IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal Nos. BZCR2015/001 and BZCR2015/002
BZ Criminal Appeal Nos. 22 of 2012 and 23 of 2013

BETWEEN

GREGORY AUGUST	**APPELLANT in** BZCR2015/001
ALWIN GABB	**APPELLANT in** BZCR2015/002

AND

THE QUEEN	**RESPONDENT in** BZCR2015/001 and BZCR2015/002

[Consolidated by Order of the Court dated 14th December, 2016]

Before The Right Honourable	**Sir Dennis Byron, President**
And the Honourables	**Mr Justice Saunders**
	Mr Justice Wit
	Mr Justice Anderson
	Mme Justice Rajnauth-Lee

Appearances

Mr. Eamon H Courtenay, SC and Ms. Iliana N Swift for the Appellants

Mrs. Cheryl-Lynn Vidal, SC, Mrs. Portia Staine Ferguson, Ms. Alleyna Cheesman and Ms. Stevanni Duncan for the Respondent

JUDGMENT
of The Right Honourable Sir Dennis Byron, President, and the Honourable Justices Anderson and Rajnauth-Lee

Delivered by The Right Honourable Sir Dennis Byron and the Honourable Mme. Justice Rajnauth-Lee

and
JUDGMENT
of the Honourable Mr Justice Saunders

and
JUDGMENT
of the Honourable Mr Justice Wit

Delivered on
the 29th day of March 2018

PART I

Introduction

[1] This judgment is divided into four (4) Parts. Part I addresses the introductory matters relevant to the consolidated appeals of Gregory August ("August") and Alwin Gabb ("Gabb"); Parts II and III, respectively, discuss August's appeal against conviction and the appeals of both August and Gabb against sentence. In Part IV, we make orders for the disposition of both appeals and other consequential matters.

[2] August was convicted on 21 November 2012 of the murder of Alvin Robinson ("the deceased") following a jury trial presided over by the trial judge, Lucas J. The deceased died on 23 May 2009 from multiple stab wounds. On 26 November 2012, August was given the mandatory minimum sentence of life imprisonment, pursuant to the proviso to section 106(1) of the Criminal Code[1] of the laws of Belize. He appealed his conviction and sentence to the Court of Appeal which ultimately dismissed his appeal on 5 February 2015 and affirmed the conviction and sentence. August sought special leave of this Court to appeal his conviction and sentence and to appeal as a poor person. He proposed to challenge his conviction on two grounds. First, that the judge's failure to give a good character direction affected the safety of the conviction and the fairness of the trial. Second, August contended that the trial judge failed adequately to address material inconsistencies in the prosecution evidence. This failure, it was submitted, left the jury with the impression that the evidence was to be accepted "at face value". As for the challenge to his sentence, August proposed to argue that the mandatory minimum life sentence was unconstitutional.

[3] On 20 April 2015 when the application for special leave came before us, we were satisfied that it raised issues of great general and public importance regarding the constitutionality of the mandatory minimum sentence of life in prison without parole for murder and the relevance and/or sufficiency of good character directions

[1] CAP 101.

in criminal trials, generally, and in respect of these proceedings. These points were not argued before the Court of Appeal and so were being raised before us for the first time. In those circumstances, we felt that they "ought ideally first to be adjudicated upon by the Court of Appeal of Belize". Accordingly, we granted special leave to appeal and leave to appeal as a poor person and remitted to the Court of Appeal, for expeditious hearing, the constitutional and good character direction issues. We also granted a stay of the proceedings upon the filing of the Notice of Appeal, with the right to either party to apply for a removal of the stay following delivery of the judgment of the Court of Appeal.

[4] Gabb was convicted of the murder of Nolan Arana ("Arana") on 3 December 2013 following a jury trial presided over by Gonzalez J. Arana died on 6 July 2007 from multiple stab wounds. Gabb was sentenced on 3 December 2013 to life imprisonment. He appealed his conviction and sentence eventually advancing only one ground, that the trial judge ought to have left provocation to the jury. The Court of Appeal dismissed his appeal, affirming his conviction and sentence. The reasons for that decision were given on 19 June 2015. Gabb approached this Court for special leave to appeal both his conviction and sentence. His proposed challenge to conviction rested solely on the provocation point raised before the Court of Appeal. In relation to his sentence, he proposed to challenge its constitutionality. This latter point was not argued before the Court of Appeal. We granted special leave to appeal against sentence only and leave to appeal as a poor person on 18 November 2015. Given that the constitutionality point was not raised before, we stayed these proceedings until the appeal in August was ready to proceed.

[5] On 4 November 2016, the Court of Appeal, by a majority comprising Sir Manuel Sosa P and Hafiz-Bertram JA (Awich JA also being part of the Panel), delivered its judgment in *August* on the issues remitted. In the majority decision given by Hafiz-Bertram JA, the court concluded that the mandatory minimum sentence of life imprisonment imposed on August without the possibility of parole, prescribed in the proviso to section 106(1) of the Criminal Code, violated both sections 6 and 7 of the Constitution, to the extent that the proviso to section 106(1) of the Criminal

Code is mandatory in nature. The Court of Appeal therefore found that the life sentence imposed on August was unconstitutional. As to August's appeal against conviction, the Court of Appeal was of the view that he was not entitled to the credibility limb of the good character direction, having made an unsworn statement from the dock, but that he was entitled to the propensity limb. Having examined the evidence, the court concluded that even if the trial judge had directed on propensity, "it would have been inevitable that the jury would have returned the same verdict".

[6] We heard the appeals on 31 March 2017 but just days before, on 29 March 2017, three new pieces of legislation were enacted in Belize - the Criminal Code (Amendment) Act, 2017,[2] the Parole Act, 2017,[3] and the Indictable Procedure (Amendment) Act, 2017[4]. The Criminal Code (Amendment) Act and the Parole Act are of particular relevance to the sentencing challenge raised in these appeals. Leave was sought by the parties, and granted by the Court, to file further submissions on the new legislation. Having regard to the issues raised in those further submissions, the Court convened a case management conference on 15 May 2017 and invited the parties to agree further issues regarding the constitutionality and impact of the new legislation. Further oral arguments were heard on 5 July 2017. More will be said about this later.

[7] Having carefully examined the matters raised in these appeals, as regards the constitutionality points, we are of the view that the current framework for imposing sentences of imprisonment for non-capital murder is constitutionally compliant. Further, we affirm the Court of Appeal's decision as it relates to August's sentence and remit Gabb's case to the Supreme Court for an expeditious sentencing hearing, preferably before Gonzales J. As to August's appeal against conviction, we are persuaded that the conviction was safe and the trial fair. We are of the opinion that, having regard to the evidence, it was inevitable that the jury would have convicted

[2] Act No 22 of 2017.
[3] Act No 25 of 2017.
[4] Act No 23 of 2017.

August. Accordingly, we affirm his conviction. The reasons for our decisions follow below.

PART II

August's Appeal Against Conviction

Issues for Determination

[8] In the round, the ultimate question which we must decide is whether August's conviction was safe and his trial fair. In making that determination, we must first consider what effect, if any, the absence of a good character direction had on the verdict and second, whether the trial judge's summing-up was adequate as regards the inconsistencies highlighted by August.

The Case for the Prosecution

[9] The prosecution's case, based purely on circumstantial evidence, was that August, the "big, bad bully…got his way" when he killed the deceased. We outline the case for the prosecution below but leave our analysis of the key aspects of its case for our examination of the cogency of the evidence in paragraphs [32] – [41] of this judgment.

[10] According to the evidence, August attended certain premises occupied by the deceased and his family on the night of 23 May 2009 sometime after 7:00. He went there with two other men, George McFazden and another man known only as 'Tunks'. August was known to members of the family for some time – some knew him for several years. On the night in question, when he went to the premises, August was wearing a white t-shirt, with a grey shirt slung across his shoulder, ¾ jeans pants and a pair of grey and red Nike tennis shoes. Neither of the deceased's two grandsons who lived on the premises owned a pair of Nike tennis shoes.

[11] At the premises, family and friends had gathered for a 'drink-up' at one of the three houses located there, the middle house. The houses on the property were occupied by several members of the deceased's family. Tyrone Robinson, one of the

deceased's grandsons, and Lindy Robinson, his (Tyrone's) uncle, lived at the house to the front. The middle house was occupied by Viannie Majil, Shalissa Majil, Jasmine Majil, Marlon Robinson, grandchildren of the deceased, and Michelle Majil, their mother. The deceased lived at the house at the back which was made of pimento with zinc roofing and which the Court of Appeal referred to as a 'shack'. That house was approximately 60 feet from the middle house. The front house was closest in proximity to the George Price Highway (formerly the Western Highway). The yard was accessible from the highway. A feeder road, which was close to the back house, allowed access to the yard from the back. This feeder road, used only by family, led from the back house to an unpaved, clay street. At the very end of that street were some fishing spots. The clay street was sometimes used by members of the public, but not the feeder road. The family would usually take the feeder road to go fishing, swimming or hunting. Under cross-examination, Marlon testified that, August came to "our" house with friends to go fishing.

[12] During the course of the night, there were altercations between August and two men who were at the premises, Andrew Smith, a family friend, and Tyrone Robinson. The men had known August for some time. In the first incident, August slapped Andrew in the face and told him certain words indicating that he, August, was the "boss". The slapping was unprovoked and was not met by any form of retaliation by Andrew, who simply walked away. August remained at the premises for approximately another half-hour until sometime between 8:15 pm and 8:30 pm at which time he and Tunks rode off on bicycle towards the highway. On the way out of the yard, they met Tyrone, who had accompanied his friends to the side of the road by the highway. August and Tunks stopped by Tyrone who asked August why he had slapped Andrew earlier. August retorted angrily and then slapped Tyrone in the face, more than once, before riding off on the highway in the direction of Belize City. While riding off, August warned that they would return shortly and, when they did, "uno wa see what wa happen".

[13] August was next seen later that evening by Mr Terrick Garbutt ("Garbutt"), Marlon's cousin, who lived in a yard near the highway about a half mile from

Marlon's house. Garbutt lived on a 25-acre parcel of land where there were three houses: his house, his granduncle's house and his mother's house. According to Garbutt, his house was roughly a 15-minute walk away from Marlon's, if one were to take the highway, and a 5-minute ride by bicycle. Coming from the highway, one would meet Garbutt's granduncle's house first and then his mother's, which was in the back. His house was behind his granduncle's, to the left. There was a "drive in" from the highway to his mother's house and from that house, "the trail starts to the back". Garbutt's evidence was that that trail led to several places including the house of a man known to him only as 'Papa Lash'. At Papa Lash's house, there were countless walkways that people used to go hunting. The trail could also be taken to go to some lagoons to the back. He testified that he took the trail to go to the lagoon to fish and swim. It was also used by persons who went hunting.

[14] Garbutt's evidence was that at about 9:15 pm on 23 May 2009 he came from inside his house on to his verandah as he had heard his dogs barking. When he came out, he saw August, whom he had known for some 8 years, and another man on bicycles entering the Garbutt property from the general direction of the highway. He observed them riding past his house through to the back of the land until they "vanished" into the night. He stayed for about 5 minutes on his verandah and then went back inside. Shortly after 10:00 pm Garbutt was alerted once more by his dogs' barking. Again, he came out to the verandah where he observed the same two persons riding in the opposite direction; that is, coming from the back of the yard going towards the highway. August, who was riding in the back, was now carrying a white cloth in his right hand. Garbutt went inside as they went across the highway.

[15] Sometime between 9:30 pm and 10:00 pm, the deceased, an elderly man of 73 years who was visually impaired in one eye and differently-abled, physically, was found in his home by his granddaughter, Viannie, suffering from multiple stab wounds. She found him sitting on his bed with blood on his shirt and neck. He was unresponsive to her calls. When other family members came to check on him, the deceased was observed slouching on the edge of the bed with his head down. Blood was also seen on the bed. He eventually succumbed to his injuries. The crime scene

technician, Mr Robert Henry, testified that he saw "several" red liquid substances which appeared to be blood on the blue mattress on the bed and on the floor of the deceased's house.

[16] According to Dr Mario Estradabran, the Forensic Doctor who carried out the post mortem examination, the deceased was stabbed 9 times with a knife that had a 5 – 5 ½ inch blade. One wound was to the chin, one to the right cheek, and the others behind the ear up to the posterior triangle of the neck. Cause of death was determined to be bronchial aspiration, that is, abnormal fluid contents (blood) inside the upper respiratory airways, due to multiple stab wounds to the neck and face. The doctor noted that the wound to the cheek would have been produced by heavy force, given the presence of bone in that area. Further, the deceased would have survived for less than an hour after receiving the fatal injury. The fatal injury was identified by Dr Estradabran as the one inflicted in the posterior triangle of the neck which ended up inside the oral cavity.

[17] On the morning of 24 May 2009, August handed himself in to the police. He was picked up from his home by the police after he called and spoke to Police Constable Gregory Witty, telling him that he heard that he was being accused of killing the deceased. While at the Hattieville Police Station, Police Corporal Teck observed what appeared to be blood on the tongue of one of August's Nike tennis shoes which were red and grey in colour. August's shoes were taken, and six ink impressions made of them by his stepping on typing paper as directed by Mr Robert Henry, the crime scene technician. Mr Henry also testified that he had seen a mark which appeared to him to be blood on the tongue of one shoe, and that he swabbed the mark applying distilled water with a cotton swab. August was cautioned but remained silent. The shoes and the cotton swab were among the items sent to the forensic laboratory for processing. Later that day, the police escorted August back to his house to conduct a search there. During the search, a white t-shirt, which was stained in the front with what appeared to be blood, was found. The white t-shirt was found on top of some dirty clothes on the floor. August was immediately

cautioned and remained silent. The t-shirt was also sent to the forensic laboratory for testing.

[18] The crime scene was processed by Mr Henry on the morning of 24 May 2009. Mr Henry testified that the area or scene could not be processed on the night of the murder because of the "lighting condition[s]". During processing, a plaster cast mould was made of a shoe print found beside a pool of water about 60 feet from the deceased's house. From the evidence given by Corporal Teck, that pool of water was a 1- or 2-minute walk from the deceased's house. This pool of water was along what he described during examination-in-chief as a "picado" road. Under cross-examination, Corporal Teck testified that the picado road was behind the deceased's house. He also gave evidence that he and his colleagues followed this picado road on foot and it took them 10 minutes to walk the picado road from the area where the foot print was found to Garbutt's yard.

[19] Some days later, Mrs Diana Bol-Noble, a forensic analyst employed at the National Forensic Science Service, carried out comparisons of the plaster cast impression of a shoe print, the pair of grey and red Nike tennis shoes and the six ink impressions. To facilitate the comparison, Mrs Bol-Noble made a transparency of the impression. Mrs Bol-Noble testified that the cast was broken and so she was only able to compare dimensions in the heel and toe areas. She found that the pattern of the sole of the shoe that made the print, as revealed by the heel and toe portions of the cast impression, and the pattern of the corresponding portions of the sole of August's left tennis shoe were one and the same. In addition, every feature of the sole pattern on the heel and toe portions of the cast impression was of the same dimensions as the corresponding feature of the sole pattern of the left tennis shoe. She also noted that although the heel of the left tennis shoe was somewhat worn, the cast impression gave no "clearly visible" indication that the shoe print was made by a worn shoe. The reason for this was that the cast, "though with good detail", had not been "properly mixed for use". Mrs Bol-Noble did find, however, that the shoe was in "fairly good condition with respect to wear and tear" and the only visible sign of wear and tear on the shoe was on the outer heel area. She was also

able to determine that the cast impression had been made in soft material such as clay, soft sand or mud. Mrs Bol-Noble concluded that because of the quality of the cast she could not conclusively state that it was made by August's shoe, but could confirm that it was made by a tennis shoe and, based on the dimensions and pattern, it "may" have been made by August's tennis shoe.

[20] Mr Eugenio Gomez, a forensic analyst also employed at the National Forensic Science Service, testified that he analyzed the cotton swab of the tongue of the shoe taken by Mr Henry and found that it contained type O blood. The blood found on the white t-shirt taken was of the same type O. He also tested the blood taken from the deceased *post mortem* and it too was of the same type O. Mr Gomez however testified that no blood was found on the tennis shoes, but, he explained, that could be because of the use of the swab in the first place. He could not say from the tests run on the deceased's blood and the blood on the t-shirt, that the blood on the t-shirt was the deceased's. Such a conclusion required another type of testing, that is, DNA analysis, which was not available in the forensic laboratory in Belize. Additionally, Mr Gomez's evidence was that the O-group was the most common blood group type in Belize.

The case for the Defence

[21] In an unsworn statement from the dock, August admitted to having visited the premises on the night in question. He had gone there with two friends to purchase marijuana sometime around 8:30 and only spent roughly 10 minutes. He left and went straight home where, at approximately 9 pm, he received his nightly telephone call from his mother who lived in New York. He did not leave his home for the remainder of the night as, after receiving the phone call, he ate and then fell asleep. When he awoke the next morning, his sister informed him that the police were looking for him concerning a murder. After hearing this news, he telephoned the police station and told the police that he was willing to assist them in their investigation. The police picked him up and another man, Dwayne Almendárez. August stated that he and Almendárez were relieved of their shoes at the police station and that the police took from his home a white, unstained t-shirt. Cross-

examination of prosecution police witnesses focused mostly on their handling of the forensic evidence and certain inconsistencies highlighted by August's attorney. During the cross-examination of PC Witty, it was suggested that only the first of his two statements was correct and that the second statement was "made up…after [he] spoke to other officers". The police witnesses were also questioned as to why they took August's shoes, but not August, to the scene on 24 May 2009 when it was being processed. It was in his closing address, that August's attorney told the jury that the reason the police took the shoes to the crime scene was because they wanted to frame August.

The Trial Judge's Summation

The Circumstantial Evidence

[22] Towards the beginning of the summing-up, the trial judge alerted the jury to the fact that the prosecution's case was based entirely on circumstantial evidence. The judge told the jury, "…to use circumstantial evidence, you must accept certain facts, pieces of evidence and when you combine them together it must point to one conclusion. If there is an alternative conclusion…[t]he circumstantial evidence will not be good". Later, the judge warned the jury that:

> "…the pieces of evidence must be reliable and…it must point in one direction. The only direction would be towards the accused. If it is not pointing to that direction, the pieces of circumstantial evidence fail.
>
> Circumstantial evidence consists of this: that when you look at all the surrounding circumstances you find that such a series of undersigned (*sic)*, unexpected coincidences that as a reasonable person you find in your judgment is compelled to one conclusion…If the circumstantial evidence [falls short] of that standard, if it does not satisfy that test, if it leaves gaps, then it is no use at all."

The Identification Evidence

[23] The trial judge warned the jury that the prosecution's case depended largely on the accuracy of the identification of August by the witness, Garbutt. He told the jury that the effect of August's alibi defence was that he was saying that Garbutt was mistaken. The jury was also directed that mistakes could be made in the recognition of someone known to a witness, even a close relative. Accordingly, the judge told

the jury that they needed to make a cautious examination of the circumstances in which the identification was made. To assist the jury, the judge highlighted the length of time and conditions under which Garbutt had sight of August. The judge pointed out the weaknesses in that evidence noting, specifically, the duration of the sighting, the distance from which Garbutt would have seen August, the fact that Garbutt only had a side view of him, the absence of a direct indication of how fast August and the other person were riding, and the lighting conditions. The judge also pointed out that Garbutt was a relative of Marlon Robinson.

The Forensic Evidence and Inconsistencies

[24] The trial judge directed on the forensic evidence. As to the evidence of Mrs Bol-Noble, the judge reminded the jury that she had testified that because of the quality of the cast, she could not say that the shoe print was made by August's tennis shoe, but based on the dimensions and pattern, it "may" have been made by that tennis shoe. The judge pointed out that the witness was "not certain" and warned the jury, "You can't work with maybe. These pieces of evidence, you must be sure of it." The judge also reminded the jury that Mrs Bol-Noble had testified that the mould was broken and so she was "not able to make out some of the marks that were on the tennis shoe…"

[25] As to Mr Gomez's evidence, the trial judge reminded the jury that Mr Gomez could not say from the tests run on the deceased's blood and the blood on the t-shirt, that the blood on the t-shirt was that of the deceased. He reminded the jury that DNA analysis was not available in the forensic laboratory in Belize. Additionally, the judge pointed out that Mr Gomez's evidence was that the type O blood was the most common blood group type in Belize. The judge then proceeded to warn the jury on two separate occasions that the forensic evidence did "not assist the Crown". He further cautioned the jury that they were not "sure that the blood found on the tongue of the tennis shoe came from the deceased; so too...the blood on the white t-shirt". In his concluding remarks on the case for the prosecution, the trial judge said:

> "Put it bluntly, it is not beyond reasonable doubt that the blood found on the white T-shirt and on the tongue of the tennis shoe is that of the deceased Alvin Robinson."

[26] Early in his summation, the trial judge addressed the jury on the credibility of witnesses, their powers of recollection and inconsistencies in the prosecution's evidence. He directed the jury that,

> "In deciding whether or not a witness is worthy of belief you should bring your own common everyday experience to such matters. You should consider such things as his/her ability and his/her demeanour when testifying, including answering questions, before you. The witness *(sic)* power of recollection, any interest, bias or prejudice he/she might have, any inconsistencies in the testimony of that witness and the answers, if any, of such witness with respect to the inconsistencies.
>
> Now speaking about recollection, if you can recall when we went to the scene the witnesses showing various places, the location of the tomb. Some were showing over here, some showing over there, one showing all the way over there. Probably they cannot recall. The place has changed it appears; you're going to see the photographs. Now there are vegetations *(sic)*, bushes and so on. So you may take that into consideration…
>
> Where there are inconsistencies in the testimony of a witness it is your task to determine whether or not the witness is lying or just confused or simply just does not remember. You must make up your mind whether or not to accept the testimony of that witness as being testimony of truth.
>
> You are entitled to believe all of the evidence given by a witness, part of that evidence or none of it. That is entirely up to you."

[27] Inconsistencies arising from the accounts of Corporal Teck and PC Itza and PC Witty (who also gave evidence for the prosecution) regarding the shoe prints that were seen near to the deceased's home were highlighted to the jury. The judge warned:

> "Now there are inconsistencies if you noticed with respect to foot prints; because police Itza showed us another area where he saw footprints. Gregory Witty, showed us too where he saw footprints; but the Counsel for the Crown is telling you the foot print which the Scenes of Crime Technician lifted and the one that he saw was the spot that was drawn to our

attention by Corporal Teck at the scene where he saw the foot print. So those that were seen by P.C. Witty and Itza there was no cast made."

The Slapping Incidents

[28] In relation to the evidence that August had assaulted Tyrone and Andrew, the judge was keen to warn the jury that they were not to treat them, if they accepted that evidence was true, as an indication that August was a person likely to commit murder. He warned the jury that if they did otherwise, they would be speculating, and that speculation had no part to play in any judicial system. The judge further pointed out that August had slapped two able-bodied men while the deceased was disabled. Further, the judge noted that there was no evidence that August had a knife when he assaulted the two men. Accordingly, he warned, there was no similarity or pattern between the assaults and stabbing a person with a knife, particularly, nine times. The trial judge therefore directed the jury that the purpose for which this aspect of the evidence could be used was to place August in the yard; a fact already admitted by him.

[29] Notwithstanding the fact that the trial judge's summing-up was overly favourable to August, the jury nevertheless returned a verdict of guilty.

Appeal to the Court of Appeal

[30] August appealed his conviction and sentence to the Court of Appeal but did not raise the absence of a good character direction. He argued *inter alia* that the judge erred in his treatment of the evidence as to the blood type and foot print, the identification evidence, the circumstantial evidence and joint enterprise. On the 5 February 2015, the Court of Appeal (Sir Manuel Sosa P, Awich and Mendes JJA) found that there was no basis on which to set aside the conviction and dismissed the appeal.

[31] As mentioned above[5], this Court remitted the issue of the absence of a good character direction to the Court of Appeal. The court agreed with the argument of

[5] See [3] above.

the Director of Public Prosecutions ("the DPP" or "the Director") that an accused who made a statement from the dock was not entitled to the credibility limb of the good character direction.

Discussion

The Cogency of the Evidence against August

[32] It is well established that it is "no derogation of evidence to say that it is circumstantial".[6] The nature and value of circumstantial evidence have been described as follows[7]:

> "Circumstantial evidence is particularly powerful when it proves a variety of different facts all of which point to the same conclusion…[it] 'works by cumulatively, in geometrical progression, eliminating other possibilities'[8] and has been likened to a rope comprised of several cords:
>
> > 'One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a strong conclusion of guilt with as much certainty as human affairs can require or admit of.'[9]"

[33] August's conviction was founded on a tapestry of circumstantial evidence woven by the prosecution. In looking at the cogency of the circumstantial evidence, we will discuss some key pieces of that evidence.

[34] The deceased, differently-abled, physically, and visually impaired in one eye, was found suffering from fatal stab wounds to his face and neck sometime between 9:30 and 10:00 on the night of the 23 May 2009. Earlier that night, sometime after 7:00, August, George McFazden and another man known only as 'Tunks', had visited the premises occupied by the deceased and his relatives. The evidence before the court was that August had behaved like a bully, exhibiting aggressive and violent

[6] *R v Taylor, Weaver and Donovan* (1928) 21 Cr App R 20 (CA).
[7] Adrian Keane and Paul McKeown, *The Modern Law of Evidence* (11th edn, Oxford 2016) 14.
[8] *DPP v Kilbourne* [1973] AC 729 (HL), 758 (per Lord Simon).
[9] *R v Exall* (1866) 4 F & F 922, 929 (per Pollock CB).

behaviour towards some of the persons there including a relative of the deceased. He first slapped Andrew and later slapped Tyrone, the deceased's grandson, without provocation. In fact, the evidence was that Tyrone was slapped only when he questioned August's behaviour towards Andrew. There was no retaliation after any of the incidents. In fact, August went back to the verandah after the first incident and only left about a half hour later. While leaving, August issued a threat – he would return shortly, and they would see what would happen. It is recognized that this behaviour had not been directed towards the deceased. There was also no evidence that that threat was directed towards the deceased. The prosecution also led evidence that August and 'Tunks' left the premises on bicycle sometime between 8:15 and 8:30 p.m. It is interesting to note the timing of the events which took place that night and, in that regard, the evidence of the neighbour, Garbutt, as well as the evidence of Corporal Teck.

[35] Garbutt lived about half a mile from the deceased's home and knew August for over eight years. He testified that at approximately 9:15 on the night of the killing, he saw August and another person riding their bicycles from the direction of the highway before vanishing into the dark to the back of his land. Garbutt further testified that shortly after 10:00 p.m., he again saw August and the other person riding from the back of the yard towards the highway. The prosecution's evidence was that there was a trail (clay/picado road) to the back of Garbutt's yard which led to the home of the deceased, but which could lead to other places as well. According to Corporal Teck, taking this road by foot, it would take 10 minutes from Garbutt's yard to an area by a pool of water mere yards away from the deceased's house. The evidence of Viannie Majil, the deceased's granddaughter, was that between 9:30 and 10:00 on the night in question she went to give the deceased a meal and found that he had been stabbed several times. He was bleeding and there was blood on his bed. In the circumstances outlined above, and having regard in particular to the timing of the events and Garbutt's evidence, there was sufficient evidence on which the jury could have drawn the inference that August was cycling with another man in the vicinity of the murder scene at the approximate time of the stabbing, having gained ready access via the road linking Garbutt's land and the

feeder road behind the deceased's house, and therefore had the opportunity to attack the deceased at the shack. The jury was therefore entitled to take into account the evidence as to opportunity as well as the ominous threat that had been issued by August earlier that evening.

[36] A shoe print was found beside a pool of water close to the deceased's home (the same pool referred to above) and a plaster cast mould was made. Although at the time of examination the mould was found to have been broken, it is important to note that the forensic evidence revealed that the sole pattern of the shoe that made the shoe print and the pattern of the corresponding portions of the sole of the left tennis shoe (worn by August the day after the killing) were one and the same. In addition, the forensic evidence was that every feature of the sole pattern on the heel and toe portions of the cast impression was of the same dimensions as the corresponding feature of the sole pattern of August's left tennis shoe. The forensic expert, Mrs Bol-Noble, made it clear that the shoeprint found close to the deceased's home the morning after the killing, "may" have been made by August's tennis shoe. There was therefore sufficient forensic evidence linking the shoe print at least to shoes of the type that August wore that evening, and on which the jury could have inferred that the shoe print found near to the deceased's home was that of August's left tennis shoe. This further bolstered any initial inference to be drawn that August was in the vicinity of the crime. The trial judge ought to have so directed the jury. Instead, he misdirected them that they could not rely on the forensic evidence of the shoe print, because the expert was not certain, and they had to be "sure" about these "pieces of evidence". We do not say that the jury should have been told that each strand required proof beyond a reasonable doubt or that they should have been told that there was such proof where the evidence was not of such a quality. However, the course that the trial judge ought to have taken was to point out to the jury that despite it not being established beyond a reasonable doubt that this was August's shoe print, it was one strand in the chain of circumstantial evidence which, when put with the others, could lead to proof beyond a reasonable doubt.

[37] There was also evidence that human blood was found on the tongue of August's tennis shoe and a swab of the blood was taken and sent for forensic testing. Human blood was also found on August's t-shirt which he was wearing when he visited the premises on the night of the killing. The forensic evidence of Mr Gomez was that the blood samples collected from the swab and the t-shirt were of blood type O and matched the blood type of the deceased. There was also evidence that there was type O blood on the deceased's shirt, bed and the floor of his house. In these circumstances, it was therefore open to the jury to infer that August was in fact at the scene and the blood that was found on August's tennis shoe and t-shirt came from the deceased. Unfortunately, on two separate occasions, the trial judge directed the jury that the forensic evidence as to the blood and the blood type did "not assist the Crown". He once more directed the jury that they were not "sure" - that is, it was not beyond a reasonable doubt - that the blood found on the tongue of the tennis shoe and from the t-shirt came from the deceased. This was once more a serious misdirection which was unduly favourable to August. As we have already said at [36] above, this evidence was part of a chain of circumstances in which each link, although not having been separately established beyond a reasonable doubt, could lead to proof beyond a reasonable doubt when taken together with the other strands of evidence. There was no reason, having regard to the evidence of the blood found on the tennis shoe and the t-shirt, that the jury could not have drawn the inference that the blood was that of the deceased, and the trial judge ought to have given the appropriate direction. We note as well that August denied that he could have been seen by Garbutt cycling in the direction of the deceased's house and gave no explanation for the blood found on his tennis shoe and t-shirt, save to say that there was no blood on those items when they were seized by the police, and that the police officers had conspired to frame him, which explanations the jury clearly rejected.

[38] A case built on circumstantial evidence often amounts to an accumulation of what might otherwise be dismissed as happenstance. The nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant's guilt beyond reasonable doubt, when the strands are woven

together, they all lead to the inexorable view that the defendant's guilt is proved beyond reasonable doubt. There was therefore a serious misdirection wholly in August's favour when the trial judge directed the jury that each strand of the circumstantial evidence required its own proof of August's guilt beyond reasonable doubt. It is not the individual strand that required proof beyond reasonable doubt, but the whole[10]. The cogency of the inference of guilt therefore was built not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence. Accordingly, the circumstantial evidence, as a whole, adduced by the prosecution pointed sufficiently to August's guilt to entitle the jury to convict him.

[39] The strong circumstantial evidence provided a rational basis for the finding of the jury and we are satisfied that there was sufficient evidence to support the verdict. To uphold August's appeal would amount to usurping the function of the jury as the sole finders of fact. The cases are legion that decry the usurpation of the jury's verdict by appellate courts. We echo the sentiments of the House of Lords[11] that an appellate court is:

> "a court of review, not a court of trial. It may not usurp the role of the jury as the body charged by law to resolve issues of fact and determine guilt…Trial by jury does not mean trial by jury in the first instance and trial by judges of the Court of Appeal in the second...the Court of Appeal is not privy to the jury's deliberations and must not intrude into territory which properly belongs to the jury".

[40] Similarly, the Court of Appeal of England and Wales has held that, "it is not the function of this court to decide whether or not the jury was right in reaching its verdicts";[12] neither is it an appellate court's function to "review the decisions of juries in order to substitute its own view".[13] Although not the case here, the

[10] R. v Hillier (2007) 233 A.L.R. 63, High Court of Australia, per Gleeson C.J. (para. 48) as to the importance of not considering circumstantial evidence piecemeal. Shepherd v R [1991] LRC (Crim) 332, High Court of Australia per McHugh J. at page 347, the inference of guilt has to be proved beyond reasonable doubt, but no particular fact has to be proved beyond reasonable doubt.
[11] *R v Pendleton* [2002] 1 WLR 72 at [12] and [17].
[12] *R v Bamber* [2002] EWCA Crim 2912 at [513].
[13] *R v Habib* [2004] EWCA Crim 1611 at [8]. See also *R v Edwards* [2012] EWCA Crim 5 at [39]: "We have well in mind the need not to substitute our own view of the evidence for that of the jury".

prohibition against intruding into the domain of the jury holds true "even in a case of difficulty and complexity" as the "primacy of the jury in our criminal justice system has to be respected".[14]

[41] The uncanny coincidences borne out by the evidence, when juxtaposed, particularly in regard to the boisterous bullying behaviour of August that night and the ominous threat he made on leaving the premises; Garbutt's evidence (contrary to August's claim that he was at home at the material time) that he saw August riding on a bicycle in the direction of the trail which led from his yard to behind the deceased's house and returning in the opposite direction; the finding of blood of the same type as the deceased on August's t-shirt and shoes; the shoe print which the jury was told "may" have been made by August's left tennis shoe; and August's failure or inability to give any explanation for the type O blood found on his shirt are so remarkable and so exceptionally consistent with the guilt of the accused that the jury was justified in putting them all together and feeling sure of August's guilt. We can therefore find nothing perverse or unsafe about the conviction.

Did the Absence of a Good Character Direction affect the safety of the conviction and the fairness of the trial?

[42] During the trial, the issue of good character never arose and the trial judge did not give any good character direction. We agree with the Court of Appeal that no fault can be attributed to the trial judge in the circumstances. It was only after August's conviction, and during the sentencing hearing, that it came to the fore that August had a clean criminal record, save for two relatively minor non-violent offences in 2006 and 2007. Mr Courtenay contended before us that August was therefore of effective good character and was entitled to both the credibility and propensity limbs of a good character direction. He argued further that the absence of such directions rendered the verdict unsafe and the trial unfair. The DPP had conceded before the Court of Appeal that the trial judge would have been entitled to treat August as being of effective good character. Accordingly, she accepted before that court and here before us that August was entitled to the propensity limb of the

[14] *R v Watts* [2010] EWCA Crim 1824 at [54].

direction, but not the credibility limb since, she argued, August had given an unsworn statement from the dock.

[43] The Director submitted that the question whether August was entitled to the credibility limb of the good character direction was a matter of some uncertainty. She referred to several judgments delivered by the Jamaican Court of Appeal, which, she contended, put into doubt whether a defendant who had not given sworn testimony was entitled to the credibility limb.

[44] In the case of *Michael Reid v R*[15], Morrison JA, delivering the judgment of the Court of Appeal of Jamaica, relied on *Muirhead v R*[16], a decision from Jamaica to the Privy Council. In *Muirhead*, the appellant had been convicted of murder. He gave an unsworn statement from the dock and complained that his counsel had failed to adduce evidence of his good character. The Privy Council referred to the *reduced value of a good character direction as to credibility in a case in which a defendant had not given sworn evidence but had merely made an unsworn statement from the dock*. The Privy Council agreed, however, that in such a case the defendant was entitled to a direction on propensity. In *Michael Reid*, Morrison JA adopted a similar approach. He referred to the value of the credibility limb of the standard good character direction as having been "*qualified*" by the fact that the defendant had opted to make an unsworn statement from the dock rather than to give sworn evidence. He was also of the view that such a defendant, who was of good character, was entitled to the "benefit of the standard direction as to the relevance of his good character to commit the offence with which he was charged".

[45] In *Horace Kirby v R*[17], a different panel of the Court of Appeal of Jamaica, purportedly relying on the principles set out by Morrison JA in *Reid*, was of the view that where an accused did not give sworn testimony or make any pre-trial statements or answers which raised the issue of his good character, but raised the issue in an unsworn statement, there was no duty placed on the trial judge to give

[15] SCCA No. 113/07 (3 April 2009).
[16] [2008] UKPC (28 July 2008).
[17] [2012] JMCA Crim 10.

directions in respect of the credibility limb of the good character direction. The accused was, however, entitled to the propensity limb of the direction. Mr Courtenay argued before us that the panel in *Horace Kirby* had misinterpreted the principles set out by Morrison JA in *Michael Reid*.

[46] In the later judgment of *Denjah Blake v R*,[18] Morrison JA again delivered the judgment of the court in a case where the appellant had been convicted of rape and indecent assault. The appellant gave an unsworn statement from the dock in which he put his character in issue by asserting his reputation for non-violence. As to the issue of the failure of the trial judge to give appropriate directions on the appellant's good character, Morrison JA (relying on *Michael Reid, Bruce Golding & Damion Lowe v R*[19] and *Horace Kirby*) observed that counsel for the appellant did not "contend for a direction on the relevance of the appellant's good character to his credibility, recognising, as is now generally accepted in the authorities, that the value of such a direction to the appellant would have been qualified by the fact that he had opted to make an unsworn statement in preference to giving evidence on oath".

[47] An interesting situation (similar to the August case) arose in the Privy Council appeal of *Peter Stewart v The Queen*[20], a case emanating from the Court of Appeal of Jamaica. The appellant had been convicted of murder. He was apparently of previous good character, but this only emerged during the sentencing hearing. At the trial, he had chosen to make an unsworn statement from the dock. The Privy Council observed that it was worth noting that where a defendant chose to make a statement from the dock (or indeed, simply relied on pre-trial statements) the credibility limb of the direction was "likely to be altogether less helpful to the defendant"[21] than when he had given sworn evidence. The Privy Council were of the further view that where the credibility limb of a good character direction had been given in a case where an unsworn statement had been made, it would have

[18] [2014] JMCA Crim 19.
[19] SCCA Nos. 4 & 7/2004 (18 December 2009).
[20] [2011] UKPC 11.
[21] Ibid at [15].

been appropriate for the trial judge to balance it with a full direction about the weight to be accorded to such a statement[22].

[48] The question which remains for us is whether a defendant who has given an unsworn statement from the dock should be entitled to the credibility limb of the good character direction. The jurisprudence coming out of Jamaica suggests that where a defendant either did not give sworn evidence or gave unsworn evidence of his character, a good character direction as to credibility would have a "*reduced value*", would be "*altogether less helpful*" or would be "*qualified*".

[49] It is understood that the aim of a good character direction is to ensure fairness of the trial process. It is the duty of the trial judge to ensure that the trial is fair and even-handed and an appropriate good character direction plays an important part in ensuring that fairness and even-handedness. Where a defendant, of good character, has given sworn testimony and has subjected himself to cross-examination, the trial judge maintains fairness and balance in the trial by directing the jury that, because of his good character, the defendant is a person who should be believed. Where however the defendant is not willing to place himself in a position where his credibility can be tested, we do not think that he should benefit from a good character direction as to credibility. Where a defendant does not give sworn testimony therefore, it is in our view, unnecessary to ensure the fairness of the trial process, for the trial judge to direct the jury on the defendant's credibility. The defendant is, however, still entitled to the propensity limb whether or not he has given sworn evidence.

[50] Bearing those principles in mind, we move on to examine whether the failure to give a good character direction as to propensity affected the safety of August's conviction or the fairness of the trial. In this regard, we agree with the useful guidance given in the Privy Council appeal of *Bally Sheng Balson v The State*[23]. This was an appeal from the Court of Appeal of Dominica. The appellant had been

[22] See the guidance given in DPP v Walker [1974] 1 WLR 1090 at 1096B-E.
[23] [2005] UKPC 2.

convicted of murder on evidence which was circumstantial, and which the Privy Council noted, "pointed to the appellant's guilt" and which was "very strong". He appealed his conviction on several grounds. The Privy Council observed that the appellant's counsel did not lead any evidence as to his good character with the result that the trial judge did not give a good character direction. In the circumstances where all the circumstantial evidence pointed to the conclusion that the appellant was the murderer and there was no evidence which suggested that anyone else was in the house that night who could have killed the deceased, the Privy Council was of the view that "the issues about the appellant's propensity to violent conduct and his credibility, as to which a good character reference might have been of assistance, are wholly outweighed by the nature and coherence of the circumstantial evidence".[24]

[51] In *Peter Stewart*, it had been argued on behalf of the appellant that had a good character direction been given, the jury could have been persuaded that the appellant was not the kind of young man who would be likely to carry out a killing which was effectively an assassination. The Privy Council did not agree. They noted that "this was an overwhelmingly strong recognition case" and there was no reason suggested why the person who identified the appellant as the killer, would do so "if in truth it was someone else".[25]

[52] Mr Courtenay has submitted before us that the case against August was not overwhelmingly strong, or such that this Court could be fully confident that, had the jury known of August's good character, it would have made no difference to their verdict. Accordingly, he argued, the conviction was unsafe. We have considered what the proper test should be. We are of the view that we must be satisfied, not that the case against August was overwhelmingly strong, but that, had the jury been given a good character direction on propensity, they would have reached the same conclusion. In other words, the proper test should be that the case

[24] Ibid at [38].
[25] [2011] UKPC 11 at [18].

against August must have been sufficiently strong that this Court could safely say that the jury would have inevitably convicted him.

[53] August, having given unsworn evidence, was therefore not entitled to a good character direction on credibility but should have been given the benefit of the propensity limb of the direction. As for the impact of the absence of the propensity limb of the good character direction, we have examined the circumstantial evidence adduced by the prosecution[26] and have formed the view that such evidence led inexorably to August's guilt. We are convinced that the case against August was sufficiently strong, and that it was inevitable, even if a good character direction on propensity had been given, that the jury would have returned the same verdict. This view is buttressed by the fact that the jury returned their guilty verdict notwithstanding several serious mis-directions by the trial judge that were all unduly favourable to August. In our view, the circumstantial evidence was sufficient to outweigh any assistance that would have been afforded by a good character direction on August's propensity to violent conduct. Accordingly, the conviction was safe and the trial fair. August therefore fails on this ground.

Did the trial judge fail to address adequately certain inconsistencies, and if so, did it affect the safety of the conviction and the fairness of the trial?

[54] Mr Courtenay argued that the trial judge erred in fully dealing with certain material inconsistencies in the prosecution's evidence. He submitted that the inconsistences were significant and cast doubt over the evidence of the blood-stained shoe and t-shirt as well as the reliability of the shoe print allegedly found near the crime scene. He argued that August had denied from the outset that there was any blood on the t-shirt or shoe and had raised in his defence allegations of fabrication of evidence on the part of the police. Accordingly, it was argued, the trial judge failed to point out to the jury that the evidence ought to be rejected as unreliable.

[55] Three (3) specific sets of inconsistencies have been identified. First, the inconsistencies with respect to the number and location of shoe prints at or near the

[26] From [34] to [37] of this judgment.

crime scene were highlighted. It was argued that there was a related inconsistency between the original statement of PC Witty and evidence which he added to his statement some three years later. Secondly, Mr Courtenay pointed out the inconsistencies relating to the number and position of the alleged spots of blood on August's shoe. Finally, Mr Courtenay contended that there were crucial inconsistencies regarding the way in which the police officers handled the allegedly blood-stained t-shirt and shoe.

[56] We do not accept the arguments put forward by Mr Courtenay. In our view, the trial judge dealt specifically with the inconsistencies arising on the evidence of the various police officers concerning the number and location of the shoe prints. Whereas the trial judge might not have fashioned his direction in the terms used by Mr Courtenay, that is, inconsistencies relating to "the number and location of footprints at or near the crime scene", we entertain no doubt that the jury would have been aware that those were the circumstances to which the judge was alluding in the portion of his summing-up set out at [27] above when he referred to certain inconsistencies arising from the accounts of Corporal Teck, PC Itza and PC Witty regarding the shoe prints that were seen near to the deceased's home.

[57] Further, although the trial judge did not address the "irreconcilable" portions of some of the evidence given by the police officers, particularly, whether Corporal Teck could have observed foot/shoe prints on the night of the murder given the poor lighting conditions; whether PC Witty was at the scene on the night of the murder; and whether PC Witty was fabricating his evidence to strengthen the prosecution's case, we note that the judge repeatedly addressed the jury on the credibility of witnesses and their powers of recollection. In addition, we are of the view that any prejudice which might have ensued from the judge's omission to address the jury on these specific inconsistencies was entirely mitigated by his directions to the jury on the value of the forensic evidence of the shoe print which, as previously mentioned, were unduly favourable to August.

[58] The second set of inconsistencies to which Mr Courtenay referred was the number and position of the blood spots on August's shoes. Whilst the trial judge failed to deal with these inconsistencies in the evidence of PC Witty, Mr Henry and Corporal Teck, we are again of the view that any prejudice to August by such an omission was erased by the judge's warnings given to the jury as to the value of the forensic evidence.

[59] As to the third set of inconsistencies, the trial judge did not address the manner in which the police officers handled the t-shirt and shoes or the inconsistencies concerning the time and place they were handed over to Mr Henry. Mr Courtenay contended that the t-shirt and shoes were contaminated with blood when they were taken by Corporal Teck to the crime scene. He further submitted that it was "troubling" that Corporal Teck claimed to have taken the shoes to the crime scene to match them with shoe prints observed, when he had earlier testified that he did not observe any prints on the night of the killing. While we agree that the trial judge did not point out these specific inconsistencies, and did not expressly address the jury on the allegation made by August that the police had fabricated evidence, we continue to bear in mind that the trial judge generally directed the jury on how they were to treat with any inconsistences in the prosecution's evidence, as well as the forensic evidence regarding both the shoe print and the blood and also their entitlement to reject any evidence led, after giving that evidence careful consideration.

[60] Although a trial judge ought to explain to the jury the nature and significance of conflicts in evidence and direct them on how to treat with those conflicts, there is no requirement that the trial judge should identify every inconsistency that arises. The Court of Appeal of Jamaica in the case of *R v Fray Diedrick,*[27] cited with approval in the case of *Cargill v R*[28], explained that there was no requirement that the judge should "comb the evidence to identify all the conflicts and discrepancies which occurred in the trial".[29] What was expected was that the trial judge would

[27] SCCA No 107/1989 (22 March 1991) at [9].
[28] [2016] JMCA Crim 6, JM 2016 CA 17 (Carilaw).
[29] *R v Fray Diedrick* SCCA No 107/1989 (22 March 1991) at [9].

"give some examples of the conflicts of evidence which have occurred at the trial, whether they be internal conflicts in the witness' evidence or as between different witnesses."[30] Of course, the trial judge should also point out any major conflicts in the evidence of the prosecution or the defence.

[61] Having regard to the judge's general directions on how the jury should treat inconsistencies in the prosecution's evidence, and more importantly, the judge's directions on the forensic evidence, we are hard-pressed to find any fault with the trial judge's summation on this issue. We therefore do not form the view that the safety of the conviction and the fairness of the trial were affected.

[62] It is in these circumstances that we find that August's conviction was safe and now affirm same.

PART III

The Appeals Against Sentence

Introductory remarks

[63] In rendering the second *August* decision, the Court of Appeal in a scholarly judgment concluded that:

> "…the mandatory minimum sentence of life imprisonment imposed on the appellant without the possibility of parole prescribed in the proviso to section 106(1) of the Criminal Code, violates both sections 6 and 7 of the Constitution, to the extent that the proviso to section 106(1) of the Criminal Code is mandatory in nature. It follows that the life sentence imposed on the appellant is therefore unconstitutional."[31]

The Court of Appeal also concluded that the circumstances of August's case did not require the imposition of a life sentence and so imposed a fixed sentence of 30 years imprisonment, less the time he had already served. [32]

[64] The analysis of the Court of Appeal provided guidance on the requirements for a constitutionally compliant life sentence regime. It was evident that the State

[30] Ibid.
[31] *August v The Queen* (Court of Appeal of Belize, 4 November 2016) at [80].
[32] Ibid at [132].

accepted the ruling of the court and, without waiting on the completion of the appellate process before this Court, the National Assembly enacted new legislation. The enactments relevant to the sentencing challenges before us are the Criminal Court Amendment Act ("the CCA"),[33] which repealed and replaced section 106 of the Criminal Code, and the Parole Act ("the PA"),[34] which repealed and effectively replaced Part VI of the Prison Rules which disallowed parole for persons convicted of murder. This new legislative framework was intended to correct the constitutional deficiencies identified by the Court of Appeal.[35]

[65] Consequently, the issues for determination on the appeal against sentence have changed significantly since the initial filing of the appeals by these appellants. They can be discussed under broad headings:

a. Should the new legislation govern the hearing of these appeals?
b. What is the nature of the enactments?
c. Is the penalty of life imprisonment for non-capital murder consistent with the Constitution?
d. Is the Parole Act unconstitutional?
e. What is the impact of the new regime on these appeals?
f. What is the impact on the other prisoners serving life sentences under the old regime?

We discuss each of these in turn.

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[33] So far as is germane to these appeals, the CCA provides as follows:

> "106 – (1) …
>
> (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.
>
> …
>
> 106A - (1) Subject to subsection (2), every person who has been previously convicted of murder and is, at the time of the coming into force of the Criminal Code (Amendment) Act, 2017, serving a sentence of imprisonment for life, 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."

[34] The PA repealed Part VI of the Prison Rules which provided for a parole system in Belize. The Preamble to the PA states that its objective is to:

> "…provide for, the enshrinement in substantive law of the parole regime, the eligibility for the consideration of parole in relation to persons serving life sentence for murder, the modification of the composition of the Parole Board…and to provide for matters connected therewith or incidental thereto."

[35] Note, in particular, the portion of the Preamble to the CCA which states that it is: "AN ACT to amend the Criminal Code, Chapter 101 of the Substantive Laws of Belize, Revised Edition 2011, 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…and to provide for matters connected therewith or incidental thereto."

Should the new legislation govern the hearing of these appeals?

[66] The new legislation was enacted during the pendency of these appeals, after the Court of Appeal had ruled but before the matter had come on for hearing before us. We therefore had to determine whether the case should be conducted on the state of the law that existed before or after these legislative changes. However, the decision was subject to trite law. The governing principle is that when there is a change in the law after the hearing of a matter and prior to the determination of an appeal, if the new law is intended to be applied retroactively, the court is normally to have regard to the state of the law at the time of the hearing of the appeal. This was not contested by any of the parties before the Court.

[67] There is abundant authority that supports this long-standing principle. This is demonstrated in the cases of *Quilter v Mapleson*[36] and *Stovin v Fairbrass*[37]; the pronouncement of Lord Denning MR in *Attorney General v Vernazza*[38], applying the learning in those cases, that "…[when] Parliament has shown an intention that the Act should operate on pending proceeding, (*sic*) the Court of Appeal are (*sic*) entitled to give effect to this retrospective intent"[39]; and also from the Court of Appeal of Guyana in *Bata Shoe Co. Guyana Ltd. and Others v Commissioner of Inland Revenue and Attorney General*[40], where Crane JA, after considering the above and other jurisprudence said,

> "On this matter of the ability of Parliament to pass retrospective legislation affecting *pending* proceedings, authority is not wanting…It seems to me that if the Court of Appeal has gone to the length of recognising the validity of retrospective legislation as affecting a vested right in a pending appeal, *a fortiori*, it seems to follow that the Court of Appeal can properly apply the intervening retrospective legislation in the instant case to a statute on which litigation is pending, but not yet determined."

[36] (1882) 9 QBD 672.
[37] (1919) 88 LJKB 1004.
[38] [1960] 3 All ER 97.
[39] *Attorney General v Vernazza* [1960] 3 All ER 97, 101.
[40] (1976) 24 WIR 172, 198 (original emphasis).

[68] Most importantly, perhaps, is the fact that this view has already been accepted by this Court in *Dean Boyce v The Attorney General of Belize and the Minister of Public Utilities and British Caribbean Bank Limited v The Attorney General of Belize and the Minister of Public Utilities*[41]**.** The Court, by majority, said at paragraph 19:

> "We have examined the several authorities cited by the Appellants. They do support the notion advanced by the Appellants that where a law changes during the period between a hearing and an appeal, the appellate court must consider the law as it stands as at the date of the hearing of the appeal, especially where that law is applied retrospectively."

[69] We should note that in the *Dean Boyce* case, the Court applied this principle by staying adjudication on the new legislation before it until the matter had been considered by the Court of Appeal, to which it remitted the case. This was done in circumstances where the new legislation had been enacted after the decision on appeal from the Court of Appeal.

[70] In the case before us, the provisions under the new section 106A of the Code are undeniably pregnant with retrospectivity, given their express applicability to persons already serving life sentences. Both parties have also submitted that the specific circumstances of this case require us to adjudicate now that we are seized of the case, and we agree. We already have the decision of the Court of Appeal on the unconstitutional nature of the regime under which the appellants were sentenced and the broad discussion on the measures that would remedy that breach. Additionally, there are some 38 persons serving life sentences in the Belize Central Prison, to whom the transitional provisions also apply and, at the time of hearing these appeals, at least 6 others awaiting sentence, having been convicted of murder in the then recent months.

What is the nature of the enactments?

[71] The amended legislation changed the nature of the appeal before us. The appellants no longer contend that the mandatory nature of the life sentence imposed on persons found guilty of murder violates the Constitution. This is because, pursuant to

[41] [2012] CCJ 1 (AJ) (R).

section 106 of the Criminal Code (as amended), that sentence does not necessarily mean 'life'. When imposing a life sentence on a person convicted of murder, the judge is required to 'individualize' the sentence by setting a minimum period which must be served as punishment for the crime committed. Further, the offender becomes eligible for parole, and if s/he poses no risk of danger to the public, ought to be released on parole. They submit that central to the constitutionality of a life sentence, therefore, is a constitutionally valid parole regime. They contend that the parole regime is unconstitutional.

[72] While both the appellants and the State accept that the new section 106 did not contravene the Constitution even if it imposed a mandatory life sentence, we considered whether the new section 106 supported the premise that the section imposed a mandatory sentence. In light of the history of the case, we decided that it was unnecessary to seek further submissions from Counsel.

[73] Under the new legislative framework, the CCA creates a statutory duty on a judge who imposes a life sentence on an offender convicted of murder, to specify a minimum period of detention that the offender must serve before being eligible to be considered for release by the Parole Board.[42] The PA provides for a new Parole Board which has been given the power, *inter alia*, to order the release of any prisoner serving a life sentence, to supervise that prisoner while he or she is on parole and to recall that prisoner to detention at any time during the full term of the life sentence.

[74] The case was argued on the assumption that this framework substantially followed the approach of the United Kingdom where a mandatory life sentence is formally imposed for murder, but does not in reality mean that those sentenced will necessarily spend the remainder of their life in prison. Instead, following pronouncement of the sentence, the judge specifies a term of imprisonment that the offender must serve before becoming eligible for release on parole. When fixing

[42] Subsection 3 of the new section 106 of the Criminal Code provides: "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."

the term, the judge takes into account factors which are the same or similar to those set out in the new section 106(4) of the Criminal Code[43], so that the duration of detention specified is proportional to the degree of offending and the personal circumstances of the offender. Since this term represents the punishment and deterrence aspects of the sentence, it is known as the "punitive" period.[44] Only exceptionally is that minimum term or punitive period a whole life sentence. What follows the expiry of the punitive period in the UK is described as the "security" or "preventative" period[45], which may be continued detention or supervision in the community on parole, with the power to recall. Again, this would appear to be reflected in the new Belize Acts. In the UK, following various legal challenges, including challenges before the European Court of Human Rights ("the ECtHR"), any further detention beyond the punitive period must be linked to the assessment of the prisoner's risk to the public[46]. As Lord Justice Simon Brown forcefully explained in the case of *R (Anderson) v Secretary of State for the Home Department*[47], "[s]urely the maintenance of public confidence in the system cannot require longer incarceration than that which properly reflects society's entitlement to vengeance." Since a prisoner's dangerousness, by its very nature, is a factor which is likely to change over time, an up-to-date "judicial" assessment is needed at the expiry of the minimum term[48]. In England, this is provided by an independent parole board panel, chaired by a judge and operating in accordance with the principles of natural justice.

[75] Although this is substantially the new approach in Belize introduced by the new legislation, including the Parole Act, there is, however, a significant difference in the statutes. The statutory provision in the UK which mandates the imposition of life imprisonment is section 1(1) of the Murder (Abolition of Death Penalty) Act 1965 which prescribes "No person shall suffer death for murder, and a person

[43] The section sets out the following factors: the circumstances of the offender and the offence; any aggravating or mitigating factors of the case; any period that the offender has spent on remand awaiting trial; any relevant sentencing guidelines issued by the Chief Justice; and any other factor that the court considers to be relevant.
[44] See for example *Vinter and others v United Kingdom* (App. Nos. 66069/09, 130/10, 3896/10) [2013] All ER (D) 158 (Jul), [2013] ECHR 66069/09 at [45] citing *R v Lichniak; R v Pyrah* [2003] 1 AC 903, [2002] UKHL 47 at [8].
[45] Ibid.
[46] See for example *Stafford v United Kingdom* [2002] ECHR 46295/99, (2002) 13 BHRC 260 at [87] and *Kafkaris v Cyprus* (Application No 21906/04) [2008] ECHR 21906/04, (2008) 25 BHRC 591, 649.
[47] [2003] 1 AC 857 at [56].
[48] See, for example, *Stafford v United Kingdom* [2002] ECHR 46295/99, (2002) 13 BHRC 260 at [72] and [87].

convicted of murder shall, subject to subsection (5) below, be sentenced to imprisonment for life." This clearly justifies the conclusion that the imposition of a life sentence is mandatory, although, as mentioned, the provision has been ameliorated to provide for the individualisation of the sentence to the offence and the offender.

[76] In Belize, the sentence of death for murder is not abolished. It is still open to the court to impose a capital sentence in the appropriate circumstance. The new section 106(1) provides that 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. The substitution of the language "shall be liable...to" for "shall be sentenced" connotes the removal of the mandate and the conferral of a discretion. This difference is also evident when compared to the repealed section 106 which this provision replaces. Prior to the amendment, the now repealed section stated that every person who commits murder shall suffer death provided that in certain circumstances (which were specified), the court may, "refrain from imposing a death sentence and *in lieu* thereof shall sentence the convicted person to imprisonment for life". The use of the phrase "in lieu of", followed by "shall sentence" clearly indicated that the court did not have any discretion and that the sentence to be imposed was either death or life imprisonment.

[77] It is a trite principle of statutory interpretation that where words in a statute are changed they are intended to have a different meaning. The change of wording from "shall sentence…to life imprisonment" must have a different meaning to "is liable …to imprisonment for life". This change of language implies that the judge is no longer mandated to impose a sentence for life.

[78] The interpretation of the amended section, is aided by looking at the other provisions in the Code so as to construe the amended section within the context of the Criminal Code as a whole.[49] The Criminal Code has several provisions which purport to control the sentencing discretion of the trial judge by imposing minimum

[49] See Diggory Bailey and Luke Norbury, *Bennion on Statutory Interpretation* (7th edn, LexisNexis 2017) at [21.1].

and maximum terms of imprisonment. For example, under section 47, the offence of unlawful and carnal knowledge of a 14-year-old girl carries, on conviction on indictment, a sentence of "imprisonment for a term which shall not be less than twelve years but which may extend to imprisonment for life". Where a person is convicted of such an offence in respect of a girl who is 14 years or older, but not yet 16 years, that person will be imprisoned for "a term which shall not be less than five years nor more than ten years". It is noteworthy that the proviso to that section, which makes provision for what is commonly referred to as "the young man's defence", explicitly categorizes the minimum period of five years as a "mandatory minimum sentence". Section 48 states that a habitual sex offender "shall be sentenced to a mandatory term of life imprisonment." Notably, this is the only provision that speaks about a *mandatory* term of life imprisonment. Sections 147-149 provide that the sentence for a person convicted on indictment for robbery (including attempted robbery and assault with intent to rob), burglary and aggravated burglary "shall" be imprisonment for a term "which shall not be less than" ten, seven and ten years, respectively, but which "may extend to" life imprisonment, in the case of section 147 and 149 and fourteen years, in the case of section 148.

[79] The Code therefore discloses a clear scheme. Where a mandatory minimum or a mandatory sentence is being prescribed as the punishment for an offence, it is stated in plain language. This is clearly not the case with the newly minted section 106. Accordingly, we conclude that it does not prescribe a mandatory sentence.

[80] We are further buttressed in our conclusion by the overarching principle stated in section 34 of the Interpretation Act.[50] Section 34 provides that where "…in any Act a penalty is prescribed for an offence under that Act, such provision shall imply…that such offence shall be punishable upon conviction by a penalty not exceeding the penalty prescribed…" This clarifies that section 106 imposes a maximum, not mandatory minimum, sentence.

[50] CAP 1.

[81] In the group of capital punishment cases *Boyce*[51], *Matthew*[52] *and Watson*[53], the Privy Council rejected that similar provisions in the relevant Interpretation Acts in Barbados, Trinidad and Jamaica could have the effect of abolishing the mandatory imposition of the death penalty. In this case, we do not consider whether the Interpretation Act has the effect that was contended in those cases. The determining feature of this case is that the amendment has given the court a discretion instead of imposing a mandate. The context in which the amendment was crafted, being a response to the decision of the Court of Appeal which struck down the original legislation as being unconstitutional mainly because it took away the sentencing discretion of the court to tailor the sentence to the circumstances of the offence and the offender and concluded that the circumstances of the case did not warrant the imposition of the life imprisonment, is an additional reason for concluding that this interpretation is consistent with the legislative intent.

[82] We have concluded that under the amended section 106, where a person is convicted of murder, that person can be sentenced to death or to a maximum term of imprisonment for life. Accordingly, any life sentence imposed following a conviction for the offence of murder will be discretionary and not mandatory. Wherever on the scale the term is fixed, the term of imprisonment must necessarily be such that it is befitting of the circumstances of the offence and the offender.

[83] Where a term of life imprisonment is imposed by the sentencing judge, the judicial tailoring function is preserved by subsections (3) and (4) which allow for the prescription of a minimum term that must be served by the offender before being eligible for release on parole. In individualizing that minimum period, the judge's exercise of his or her sentencing discretion is guided by the consideration of the key factors set out in subsection (4).

Are the enactments consistent with the Constitution?

[84] We therefore find, subject to what we have said here, that the regime for the imposition of the sentence of life imprisonment for non-capital murder, as is now

[51] *Boyce v The Queen* [2005] 1 AC 400.
[52] *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433.
[53] *Watson v The Queen* [2205] 1 AC 472.

provided for under section 106 of the amended Criminal Code, is consistent with the Constitution of Belize.

[85] It has not been lost on this Court that several sections of the Code, such as sections 147-149 and 170, for example, all contain substantial mandatory minimum sentences. However, these offences are beyond the scope of this judgment and so we will only say, as we did in *Zuniga and others v Attorney General of Belize*[54], that courts will always examine such penalties with "a wary eye". Accordingly,

> "If by objective standards the mandatory penalty is grossly disproportionate in reasonable hypothetical circumstances, it opens itself to being held inhumane and degrading because it compels the imposition of a harsh sentence even as it deprives the court of an opportunity to exercise the quintessentially judicial function of tailoring the punishment to fit the crime."

[86] We also offer no comment on the other amendments effected by the CCA, such as the amendment to section 135 of the Code. As for the amendment to section 270, the matters there do not fall within the scope of this decision.

Is the Parole Act unconstitutional?

[87] Section 2(1) of the Constitution of Belize asserts the supremacy of the Constitution by providing that: "[t]his Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void." Under section 5(1)(a) of the Constitution, "A person shall not be deprived of his personal liberty save as may be authorised by law…in execution of the sentence or order of a court, whether established for Belize or some other country, in respect of a criminal offence of which he has been convicted." In guaranteeing equal protection of law, section 6(1)-(2)[55] proclaims every citizen of Belize's right to a fair hearing before an independent and impartial court established by law.

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[54] ibid.

[55] Section 6(1) provides that, "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law." Subsection 2 guarantees to a person charged with a criminal offence a "fair hearing within a reasonable time by an independent and impartial court established by law."

[88] The constitutional provisions relating to the protection of the law and the freedom from inhuman treatment, require the existence of a mechanism which supports the reducibility of the life sentence.[56] Reducibility speaks to a mechanism which affords an offender serving a life sentence the "'possibility' or 'hope' or 'prospect' of release".[57] This is the purpose of the PA. It was enacted to improve the parole system in general to regulate the possible release of all prisoners, including those serving life sentences for murder.

[89] It is not contested that the parole system is authorized by law, the main provisions of which are contained in the CCA and the PA. The appellants, however, contend that the Parole Board does not have the characteristics akin to a court and is not independent or impartial and that there are deficiencies in its procedure. On those premises, they contend that the entire system now in place for the imposition of, in their view, the mandatory minimum sentence of life imprisonment for murder is unconstitutional.

Is the Parole Board an independent and impartial tribunal?

[90] The Parole Board is comprised of 9 persons appointed by the Minister, namely[58]:

a) a Chairman who shall be the Chief Executive Officer of the Ministry responsible for Prisons,

b) the Director of Prisons,

c) a person who holds or has held judicial office,

d) a representative of the DPP's Office,

e) a representative of the Belize Police Department,

f) a registered medical practitioner who, as far as practicable, should be a psychiatrist,

g) a representative of the Ministry responsible for Human Development, and

h) two persons selected by the Minister who appear to have knowledge and experience of the supervision or after care of discharged prisoners, or who

[56] *Vinter and others v United Kingdom* (App. Nos. 66069/09, 130/10, 3896/10) [2013] All ER (D) 158 (Jul), [2013] ECHR 66069/09.
[57] *Kafkaris v Cyprus* (Application No 21906/04) [2008] ECHR 21906/04, (2008) 25 BHRC 591, ECtHR.
[58] See section 3(1) of the Parole Act.

have made a study of the causes of delinquency or the treatment of offenders.

[91] Mr Courtenay, for the appellants, criticises this composition. He alleges that the Board is not a body independent of government because it is appointed by the Minister and contains at least five persons who must be government employees and therefore it cannot be viewed as impartial. On this basis, he claims that any refusal to release a person sentenced to life, after the expiry of a judge-stipulated minimum term, will amount to detention by the Executive and thus a breach of the separation of powers doctrine. In addition, the fact that the Minister has rule-making authority raises perceptions of bias and denies the tribunal the qualities required by the Constitution for independence and impartiality.

[92] The appellants have relied on section 5 of the Constitution of Belize in support of their submission that only a "court" or a body akin to one may decide to detain an offender in consequence of a criminal offence. That "court", they submit, need not be a classic court of the kind integrated in the judicial system once it contained the essential features of judicial procedure.

[93] These contentions are not novel and have even been extensively explored before the ECtHR. A number of challenges were made to that court on the basis that the parole board in England was not independent and impartial. The matter became justiciable under article 5(4) of the European Convention on Human Rights. This is the equivalent of section 5(1) of the Belize Constitution, but it should be noted that in the Convention, the determination must be made by a court, while under the Belize Constitution, the provisions require that it be made in a manner authorized by law. In the case of *Weeks v United Kingdom*,[59] the court expressly concluded that a specialized body such as a parole board could discharge these functions in accordance with the law once it had the characteristics of independence and impartiality. The court articulated the point in this way:

[59] [1987] ECHR 9787/82.

> "The 'court' referred to in Article 5(4) does not necessarily have to be a court of law of the classic kind integrated within the standard judicial machinery of the country…The term 'court' serves to denote 'bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case…, but also the guarantees' – 'appropriate to the kind of deprivation of liberty in question' – 'of a judicial procedure', the forms of which may vary from one domain to another … In addition, as the text of Article 5(4) makes clear, the body in question must not have merely advisory functions but must have the competence to 'decide' the 'lawfulness' of the detention and to order release if the detention is unlawful.
>
> There is thus nothing to preclude a specialised body such as the Parole Board being considered as a 'court' within the meaning of Article 5(4), provided it fulfils the foregoing conditions …"[60]

[94] The court went on to reject the notion that the mere fact that the board was appointed by the Minister, who exercised rule-making and administrative powers, made it not independent and impartial:

> "The applicant maintained that the Parole Board is not independent of the Home Secretary, primarily because he appoints the members of the Board, provides its staff and makes the rules under which it conducts its procedures.
>
> The Parole Board sits in small panels, each of which in the case of life prisoners includes a High Court Judge and a psychiatrist…The manner of appointment of the Board's members does not, in the Court's opinion establish a lack of independence on the part of the members… Furthermore, the Court is satisfied that the judge member and other members of the Board remain wholly independent of the executive and impartial in the performance of their duties.
>
> There remains the question whether the Board presents an appearance of independence, notably to persons whose liberty it considers…On this point, as the Government stated, the functions of the Board do not bring it into contact with officials of the prisons or of the Home Office in such a way as to identify it with the administration of the prison or of the Home Office.
>
> The Court therefore sees no reason to conclude that the Parole Board and its members are not independent and impartial."[61]

[95] In *Hirst v United Kingdom*,[62] the court rejected the contention that the Parole Board was not independent because its members included former employees of the Prison

[60] Ibid at [61].
[61] *Weeks v United Kingdom* [1987] ECHR 9787/82 at [62].
[62] [2001] ECHR 40787/98.

Service or members of Boards of Visitors and because there were structural links between the Board's secretariat and financing and the Prison Service. The European Court also concluded in another case, that of *Hutchinson v United Kingdom*[63], that the requirement for reducibility of sentence can be performed in a manner authorized by law even if the mechanism is part of the executive, such as a minister of government.[64]

[96] The appellants' contentions could also be categorized as submitting that there was a perception of bias in the structure of the Parole Board. The leading authority in England is *Porter v Magill*[65]. The essential principle is best expressed by Lord Hope of Craighead in paragraph 103 of his opinion where he said, "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased." This formulation has been followed by the Judicial Committee of the Privy Council in, for instance, *Attorney General of the Cayman Islands v Tibbetts*[66] and *Prince Jefri and others v The State of Brunei*[67]. These principles were applied to Belize in *Belize Bank Ltd v Attorney General of Belize and others*[68]. In that case, the appointment of a Banks and Financial Institutions Appeal Board to hear and determine all appeals in respect of matters which may be referred to it under the Act was challenged on the ground of bias, mainly because the appointment was made by the Minister. The Privy Council, after examining the legal principles and considering the surrounding factual landscape, rejected the contention. It was noted in another case before the Eastern Caribbean Supreme Court in *Attorney General v Lake*[69] where a submission was made about the independence and impartiality of a Land Acquisition Compensation tribunal, that the composition and appointment of an adjudicative Board "must be looked at as a whole, including the purpose for its

[63] [2017] ECHR 57502/08.
[64] Ibid at [45], [48] – [50].
[65] [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465.
[66] [2010] UKPC 8, [2010] 3 All ER 95 at [3], 76 WIR 220, [2010] 3 LRC 683.
[67] [2007] UKPC 62 at [15], [2008] 2 LRC 196.
[68] [2011] UKPC 36.
[69] *Attorney General v Lake* AI 2005 CA 2 (Carilaw).

unique features, before one can determine whether the Board can be said to be lacking in independence and impartiality."[70]

[97] The Board, as constituted under the PA, consists of 9 persons appointed by the Minister. His power of appointment does not necessarily include the power of selection. The persons in (a) and (b) are appointed *ex officio*, they are not selected by the Minister. In (c) the selection of a current or former judicial officer, is not worded in a manner to exclude the exercise of a choice by the Minister. But one would expect that that member would either be selected by the Chief Justice or, at the very least, selected by the Minister after consulting with the Chief Justice. The appointment in (d) of a representative of the DPP's office, and in (e) of a representative of the Police Department, does not allow the Minister to make his selection as the concept of a person serving as a *representative*, implies selection by the person or office that they represent. The appointment in (f) of a registered medical practitioner does not exclude the Minister making a choice. But, again, it would be expected that that power would be exercised after meaningful consultations with the relevant authority from the Ministry of Health. For reasons given above, the appointment in (g) of a representative of the Ministry responsible for Human Development does not allow the Minister to make a selection. In respect of the persons categorized at (h), the Minister must exercise the power of selection in accordance with very specific criteria as those persons must have specialized knowledge in the supervision or after care of discharged prisoners or have made specialized study in causes of delinquency and the treatment of offenders. The Act requires the Minister to select the two persons in (h) and to be involved in the selection of the two persons in (c) and (f).

[98] In practical terms, mechanisms ought to be utilized to insulate the Minister from personally making the choices under (c) and (f). We expect that these will be put in place. However, even if no such arrangements are put in place, there is no objective reason to conclude that the exercise of a power to select undermines the independence of any person appointed under this section. The selectees must be

[70] *Attorney General v Lake* AI 2005 CA 2 (Carilaw) at [16].

from categories that have been identified by the Legislature as possessing professional competencies critical to the proper determination of the questions with which the Board will be concerned. Some of these members hold independent positions established by the Constitution. The Board has not commenced operation, and there is no evidence of the manner in which the practice will develop. In this context, we are of the view that it would be grossly improper, to respond to any suspicion that any or all of the members of the Parole Board will not perform their statutory functions under the PA as professionals involved in the due administration of justice. One can argue that it may have been better if the Board had among its members more persons who were not public servants, but that is not a sufficient circumstance to support the view that the Board would be lacking in independence and impartiality. We also respectfully adopt the position of the ECtHR that, "the judge member and other members of the Board remain wholly independent of the executive and impartial in the performance of their duties", as we set out in [94] above.

[99] Board members, once appointed, are free to act and decide matters in their own individual discretion. Nothing constrains their decision-making power or requires them to report to or accept the Minister's point of view in relation to any matter before the Board. A critical feature of the Board's independence is that it is autonomous and has decision-making power. It is not an advisory body. It does not make recommendations to the Minister or any Executive authority who can agree or disagree with its recommendations. Similarly, the Minister has no power to give the Board directions or instructions on whether to release or recall a prisoner. It is the Board itself that has been given the autonomy to make the decisions of release and recall. The Parole Board is not a court. It does not conduct a retrial of guilt nor is its function to set the punishment for the crime. These functions are carried out by the court and the judge. The Board is governed by the Parole Act which sets the criteria to be considered to determine whether to order the release of the prisoner on the conditions specified in the Act.[71] Once granted, parole may only be revoked

[71] Section 4(3).

for "reasonable cause" that must be set out in writing.[72] Such "reasonable cause" must, of course be linked the Board's assessment of the offender's dangerousness and must relate to the original murder conviction and the objectives of the original sentence.[73] Of great import, too, is the fact that the question of dangerousness is a justiciable one. As such, any decision by the Board to detain the prisoner beyond the judge-stipulated or legislatively-fixed minimum period or to recall the prisoner is subject to judicial scrutiny.

[100] Once appointed the members of the Board have security from removal by the Minister. Those who hold office *ex officio* cannot be removed. The Act does not provide any term limit in relation to the tenure of the Board's members, and there is no power given to the Minister to terminate the appointment of any member of the Board. The Act does not specify other terms of service, for example whether it is voluntary or not. This implies that these terms may be addressed in the Regulations to be made under the Act. However, in terms of the present assessment, the legislation allows for security of tenure of the members of the Board.

[101] The PA is a new law that is not yet operational. It is premature to make assumptions that the implementation of its provisions would be improper or lead to concerns about the impartiality of the persons appointed to be on the Board. The law in Belize regarding the operations of the Board will develop through a combination of the Regulations to be enacted and the iterative process of jurisprudential refinement by the judgments in cases brought by any who complain on any of these issues. For the avoidance of doubt, we reiterate that nothing in the legislation or in this judgment excludes the availability of challenge to the exercise of powers or the pursuit of any other complaint brought with evidence.

[102] It necessarily follows that the full operation of the Board and the issue of the Regulations, which are essential to flesh out the practical workings of the legislation, must be expedited. The Regulations promulgated ought to reflect the guidance offered in this judgment.

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[72] Section 8.
[73] See for example, *Stafford v United Kingdom* [2002] ECHR 46295/99, (2002) 13 BHRC 260 at [82] and [87].

[103] We are satisfied that the legislation is capable of guaranteeing the independence of the Board from the executive and the parties to the case; its impartiality and the observance of appropriate procedures in keeping with the prevailing law in Belize. It cannot be assumed that the Regulations will have the effect of whittling away at the independence of individual members and of the Board in general.

Is the Board's procedure constitutionally fair?

[104] The DPP has suggested that despite the absence of Regulations, the procedures set up under the PA envision a constitutionally fair procedure in that they create a system for considering an offender's release on parole, taking into account specific factors. It is contended that the provisions of the PA inform the Board's determination of whether the prisoner's release is safe for the public and for the prisoner; permit the Board to seek and obtain representations from the prisoner; permit the Board to convene an oral hearing; and allow for judicial review of the Board's decisions. Additionally, it is submitted that the language of the PA does not foreclose any of the issues raised by the appellants.

Criteria for granting parole

[105] The criteria for granting parole are set out in section 4 of the Parole Act. Section 4(3) provides thus:

> "(3) In considering any case for parole, the Board shall take into account,
>
> *(a)* the nature and circumstances of the offence for which the applicant was convicted and sentenced;
>
> *(b)* the sentence imposed by the court and any comments made by the court when the sentence was imposed;
>
> *(c)* the safety of the public, and of any person or class of persons who may be affected by the release of the offender;
>
> *(d)* any representations made by the victim of the offence or any person acting on his behalf, or of the relatives of the victim of the offence, or anyone acting on their behalf;
>
> *(e)* any representations made by the offender or any person acting on his behalf;

(f) the welfare of the offender and his reformation and training while in the prison;

(g) the probable circumstances of the offender if released, especially the likelihood of his peaceful reintegration into society;

(h) the likely response of the offender to supervision by the parole officer;

(i) the reasonable probability that the offender will live and remain at liberty without violating laws, and

(j) any other factor that the Board may consider relevant in reaching a decision."

[106] The appellants contend that section 4 does not provide a constitutionally fair procedure for the granting of parole to persons convicted of murder and serving a life sentence. They argue that the section has not set an overriding statutory criterion or objective to guide the Board in deciding whether to grant parole. Instead, it lists a number of factors, some of which are irrelevant and inconsistent with prevailing principles.

[107] The specific provisions about which the appellants have complained are those which allow the decision to be based on representations made by relatives of the victim; the probable "circumstances" of the offender if released "especially the likelihood of his peaceful reintegration into society"; and the reasonable probability that the offender "will live without violating any laws". They have also taken issue with 4(3)(a), arguing that consideration of this factor would be tantamount to "second guessing" the decision of the sentencing judge. Unsurprisingly, no complaint is made in relation to 4(3)(c) which requires the Board to consider "the safety of the public, and of any person or class of persons who may be affected by the release of the offender". In fact, this is put forward as the only relevant consideration.

[108] The jurisprudence in England on this very issue has evolved to the state where once the punishment and deterrence element of the sentence set by the judge has been served by a prisoner, the only legitimate penological ground for continued detention

can be societal protection or dangerousness. This has been clarified in the leading case of *Stafford v United Kingdom*[74] and is embodied in the statute law in section 269 of the Criminal Justice Act 2003 and section 28 of the Crime (Sentence) Act 1997. Section 28 states, *inter alia*:

> "(5) As soon as—
>
> (a) a life prisoner to whom this section applies has served the [minimum term or "tariff"] of his sentence; and
>
> (b) the Parole Board has directed his release under this section,
>
> it shall be the duty of the Secretary of State to release him on licence.
>
> (6) The Parole Board shall not give a direction under subsection (5) above with respect to a life prisoner to whom this section applies unless—
>
> (a) the Secretary of State has referred the prisoner's case to the Board; and
>
> (b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."

We accept the principle that the powers of the Parole Board to extend the duration of the period of imprisonment set by the judge who imposed the life sentence should be limited to the consideration of measures necessary for the protection of the public.

[109] Section 4 of the PA has not limited itself to this basis and has expanded the factors which the Parole Board can consider in deciding whether to extend the duration of imprisonment beyond the time fixed by the judge for the punitive and deterrent period of punishment. The paragraphs of section 4(3) of the PA, highlighted by the appellants, include factors that are related to the issue of protection of the public if they are considered within the context that the only legitimate reason for continued detention after the expiration of the punitive element of the sentence is the protection of the public. However, if considered as individual factors, they would allow consideration of matters that are irrelevant to that overriding principle and expand the remit of the Board's power to continue a life prisoner's detention beyond the minimum period. The extension of the powers of the Parole Board in this

[74] [2002] ECHR 46295/99, (2002) 13 BHRC 260.

manner reopens the issue as to whether the Board should have power to continue or renew imprisonment on persons who were previously released for reasons that are not connected to the protection of the public. This would undermine the constitutional imperative of reducibility of a sentence of life imprisonment, or, indeed, of any other sentence where the prisoner becomes eligible for parole. In these circumstances, the conclusion seems inevitable that the extension of the power to continue detention beyond the judge-stipulated minimum period, for reasons other than the safety of the public constitutes a violation of constitutionally guaranteed rights.

[110] In our view, section 4(3)(c) by itself quite adequately deals with the issue of public protection and is sufficiently broad to encompass some of these expanded factors. As a matter of fact, a proper assessment under 4(3)(c) may require information connected to some of these other factors. However, none of these other factors can by itself be determinative. Accordingly, in keeping with the established principles earlier discussed, we take the view that the overarching consideration for release must be an assessment of safety under section 4(3)(c). This overarching consideration is the same for prisoners serving life sentences for murder as well as those serving other sentences of incarceration.

Minimum due process guarantees in the procedures for release and recall

[111] The appellants contend that there is no indication that the procedure by which the Parole Board will make a decision will comply with the common law minimum requirements of natural justice. Three specific complaints have been made namely, that there is: no provision entitling the prisoner to make representations to the Board or for those representations to be taken into account; no provision compelling the Board to disclose all the materials considered by it; and no provision requiring an oral hearing to be provided. The ECtHR cases of *Weeks*[75] and *Hussain v United Kingdom*[76] and the UK Supreme Court's decision in *Regina (Osborn) v The Parole*

[75] *Weeks v United Kingdom* (1987) 10 EHRR 293
[76] *Hussain v United Kingdom* (1996) 22 EHRR 1, paras 58-60

Board [77] and *R v Secretary of State for the Home Department, ex parte Watson*[78] are cited as authority for these propositions.

[112] The case of *Weeks* is, however, a peculiar one. Armed with a starting pistol, a youngster had committed a robbery of 35 pence in order to repay his mother £3. The trial judge exercised his discretion to impose a life imprisonment sentence on the boy, but this sentence was not a normal discretionary life sentence. The sentencing judge confidently expected that, given the discretion the Executive then had to authorize early release, the boy would actually spend less time in prison than if he were given a determinate sentence befitting a person convicted of armed robbery.

[113] Those circumstances cannot be compared to a regime of discretionary life sentences for non-capital murder. When a judge in Belize gives a life sentence under this new regime, it would be because the judge considers that the gravity and circumstances of the offence and the danger to the public posed by the prisoner fully justify such a severe sentence. Even when released on licence, the life sentence prisoner in Belize remains subject to that sentence.

[114] Among other things, the ECtHR determined in *Weeks* that in cases of re-detention, natural justice requires that there should be full disclosure of the material upon which the re-detention is premised. We agree and would suggest that this practice be adopted by the Belize Parole Board, if not eventually expressly provided for in the Regulations.

[115] The case of *Osborn*, which followed *Hussain*, confirmed that before determining an application for release, the Parole Board was required to hold an oral hearing whenever, in the light of the facts of the case and the importance of the issues at stake, fairness to the prisoner required it. The court listed a non-exhaustive set of considerations that would render an oral hearing necessary. It however did not state

[77] [2013] UKSC 61, [2013] 3 WLR 1020
[78] [1996] 1 WLR 906 p.916

that an oral hearing was required in all cases. The court observed that cases in which an oral hearing would be necessary included those where: (i) important facts were in dispute, or significant explanations or mitigations were advanced, which needed to be heard orally in order fairly to determine their credibility, or (ii) the Board could not otherwise properly or fairly make an independent assessment of risk, or of the means by which it should be managed, or (iii) a face-to-face encounter with the Board, or questioning of those who had dealt with the prisoner, was necessary to enable the prisoner's case to be put effectively or tested.

[116] It must be pointed out that the law in England as it relates to the procedure to be adopted by the Parole Board was developed by common law. This point was clarified in *Osborn*[79] where the House of Lords traced the development of the law through the application of common law principles. At this stage, although the Regulations have not yet been made, there is no indication that the practice will not accord with the fundamental principles of natural justice. Since we are assessing the constitutionality of Belize's Parole Act in the abstract, the various complaints and objections raised by the appellants are interesting, but somewhat premature. We say that the system in Belize should be given a chance to develop.

[117] The appellants have argued before us that the PA is deficient in that it does not specify, with any precision, the circumstances under which a prisoner may be recalled to detention. Section 9 specifies that he may be recalled for any reasonable cause. As we mentioned at paragraph [99], jurisprudence on what amounts to legitimate reasons for recall to prison, as espoused by the decisions emanating from the European Court, indicates that there must be a causal link between the detention and the original offence, such as the commission of a violent or sexual offence, and the detention must fulfil the objectives of the original sentence, for example protection of the public.[80]

[79] [2013] UKSC 61, [2013] 3 WLR 1020.
[80] See *Stafford v United Kingdom* [2002] ECHR 46295/99, (2002) 13 BHRC 260 at [82] and [87].

[118] Again, in the English system, the case law was required to develop the practice and procedure in this regard as it was not contained in the statutes. It is premature to rule that the law is itself defective when it does not exclude that "reasonable cause" would accord with the common law and constitutional law principles. The jurisprudence could guide the development of the practice. It bears repeating that we expect that the Regulations will be drafted so as to accord with the jurisprudentially established best practices, including the principles derived from *Osborn* discussed above as well as the other guidance offered throughout this judgment by way of commentary on the issues raised by the appellants.

[119] The Court cannot assume that if a power granted to the Board may be exercised reasonably and lawfully or, alternatively, in breach of due process rights, it invariably follows that the Board will adopt the latter approach. Moreover, the scope of the matters that the Regulations can cover is wide and we do not have before us any of the Regulations that will condition the Board's procedures.

[120] Finally, we do not know what is the actual practice that the Board will adopt in this or that situation and there has been no jurisprudence developed as yet to guide the Board. The arguments presented here are mostly relevant to the unique circumstances of persons sentenced to life who have served the minimum period specified by the sentencing judge. On the other hand, the provisions of the Act relating to release on and revocation of parole are for the most part of general application as no special provision is made for "lifers". The decisions of the Board will also be susceptible to judicial review not only on account of the fact that Rule 267(7) of the now repealed Prison Rules[81] which expressly provided for the finality of decisions of the Parole Board and precluded appeals and judicial review of those decisions, has not been re-enacted by the 2017 Act but on the now established principle that such decisions are amenable to judicial scrutiny[82].

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[81] Originally Rule 267(7) provided that: "There shall be no right of appeal to any authority by a prisoner against the Board's decision refusing to grant parole, nor shall there be any right to apply for judicial review against such a decision and the Board's decision in any case for parole consideration shall be final." Subsection (7) was repealed by the Prisons (Amendment) Rules, 2010 and substituted with the following provision: "There is neither right of appeal to any authority nor right to apply for judicial review by a prisoner against the Board's decision

(a) to refuse to grant parole,

(b) to recall a parolee or revoke the order granting such parole,

and the Board's decision for parole consideration or recall of parolee, as the case may be, is final."

[82] See for example, *Attorney General v Joseph and Boyce* [2006] CCJ 3 (AJ).

[121] For all these reasons, we answer this question by holding that the Parole Act is in conformity with the Constitution, subject to what we have expressed above in paragraphs [109] – [110].

What is the impact of the new regime on these appeals?

[122] When the Court of Appeal ruled in the second *August* decision that the mandatory sentence of life imprisonment was unconstitutional and that there were mitigating factors which made the sentence of life imprisonment indiscriminate and disproportionate to the particular circumstances of the offence and the offender, it fixed a determinate sentence of 30 years imprisonment, less the time August had already served.

[123] Counsel for the appellants has submitted that the original sentencing, which was admittedly a constitutional violation, should attract condemnatory declarations in favour of both appellants in accordance with the principles set out in *Vishnu Bridgelall v Hardat Hariprashad*[83]. The DPP rebutted that contention on the ground that the recent enactments have taken the wind out of the sails of any argument that the sentences imposed upon August are unconstitutional.

[124] We are satisfied that the Court of Appeal was not remiss in exercising its constitutional and sentencing responsibilities towards August, whether it acted as a matter of ordinary criminal procedure to fill the void created by the declaration of unconstitutionality which caused August to revert to the status of a convicted person awaiting sentence, or the basis of a court granting redress for a violation of the Constitution. The new legislation that was subsequently enacted could not intrude into that judicial process and thereby undermine the decisional authority and independence of this Court.

What is the impact on the other prisoners serving life sentences under the old regime?

[125] In light of the findings above, it becomes necessary to address the fate of those persons currently incarcerated who were sentenced to life imprisonment for murder, under a now declared unconstitutional mandatory life imprisonment penal

[83] [2017] CCJ 8 (AJ).

provision. In the exercise of our jurisdiction under section 20 of the Constitution, we must order that notwithstanding the provisions of section 106(A)(1),[84] these offenders must be individually re-sentenced by a trial judge. Bearing in mind the utter abhorrence of society towards the crime of murder, the sentencing judge may well take the view that the fit sentence is one of life imprisonment unless, having regard to mitigating factors, a lesser sentence is deserved.

[126] Since the sentences of these persons have been vacated by this judgment, as a practical interim measure, we order that all such persons must remain incarcerated until, in relation to his or her case, respectively, a sentencing hearing is completed. In the event that the sentencing judge should decide that a fit sentence is one of life imprisonment, then the judge shall stipulate a minimum period which the offender shall serve before becoming eligible for parole, or for a consideration of whether the prisoner has become eligible for parole. We would not expect that exercise to be rushed, but the entire exercise should be completed within a reasonable time. For the avoidance of doubt, a similar reasoning is to be applied to any person sentenced under the new regime to a mandatory life sentence for murder.

PART IV

Disposition

[127] In accordance with our foregoing conclusions, we dispose of these appeals as set out below.

a. We order that:

i. August's appeal against conviction is dismissed and the Court of Appeal's decision in relation to his conviction and the sentence imposed is affirmed;

ii. Gabb's matter be remitted to the Supreme Court for an expeditious sentencing hearing; and

b. We declare that:

[84] Section 106A(1) states that: "Subject to subsection (2), every person who has been previously convicted of murder and is, at the time of the coming into force of the Criminal Code (Amendment) Act, 2017, serving a sentence of imprisonment for life, 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".

i. Section 106 of the Criminal Code, as amended by the Criminal Code (Amendment) Act 2017, is compliant with sections 6 and 7 of the Constitution of Belize; and

ii. The Parole Act 2017 is compliant with the Constitution.

c. We further order that the sentences of those persons convicted of murder and imprisoned pursuant to the now repealed section 106 of the Criminal Code are vacated. Section 106A notwithstanding, these persons must be re-sentenced and must remain incarcerated until the conclusion of their respective re-sentencing hearings

JUDGMENT OF THE HONOURABLE MR. JUSTICE SAUNDERS, JCCJ

[128] For all the reasons expressed at [1] to [62] above, I agree that the verdict of the jury in August's case should not be disturbed. These remarks relate solely to the appeals, lodged respectively by August and Gabb, against the sentences originally imposed upon them. Each man had been sentenced in keeping with section 106(1) of the Criminal Code[85]. Before it was amended recently[86] (after the men had been sentenced), the proviso to that section required the sentencing judge to impose a penalty of life imprisonment for murder in lieu of imposing the death penalty.

[129] When August's appeal first came before this Court, we remitted the matter back to the Court of Appeal so that we could receive the views of that court on the constitutionality of the mandatory life sentence. In giving their views, I understood the Court of Appeal to have made two important findings. Firstly, the court was satisfied that the Legislature's prescription of an automatic life imprisonment penalty for murder was likely to yield disproportionate sentences. On this basis, the court stated that the stipulated penalty, and its indiscriminate imposition upon August, resulted in a denial of August's constitutional right to be treated in a humane way. In principle, the Court of Appeal would have had no objection to the Legislature prescribing a discretionary life sentence. What was objectionable was the direction by the legislature that courts *must* impose a life sentence in all such cases.

[85] The Criminal Code, Chapter 101.
[86] The Criminal Code Amendment) Act, No 22 of 2017.

[130] The Court of Appeal made a second finding of equal importance. The court noted that, at the time of the delivery of its judgment, Belize did not have in place any system of parole for prisoners convicted of murder. The court concluded that, in the absence of any possibility of parole, the imposition of a penalty of life imprisonment also resulted in inhumane treatment. Ultimately, the Court of Appeal adjudged the proviso to section 106(1) to be unconstitutional. That judgment is at the centre of this appeal.

[131] In the period between the Court of Appeal's judgment and the initial hearing before this Court, Parliament enacted new legislation directly related to the matters discussed above. Section 106 and its proviso were repealed and replaced. The new section 106(1) states that persons over the age of 18 years who commit murder are liable, having regard to the circumstances of the case, to a) suffer death, or b) imprisonment for life. This was interpreted by the DPP and Counsel for the appellants alike as a retention of a mandatory life imprisonment sentence for those who were not given the death penalty for murder. The Parliament also enacted the Parole Act[87] to, *inter alia*, establish a system of parole for convicted murderers. For convenience, in this judgment, I shall lump together the new Parole Act and the amendment to section 106(1) and refer to them together as "the recent enactments".

[132] For the reasons expressed in the main judgment, I have no difficulty whatsoever with the interpretation that has been placed on the plain words of the new section 106(1)(b) of the Criminal Code (Amendment) Act, 2017. I agree that judges have been accorded by that provision the discretion to impose on a murderer, in lieu of death, such term of years, up to life, as the court considers appropriate. I also agree that, for the reasons expressed in the main Opinion, the Parole Act can be read in a manner that places it in conformity with the Constitution. This opinion addresses the single question of the constitutionality of mandatory life sentences. The question deserves an answer because the Court of Appeal pronounced upon it. I believe a comment on that court's findings is necessary especially as, in their submissions to us, both sides assumed that section 106(1)(b) should be read as prescribing a mandatory life sentence.

[87] The Parole Act 2017, No 25 of 2017.

Is a mandatory penalty of life imprisonment consistent with the Constitution?

[133] This Court has previously expressed its serious reservations with mandatory or mandatory minimum sentences. In *Zuniga and others v Attorney General of Belize*[88], we observed that courts always examined such penalties with "a wary eye". We stated that:

> "If by objective standards the mandatory penalty is grossly disproportionate in reasonable hypothetical circumstances, it opens itself to being held inhumane and degrading because it compels the imposition of a harsh sentence even as it deprives the court of an opportunity to exercise the quintessentially judicial function of tailoring the punishment to fit the crime."

[134] The source of the difficulty with mandatory life sentences for murder much resembles that which impelled the Eastern Caribbean Supreme Court to strike down the automatic death penalty.[89] In the same way that mandatory death penalties were held to be inhumane notwithstanding the existence of a Mercy Committee that reviewed such sentences and was obliged to act with due process, the constitutional validity of mandatory life sentences should not, in my opinion, hinge on the existence or otherwise of a valid parole system.

[135] In my opinion, the separation of powers principle is implicated whenever Parliament prescribes a mandatory sentence. The Legislature has every right to establish maximum penalties for legislated offences or even to set a reasonable sentencing range within which judges retain flexibility. That responsibility is consistent with the separation of powers. Within such maximum penalty or reasonable sentencing range, however, judges should be entitled to return sentences they consider to be in keeping with the nature and circumstances of the offence, the history and characteristics of the offender and such other considerations as it is legitimate for them to weigh. For Parliament to eliminate all such discretion and decide for itself what is an appropriate sentence in each and every case is problematic. The court's sentencing responsibility is reduced to 'rubber-stamping' the dictates of the Legislature in a realm the

[88] ibid.
[89] See *Spence v R*, VC 2001 CA 1 (Carilaw) affirmed in *Reyes v. R* [2002] UKPC 11, [2002] 2 AC 235.

Constitution reserves for the judicial branch. This impairs the judicial process and compromises judicial legitimacy and independence.

[136] A line of Caribbean cases beginning with *Hinds v The Queen*[90] and including *Greene Browne v The Queen*[91], *Director of Public Prosecutions v Mollison*[92] and *BCB Holdings Limited v AG*[93], support the proposition that the separation of powers is such a foundational feature of the Constitution that legislative or executive action which violates the principle may be declared void by the court, as it was in each of these cases.

[137] I disagree with the view that the encroachment on the judicial function by a prescription of a mandatory life sentence would have been sufficiently counterbalanced by the possibility of parole. A commendable Parole Act ameliorates but does not fully compensate for the vice that renders the prescription of mandatory life imprisonment penalties to be unconstitutional. Every person sentenced under such a regime who, but for the legislature's direction, might have received a judicially determined sentence that was for a duration that was substantially less than life imprisonment is, in a sense, short-changed. The outer extremity of his possible incarceration would not be determined and pronounced by a court upon the conclusion of his trial, as should ideally be the case after every criminal trial.

[138] Since the decision in *R v Spence*[94], some courts throughout the region, have enjoyed the discretion to impose such sentence for murder as they consider appropriate. On many occasions, judges have handed down life sentences.[95] But on other occasions they have imposed a term of years. Such has been the case, for example, in *DPP v Spencer*[96] where a term of 18 years was imposed; *R v Gilbert*[97] where 18 years was

[90] [1977] AC 195, 212.
[91] (2000) 1 AC 45.
[92] (2003) 62 WIR 268.
[93] [2014] 2 LRC 81 at [40] – [53].
[94] VC 2001 CA 1 (Carilaw).
[95] *See* for example, *R v Patrick Reyes*, Belize, 25th October 2002; *R v Sutherland* JM 2004 CA 34 (Carilaw); *Moise v R*, St Lucia Cr App 8 of 2003, 15th July 2005*; Isaie v. R*, LC 2008 CA 4 (Carilaw)*; Wilson v R*, St. Vincent and the Grenadines Cr App 30 of 2004, 28th November 2005; *Duporte v DPP*, KN 2009 CA 1 (Carilaw); *Roberts v R*, VC 2009 CA 3 (Carilaw).
[96] KN 2009 HC 7 (Carilaw).
[97] GD 2007 HC 1 (Carilaw).

also imposed; *R v Butler*[98] where a term of 45 years was imposed; *Potter v R*[99] where the trial judge sentenced the prisoner to a term of 20 years but the conviction was set aside on appeal; *Yearwood v R*[100] where the Court of Appeal imposed a sentence of 20 years; and *R v Stuart and Lewis*[101] where the two accused were sentenced respectively to 30 and 20 years in prison. This is a mere sampling and by no means an exhaustive list of such instances.

[139] Judges can and should be trusted to give fit sentences. They are best placed and experienced at apportioning the degree of responsibility of each particular offender. As the list of cases in the previous paragraph shows, judges may consider a life sentence appropriate for some cases, but they should not be constrained to hand down such a harsh sentence when it can be said at the outset, with certainty, that the penalty will be seriously disproportionate in other cases. As was stated in the Canadian case *of R v Smith (Edward Dewey)*[102], it is that certainty, and not just the potential, that causes such a legislated penalty to be inhumane and, in my view, a violation of the separation of powers.

[140] The significance of maintaining judicial discretion to award, as opposed to mandating, life sentences is particularly apparent when the offender is very young. The case of August provides the perfect example. August was 24 years of age at the time he was sentenced. His crime was an awful one but, after factoring all the circumstances and his antecedents, the Court of Appeal, in the exercise of their discretion, saw it fit to sentence him, not to life but to a term of 30 years. If no part of that sentence was remitted by the prison authorities or reduced by the Governor-General,[103] August could have confidently expected that, by age 54, at the very latest, he would have served his sentence, repaid his debt to society and been done with the penal system, at least for this offence. He could then get on with his life.

[98] BS 2016 SC 161 (Carilaw).
[99] AG 2004 CA 7 (Carilaw).
[100] VC 2003 CA 14 (Carilaw).
[101] BS 2010 SC 80 (Carilaw).
[102] (1987) 1 SCR 1045.
[103] See section 52 of the Constitution.

[141] If the court had been compelled to sentence him to a life term, under the recent enactments, the trial judge would then have had to prescribe a minimum period of incarceration. Given the Court of Appeal's views, it is inconceivable that any such minimum period could have been set at greater than 30 years. Assuming, then, a 30-year minimum period (which, in all the circumstances, would have been quite high), the duration of his incarceration beyond age 54 would be indeterminate. His fate beyond that age would be in the hands of the Parole Board. It is true that decisions of the Parole Board must be made in keeping with defined criteria and are subject to judicial review. That does provide some comfort. But even if he were released on parole immediately after the expiry of his hypothetical minimum 30-year period, for the remainder of his life his autonomy would be compromised in significant ways.

[142] He would always remain at risk of being re-incarcerated without charge or trial at any time the Parole Board thought that he had become a relevant danger to the public. Even if he never posed any such danger, up until his death he may be required to fulfil the conditions of section 7 of the Parole Act. These include reporting to his parole officer as and when so required[104]; not residing at an address that is not approved by the parole officer[105]; not engaging in any employment or occupation that is not approved by the parole officer[106]; not associating with any specified person or persons of a specified class[107]; giving reasonable notice of any intention to move from his address and, if he does move to another address, within forty-eight hours after his arrival at the new address, notifying his parole officer of his arrival, his new location and the nature and place of his employment (if any)[108].

[143] Such intrusions into the daily grind of life could not be objectionable if a court had considered at the outset that his crime and his own peculiar characteristics merited imprisonment for life (with all the attendant consequences that follow possible release on parole) and he had been so sentenced by a judge. In such instances, the unwelcome burdens with which those who are on parole must abide would then be considered an

[104] See section 7(b) of the Parole Act.
[105] See section 7(d) of the Parole Act.
[106] See section 7(e) of the Parole Act.
[107] See section 7(f) of the Parole Act.
[108] See section 7(c) of the Parole Act.

acceptable alternative to the four walls of a prison cell. It is a different matter when we believe on reasonable grounds – and *we actually know* in August's case - that a court, permitted to exercise the discretion that is an inherent feature of judicial power, would have considered at the outset that, for his offence, he should have been out of prison and free from any further penal consequence at age 54, at the latest. In effect, between age 54 and the time of his death August would have effectively been made to serve additional unwelcome treatment imposed not by any court but by the Legislature.

[144] Murder is a very serious offence. Society at large and the relatives of the deceased are entitled to expect that the murderer will serve a stiff sentence befitting the seriousness of the crime and the blameworthiness of the perpetrator. Civilisation has, however, long progressed beyond a brand of justice that is more in keeping with Hammurabi's Legal Code. It plainly does not follow that, because in every crime of murder human life is lost, the sanction to be pronounced by the court on the offender after trial must always be the exact same. The arbitrariness of a mandatory life sentence for murder is palpably apparent when one appreciates that there are some cases of manslaughter that are more atrocious than some cases of murder. Equally, there are persons who may have been convicted only of intentional wounding but whose bad character and antecedents unequivocally suggest that they are a far greater menace to society than even some persons convicted of murder. Modern penology does not conflate the consequence to the victim with the culpability of the offender. While it should be open to a judge to pass a life sentence for non-capital murder on a deserving offender, I believe the Court of Appeal was right to find that the mandatory life sentence should be abjured.

[145] For the above reasons, even if counsel were correct in their interpretation of section 106(1)(b), I would have held that the mandatory penalty of life imprisonment was inconsistent with the Constitution and that judges should have a discretion and not an obligation to impose a sentence of life imprisonment for non-capital murder.

JUDGMENT OF THE HONOURABLE MR. JUSTICE WIT, JCCJ

[146] Gregory August was found guilty of murder and convicted on 21 November 2012. The victim ("the deceased") was a fragile, 73-year-old man who was visually impaired in one eye and differently-abled physically. This Court's majority, agreeing with the Court of Appeal, has concluded that this conviction is safe and should stand. I beg to differ and regretfully dissent with respect to Parts II and order (a)(i) in paragraph [127] of Part IV of their judgment dealing with August's conviction but concur on Part I (except, of course, in relation to the majority's conclusion on the safety of August's conviction), Part III (generally and with respect to Gabb) and the orders and declarations made in paragraph [127](a)(ii), (b) and (c) in Part IV.

The Evidence

[147] The evidence in this case is set out in the judgment of the majority. It rests mainly on five pillars: (1) Early in the evening of the day of the murder, 23 May 2009, August was in the yard where the deceased and members of his family were living. There were two altercations between August, who was wearing a white t-shirt and Nike tennis shoes, and two of the younger people present in that yard (it is not clear if the deceased was present at that point or even if he and August knew each other). During those altercations, August slapped two persons in the face, indicating the first time that he was "the boss" and the second time, while he was leaving the premises with a friend, that he would be back and they would see what was going to happen: the behavioural evidence. (2) Not long after August and his friend had left on their bikes, August and another man (probably the same friend, but this is not clear) were seen from a distance by the neighbour of the deceased, Mr Garbutt, who recognized August, while they were riding their bikes and moving in the direction of the back of Garbutt's land, from where the shack where the deceased was living could be reached. Some 45 minutes later, Mr Garbutt saw both men on their bikes returning from the back of his land, August now carrying a white cloth in his hand: the identification evidence. (3) Around the same time, the deceased was found in his shack, unable to speak, bleeding and suffering from multiple stab wounds. He was brought to the hospital but succumbed to his injuries. The autopsy revealed that he was stabbed nine times with a knife: the cause of death evidence. (4) The next day, a footprint was found near the shack. This

print was such that it may have been made by one of August's tennis shoes: the footprint evidence. (5) In August's home a white t-shirt was found which August acknowledged to be his. That t-shirt had blood stains and on one of August's tennis shoes, a drop of blood was found. The blood found on these objects was tested: both were blood group type O; so was the blood taken from the deceased: the blood evidence.

[148] The first three pillars of the evidence, that is (1) the violent behaviour of August earlier that evening followed by his ominous threat that he and his friend would return, (2) the identification evidence of Garbutt, and (3) the cause of death evidence, although sufficient for establishing a reasonable suspicion, were, even taken at their highest, certainly not enough to carry the conviction of August. Clearly, more was needed to bridge the gap and to prove August's involvement in this horrendous crime, and this "more" was provided by the fourth and fifth evidential pillar, the technical evidence produced by the police: the footprint found not far from the deceased's shack said to be left by August, the drop of blood on the tongue of one of August's shoes and the white shirt acknowledged by August to be his which was bloodstained (but, according to him, not when it was seized by the police).

[149] A thorough analysis of this evidence reveals grave infirmities, in my opinion. Some of those had already been identified by the trial judge, although perhaps not in the most nuanced manner possible. As far as the behavioural evidence is concerned, the prosecution argued that it showed that August behaved as a "bully" and that he had a propensity for violence. The majority seems to share this conclusion but has stopped short of stating that this evidence supplied a motive for the subsequent murder. The trial judge went to the other extreme and told the jury to ignore this evidence altogether. It is clear to me that one cannot conclude that August's behaviour provides a motive for killing the old man who, according to the evidence, was not even involved in the altercations that evening. Bullying and threatening behaviour by a young man towards other young men does not explain the slaughtering of an old, defenceless man. The identification evidence, I suppose, can stand; even though this part of the

evidence, as the Court of Appeal remarked, also "did have its weaknesses." But even accepting both the behavioural and the identification evidence of Mr Garbutt, they do not, without more, lead to the conclusion that August committed the murder. Moreover, the evidence shows that in the back of Garbutt's land, and in the vicinity of the deceased's shack, there were countless walkways used by hunters and one other man, 'Papa Lash', residing. The technical evidence, therefore, was necessary to prove the case against August; it is there where the more serious weaknesses are.

[150] The fact is, as the majority acknowledges, that the cast mould which was used to lift the footprint was of such a bad quality that it could not conclusively be established that the print was in fact made by August's shoe. It could only confirm that the foot print was made by a tennis shoe and, based on the dimensions and pattern, "may" have been made by August's tennis shoe.

[151] Another fact is that it could not be established that the blood found on August's t-shirt and on one of his tennis shoes was in fact the deceased's blood as no DNA test (not being available in Belize) was carried out. The only conclusion that could possibly be drawn was that the blood found on these objects and the deceased's blood were both of type O, which, although not without relevance, lacks the precision one would expect of technical evidence in serious criminal cases. This is especially so given the fact that type O appears to be the most common blood group in Belize.

[152] Surely, in this day and age and certainly in very serious criminal cases as this one with only scarce and circumstantial evidence, it is unacceptable to base a conviction on evidence that, although available for DNA testing, is not so tested. That Belize did not have this facility at the time, is hardly an excuse as there were, and are, plenty facilities nearby (Miami, for example) where such testing can properly, and affordably, be done.

[153] What the trial judge had not specifically identified or emphasized in his summation, although it was roughly raised by the defence, and what the majority seems to

downplay to some extent, is an even more serious issue: the mishandling and possible framing of the technical evidence by the police.

[154] The evidence shows (with respect to the shoes) or at least strongly suggests (with respect to the shirt) that August's tennis shoes and t-shirt were brought to the crime scene by the investigating officer, Everon Teck, and at some point shown and handed over by him to the crime scene technician, Robert Henry, while these objects were not properly packed or sealed. This happened in the absence of August, without any evidence or indication that proper procedures or guidelines were followed. From a law enforcement perspective, this is a mortal sin[109]. Such careless handling of technical evidence inevitably creates an enormous risk of contamination and a real possibility of tampering with that evidence. As many cases worldwide have shown, the latter possibility is not a fanciful proposition and equally so in this matter as it was Officer Teck who pointed Henry to this particular footprint and it was Teck who showed and handed him the shoes and the t-shirt at the crime scene sometime after he had been in the shack where the deceased used to live and where there was still blood present.

[155] Under those circumstances, the technical evidence garnered by the police cannot properly serve as a reliable building block for a safe conviction. This is not to say that the police officers involved acted in violation of any laws or of their oath of office. There is no evidence to suggest that. The problem is, however, that where evidence is mishandled in the way as described, the integrity of the fact-finding process and the reliability of the evidence resulting from that process are definitively and irrevocably affected. This is not a matter of the investigating officer's credibility, it is a matter of forensic propriety.

[109] See, for example, Federal Judicial Centre and National Research Council of the National Academies, *Reference Manual on Scientific Evidence* (3rd edn, The National Academies Press 2011) pp 156-159. At p 157, it is noted that: "Mislabelling and *mishandling can happen with any kind of physical evidence and are of great concern in all fields of forensic science*. Checkpoints should be established to detect mislabelling and mishandling along the line of evidence flow. *Investigative agencies should have guidelines for evidence collection* and labelling so that a chain of custody is maintained. Similarly, *there should be guidelines, produced with input from the laboratory, for handling biological evidence in the field*. *Professional guidelines and recommendations require documented procedures to ensure sample integrity…".* (emphasis added).

[156] Given the multitude of weaknesses in the evidence, this particular flaw, in my view, is the one that breaks the camel's back and puts the evidential edifice in danger of collapse. That does not necessarily mean that we should consider August to be an innocent man; it simply means that the safety of his conviction, built as it is on this kind of evidence, is in serious doubt and that therefore, as the law requires us to do, the conviction should be quashed.

The Possibility of a Retrial

[157] I understand that this might be an unsatisfactory result, although, the quashing of an unsafe conviction is not the same as an acquittal. It does not necessarily lead to a release of the accused. There is, in principle, the possibility of ordering a retrial where mistakes, once made, can be avoided. However, a retrial is not always a viable option. Unfortunately (from society's perspective at least), this is such a case. Because of the improper handling of the technical evidence, there is no magical way to restore its reliability whereas, given the dearth of the totality of the evidence, that technical evidence is crucial for a conviction. Seeking the resurrection of August's conviction through a retrial would therefore be nothing more than chasing a *fata morgana*, embarking on an exercise in futility, and entering a dead-end road.

[158] Moreover, there is the problem of delay. Much time has passed since the murder was committed, almost nine years by now. After such a long time it will be difficult if not impossible for the witnesses properly to recollect the relevant facts. This is, of course, not a problem particular to this case or even to Belize. The cancer of delay has spread over the whole of the Commonwealth Caribbean (and beyond). In some countries, the situation is even much worse than in Belize, and it seriously affects the efficacy and integrity of the criminal justice system. In times not even so long past, criminal trials were often held within six months up to a year after the crimes were committed and, in many cases, there would be a decision on appeal within a year from the verdict. It was in those happy times that in England the possibility of a retrial was created and under those circumstances it clearly made sense to have one. But the situation now is very different and, in many cases where there should be a retrial, the time factor basically prohibits appeal courts to order one.

[159] There would probably or perhaps be less appeals if police investigations were done in a more thorough and profound manner. Having seen quite a lot of criminal cases coming from the Commonwealth Caribbean, it strikes me how often these investigations seem to be marginal and minimalistic, at least so far as is reflected in the records of the trial courts. They regularly leave many important questions unanswered. It may be that my civil law and "inquisitorial" background plays a role in my rather harsh assessment of this aspect of the criminal justice system, but I do consider this situation very unsatisfactory, especially given the sometimes very harsh consequences of a conviction. It goes without saying that these two problems, delay and unsatisfactory police investigations, for which it is not my intention to blame anyone at this point, do have a detrimental effect on the quality of law enforcement and, hence, on the wellbeing of the people.

Procedural Defects in the Trial

[160] In my analysis, I have not yet dealt with the "good character" defence, nor have I gone into the issue of the correctness, completeness or the fairness of the trial judge's directions. This is a deliberate course.

Good Character Direction

[161] As far as the "good character" defence is concerned, it is unnecessary for me to deal with it as I have already on substantive and genuine grounds concluded that the conviction of August is unsafe. More fundamentally, however, I am of the view that this defence is quite artificial and, frankly speaking, grossly overrated. To start with, it is a misnomer. The fact that a defendant has a clean criminal record does not say much, if anything at all, about his "character" (although this might be different with a "bad" criminal record). Surely, a clean criminal record alone does not mean that the defendant is credible. At best, it might be a minor indication in combination with more relevant and weighty factors. But that is as far as it goes.

[162] A clean record may be a somewhat stronger indication that the defendant does not *seem* to have a propensity to commit crimes or certain crimes but, depending on other more important aspects of the case, it could just mean that he was smart enough to stay

out the hands of the police. I would assume that it is only in a very rare and very close case, that the defendant's clean record would make any impact on the final decision of guilt or innocence. It is with great admiration that I have wondered how such a monumental edifice of jurisprudence could have been erected on such thin air. But then, I think, I understand. In my view, the defence is mainly an artificial device to reach the genuine conclusion that a conviction is not safe without having to create the impression that the court is trespassing into the sacred domain, the jurisdiction, of the jury. In other words, it is a fiction, a façade for appellate courts to hide behind. Hiding, however, is in my view undesirable and unnecessary. Although it is sometimes said that the voice of the people is the voice of God ("*Vox populi, vox Dei*"), it does not mean that an appeal court cannot overrule the jury's guilty verdict if it thinks the jury is clearly wrong (as they sometimes are). I will amplify this point later.

The trial judge's summation

[163] This brings me to the second point: the assessment of the trial judge's directions to the jury. The majority in its analysis of the case has focused, as Counsel had asked the Court to do, on the fact that the trial judge did not expressly address the allegation made by the defence that the police had fabricated the evidence. Nor did he highlight the "troubling" manner in which the tennis shoes and t-shirt of August had been handled by the police, which gave rise to that allegation. Counsel argued that because of these flaws, the trial judge's summation had not been fair and balanced and that, *ergo*, the conviction was unsafe. While the majority agrees that the trial judge did not expressly address those points, they state to be "hard-pressed to find any fault with the trial judge's summation on this issue" because the judge gave general directions on how the jury should treat inconsistencies in the prosecution's evidence and, more importantly, practically and bluntly directed the jury to ignore both the footprint evidence (that the print "may" have been made by August's shoe is not good enough: "You can't work with maybe") and the blood evidence ("it is not beyond reasonable doubt" that the blood found on the t-shirt and the tennis shoe "is that of the deceased"). It is on this premise that the majority concludes that the safety of the conviction and the fairness of the trial were not affected.

[164] It may be obvious that I do not agree with this reasoning. There are practical but also fundamental reasons for this disagreement. From a practical perspective, the trial judge may have been too robust in his directions to the jury. Clearly, the jury did not follow him and I think I understand why. One possible thought of the jury could have been that while it was unclear whether the footprint was made by August's shoe, there were some parts of the mould which matched the shoe perfectly. This, coupled with the positive fact that August was moving in the direction of the backside of the yard where the deceased was residing after the earlier altercation and the threat which followed, could be proof of guilt. The jury could have also thought that although it has not been proven that the blood on August's shoe and shirt was that of the deceased, there was blood on those objects which he could not explain. Further, it was blood which matched the blood group of the deceased. In the jury's mind, given the scarcity of the evidence, this would have provided a piece of the puzzle. Although, it was not conclusively proved, it did not exclude the possibility that the blood on August's t-shirt and shoe was the blood of the deceased. Taking everything together, it is quite possible that the jury thought that there cannot be that many coincidences and felt pretty sure that August was guilty.

[165] If it can reasonably be assumed, and I think it can, that the jury may have reasoned in this way, it becomes clear that the omission of the trial judge to expressly address the allegation of evidence fabrication and the facts relevant to that allegation cannot be deemed to be neutralized by the judge's other directions that were perhaps overly favourable to the defendant and certainly not by his general remarks on how to deal with inconsistencies. To reach the conclusion that they did, the jury must have assumed that the evidence was properly handled. Dealing with the allegation of fabrication and contamination of the evidence was therefore relevant for a proper assessment of the totality of the evidence. The thrust of this allegation and the facts on which it is founded should have been fully explained to the jury. Without having to address their minds to these issues, the jury may easily have been led astray (as I think they were). I would, however, go further than that and this brings me to the following, more fundamental, remarks.

The role of a review court

[166] The question could be asked: what should have been the appeal court's (or our) approach if the trial judge had given the omitted directions and the jury had ignored those directions or had nevertheless, despite these directions, convicted August? For the reasons I have given, it will be clear that this would and should not make a difference: the conviction would still be unsafe. Surely, it is important for an appellate court to look at possible misdirections by the trial judge, material irregularities or other procedural errors when it must assess the safety of a conviction, but its responsibilities do not stop there. This has been confirmed in English case law since *R v Cooper*[110], where the idea of the "lurking doubt" was introduced. The problem with that case law, however, is that it has been very unsteady and the English appeal courts, including the Privy Council, have since long been blowing hot and cold on the subject. Nevertheless, the majority of this Court seems inclined to adhere to that line of overly cautious and orthodox jurisprudence which echoes the sentiments of the House of Lords in *R v Pendleton*[111] and the Court of Appeal of England and Wales in some of its decisions cited by the majority. I do not think that we should follow this route and I will, as briefly as I can, explain why.

[167] Section 30 of the Court of Appeal Act of Belize states what an appellate court has to do in an appeal against conviction: if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, it should allow the appeal. *If it thinks*. The shorthand version of section 30 is this: the judges of an appellate court must quash the conviction if they genuinely think that the conviction is not safe or has been reached in serious violation of the law. If the members of the court are of this view, there is no need for them to, and they should not, defer to or - my words - hide behind the jury.

[110] (1969) 53 Cr App Rep 82.
[111] [2001] UKHL 66.

[168] The safety issue goes to the truth of the matter, the second (due process) to the fairness of the trial, which is a requirement of the law. Usually, unfairness in the procedure will negatively affect the safety of the conviction. But this is not always so. There will be cases where the conviction is safe but the procedure, leading to that conviction, unfair. As the courts need to uphold the rule of law, including the fair and proper administration of justice, the conviction in such a case also, may need to be quashed[112].

[169] Appellate courts in this system are required to be pro-active in the performance of their duty to scrutinize convictions (even if these are based on a guilty verdict of the jury) and to prevent substantial miscarriages of justice. For this reason, the Legislature has given them broad powers, which they can and should use if and when they think it necessary or expedient in the interests of justice (sections 33 and 20 of the Court of Appeal Act of Belize[113]). Admittedly, they are not courts of (re)trial but courts of review. But that should not keep them from actively doing their job of pursuing a thorough and substantive review of the conviction and all the issues related thereto[114]. That is why they are not only *allowed* to receive further evidence if that is offered to them, but they are also *empowered* to order the production of documents they consider relevant and necessary for the determination of the case. That is why they can order witnesses to be called and be examined before the court, whether or not these were called at the trial. That is why they can assign a special commissioner to do an inquiry and file a report with his or her findings or appoint any person with special expert knowledge to act as an assessor in an advisory capacity where it appears to them that such knowledge is required for the proper determination of the case. For example, if the only relevant flaw in August's case had been the omission of the DNA-test, the Court of Appeal could have solved that issue by ordering that test to be done in a reliable institute outside Belize before finalizing its review of the conviction, provided

[112] Catherine Penhallurick, 'The Proviso in Criminal Appeals' (2003) 27 Melbourne University Law Review, p 809.
[113] CAP 90.
[114] This obligation also flows from Article 14(5) of the International Covenant on Civil and Political Rights (ICCPR): "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law" which, according to General Comment 32 of the U.N. Human Rights Committee, "imposes on the State party *a duty to review substantively,* both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case." (emphasis added) (citation omitted). Belize is such a State party.

of course that the blood samples were still available, as they should be, for such testing. Unfortunately, it was not the only substantive flaw.

[170] The Court of Appeal Act of Belize is clear and unambiguous. As it is modelled after the relevant legislation in England, it is also clear what the Legislature intended when that legislation was enacted. The idea was that the appellate court should not be overly cautious, restrictive or passive in its review. In fact, given the text of the legislation, the judges were apparently expected to go to great lengths in their task of assessing possible substantive miscarriages of justice. And yet, the English courts, and following in their footsteps the courts in the Commonwealth Caribbean, have never fully embraced this idea. Instead, they appear to have restricted themselves in this task, unnecessarily and against the will of the Legislature, invoking the constitutional position and role of the jury as the sole finders of fact whose domain should not be intruded into and whose role should not be usurped. The English courts have further referred to the more practical, but also more limited, reason of the major "advantage given to the jury of seeing and hearing the witness, and observing the body language"[115], which must be respected and taken into account by an appellate court when reviewing a guilty verdict[116]. Some academics, however, have dared to express the view that the real reason for the appellate judges' reluctance to conduct a broad review has always been and still is their fear of being flooded with time-consuming and in most cases probably unmeritorious appeals[117].

[171] All of this should not prevent this Court from adopting a proper approach to our reviewing task. In Belize, like in most states in the Commonwealth Caribbean, juries have not been enshrined in the Constitution and have not attained constitutional status.

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[115] Justice Committee, Criminal Cases Review Commission, 25 March 2015, HC 850, supplementary written evidence of Lord Judge (CCR 57) < http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/criminal-cases-review-commission/written/18446.html>.

[116] It must be realised, though, that the credibility and cogency of evidence provided by witnesses depends only to a limited degree on their demeanour as seen by trial judge and jury. As Lord Bingham stated in his book, *The Business of Judging*, at p. 11, "To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm."

[117] Professor Michael Zander QC in his supplementary evidence to the House of Commons Justice Committee, wrote: "In declining – for over a hundred years – to play the role assigned to it by statute, the Court of Appeal has been in serious dereliction of its principal and, indeed, constitutional responsibility... I believe that the real reason for the Court's restrictive approach is the understandable fear that if it showed itself willing to second guess the jury's verdict, it would be deluged with too many appeals requiring reassessment of the evidence." Michael Zander, 'The Criminal Cases Review Commission, the Court of Appeal and Jury Decisions – A Better Way Forward' (2015) 174(4) Criminal Law & Justice Weekly, 74 < https://www.criminallawandjustice.co.uk/files/issues/CLJW_179_04.pdf >.

They have no constitutional role to play. A jury trial is just one of the acceptable modes of trial that exists, nothing more, nothing less. Belize recently even abolished jury trials for the most serious criminal cases. Be that as it may, even the great Lord Devlin, one of the champions of the jury system, saw nothing wrong in a broad and an actively conducted review by the Court of Appeal and he saw no intrusion into or usurpation of the jury's function. In his view, no conviction could "stand that is not based on the verdict of a jury given after a full and proper trial. No matter that the guilt of the accused cries out to the heavens through the voices of all the judges of England."[118] He called this "the first and traditional protection that the law gives to an accused."[119] But he also identified a "second and more recent protection", which was "that even such a verdict will not be enough if on the evidence the appellate judges find the lurking doubt which they consider that the jury had missed."[120]

[172] In an article titled '*Beyond "reasonable doubt",* Jon O. Newman, Chief Judge of the United States Court of Appeals for the Second Circuit, wrote approvingly of the broad approach adopted by the English Court of Appeal in *Cooper,* comparing it with the approach of American courts with "their unbounded enthusiasm for the jury". He stated:

> "We say that we do not wish to invade the 'province of the jury.' But that 'province' is not a fortress that can never be entered, nor is it a black box into which we dare not look. It is simply a group of twelve people doing their level best. Generally, we should accept their verdict. But our task as judges includes the enforcement of constitutional standards. And a vital component of those standards is the requirement of proof beyond a reasonable doubt."[121]

[173] However, after *Cooper* the appellate courts regularly fell back into their old reluctance and restricting habits so that lurking doubts defences have only rarely been successful[122]. Also, the fact that the judges were supposed to ask themselves "a subjective question" whether there was a "lurking" doubt in their minds and that they

[118] Patrick Devlin, *The Judge* (Oxford University Press 1981) p 157.
[119] Ibid.
[120] Ibid .
[121] Jon O. Newman, 'Beyond "reasonable doubt"' (1993) 68 New York University Law Review, 979 at p 1002 (citations omitted).
[122] Stephanie Roberts, 'The Royal Commission on Criminal Justice and factual innocence: remedying wrongful convictions in the Court of Appeal' (2004) 1(2) JUSTICE Journal 86; L.H. Leigh, 'Lurking doubts and the safety of convictions' (2006) Crim LR 809-816.

were to decide the appeal on the basis of a "general feel of the case" must have sounded, as it still does, pretty horrifying to judges who prefer reason and objectivity above feelings and subjectivity, at least when justifying a judicial decision. So, other formulas were suggested and found: a serious doubt[123], real doubts[124], a significant sense of unease about the correctness of the verdict based upon a reasoned analysis of the evidence[125], or a doubt about the conviction either because of facts that emerged subsequently or because of a different analysis of the evidence given at trial[126].

[174] In *R v Criminal Cases Review Commission ex parte Pearson*[127], Lord Bingham seemed to have embraced the broad and liberal approach of review, when he sought to define the concept of an unsafe conviction. There were obvious cases, he wrote, for example, "…where a conviction is shown to be vitiated by serious unfairness in the conduct of the trial or significant misdirection"[128]. Equally, there were cases:

> "…in which unsafety is much less obvious: cases in which the court, although by no means persuaded of an appellant's innocence, is subject to some lurking doubt or uneasiness whether an injustice has been done … If, on consideration of all the facts and circumstances of the case before it, the court entertains *real doubts* whether the appellant was guilty of the offence of which he has been convicted, the court will consider the conviction unsafe. In these less obvious cases the ultimate decision of the Court of Appeal will very much depend on *its assessment* of all the facts and circumstances."[129]

[175] These are wise words. However, only one year later, in *Pendleton*, Lord Bingham started to put the brakes on his liberal approach. In that case, he stated:

> "Trial by jury does not mean trial by jury in the first instance and trial by judges of the Court of Appeal in the second. The Court of Appeal is entrusted with a power of review to guard against the possibility of injustice but it is a power to be exercised with caution, mindful that the Court of Appeal is not privy to the jury's deliberations and must not intrude into territory which properly belongs to the jury."[130]

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[123] The Royal Commission on Criminal Justice, *Report of the Royal Commission on Criminal Justice* (Runciman Report) (Cm2263 1993), pp 171-2 at [46].
[124] *R v Criminal Cases Review Commission ex parte Pearson* [1999] 3 All ER 498.
[125] *R v Pollock* [2004] NICA 34.
[126] *Wilson (Dennis Francis)* [2006] NICA 1.
[127] [1999] 3 All ER 498.
[128] Ibid, 503.
[129] Ibid (emphasis added).
[130] [2001] UKHL 66 at [17].

[176] This appears to be a rash retreat, although it must be noted that the *Pendleton* remarks were made in the context of how the Court of Appeal should deal with fresh evidence not heard by the jury.

[177] Then, in 2012, the English Court of Appeal completed the retreat in the case of *R v Pope*[131] where Lord Judge LCJ made a statement which takes the standard of review back to square one. He stated:

> "As a matter of principle, in the administration of justice when there is trial by jury, the constitutional primacy and public responsibility for the verdict rests not with the judge, nor indeed with this court, but with the jury. If therefore there is a case to answer and, after proper directions, the jury has convicted, it is not open to the court to set aside the verdict on the basis of some collective, subjective judicial hunch that the conviction is or may be unsafe. Where it arises for consideration at all, the application of the 'lurking doubt' concept requires reasoned analysis of the evidence or the trial process, or both, which leads to the *inexorable* conclusion that the conviction is unsafe. It can therefore only be in the *most exceptional* circumstances that a conviction will be quashed on this ground alone, and *even more exceptional* if the attention of the court is confined to a re-examination of the material before the jury."[132]

A snow-ball's chance in hell

[178] It will not surprise anyone that this decision has received fierce criticism.[133] A limited standard of review significantly decreases the chance that serious miscarriages of justice will be found. In the United Kingdom and other developed countries, mechanisms may exist to deal with these miscarriages[134]. But in Belize, and other Commonwealth Caribbean countries, that is not the case. The appeal process is the

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[131] [2012] EWCA Crim 2241 (emphasis added).
[132] Ibid at [14] (emphasis added).
[133] Dr Dennis Eady, who, referring to *Pope*, wrote: "So consideration of 'lurking doubt' cases would be an exception built upon an exception based on an inexorable conclusion – perhaps more accurately termed *a snowball's chance in hell*." (emphasis added) (http://www.thejusticegap.com/2016/03/malice-in-wonderland/). Laurie Elks, a former commissioner on the Criminal Cases Review Commission, also commented on the *Pope* decision and wrote: "It is the adjectives: inexorable conclusion; most exceptional circumstances which express the true intention. The process of reasoned analyses is the correct one but the bar has been set impossibly high." <http://www.thejusticegap.com/2015/04/is-the-court-of-appeal-in-dereliction-of-its-duty-over-its-reluctance-to-review-jury-decisions/>.
See further House of Commons Justice Committee, Twelfth Report of Session 2014-15. In his evidence before the Committee Lord Judge pointed out that "if having examined the evidence, the court is left in doubt about the safety of the conviction it must and will be quashed." However, the Committee commented, "In the short time available to us at the end of the inquiry we were unfortunately unable to explore how this statement could be reconciled with the judgment in *Pope* ..." (para. 26). "We recommend that the Law Review Commission review the Court of Appeal's grounds for allowing appeals. This review should include consideration of the benefits and dangers of a statutory change to allow and encourage the Court of Appeal to quash a conviction where it has a serious doubt about the verdict, even without fresh evidence or fresh legal argument." (at [28]).
[134] The United Kingdom, for example, has Criminal Cases Review Commissions that may refer a case to the Court of Appeal or the Scottish High Court, if they consider that there is *a real possibility* that the conviction, verdict, finding or sentence would not be upheld were the reference to be made.

only way to effectively scrutinize the evidence and assess the safety of the conviction. The standard of review must therefore be as broad and liberal as possible and the appellate courts in Belize, both the Court of Appeal and this Court as the final court of appeal, have a duty to be pro-active in their handling of appeals against conviction, just as the Legislature intended. We simply cannot afford to follow the conservative and narrow approach of the English courts, lest we create or maintain injustice.

[179] Although it is true that this case concerns a heinous crime and that August does not emerge from the evidence in the trial record as an overly sympathetic young man, this does not mean that the review standard in his case should be more relaxed than in other cases. In this respect, we do well to remind ourselves of the words of Judges Pound and Cardozo of the New York Court of Appeals in their well-known dissent in *People v Gitlow*[135]:

> "Although the defendant may be the worst of men…the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected."[136]

/s/ CMD Byron

The Rt. Hon Sir Dennis Byron (President)

/s/ A. Saunders

The Hon Mr Justice A. Saunders

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ W. Anderson

The Hon Mr Justice W. Anderson

/s/ M. Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

[135] 234 NY 132 (1922).
[136] Ibid, 158.