IN THE CARIBBEAN COURT OF JUSTICE

Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal Nos. GYCR2016/001
Guyana Criminal Appeal No. 21 of 2013

BETWEEN

James Anthony Hyles **APPELLANT**

AND

The Director of Public Prosecutions **RESPONDENT**

CCJ Appeal No GYCR2016/002
Guyana Criminal Appeal No. 21 of 2013

BETWEEN

Mark Royden Williams **APPELLANT**

AND

The Director of Public Prosecutions **RESPONDENT**

[Consolidated by Order of the Court dated 19th October 2016]

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

Appearances

Mr. Clarence Anthony Nigel Hughes, Mr. Stephen Roberts and Ms. Savannah Barnwell for the Appellant James Anthony Hyles, and Mr. D. Roger Yearwood for the Appellant Mark Royden Williams

Sir Fenton Ramsahoye, SC, Mrs. Shalimar Ali-Hack and Ms. Sonia Joseph for the Respondent

JUDGMENT

of The Right Honourable Sir Dennis Byron, President, and the Honourable Justices Saunders, Wit, Hayton and Rajnauth-Lee

Delivered by the Honourable Mr Justice Wit

on the 11th day of May 2018

Introduction

[1] The peace of the village of Lusignan in Demerara, Guyana was horribly destroyed on 6 January 2008 when intruding gunmen went from house to house with high powered rifles on a shooting rampage. Eleven innocent persons, five of whom were children, were murdered in cold blood as they slept in their homes in the wee hours of the morning. We solemnly record the names of these victims in this judgment so as to ensure they will not be forgotten: Shazam Mohamed, 22 yrs; Mohandai Gurudat, 32 yrs; Seegopaul Harrylall, 10 yrs; Seegobin Harrylall, 4 yrs; Seecharran Rooplall, 52 yrs; Banrajie Ramsingh, 52 yrs ; Ramywattie Ramsingh, 11 yrs; Shalem Baksh, 52 yrs; Vanessa Thomas, 12 yrs; Clarence Thomas, 48 yrs; and Ron Thomas, 11 yrs.

[2] The Appellants, James Hyles, also referred to as Sally ('Hyles') and Mark Williams also referred to as Smallie ('Williams'), were detained by the authorities on 17 February and 15 June 2008 respectively. The Appellants were indicted on 11 counts of murder on 15 July 2013. They pleaded not guilty to the charges and a trial by jury proceeded.

[3] On 2 August 2013, the jury returned unanimous verdicts of not guilty on all 11 counts. The Director of Public Prosecutions ('DPP') appealed the acquittals under section 33B of the Court of Appeal Act[1] as amended in 2010 on the basis that there were material irregularities in the trial which, despite, on the DPP's assertion, strong and compelling evidence, resulted in the not guilty verdicts. The Court of Appeal rendered its decision on 10 March 2016 allowing the DPP's appeal and ordering a retrial in the interests of justice.

The Trial

[4] At trial, Hyles was represented by Mr. Nigel Hughes ('Mr. Hughes') and Williams by Mr. D. Roger Yearwood ('Mr. Yearwood'). Counsel for the State was Ms. Judith Gildharie in association with Ms. Teshana Lake.

[1] Cap 3:01.

[5] Before the jurors were empanelled, Mr. Hughes made an application to question jurors in a *voir dire* prior to jurors being sworn and prior to peremptory challenges, reserving the right to further question jurors after peremptory challenges were taken. Neither Mr. Yearwood nor counsel for the State objected to this application. In fact both counsel participated in the questioning. The questions centred on familiarity with and views on the Lusignan massacre and media coverage of the event, the level of confidence in the police and the ability to follow directions from the trial judge. Both State and Defence counsel exercised their right to challenge the prospective jurors and agreed in seven cases that for several reasons the prospective juror ought to be discharged. State Counsel also successfully argued for the discharge of a juror who had a clear bias against the police, despite an objection by Defence Counsel. Subsequent to the questioning and after the Appellants had used their right to peremptory challenges, twelve jurors were selected to hear the matter including Mr. Vernon Griffith ('the foreman').

The Evidence

[6] The State called a total of 16 witnesses, most of whom were family members of the deceased, along with police officers who had conducted the investigation. The main prosecution witnesses were Dwane Williams ('Dwane') and Durwin Wright ('Wright'), two members of the gang allegedly responsible for the massacre and reputedly led by a person known as 'Fine Man'. The evidence pointing to the role of the Appellants in the massacre can be summarised as follows.

[7] Dwane, in sworn testimony, stated that he knew Hyles from 2004 having resided with him and Williams from 2006. He testified that during the day on 5 January 2008, he was approached by Williams who told him that they 'have a work to go and do' and to meet him at Buxton Middlewalk that night. According to him, he arrived at Buxton at 11 p.m. and met a number of people there including Williams, Hyles and Fine Man. Artillery was distributed to the men present and they were led through a 'backdam' for approximately 20 minutes. After arriving at the dam, Fine Man told the men to each take a different house. Dwane testified that he was instructed to stay on the dam. He said he saw Williams "take a house and scale a gate" and heard gunshots a minute and half later. He said the men

returned 15 minutes later and they left for Buxton and spent the night in the 'backdam'. He recounted that Hyles and one other man left in the morning and returned five hours later with a newspaper and clothing. It was then that he learned that 11 people were murdered at Lusignan.

[8] Dwane further testified that he was arrested on 16 June 2008 and later gave police statements. He said he was informed by Assistant Superintendent of Police Reid that the charges against him relating to the Lusignan massacre were withdrawn on 15 July 2013, five years after his arrest and two weeks before the trial.

[9] Under cross examination by Mr. Yearwood, Dwane denied that his testimony was in exchange for the charges against him being dropped or that he was served with a document that stated the charges were withdrawn. He added that while he was no longer in jail or facing a charge, he was still in police custody to give evidence in a matter. Mr. Yearwood raised several discrepancies with the caution statement given by Dwane on 17 June 2008 prior to his arrest, the statement he gave on 12 July 2013, and what he said in court including the time at which he initially met with Williams and the type of weaponry the assailants were given.

[10] Following a question by the jury and follow up questioning by Mr. Hughes, Dwane also revealed that Hyles left the 'backdam' at 8:00 a.m. and it would have taken him two hours to walk from where they were camping out to the 'line top'.

[11] The other main prosecution witness, Wright, testified that he knew Williams from 2004 and Hyles from 2007. On the morning of 26 January 2008, Hyles came to his home and he noticed that he had mud on his feet. Hyles directed him to turn on the television and he saw reports of 11 murders in Lusignan. Wright proceeded to ask Hyles if he had gone to Lusignan and Hyles said "yes". Wright further testified:

> "He tell me, if I went there I would get the chance to kill some people. I ask him if he kill anybody. He said yes and start laughing. He turn and tell me "all the time black people dying, what if some coolie dead."

[12] Under cross examination, Wright revealed that he had been charged with murder in February 2008 and had been in police protective custody. He was committed to stand trial for that charge in May 2009 along with Williams and two others. He

stated that he had been kept in protective custody because he was fearful of being with the other accused and not because he was cutting a deal with the police.

[13] Part of the evidence before the jury was a caution statement, dated 15 June 2008, allegedly made and signed by Williams, which said that one late afternoon Fine Man told him, Williams, and some others that "we are going out tonight." That night Fine Man gave guns to five members of the group. Fine Man then told the group that "we going and fuck-up some people in Lusignan." The group went through the cane fields and reached Lusignan about midnight. The group members, or most of them, ran into the street and for about half an hour Williams heard gunshots. When they were done, "all a we teck the canefield and head back for Buxton where we gone and hide at different place."

[14] According to the statement, however, Williams did not belong to those who got a gun from Fine Man; he only got a "choppa." It was further stated that Williams decided to go with the group because Fine Man had told them that he would kill those of them who did not want to go and "me na want Fine Man do me nothing." Again, according to the statement, Williams did not participate in the shooting itself because Fine Man told him "stay back at the dam and watch out", which he allegedly did.

[15] At trial, Williams elected to give an unsworn statement in direct contradiction to the contents of the alleged caution statement. He denied knowledge of the Lusignan massacre and claimed that he was at his grandmother's home in Berbice at the time. It was from the dock that he denied making a statement to the police and made the allegations of police misconduct. He stated that he was apprehended by police on 15 June 2008 and was beaten, shocked and threatened by the police while in their custody. He alleged that he was forced to sign a document to stop the beating, but he was not aware of its contents nor was he told.

[16] Hyles also elected to give an unsworn statement. He stated that he was at home on the night of the incident with his family watching 'T20' cricket. He saw a news report about the Lusignan incident and woke up his aunt to tell her about it. He was picked up by the police following a raid in his village on 17 February 2008. At the station, Wright recapped the statement he gave to the police in Hyles's

presence. Hyles maintained that he was not a gang member and knew nothing about the murders. He also testified that he was told to give a statement on 19 February 2008 but refused.

[17] Under sworn testimony, Hyles' aunt, Vanessa Daniels testified that she was watching cricket with Hyles on the night in question until after midnight. When cricket concluded, they watched movies until approximately 2:30 a.m., when she fell asleep. She was awakened by Hyles and he alerted her to the reports of the massacre on television.

The Verdict and Events After

[18] As stated above, the Appellants were found not guilty of all counts on 2 August 2013. Some days after the verdict, controversy arose surrounding an alleged association between Mr. Hughes and Mr. Griffith, the foreman of the jury. It was revealed that Mr. Hughes had represented him in a civil matter, which concluded on 29 October 2008, for approximately six years. Upon learning this, the trial judge questioned the foreman in chambers and banned him from jury service for life for the failure to disclose this previous relationship.

Court of Appeal Judgment

[19] The DPP appealed the acquittal on the basis that there were material irregularities in the trial including the decisions of the trial judge to allow the questioning of jurors, to exclude photographs the prosecution sought to adduce into evidence, and a failure to conduct an investigation into an incident between a juror and a man alleged to be Hyles' father. The Court of Appeal agreeing with the DPP, allowed the appeal, set aside the verdicts of not guilty, and ordered a new trial.

[20] The Court of Appeal decided that the trial judge erred in law when he allowed prospective jurors to be questioned to determine whether they had a bias. The court held that fairness could only be achieved through random selection of the jury and not an inquiry into the minds of the jurors on their views on a particular issue. It held that there was no statutory or common law authority or discretion to justify the procedure adopted. A challenge for cause was the proper avenue to dismiss a juror if he was thought to be biased. The procedure adopted offended the principle of random selection and was highly irregular and unfair. The court

further held that while the cross-examination of the jury would be permitted in exceptional cases where there was pre-trial publicity, there was no evidence to show that the pre-trial publicity in this case was widespread and adverse to the Appellants. In the court's view, the instant case was not wholly exceptional and the trial judge ought not to have allowed it.

[21] The court also found that the relationship between Mr. Hughes and the foreman of the jury should have been disclosed. The foreman had a legal and ethical duty to disclose while Mr. Hughes, as counsel for the defence, had an ethical duty to do so. This would not have breached his duty of confidentiality. The relationship should have been investigated to decipher if the independence and impartiality of the tribunal had been compromised. The court held that the danger or likelihood or appearance of bias on the part of the foreman of the jury had tainted the fairness of the trial and it was a material irregularity.

[22] The court also found that the trial judge should have investigated the allegation by prosecuting counsel that there was a relationship between a juror and a man alleged to be Hyles' father. This inquiry would have aided in deciphering whether the juror might have been prejudiced against or favoured Hyles and whether there was a possibility of a miscarriage of justice.

[23] In addition, the court found that the trial judge erred in law when he excluded photographs sought to be adduced by the prosecution. The judge should have considered the relevance of the photos and not just whether the prejudicial effect outweighed the probative value. It was held that the photographs were a visible representation of the objects they represented, and fairness demanded that they be admitted into evidence. The court also agreed with the DPP's contention that the trial judge allowed suggestions of police impropriety to be put to the witnesses without the judge giving appropriate directions to the jury. The court held that where such allegations are made, the defence should call witnesses to support them. In the circumstances, a direction was necessary.

[24] It was further found by the court that the trial judge had failed to adequately and accurately direct the jury on the law relating to joint enterprise. In its view, the direction to the jury did not capture the essence of the subject. Additionally, the judge should have directed the jury on the law relating to the element of conduct

and the necessary mental intent. The court held that the directions of the trial judge were inadequate noting, however, that it was an excusable mistake as the directions were based on *Chan Wing-Sui v R*[2], which was overturned by the Privy Council in *R v Jogee, R v Ruddock*[3] after the conclusion of the trial.

[25] The Court of Appeal also held that the trial judge erred in his treatment of Williams' caution statement in the judge's directions to the jury. The issue of voluntariness was an issue of law for the judge to decide and the judge seemed to have left it for the jury's consideration. The jury is not tasked with that function and should only consider the probative value of a caution statement.

[26] Given these findings, the Court of Appeal concluded that some irregularities at the trial were of such a nature as to render the verdict "unsafe or unsatisfactory", that the cumulative effect of the material irregularities resulted in "there not being a fair hearing", and that a new trial should be ordered in the interests of justice.

Appeal to the CCJ

[27] The Appellants sought special leave to appeal the decision of the Court of the Appeal on 18 April 2016. In opposition, the DPP submitted that the Appellants were not permitted to seek special leave to appeal because only the DPP had an appeal as of right under section 33L of the Court of Appeal Act and a special leave application under section 8 of the Caribbean Court of Justice Act[4] ('the CCJ Act') only arose when the Appellants have an appeal as of right. In the DPP's view, the Appellants possessed no such right and were ineligible to seek special leave. This Court considered written submissions on the issue and delivered brief judgments[5] on 13th July 2016. It was held that while the DPP was correct in stating that the Court of Appeal did not give the Appellants a right to seek special leave to appeal, such a right still existed under the CCJ Act, independently of whether the applicant had an appeal as of right or had sought and had been refused leave from the Court of Appeal to appeal to this Court.

[2] [1985] AC 168.
[3] [2017] AC 387.
[4] Cap. 3:07.
[5] [2016] CCJ 15 (AJ); [2016] CCJ 16 (AJ).

[28] We also considered whether Hyles should be granted bail pending the hearing of the special leave application. We held that we would not consider the question of whether an applicant who had no appeal pending before us should be granted bail until special leave had been granted. The parties were also reminded that the normal course in such a circumstance was to apply for bail in the appropriate lower court.

The issues for determination

[29] Based on the written and oral submissions presented to us, this appeal raises both constitutional and procedural issues, which can be summarised as follows:

The constitutional issues

i. Does Section 33B of the Court of Appeal Act (section 33B) breach the Appellants' right to protection of the law under Article 144(5) of the Constitution of Guyana?
ii. Is Section 33B applicable to the Appellants?
iii. Does Section 33B offend the principle of separation of powers?

The general procedural issues

iv. What is the proper test to be applied on a prosecution appeal?
v. What is a material irregularity?

The specific procedural issues

vi. Should the trial judge have allowed the questioning of the jurors?
vii. Should the foreman and Mr. Hughes have disclosed their previous relationship and did the failure to do so affect the fairness of the proceedings?
viii. Should the trial judge have investigated the relationship between a juror and the alleged father of Hyles and should the Court of Appeal have relied on the contents of an affidavit sworn by prosecuting counsel as a ground for allowing the appeal?
ix. Should the photos have been excluded?
x. Was the jury properly directed on the caution statement?
xi. Was the jury properly directed on joint enterprise?

xii. Should the jury have been directed that allegations of police impropriety should be supported by evidence?

[30] Before assessing the merits, it will be useful to clarify the two different thrusts on which the issues in this appeal rest. In relation to the first three issues (i.e the constitutional issues), the Appellants are asking this court to decide that the law, which the Court of Appeal acted on to arrive at its decision to set aside the acquittal, was unconstitutional. On this basis, it is the Appellants' contention that the decision of the Court of Appeal must itself be set aside without regard to the merits.

[31] In relation to the remaining issues, listed as iv to xii, the Appellants ask this court to consider the merits of the decision of the Court of Appeal and conclude that there was no material irregularity sufficient to justify the decision to set aside the verdict of the jury. The Appellants' case is that the decision of the Court of Appeal to set aside the acquittals was made on the basis that the verdicts of not guilty were returned because of the listed material irregularities in the trial. But, the Appellants contend, none of the matters on which the Court of Appeal based its decision actually amounted to a material irregularity, either as a matter of fact or as a matter of effect.

Discussion

The constitutional issues

(i) Does Section 33B breach the Appellants' right to the protection of law under Article 144(5) of the Constitution?

[32] The Appellants submitted that the amendment to the Court of Appeal Act encroached upon Article 144(5) of the Constitution of Guyana which offers a protection against double jeopardy.

[33] Article 144(5) states that: "no person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, **save upon the order of a**

superior court in the course of appeal proceedings relating to the conviction or acquittal". (emphasis added)

[34] Section 33B of the Court of Appeal Act states:

(1) Notwithstanding section 32A, the Director of Public Prosecutions may appeal under this Part to the Court of Appeal:

a) against a judgement or verdict of acquittal of an accused person in proceedings by indictment in the High Court when the judgment or verdict is the result of:

i. a decision by the trial judge to uphold a submission that there is no case to answer or withdraw the case from the jury, on any ground of appeal which involves a question of law or evidence;
ii. a decision by the trial judge to uphold a submission that there is a defect in the depositions or the committal of the accused person for the trial or the indictment;
iii. a decision by the trial judge to exclude material evidence sought to be adduced by the prosecution;
iv. the trial judge's substantial misdirection of the jury in the course of the judge's summation on the law or facts or on a mixed question of law or fact; or
v. a material irregularity in the trial.

[35] It is clear from this provision that the amendment to the Court of Appeal Act was intended to give the DPP the power to appeal against a judgment or verdict of acquittal. The Appellants consider this a breach of their guaranteed right to protection of the law. The Appellants argued that the phrase in Article 144(5) "save upon the order of a superior court in the course of appeal proceedings relating to the conviction or acquittal" does not permit the amendment. They acknowledged that while the DPP always had the power to refer a matter to the Court of Appeal on a point of law, the new power to interfere with the verdict of a jury was one which removed the very right Article 144(5) sought to preserve.

[36] The Appellants attempted to distinguish the Privy Council decision of *The State v Boyce (Brad)*[6] on the basis that that appeal concerned a wrong and premature intervention by the court. In that case, the accused was charged with murder and at the trial the judge withdrew the evidence of a forensic pathologist from

[6] [2006] 2 AC 76.

consideration by the jury, after being told that he was not registered as a forensic pathologist. The judge then ruled that there was no other evidence which would provide a sufficient basis to support a verdict of murder against the accused and the case should be withdrawn from the jury. He then directed a verdict of acquittal. On appeal, the Court of Appeal held that section 65E of the Supreme Court of Judicature Act of Trinidad and Tobago, which was similar in wording to section 33B, was unconstitutional. The Privy Council disagreed and found that the principle that a person who has been finally convicted or acquitted, in proceedings which have run their course, should not be liable to be tried again for the same offence, is a fundamental principle of fairness, but not one entirely without exceptions. Further, principles that protect an accused from double jeopardy are qualified by the following phrase – 'save upon an order of a superior court made in the course of appeal proceedings relating to the conviction or acquittal', which clearly accommodates the possibility of appeals against acquittals.[7] Before us, the Appellants argued that the right of appeal permitted by the amended Court of Appeal Act was far more invasive than the law in Trinidad and Tobago as it gave the DPP the power to derogate from the finality of a decision of a jury. In the Appellants' view, that is where the encroachment lay.

[37] We cannot agree with that argument. There is no support for the argument presented by the Appellants that the amendment breaches the right to protection of the law in Article 144(5) of the Constitution. First, the very wording of Article 144(5) contemplates the possibility of an appeal against acquittal. The prospect of such an appeal is not a new occurrence. Since 1929, it was possible in Guyana (then British Guiana) for "anyone [including the prosecutor] dissatisfied with a decision of a magistrate to "appeal therefrom to the Court"[8], (the Court meaning the Full Court of the High Court and since 1980 in the case of a decision given by a magistrate in respect of an indictable offence dealt with summarily)[9]. We also note in passing that persons convicted on indictment in the High Court in Guyana have been allowed to appeal their conviction even before the country

[7] Ibid at pp 86 - 87.
[8] Section 3(1) of the Summary Jurisdiction (Appeals) Act, Chapter 3:04.
[9] Supra (n1), section 3(2).

became independent. What is surprising though, is that this possibility has existed for only 65 years.[10] [11]

[38] Second, Article 144(5) should be understood against the background of Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR), to which Guyana is a signatory. Article 14(7) states: "No one shall be *liable to be tried* or punished *again* for an offence for which he has already been *finally* convicted or *acquitted* in accordance with the law and penal procedure of each country." (emphasis added). This provision embodies the principle of *ne bis in idem* or, as it known in the common law, the rule against double jeopardy. However, this is not an absolute rule. It mainly protects a person who has been acquitted at first instance and whose acquittal, after having been affirmed by an appellate court, has become final in accordance with the law and penal procedure of the country where he or she was tried.

[39] The Appellants in this case obviously do not fall into this category. Although they were acquitted in the High Court, they were not finally acquitted as the DPP appealed that decision in accordance with the relevant sections of the Court of Appeal Act. Article 14(7) of the ICCPR and consequently Article 144(5) of the Constitution should therefore be read and understood as not covering the double jeopardy prohibition in such a case. This is also the undisputed position in civil law jurisdictions where there is an "inquisitorial" system. It has also been supported, though ultimately unsuccessful, in the United States, a strongly adversarial criminal justice system. In a dissenting opinion in *Kepner v U.S.* (1904 195 US 100), Justice Holmes of the United States Supreme Court pointed out that the rule against double jeopardy did not prohibit a retrial when the jury failed to agree on a verdict and did not see why this should be different in a case where the accused was acquitted and the prosecutor had sought to appeal that decision in accordance with the law. For this reason, Justice Holmes preferred the 'continuing jeopardy' rationale, stating: "The jeopardy is one continuing jeopardy from its beginning to the end of the cause." (at p 135). In other words, the

[10] Since 1 January 1952 when the Criminal Appeal Ordinance 1950 came into force.
[11] Interestingly, as early as 1923 the Secretary of State for the Colonies, Lord Devonshire, approved of a local Court of Criminal Appeal for British Guiana that (unlike the English Court of Criminal Appeal at the time) would even be empowered to order a retrial, but he dissented from a suggestion that a provision should be made for a right of appeal by the Crown from a verdict of acquittal by the jury (See: M Shahabuddeen, The legal system of Guyana, 1973, at pp 150-1).

prosecution of an appeal against an accused who has been acquitted, is not a second prosecution of that person but a continuation, or at best a resumption, of the first one.

[40] However, common law jurisdictions apply the one-trial principle, even though that principle has never been rigidly adhered to. In fact, retrials are regularly ordered for all kinds of reasons. Nevertheless, one of the differences between civil and common law criminal procedures is that in the former a criminal appeal takes the case in its entirety to the next adjudicatory level reigniting a full retrial before the appellate court which is a court of rehearing, while in the latter the appellate court is basically (although arguably not exclusively) a court of review. The consequence of this legal structure is that in a common law criminal justice system the judgment or verdict of acquittal is supposed to be final, unless and until it is overturned, whereas in the civil law system, the first instance acquittal evaporates into non-existence only to re-emerge when it is confirmed on appeal. In terms of doctrine, it can therefore be argued that an acquittal at the trial level is the final acquittal, the difference being that the common law only knows one trial level whereas the civil law knows several, even in appeal. It is probably for this reason that the common law has traditionally prohibited any act of prosecution beyond an acquittal in the trial court. This strict and absolutist view of the principle is still maintained in the United States. In *Green v United States* (1957) 355 US 184 at p 187-8, Justice Black remarked:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

[41] The rigidity of this approach, however well-reasoned, is no longer seen as universally sound. The Human Rights Committee in two General Comments dealing with Article 14 of the ICCPR (Nos. 13 and 32) has emphasised that Article 14(7) does "not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal." As recalled, the Privy Council in *Brad Boyce* accepted that the protection against double jeopardy, although a

fundamental aspect of the right to a fair trial, is not entirely without exceptions. Many countries now allow a revision of an acquittal in exceptional circumstances even after the acquittal has become final in an appeal procedure. These revision procedures have recently been introduced, for example in some very sophisticated legal systems (such as Germany and The Netherlands). But they also exist in England, Wales and Northern Ireland where the Criminal Procedure and Investigations Act 1996 allows a new trial in cases of "tainted acquittals" where there has been proven "interference with or intimidation of a juror or a witness or potential witness" which has led to the acquittal. Additionally, the Criminal Justice Act 2003 has added another ground to that prosecutorial armoury allowing the revision of an acquittal in cases of serious crimes, so called "qualifying crimes", if there is "new and compelling evidence" and the ordering of a retrial is "in the interest of justice."

[42] Why is this development taking place? Certainly, accused persons have, and should have, a guaranteed and fundamental right to protection of the law but they are not the only ones. We are well aware that the principle that all proceedings should at some point come to an end (*lites finiri oportet*) is important. The European Court of Human Rights has been vocal in this regard, having stated, "one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, inter alia, that where the courts have finally determined an issue, their ruling should not be called into question"[12] and "legal certainty presupposes respect for the principle of res judicata, that is the principle of the finality of judgments."[13] We are also aware that the presumption of innocence requires respect for a final judgment once the accused has been acquitted. However, this represents a fragment of the argument. The principle of fundamental fairness in Article 144(1) of the Constitution equally requires the protection of the rights of other stakeholders in the criminal justice process and it demands "to the maximum extent possible, a fair balance between the interests of an individual and the need to ensure the effectiveness of the system of criminal justice."[14] It is true that a criminal justice system must be fair and be seen to be

[12] ECtHR 28 October 1999, No. 28342/95, Brumărescu v Rumania at [61].
[13] ECtHR 24 July 2003, No. 52854/99, Ryabykh v Russia at [52].
[14] ECtHR 24 May 2007, No. 65582/01, Radchikov v Russia at [43].

fair but above all it must be effective in protecting the rights of all; in fact, a profusely ineffective criminal justice system can hardly ever be fair.

[43] What does this mean in practical terms? Consider, for example, Article 138 of the Constitution. It guarantees protection of the fundamental right to life, which is at the very centre of this case dealing with the murder of eleven innocent persons. The fundamental right to life, however, is not just a right but, because it needs to be protected, it also includes, inter alia, a positive *obligation* on the judicial authorities of the State, particularly the police and the DPP, to thoroughly and properly investigate the case, to uncover the truth, and to bring the perpetrators to justice. Not only the relatives of the murdered victims but also society as a whole have a right to know the truth and what transpired. They have a right to see those responsible for the murders prosecuted, convicted and faced with appropriate consequences.[15] It is for this reason that the rights of accused persons finally acquitted of perpetrating very serious crimes and their right to be left alone, important as it is, cannot be seen as absolute but must be balanced against the rights of those mentioned above. That is why in exceptional circumstances the rights of the accused must to the maximum extent in fairness possible give way to the rights of others.

[44] It follows from the above considerations that although the Constitution allows for an "order of a superior court in the course of appeal proceedings relating to the … acquittal", this does not mean that the legislature has a free hand in designing any legal framework it wishes to provide for such an order. Given the complexity of the rights involved, proper safeguards will be needed for this legislation to be truly constitutional. The Constitution is not a mechanical but a normative instrument. The rule of law and the right to protection of the law require "law of sufficient quality, affording adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power."[16]

[45] We find that the above safeguards are present in the amendment to, what is now Part IIIA of the Court of Appeal Act for four reasons. First, where the DPP elects

[15] See Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, *The Inter-American Court of Human Rights, Case Law and Commentary*, Chapter 26, referring to the jurisprudence of the Inter-American Court of Human Rights. It must also be noted that the Constitution of Guyana is one of the few, if not the only constitution, in the Commonwealth Caribbean that requires a court "to ascertain the truth in every case" provided certain rights are respected: Article 144(2).
[16] See: Wit JCCJ in *AG v Joseph and Boyce* (2006) 69 WIR 104 at p 226 at [20].

to appeal against an acquittal or sentence, it must be done within a limited time which creates legal certainty for the acquitted person. The DPP must, before the trial judge discharges the accused or orders otherwise, serve on the Court a notice of intention to appeal and inform the Court orally of the intention to appeal against the verdict of the Court: section 33C(1) and then the DPP shall file with the Court a notice of appeal and the grounds of appeal within 14 days of the date of the verdict of acquittal or sentence passed: section 33C(2). Although the Court or a Judge of the Court "may at any time extend the time within which notice of appeal may be given" (section 33C(2), it is clear that this discretion has to be exercised with prudence. Second, section 33C(5) limits the right of appeal conferred on the DPP to certain (serious) offences, murder being one of them. Third, the grounds of appeal for the DPP are mainly limited to procedural errors and flaws enumerated in section 33B which also requires that the acquittal is the result of those errors and flaws. This formulation foreshadows, as we will see later, a steep hill to climb for the prosecution, a test much steeper than that required of a person desirous of appealing a conviction. On the other hand, because the Court of Appeal cannot retry the case itself but must remit it to the trial court with a jury deciding on the facts, the calibration of such a test must be such as not to impinge on the accused's right to the presumption of innocence. We conclude that this is possible.

[46] Fourth, section 33D provides that on an appeal from an acquittal the Court of Appeal may (a) dismiss the appeal; or (b) allow the appeal, set aside the verdict, and order a new trial. Even if there are good reasons for allowing the appeal, however, the appellate court may decline to order a retrial. In fact, after stating the reasons that would have justified allowing the appeal, the court may nonetheless dismiss it, if, for example, there has been a long delay between the event giving rise to the offence and the date of a possible retrial, and in the circumstances of the case, a retrial would greatly risk the result of an inaccurate verdict being reached or would violate the right to a fair trial. Given the above, we find the amendment to the Court of Appeal Act constitutional.[17]

(ii) Does the Act apply to the Appellants?

[17] See: Supra (n6) at [26].

[47] The Appellants further contended that as the Act did not expressly state that it was retrospective and the provision in question was not operative when the charges were instituted against them, the amendment could not have the effect of denying them the protection of Article 144(5). It was argued that the reference to 'proceedings by indictment' in section 32(d) of the Act should be construed as meaning the time at which the charges were made and not when the indictment was filed. The Appellants asked this Court to differ from the dicta of the Court of Appeal of Trinidad and Tobago and the Privy Council in *Boyce* on the time at which indictable proceedings commence. In *Boyce*, while the relevant law was passed in October 1996 and the indictable information had been laid six weeks prior, in September, the indictment was not filed until February 1998.

[48] The Court of Appeal of Trinidad and Tobago[18] proceeded thus:

> "The real question therefore is whether an accused person could lay claim to any right which could arise should he be acquitted at his trial, as being vested at the stage when the indictable information is laid against him. It is plain that, at the point of the laying of the indictable information, there is no certainty that a trial will follow. The information is merely an allegation of criminal misconduct. The preliminary inquiry is held to determine whether there is sufficient evidence for a person accused of criminal conduct to face trial. It is clear to us that the stage at which vested rights may accrue to an accused against whom an indictable information is laid is at the time he is indicted by the Director of Public Prosecutions."[19]

[49] The Privy Council agreed and held that proceedings by indictment are commenced by the filing of the indictment. The indictable information may be a necessary preliminary to proceedings by indictment but it does not necessarily lead to such proceedings and does not form part of them.[20] The Appellants encouraged this Court to disregard this dictum and consider the case of *Kewley v The Attorney General*[21] which affirmed the decision of the Guyana Court of Appeal in *Re: Williams and Salisbury (1978) 26 WIR 139*. In *Kewley*, Justice Chang held that:

> "The further point must be made that the preliminary inquiry or any other form of committal proceedings is judicial in nature as part and parcel of the hearing process for an indictable offence. Indeed, as

[18] (2001) 65 WIR 283.
[19] Ibid at p 293.
[20] Supra (n6) at p 88.
[21] 2015 HC 32.

> Haynes C. described it in Re: Williams and Salisbury (supra), it is "a stage in the judicial proceedings for proof of guilt of an indictable offence."[22]

[50] While *Kewley* correctly identifies preliminary inquiries and committal proceedings as part of judicial proceedings, we do not agree that this marks the commencement of indictable proceedings. In respect of indictable offences, there must first be a preliminary enquiry in the Magistrates Court to determine if the case should go for trial by jury in the High Court. Thus, it is only after the preliminary enquiry that the DPP decides whether or not to proceed with the indictable charge and cause an indictment to be filed. It is only when that indictment is filed that an indictable trial in the High Court is initiated. The Appellants were indicted on July 15, 2013 and the new provisions which give the DPP a right of appeal took effect in 2010. We hold, accordingly, that the new provisions are applicable to the Appellants.

(iii) Does section 33B offend the principle of separation of powers?

[51] The Appellants also submitted that section 33B offends the principle of separation of powers. It was argued that the DPP, a member of the Executive, now had the power to decide the consequences which flow from an acquittal. Prior to the amendment, the DPP only had the power to appeal by way of reference which had no effect on the liberty of the acquitted person. By virtue of section 33B, the DPP can now procure an outcome with a vastly different consequence – a re-trial.

[52] This argument is plainly flawed. The DPP has been given the right to seek a certain determination from the court. The outcome of that endeavour is perfectly uncertain and entirely beyond the DPP's competence. The right to appeal cannot be construed as including even slightly the ability to determine the outcome of the appeal against acquittal. The power to make that determination remains wholly with the judiciary. The principle of separation of powers remains intact.

The general procedural issues

(iv) What is the proper test to be applied on a prosecution appeal?

[22] Ibid at [14], [15].

[53] The Court of Appeal came to its decision to set aside the acquittal of the Appellants and to order a new trial after concluding (1) that the trial of the Appellants suffered from several material irregularities and that some of these irregularities were of such a nature as to render the not guilty verdict "unsafe or unsatisfactory", and (2) that the cumulative effect of the material irregularities resulted in "there not being a fair hearing". It would appear, therefore, that the court applied a test very similar to the one that is used in deciding an appeal against a conviction. But is this test appropriate in a prosecution appeal against an acquittal and, if not, what is the proper test? When should the judicial errors or procedural flaws enumerated in section 33B be considered sufficiently serious to set aside an acquittal and justify a second proceeding? When should such errors or flaws be deemed material to the verdict of not guilty?

[54] In seeking to answer these questions, one first needs to look at the text and structure of section 33B of the Court of Appeal Act. From that exercise, it becomes clear that in order to set aside a verdict of acquittal, an appellate court needs to establish, firstly, that one or more of the above mentioned judicial errors or procedural flaws have in fact occurred and, secondly, that the acquittal "is the result of" those errors or flaws. Before continuing, we must make an important distinction as it relates to the powers of the Court of Appeal under section 33B. On the one hand, there are the decisions by the trial judge mentioned in section 33B (a)(i) (submissions of no case to answer) and (ii) (defective depositions or committals). These decisions will prevent the jury from assessing the facts of the case themselves and if shown to be wrong, can easily be identified as having caused the acquittal. On the other hand, where the trial judge wrongfully decided to exclude material evidence (iii), where the trial judge substantially misdirected the jury (iv) or where the trial suffered from a material irregularity (v), the case goes to the jury for the factual assessment of the evidence. In such a case, the verdict of acquittal would be the jury's own decision and given the secrecy of their deliberations, it will not always be clear whether the decision to acquit "is the result of" an error or irregularity.

[55] So, how does an appellate court decide whether an acquittal has resulted from the judge's error, flaw or irregularity? In this context, it seems useful to have a look at a long line of jurisprudence from Canada where, exceptionally, since 1930, the

Crown had a right to appeal against an acquittal on any ground of appeal that involves an error of law alone. In the first two decades after the introduction of this appeal, Canadian appellate courts held that the Crown, unlike a convicted person, was not entitled to the *prima facie* assumption that an error at trial warranted allowing the appeal unless there had been no (substantial) miscarriage of justice.

[56] Six years after that law was passed, Harvey CJA made the following remarks in the Court of Appeal of Alberta case of *Curlett*[23]:

> "It seems quite apparent that the rules applied on appeals by a person accused of crime, based as they are on the traditional policy of the English law for the safeguarding of life and liberty, that everything must be established beyond any reasonable doubt, are not appropriate to an appeal by the Crown which is made for the purpose of putting an acquitted person a second time in jeopardy."[24]

[57] In that case, Harvey CJA formulated the following test: was the error such that "the jury might probably have given a different verdict?"[25] In 1943, the Court of Appeal of Saskatchewan went slightly further in *Probe*[26] where it said that "upon an appeal by the Attorney General from a verdict of acquittal, even if substantial error has been shown, the Court should not grant a new trial when upon the evidence adduced, a doubt may reasonably be entertained by the jury as to the guilt of the accused."[27]

[58] In 1947, however, the Supreme Court of Canada changed course and introduced a standard that came close to the one used in conviction appeals. In *White v The King*[28], Kerwin J stated the test as follows: "In the present case, the proper rule to be followed by the Court of Appeal was that the onus was on the Crown to satisfy the Court that the verdict would not necessarily have been the same if the magistrate had properly directed himself."[29] This test, which was also to be applied to jury verdicts, permitted a retrial if the error may or might have affected the result. In subsequent cases, the Supreme Court generally maintained that it

[23] (1936) 66 CCC 256.
[24] Ibid at [3].
[25] Ibid at [12].
[26] (1943) 79 CCC 289.
[27] Ibid.
[28] (1947) SCR 268.
[29] Ibid at p 276.

was the Crown's onus to establish that, not only had a legal error occurred, but the verdict may well have been affected by that error (see the cases of: *Savoie* [30], *Forgeron*[31], *Paquette*[32] and *Vézeau*[33]).

[59] It must be noted, however, that in *Vézeau* there was a strong dissent by Laskin CJ and Dickson J, who argued "that in order for a new trial to be ordered the Crown must satisfy the Court with a substantial degree of certainty that the jury would necessarily have convicted the accused in the absence of the [legal error]."[34]

[60] In the 1988 case of *Morin*[35], the Supreme Court seemed to have moved to some extent into the direction of the Laskin-Dickson dissent in *Vézeau*, emphasising that the onus on the prosecution is a heavy one. In this case, Sopinka J set out the test for setting aside an acquittal and directing a new trial: "An accused who has been acquitted once should not be sent back to be tried again unless it appears that the error at the first trial was such that there was a reasonable degree of certainty that the outcome may well have been affected by it."[36] He added: "Any more stringent test would require an appellate court to predict with certainty what happened in the jury room."[37] This line of thinking continued to develop in the jurisprudence.

[61] McLaughlin J made reference to that test in *Livermore*[38] stating that:

> "In this [sexual assault] case, we have no way of knowing whether the jury acquitted because it had a reasonable doubt about whether [the victim] consented, or whether it acquitted on the basis of a defence which should not have been left with it. The cumulative effect of the numerous errors in this case is such that the *Morin* test is made out. Absent the significant errors at trial, a reasonable jury properly charged may well have reached a different verdict."[39]

[62] Interestingly, Major J dissented in *Livermore.* He cited *Evans*[40] where Cory J said:

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[30] (1956) 117 CCC 327.
[31] (1958) 121 CCC 310.
[32] (1974) 19 CCC 2d 154.
[33] (1977) 2 SCR 277.
[34] Ibid at p 282.
[35] [1988] 2 SCR 345.
[36] Ibid at p 374.
[37] Ibid.
[38] [1995] 4 SCR 123.
[39] Ibid at p 138.
[40] [1993] 2 SCR 629.

> "In setting the standard for reversal, it is worth observing that, among the major English-speaking common-law jurisdictions, Canada appears to possess the most liberal provisions for Crown appeals… Among appellate courts there has always been a great deal of healthy respect for and deference to a jury verdict of acquittal. This deferential approach is appropriate and correct."[41]

[63] Major J, reiterating some of the dicta in *Evans*, then stated:

> "The onus on the Crown to overturn an acquittal as stated is a heavy and substantial one. The Crown must demonstrate, with a reasonable degree of certainty, that the verdict would not necessarily have been the same had the jury been properly instructed. Unlike an accused person appealing a conviction, the Crown does not benefit from the prima facie assumption that any error warrants a new trial."[42]

[64] Applying these principles to the facts of the case, Major J concluded that:

> "The appellant has not demonstrated to a reasonable certainty that the jury would have not necessarily had a reasonable doubt about the guilt of the accused. For the reasons stated it is my opinion that not only is it uncertain that a different result would have occurred but for the errors, but that it is unlikely that this would have occurred."[43]

[65] In 2006, in the Supreme Court of Canada case of *Graveline*[44], Fish J stated:

> "It has been long established … that an appeal by the Attorney General cannot succeed on an abstract or purely hypothetical possibility that the accused would have been convicted but for the error of law. Something more must be shown. It is the duty of the Crown in order to obtain a new trial to satisfy the appellate court that the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have a material bearing on the acquittal. The Attorney General is not required, however, to persuade us that the verdict would necessarily have been different…after a careful review of the record and consideration of counsels' full and able submissions, we have concluded that the Crown had failed to discharge its very heavy burden in this regard."[45]

[66] A decade later, in the recently decided Supreme Court case of *George*[46], the issues were (1) whether the trial judge had made any legal errors and (2) whether those

[41] Ibid at pp 645 - 646.
[42] Supra (n38) at p 145.
[43] Ibid at p 152.
[44] [2006] SCR 609.
[45] Ibid at pp 614 - 616.
[46] 2017 SCC 38, [2017] 1 SCR 1021.

errors were sufficiently material to the verdict, a jurisprudential requirement for Crown appeals. Gascon J stated that: "An acquittal at trial on an indictable offence cannot be overturned unless an error of law was made."[47] As to the question of when an acquittal can be overturned, the Court stated that:

> "if it is implied that an appellate court can overturn an acquittal where it is merely possible that the verdict would have changed, that is too low a threshold. This Court has used various phrasings to articulate the threshold of materiality required to justify appellate intervention in a Crown appeal from an acquittal. An "abstract or purely hypothetical possibility" of materiality is below the threshold … An error that "would necessarily have been material is above the threshold… And an error about which there is a "reasonable degree of certainty" of its materiality is at the required threshold."[48]

[67] The Canadian cases illustrate the difficult task faced by appellate courts of constructing the proper test to be used in prosecution appeals. Martin Friedland, a Canadian lawyer and academic writing in 1969, addressed these difficulties in his book, *Double Jeopardy*[49]:

> "To articulate what should be the proper test is not easy. It is usually not possible to say with certainty what effect an error may have had on the result. Whereas there are sound reasons for an appellate court not to invoke the 'no substantial wrong' proviso on an appeal by the accused in such a case, to refuse to invoke the proviso in similar circumstances on a Crown appeal gives the Crown too great an advantage. A deliberate attempt should be made to access the seriousness of the error on a Crown appeal and impressions of probability can be the only guide. The seriousness of the error should be judged according to the degree of probability that the error was responsible for the verdict." [50]

[68] In this respect, Friedland, with whom we agree, argued that the approach of the Canadian Supreme Court in *White* was wrong. He preferred the test used by Dixon CJ in the Australian case of *Vallance v The Queen*[51] which considered whether the error on the whole case was a probable explanation of the verdict of

[47] Ibid at p 1025.
[48] Ibid at p 1035.
[49] Martin Friedland, Double Jeopardy (Clarendon Press, 1969).
[50] Ibid at p 303.
[51] [1961] HCA 42, (1961) 108 CLR 56 (31 July 1961).

the jury[52] Friedland also highlighted the judgment of Kitto J in that same case which cautioned against new trials if a direction to the jury along the correct lines would not have been likely to make any difference in the result.[53] Unlike *White, Vallance* encouraged an examination of the entire case and the effect of the error(s) on the verdict of the jury.

[69] So, given the development of the Canadian jurisprudence, what is the proper test to be applied in a prosecution appeal in Guyana? The Canadian quest for the gold standard of prosecution appeals clearly shows that there may be many nuances and "various phrases" in which that test could be clothed. It is obvious, however, that in Guyana given the wording of section 33B (set out at [34] above), a prosecution appeal should be measured against a rather strict standard. We note that in none of the other common law jurisdictions allowing prosecution appeals such a standard or test has been prescribed by the legislature. Further, insofar that there is a test, as we have seen in Canada, it has been developed by the courts. Section 676(1) of Canada's Criminal Code[54], for example, only stipulates that the Attorney General may appeal a judgment or verdict of acquittal of a trial court in proceedings by indictment "on any ground of appeal that involves a question of law alone." No test is formulated. This is equally the case in St. Kitts and Nevis which has a legislative provision that is practically identical in wording to section 33B. That provision, section 42 of the Eastern Caribbean Supreme Court (St. Christopher and Nevis) Act[55], mentions practically the same errors and flaws (*inter alia* "a material irregularity in the course of the trial") as section 33B, but it allows the DPP to appeal against the acquittal of an accused person "where the accused has been acquitted by reason of" these errors and flaws. However, unlike section 33B, it does not require that the acquittal "is the result" thereof.

[70] Although it is true that an appellate court cannot "predict with certainty what happened in the jury room" the proper test to be applied would need to come close to the one formulated by the dissenters in *Vézeau*, requiring a substantial degree of certainty that the jury would have convicted the accused but for the legal error. We stop short, however, of requiring that the jury would *necessarily* have

[52] Ibid at p 62.
[53] Ibid at p 66.
[54] Formerly section 1013(4) of the Canada Criminal Code as amended in 1930.
[55] Cap 3:11.

convicted the accused, had the trial been flawless. Such a test would be a double-edged sword as it would admittedly offer the accused the best protection against being subjected to a retrial but at the same time, once the appellate court had ordered a retrial on the application of that test, it would be very difficult for the second jury, knowing the expressed view of the appellate court, to properly honour the presumption of innocence, a right of the accused guaranteed by Article 144(2)(a) of the Constitution. In our view, this would prejudice the fairness of that new trial to an unacceptable degree.

[71] Taking into account all of the above, we conclude that in a prosecution appeal against an acquittal in proceedings by indictment in the High Court the prosecution must satisfy the Court that, given, on the one hand, the nature and weight of the evidence as a whole and, on the other hand, the seriousness of the judicial error(s) or procedural flaw(s), it can with a substantial degree of certainty be inferred that had the error(s) or flaw(s) not occurred, the trial would not have resulted in an acquittal of the accused. If that inference cannot be made with the required degree, the acquittal must stand, even if the error(s) or flaw(s) were substantial.

(v) What constitutes a material irregularity?

[72] Section 33B(1)(v) of the Court of Appeal Act identifies as one of the procedural flaws that may lead to overturning an acquittal "a material irregularity in the trial." The Act gives no guidance on what such a material irregularity would entail. It must therefore be this Court's responsibility to issue such guidance in the context of acquittal appeals.

[73] In several Caribbean jurisdictions "material irregularity" is well known as a ground of appeal in conviction appeals. It would appear, however, that the term in the context of acquittal appeals is unique to the jurisdictions of Guyana and St. Kitts and Nevis. We would seem to be, therefore, in uncharted territory in having to determine how the term should be interpreted in that context. But does the different context really change its meaning? We do not think so. According to

Seetahal[56], a material irregularity is "usually a procedural irregularity[57], that is, a mistake in the procedure at trial short of defects in the summing up." As examples, she mentions situations where a juror improperly separates from others while the jury is sequestered (citing *Roberts v R*[58]) or where the judge fails to hold an enquiry upon allegations that jurors were tampered with (citing *R v Blackwell*[59]).

[74] Usually, but not necessarily, the irregularity will be a mistake made by the trial judge and in order for it to be a *material* irregularity, it should be a significant one. But even so, historically, in conviction appeals, the mere identification of a material irregularity did not necessarily mean that an appeal against conviction would succeed. For that to happen, the material irregularity had to result in a (substantial) miscarriage of justice[60]. A material irregularity also had to go to the root of the case. In *R v Furlong and Others*[61] the appellants were charged with conspiracy to steal and stealing. After retiring to consider the verdict, the jury sent a written question to the judge and received an answer written on the same piece of paper, but the question and answer were not read out in open court until after the jury had been discharged. It was argued that this was an irregularity which rendered the trial unlawful. The Court of Appeal held that:

> "It is impossible to say that every irregularity in a trial is a ground for quashing a conviction. It may, not infrequently it does, happen that something is done in the course of a trial which is not strictly in accordance with recognised procedure. If that is so, the court must consider whether or not it is an irregularity which goes to the root of the case, as, for instance, in *R v Neal* which was cited to us by counsel for the appellants, where a jury, having been enclosed to consider their verdict, were allowed by the recorder during their enclosure to leave the court and have their lunch in the town. That was such a **grave departure from the recognised practice and procedure of criminal law** that the court felt that the verdict could not stand."[62] (emphasis added)

[75] In the case of an appeal against an acquittal where there has been a significant material irregularity going to the root of the case, the question is not whether this irregularity resulted in a miscarriage of justice but whether it can be inferred that

[56] See: Dana Seetahal, Commonwealth Caribbean Criminal Procedure (Routledge-Cavendish, 2001) at pp 410 - 411.
[57] Ibid.
[58] (1968) 13 WIR 50.
[59] [1995] 2 Cr App R 625.
[60] See: R v Ash [1984] Crim LR 45.
[61] [1950] 1 All ER 636.
[62] Ibid at pp 637 - 638.

it resulted in the acquittal of the accused. In other words, the concept of a material irregularity remains the same whether in the context of a conviction or an acquittal appeal, but whether it will lead to quashing the verdict or upholding it, must be measured against another, much stricter standard as we have explained at paragraph [71] above.

The specific procedural issues

[76] The Court of Appeal found seven procedural issues which it considered material irregularities on which it based its decision to overturn the acquittals of the Appellants. These issues will be discussed in the following paragraphs. It must be acknowledged, however, that only the first three issues (vi) – (viii) can be qualified as possible material irregularities (within the meaning of section 33B(1)(a)(v)). Issue (ix) would possibly fall under section 33B(1)(a)(iii) – a decision of the trial judge to exclude evidence sought to be adduced by the prosecution - and issues (x) – (xii) under section 33B(1)(a)(iv) - the trial judge's substantial misdirection of the jury in the course of the judge's summation on the law or on a mixed question of law or fact.

(vi) Should the questioning of the jurors have been permitted?

[77] Before considering the substance of the arguments on whether the questioning of the jurors should have been permitted, we must consider a preliminary issue raised by the Appellants as a separate but related ground of appeal. The Appellants contended that in all the circumstances of the case, the Court of Appeal should have exercised its discretion and refused the DPP leave to advance the ground of appeal relating to the cross-examination of the jury. In their view, Counsel for the State had given more than her 'imprimatur' to the procedure at trial, as stated by the Court of Appeal. In fact, not only did she agree, State Counsel actively participated in the procedure by examining jurors to the point where a juror was passed over because the juror expressed bias against the State. How then, in those circumstances, could the prosecution properly be allowed to complain about that same procedure? The Appellants argue that similar behaviour was frowned upon by the Court of Appeal in *Gibson v R*[63] and *Belcon v R*[64].

[63] (1963) 5 WIR 450.
[64] (1963) 5 WIR 526.

[78] In *Henry v The State*[65], the Court of Appeal held that: "in our view, it is quite improper of counsel to be willingly agreeable to or deliberately to refrain from objecting to a course of action and then complain later. Happily, counsel at the trial is not the same here; otherwise some strictures of a sort from this court would, in our opinion, not have been inappropriate."[66] Similar sentiments were expressed in the cases of *Gibson* and *Belcon.* The essence of those decisions was that it was an undesirable course of action. The jurisprudence, however, does not prescribe that a subsequent objection to a course previously accepted may not be relied on as a ground of appeal and we have not been persuaded that we should take a different course in the present appeal.

[79] That brings us to the broader question at hand – was the trial judge justified in allowing the questioning of prospective jurors and, we should add, in deciding the subsequent challenges himself? The Court of Appeal examined this ground extensively and found that there was no basis for an enquiry into whether the jurors were impartial and found, also, that as a result of the procedure adopted the principle of random selection of jurors was compromised.

[80] The Appellants strongly opposed these findings. They argued that the jurors were lawfully questioned as Article 144(1) of the Constitution mandates that an independent and impartial court is necessary to achieve a fair hearing in criminal matters. In fact, they argued, the relevant sections of the Criminal Law (Procedure) Act[67] which relate to juries must yield to that constitutional principle. The Appellants further contended that the questioning sought to remove any elements of bias which could have impaired the Appellants' right to a fair trial due to the widespread media coverage of the massacre. In their view, the enormity of the Lusignan massacre and its huge impact on society satisfied the requirements for regarding this as a case of exceptional circumstances. They observed that judicial notice had properly been taken of the exceptional nature of the events, referring to the Court of Appeal's description of the circumstances as of a 'gruesome and unprecedented nature' in the judgment. Therefore, they argued, counsel's application to question the potential jurors was directed at

[65] (1986) 40 WIR 312.
[66] Ibid at p 325.
[67] Cap 3:10

preserving the fairness of the trial. The mere fact that the trial judge adopted an alternative procedure directed at achieving this constitutional objective was not sufficient in itself to constitute a material irregularity, they argued.

[81] The DPP dismissed the Appellants' contention that the jury selection provisions in the Criminal Law (Procedure) Act had to be disregarded to ensure the fairness of the trial. In her view that argument was wholly unsustainable. The procedure adopted was not in accordance with the law; it was merely a fishing expedition to procure the selection of a 'favourable' jury. Further, the Director argued, the questions asked were both defamatory and inflammatory and should have been forbidden due to the possible prejudicial effect on the minds of the jurors.

[82] The jury system is still believed to be an integral part of achieving fairness in the criminal justice system in the Commonwealth Caribbean. It follows that the selection of the jury is a crucial part of that system and some core principles of this were discussed in the Canadian Supreme Court case of R *v Yumnu*[68]:

> "… while there are various rules and regulations that govern the selection of juries, much of what occurs is rooted in custom. The process must take into account the needs of the people and the special problems that may exist in the locale or region in which the trial is being held. Flexibility is essential, as is common sense, good judgment and good faith on the part of those who play a central role in the process, including judges, Crown and defence counsel, the police, and court administration personnel. In the end, it is essential to keep in mind that from start to finish, the jury selection process is designed to make good on the constitutional promise, enshrined in s.11 (*d*) of the Canadian Charter of Rights and Freedoms , that everyone charged with an offence has the right to be tried by an independent and impartial tribunal. Attempts by one side or the other to obtain a favourable jury are inimical to that ideal and the parties should be guided by this and conduct themselves accordingly."

[83] In Guyana, the legislation which governs jury selection is the Criminal Law (Procedure) Act). The Act makes provision for challenges to the array (section 32), peremptory challenges (section 38) and challenges for cause (section 39). Challenges to the array and peremptory challenges do not need to be considered for present purposes which leaves challenges for cause. Section 39 states:

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[68] 2012 SCC 73 at [72].

> 39. (1) The State and every accused person shall be entitled to any number of challenges on any of the following grounds that is to say -
> (a) That any jurors' name does not appear in the jurors' book: […];
> (b) That any juror is disqualified under section 20 or exempt under section 21; or
> (c) That any juror is not indifferent between the State and the accused person.
> (2) No other ground of challenge than those above mentioned shall be allowed, and no challenge under this section shall be allowed except for one of those grounds on any trial.
> …
> (4) If the ground of challenge is any other than as last foresaid, then two persons present whom the Court may appoint for that purpose, shall be sworn to try whether the juror challenged is disqualified under section 20, or is exempt under section 21, or stands indifferent between the State and the accused person, as the case may be, and that trial may be held before the judge in chambers.
> (5) If the Court or triers find against the challenge, then the juror shall be sworn, but if the Court or the triers find for the challenge, the juror shall not be sworn, and if, after what the Court considers a reasonable time, the triers are unable to agree, the Court may discharge them from giving a verdict and direct other persons to be sworn in their place or may give any other directions it thinks fit.

[84] Section 47 of the Criminal Law (Procedure) Act further mandates that: "subject to this Act and any other written law for the time being in force, the practice and procedure relating to juries on the trial of indictable offences shall be as nearly as possible in accordance with the practice and procedure in the like case of the courts in England mentioned in section 16."

[85] The questioning of prospective jurors in this case was obviously meant to disclose whether they stood "indifferent between the State and the accused person", in other words whether they were sufficiently impartial and unbiased. The challenges that followed this questioning were unmistakably for cause. It must be reiterated that section 39(2) of the Criminal Law (Procedure) Act allows no other ground for challenges than those mentioned in that Act. Whether, at what point and in what manner such questioning is to be allowed, is within the exercise of a discretion undoubtedly possessed by a trial judge in order to ensure a fair trial. The question in these circumstances is of course: was the discretion properly exercised?

[86] Both in Guyana and in England (relevant because of section 47 of the Criminal Law Procedure Act) challenges for cause are to be supported by a foundation of fact, which is a rule of criminal practice. Usually the laying of this foundation is done by providing the judge with specific evidence identifying a concrete objection against one or more of the jurors. In exceptional circumstances, however, the trial judge is allowed some flexibility with regard to that condition. This was clearly stated in the English case of *R v Kray*[69]. In that case, Lawton J, the trial judge, permitted the questioning of jurors as they came to be sworn as there had been widespread and prejudicial pre-trial publicity. In his view that was sufficient to establish the probability of prejudice on the part of anyone who had read the information.

[87] Lawton J held that the questioning was permissible due to the wholly exceptional circumstances of the case but that a challenge for cause in those circumstances must still be supported by a foundation of fact if only on a *prima facie* basis. Only then can the right to cross-examine be used:

> "My attention has been called to the authorities including Blackstone's Commentaries on the Laws of England. Before a challenge for cause can be effectively made, the challenger must lay a foundation of fact…He referred me to a passage in the judgment of the Lord Chief Justice in the case of Chandler (1964) 48 Cr.App.R. 143 at p. 151. One of the matters which had to be decided in that case was whether the appellant at his trial had been deprived of his right to examine prospective jurors. In the course of dealing with that point the Lord Chief Justice said, "Be that as it may, the fact of the matter is that before any right to cross-examine the juror arose, the appellant would have to lay a foundation of fact in support of his ground to challenge. It is no good his saying, 'I think this man is antagonistic' or calling somebody to say, 'I don't think he likes processions. He thinks they are unreasonable'. There must be a foundation of fact creating a prima facie case before the man can be

[69] (1969) 53 Cr App R 412.

cross-examined." The foundation of fact having been laid in this case, the right to cross-examine can be used."[70]

[88] This point was reiterated in the Australian case of *Murphy v The Queen*[71]:

> "It is beyond question that some foundation must be laid before an application to challenge for cause will succeed. Ordinarily this will take the form, at least initially, of an affidavit relating to the disposition of a particular juror or jurors. There may be cases where a reading by the trial judge of offending material, where it has been published in circumstances that justify an inference that members of the jury are likely to have read it and to have been influenced against the accused, will be enough to justify acceding to an application to question potential jurors. But they are exceptional cases. There is still a need to provide a sufficient foundation of fact to justify acceding to the application."[72]

[89] The approach taken by Lawton J was embraced and recommended in *Grant v DPP*[73] by the Court of Appeal of Jamaica as a common law remedial measure to ensure the empaneling of an "independent and impartial" jury in a case with pre-trial publicity. Also, the Court of Appeal of Trinidad and Tobago, Sharma JA, approvingly mentioned the approach as a useful manner to deal with this issue in *Nankissoon Boodram v AG*[74]. In both cases there were further appeals to their Lordships in the Privy Council who did not negatively comment on these remarks.

[90] In our view, this was a case which could be classified as an exceptional one; it would seem that none of the professional participants in the trial had any doubts about that. In the rather small jurisdictions of the Caribbean the impact of events, criminal or otherwise, are often well known and do not always need much elaboration. So, we acknowledge that, at the very least, the trial judge cannot be faulted for apparently having found that the threshold for harmful pre-trial publicity had been met. Nevertheless, some errors were made.

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[70] Ibid at p 416.
[71] [1989] HCA 28.
[72] Ibid at [24].
[73] (1980) 30 WIR 246.
[74] (1994) 47 WIR 459.

[91] The first of those errors was the failure to record a ruling or reasons for allowing defence counsel's application to question the jurors. There was also the failure to record whether counsel had, in fact, laid a foundation of fact in support of his application and, if so, what this entailed. The Record merely states that: "Mr. Hughes asks that Defence be allowed to question jurors in a voir dire prior to peremptory challenges being taken, with the further opportunity to question jurors after peremptory challenges are taken." It continues: "State has no objections". This was followed by the questioning of the first juror. There was nothing on the Record to suggest that the trial judge made a ruling on the application which was made, although we are quite sure that he did. In our view, this was highly irregular. The trial judge should, as far as it is possible, have recorded his decision and provided reasons for the exercise of his discretion. And while these reasons need not be elaborate, they must however show the parties and if need be, the appellate court the basis upon which that decision was reached. This is particularly important in criminal trials given the scrutiny of any decisions or directions of the trial judge on appeal.

[92] The second error arose in the way in which the challenges were conducted and adjudicated. As shown above, section 39 clearly states where a juror is challenged for cause, the Court may appoint two persons to try whether the juror challenged stands indifferent between the State and the accused person. The law clearly mandates that this particular challenge for cause is to be decided by triers and not the trial judge. This point was made by the Supreme Court of Canada in the case of *Sherratt v The Queen*[75], where the main ground of appeal was whether the trial judge had usurped the function of triers of facts in dealing with challenges for cause. In her leading judgment, L'Heureux‑Dubé J stated:

> "The last case I will discuss at any length is that of *Guérin and Pimparé, supra*, a case that received favourable mention by this Court in *Barrow, supra*. The two accused in the case had allegedly committed a double murder that was the subject of massive media speculation and community outrage. Bisson J.A., now Chief Justice, noted that "this tragedy horrified the Montreal community, and that, in large measure,

[75] [1991] 1 SCR 509.

> the events, which were widely publicized by the media, were . . . still fresh in the minds of a good number of the citizens" (at p. 241). The trial judge refused the application of counsel to challenge each prospective juror for cause on the basis of the pre-trial publicity. **Instead, the trial judge, in essence, took over the procedure and asked each juror questions suggested by counsel. The trial judge then decided whether the individual juror was or was not impartial…All three members of the Court of Appeal delivered reasons. In discussing the *Hubbert, supra,* pre-screening procedure, Bisson J.A. commented that such a procedure cannot entail the judicial takeover of a process granted to two triers under the *Criminal Code* ."[76]** (emphasis added)

[93] In the instant matter, the record shows that the trial judge was actively involved in the questioning of the jury. So much so that he disallowed challenges on some occasions. The Criminal Law (Procedure) Act clearly mandates that this task is reserved for the triers. The trial judge's sole role in the process is to appoint those triers, to provide them with sufficient guidance how to deal with the matter and to oversee the proceedings; any participation beyond that, in our view, constitutes a material irregularity.

[94] As to the specific complaint made by the Prosecution that the questions asked were defamatory and inflammatory, we do not agree. An examination of the record reveals that the questions that were asked were relevant to and focused on ensuring an impartial jury, essentially unaffected by the pre-trial publicity.

[95] To conclude, we disagree with the Court of Appeal that the trial judge ought not to have allowed the cross examination of the jury. The Lusignan massacre was unprecedented and took the lives of eleven innocent souls. The media coverage which followed an event of that magnitude would have been vast and incessant. It was a wholly exceptional situation which the trial judge properly could have assessed as justifying the adoption of an exceptional procedure. We do, however, find the way in which the exercise was conducted to be highly irregular in so far as it was undertaken with little to no regard to established criminal practice and

[76] Ibid at pp 530 – 531.

statutorily prescribed procedure in Guyana. In the circumstances, the trial judge should have recorded a formal reasoned ruling on defence counsel's application to question the jurors after requiring defence counsel to lay a foundation of fact, however summarily, to support the application to cross-examine and, if need be, challenge the jurors for cause, and he should have appointed triers to decide these challenges as statutorily prescribed instead of conducting the exercise himself. Though the circumstances of the case were exceptional, the judge should have ensured that any exceptional measures adopted were framed within the constitutional and statutory framework as well as the common law which underpins the criminal justice system in Guyana. Whether these material irregularities resulted in the acquittals is, however, an entirely different matter, which we will deal with later in this judgment.

(vii) Should the foreman and defence counsel have disclosed their previous relationship and did the failure to do so affect the fairness of the proceedings?

[96] The Appellants argued that neither the foreman nor Mr. Hughes had a duty to disclose their previous attorney/client relationship to the court because there was no association or connection between the two men at the time of the trial. The Appellants argued that the foreman had no duty to disclose, because his relationship with Mr. Hughes had ended since 2008, upon the conclusion of the civil matter in which counsel had represented him, and he had since publicly opposed Mr. Hughes by participating in a picketing exercise which condemned him in 2012; and that Mr. Hughes had no duty to disclose as he was subject to a continuing duty of confidentiality under the Code of Conduct of the Legal Practitioners Act of Guyana[77]. The Appellants also argued that the Court of Appeal failed to analyse the history of the relationship between Mr. Hughes and the foreman. In their view, had that been done, the finding that there was a danger of the appearance of bias, based on the test formulated in *R v Gough*[78], requiring that there was a real danger of bias on the part of the foreman, would not have been made.

[77] Cap 4:01.
[78] [1993] AC 646.

[97] Counsel for the DPP submitted that the Court of Appeal was correct to find that Mr. Hughes and the foreman should have disclosed their relationship. The failure to disclose the relationship undermined the impartiality of the proceedings and polluted the clear stream of justice. Counsel for the DPP further contended that on the application of the test for bias, no reasonable onlooker would have overlooked the possibility of bias against the State.

[98] The submission for the Appellants that the foreman did not have a duty to inform the trial judge that he had an 'association or connection' with Mr. Hughes on enquiry, because of the hostile relationship which had developed after the conclusion of the matter in which Mr. Hughes had represented him, does not sufficiently satisfy the demands of the situation. It does not follow, even assuming counsel is correct that the 'association or connection' had ended, that disclosure was not warranted by the foreman. The very controversy that has arisen from the failure to disclose the historical association or connection shows that in the circumstances disclosure would have been desirable and the better course. It would have been better to be transparent and to leave it for the trial judge to decide what course to follow upon receiving the disclosed information.

[99] Similarly, Mr. Hughes' reliance on the client confidentiality provision in the Code of Conduct does not supplant the desirability of disclosure by him. Rule 1 of the Code states that: "every attorney-at-law has a duty to hold in strict confidence all information received in the course of the professional relationship from or concerning his client or his client's affairs and this information should not be divulged by an attorney-at-law unless he is expressly or impliedly authorised by his client to do so." Informing the court that he had previously represented the foreman would not have breached Rule 1 as he was not being asked to divulge confidential information. His representation of the foreman was a matter of public record.

[100] Further, the preamble to the Code of Conduct states that "the underlying aim [of the Code] is that an attorney-at-law should at all times conduct himself in a manner that promotes **public confidence in the integrity and efficiency** of the legal system and the legal profession. **Integrity and judicial independence are the twin pillars of justice**." (emphasis added) In our view, this points to counsel's

duty in dealing with the court. In the circumstances, it would have been better for counsel to have informed the Court, for the sake of its integrity and that of the criminal justice system as a whole, especially upon noting the failure of the foreman to disclose the relationship. On one view, the onus we place upon counsel and a juror to disclose even a clearly severed historical relationship may be regarded as a counsel of perfection, and counsel is not to be criticized for the view he took as to disclosure. Be that as it may, the course of disclosure could have been easily taken and we are satisfied it was the better course.

[101] Following our conclusion that the appropriate course was for both persons to have disclosed, we now consider whether the failure to disclose affected the fairness of the trial. Generally, where there is a relationship between a party and a juror, the trial judge is obliged to consider whether it might lead to bias on the part of the juror. The test the judge should apply is whether a fair-minded and informed observer would conclude that there is a real possibility that the party alleged to be adversely affected may not have a fair trial as a result of the facts alleged: *Re Medicaments and Related Classes of Goods*[79]**.**

[102] We are satisfied that if the judge had applied that test and analysed the history of the relationship between Mr. Hughes and the foreman he would have concluded that a fair-minded observer would not have perceived a real possibility of bias. As mentioned, the matter in which Mr. Hughes had represented the foreman, which he lost, had concluded in 2008, some five years before the trial. Since that time, not only had counsel appeared in a court matter in opposition to the foreman, but the foreman had publicly demonstrated himself to be an adversary of counsel by participating in a picket against him. These facts do not indicate a relationship that would have been favourable to Mr. Hughes or his client Hyles. We, therefore, do not agree with the findings of the Court of Appeal on this ground of appeal. In light of the foregoing, the failure to disclose could not reasonably have affected the impartiality of the jury or the fairness of the trial, and therefore gave rise to no material irregularity.

(viii) Should the trial judge have investigated the alleged thumbs-up incident between a juror and the alleged father of Hyles and should the Court of Appeal have

[79] (No 2) [2001] 1 WLR 7000.

relied on the contents of an affidavit sworn by prosecuting counsel concerning this allegation?

[103] During the trial, State Counsel reported to the court that there had been communication (in the form of a thumbs-up sign) between a juror and a man alleged to be the father of Hyles but the judge did not deal with this allegation at the time. After the trial ended, State Counsel swore an affidavit detailing this incident and it became a ground of appeal which the Court of Appeal upheld. In the Court of Appeal and before us, it was contended for Hyles that this complaint was false because, as an investigation into the incident would have revealed, Hyles' father had died some ten years before the trial started. His counsel further submitted that the Court of Appeal fell into grave error when it relied on the contents of the affidavit sworn by prosecuting counsel to uphold that ground of appeal. Counsel for Hyles submitted the Court of Appeal is a reviewing court and the record of appeal is the only proper record of what transpired at trial and should be the only basis on which the Court of Appeal makes any determination. It is accepted that there is no reference in the Record to a complaint being made and the only information about a complaint was in the affidavit. In opposing this ground, counsel for the DPP contended that the affidavit evidence on the occurrence of the thumbs-up incident was admissible in the absence of other evidence.

[104] We think that the correct approach to such an occurrence is that if there is an apparently credible allegation that a juror has been improperly approached or communicated with, it is the duty of the trial judge to investigate the matter to ascertain whether the fairness of the trial has been compromised. In *Blackwell*, there were allegations that there had been contact with a juror and someone sitting in court. The judge refused to investigate the matter, instead discharging the juror and continuing the case. On appeal, it was held that he had improperly exercised his discretion and his failure to conduct an investigation resulted in a 'serious irregularity'. The English Court of Appeal held that an investigation should have been held to determine whether the independence of the jury had been compromised. We agree that this is a sound approach and it should have been followed by the trial judge in this case.

[105] As to reliance on an appeal on material not included in the record of appeal, this is clearly a matter for the appellate court to consider and decide. It is a decision which must be made on a case by case basis. A decision to admit the extraneous material will usually require conditions to be attached including, for example, giving the opportunity to an opposing party to file an opposing affidavit and produce supporting material. In this case, as it would seem to appear, had this been done it would have been established that the allegation was unfounded to the extent that the juror could not have communicated with Hyles's father who was long dead at the time.

[106] Nevertheless, it cannot be excluded that the alleged communication had taken place between the juror and a man mistakenly identified as Hyles' father. The failure of the trial judge to order an investigation into the allegation of improper communication with a juror at the time the allegation was made, constitutes therefore a material irregularity.

(ix) Should the photographs have been excluded?

[107] During the trial, Mr. Hughes applied on behalf of the Appellants to exclude photos which the DPP sought to adduce into evidence on the ground that the photos were more prejudicial than probative and did not assist with proving any fact in issue. The State argued that this was not a sufficient ground for exclusion and the photos merely represented what had transpired. The trial judge agreed with the Appellants and excluded the photographs. The trial judge further held that "the State was allowed to renew their application to tender any of the photographs should they determine, during the pendency of the case, that such photographs would prove or support a fact then in issue." We hasten to note at this juncture that the trial record does not reveal if the State did renew its application. It would seem, it did not.

[108] The Court of Appeal disagreed with the trial judge and found fairness demanded the photographs be admitted into evidence. In its view, the trial judge was wrong and should have gone beyond whether the prejudicial effect outweighed the probative value and considered the relevance and admissibility of the photos.

[109] In *DPP v Kilbourne*[80], the House of Lords held that in assessing evidence, a trial judge should consider whether the probative value outweighs its prejudicial quality. The court also discussed the issue of relevancy and admissibility noting that "apart from exceptional cases where evidence which is irrelevant to a fact which is in issue can be admitted to lay the foundation for other relevant evidence, no evidence which is irrelevant to a fact in issue is admissible."[81]

[110] Their Lordships went on to state that even then, all relevant evidence will not inevitably be admitted:

> "All relevant evidence is prima facie admissible. The reason why the type of evidence referred to by Lord Herschell L.C. in the first sentence of the passage [*evidence of the finding of other bodies than the body of the victim*] is inadmissible is, not because it is irrelevant, but because its logically probative significance is considered to be grossly outweighed by its prejudice to the accused, so that a fair trial is endangered if it is admitted; the law therefore exceptionally excludes this relevant evidence."[82]

[111] It is clear from this decision that the trial court's consideration may well go beyond relevancy and admissibility. Admissibility is ultimately subject to ensuring the fairness of the trial and relevance does not guarantee admission. Accordingly, the trial court should consider the prejudicial and probative nature of the evidence in the context of fairness. In this case, the photographs were not probative of any fact that was in issue. Their relevance would have been to establish the killings that had occurred but there was cogent oral evidence of that grim fact. Contrary to the Court of Appeal's finding, fairness nor truth demanded the admission of the photographs; if anything, they demanded their exclusion.

[112] In short, while the photographs were undoubtedly admissible, as we have just indicated a trial judge has a discretion at common law to 'exclude evidence if it is necessary in order to secure a fair trial for the accused'.[83] When this discretion is exercised, an appellate court must be cautious about interfering with the decision of the trial judge. It may only do so if it is of the view that the judge's

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[80] (1973) AC 729.
[81] Ibid at p 756.
[82] Ibid at p 757.
[83] See: Lord Griffiths in *Scott v R* [1989] AC 1242 at p 1256.

exercise of discretion approaches Wednesbury unreasonableness.[84] There was no unreasonableness in this case. Therefore, we cannot agree that the trial judge improperly exercised his discretion when he held that the photographs had no other effect than to show the gruesome nature of the events and did not go to a fact in issue. Hence, the evidence the judge excluded was not material within the meaning of section 33B(1)(a)(iii).

(x) Was the trial judge's approach to the caution statement wrong and did this constitute a substantial misdirection?

[113] In relation to the caution statement given by Williams, both the Appellants and the DPP agreed with the Court of Appeal that the trial judge should not have left the issue of voluntariness for the jury to decide. The Court of Appeal found that the judge so did. The Appellant argued that while the judge clearly directed the jury to consider the voluntariness of the statement, it is clear from the language and context of the direction that the judge was drawing the jury's attention to voluntariness as a factor to consider in assessing whether the contents of the statement were true.

[114] The trial judge gave the following direction to the jury on the caution statement:

> "Members of the jury, whether you believe that the statement tendered is Mark William's statement given freely and voluntarily by him or not is a matter of fact solely for your consideration. You must be satisfied to the extent that you feel sure that **he made this statement** before you accept it or act on it. If **you accept that he made it** then you must be satisfied to the extent that you feel sure that you believe that the contents are true before you act on those…In considering this you obviously have to determine on this point whether you accept Williams' version of events and in this regard, just when you look at the state's evidence you should consider if there are discrepancies in Williams' version of events as how his case was put and his unsworn statement." (emphases added)

[115] The trial judge continued:

> "With regards to the fourth paragraph of the Caution Statement, Mr. Yearwood suggested that it was an important paragraph to which Williams did not sign and [officer] Singh indicated that the paragraph is only signed when the person is writing the statement himself. Rule C of the Judges' Rules states that the person making the statement, if he is going to write it for himself, shall be asked to sign such a statement before writing what he wants to say. In any event you may want to ask

[84] See: *R v O'Leary* 87 Cr App R 387 at p 391.

> yourselves if Williams could refuse to sign that paragraph, how come he was forced to sign all the others."

[116] We regard these passages as fairly representing how the trial judge treated the caution statement and what was the purpose of that treatment. In this treatment, the judge identified the doubt raised by the prosecution as to Williams' assertion that he was forced to sign the statement because, on the prosecution's case, given the fact that Williams' signature was missing from one paragraph, it was to be implied that he exercised the right to refuse to sign that paragraph. Therefore, on the prosecution's argument, if Williams could refuse to sign a paragraph to which he objected then Williams' claim, that he did not make the statement and that it was a document he was forced to sign, could not be believed.

[117] There are several other examples in the summation which illustrate a careful analysis of the caution statement by the trial judge. We find the judge's treatment showed a fair and balanced approach and agree with the Appellants that the judge was mainly directing the jury to consider the issue of voluntariness specifically as a factor going to the truth of whether the statement was actually made by Williams, hence the passages we emphasised above, voluntarily and truthfully given by him or a composition of the police, that Williams for some reason felt he must sign.

[118] We agree with the Appellants that the Court of Appeal should have considered the trial judge's treatment of the caution statement as a whole and looked at the context of his treatment of the issue of voluntariness, which was actually more favourable to the State. The Appellants relied on the decision in the Trinidad and Tobago case of *Guerra and Wallen v The State*[85] in which a similar issue arose. In that case, although the trial judge seemingly left the issue of voluntariness to the jury, on appeal it was held that the judge had been more than favourable to the appellant, who raised the matter of the judge's treatment, and the judge had given an otherwise adequate direction on the issue. It was not considered a misdirection. A similar finding was made in *Henry*.[86] These cases demonstrate that what is required on appeal is a consideration of the directions as a whole. As

[85] (1993) 45 WIR 370.
[86] Supra (n65) at p 326.

we have indicated, in this case on an overall consideration, the summation to the jury on this point was more favourable to the State and the judge did not err in law by directing the jury to consider voluntariness, as a factor going to the truth of the contents of the statement, rather than its admissibility into evidence. We therefore hold that the Court of Appeal erred in finding the trial judge misdirected the jury by leaving the issue of voluntariness for them to decide; the judge had already decided that issue when he admitted the caution statement into evidence. Although the judge's summation with respect to William's caution statement was far from impeccable, his directions concerning this matter did not constitute a substantial misdirection within the meaning of section 33B(1)(a)(iv).

(xi) Was the jury substantially misdirected on joint enterprise?

[119] The Appellants argued that the Court of Appeal erred in law when it found that the jury was inadequately instructed on joint enterprise. The DPP's contention was that the Court of Appeal was correct to conclude that the summation of the trial judge was inadequate and gravely prejudicial to the State.

[120] The trial judge instructed the jury as follows:

> "This brings me to the third element of the crime, that the Prosecution has to prove and probably the most important element that you have to consider and that is that it was the accused Mark Williams and James Hyles acting together or either of them individually or acting together with others who inflicted the injuries on each of the eleven deceased that led to their deaths."
>
> "Members of the jury, you have to consider the specific evidence that I just went through to determine whether the accused, both of them or either of them, inflicted injuries on the deceased persons mentioned earlier, acting alone, together or along with others. You must be satisfied so that you feel sure that an accused inflicted the injury or was part of a group acting in pursuance of a common plan that committed the offence charged before you make that determination."

[121] We regard this direction as being in standard and appropriate terms, not favourable to either side and certainly not unfavourable to the Prosecution, who appealed against it as being inadequate. In this case there was no need to embark on a lengthy exposition of the law on joint enterprise when the straight case against each accused was that he, personally, inflicted harm and, in any event, formed part of a group, armed with guns and acting in pursuance of a common

plan, that committed the massacre. It is common ground that the offence was committed by a number of persons and the sole question was whether the accused directly participated by inflicting harm. In this case, there was no need to consider what the Appellants did at the periphery of the crime or what they knew about it, and whether those actions or that knowledge amounted to participation in the crime. In this case there arose only the primary question: did the Appellants do any of the shooting or were they directly involved in that activity? This was a straight question of fact. If the Appellants each did some of the shooting or if they were directly involved in the massacre, there could arise no need for any direction for the jury to consider whether this amounted to an extended participation in the crimes. There was no question of any other act of participation such as standing by in support, keeping a look out, giving exhortations, restraining victims or anything else. It would have been rank hypothesis for the judge to give any direction on such or similar matters. Therefore, we cannot agree with the Court of Appeal that the trial judge erred or fell short in his direction on joint enterprise. His direction, succinct as it was, was right on the mark.

[122] Before concluding on this point, it may be helpful to address the Court of Appeal's reliance on *R v Jogee; Ruddock v The Queen* in its decision on joint enterprise. In that case, the Privy Council and the Supreme Court of the United Kingdom reviewed the law on the criminal liability of accessories, particularly the case of *Chan Wing-Sui v R* and decided that the law had taken a wrong turn by adopting the doctrine of extended joint enterprise involving "parasitic accessory liability." As a consequence, the Privy Council and the Supreme Court jointly declared *Chan Wing-Sui* to be bad law. In its judgment in this case, the Court of Appeal considered *Jogee* at length before relying on it for the Court of Appeal's finding that the directions of the judge were inadequate. This engages us for three reasons. Firstly, *Jogee* and *Chan Wing Sui* deal with criminal liability beyond direct criminal involvement of participants in the crime and with the question how wide that liability net should be spread; it was therefore irrelevant in the case before us. Secondly, *Jogee* was decided three years after the trial judge gave his directions, so to criticize the judge's directions based on law that did not exist at the time of the trial and still does not exist in Guyana, was rather unfair

to the trial judge. Thirdly, *Jogee*, a controversial decision[87], recently decided by the Privy Council and representing the departure from established law, cannot be regarded as binding in Guyana, until that departure is confirmed or propounded by this Court. The practical point is that unless this court states otherwise *Chan Wing-Sui* remains applicable in Guyana.

(xii) Should the jury have been directed that allegations of police impropriety should be supported by evidence?

[123] The Appellants submitted that the Court of Appeal fell into grave error when it held that the learned trial judge ought not to have permitted cross examination of police witnesses to allege impropriety without directing the jury that the Defence would have to substantiate those allegations. At paragraph 53, the Court of Appeal held:

> "It was also contended for by the Director of Public Prosecutions that the trial judge allowed suggestions of police impropriety to be put to the witnesses, without appropriate directions being given. We agree that a direction was necessary in the circumstances. The proper practice where allegations of police impropriety are made to witnesses for the Prosecution, the Defence should call witnesses to support those suggestions or allegations. This has been emphasised in a number of cases: see *Sutherland v The State (1970) 16 WIR 342* and *Henry v The State (1986) 40 WIR 312*."

[124] The Appellants contended that neither *Sutherland*[88] nor *Henry* supported the proposition advanced by the Court of Appeal "that the trial judge is obliged to give appropriate directions regarding the burden of proving police impropriety on the part of the Defendant making the allegation". In their view, both cases were distinguishable. In *Henry*, the Court of Appeal of Trinidad and Tobago was critical of the practice of impugning the credibility of a witness from the dock without the witness being given an opportunity to answer the allegations as put and without the benefit of cross-examination on the part of the prosecution. In *Sutherland*, the Court was addressing the appropriateness of putting suggestions to police officers in circumstances where the Defence had no intention to call witnesses to substantiate the allegations put.

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[87] The Hong Kong Court of Final Appeal, for example, refused to follow this decision, see: *HKSAR v. Chan Kam Shing*, 16 December 2016 [2016] HKCFA 87.

[88] (1970) 16 WIR 342.

[125] In our view, the argument for the Appellants failed to capture the totality of the *Henry* and *Sutherland* decisions. For instance, in *Sutherland* Luckoo C stated:

> "For reasons best known to him, the appellant did not go into the witness‑box to allow himself to be cross‑examined, but was it right for those suggestions of impropriety on the part of the police to be made when, as it would appear, there was never any intention of putting the appellant in the witness‑box to support the suggestions which were put?"[89]

[126] Luckoo C then went on to affirm the dicta of Lord Goddard *R v O'Neill, R v Ackers*[90] where he referred to this course as "quite wrong and improper conduct on the part of counsel".[91] Similarly, in *Henry*, the Court of Appeal of Trinidad and Tobago (Bernard CJ) found at pg. 336 – 337 that:

> "The practice whereby accused persons remained in the shelter of the dock and indulged in making allegations of gross impropriety on the part of the police either with or without the active assistance of other prosecution witnesses and without giving them an opportunity to answer the allegations, was denounced by this court in *Daken v R* (1964) 7 WIR 442 in which the admonitions of Lord Goddard CJ (England) in *R v O'Neill and Ackers* (1951) 34 Cr App Rep 108 at pages 110 to 111 with regard to this were referred to and adopted. Following this decision, the practice ceased. It is a matter of record that within recent times the practice has again raised its head. So much so that in the recent case of *François v The State* (unreported) this court had cause not only to sound the warning again, but fully supported the strong statements which the trial judge found it necessary to make to the jury in circumstances of a like kind to this. It is, of course, the right of an accused person to remain in the dock and make his defence unsworn from there. Equally, however, prosecution witnesses are entitled to expect their credibility to be tested if their character is later to be sullied from the shelter of the dock… in our view, having regard to all the circumstances, it was open to the trial judge and he would have been entitled to pass the strongest strictures upon the appellant for his conduct in casting the aspersions which he did upon the prosecution witnesses from the sheltered haven of the dock."

[127] In the instant case, Williams (who was responsible for making the allegations) gave an unsworn statement from the dock. In the piquant language of Bernard CJ, he made allegations of impropriety against the police from 'the sheltered haven

[89] Supra (n88) at p 348.
[90] (1950) 34 Cr App Rep 108.
[91] Ibid at p 110.

of the dock'[92] and that evidence was never tested under cross examination. In our view, far more can be gleaned from the *Sutherland* and *Henry* cases than was made out before us by the Appellants. The jurisprudence indicates that although it is an accused's right to give an unsworn statement, when allegations of police impropriety are made it would be expected, as a matter of fairness, that the accused would give sworn evidence which could then be tested under cross-examination. It further contemplates that failing this, the trial judge would make any statement to the jury about this conduct of the accused that the judge deems necessary. In the circumstances of the present case, we agree with the Court of Appeal that the trial judge should have directed the jury in appropriate terms. The failure to do so, in fact a non-direction, constitutes in our view a substantial misdirection.

Applying the test

[128] In [71] we concluded that in a prosecution appeal against an acquittal in proceedings by indictment in the High Court the prosecution must satisfy the Court that it can with a substantial degree of certainty be inferred that had the error(s) or flaw(s) not occurred, the trial would not have resulted in an acquittal of the accused. Whether that inference can be made, will depend, on the one hand, on the nature and weight of the evidence as a whole and, on the other hand, on the seriousness of the judicial error(s) or procedural flaw(s) at the trial. If, however, that inference cannot be made, the acquittal must stand, even if the error(s) or flaw(s) were substantial.

[129] It follows from the preceding paragraphs that material irregularities have occurred in the trial of the Appellants. There were significant irregularities in the selection of the jury and also the failure of the trial judge to order an investigation into the allegation of improper communication with a juror constituted a material irregularity. Moreover, there was a substantial misdirection in the summation to the jury to the extent that the trial judge failed to properly counterbalance the allegations of police impropriety launched by the accused from the safety of the dock, with a direction pointing out to the jury the fact that this allegation was not supported by evidence and the accused could not be cross-examined, meaning

[92] Supra (n65) at p 337.

that these allegations should be considered with great caution. Taken together, these errors and flaws were of a sufficiently serious nature and we have little doubt that in a conviction appeal the material irregularities that we have found might well have led to allowing the appeal and overturning the verdicts. But, as we have stated, that is not the test. We should be able to infer that had the material irregularities and the substantial misdirection not occurred, the trial would not have resulted in an acquittal of the accused.

[130] However, we cannot with the required degree of certainty conclude that a jury not having been selected in the manner it was, would have reached a different verdict. Nor can we at all be sure or even find it likely that had the other mistakes not been made, the accused would have been convicted. It is quite possible that the jury acquitted the Appellants because they simply did not believe, beyond reasonable doubt, the evidence presented by the State. Apart from Dwane, the State called no other alleged eyewitnesses to the murders and the uncorroborated evidence of Dwane, a former co-accused turned state witness, was clearly not acted upon by the jury. We note here that the possible strength of that evidence could be seen as substantially weakened by the unsatisfactory reasons given for this witness's last minute-change of mind and the lack of information about the conditions under which this transformation might have taken place. Then there was the statement of another witness, Wright, whose evidence was basically of a hearsay nature and the circumstances under which he, also connected to the Fine Man gang, decided to give evidence were equally nebulous. The only other available evidence was a caution statement containing an alleged half-hearted confession of the Appellant, Williams, which he denounced as a fabrication by the police and which the jury also chose not to act upon. This was all the relevant evidence there was for the jury to consider – no further investigations apparently having been done – and it was far from overwhelming evidence in the sense that it depended entirely upon whether the jury chose to believe the persons who advanced this evidence and it was competent for the jury to reject the evidence. Surely, criminal cases of this magnitude, deserve a more thorough and exhaustive investigation with better and stronger evidence than was produced here.

[131] In summary, this Court is satisfied that none of the constitutional arguments raised by the Appellants are available and the right of the DPP to appeal the

acquittals was properly exercised in this case. The Court of Appeal, however, upheld that appeal on the ground that the trial was unfair because of a number of material irregularities including the questioning of prospective jurors, the failure of the trial judge to investigate a relationship between a juror and a man alleged to be Hyles' father and the judge's failure to give a proper direction with respect to allegations of police impropriety. Having considered each of the alleged errors and flaws, we are satisfied that there were some material irregularities and one substantial misdirection but that it cannot be inferred that had these not occurred the jury would have convicted the Appellants. The decision of the Court of Appeal to set aside the acquittals and to order a retrial, therefore, cannot stand.

Disposition

[132] In the circumstances, the Court

(i) Allows the appeal and sets aside the decision of the Court of Appeal; and

(ii) Restores the jury's verdict of acquittal of the Appellants.

/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/ D. Hayton

The Hon. Mr. Justice D. Hayton

/s/ M. Rajnauth-Lee

Hon Mme Justice M Rajnauth-Lee