IN THE COURT OF APPEAL OF BELIZE AD 2018

CRIMINAL APPLICATION FOR LEAVE TO APPEAL NO 6 OF 2014

THE QUEEN Applicant

v

ARACELY CAHUEQUE Respondent

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BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Madame Justice Minnet Hafiz Bertram	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

S Lovell along with J Chan, Crown Counsel for the applicant.
A Sylvester for the respondent.

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12 June and 14 September 2018.

HAFIZ BERTRAM JA

Introduction

[1] This was an application for leave by the Crown, to appeal the directed acquittal of Aracely Cahueque ("the respondent") by the learned trial judge, Hanomansingh J. The application for leave to appeal, dated 11 April 2014, was made pursuant to sections 49(1)(a) and 49(2)(b) of the Court of Appeal Act, Chapter 90 of the Substantive Laws of Belize

(Revised Edition) 2011. It was supported by the affidavit of Cecil Ramirez, Senior Crown Counsel of the Office of the Director of Public Prosecutions.

[2] The respondent was tried between the 12 and 21 day of March 2014, on an indictment alleging three counts of abetment of murder, contrary to sections 20(1) (a) and 20 (3) read along with sections 106(1) and 117 of the Criminal Code, Chapter 101 of the laws of Belize**.** It was alleged that the respondent on a precise date unknown between the 1 and 7 day of October 2010, in the City of Belmopan, solicited Brandon Budna to murder Raylene Dyer.

[3] On 12 June 2018, this Court heard the application for leave to appeal the acquittal of the respondent and reserved its decision.

Factual Background

[4] The trial of the respondent commenced on 12 March 2014, before Hanomansingh J and a jury in the Supreme Court at Belmopan City. The respondent stood trial on a three count indictment alleging abetment of murder through the solicitation of Brandon Budna ("Budna") to kill Raylene Dyer, on three separate occasions.

[5] The affidavit in support of the application for leave which was not in dispute, showed that the case against the respondent was for "*the solicitation of the murder of a young mother, Raylene Dyer, so that the respondent could keep her child, which she had passed off as her own, to her former boyfriend."*

[6] Dyer was subsequently killed and her child was found at the home of the respondent's former boyfriend. The respondent had left the child with him at his home.

[7] Three persons were charged for the murder of Dyer and they were all acquitted for that offence after a trial before Hanomansingh J. The main witness for the prosecution was Budna, one of the three persons who was acquitted. Budna had given a statement to the police which showed that himself and the respondent were both students at the

University of Belize and that the respondent had asked him to murder Dyer, on three separate occasions.

[8] Budna did not testify in accordance with his statement to the police at the trial of the respondent. The Crown made an application for Budna to be deemed adverse. That application was granted and Budna was deemed adverse, his statement was proved and he was cross-examined. Thereafter, the Crown made an application to have Budna's statement admitted into evidence pursuant to *section 73A of the Evidence Act,* Chapter 95 of the Substantive Laws of Belize (Revised Edition) 2003, as amended by Act No 6 of 2012.

[9] On 21 March 2014, the trial judge ruled that the statement would not be admitted into evidence. As a result, the Crown closed its case because there was no other evidence upon which the charges could have been proven.

[10] Counsel for the respondent, Mr. Richard Bradley, senior counsel, made a no case submission which succeeded. The trial judge thereafter directed that the respondent be acquitted.

[11] At the trial, the Crown led evidence, by way of proving the statement given by Budna, that the DPP had met with him at the prison and asked for his cooperation in the case against the respondent, to which he had agreed. An investigating officer met with Budna the following day and recorded a statement from him.

<u>The ruling of the trial judge in relation to the statement by Budna</u>

[12] The trial judge found that "*there was deliberate wrong doing and bad faith on the part of the Director of Public Prosecutions when she visited and interviewed the witness Budna without ensuring that he had some sort of advice especially in view of her undeniable authority and her qualifications as an attorney-at-law."*

[13] The trial judge ruled that all the statutory requirements for the admission of the statement into evidence had been satisfied but stated that "*because of the actions of the Director of Public Prosecutions and the Investigating Officer, I will exercise my discretion and exclude the statement in these proceedings on the basis of bad faith, pressure, hope of expectation of advantage and unfairness."*

Ground of the application for leave to appeal

[14] The ground of the application for leave to appeal was that the learned trial judge improperly exercised his discretion in refusing to admit the statement of Brandon Budna, the main witness for the prosecution, who had been deemed adverse by the trial judge upon an application by the applicant, and the improper exercise of the discretion by the judge, denied the applicant of the opportunity to put its case before the jury.

Arguments for the Crown

[15] Ms. Lovell for the prosecution submitted that counsel for the respondent at the trial argued that the witness statement from Budna was unfairly obtained as it was obtained as a result of bad faith on the part of the investigating officer in the case. Therefore, the judge should exercise his discretion to exclude the statement.

[16] Counsel for the Crown put before this Court the comments made by the trial judge during the course of the above submissions on unfairness. The judge said:

> "I thought you would pursue the issue of bad faith, in relation to the DPP and not Romero, but you never asked any questions about that …That is where I think you should have gone if you want to come with bad faith. What was she doing in the prison? A man who is charged [without] having him legally represented or legally advised. But you never asked any questions about that. Did she make any promise? You never asked Budna if the DPP promised him anything? ……But he had already agreed to give the statement when the DPP went there. DPP is the [crux] of the matter, the catalyst. That's the matter that I was waiting for you to ask and then we would have had something. … You did not pursue the vital part that I thought you should have, if you want to raise this. ….. As such, I can't agree with you at this stage."

[17] Counsel for the Crown, Ms. Lovell submitted that the trial judge took time to consider his ruling overnight and on the next day exercised his discretion to exclude the statement of Budna. Counsel submitted that the basis upon which the judge excluded Budna's statement was the conduct of the DPP in obtaining the witness statement notwithstanding his initial indication that this was not borne out in the evidence. The judge stated his views of the DPP as follows:

> "…I am of the view that the action of the Director of Public Prosecutions in visiting and interviewing the witness Brandon Budna to request a statement after he was charged for the murder of Raylene Dyer and asking him to give a statement implicating the accused in the said murder is highly unethical to say [the] least.
>
> ….Whether anything was said to him or not, was this not pressure to him? Also, did he not have a reasonable expectation in his mind of some sort of advantage in his case if he cooperated with the Director of Public Prosecutions and the investigator who laid the charge against him? There is no doubt in my mind that these things were still operating on his mind and influencing him the next morning when very early Romero and JP Lind appeared at the prison and told him that they had come to record the statement that he had promised the Director of Public Prosecutions the day before in circumstances stated above. …It is my view that she made that decision based on the fact that he was the most vulnerable of the three as he was suffering from a medical impediment.

[18] Counsel then stated the findings of the trial judge which is shown at paragraph 12 above. Ms. Lovell submitted that the ruling of the judge was based on three conclusions, namely: (i) The Director of Public Prosecutions placed pressure on Budna to give a statement; (ii) Budna had a reasonable expectation, because of the actions of the DPP, that he would have had an advantage if he gave a statement and (iii) the DPP had a choice of three accused persons to ask to give a statement and exercised the option to choose Budna since he had a medical condition.

[19] Ms. Lovell submitted that the trial judge had absolutely none of these conclusions available to him on the evidence which was before him.

[20] Counsel referred the Court to the law on the admissibility of a statement pursuant to section 73A of the Evidence Act, which was considered in a judgment of this Court, **Vincent Tillett v The Queen,** Criminal Appeal No 21 of 2013. She contended that the trial judge had the power to exclude the statement of Budna, if the prejudicial effect outweighed its probative value or if the judge was of the view that it would have been unfair in the proceedings to admit it into evidence. Further, that neither situation applied on the facts and as such the trial judge wrongly exercised his discretion in excluding the statement.

[21] Ms. Lovell referred the Court to several authorities in relation to the exercise of a discretion of a trial judge, which showed that the discretion is reviewable by an appellate court. Also, if the trial judge had not acted reasonably, the court can set aside the decision. The authorities relied upon by counsel are: **R v Cook** [1959] 2 WLR 616; **Reg v Selvey** [1970] AC 304; **R v Khan and Others** [1996] Crim LR 508; **Associated Provincial Picture Houses Ltd v. Wednesbury Corporation** [1948] KB 223; **Eversley Thompson v The Queen** [1998] 3 LRC 75; **Evanson Mitcham v The Queen** [2009] UKPC 5; **Queen v Gabriel Salazar** Criminal Appeal No 7 of 2014.

[22] In relation to the exclusion of the statement, Ms. Lovell relied on **R v Jacinto Roches and Others**, Criminal Appeal No. 23 of 2012. She contended that the cross-examination of Budna by the Crown after he had been deemed adverse disclosed the content of the statement which he had given and showed that it would have sufficed to prove the allegations of abetment of murder, charged in the indictment against the respondent. Counsel submitted that the issue for this Court was whether it agreed that the exclusion of the statement was erroneous.

Arguments for the respondent

[23] Learned counsel, Mr. Sylvester acknowledged that the trial judge said in his ruling, *"In this case all the statutory requirements for the admission of the statement in evidence has been satisfied…"*

[24] Mr. Sylvester then rightfully conceded, for which he should be commended, that the exercise of the discretion of the trial judge to exclude the statement is limited to two situations as shown at paragraph 41 of the *Vincent Tillett* judgment of this Court, that is: (i) if the statement's prejudicial effect outweighs its probative value or (ii) if it is considered by the trial judge to be unfair to the defendant in the sense of putting him at an unfair disadvantage or depriving him unfairly of the ability to defend himself.

[25] The trial judge excluded the statement on the basis of *bad faith, pressure, hope of expectation of advantage and unfairness.* Mr Sylvester accepted that bad faith, pressure and hope of expectation did not arise in this case. In relation to unfairness, (and to be fair to the trial judge), counsel pointed out to the Court that at the time the judge made his ruling on 21 March 2014, he did not have the benefit of the principles in *Vincent Tillett* decision, since it was handed down in November 2014. As such, though the judge addressed "unfairness" it was not done as shown at paragraph 41 of *Vincent Tillett* judgment. That is, unfairness to the defendant "*in the sense of putting him at an unfair disadvantage or depriving him unfairly of the ability to defend himself."* As such, Mr. Sylvester correctly conceded, for which he should be commended again, that the trial judge used the wrong test when he made his decision by relying on the cases of *R v Mason* [1988] 1 WLR 139 and *R v Dunphy* [1993] 98 Cr. App. R 93. As a result, learned counsel accepted that the trial judge erred in arriving at his decision. Further, Mr. Sylvester accepted that even if the proper test of "unfairness" is applied to the facts of this case, it would be impossible to argue successfully that there was unfairness to the respondent in the sense contemplated by section 73A of the Evidence Act.

Miscarriage of justice submissions by Mr. Sylvester

[26] Learned counsel, Mr. Sylvester put to the Court the issue of whether a miscarriage of justice had occurred in this case within the meaning of section 49 (3) of the Court of Appeal Act, Chapter 90. By this section, the Court of Appeal is empowered on the hearing of an appeal by the Director of Public Prosecutions, "*if it thinks a miscarriage of justice has occurred"* to allow the appeal and order a retrial. Counsel relied on the decision of

Director of Public Prosecutions v Fabian Bain, Criminal Appeal No. 6 of 2005 of this Court, at paragraphs 25 and 26, where the Court interpreted section 49(3) as thus:

> "25 ….The Court is thus empowered to allow the appeal and set aside the verdict of not guilty of murder and order a re-trial if it is satisfied that a miscarriage of justice has occurred.
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> 26. In disposing of the appeal, the issue arose whether the Court of Appeal was obligated to set aside a verdict of acquittal and order a new trial or whether it has a discretion to refuse to do so even though it found that an error of law had occurred."

[27] The Court held at paragraph 28 of the judgment that section 49(3) of the Court of Appeal Act, gave the Court a discretion and as such it could determine that an error of law had been committed, but still proceed to correct the error of law made and dismiss the appeal if there was no miscarriage of justice.

[28] Mr. Sylvester argued that if this Court finds that the trial judge committed an error of law, it is not automatic for the appeal to be allowed, the verdict of not guilty set aside and a re-trial ordered. Counsel submitted that in **Bain** the Court found that an error of law was committed but when considering whether to order a re-trial, the Court was guided by the judgment in **Reid v The Queen** [1979] 2 ALL ER 904 and **The State of Trinidad & Tobago v Boyce** [2006] 2 WLR 284, [2006] UKPC 1. Counsel referred the Court to **Boyce** at paragraph 27, where the Board considered whether a re-trial should be ordered:

> "27. …….The decision as to whether to order a new trial must take into account that, unlike the convicted appellant, the acquitted respondent has believed himself absolved from guilt. Their Lordships consider that in ordering a new trial after an acquittal, an appellate court should be satisfied that it will be fair in the sense that there is not (by reason) for example, of fading memory or missing witness) a materially greater risk of an inaccurate verdict than there would have been if the case had been properly left to the jury at the trial……."

[29] Mr. Sylvester relying on the above authorities, contended that the alleged crime in the case at bar, occurred in October 2010, almost 8 years ago. The respondent is not in the country and is in Costa Rica pursuing a Bachelor's at the Universidad Autonoma de

Centro America in Costa Rica. Further, there may be an issue with witness memory fading and the respondent not being able to properly conduct her defence and securing *alibi* witnesses. As such, counsel submitted that this Court should dismiss the appeal as it would not be appropriate to order a re-trial in the circumstances.

[30] Learned counsel further relied on the judgment of **Francis Eiley, Ernest Savery, Lenton Polonio v The Queen** [2009] UKPC 40. In that case the appellants were convicted for murder on the evidence of one person, Frank Vasquez. He had been apprehended at the scene of the crime with bloodstained shoes and clothing and was initially charged with murder. The charge against Mr. Vasquez was subsequently withdrawn under an agreement with the Director of Public Prosecutions under which he was promised immunity from prosecution if he gave truthful evidence at the trial.

[31] On appeal, the Board found that Mr. Vasquez's evidence "*had features that were unsatisfactory and suggest that his primary concern was to distance himself from involvement in the murder,"* despite his agreement to tell the truth. The Board stated that it was possible that Mr. Vasquez pointed to the first group of men that he saw after indicating to the police that he would take them to the persons who were involved in the crime. As such the conclusion reached by the Board was as follows:

> " 49. A judge enjoys a discretion to exclude evidence if the circumstances in which it has been obtained are such as to render its admission contrary to the interests of justice. One circumstance where it may be appropriate to do so is where the witness has received an inducement to give evidence for the prosecution that will render the evidence suspect – see R v Turner (1975) 61 Cr. App. R. 67 at p. 78. The discretion is one that should be used sparingly. Such promises, when made to an accomplice to a crime, have been described as distasteful – see Turner at p. 80. They are nonetheless capable of being justified in the public interest. While the Board has reservations as to whether it was appropriate for the Director of Public Prosecutions to enter into the immunity agreement that was concluded with

Mr. Vasquez, their Lordships do not consider that the trial judge should have refused to receive the evidence of Mr. Vasquez of his own motion.

50. None of the defence counsel applied to have the trial stopped at the end of the prosecution case under the principle in *R v Galbraith* [1981] 1 WLR 1039. Had such an application been made the Board considers that it would have had merit. It would, however, have been an unusual and extreme step for the judge to have ruled that there was no case upon which the jury could safely convict in the absence of any submission to this effect from any defendant. The critical question is whether having regard to the nature of the evidence given by Mr. Vasquez, the circumstances in which it was given and the terms in which the judge summed up the evidence to the jury, the appellants' convictions are safe. The Board has concluded that they are not. For these reasons their Lordships will humbly advise Her Majesty that the three appeals should be allowed and the convictions of the appellants quashed."

Discussion

Improper exercise of discretion in refusing to admit statement

[32] The contention of the Crown was that the trial judge improperly exercised his discretion in refusing to admit the statement of Brandon Budna, the main witness for the prosecution and as such the prosecution was denied the opportunity of putting its case before the jury. Mr. Sylvester did not waste the Court's time and conceded in written and oral submissions that the trial judge erred in not admitting the statement. However, counsel did not surrender as he vigorously made arguments on miscarriage of justice, which the Court will come to later.

[33] The trial judge found that the statutory requirements for the admission of Budna's statement into evidence had been satisfied. Those provisions being sections 71, 72 and 73A of the Evidence Act, Chapter 95 of the Laws of Belize. Section 73A provides for the admissibility of previous inconsistent statements. It states:

> "73A Where in a criminal proceeding, a person is called as a witness for the prosecution and –
>
> (a) He admits to making a previous inconsistent statement; or
>
> (b) A previous inconsistent statement made by him is proved by virtue of section 71 or 72,
>
> the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible and may be relied upon by the Prosecution to prove its case."

[34] It can be seen in the **Vincent Tillett judgment** of this Court, that despite a statement has been proved by virtue of sections 71 and 72 , it may be deemed inadmissible. A judge has a discretion to exclude the statement if the prejudicial effect outweighs the probative value or if it would be unfair to the defendant to do so. The Court in that judgment said in relation to section 73A:

> "[41] This brings us back then to section 73A. As in section 105 of the Act, the legislature has chosen the phrase "is admissible" to describe what use may be made of a previous inconsistent statement which a witness for the prosecution admits having made or which is proved to have been made by him. Unlike in section 125 of the English Criminal Justice Act 2003, there is no provision further limiting or qualifying the circumstances in which such a statement may be admissible. However, we consider that, as this court held in relation to section 105 in **Micka Lee Williams**, the admissibility of such a statement will nevertheless remain subject to the rule of the common law that a judge in a criminal trial has **an overriding discretion to exclude it if its prejudicial effect outweighs its probative value,** or if it is considered by the judge to be **unfair to the defendant in the sense of putting him at an unfair disadvantage or depriving him unfairly of the ability to defend himself**." (emphasis mine)

[35] The trial judge, as mentioned above, did not have the benefit of the **Vincent Tillett** judgment and therefore, did not approach unfairness as shown in that case. There is no need to discuss the authorities relied upon by the judge since counsel for the respondent, Mr. Sylvester had accepted that the trial judge applied the wrong test. The trial judge did

not consider unfairness to the respondent in the sense of putting her at an unfair disadvantage or depriving her unfairly of the ability to defend herself.

[36] It can be seen from the ruling of the trial judge that his main focus was on the Director of Public Prosecutions. He considered that the Director, a trained attorney, went to the prison to interview Budna who had no legal advice. As such, the judge exercised his discretion and excluded the statement "*on the basis of bad faith, pressure, hope of expectation of advantage and unfairness."* This finding of the trial judge was made without any evidence from Budna that the DPP had influenced him improperly to give the statement. There is absolutely no evidence of bad faith on the part of the Director. As such, it is the opinion of the Court, that the discretion of the trial judge was exercised improperly and as a consequence, he erred in refusing to admit the statement of Budna.

Interference with exercise of discretion

[37] It is trite law that a court "will not interfere with the exercise of a discretion by a judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision." See **R v Cook** and **Reg v Selvey**. See also the well known *Wednesbury test* as stated in **Associated Provincial Picture Houses Ltd. v Wednesbury Corporation**, where Lord Greene M.R. said that the authority in that case had come to a conclusion so unreasonable that no reasonable authority could ever have come to it.

[38] In the instant matter, it is the opinion of the Court that there was no evidence upon which the trial judge could properly have arrived at his decision. The Court had looked at the evidence of the Director which showed that she did not make any promises to Mr. Budna, nor did she use any force, pressure, threats or any improper influence of any kind in relation to her conversation with him. As such, this Court can interfere with the exercise of the discretion of the trial judge for not admitting the statement, and set aside his decision.

Miscarriage of justice point

[39] The Court is empowered by section 49(3) of the Court of Appeal Act, Chapter 90, on the hearing of an appeal by the Director of Public Prosecutions to allow an appeal and order a retrial, if it thinks a miscarriage of justice has occurred. Section 49(3) of the Court of Appeal Act provides:

> 49. (1) Without prejudice to any right of appeal granted to the prosecution by any other provision of this Act, an appeal shall lie to the Court at the instance of the Director of Public Prosecutions in the following cases- …….
>
> (3) **On any such appeal against acquittal the Court may, if it thinks that a miscarriage of justice has occurred, allow the appeal and order a retrial.**

[40] In **Bain,** the Court considered whether it had a discretion to refuse to order a re-trial even if it found that an error of law had occurred. That Court was guided by **Boyce,** a case in which the judge had made rulings erroneous in point of law. Lord Hoffman in delivering the judgment at paragraph 26 stated:

> "26. …….. Section 65G provides that on an appeal from an acquittal the Court of Appeal may "(a) dismiss the appeal; or (b) allow the appeal, set aside the verdict, and order a new trial". There was some discussion about whether, if the appeal was allowed, the Court of Appeal was also obliged to set aside the verdict and order a new trial, or whether it had a discretion to refuse to do so. Their Lordships do not think that Parliament could have intended that in every case in which the accused had been acquitted as a result of an error of law by the judge, the Court of Appeal would be bound to allow the appeal and order a new trial. There would be cases in which such a course would be most unjust; for example, where an important defence witness had died. On the other hand, it would be unsatisfactory to allow the appeal and set aside the acquittal, leaving the guilt or innocence of the accused hanging in the air, without ordering a new trial. The position is different when an appeal against a conviction is allowed and no new trial ordered. There the conviction is simply quashed. In their Lordships' view, if the Court of Appeal considers that there was an error of law but that there

> should not be a new trial, it should correct the error but then simply dismiss the appeal and leave the acquittal standing."

[41] The Court in **Bain** found that the trial judge by "*prematurely treating the prosecution case as closed before all its witnesses had been called to give evidence and then directing the jury to return a verdict of not guilty, the trial judge in our view committed an error of law. However, based on what said in Boyce's case, it is open to this Court to correct the error and in our judgment dismiss the appeal."* At paragraph 29 of the judgment, the Court said:

> "29. In deciding whether to order a new trial, we are mindful that "the acquitted respondent has believed himself dissolved from guilt" (Lord Hoffman in Boyce's case) The Court must be satisfied that it would be fair that there is not "a greater risk of an inaccurate verdict that there would have been if the case had been properly left to the jury" at the trial. The prosecution was experiencing great difficulty in getting Yorke to give evidence in accordance with his prior written statement to the police even though he had been treated as a hostile witness. He did not identify the persons who he said entered and left the yard. At no stage did Yorke identify the appellant as the person doing the shooting. For that matter he never stated he saw anyone with a gun on the night of the killing. The prosecution was unable to secure the attendance of the witness even though a bench warrant had been issued for his arrest. It would, in the circumstances, be unfair to allow the prosecution a second opportunity to lead evidence of identification of the person who committed the offence, having failed to do so at the trial, in circumstances where the witness was treated as a hostile witness.

[42] It was for the above reasons that the Court in **Bain** decided that the appeal should be dismissed despite the judge committed an error of law.

[43] In the instant matter, Mr. Sylvester had conceded that the trial judge made an error in law by not admitting the statement from Budna. The issue before this Court, having accepted that the trial judge erred, is whether to exercise our discretion and dismiss the appeal as urged by Mr. Sylvester. We cannot agree with Mr. Sylvester's submissions for reasons to follow.

[44] In the view of the Court, the cases of **Boyce** and **Bain** are distinguishable from the instant matter. Mr. Sylvester quoted a part of paragraph 27 of the **Boyce** judgment to show that the appellate court " ….should be satisfied that it will be fair in the sense that there is not (by reason of, for example, of fading memory or missing witnesses) a materially greater risk of an inaccurate verdict …." This is about 9 years after the incident occurred. However, it is our view that it is important to look at the facts of each case before deciding fairness after lapse of time. For clarity, the entire paragraph 27 would be quoted from the **Boyce** judgment before distinguishing it from the facts of the instant case. It states:

> "**27.** In the present case it is now nine years since the incident occurred. The issues turn upon eye-witness evidence of some fast-moving events outside a nightclub in the early morning, much of which was understandably confused and contradictory, and some complicated medical evidence. The decision as to whether to order a new trial must take into account that, unlike the convicted appellant, the acquitted respondent has believed himself absolved from guilt. Their Lordships consider that in ordering a new trial after an acquittal, an appellate court should be satisfied that it will be fair in the sense that there is not (by reason, for example, of fading memory or missing witnesses) a materially greater risk of an inaccurate verdict than there would have been if the case had been properly left to the jury at the first trial. In this case, they do not think that it would be fair for the accused to be tried again after such a lapse of time. They will therefore dismiss the appeal."

[45] In **Boyce**, as can be seen from the above, it had been nine years since the incident occurred and the issues turn upon "*eye-witness evidence of some fast-moving events outside a nightclub in the early morning, much of which was understandably confused and contradictory, and some complicated medical evidence..*"

[46] In the instant case, although it had been eight years since the incident occurred, it does not turn on eyewitness evidence of fast moving events. There were no issues of fast-moving events which caused confusion, contradiction or complicated medical evidence.

[47] Likewise in **Bain,** the facts of that case are not similar to the instant appeal. At paragraph 29 of the judgment, as shown above, the prosecution's main witness did not identify the persons who he said entered and left the yard and also did not identify the person who did the shooting, in particular, the appellant. Further, he had not stated that he saw anyone with a gun on the night of the killing.

[48] In the instant matter, although it was eight years after the incident, Budna had identified the respondent as the person who was the mastermind of the plot to kill Dyer and take her baby. The fact that he had recanted his statement and treated as a hostile witness (stating that Romero is the true author of the statement) is a matter for the fact finding tribunal). This is not a case of identification evidence or complicated medical evidence. It is for the fact finding tribunal to decide if the respondent solicited Brandon Budna to murder Raylene Dyer. Mr. Sylvester argued that this incident occurred 8 years ago and the respondent is studying in Costa Rica. The record shows that the respondent was aware of this matter but service on her proved to be quite frustrating for the Prosecution. Also, there was no counsel on record at the time and hence the reason for the delay in the hearing of the application for leave to appeal by the Crown.

[49] Mr. Sylvester further contended that there may be an issue with witness memory fading and the respondent not being able to properly conduct her defence and securing *alibi* witness. We have a difficulty with this submission since there was no evidence before this Court, either by way of affidavit from the respondent or from the respondent herself, which showed that the respondent has witnesses who would have experienced memory difficulties because of the lapse of time.

[50] The Court had also considered the judgment of **Eiley, Savery, Polonio v The Queen**, relied upon by Mr. Sylvester and do not consider the facts of that case is comparable with the instant case. The DPP in the instant matter had not offered Mr. Budna an immunity agreement. Further, this Court cannot simply dismiss the application because Budna is a sole witness and say that any conviction that follow would be unsafe.

[51] The Court in exercising its discretion considered both the interest of the accused and the public interest in determining the issue of a re-trial as shown in the Privy Council judgment of **Forrester Bowe and anor v The Queen** [2006] UKPC. We considered that there are some gruesomeness in the allegations as to the death of Raylene Dyer and this was acknowledged by counsel for the respondent. In **Forrester Bowe,** the Board said the following on the issue of re-trial:

> " Whether a second retrial should be permitted depends on an informed and dispassionate assessment of how the interests of justice in the widest sense are best served. **Full account must be taken of the defendant's interests , particularly where there has been long delay or he has spent long periods under sentence of death or if his defence may be prejudiced in any significant way by the lapse of time. Account must also be taken of the public interest in convicting the guilty, deterring violent crime and maintaining confidence in the efficacy of the criminal justice system.** These are matters which a national court is well placed to consider. The Board is for obvious reasons much less well placed…." (emphasis added).

Disposal

[52] For those reasons given above, the Court makes the following orders:

(1) The application for leave to appeal is granted and treated as the appeal, which is allowed;
(2) The ruling of the trial judge not to admit the statement of Budna is set aside;
(3) The directed acquittal of the respondent is set aside;
(4) The respondent is to be retried on the same indictment by a judge other than the trial judge.

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SIR MANUEL SOSA P

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HAFIZ BERTRAM JA

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DUCILLE JA