IN THE COURT OF APPEAL OF BELIZE AD 2018

CRIMINAL APPEAL NO 6 OF 2016

DIONICIO SALAZAR Appellant

v

THE QUEEN Respondent

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BEFORE

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

A Sylvester for the appellant.
S Smith and J Tillett for the respondent.

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16 October 2017 and 16 March 2018.

HAFIZ-BERTRAM JA

Introduction

[1] Dionicio Salazar ('the appellant') was tried for the offence of murder before Moore J sitting without a jury. He was tried on an indictment dated 10 January 2013 charging him with the murder of Marlon Rivera. The trial commenced on 2 March 2016 and on 29 March 2016 the trial judge reserved her decision. On 6 May 2016, Moore J found the appellant guilty of murder and sentenced him to life imprisonment. The appellant filed his notice of appeal on 9 May 2016 and his grounds of appeal on 29 May 2017. The Court heard the appeal on 16 October 2017 and reserved judgment.

[2] At the hearing of the appeal the respondent applied for the leave of the Court to rely on an affidavit of Ms. S. Maharaj. There was no objection by Mr. Sylvester. The Court granted the respondent leave to rely on the said affidavit which will be discussed later.

The case for the prosecution

[3] Marlon Rivera ('the deceased') was shot dead by the appellant in the early morning hours of 13 June 2010 whilst sitting in front of Belmore Hotel in the centre of San Ignacio Town. The prosecution called eight witnesses to prove its case and also relied on the deposition of a deceased witness. The witnesses were the investigating officer ASP Raymundo Reyes, the Scenes of Crime Technician, Marie Lou Rancharan-Grinage who took photographs at the scene of the shooting, Omar Rodriguez, a former police officer who was on mobile patrol near the scene of the crime, Dr. Mario Estrada Bran, Jose Luis Rivera, the brother of the deceased, Jerry Robateau an eyewitness to the crime whose statement was not allowed into evidence by the trial judge. The prosecution tendered the deposition of a deceased witness, Dean Dougal (Dougal) who was also shot by the appellant on the same morning but survived. He later died from unrelated causes. Keisha Bahado the common law wife of Dougal who was at the scene of the crime was a witness and also Corporal Solomon Mas who recorded the statement from Dougal.

[4] The evidence that Marlon Rivera is dead came from Jose Luis Rivera who identified his body to the doctor and police officer before the post-mortem was conducted. Dr. Mario Estrada Bran testified that on 14 June 2010 he performed a post-mortem examination on the body of the deceased and in his opinion the cause of death was heart failure due to head injuries due to multiple gunshots which showed that he died of harm.

[5] As stated by the trial judge, the identification of the appellant as the person who did the shooting and caused the death of the deceased was the crux of the case. The prosecution partially relied on the evidence of Dougal who gave a statement to the police on the 1 July 2010. At the time of the trial he was deceased. Keisha the common law

wife of Dougal testified that he died in November 2013. The trial judge admitted his death certificate into evidence. Corporal Mas who recorded the statement from Dougal testified as to the circumstances when the statement was recorded. He said that Dougal gave the statement voluntarily and he was given an opportunity to read over it after it was recorded.

[6] The trial judge held a *voir dire* in relation to Dougal's statement which she admitted and gave it full weight. The relevant portions of the statement as shown in the judgment of the trial judge was that on the morning of the shooting in the centre of San Ignacio Town, he felt something touch him on the left side of his head and when he turned his face he saw Dionicio "Life" Salazar (the appellant) who was about two feet in distance from him. He stated that the appellant had a gun in his right hand and he stuck the gun to the left side of his (Dougal) head. Dougal stated that he slapped the gun away but immediately after that, the appellant raised the gun again and he opened fire at him and Marlon from close range. He stated that the last thing he remembered was seeing the appellant pulling the trigger with fire coming from the gun. Thereafter, he fell face downwards to the street and Marlon fell beside him. When he regained consciousness he was at the San Ignacio Hospital and was later taken to the Belmopan hospital.

[7] Dougal stated that the lighting condition was good, there was nothing obstructing his view and he had known the appellant for many years. They were once friends but the situation changed after the appellant was accused of the chopping murder of Dougal's nephew in June 2004. On the morning of the shooting Dougal said that the appellant was right up his face but because it was the first time he saw him during the material time combined with the swiftness of the incident, he cannot recall the colour of the clothes that the appellant was wearing.

[8] Keisha testified that she and her common law husband, Dougal had gone bar hopping with a group of friends to celebrate the birthday of a friend. Dougal left the group to go across the street to sit with Marlon at a table in front of Belmore Hotel. She testified that she heard six gun shots and when she turned around to the area where the shots were heard, she saw Dougal and Marlon on the ground. She said that she saw a man

standing 15 feet from the bodies and she was about 35 feet from the man. She testified that she recognized him as Dionicio "Life" Salazar, the appellant and she yelled "You shot Dean" and "Life just shot Dean." Thereafter, the appellant ran away dropping the shiny object under a vehicle. She testified that she knew the appellant since he was 12 or 13 years old and that he had dated her sister for a few months when he was about 16 or 17 years old. Before the shooting, she saw him at a nightclub as she stood in a bathroom line. The prosecution's case was that the statement 'Life shot Dean' constituted excited utterances that form part of the *res gestae* and are admissible in evidence under this principle of law. The trial judge accepted that the statement was made "*in circumstances of spontaneity and involvement in the event that the possibility of concoction or fabrication can be disregarded*." Further, it was the appellant whom Keisha saw near the bodies and it was him that she referred to as "Life".

[9] Omar Rodriguez, a former police constable was on duty on the night of the incident and parked in front of the Belmore hotel prior to the shooting incident. He saw Dougal and the deceased sitting together in front of the hotel. He left when he saw a taxi dragging a woman and was dealing with that incident when he heard the gunshots. He returned and saw the bodies on the ground in front of the hotel. He saw Keisha over the bodies screaming for help and she said, "*Life just shot my husband and he is wearing a red cap."* The trial judge said that this evidence was confirmation that the appellant shot the deceased. The judge found Rodriguez to be a truthful witness.

The case for the defence

[10] The appellant testified under oath. He provided an alibi saying that at the time of the shooting he was at the home of the parents of his common law wife, which is situated in Georgeville Village. He testified that he did not shoot and kill the deceased. He gave evidence of his whereabouts from 12 to 14 June 2010. He testified that he knew Dougal but had never been his friend.

[11] The common law wife of the appellant, Verona Usher testified for the defence. She gave a similar account of the whereabouts of the appellant and as stated by the trial judge, using similar language and exact expressions in several instances. The testimony of both the appellant and his witness were not found to be convincing by the trial judge. They were testifying after six years of the incident and recalled their movements with precision. Since the judge did not find the testimony of the appellant and Ms. Usher as truthful, she rejected the alibi of the accused. It was also established by the prosecution that Ms. Usher, had been an alibi witness for the appellant in a previous trial and she used a different name, Verona Chacon. The prosecution in the cross-examination of Verona used a portion of the transcript from the previous trial.

Grounds of Appeal

[12] By an amended notice of appeal dated 30 August 2017, the appellant filed the following grounds of appeal:

(1) The learned trial judge failed to direct her mind properly as to the weight to be attached to the untested deposition of Dean Dougal.

(2) The learned trial judge erred in considering the transcript of previous testimony of defence witness, Verona Usher and this amounted to a material irregularity in the trial below.

(3) The sentence of life imprisonment passed is unlawful and unconstitutional for reasons explained in Criminal Appeal No. 22 of 2012, Gregory August v The Queen.

Weight to be attached to the untested deposition of Dean Dougal

[13] Learned counsel, Mr. Sylvester submitted that in the court below the deposition of Dean Dougal was admitted into evidence pursuant to section **123 of the Indictable Procedure Act** after holding a *voir dire.* Thereafter, the trial judge after directing herself held that it "*accept[ed] the statement, including the identification evidence of the*

deponent, giving it full weight." Mr Sylvester contended that the directions given by the trial judge on the due weight to be given to the deposition of Dougal was deficient and faulty. As such, this resulted in a miscarriage of justice.

[14] He argued that the judge relied on the case of ***Emmerson*** **Eagan v Queen,** Criminal Appeal No 10 of 2012, paragraphs 28 – 35, for guidance in relation as to how to assess the weight to be given to the deposition of a deceased person. Counsel contended that other paragraphs of **Eagan's** case are also relevant and were not considered by the judge. He distinguished that case from the instant matter. In that case, there was admission into evidence of a statement of a deceased person pursuant to section 105 of the Evidence Act and as such consideration of the issues was done in relation to the interplay between section 105 and 85 of the Evidence Act. However, in the instant matter, Dougal's statement was admitted pursuant to section 123 of the Indictable Procedure Act. As such, Mr. Sylvester submitted that an examination must be done of section 105 of the Evidence Act and section 123 of the Indictable Procedure Act to determine whether a court would be bound to apply the principles laid down in **Eagan's** case in relation to the determination of weight, when a deposition is admitted into evidence pursuant to section 123 of the Indictable Procedure Act or whether other directions would be required.

[15] Learned counsel contended that a statement/deposition admitted pursuant to section 123 is *prima facie* to be given lesser weight than a statement admitted into evidence pursuant to section 105 of the Evidence Act, since section 123 does not have the in-built safeguard as a section 105 statement. The in-built safeguards being those in section 105(3), that is, must be signed before a magistrate or justice of the peace. Mr. Sylvester also relied on **Eagan's** case at paragraph 36, where the Court explained that section 105 would not be inconsistent with the constitutional guarantee for an accused person to cross-examine a prosecution witness for reasons explained by Lord Bingham in **Steven Grant v R** [2006] UKPC 2. Those reasons being that the "*legitimate interests of a defendant in a criminal trial are adequately safeguarded by, among other things, the*

careful direction as the correct approach to hearsay evidence which a trial judge is required to give."

[16] Mr. Sylvester argued that section 105(3) in-built safeguard goes towards as well balancing the *prima facie* violation of the rights of an accused but a section 123 IPA deposition merely requires the statement of a dead person to be admissible. There is no requirement for it to be taken before a magistrate or justice of the peace. As such, it is *prima facie* of lesser value than a section 105 statement and must be explained in a judge's direction if the rights of an accused right are to be adequately safeguarded.

[17] Counsel further submitted that a direction under section 123 of the IPA would have to go a little further in order to adequately safeguard the constitutional rights of an accused. He argued that the direction would include the full **Eagan** directions as well as a direction that section 123 IPA deposition does not have the in-built safeguard as a section 105 statement and consequently, this is a matter which goes to the weight to be attached to the deposition. Counsel relied on Eagan's case at paragraph 35 where the Court said that, "*a trial judge must give a jury a direction as to the weight which should be accorded a statement admitted under section 105 and should tell them that, in estimating the weight which may be attached to such a statement, they must take into account the matters referred to in section 85."* He also relied on paragraph 45 of the judgment of Eagan which shows that when a statement is admitted in Belize pursuant to section 105, a trial judge must also give a direction as described by Lord Bingham in **Grant.**

[18] Learned counsel argued that there are three areas in the trial judge's direction in which she did not properly direct herself and as such the ground of appeal should succeed. These are (a) the deposition admitted pursuant to section 123 of the IPA does not have the in-built safeguard as a section 105 statement; (b) trial judge failed to indicate by illustration, the sort of matter that might well be put in cross examination as shown at paragraph 51 of **Eagan's** case. Counsel stated that the statement of Dougal was not recorded until 18 days after the incident and as such questions would have been put to

Dougal in relation to the contact and communication and discussion with Keisha Bahado and indeed anyone including police officers during those days. Counsel questioned whether Keisha Bahado might have told Dougal she saw the accused that night and Dougal fashioned his statement to accord with that. (c) the trial judge's treatment of the issue of non-contemporaneous recording of the statement since the judge merely pointed out that the statement was made 18 days later. Counsel submitted that the trial judge was obliged to consider whether there was a possibility of concoction.

[19] Learned counsel, Ms. Smith for the prosecution submitted that Dougal's statement was admitted under section 123 of the IPA and not section 105 of the Evidence Act. Further, despite the in-built safeguards provided by section 105(3), both sections suffer from the same limitation since the maker of the statement is not available for cross-examination.

[20] Counsel contended that the directions of the trial judge to a jury or herself when sitting alone in relation to how to determine the weight to be given to a statement are the same. She submitted that judges are required to (a) remind juries that the evidence contained in the statement was not given under oath (b) when assessing the weight to put on the evidence the deponent was not tested under cross-examination and (c) required to point out particular features of the evidence in the deposition/statement which conflict with other evidence and which could have been explored in cross-examination. Counsel relied on **Barnes Desquottes and Johnson v R Scott and Walters v R** (1989) 37 WIR 330 at 340 and **Steven Grant** at paragraph 21.

[21] Ms. Smith further submitted that where a statement has been admitted pursuant to section 105 of the Evidence Act, a trial judge is required pursuant to section 85 of the Evidence Act to include some additional directions to herself or a jury in deciding the weight to attach to the statement of an absent witness. She submitted that the directions require the judge or jury to consider whether the statement was made contemporaneously with the occurrence or existence of the facts stated and whether or not the maker of the statement had any incentive to conceal or misrepresent the facts.

[22] Counsel contended that although section 85 does not impose a similar obligation on a trial judge when a statement had been admitted under section 123 of the IPA, it would be wise to consider those factors under the said section when assessing the weight of a deposition. She submitted that the trial judge in the instant matter directed her mind to the said section and the guidance as laid out by the Court in **Eagan's** case at paragraphs 373-375, in assessing the weight to be attached to the deposition of Dougal.

[23] Ms. Smith argued that Moore J took all the relevant matters into consideration in assessing the weight to attach to the deposition and there was no added obligation on the trial judge sitting as judge and jury to direct herself that a deposition admitted under this section be given less weight than a statement admitted under section 105 of the Evidence Act.

Discussion

[24] Dean Dougal is deceased and his statement was admitted into evidence pursuant to section 123 of the IPA by the trial judge sitting without a jury. The trial judge sought guidance from **Eagan's** case. Mr. Sylvester distinguished **Eagan's** case from the instant matter since in that case the deposition was admitted pursuant to section 105 of the Evidence Act which has in-built safeguards. In the instant matter, the statement was admitted pursuant to section 123 of the IPA which Mr. Sylvester submitted has no in-built safeguards and as such additional directions should have been given by the trial judge that lesser weight should be given to Dougal's statement and further, full directions should have been given as in the **Eagan's** case. The Court will examine section 105 of the Evidence Act and section 123 of the Indictable Procedure Act to determine whether a court would be bound to apply the principles laid down in **Eagan's** case (in relation to the determination of weight to be given to a deposition admitted into evidence pursuant to section 123 of the IPA) or whether other directions would be required that lesser weight should be given when admitted under section 123 of the IPA.

The guidance in the case of Eagan

[25] The Court in **Eagan** discussed the weight to be given to evidence contained in a written statement admitted under section 105 of the Evidence Act. There was no discussion about statements admitted under section 123 of the Indictable Procedure Act as it was not necessary to do so since the statement was not admitted under that section as was done in the instant matter. Nevertheless, Moore JA followed the guidance in the case of **Eagan** (and section 85 of the Evidence Act which was discussed in **Eagan)** and **Scott v R** [1989] AC 1242.

[26] In **Eagan** the Court considered several authorities which were presented to it to support the argument that lesser weight should be placed on evidence not tested by cross-examination. At paragraph 30, the Court said that the authorities do not support the "more strident proposition that a trial judge **must** direct a jury in every case that the statement of a witness who has not been cross-examined **must** be given less weight than the viva voce evidence of a witness who has been. In **Grant** at para 21(4), Lord Bingham considered it proper, even if not very helpful, "*to direct the jury to give the statement such weight as they may think fit.*"" Lord Bingham rejected authorities than took a different position.

[27] At paragraph 33 of the judgment, the Court said that the debate has been resolved in Belize by section 85 of the Evidence Act which specifically addressed the issue of weight to be attached to statements under section 105. The Court interpreted the section in this way:

> "[34] In our judgment, section 85 envisages situations both where a jury may decide to <u>attach no or very little weight</u> to the evidence contained in a statement untested by cross-examination, as well as one where the jury may <u>decide not to discount the weight</u> of the evidence at all. It is accordingly not right to suggest that a trial judge must, in every case, direct a jury to attach less weight to a statement admitted under section 105 than to viva voce evidence. And equally, it is wrong to

require a trial judge, who has given the jury appropriate warnings, to direct them to give a statement admitted under section 105 equal weight to evidence tested by cross-examination.

[35] In light of section 105(5), therefore, it would appear clear that in every case in which a statement is admitted under section 105, the trial judge must give the jury a direction as to the weight which should be accorded a statement admitted under section 105 and should tell them that, in estimating the weight which may be attached to such statement, they must take into account the matters referred to in section 85. ….it is necessary to determine whether and, if so, what effect the combination of sections 105(5) and 85 may have had on the content of the warning which trial judges are traditionally to give in relation to statements or depositions admitted into evidence and not tested by cross-examination."

[28] The Court thereafter discussed the hearsay warning and pointed out that the admission of evidence in a criminal trial of a statement of a witness who has not appeared to be cross-examined, *prima facie* violates the right of an accused which is guaranteed by section 6(3) (e) of the Belize Constitution, to examine witnesses called by the prosecution. The Court relied on **Grant** in which the Privy Council held that the admission of a statement into evidence in Jamaica under a provision similar to Belize section 105, was not inconsistent with the Jamaican equivalent of section 6(3)(e). The reason being that, "*the legitimate interests of a defendant in a criminal trial are adequately safeguarded by, among other things,* ***the careful direction as the correct approach to hearsay evidence which a trial judge is required to give***."

[29] The authority of **Grant** concerns the admission into evidence of an unsworn statement made out of court by a witness who was absent and not cross-examined. The evidence would have been hearsay if it was not for the enabling statutory provision (in Belize section 105). Lord Bingham at para 21(4) gave the following formulation of the direction which ought to be given:

"It is not correct to say that a statement admitted under section 31D is not evidence, since it is. It is necessary to remind the jury, however obvious it may be to them, that such statement has not been verified on oath nor the author tested by cross-examination. But the direction should not stop there:

the judge should point out the potential risk of relying on a statement by a person whom the jury have not been able to assess and who has not been test by cross-examination, and should invite the jury to scrutinize the evidence with particular care. It is proper, but not perhaps very helpful, to direct the jury to give the statement such weight as they think fit: present with an apparently plausible statement, undented by cross-examination, by an author whose reliability and honesty the jury have no extraneous reason to doubt, the jury may well be inclined to give it greater weight then the oral evidence they have heard. It is desirable to direct the jury to consider the statement in the context of all the other evidence, but again the direction should not stop there. If there are discrepancies between the statement and the oral evidence of the other witnesses, the judge (and not only defence counsel) should direct the jury's attention specifically to them. It does not of course follow that the omission of some of these directions will necessarily render a trial unfair, but because the judge's direction are a valuable safeguard of the defendant's interests, it may."

[30] Lord Bingham cited **Scott v R** [1989] AC 1242 where the importance of that warning had been previously highlighted. This is a case in which the witness was dead and therefore could not be cross-examined.

[31] The Court concluded in **Eagan** that in Belize, where a statement is admitted pursuant to section 105 of the Evidence Act, a trial judge must give a direction as described by Lord Bingham in **Grant** and also must direct the jury on the weight to be attached to the statement in accordance with section 85 of the Act.

Section 123 of the Indictable Procedure Act

[32] Section 123 of the Indictable Procedure Act provides for the giving of depositions in evidence at trial. It is a statutory exception to the rule against the admission of hearsay. Section 123(1) and (2) 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."

[33] Section 2 of the Act provides that 'deposition' "*includes a written statement" and that a 'written statement' "means a statement made by a person about a crime which is reduced into writing by the person making the same or which is recorded by a police officer before whom it is made and signed by the maker".*

[34] The pre-condition in section 123 is for the prosecution to prove that the deposition of a witness, in this case Dougal, "…. is proved at the trial by the oath of a credible witness to be dead." Regardless if this pre-condition is proved, the trial court has a discretion to refuse to admit the deposition into evidence if in the opinion of the court, "… **the accused will not be materially prejudiced by the reception of such evidence**." It was proven

that Dougal is dead and the statement was admitted into evidence by the trial judge after considering the evidence.

Section 105 of the Evidence Act

[35] Section 105 is also a statutory exception to the common law rule against hearsay. Section 105 provides as follows:

> '105. (1) Notwithstanding anything to the contrary contained in this Act or any other law, but subject to subsections (4) and (5), a statement made by a person in a document **shall be admissible** in criminal proceedings (including a preliminary inquiry) as evidence of any fact of which direct or oral evidence by him would be admissible if –
>
> (a) the requirements of one of the paragraphs of subsection (2) are satisfied; and
>
> (b) the requirements of subsection (3) are satisfied.
>
> (2) The requirements mentioned in subsection (1) (a) are –
>
> (a) that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness;
>
> (b) that –
>
> (i) the person who made the statement is outside Belize; and
>
> (ii) it is not reasonably practicable to secure his attendance;
>
> (c) that all reasonable steps have been taken to find the person who made the statement but that he cannot be found.
>
> (3) The requirements mentioned in subsection (1) (b) are that the statement to be tendered in evidence contains a declaration by the maker and signed before a magistrate or a justice of the peace to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence he would be liable to prosecution if he

willfully stated in it anything which he knew to be false or did not believe to be true.

…

(5) Section 85 of this Act shall apply as to the weight to be attached to any statement rendered admissible as evidence by virtue of this section.

[36] The in-built safeguards Mr. Sylvester referred to are "…. *the statement to be tendered in evidence contains a declaration by the maker and signed before a magistrate or a justice of the peace* …"

Section 85 of the Evidence Act

[37] Section 85 provides for the weight to be attached to the statement admissible as evidence.

"85. (1) In **estimating the weight**, if any, to be attached to a statement rendered admissible as evidence by virtue of this Part, regard shall be had to all the circumstances from which any inference may reasonably be drawn as to the accuracy or otherwise of the statement and in particular :-

...

(b) in the case of a statement falling within any other section in this Part (other than section 83), to the question whether or not the statement was made **contemporaneously** with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to **conceal or misrepresent the facts**."
(emphasis added)

Is section 123 subject to section 105 of the Evidence Act?

[38] In the opinion of the Court, section 123 is not subject to section 105 or *vice versa* as both sections are independent of each other. As submitted by Ms. Smith, there was no added obligation on the trial judge to direct herself that a deposition admitted under this section be given less weight than a statement admitted under section 105 of the Evidence Act. In both scenarios, the maker of the statement is not available for cross-examination.

[39] This Court had discussed the effect of both of these sections (section 105 of the Evidence Act and section 123 of the IPA in several cases including the case of **Director of Public Prosecutions v Avondale Trumbach,** Criminal Appeal No. 17 of 2004, where the Court opined that section 123 of the IPA is unaffected by section 105 of the Evidence Act. In **Trumbach**, a statement was admitted into evidence pursuant to section 123 of the IPA. An objection was taken that the statement was recorded by a detective sergeant of police and therefore did not fall within section 105(3) of the Evidence Act, which provides that the statement contain a declaration by the maker and signed before a magistrate or a justice of the peace. Morrison JA (as he was then) discussed these provisions in relation to the objection taken. He stated at paragraphs 23 and 24:

> "23. Which leaves the objection raised for the first time in this court, based on section 105 of the Evidence Act. It is not irrelevant, we think, to point out that that section, which was introduced as the Director pointed out into that Act by way of amendment by Act 26 of 1992, was designed to provide a statutory exception to the rule against hearsay in criminal cases along the lines of the UK Criminal Evidence Act 1968. It is therefore in our view a provision which facilitates the admission in evidence of statements that would at common law be excluded as hearsay and provides for the preconditions to their acceptance by the court. Section 123 of the Act, has a much longer provenance: it was part of the original Act passed in 1953 and carries even now essentially the same language of the UK Criminal Justice Act 1925 (see Archbold's Criminal Pleading, Evidence & Practice,

36th edition, paragraph 1239, and see now the UK Criminal Procedure and Investigations Act 1996). The editors of Blackstone's Criminal Practice 2004 in fact treat the modern UK equivalents of both sections under the general rubric "Exceptions to the rule against hearsay" as providing alternative bases of some respects different pre-conditions - see paragraphs F16.3 to 19).

To treat section 123 of the Act as subject to section 105 of the Evidence Act, as … in effect contends, would in our view require a gloss on the clear language of section 123 that is not warranted either by the language of the Evidence Act or the legislative history of the two provisions. While we are acutely aware that this aspect of the matter was not as fully argued before us, as it might have been, we are nevertheless satisfied that had the legislature intended by the introduction in 1992 of section 105 of the Evidence Act to circumscribe the scope of the operation of section 123, which had previously been applied in Belize for many years, in the manner contended for …, it would have done so in express terms. Given that section 105 of the Evidence Act, as amended, sought to introduce a new departure from the venerable rule against hearsay of general application in criminal cases, we do not regard the opening words of the section "Notwithstanding anything to the contrary contained in this Act (or any other law) …" as having been intended to convey anything more than the scope of the new exception. So that other, more limited, exceptions such as that provided by section 123 of the Act, remain unaffected by section 105. In our view, therefore, the objection … to the admissibility of the deposition of Mr. Flowers on the basis of section 105 of the Evidence Act must fail."

[40] In our opinion, although the case of **Trumbach** dealt with admissibility of the statement and not the weight, for the same reasons discussed in that case, section 123 of the IPA is unaffected by section 105 in relation to weight to be attached to a statement. Section 123 expressly provides that the court has to be satisfied **that the accused will not be materially prejudiced** by the reception of such evidence. That is, that the prejudicial effect of the statement does not outweigh the probative value of same.

[41] The Court also find it necessary to mention the case of **Micka Lee Williams v The Queen,** Criminal Appeal No. 16 of 2006, in which section 105 was challenged. It does not concern the weight to be attached to a section 105 statement but it is helpful to show that section 105 is not subject to section 123. In that case, there was a flip as section 105 was challenged and not section 123 of the IPA. Here the appellant was convicted for the offence of unlawfully causing dangerous harm to Andre Douze, a security guard. Douze was shot and was hospitalized and he purportedly identified the appellant as the person who shot him. Douze returned to his country of birth after his discharge from the hospital. On appeal, the appellant complained that the admission by the trial judge of the statement made by Douze into evidence, pursuant to section 105 of the Evidence Act, was in violation of his right to a fair trial as guaranteed under section 6(3) (e) of the Constitution of Belize. The reason being that section 105 of the Evidence Act does not provide any safeguards to ensure that the appellant has a fair trial if the statement is admitted into evidence. The gist of the argument by the appellant is that once the pre-conditions of section 105 are satisfied the trial judge had no discretion to refuse to admit the statement if the prejudicial effect outweighs the probative value as provided for in section 123(1) of the IPA.

[42] The Court looked at the issue as to whether the discretion remained vested in the court to exclude prejudicial evidence although not expressly mentioned in section 105. The Court, made two important observations in relation to section 105 at paragraphs 20 and 21 of the judgment. The Court said that subsection (1) of 105 states that the statement shall be "admissible" and not shall be "admitted". It does not make the statement mandatory even if the pre-conditions are satisfied. The Court looked at the definition of law as stated in the Interpretation Act at section 3 which does not include common law. As such, the Court concluded that any rights existing at common law are not abolished and in its opinion, "are preserved." The Court further stated that, "*At common law, a judge in a criminal trial had an overriding discretion to exclude evidence if the prejudicial effect outweighs the probative value.*" Reliance was placed on **R v Sang**; **Scott v The Queen** [1989] AC; **Henriques v The Queen** [1991] 1 W.L. R. 242.

[43] At paragraphs 22 and 23, the Court concluded that "*the common law right of the trial judge to exclude evidence was not abolished"* and section 105 does not exclude "*the common law right of a judge in a criminal trial to exclude evidence where the prejudicial effect outweighs the probative value in the sense that it will put him at an unfair advantage or deprive him unfairly of the ability to defend himself".* The Court also concluded that section 105 does not offend the constitutional guarantee to a fair trial.

[44] In the instant case before us, there was no cause to give the statement lesser weight for the reason that it was not taken before a magistrate on oath pursuant to section 105 of the Evidence Act. The trial judge had the discretion to exclude the statement if the prejudicial effect outweighed the probative value. The trial judge was guided by the cases of **Eagan** and **Scott** and took all relevant matters into consideration as shown by her judgment. The judge considered Dougal's statement with the evidence of the other prosecution witnesses, including Keisha, in great detail. There were no discrepancies between Dougal's statement and that of his common-law wife, Keisha, as to the person who shot him and the deceased. Even if there are omissions of any directions as in **Eagan,** this will not necessarily render the trial unfair. (See **Grant**) The identification of the appellant as the person who shot the deceased was the crux of the case and the judge was satisfied beyond a reasonable doubt that the appellant shot and killed the deceased.

The reasons given by the trial judge for giving full weight to Dougal's statement

[45] The trial judge admitted the deposition of Dean Dougal into evidence pursuant to section 123 of the Indictable Procedure Act after holding a *voir dire.* She stated that after hearing submissions from both sides she **exercised her discretion** to admit the statement. The prosecution relied partly on the statement of Dougal given to the police in July of 2010. The trial judge was satisfied that the pre-condition was met under section 123 of the IPA. The witness Keisha Bahado testified that Dougal died in November 2013 and his death certificate was admitted into evidence. Corporal Mas who recorded the statement from Dougal also gave evidence as to the circumstances when the statement

was recorded. The statement was voluntary and Dougal was given an opportunity to read over same after it was recorded.

[46] The judge had to be satisfied as provided by section 123 of the IPA that the accused will not be materially prejudiced by the reception of the evidence. In doing so, she reviewed the learning in **Eagan's** case for guidance at paragraphs 28 to 35 of the judgment where the Court considered the weight to be given to evidence admitted under section 105 of the Evidence Act. Moore J specifically drew attention to what the Court said at paragraph 35 of the judgment, that in estimating the weight to be attached to a section 105 statement the trial judge must take into account the matters referred to in section 85, that is, regard to all the circumstances from which an inference may reasonably be drawn as to the accuracy of the statement, whether the statement was made contemporaneously with the occurrence of the incident and whether the maker of the statement had any incentive to conceal or misrepresent the facts.

[47] Moore J was not required by section 123 of the IPA to consider section 85 of the Evidence Act. But, she did so in the assessment of the statement and this in our view, was to the benefit of the accused. The trial judge also sought guidance from **Scott** where the Board said that the court may admit the evidence of a deceased witness but it must consider the weakness of this type of evidence as well. The trial judge considered that the police statement of Dougal was not sworn on oath and that the maker was not subject to cross-examination. The judge said that Dougal statement was made about 18 days after the incident so it was not made contemporaneously or within days after the incident. She also kept in mind the warning to examine with utmost care the untested evidence and to consider all the circumstances under which the statement was made including whether Dougal had a reason to conceal or misrepresent facts. She took into consideration that the accused testified that if he had the opportunity he would have confronted Dougal about how well they knew each other before the shooting. The judge also considered that a question could have been put to Dougal under cross-examination as to the last time he saw the appellant before the shooting. Further, the judge considered bias which was raised by defence counsel. After referring to all of the above, the trial

judge said that, "*I must take all of this into consideration when evaluating the reliability and weight to be given the Dean Dougal deposition*." This statement shows that the judge directed her mind to the relevant matters. In the opinion of the Court, she had to give herself the same directions as she would give to a jury but since she is an expert in the law, it is not expected for her to put the directions in great details to herself.

[48] The trial judge considered the relevant portions of Dougal statement which included the circumstances under which he and the deceased were shot, circumstances under which the accused was identified by Dougal who stated that he was friends with the accused and friendship between Dougal and accused changed when the appellant was accused of chopping the Dougal's nephew. The trial judge said that because of "the **weaknesses in untested evidence, particularly when it comes to identification evidence I examine the statement of Mr. Dougal with the greatest of care."** The judge gave herself the warning of the special need for caution because a convincing witness may be a mistaken witness.

[49] Moore J considered the **weaknesses of the identification evidence**. She stated that the brevity in which everything happened is a weakness and also not knowing when the deponent had last seen the accused before the incident. She said this is a matter which could have been cleared up by cross-examination. The judge also warned herself that mistakes can be made even in cases of recognition of close relatives and friends.

[50] The trial judge after giving the above warnings to herself and considered the evidence, stated the following:

> "I accept the statement including the identification evidence of the deponent. **Giving it full weight**. I believe Mr. Dougal knew the accused from the past and he recognized him when the encounter happened. In extremely close quarters under sufficient timing with enough time, though brief, to recognize him. **I do not accept that Mr. Dougal fabricated this statement** and I will discuss in further detail why I reached this conclusion…"

[51] In relation to bias, after the trial judge considered the evidence of the other witnesses, she said that even if she accepted that Dougal strongly disliked the accused and was biased against him and she accepted the evidence that Ms. Bahado shared the same sentiment, it is a far stretch to conclude that they both lied about the accused being at the scene of the shooting. The judge considered that after Dougal had been shot, he was not in a position to have colluded with Bahado or anyone to fabricate a case against the accused. She further considered that Dougal was unable to speak or had trouble speaking for a couple of weeks after being shot. Further, Bahado had given her statement a day after the shooting. As such, the judge stated that she did not see that it would have been possible for Dougal to conspire with Bahado for the sake of revenge to blame the accused for the shooting.

[52] The trial judge also found it difficult to accept that Dougal himself would have lied to the police about seeing who shot him or conspire with the police to implicate the accused for the sake of revenge for an incident which happened six years earlier. She found it unreasonable that he would not have wanted the person who shot him to be captured and punished. The judge did not accept the theory of the defence that Dougal had plotted against the accused rather than provide evidence to the police as to who shot him and killed his friend, the deceased, in the instant matter.

[53] Moore J stated that the defence theory was that the police, including ASP Reyes, Corporal Mas and former PC Rodriguez would also have had to participate in the conspiracy in order to pin the crime on the accused. The judge considered all the circumstances of the case and rejected the defence conspiracy theory. She stated that PC Rodriguez whom she found to be a credible witness despite his memory lapses would have had to be involved from the day of the shooting and put in a report from Keisha in which she said, “Life just shot my husband”.

[54] The judge also rejected the submission of the defence that the rejection by Jerry Robateau of a police statement he signed implicating the accused in the shooting, was

evidence of conspiracy. She considered that Robateau signed the statement a few hours after the shooting and rejected the submission that the police pre-drafted the statement.

[55] In the opinion of the Court, the trial judge properly considered the evidence before her and drew reasonable inferences. The judge considered the important issues of identification and the weaknesses of the evidence of identification in Dougal's statement and the question that could have been put to him in cross-examination as to how long he had known the accused. She considered Dougal's evidence with that of the other witnesses who testified in relation to the identification of the appellant. As such, it is the opinion of the Court, that the judge was correct to give Dougal's statement full weight. Further, it is our opinion, that the judge was not required to give a direction to herself for reasons discussed above that a section 123 IPA deposition is *prima facie* of lesser value. The ground is therefore without merit as the trial judge had not failed to direct her mind properly as to the weight to be attached to the untested deposition of Dean Dougal.

The ground in relation to the reliance on the transcript of the previous testimony of defence witness Verona Usher

[56] Mr. Sylvester submitted that the learned trial judge erroneously admitted into evidence of previous testimony of defence witness, Verona Usher and this did not fall within section 71 of the Evidence Act as amended by Act No. 2 of 2012, (section 73 A), which provides for a person to be called as a witness for the prosecution. Section 73 A provides for the admission into evidence the previous inconsistent statements of a witness as evidence of the truth in criminal proceedings. He contended that after the defence closed its case, the prosecution sought and obtained leave to recall the appellant and his witness, Verona Usher for further cross-examination. He stated that when Verona was further cross-examined, although the transcript of the proceedings below in the trial does not show this, the transcript of a previous proceeding in which Verona had given evidence was admitted into evidence by the trial judge. Counsel referred to page 411 of the record where Moore J considered the previous transcript for confirmation that Verona had testified in a previous trial for the accused.

[57] Learned counsel submitted that it is clear that the trial judge considered the transcript in the previous trial which played some part in her determination of the alibi defence of the appellant. Mr. Sylvester argued that the only way the transcript could have been considered by the trial judge is if the transcript was admitted into evidence. He argued that this amounted to a material irregularity but since no objection was raised at the trial pursuant to section 145 of the Indictable Procedure Act, he commended to this Court the case of **Albino Garcia**, Criminal Appeal No. 24 of 2004.

[58] Mr. Sylvester further argued that the transcript could not have been admitted into evidence because Verona was not a witness for the prosecution. As a result, the trial judge considered inadmissible evidence when she considered the alibi defence. Counsel submitted that it is uncertain to what extent the previous transcript played in the trial judge's determination in rejecting the alibi of the appellant and so the appellant should succeed under this ground.

[59] Section 73A provides for the admissibility of previous inconsistent statements as evidence of truth. It provides:

> "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."

[60] Learned counsel, Ms. Smith for the prosecution submitted that the transcript for Ms. Verona was not admitted into evidence as submitted by the appellant. The prosecution sought leave before this Court and was granted permission, to rely on the

affidavit of Ms. Sabita Maharaj in which she deposed as to the circumstances under which the portion of the transcript was handed to the trial judge. In an affidavit sworn on 19 September 2017, Ms. Maharaj deposed as follows:

> "…
>
> 2. On Wednesday the 9th day of March 2016, the case of The Queen v Dionicio Salazar commenced in Belmopan in the Central Session of the Supreme Court before the Honourable Justice Antoinette Moore in a trial by judge alone.
>
> 3. At that trial, Dionicio Salazar, the appellant herein, was indicted on indictment number C85/2013 and stood trial for the murder of Marlon Rivera.
>
> 4. I appeared on behalf of the Crown whilst learned defence counsel Kareem Musa appeared for the now Appellant.
>
> 5. On Thursday the 24th March 2016, after the close of the case for the defence I provided to the Court and to the defence, copies of a portion of a transcript in the matter The Queen v Dionicio Salazar, indictment number C84/2013 which had been heard before the Honourable Chief Justice Kenneth Benjamin during the month of June in the year 2015. The portion of the transcript provided reflected the defence's case in its entirety in the above quoted matter.
>
> 6. I then made an application to the Court to recall the Appellant as well as his witness, Verona Usher a.k.a. Verona Chacon, herein after referred to as Verona Usher, for further cross-examination based on the content of portions of the transcript referred to. This application was granted.
>
> 7. Learned defence counsel applied to the court for, and was granted, an adjournment in order to study the contents of the portion of the transcript which had been provided. As a result, the matter was then adjourned to Tuesday the 29th day of March 2016.
>
> 8. On Tuesday 29th March 2016, with the leave of the court, I requested that the appellant and his witness, Verona Usher, be recalled to the stand for further cross-examination with respect to the portions of the transcript that had been provided.

9. During the course of this cross-examination the appellant and his witness, Verona Usher, agreed to all the material suggestions that I had put to them in relation to the transcript.

10. I therefore found it unnecessary to make an application to the court for the transcript to be tendered into evidence. As such, the transcript was not admitted as evidence in the trial."

[61] Ms. Smith submitted that the transcript was used for the sole purpose of cross-examining Ms. Usher. The record does not show that a portion of the transcript was admitted into evidence or that Moore J considered other issues which were not in evidence. Counsel argued that the judge considered matters with respect to those parts of the transcript that were brought out into evidence through cross-examination. Further, that even if this Court is of the view that Moore J considered the transcript, no prejudice accrued to the appellant as Verona accepted the essence on what appears on page 411 of the record of the trial below.

Discussion and analysis

[62] The further cross-examination of Verona Usher which is at pages 335 to 337 of the record shows that she was an alibi witness for the accused in a previous trial but she used a different name, 'Verona Chacon'. The relevant portion shows the following exchange between counsel and witness:

"Q. This is not the first time you have testified in the Supreme Court?
A. That is correct.
Q. And this is not the first time you have testified for this accused?
A. Yes. I testified before for Dionicio Salazar.
Q. **Also not the first time you have provided an alibi for this accused?**
A**. Yes. That is correct.**
Q**. You had testified in 2015 in the name of Verona Chacon in a case where you provided an alibi for this accused?**

A. **Yes.**

Q. **At that time, you did not disclose that you were his common law wife?**

A. No. I did not disclose that information because it was not requested.

..."

The consideration of the evidence by the trial judge and directions in relation to alibi

[63] At pages 410 – 411 of the record, the trial judge held that she did not accept the testimony of the appellant and Verona as truthful and as such rejected the alibi of the accused. The judge had allowed the prosecutor's application to recall the appellant and Verona. When Verona was confronted by the prosecutor, it was established that she was also known as 'Verona Chacon' and that she had appeared as an alibi witness under the name of 'Chacon' for the accused in a previous murder trial. The judge stated that Ms Usher testified on behalf of the accused in June 2015, before a different court in which the accused was the defendant in an unrelated trial. In relation to the transcript the judge stated at page 411 line 4:

> "The transcript of the previous testimony which the learned crown counsel did not object to, **confirmed** that Ms. Usher had indeed been the alibi witness for the accused last year. Ms Usher **did not deny** that she had once before given an alibi evidence for the accused. There was no evidence from Ms. Usher in the 2015 trial that contradicted the evidence she provided in this trial. .."

[64] The evidence shows that Verona Usher was an alibi witness for the accused in a previous trial. This evidence was brought out under further cross-examination and Verona admitted that this was so. This was not a previous inconsistent statement and therefore section 73A of the Evidence Act is inapplicable. The prosecution was correct in not making an application to have the statement admitted under that section. Further, as pointed out by Mr. Sylvester, Verona was not a prosecution witness.

[65] The record does not show that the portion of the transcript was admitted into evidence during the trial. Further, there was no objection by the then counsel for the appellant in relation to the use of the previous transcript during cross-examination by the prosecutor. Nevertheless, the judgment of the trial judge shows that she referred to the transcript for purposes of confirmation as shown by the use of the word "confirmation". The use of such word shows that the trial judge had already accepted the evidence of Verona as the truth that she was an *alibi* witness in a previous trial for the accused. Since the portion of the transcript may have found its way in the hands of the trial judge, this amounts to an irregularity but not in the sense as shown in the case of **Albino Garcia Jr v The Queen**, Criminal Appeal No 2 of 2004 which was relied upon by Mr. Sylvester. In that case, prejudicial evidence was allowed by the trial court. In the instant matter, it is the opinion of the Court, that no prejudice had been caused to the appellant. The trial judge did not reject the alibi witness by relying on the portion of the transcript. Further, the portion of the transcript was not evidence before the trial court and cannot be an admission of prejudicial evidence. Furthermore, the evidence of the previous charge and acquittal of the appellant was brought out by the then defence counsel for the appellant before the issue arose of Verona being an alibi witness for the appellant in that previous trial.

[66] The evidence of a prior criminal trial was also brought out during cross-examination of prosecution witness Solomon Mas. He recorded the statement from Dougal and when he was cross-examined, defence counsel elicited evidence of the previous criminal trial. The case for the accused at the trial below was that there was a conspiracy to implicate the appellant because he was acquitted of the murder charge of Dougal's nephew. Mas gave evidence in cross-examination that he knew Dougal through his brother Alberto August whose son was murdered. Defence counsel at the time cross-examined Mas in the following manner:

> Q. "Being a close friend of Alberto August, ... are you aware that he had lost one of his sons, one of his sons was murdered?
>
> A. Yes.

Q. Do you know who the police charged for the murder of that son?

A. Yes. Dionicio Salazar.

Q. Is he the same as the accused sitting behind me?

A. Yes.

…

Q. I further suggest that because of your friendship with Alberto August is why they are now attempting to blame Dionicio Salazar and implicate him in this incident.

A. I totally disagree with you."

[67] There was further evidence elicited in cross-examination of prosecution witness, Keisha Bahado by defence counsel to bolster his theory of the conspiracy to implicate the appellant. Defence counsel said the following to the witness:

> "I am suggesting to you the reason why you are trying to implicate this accused in this crime is because you knew that your husband and his family were not satisfied that Mr. Salazar was acquitted of the murder of Rodney August."

[68] The Court is of the opinion, that no prejudice was caused to the appellant when Verona testified that she was an alibi witness in a previous trial because (a) Verona **admitted** that she was an alibi witness in a previous criminal trial for the appellant; (b) **there was no objection** by the then counsel to the use of the transcript which was not evidence before the court for the cross-examination of Verona; (c) the trial judge **properly directed herself on alibi** and reminded herself that the accused had nothing to prove. She considered the evidence of the prosecution to prove that the appellant was guilty beyond a reasonable doubt and (d) the trial judge rejected the conspiracy theory raised by the defence.

[69] The judge at page 412 of the transcript directed herself as follows:

"As I considered the testimony of the accused and that of his witness, even with the additional evidence presented by the prosecutor I continued to direct myself that the accused has nothing to prove to this Court. **Even if I do not accept his testimony and that of his witness, it does not mean that I may convict because I do not believe him. I am also mindful that an accused may fabricate an alibi, to voucher a genuine defence. So that rejection of an alibi does not lead me to a guilty verdict.**

It is the prosecution's evidence that must make me feel sure of the guilt of the accused so I will revert to the prosecution's case … ." (emphasis added).

[70] The trial judge thereafter properly considered all the evidence before her and found the appellant guilty of murder. It is the opinion of this Court, that the irregularity of considering a portion of the transcript of the previous trial for the sake of confirmation of evidence brought out in cross-examination, was not a material irregularity as it caused no prejudice to the appellant. The trial judge did not rely on the portion of the transcript (which shows only the case for the defence), for any other purpose. As such, the appellant cannot succeed under this ground that the reliance on the portion of the transcript was a material irregularity.

Sentence of life imprisonment unconstitutional

[71] Mr. Sylvester submitted that the appellant was sentenced to life imprisonment without a mitigation hearing. He relied on the case of **Gregory August**, Criminal Appeal No. 22 of 2012 and submitted that the appeal should be remitted back to the Supreme Court for a proper mitigation hearing and the sentencing court to pass the appropriate sentence. Since the judgment of the Caribbean Court of Justice is still pending in relation to **August** appeal, this Court will refrain from relying on same.

[72] Counsel further submitted that the appellant can be sentenced under the new section 106A of the Criminal Code (Amendment) Act, 2017.

[73] Learned Counsel, Ms. Smith for the prosecution submitted that she agrees that the appellant's case should be remitted to the Supreme Court so that he could be sentenced in accordance with section 106A of Act 22 of 2017.

Discussion

[74] 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 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 ….."*

[75] 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."

[76] In the opinion of the Court, the appellant is entitled to be sentenced pursuant to section 106A of the Criminal Code. The Court therefore remits 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

[77] The appeal against the conviction of the appellant is dismissed and the conviction is affirmed. The sentencing of the appellant is allowed and is remitted to the Supreme Court pursuant to **section 106A** of the **Criminal Code, Chapter 101**, for the fixing of a minimum term of imprisonment which he shall serve before becoming eligible for parole.

_____
SIR MANUEL SOSA P

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HAFIZ-BERTRAM JA

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DUCILLE JA