IN THE COURT OF APPEAL OF BELIZE AD 2018

CRIMINAL APPEAL NO 5 OF 2015

GODWIN SANTOS Appellant

v

THE QUEEN Respondent

BEFORE

The Hon Mr Samuel Justice Awich — Justice of Appeal
The Hon Madam Justice Minnet Hafiz Bertram — Justice of Appeal
The Hon Mr Justice Christopher Blackman — Justice of Appeal

N Myles for the appellant.
C Ramirez, Senior Crown Counsel for the respondent.

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13 March and 15 June 2017, and 27 September 2018.

HAFIZ-BERTRAM JA

Introduction

[1] On 13 February 2015, Godwin Santos ('the appellant') was convicted of murder following a trial before Moore J, sitting without a jury. He was sentenced on the same date to life imprisonment. On 17 February 2015, the appellant appealed against his conviction and sentence. The appeal on conviction was heard on 13 March 2017. The

parties were ordered to file submissions on sentencing and there was compliance with that order. The matter was called up for hearing on sentencing on 15 June 2017, on which date the Court decided not to hear oral arguments. The Court reserved its judgment on the appeal on conviction and sentence.

[2] On 10 January 2013, the appellant was indicted for murder contrary to section 117 read along with section 106 (1) of the Criminal Code, Chapter 101 of the Laws of Belize (Revised Edition) 2003. The particulars of the indictment being that the appellant murdered Justin Jones ("the deceased") on 23 December 2010, in Ontario Village, in the Cayo District.

The case for the Prosecution

[3] The case for the prosecution was that on 23 December 2010, at Ontario Village, Cayo District, the appellant who was at a wake at the home of Aminta Jiminez, walked up to the deceased and attacked him which resulted in the deceased being injured. The prosecution stated that the appellant had no lawful justification to attack the decease and thereby caused his death unlawfully and with the intention to kill. The deceased was rushed to the Western Regional Hospital where he was pronounced dead.

[4] The prosecution called eight witnesses to prove its case, namely: (1) Nisa Sutherland, the common law wife of the deceased; (2) Marcia Jones, the sister of the deceased; (3) Zayne Periott who drove the deceased to the wake and drove him to the hospital after he was fatally injured; (4) Aminta Jimenez in whose yard the wake was kept; (5) Sgt Santiago Pott the investigating officer; (6) Dr. Mario Estrada Bran, the doctor who performed the post mortem; (7) Antonio Manzanero the scenes of crime technician; and (8) Mrs. Diane Bol-Noble from the National Forensics Science Service Laboratory

[5] Ms. Marcia Jones, the sister of the deceased testified that on 23 December 2010 she attended the Karl Heusner Memorial Hospital Morgue and there she identified the body of the deceased, as that of Justin Jones to the doctor and the police officer. The doctor, being Dr. Mario Estrada Bran, who testified that on 23 December 2010, he

performed a post mortem examination on the body on a man identified by Marcia Jones to be that of Justin Jones. This evidence satisfied the judge that Justin Jones is dead.

[6] Dr. Estrada Bran, who was deemed an expert by the trial judge, also testified as to the harm received by the deceased and his cause of death. In his opinion, the cause of death was "*exsanguinations due to external bleeding due to stab wound in the neck.*"

He testified that the stab wound was half inch situated on the right side of the nape of the neck. According to the evidence, the injury wounded superficial tissues of the area, vascular plexuses, going through and between the second and third cervical vertebrae and wounding the upper portion of the oesophagus. This evidence satisfied the trial judge that the deceased died of harm.

[7] The prosecution relied heavily on the evidence of Nisa Sutherland, the common law wife of the deceased, to prove that it was the appellant who killed the deceased.

Voir dire

Oral statement made by the appellant

[8] A *voir dire* was held with regards to an alleged oral statement made by the appellant at the Belmopan Police station. The learned trial judge found the statement to be inadmissible because no evidence was adduced that the statement, which was blurted out spontaneously, had been made freely and voluntarily in accordance with section 90(2) of the Evidence Act. Moore J applied the principles in the case of **Veola Pook**, Criminal Appeal No. 25 of 2014, paragraphs 18 – 20, and found that the court could not assume that the statement was said freely and voluntarily by the appellant since the court had to be "*satisfied affirmatively by evidence that this was how the statement came to be made."*

Article of clothing from the appellant

[9] An article of clothing was taken from the appellant by the Scenes of Crime technician which was analyzed by the Forensics laboratory. The trial judge excluded the

evidence because the brown paper bag in which the clothing was placed had been torn in two places. One of the tears was large enough that the clothing could have been removed and replaced through the same tear. The defence counsel challenged the admissibility of the piece of the clothing and succeeded. The trial judge stated that the prosecution did not produce evidence from the Scenes of Crime Technician or the Supervisor of the Forensic analyst which explained how the tears occurred. As such, the judge excluded the clothing and any reference to it in the trial on the basis of doubt on the integrity of the exhibit. She applied the principles in *Hodge v Queen* HCRAF 2009/001 OECS CA from the Virgin Islands at paragraph 12; *R v Larsen* 2001 BCSC 597 at paragraph 64 and *Bowen v PC Ferguson*, Sup Ct Claim No. 112 of 2014

Grounds of appeal

[10] There were four grounds of appeal:

1) The trial judge erred in failing to give a ruling in relation to the Crown's application to tender Mr. Eugenio Gomez's forensic report in his absence and subsequently erred in admitting the report into evidence.
2) The judge gave a proper Turnbull warning but failed to give weight to the grave inconsistencies and weaknesses in the evidence;
3) The judge misportrayed evidence and/or failed to give proper consideration to evidence which raised reasonable doubt as the appellant's guilt;
4) The appellant should be sentenced in accordance with section 106 of the Criminal Code as amended by Act No 22 of 2017.

The ground on the application to tender the forensic report of Mr. Eugenio Gomez

[11] Learned counsel, Mrs. Myles argued that the Crown's application to tender Mr. Gomez's forensic report into evidence in his absence was based on his being out of the country at the time of the trial. However, there was no evidence adduced by the Crown to show steps were taken to confirm that Mr. Gomez was out of the jurisdiction. As such the learned trial judge should not have accepted the report into evidence and let Mrs. Bol-Noble, Chief Forensic Analyst read the report. Further, counsel contended that the

forensic report being accepted into evidence by the trial judge without a ruling on the objection by the defence was unsafe and highly prejudicial to the appellant. She argued that the trial judge admitted the report into evidence pursuant to *section 123 of the Indictable Procedure Act,* and there is no evidence of her considerations to the requirements of the said section and her exercise of discretion. Counsel relied on *The Queen v Donicio Salazar*, Indictment No. C83/2013 (Ruling of the learned Chief Justice Benjamin).

[12] Mrs. Myles submitted that the Crown relied on *section 47 of the Evidence Act* and it is presumed *section 123(1) and (2) of the Indictable Procedure Act,* in its request to have Mrs. Bol-Noble, tender and read the said report as part of the Crown's evidence. Counsel further submitted that counsel for the defence at the time objected on the basis that it should have been done in accordance with *section 36 of the Evidence Act* or *section 123* of the *Indictable Procedure Act*.

[13] In oral submissions, counsel submitted that the applicable provision is section 36 of the Evidence Act which speaks of forensic or analytical reports from a Government official.

[14] Senior Crown Counsel, Mr. Ramirez submitted that Mrs. Bol-Noble, then acting Chief Forensic Analyst with the National Forensic Laboratory gave evidence that she knew Eugenio Gomez who is a Forensic Scientist and he works in the biology section of Forensic Laboratory. She also gave evidence that Mr. Gomez was attending a course on DNA Analysis and Interpretation at the Mexican Federal Laboratory in Mexico City. He left on 25 January 2015. He contended that there was no objection to Mrs. Bol-Noble testifying nor there was no objection to the Forensic Analyst's certificate being tendered as an exhibit. He further submitted that the report was admitted pursuant to *section 36(1)* of the Evidence Act and not section 36(3) as stated in his written submissions.

[15] The Court was referred to page 57 of the record which shows that the prosecution applied for the report to be tendered as an exhibit pursuant to section 123(1) and (2) of

the Indictable Procedure Act since Mr. Gomez was out of Belize. Further, it was submitted by the prosecution that it also relied on section 47 of the Evidence Act because Mrs. Bol-Noble knew the signature of Mr. Gomez.

Discussion

[16] It can be seen at page 55 of the record that the prosecution informed the judge that the document is admissible pursuant to section 47 of the Evidence Act which provides for recognition of a signature of another person. Thereafter, defence counsel at the time, made a statement that "*section 47 is not applicable for what he wishes to use it for. It is used for contentious situations. How can it be tendered and by whom; the appropriate section is 36(3) which deals with the use of report by government analyst ….".* Strictly speaking there was no objection.

[17] Mrs. Bol-Noble testified she is the acting Chief Forensic Analyst with the National Forensic Science Service Laboratory located in Ladyville, Belize District. She gave evidence that:

> "Yes, I know Eugenio Gomez because Mr. Gomez is a Forensic Analyst Grade 2 and in his capacity as a Biologist working in the Biology Section of the Forensic Lab.
>
> I am his Supervisor and have been since start of his employment with lab in April 2003.
>
> Mr. Gomez is presently attending a course on DNA analysis and interpretation at the Mexican Federal Laboratory in Mexico. He left on Sunday the 25th January 2015, and he is scheduled to return the 31st of January which is this Saturday.
>
> Yes, I am familiar with reports made by Mr. Gomez and his signature. As his supervisor and in my capacity as acting Chief Forensic Analyst. I am responsible for review of all reports and analysis. In this way, I am familiar with his work and signature which must be on all reports of analysis that he has completed."

[18] The report from Mr. Gomez was thereafter shown to Mrs. Bol-Noble and she stated that she had seen the report before and that it bears the signature of Mr. Gomez on each of the four pages. The prosecution thereafter applied for the report to be entered as an exhibit in this case pursuant to section 123(1) and (2). At this time, there was no objection by defence counsel. The trial judge thereafter said, "*Report of Eugenio Gomez of National Forensic Science Service is admitted into evidence in this trial and marked as an exhibit "DBN1".* There was no consideration of the provisions of the said section by the trial judge.

[19] **Section 123 (1)** and **(2)** of the **Indictable Procedure Act, Chapter 96** provides as follows:

> "123. (1) Where any person has been committed for trial for any crime, the deposition of any person may, if the conditions set out in subsection (2) are satisfied, without further proof be read as evidence at the trial of that person, whether for that crime or for any other crime arising out of the same transaction or set of circumstances as that crime, provided that the court is satisfied that the accused will not be materially prejudiced by the reception of such evidence.
>
> (2) The conditions hereinbefore referred to are that the deposition must be the deposition either of a witness whose attendance at the trial is stated by or on behalf of the Director of Public Prosecutions to be unnecessary in accordance with section 55, or of a witness who is proved at the trial by the oath of a credible witness to be dead or insane, or so ill as not to be able to travel or is absent from Belize."

[20] The evidence shows that Mr. Gomez was out of Belize and the prosecution proved this fact by the evidence of Mrs. Bol-Noble. There was no objection by the then defence to the admission of the report although he had mentioned section 36(3) before Mrs. Bol-Noble testified. In my view, as recognized by senior counsel, Mr. Ramirez, on the appeal, section 123 subsections (1) and (3) are not applicable in the circumstances of this case. The applicable law is section 36(1) of the Evidence Act as amended by Act No. 1 of 2012. Counsel on both sides cited the old law, before the amendment. The words *"the*

government analytical chemist, government assistant analytical chemist, government pathologist or government bacteriologist" were deleted and substituted by the words *'a Government Expert*.' A new subsection (5) was added by the amendment which provided for the meaning of 'government expert'. Forensic Analyst was one of such experts.

Section 36 (1) and 36(3) of the Evidence Act

[21] Section 36(1) of the Evidence Act as amended by Act No. 1 of 2012 provides:

> "Any document purporting to be a post-mortem report, under the hand of a registered medical practitioner or the Government Pathologist or any document purporting to be a report under the hand of **a Government expert**, upon any matter or thing duly submitted to him for examination or analysis and report, for the purposes of any trial on indictment, or in any preliminary inquiry before a magistrate in respect of any indictable offence … shall be receivable at that trial, inquiry or proceeding as *prima facie* evidence of any matter or thing therein contained relating to the examination or analysis:
>
> Provided that where the report of any of the aforesaid experts is produced in any trial, such expert shall if within the country be called if the defence so requires."

[22] Section 36(3) provides:

> "(3) The provisions of this section shall, with the necessary modifications, apply in the case of a document purporting to be a report by a registered medical practitioner on any injuries received by a person which are the subject of a prosecution in any trial on indictment, in any preliminary inquiry or in any proceeding in a summary jurisdiction court:
>
> Provided that the report purports to have been written on the same day as, or on the day following, that on which the examination was made by the medical practitioner."

[23] Section 36(3) is clearly not applicable in the instant case and there is no contention in relation to this section by counsel in the appeal. Defence counsel below was incorrect when he cited section 36(3) before the trial judge. Further, the trial judge was misled by prosecution counsel as to the appropriate section. However, since section 123 of the

Indictable Procedure Act was not applicable to the instant matter, the trial judge cannot be faulted for not considering the provisions of that section.

[24] The question for this Court is whether the report was properly admitted pursuant to section 36(1) of the Evidence Act. The report was a " document purporting to be a report under the hand of the government analytical chemist". This was proven by the evidence of Mrs. Bol-Noble. In relation to the proviso, it was proven that Mr. Gomez was not in the country and therefore could not be called. Even further, defence counsel at the time, made no application for Mr. Gomez to be called to give evidence. Rightly so, Mr. Gomez was not in the country.

[25] In the opinion of the Court, the judge was not required to give a ruling in relation to the application to tender Mr. Gomez's forensic report in his absence. Also, the judge had not erred in admitting the report since section 36(1) had been satisfied. The Court sees no merit on this ground.

[26] The Court would mention though that the trial judge should have engaged prosecution counsel as to the citing of the applicable section after it was raised by defence counsel.

Whether the trial judge failed to give weight to inconsistencies and weaknesses in the evidence

[27] Mrs. Myles submitted that the trial judge advised herself of the direction in **R v Turnbull** (1977) QB 222, at 228-229, but failed to give sufficient weight to the grave inconsistencies and weaknesses in the evidence. Learned counsel referred the Court to the evidence of Nisa Sutherland, in relation to the length of time she had the appellant in her view. Ms. Sutherland gave evidence that, "A little before 11.40 pm I went to put my baby down." She also testified that, "That night I saw Jack Santos the whole time we were at the wake until the incident happened and he left the wake trotting. We reached there about 9.00 - 9.30 pm, maybe 2 1/2 hours, maybe 3." Then Ms. Sutherland was asked whether she attended to her young son from the time she got to the wake and she

answered ‘Yes’. She also testified she was not running around with her baby since he could barely walk and that she put the baby down to sleep. Mrs. Myles also referred the Court to the evidence of Mr. Perriot who said that Ms. Sutherland was caring for her baby and that she was busy with the child running around. Counsel contended that the trial judge did not consider the evidence of Mr. Perriot, to the extent that the sole eyewitness may not have had the accused in her view the entire time as testified by her.

[28] Mrs. Myles further submitted that defence counsel had submitted that there was obstruction between Ms. Sutherland and the appellant in that the bottom of the house where the wake was kept, was enclosed. Also, that Mr. Periott’s vehicle was parked directly in front of the house. However, there was no consideration by the trial judge of these weaknesses.

[29] Mr. Ramirez in response submitted that the trial judge at page 164, lines 5 - 7 of the transcript, stated that, “I am of the view that despite the weaknesses mentioned above in the recognition evidence, Ms. Sutherland evidence is such a quality that it can withstand scrutiny and hold up.” He submitted that the trial judge throughout the judgment stated the weaknesses and inconsistencies of the evidence. In relation to obstruction, Counsel submitted that the trial judge took into consideration the issues of obstruction raised by the defence and came to the view that there was no obstruction. Mr. Ramirez further submitted that as the trier of facts, the conclusion reached by the trial judge, depended on what she believed.

Discussion

[30] In the view of the Court, the trial judge had properly considered the inconsistencies and weaknesses of the evidence of Ms. Sutherland in relation to identification of the appellant. Mrs. Myles raised inconsistencies in relation to identification and obstruction of Ms. Sutherland’s view. At paragraph 31 of the judgment, the trial judge mentioned that Ms. Sutherland said that she observed the appellant for 2 hours or 2 ½ hours. The judge stated that “it was, by any standard a long period of time to have observed someone, even if on and off over that time.” It can be seen that the trial judge considered

that Ms. Sutherland could not have been looking at the appellant the entire duration of 2 hours or 2 and 1/2 hours. The trial judge also considered Ms. Sutherland's evidence that she had seen the appellant throughout her time at the wake except when she put her baby to sleep in the house. Mr. Periott had testified that Ms. Sutherland was at times caring for her baby. The judge was quite aware that Ms. Sutherland could not have been looking at the appellant the entire time she was at the wake because she was taking care of her baby (14 months old) also. The judge found Ms. Sutherland to be credible despite the inconsistencies. In her judgment at paragraph 31, the judge said:

> "She (Ms. Sutherland) was seated with other family members, according to her, not walking about. It is quite credible that sitting at the wake for a period of time, with her baby asleep inside and her husband socializing, that she was observing people at the wake, including the person she says is the accused. She saw him before the attack standing facing the wake. This would have been when she was not in the heat of the moment reacting to the incident but calming sitting."

[31] The judge in her judgment considered the submissions of defence counsel in relation to obstruction. She also considered the evidence of Ms. Sutherland that there was nothing between her and the appellant, which would have prevented her from recognizing him as it was an open area.

[32] At paragraph 31 of her judgment, (page 157) the judge said:

> "From the distance pointed out by Ms. Sutherland in this Court, she was about 40 feet from the person she says is the accused and he was about 30 feet from the deceased before his approach. She testified that she and another person help lift the decease off the person who had attacked the deceased before the person left the scene. This would mean that at this particular point in time Ms. Sutherland was very close to the person she says is the accused, even if only briefly. This aspect of her ability to recognize and identify the accused was not delved into but based on Ms. Sutherland's explanation of how the incident transpired, there would

have to have been this closer physical encounter between the witness and the attacker. This time when the witness would have been extremely close to the person who she saw struck the deceased supports her ability to person. At paragraph 21 of this judgment, I discuss how long and how Ms. Sutherland knew the accused prior to the incident.

[33] The trial judge at paragraph 32, followed the *Turnbull* guidelines and discussed the weaknesses of the identification evidence. The judge was sitting alone, without a jury, and was not expected to mention each and every inconsistency and weaknesses. She was satisfied that Ms. Sutherland saw the appellant attach her husband. The trial judge believed Ms. Sutherland's evidence that at the time the appellant attacked the deceased the baby was asleep. As such, Ms. Sutherland could not have been busy chasing after the baby when the incident occurred.

Whether the trial judge misportrayed evidence and/or failed to give proper consideration to evidence which raised reasonable doubt as the appellant's guilt

[34] When considering the issue of intention to kill the trial judge considered the evidence of Dr. Estrada Bran and submissions made by the prosecution (in relation to evidence given by Ms. Sutherland as to how the deceased was attacked).

[35] As shown at paragraph 43 of her judgment, the judge stated that the doctor testified that the amount of force used to cause this type of injury was moderate to heavy force. Further, that the "*trajectory of the wound was backwards to frontwards, upwards to downwards and right to left, wounding the upper portion of the oesophagus where its trajectory ended up to a depth of 4 inches. The doctor was of the view based on the characteristics of the wound that a knife was used to cause the fatal injury."*

[36] At paragraphs 44 to 46 of the judgment, the judge said:

"[44] The neck, of course is a vital area of the body. The Learned Prosecutor in his closing submissions likened the attack to the neck with a knife using moderate

to heavy force to taking a loaded gun and shooting someone in the head. In other words, this is a situation where intention to kill may be inferred. The Prosecutor further submitted that attacking the deceased from behind left him with no genuine opportunity to defend himself and thus the attacker intended to leave his victim dead. These are persuasive submissions.

[45] In order to determine if I can reasonably infer that the accused intended to kill the deceased, I have considered the following surrounding circumstances: the location of the injury on the neck; the sharp instrument used to cause the injury; the moderate to heavy force used to cause a 4 inch deep wound; and the attack from behind rendering the deceased immediately incapable of defending himself. I have assessed all of the evidence to determine if I am sure that the accused intended to kill the deceased when he stabbed him.

[46] Having considered all the circumstances mentioned above, I am sure that the accused intended to kill the deceased when he inflicted the harm on him."

[37] Mrs. Myles submitted that the trial judge determined the appellant's intention to kill the deceased, Justin Jones, by considering the location of the injury, the sharp instrument used to cause the injury, the force used and the attack from behind rendering the deceased immediately incapable of defending himself. She contended that the trial judge misportrayed the evidence of the witness as it relates to the attack by the appellant on the deceased being from behind because back is not equivalent from being attacked from behind. Counsel submitted that there is absolutely no evidence that suggest or confirm that the appellant attacked the deceased from the back. Therefore, it was prejudicial to the appellant for the prosecution to make such submissions and it was unsafe and unreasonable for the judge to make such inference without evidence.

[38] In oral submissions, Mrs. Myles submitted that the only other point she would address on ground 4, is that if the Court finds that the forensic report should not have been accepted then whatever consideration was given to the blood on the clothes of the

deceased should not have been considered by the trial judge. Since the Court found that the forensic report of Mr. Gomez was properly admitted by the trial judge, the Court will consider this issue.

[39] Counsel further submitted that there is no indication by the trial judge as to how the evidence given by the appellant that he had ample time to change his clothes before voluntarily going to the police station, should he need to hide any blood on his clothes, was treated. She contended that the fact that the appellant made no effort to change and hide his clothes further supports the good character reference already made by Ms. Jiminez.

[40] Mr. Ramirez in response submitted that the prosecution was asking the judge to draw the inference that the accused attacked the deceased from behind. Further, that the judge considered Ms. Sutherland's evidence and stated that the deceased was attacked from behind. Counsel submitted that the judge as trier of the fact of the case can draw inferences that the attack was from behind.

[41] As for blood on the clothes of the deceased, Counsel submitted that the learned trial judge dealt with this issue.

Discussion

[42] The Court is of the opinion that there was sufficient evidence before the trial judge to draw an inference that the appellant intended to kill the deceased. The evidence of Dr. Estrada Bran was very compelling. There was no prejudice caused to the accused by the choice of words used by the trial judge, that is, that the deceased was attacked from behind. The injury is to the right side nape of the neck. The judge had accepted the evidence of Ms. Sutherland that she saw the accused walk up to the deceased on the right side and hit him in the back of his neck. Ms. Sutherland testified that:

> " … I was sitting under the house bottom with my mom and some other family members. Then I saw Jack who was standing on the street side. I don't know his

first name at that time but I know him as Santos. He walked up to Justin; he was about 30 feet away from Justin. **He walked up to him on the right side. He was coming staggering. He hit Justin in the back of the head by the neck.** When I saw Jack coming towards Justin I stood up and yelled, "look at Jack, start simpleness…."

[43] The trial judge at paragraph 36 of her judgment said that she believed Ms. Sutherland when she said that she saw the accused walk up to the deceased on the right side and hit him in the back of his neck. The judge therefore, did not rely solely on the words used by the prosecution that the deceased was attacked from behind. She was aware as to how the deceased was attacked. Dr. Estrada Bran's evidence confirmed that the deceased injuries were to the back of the neck. This is not a case where the judge was addressing a jury. As such, the Court is of the view that the trial judge properly considered the evidence which was before her and drew the inference that the appellant had an intention to kill the deceased. The ground that the judge misportrayed evidence is without merit.

Blood on clothes of the appellant

[44] The Court is of the opinion that the trial judge properly considered the unsworn statement of the appellant and the explanation given by him as to how he got the blood on his clothes. The judge was generous to the appellant in the way she dealt with the appellant's explanation that someone who had blood all over him, hugged him. There is no need to say more on that issue since the trial judge at paragraph 56 of her judgment stated that "*the prosecution evidence has made me feel sure and left me without any reasonable doubt that the accused caused the fatal harm to the neck of the deceased, I do not accept the core of what the accused has said in this trial, that is, that he was elsewhere at the time of the incident and had nothing to do with the stabbing. I reject his account of what happened and thus give the unsworn statement little to no weight."*

The appeal on sentence

[45] Mrs. Myles submitted that if the appeal on the conviction of the appellant is dismissed then his case should be reverted back to the Belmopan Supreme Court for sentencing pursuant to section 106A (1) of the Criminal Code.

[46] Mr. Ramirez for the prosecution accepts that the transitional provisions of the Criminal Code (Amendment Act) Act No. 22 of 2017 applies in this case and that the appellant should go back to the Supreme Court for the fixing of the term, if his conviction is dismissed.

Discussion

[47] The Court accepts the submissions of both counsel on sentencing. The appellant did not succeed on the grounds of his appeal on conviction. Therefore, the Court has to consider his sentence under the amended legislation which introduced a new sentencing regime. On 29 March 2017, the **Criminal Code (Amendment) Act 2017** and the **Indictable Procedure (Amendment) Act 2017** came into force.

[48] The Criminal Code (Amendment) Act 2017, (No. 22 of 2017) dated 29 March 2017, is an Act to amend the Criminal Code, Chapter 101, "*to make provision for, among other things, the specification of a minimum term of years, which an offender sentenced to life imprisonment for murder shall serve before the offender can become eligible to be released on parole …..*"

[49] Section 106 was repealed and replaced with section 106 and 106A. Section 106 provides as follows:

> "Murder 106 – (1) Subject to subsection (2), a person who commits murder shall be liable, having regard to the circumstances of the case, to,
>
> (a) suffer death; or
>
> (b) imprisonment for life.
>
> ……

(3) Where a court sentences a person to imprisonment for life in accordance with subsection (1), the court shall specify a minimum term, which the offender shall serve before he can become eligible to be released on parole in accordance with the statutory provisions for parole.

(4) In determining the appropriate minimum term under subsection (3), the court shall have regard to,

(a) the circumstances of the offender and the offence;

(b) any aggravating or mitigating factors of the case;

(c) any period that the offender has spent on remand awaiting trial;

(d) any relevant sentencing guidelines issued by the Chief Justice; and

(e) any other factor that the court considers to be relevant.

(5) Where an offender or the Crown is aggrieved by the decision of the court in specifying a minimum term under subsection (3), the offender or the Crown, as the case may be, has a right of appeal against the decision.

……

106A – (1) Subject to subsection (2), every person who has previously been 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, shall be taken before the Supreme Court for the fixing of a minimum term of imprisonment, which he shall serve before becoming

> eligible for parole, or for, a consideration of whether he has become eligible to be considered for parole."

[50] In the opinion of the Court, the appellant is entitled to be sentenced pursuant to section 106A of the Criminal Code, which is the transitional provision for existing life sentences for murder convictions. The Court will therefore remit the sentencing of the appellant to the Supreme Court pursuant to section 106A for the fixing of a minimum term of imprisonment which he shall serve before becoming eligible for parole.

Disposition

[51] For reasons stated above, the order of the Court is as follows:

(1) The appeal against the conviction of the appellant is dismissed and the conviction is affirmed.

(2) The appeal on sentencing is allowed. The sentencing of the appellant is remitted to the Supreme Court pursuant to **section 106A** of the **Criminal Code** for the fixing of a minimum term of imprisonment.

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AWICH JA

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HAFIZ-BERTRAM JA

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BLACKMAN JA