But with respect to Marlon Middleton again, because of his inconsistency, Madam Forelady members of the jury, I need to give you further instructions. Remember I told you, however, if you are sure that one of Marlon Middleton's accounts is true, then you say either the evidence from the witness box or from the witness statement, then it is evidence you may consider when deciding [your] verdict. But I need to tell you more with respect to Marlon Middleton's unreliability.

> Marlon Middleton denied signing the statement. He did not remember giving the statement.
>
> Marlon Middleton is a witness who has changed his story and as such changed sides. He has given one account in his statement and a different account in the witness box.
>
> You may regard Marlon Middleton, because of the inconsistency between the statement that he had made and with the evidence he gave here in court as a witness as being unreliable. You might regard him as a witness upon whom you would either not place much, if any reliance or, if you do place reliance upon him, you would consider that you will have to be very careful in [assessing] him and be very cautious before relying on any part or parts of what he had said or what he signed his name to. Because of his inconsistency you must be very careful in assessing him if you are relying on any parts or parts of what he said or what he signed his name to, if you accept that he signed his name to the statement…."

The Court therefore, finds no merit on this ground.

Failure to give an adequate Turnbull direction

[25] It was submitted by counsel that the trial judge failed to direct the jury to examine closely the circumstances in which the identification was made, in particular (on the facts of the case) (a) how long did Middleton, according to his statement, have the appellant under observation; (b) how far away was he; and (c) how often had Middleton seen the appellant before the incident. Further, the trial judge failed to remind the jury of specific weaknesses in the identification evidence.

[26] Mrs Shepherd in her oral arguments submitted that the quality of evidence was poor and this can be seen from the evidence of Middleton who stated in his statement that at all times he was riding his bicycle. Further, she contended that it is common sense that one cannot ride a bicycle and look in the opposite direction and he also stated that he never got off his bicycle. She submitted that Middleton stated that he saw

the appellant's face clearly but he never said what portion of the face he saw and at what angle. Further, Middleton said the appellant wore a fitted cap but he did not state how the cap was worn.

[27] In the view of the Court, the statement of Middleton does not support the contentions made by Mrs. Shepherd in relation to the identification evidence. Middleton did not state that he was riding his bicycle at all times. He said, "I was on my bicycle." He further said that, "*He wore a fitted cap….I was able to see his face clearly. There was nothing obstructing me. I recognized him as Japhet Bennett. I knew him before that day*..." The fact that he said that he was able to see the appellant's face clearly meant that the fitted cap was not covering his face. Further, the trial judge had pointed out to the jury the weaknesses in Middleton's statement. That is, Middleton did not say for how long he observed the accused and how the accused wore the fitted cap.

[28] The Court is of the opinion that the directions given by the trial judge to the jury on the identification evidence was adequate. Lucas J satisfied the *Turnbull* principles and adequately pointed out the weaknesses of the evidence. The directions of the trial judge (as stated at pages 17 to 21 of the supplemental record) on the identification evidence were as follows:

> "The case against the accused depends wholly on the correctness of identification of him by Marlon Middleton. I repeat, in his written statement. To avoid the risk of any injustice in this case, such as happened in some cases in the past, I must therefore, warn you of the special need for caution before convicting the accused in reliance on the evidence of identification. A witness who is convinced in his own mind may as a result be a convincing witness, but may nevertheless be mistaken. Mistakes can also be made in the recognition of someone known to a witness, even of a close friend or relative.

You should therefore, examine carefully the circumstances in which the identification by Marlon Middleton was made:

(1) For how long did he have the person he said was the accused under observation?

There is nothing in the statement or his initial testimony here in Court, the duration he saw the accused. This is what he said in his statement:

"As I look across on the right hand side of the Boulevard part at that junction with Banak Street …."

(2) At what distance?

"I was at a distance of 40 feet away both the gunman and the male person who laid on the sidewalk…"

(3) In what light?

"I was able to see his face because just at the right hand side of the Boulevard with the Banak Street junction where he was there was a big lamp post that was well illuminated."

(4) Did anything interfere with the observation?

"I must say that at the time when I saw all of this, there was nothing obstructing my view and there was no traffic passing by. I did not see any other person passing in the immediate area."

(5) Had the witness ever seen the person he observed before?

"*The male person whom I saw with the gun is one whom I know as Japhet Bennett as I would see him regularly on the Boulevard. I know that he lives in St. Martin's De Pores Area, Belize City.*

Japhet normally passes on the Boulevard during daytime and night time riding on bicycle every week. I have known him for more than

four months now and the last time I saw him before this incident was about a week before."

Lucas J later pointed out the weaknesses in the statement. He said:

> *"I am required to draw your attention to certain weaknesses in Marlon Middleton's statement:*
>
> *(i) He did not say how long he saw the accused that night.*
>
> *(ii) In his description of the accused it included that he (the accused) "had a light in colour fitted cap". The witness did not tell us the manner in which the cap was worn by the accused for the witness to see his face."*

[29] In the view of the court, the trial judge adequately addressed the *Turnbull* principles and the weaknesses of the evidence.

The evidence does not support the verdict

[30] The appellant's fifth ground is that the verdict was against the weight of the evidence presented before the court "*such that no jury, acting reasonably, could have convicted the appellant on it."*

[31] The submissions under this ground about the *Turnbull* direction and the sufficiency of evidence by learned counsel, Mrs Shepherd were discussed above and determined in favour of the respondent. Counsel further submitted that the appellant was convicted on the witness statement of a tainted witness. Also, that the untested witness statement does not provide evidence beyond a reasonable doubt that any jury properly directed could have reasonably arrived at a verdict of guilty.

[32] The learned Director in response submitted that section **73 A** of the **Evidence Act** was the subject of the appeal in the case of **Vincent Tillett v The Queen,** where the prosecution relied on the statements of two adverse witnesses and the court dismissed

the appeal and affirmed the appellant's conviction and sentence. The Court agrees with the Director. Morrison JA, as he then was, on behalf of the Court, said at paragraphs 46 and 47 of the judgment the following:

> "[46] The contents of both Angela's and Oran's statements plainly provided ample support for, at the very least, the verdict of guilty of manslaughter which the learned trial judge returned.
>
> …….
>
> [47] Against this background, Mr. Sylvestre's submission that there may have been a miscarriage of justice, rendering the appellant's conviction unsafe, finds no support in either the evidence or in the manner in which the trial was conducted by the trial judge. It is for these reasons that the appeal was disposed of in the manner stated at paragraph [2] above."

[33] The Court is of the opinion that there was no miscarriage of justice. The witness statement of an adverse witness, in this case, Middleton, was sufficient to support a safe conviction.

Conclusion on the appeal against conviction

[34] For all the reasons stated above, the appeal against the conviction of the appellant is dismissed.

The unconstitutionality of the sentence

[35] The appellant's sixth ground of appeal is that the life sentence imposed on the appellant is unconstitutional as the accused was arrested and charged as a minor. Mrs. Shepherd submitted that the sentence of life imprisonment is unlawful in that it contravenes **section 7** of the **Belize Constitution** which guarantees that no person shall be subjected to torture or to inhuman or degrading punishment or other treatment. The appellant was 17 years old at the time of the commission of the offence.

[36] At the sentencing hearing, Lucas J sentenced the appellant to life imprisonment with effect from 4 October 2011. The trial judge relied on **Agripo Ical v The Queen,** Criminal Appeal No. 6 of 2007, in which the Court imposed a sentence of life imprisonment. The judge further relied on **section 146(2)** of the **Indictable Procedure Act, Chapter 96** of the Substantive Laws of Belize (Revised Edition) 2003 **which** provides:

> "Sentence of death shall not be pronounced on or recorded against a person convicted of a crime if it appears to the court that at the time when the crime was committed he was under the age of eighteen years, but in lieu thereof the court shall sentence him to imprisonment for life."

[37] That was the law at the time of the conviction. **Section 146(2)** of the **Indictable Procedure Act** was **deleted** by the **Indictable Procedure (Amendment) Act 2017 (Act No. 23 of 2017)** and the sentence is now governed by **section 106(2) of the Criminal Code, Chapter 101**.

The Criminal Code (Amendment) Act 2017

[38] On 29 March 2017, the **Criminal Code (Amendment) Act 2017 and** the **Indictable Procedure (Amendment) Act 2017** came into force. These amendments introduced a new sentencing regime. The parties were requested by the Court to file additional submissions regarding the impact of the **Criminal Code (Amendment) Act 2017** and the **Indictable Procedure (Amendment) Act 2017**, on the appeal. It is these submissions filed on the 2 June 2017 and 13 September 2017, by the parties that this Court will consider in determining the sentence which should be imposed on the appellant.

[39] The **Criminal Code (Amendment) Act 2017, (No. 22 of 2017)** dated 29 March 2017, is an Act to amend the **Criminal Code, Chapter 101**. The sections relevant to the present appeal states:

"106 (2) A person who commits murder who was, at the time of the commission of the offence, under the age of eighteen years, shall be sentenced to detention at the court's pleasure.

…….

(6) Where a person has been sentenced to detention at the court's pleasure in accordance with subsection (2), the court after having passed sentenced, shall specify a period, at the expiration of which, the offender shall be eligible to be taken before the court for a review of his detention."

106A (2) Every person who has been previously convicted of murder and is, at the time of the coming into force of the Criminal Code (Amendment) Act, 2017, serving a sentence of imprisonment for life, and who was, at the time of the commission of the offence, under the age of eighteen years, shall be taken before the Supreme Court to be resentenced in accordance with subsections (2) and (6) of section 106."

Submissions of the appellant

[40] Mrs. Matura's stated three positions on the amended legislation. These are:

(1) If the appeal against conviction is dismissed, then for the reasons given in previous submissions, his appeal against sentence should be allowed, and the matter should be remitted to the Supreme Court to decide what sentence to impose instead. On the remitted hearing, the Supreme Court should sentence the appellant on the footing that the relevant part of the new legislation is unconstitutional and exercise an unfettered discretion to impose if appropriate, a determinate sentence of imprisonment;

(2) Alternatively, if the appeal is allowed because it is unconstitutional, the matter should be remitted to the Supreme Court and at that remitted hearing, the court must sentence him to detention at the court's pleasure, and specify a period at

the expiration of which he will be eligible to be taken before the court again for a review of his detention.

(3) Even if contrary to (1) and (2), the appellant is not entitled to have his appeal against sentence allowed, the matter must be considered by the Supreme Court for it to determine his sentence under the new legislation.

[41] Mrs. Shepherd contended that based on her first and section positions, the appellant is entitled to have his appeal against sentence of life imprisonment allowed because the sentence was imposed unlawfully and in breach of the Constitution, for reasons as shown in her previous submissions dated 8 April 2016. In those submissions, counsel relied heavily on the case of **Andrew Bowen and David Jones v The Attorney General of Belize,** Claim No 214 of 2007, where the Conteh CJ (as he was then) said that *section 146(2)* of the *Indictable Procedure* Act, has to be read in a manner that was consistent with the Constitution. That is, the court has discretion in relation to the sentence to be imposed, which should be "*informed by the circumstances of the offence and the offender*". (para 90 of the judgment). In **Bowen**, counsel submitted that the trial court had exercised its power under section 20 of the Constitution to quash the claimant's life sentences and to impose instead fixed term of 25 years imprisonment. Therefore, in the instant case Lucas J was wrong to consider that he was bound by section 146(2) of the Indictable Procedure Act.

[42] Mrs. Shepherd submitted that the amended legislation appears to have removed the discretion to consider or to impose a fixed term imprisonment. Further, the mere fact that the amended legislation provides for a new sentencing regime does not deprive the appellant to have his appeal against sentence allowed based on the previous arguments. She further argued that the new legislation is unconstitutional insofar as it purports to remove from the appellant the right to contend for a determinate sentence. She argued that the retrospective change in the penalty for the offence breaches the appellant's rights under the Constitution. Counsel relied on **Scoppola v Italy (No. 2) [2009]** 51 EHRR 323 at 106 – 109, and submitted that Article 7 of the European Court of Human Rights provides that a heavier penalty should not be imposed than the one

that was applicable at the time the criminal offence was committed. That this section guarantees that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are more favourable to the defendant.

[43] Learned counsel argued that the new legislation allows a sentence now to be passed which is "severer in degree or description than the maximum penalty that might have been imposed for that offence at the time it was committed", contrary to section 6(4) of the Constitution.

[44] She further argued that the question of the approach that should be taken by the Supreme Court is a matter for that court to decide after hearing arguments on the law and facts. As such, counsel submitted that this Court should not determine which of the three approaches will be appropriate. To do so, she argued, would usurp the role of the Supreme Court to decide the matter in the first instance.

[45] Mrs. Shepherd contended that in relation to her third approach, if the appeal against sentence fails, the appellant is entitled to have the Supreme Court consider his sentence in accordance with the new legislation. However, on that basis also, it would be inappropriate for the Court of Appeal to determine what approach the Supreme Court should adopt under that new legislation.

Arguments in response by the Crown

[46] The Director contended that the law to be applied is the law that was in force at the time of the hearing of the appeal and that law does not offend either section 6(4) or section 7 of the Constitution. As such, the appeal against sentence should be dismissed.

[47] In relation to the applicability of the amended law, the Director submitted that when there is a change in the law prior to the determination of an appeal, the Court is to

have regard to the state of the law at the time of the hearing of the appeal. She relied on **Dean Boyce v The Attorney General of Belize and the Minister of Public Utilities and British Caribbean Bank Limited v The Attorney General of Belize and the Minister of Public Utilities** [2012] CCJ 1 at paragraphs 19 and 20 which shows that an appellate court can give effect to a retrospective Act passed in the interval since the case at first instance. See also **Attorney General v Veranazza [1960] 3 All ER 97** and **Quilter v Mapleson (1882) 9 QBD 672 relied** upon by the CCJ in the aforementioned case. These cases were discussed in **Bata Shoe Co. Guyana Ltd., and Others v Commissioner of Inland Revenue and Attorney General [1976] 24 WIR 172.** At page 198, Crane J said:

> **….**
> "It is, of course clear that, in the ordinary way, the Court of Appeal cannot take into account a statute which has been passed in the interval since the case was decided at first instance, because the rights of litigants are generally to be determined according to the law in force at the date of the earlier proceedings….<u>But it is different when the statute is retrospective either because it contains clear words to that effect or because it deals with matters of procedure only; for then Parliament has shown an intention that the Act should operate on pending proceedings, and the Court of Appeal are entitled to give effect to this retrospective intent</u> as well as a court of first instance……."
> (emphasis added)

[48] The Director relying on the above authorities contended that this Court is bound to consider the issues raised on this appeal, in light of the law as it presently exists and should not entertain, as an appellate court, a challenge to the new law at this stage.

Discussion

[49] A life sentence was imposed on the appellant pursuant to **section 146(2)** of the **Indictable Procedure Act.** This section was deleted by the **Indictable Procedure (Amendment) Act 2017 (Act No. 23 of 2017)** and the sentence is now governed by **sections 106(2)** and **(6) of** the **Criminal Code (Amendment) Act 2017.** The law presently is that any person who commits murder who was, at the time of the commission of the offence, under the age of eighteen years, shall be sentenced to detention at the court's pleasure (section 106(2)). This law has retrospective effect as shown by the transitional provision, section 106A(2). The law clearly states that if a person has been convicted of murder prior to the amendment and is serving a sentence of imprisonment for life, that person shall be taken to the Supreme Court to be resentenced pursuant to the section 106 (2) and (6). In the opinion of the Court, since the amended law has retrospective effect, the issue of sentencing of the appellant should be determined based on the amendments. See **Dean Boyce; Veranazza; Mapleson; Bata Shoe Co. Guyana Ltd.**

[50] Further, it is our opinion that it would serve no useful purpose to consider the ground on the unconstitutionality of the sentence under the old law since this would be of academic interest only. See **Bata Shoe Co. Guyana Ltd.** at paragraph 199, where Crane J stated that prior issues under the old law were dead and is a matter of academic interest only and would serve no useful purpose.

[51] It is the opinion of the Court that the appellant is entitled to be sentenced pursuant to section 106A, which is the transitional provision for existing life sentence for murder convictions. The Court therefore has to remit the sentencing of the appellant to the Supreme Court pursuant to section 106A (2) to be resentenced. The trial judge in pursuant with the amended legislation will be required to substitute the sentence of life imprisonment with a sentence of detention at the court's pleasure. (section 106(2)). The trial judge will also be required to specify a period at the expiration of which the

appellant will be returned to the court for a review of his detention as required by section 106(6).

Disposition

[52] It is for the above reasons that:

1. The appeal against the conviction of the appellant is dismissed.
2. The Court remits the sentencing of the appellant to the Supreme Court pursuant to **section 106A (2)** of the **Criminal Code (Amendment) Act 2017, to** be resentenced.

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AWICH JA

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HAFIZ BERTRAM JA

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DUCILLE JA