[2018] CCJ 29 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No BZCR2017/005
BZ Civil Appeal No 8 of 2013

BETWEEN

JAPHET BENNETT **APPLICANT**

AND

THE QUEEN **RESPONDENT**

Before The Honourables **Mr Justice Wit**
Mr Justice Hayton
Mr Justice Anderson
Mme Justice Rajnauth-Lee
Mr Justice Barrow

Appearances

Mr Anthony Sylvestre for the Applicant

Ms Cheryl-Lyn Vidal, SC and Ms. Shanice Lovell for the Respondent

JUDGMENT
of
The Honourable Justices Wit, Hayton and Anderson

Delivered by The Honourable Mr Justice Wit

And
the dissenting
JUDGMENT
of
The Honourable Mme Justice Rajnauth-Lee

And
JUDGMENT
of

The Honourable Mr Justice Barrow

Delivered on the 17th day of October 2018

JUDGMENT OF THE HON. MR. JUSTICE JACOB WIT

[1] The Applicant, Japhet Bennett, has been convicted of, and sentenced for, a murder committed on 13 September 2009. The crucial evidence, upon which his conviction rests, is a previous statement of a witness to the police, which the witness, under oath, retracted at the trial (a previous inconsistent statement). In his appeal before the Court of Appeal, Bennett argued that this statement should not have been admitted or, alternatively, that his no case submission should have been upheld by the trial judge. The Court of Appeal did not agree with him and dismissed his appeal against the conviction. He then appealed to this Court where divergent views have emerged about the correctness of the decisions in the lower courts. Justice Rajnauth-Lee, in a lengthy and thorough judgment, has concluded that no errors were made in the courts below and that the appeal against the order of the Court of Appeal affirming Bennet's conviction should be dismissed. Justice Barrow, on the other hand, reasons with great force that the recanted hearsay statement was highly unreliable and should not have been admitted into evidence. But having admitted it without objection, he points out, the trial judge should at least have stopped the case from going to the jury by upholding the no case submission. He is therefore of the view that the appeal should be allowed, that a verdict of acquittal should be entered, and that Bennett should immediately be released from prison.

[2] We agree *grosso modo* with Justice Barrow's reasoning and the orders he suggests. We do not, however, agree that the trial judge erred by admitting the previous inconsistent statement when it was introduced. It was in our view only at the close of the prosecution case, that it became clear that no evidential material had been produced which could have allowed the jury properly to assess the reliability of the statement, and it was for that reason that the trial judge should have upheld the no case submission and directed the jury to acquit the accused. We will set out our reasons hereunder as succinctly as possible. For the details and background of this case, we refer to the judgements of our colleagues in order to avoid unnecessary and cumbersome repetition.

[3] As a general principle, all relevant evidence is admissible with the exception of hearsay evidence which the common law as a rule, even if it is relevant, excludes. This is what is called the rule against hearsay. Traditionally, exceptions to this rule have been

accepted by the common law courts. In more recent times, however, most of these exceptions have been created by statute (Canada being an exception).[1] Although the extent and scope of these exceptions are not the same in every jurisdiction, there are some common trends. One such statutory exception can be found in section 73A of the Evidence Act of Belize, which provides:

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

There is no doubt that this provision applies to the statement which Bennett's counsel argues should not have gone to the jury. But the fact that the statement was admissible does not necessarily mean that the judge must always admit it. This flows from his duty to ensure the fairness of the trial.

[4] We note that fairness in this context is not limited to the defendant; the trial should be fair to all: defendant, victims, witnesses and society as a whole. As s 6(2) of the Belize Constitution puts it: "If any person is charged with a criminal offence, then …*the case* shall be afforded a fair hearing…". Procedural fairness is therefore an overriding objective of the trial. Verdict accuracy, however, is equally important and must also be considered. Although it is possible (but surely not proper) to reach an accurate verdict through an unfair process, a procedurally fair process leading to an obviously inaccurate result can hardly be called fair, especially if the verdict is a conviction of a possibly innocent person. It is therefore obvious that the judge's duty to ensure a fair trial must also include safeguards against reaching an inaccurate or wrong conviction.

[5] It is important to consider the role of the judge vis-a-vis the jury. Both have an essential part to play in the resolution of a criminal case and their respective functions require a proper allocation of powers and responsibilities. Between them exists a complementarity that needs to be maintained as much as possible. As Lord Steyn stated in *Crosdale v R:*[2]

> "A judge and jury have separate but complementary functions in a jury trial. The judge has a supervisory role. Thus, the judge carries out a filtering process

[1] See [7] below.
[2] [1995] 2 ALL ER 500.

> to decide what evidence is to be placed before the jury. Pertinent to the present appeal is another aspect of the judge's supervisory role: the judge may be required to consider whether the prosecution has produced sufficient evidence to justify putting the issue to the jury."

[6] The jury is the trier of the facts, not the judge. But the judge decides which evidence, if any, will go before the jury. It is the jury that decides what weight should be given to the evidence, which includes an assessment of its reliability. The judge is not supposed to look at those issues. Yet, the decision whether to admit evidence or to leave it for the jury to decide its strengths or weaknesses, is a normative decision that will of necessity include some limited form of weighing of both the contents and the reliability of the evidence. Clearly, great caution is required lest the judge unjustifiably intrudes on the jury's province.

[7] As indicated in the citation of Lord Steyn's statement of the law, the judge's supervisory role is supported by at least two procedural tools the judge possesses: the power to filter out (exclude) the evidence to be placed before the jury; and the power, upon a no case submission by the defence at the close of the prosecution's case, to uphold that submission, stop the trial and direct the jury to acquit. Both the legal foundation and the limitations of these powers are to be found in the common law although in several jurisdictions these have partly been supplemented, replaced or amended by statutory provisions. In Canada, fundamental changes have been made by its Supreme Court through adjustments of the common law itself, although exclusively with respect to, and full focus on, the admissibility of hearsay evidence, whereas the existing Canadian judicial tool of upholding a no-case submission has not been specifically adapted for this kind of evidence.

[8] In England, the major changes have been statutory. A previous inconsistent statement, for example, was made admissible by section 119 of the Criminal Justice Act 2003 (which was adopted in section 73A of the Evidence Act of Belize). At the same time, the judge's discretion to exclude otherwise admissible evidence under certain circumstances was acknowledged and codified in section 126 of the Act, recognising also the power of the trial court to exclude such evidence under section 78 of the Police and Criminal Evidence Act 1984 (PACE) if "having regard to all the circumstances,

including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." Interestingly, section 114(1)(d) of the Criminal Justice Act 2003 (CJA) allows the judge to admit basically inadmissible hearsay evidence in the "interests of justice", whereas section 114(2) provides a non-exhaustive list of factors that should be taken into account when deciding whether it is in the interests of justice to admit the evidence. According to the jurisprudence of the English Court of Appeal, the trial judge should also use this "checklist" or "aide memoire" when considering admitting or excluding hearsay evidence under provisions that already declare such evidence in principle admissible, for example in the exercise of its discretion under section 78 PACE.[3]

[9] The power to stop the trial at the close of the prosecution case is founded in the common law. The appropriate tests are to be found in the well-known case *R v Galbraith.*[4] In accordance with that decision, there is no difficulty "if there is no evidence that the crime alleged has been committed by the defendant… The judge will of course stop the case." The difficulty arises, Lord Lane CJ said, "where there is some evidence, but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence." He then identified two scenarios: "(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that the strength or weakness depends on the view to be taken of the witness's reliability, or other matter which are generally speaking to be taken within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

[10] It was feared, however, that this test would not be adequate in case of hearsay evidence. For this reason "an additional safety valve"[5] was created by section 125 CJA providing that if, on the trial of a defendant before a judge and jury, the court is satisfied at any

[3] *R v Riat* [2013] 1 All ER 349, [22].
[4] [1981] 2 ALL ER 1060.
[5] Rose LJ in *R v Joyce* [2005] EWCA Crim 1785 at [19].

time after the close of the case for the prosecution that (1) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceeding; and (2) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe, the court must either direct the jury to acquit of the offence or discharge the jury, if the judge considers there ought to be a retrial.

[11] It would appear that the English statutory legal framework as a whole effectively enables the trial judge to supervise the fairness of the proceedings and that it is thus compliant with Article 6(1) of the European Convention of Human Rights, which guaranties the right to a fair trial.[6]

[12] In Belize, no statutory provisions exist that limit or qualify the circumstances under which a previous inconsistent statement, or more generally hearsay evidence, can be admitted. Nevertheless, the power of the judge not to admit admissible evidence was correctly recognized by the Court of Appeal in *Tillett v R,* a case which dealt with a hearsay statement admissible under section 73A, where the court stated, referring to its earlier decision in *Micka Lee Williams*, that

> "the admissibility of such a statement will nevertheless remain subject to the rule of the common law that a judge in a criminal trial has an overriding discretion to exclude it if its prejudicial effect outweighs its probative value, or if it is considered by the judge to be unfair to the defendant in the sense of putting him at an unfair disadvantage of depriving him unfairly of the ability to defend himself." [7]

[13] So far as the power to stop the case upon a no case submission is concerned, the trial judge in Belize must rely on the *Galbraith* tests as a "safety valve" similar to section 125 CJA has not been adopted by the Belize legislature. It appears to us, however, that the second limb of *Galbraith* allows the judge, to a great extent, room to achieve procedural fairness and to safeguard a sufficient level of verdict accuracy.

[14] We note in passing that these common law powers and discretions of the judge have an even stronger foundation in Belize because they directly flow from, and give further

[6] *R v Horncastle and another; R v Marquis and another* [2009] UKSC 14.
[7] *Vincent Tillett Sr v The Queen* Criminal Appeal No. 21 of 2013 at [41]

content to, the judge's constitutional duty to ensure a fair trial. We also note that the very fact that the right to a fair trial (including the judge's corresponding duty to ensure it) is a fundamental constitutional right in Belize, not only means that the judge needs to conduct himself fairly in accordance with his common law duties, but also that if the common law would not sufficiently allow the judge to do what basically needs to be done from a perspective of fairness in the broader sense as set out in [4] , the common law could, and depending on the circumstances should, be recalibrated or incrementally adapted in order to enable the judge to comply with his constitutional mandate[8]. We hasten to say, however, that we do not see a need to embark on that exercise in the case before us. The existing legal instrumentarium is in our view adequate to properly deal with this case.

[15] In a case, as the one before us, where the hearsay (previous inconsistent) statement is decisive for the outcome of the trial, as the case wholly or substantially rests on that statement, the result of excluding that statement at the stage that it is introduced on the one hand and at the stage of stopping the case at the close of the prosecution's case on the other is the same. On both approaches the defendant must be acquitted. Considered from that perspective, the test for both decisions should be the same. However, the fact that these decisions will be made at different stages of the trial would seem to suggest a different test. The Canadian case law does not assist here as it is entirely focussed on the admissibility and exclusion of evidence at the admission stage, even requiring a *voir dire* in preparation of that decision. The English case law is more relevant, although not altogether coherent. Especially two English authorities are especially apposite: *Ibrahim*[9] and *Riat,*[10] judgments delivered respectively by Aitken LJ and Hughes LJ.

[16] In *Ibrahim,* Aitken LJ stated that at the stage where the hearsay evidence is introduced, the test is whether the evidence is "potentially safely reliable" (although this was not further explained). At the second stage, when section 125 CJA comes into play, the test is whether the evidence is so "unconvincing", that considering its importance for the prosecution case, a conviction would be unsafe. The test would then be "whether the statement *has been shown to be reliable* in the light of all the other evidence then

[8] See Lamer CJ in *R v B (KG)* [1993] 1 S.C.R. 740 p. 774-783 and also Wit JCCJ in *Lucas v Chief Education Officer et.al.* [2015] CCJ 6 AJ at [180]-[183].
[9] [2012] EWCA Crim 837; [2012] 4 ALL ER 225.
[10] [2013] 1 All ER 349.

adduced. If an untested hearsay statement is not shown to be reliable and it is a statement that is part of the central corpus of evidence without which the case on the relevant count cannot proceed, then we think that … the statement is almost bound to be *"unconvincing"* such that a conviction based on it will be unsafe." Therefore, a different test needed to be applied at each stage of the proceedings, whereby the final test was strongly tailored to the "safety valve" of section 125 CJA which is unknown to Belize.

[17] In *Riat*, however, the English Court of Appeal rapidly changed its course. Hughes LJ indicated that there was no rule that hearsay evidence has to be independently verified before it can be admitted or left to the jury. He stated that, "The true position is that in working through the statutory framework in a hearsay case …, the court is concerned at several stages with both (i) the extent of risk of unreliability and (ii) the extent to which the reliability of the evidence can safely be tested and assessed." The job of the judge was, either at the admission stage or after the close of the prosecution case, "to ensure that the hearsay can *safely* be held to be reliable" (and not whether it has been shown to be reliable).

[18] Both the *Ibrahim* and the *Riat* approach must be understood against the background of section 125 CJA and it would seem that the first mentioned analysis reflects a proper, natural interpretation of the words in section 125 CJA, which seeks to create a safety valve that is broader than the *Galbraith* (second limb) test would appear to allow. However, the *Riat* approach, which has been followed in all subsequent English appellate judgments, "dovetails with the way judges handle a submission of "no case"[11]. We are therefore of the view that the proper approach for Belize would not be to require the judge to make a finding on the reliability of the hearsay evidence (prohibited by *Galbraith*) but to limit himself to the question whether the hearsay evidence could safely be held to be reliable. That test does not go to the reliability of the evidence as such, which would be for the jury to assess, but to the pre-condition of the quality of the evidence, more or less in the same way as in *Turnbull*[12] where the judge must exclude inherently weak identification evidence.

[11] *Phipson on Evidence*, 19th edition p. 1069
[12] [1977] 1 QB 224.

[19] We do not, however, agree that the test should altogether be the same for both the admission stage and the no case submission stage. Although it might be true, as Hughes LJ stated in *Riat*, that "If it is the Crown which is seeking to adduce the evidence, and if the evidence is important to the case, the judge is entitled to expect that very full inquiries have been made as to the witness's credibility and all relevant material disclosed", it would seem to us more aspirational than real to expect that at that early stage of the proceedings all the relevant evidential material would be available to make the decision to exclude the evidence. As is stated in *Phipson*: "The more important the hearsay is to the prosecution's case, the more is required by way of counterbalancing factors to ensure the trial was fair. During a trial at first instance, the extent to which a statement is supported by other evidence or is decisive may depend upon how the trial unfolds, hence the need for English trial judges to be able to stop trial proceedings *after* hearsay has been admitted."[13] What is true for English trial judges is also, if not more, true for Belizean trial judges. In this respect we would also refer to what was said in the recent case of *HM Advocate v Alongi*:

> "[I]f there is no strong corroborative evidence to enable the fact-finder to conduct a fair and proper assessment of the reliability of the statement allegedly made by the deceased, then unfairness may be seen to occur … In this case the degree to which RS's statement will be decisive remains uncertain, notwithstanding the concessions made by the Crown."[14]

The court concluded that in all the circumstances of that case, it could not be determined "on the predicted testimony" that the defendant's trial would "inevitably be unfair." [15]

[20] In short, the reality is that in the course of the trial evidence may be adduced which will strengthen (or weaken) the hearsay, this being good reason why it would be prudent and in the interest of justice to allow the adducing of further evidence. This is, we think, also in keeping with the intention of the legislature to facilitate the prosecution of serious crimes and to strengthen the administration of criminal justice. In our view, the judge should therefore in principle admit (admissible) hearsay evidence when it is introduced if there is at least a reasonable possibility that eventually, depending on how the trial unfolds, sufficient evidential material will emerge given which the hearsay evidence

[13]Supra (n10), p. 1064/5
[14] [2017] HCJAC 18.
[15] 2017 HCJAC 17; 2017 SCL 455.

could in the end safely be held to be reliable. As we will explain, there certainly was such a possibility in the case against Japhet Bennett, even though in the end no such material was adduced.

[21] What remains to answer now are the following questions: (a) when or on what basis can hearsay evidence safely be held to be reliable and (b) whether, and why, that test was not eventually met in Bennet's case?

[22] The first question was thus answered by Hughes LJ in *Riat*: to ensure that the hearsay evidence can *safely* be held to be reliable, the judge must look (1) at its strengths and weaknesses, (2) at the tools available to the jury for testing it, and (3) at its importance to the case as a whole.[16] In *Friel* the Court of Appeal indicated that judges should focus on the reliability of the hearsay evidence, grounded in a careful assessment of (1) the importance of the evidence, (2) the risks of unreliability and (3) the extent to which the reliability of the evidence can safely be tested and assessed by the jury.[17]

[23] The requirement that the jury must have sufficient tools to test and assess the hearsay evidence also figures prominently in the Canadian case-law: "threshold reliability" can in the first place (and should preferably) be established "by showing that there are adequate substitutes for testing the evidence which provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the hearsay statement" ("procedural reliability"). [18] As a substitute for the traditional safeguards is mentioned a video (or audio) recording of the entire statement.[19]

[24] Threshold reliability can also, although it would seem to a lesser extent, be established when there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy ("substantive reliability"). Whether this is the case may depend on the circumstances in which the statement was made and on evidence (if any) that

[16] [2012] EWCA Crim 1509, [28].
[17] [2012] EWCA Crim 2871.
[18] *R v Bradshaw* [2017] 1 SCR 865, *R v Khelawon* [2006] 2 S.C.R. 787, *R v Youvarajah* [2013] 2 S.C.R. 720. See also, for Australia, *Cross on Evidence 11th edition at p. 447*-: The exercise of a discretion to exclude otherwise admissible evidence "may exist where the weight and credibility of the evidence cannot be effectively tested."
[19] See also the English case *R v Bennett* [2008] EWCA Crim 248, classifying a video recording of the making of the statement as a "potential strength."

corroborates or conflicts with the statement.[20]Another factor may be whether or not the maker of the statement had any reason to misrepresent the matter stated or whether the statement was made spontaneously, or against his or her own interest (factors that can be found on the "checklist" of section 114(2) CJA).

[25] As to the second question, we are of the view that for the reasons expounded by Justice Barrow but most importantly for the reason that at the close of the prosecution case the jury had no tools or evidential material available to rationally test and evaluate the truth and accuracy of the previous inconsistent statement of the witness, there was no other conclusion possible than that the evidence, which wholly or substantially rested on the impugned statement, could not safely be held to be reliable.

[26] We emphasize that the situation was significantly different at the admission stage. Although there was no recording of the making of the witness's statement, more information could have been obtained about the exact circumstances in which the statement was made. How long did it take to take down the statement? Was the witness cooperative or not? Was he hesitant in giving the statement or did he seem confident? Was he asked why he did not directly come forward as a witness? The witness is the brother of the widow of the deceased victim whom he met shortly after the murder. The sister, who was heard as a witness, could have been asked what, if anything, her brother had told her about the murder and the murderer. The police officer Espat, another witness, could have been asked if he had seen the witness when he arrived at the scene of the crime, whether he had spoken with him and if so, what the witness answered. In the impugned statement, it was said that there was a big lamp post at the crime scene that was well illuminated but no witness was asked to confirm that point. Bennet, who was 17 years old at the time and who had no previous convictions, was arrested long after this crime had been committed. There is no information why this was so. Had he been on the run? Had he been hiding? Were there other reasons and if so, which were these? Had there been a search in his house? We conclude that at the time the statement was introduced as evidence, there would have been sufficient reason to assume that there was a reasonable possibility that the evidence would in the end meet the required test. That this did not happen, is a different matter and justifies upholding the no case

[20] See *Bradshaw* and *Khelawon*, supra (n17).

submission as the prosecution evidence for the reasons given was inherently so weak that the jury properly directed could not *properly* or *reasonably* convict upon it. Before we conclude, we summarize for clarity's sake the following.

[27] During a trial, particularly a jury trial, the judge in Belize has basically two opportunities to evaluate and assess the necessity and reliability of the hearsay evidence, and to decide whether it should be left to the jury. The first occasion occurs when the hearsay evidence is introduced, and the judge must decide whether, at that stage, to admit it. The evidence having been admitted, the second occasion occurs when at the close of the prosecution case a no case submission is made, and the judge must decide whether to uphold that submission. If, on the first occasion, the judge, exceptionally, is clear in his mind that the hearsay evidence cannot in reason safely ever be held to be reliable, the judge must exclude it and, where the prosecution's case, like here, wholly or substantially rests on that evidence, the judge should stop the trial and direct the jury to acquit the accused. If, however, there is a reasonable possibility that eventually, depending on how the trial unfolds, sufficient evidential material will emerge given which the hearsay evidence could in the end safely be held to be reliable, the judge should in principle admit the evidence. This is the more so, of course, if at that stage it is already clear that this test is or will be met.

[28] Where at the close of the prosecution case a no case submission is made, which, one can assume, will be standard in cases like these, the final test is whether the evidence thus far produced could safely be held to be reliable "as it is for the jury to decide whether in fact the evidence is reliable or not." This is what in the Canadian terminology could be called the "threshold reliability" (although it is there applied to the admissibility issue). If that test is met, the judge will leave the evidence for the jury, after having given them the necessary directions, to consider its "ultimate reliability." If it is not met, the judge should conclude that the evidence is inherently so weak that the jury, even if properly directed, could not properly or reasonably convict upon it, in which case the judge will uphold the submission and direct the jury to acquit the accused.

[29] In this case, the final test was not met, and we therefore decide that the appeal be allowed and make the orders at [150] below.

DISSENTING JUDGMENT OF THE HON. MME JUSTICE MAUREEN RAJNAUTH-LEE

[30] Japhet Bennett ("Bennett") seeks special leave to appeal the order of the Court of Appeal of Belize affirming his conviction for murder and remitting his sentence to the Supreme Court pursuant to section 106A(2) of the Criminal Code (Amendment) Act, 2017.[21] By order of this Court dated 20 February 2018 we ordered that the hearing for special leave be treated as the hearing of the substantive appeal. Having regard to the issues raised at the hearing, I share the view of the majority that the application for special leave should be granted. The appeal raises points of law of public importance and there is a potential for a serious miscarriage of justice.[22] Despite granting special leave, however, I do not agree with the majority that this appeal should be allowed, and that Bennett's conviction should be overturned. I am of the view that the appeal should be dismissed on the merits. My reasons follow.

Factual background

[31] The appeal concerned the murder of Ellis Meighan Sr. ("the deceased") who was shot and killed on the night of 13 September 2009 at the corner of Banak Street and Central American Boulevard, Belize City. Two days after the murder, that is, on the 15 September 2009, Marlon Middleton ("Middleton") brother-in-law of the deceased, gave a statement to the police wherein he identified Bennett as the shooter. In his statement, Middleton said that he was riding his bicycle along American Boulevard on the night the deceased was murdered when he heard gunshots. He began "speeding up" towards Banak Street because his sister lived on that street and the shots came from that general area. He said that he noticed a body lying on the ground at the corner of Banak Street and Central American Boulevard. He was "about 40 feet or more" away from the body. He said that he saw Bennett, whom he described as a 'medium built' male of 'brown complexion', about 5 feet 8 inches tall, wearing a red shirt and a light coloured fitted cap, standing about two feet from the body with a black handgun which resembled a 9mm pistol in his right hand. He said that he could see Bennett's face because the area

[21] Act No. 22 of 2017.
[22] See the test for special leave in criminal cases as mentioned in *Cadogan v R (No. 2)* (2006) 69 WIR 249; [2006] CCJ 4 (AJ) at [2] and *R v Doyle* (2011) 79 WIR 91; [2011] CCJ 4 (AJ) at [4].

was well illuminated by a big lamp post. He said that he had known Bennett for about 4 months and had last seen him a week before the shooting. He said that Bennett rode off from the scene of the crime onto Partridge Street on a bicycle in the company of another male person who was also on a bicycle.

[32] After seeing this, Middleton said that he headed towards his sister's house. As he was on Banak Street heading to the house he saw his sister and her brother-in-law running towards him. He asked his sister if she heard the shots and she replied that she heard the shots but did not know where her husband was. Middleton then jumped on his bicycle and went back to the corner of Banak Street and Central American Boulevard where he noticed that the man who had been killed was his sister's husband. Bennett was detained and charged on 26 October 2009.

Supreme Court Proceedings

The Case for the Prosecution

[33] The Crown opened its case by calling Middleton to give evidence. Middleton confirmed that he was riding along Central Boulevard towards his sister's house on Banak Street when he heard gunshots and that he saw a body at the corner of Banak Street and Central Boulevard from "about 40 feet or more away." However, he said that apart from the body he "did not observe nothing else" and he continued on his way to his sister's house. He remembered giving a statement to the police but when he was shown the statement dated 15 September 2009 although he said that he "think this is the statement I gave to the police on 15th September 2009", he denied that the signature at the bottom of the first page was his. He could not remember who recorded the statement, who was present when it was recorded or where it was recorded.

[34] The Crown applied to treat Middleton as a hostile witness pursuant to section 73A of the Evidence (Amendment) (No. 2) Act, 2012 ("the Evidence Act").[23] After a *voir dire*, Lucas J, the trial judge, after considering sections 71-73A of the Evidence Act, ruled that the application was premature as it had not been proven that Middleton had made

[23] Act No. 6 of 2012.

the statement dated 15 September 2009. The Crown therefore asked that Middleton be stood down and that Assistant Superintendent Suzette Anderson be allowed to give evidence. Assistant Superintendent Anderson testified that Middleton made a statement on 15 September 2009 which she recorded in the presence of Ms Grace Flowers, a Justice of the Peace. She said that Middleton gave the statement of his own free will. He was not threatened and no promise was made to Middleton for him to give that statement. Middleton signed the statement in the presence of Ms. Flowers and herself. In cross-examination, Assistant Superintendent Anderson made it clear that although the statement taken from Middleton was not a caution statement, but an open statement, a "Justice of the Peace is present in the recording of the open and caution statements particularly as it relates to major cases." Ms. Flowers was also called as a witness and she too testified that Middleton made the statement on 15 September 2009. She was present when the statement was recorded by Assistant Superintendent Anderson and she was also present when the statement was signed by Middleton in four (4) places. She too signed and stamped the statement in the four (4) places where Middleton signed. Anderson then signed at the end of the statement.

[35] The trial judge ruled that Middleton was hostile to the party that called him, that is, the Crown, and gave leave to the Crown to cross-examine him in connection with the statement. Middleton was then recalled to the witness stand. He maintained that he only saw the deceased's body lying on the ground and denied telling Assistant Superintendent Anderson that he had seen a male person with a black handgun resembling a 9mm pistol. He also denied telling the police that the male person had the gun in his right hand and that this male person was two (2) feet from the man lying on the sidewalk. He furthered denied that he told the police that this male person was about 5 feet 8 inches in height, he was wearing a red shirt and a light coloured fitted cap and was medium built. He also denied that the gunman was at the corner of Central American Boulevard with Banak Street on the left-hand side and that he had said that he could clearly see the male person's face because the area was well illuminated by a big lamp post. He further denied that the male person made an escape on a bicycle along with a male accomplice onto Partridge Street. He also denied that he had said that when he saw all of this nothing was obstructing his view. Importantly, Middleton denied that he told Assistant Superintendent Anderson that the male person he saw was Bennett, that he saw him regularly on the Boulevard, that Bennett lived in the "St Martin's DePorress area", that

Bennett passed the boulevard during the day and night time every week, that he (Middleton) knew him (Bennett), and had known him for more than four (4) months, and that the last time Middleton saw Bennett was about a week before the shooting. Middleton volunteered that he had "no problem with this man, the prisoner in the box."

[36] Mr Peyrefitte, counsel for Bennett, cross-examined Middleton. Middleton testified that he did not see when the deceased was shot, that he did not see who shot the deceased, and that at the time he heard the gunshots, he did not see the deceased, and did not see who was firing the shots.

[37] Lucas J admitted the statement into evidence pursuant to section 73A of the Evidence Act without objection from Mr. Peyrefitte. In a further *voir dire*, Lucas J ruled that parts of the statement where Middleton had said that he knew Bennett because his nephews, Ellis and Tyrone Meighan, often had problems with Bennett, should be excluded. Assistant Superintendent Anderson, being the recorder of the statement, was recalled and allowed to read the statement (save for the excepted part) aloud to the jury.

[38] Middleton's statement dated 15 September 2009 read as follows:

> "I am a Belizean engineer and a residence of #119 Antonio Soberanis Crescent, Belama Phaze I, Belize City. On Sunday 13th day of September, 2009 at about 8:40pm, I was riding on my bicycle coming from off the Belcan Bridge and I was now on Central American Boulevard on the right hand side of the road and upon reaching the junction of Central American Boulevard with Vernon Street I crossed on to the left hand side of the road contrary to traffic and continued riding where upon reaching near Bagdad Lane I then heard the loud sound of a gunshot. Shortly after hearing this gunshot in a matter of second I then heard the sound of three gunshots. Shortly after hearing the sound of the gunshots I then began speeding up on my bicycle on the same left hand side of Central American Boulevard as I knew that my sister Sheldon Meighan and her family live on Banak Street which is located a bit more ahead from where I was and I heard the gunshots and because the gunshots sounded as if it was coming from that general area. As I continued speeding up and upon reaching just at the corner of Banak Street and Central American Boulevard I looked across on the

right hand side of Central American Boulevard and Banak Street and I must say that Banak Street runs across American Boulevard so therefore there is a junction of Banak Street with Central American Boulevard on the left hand side of the Boulevard and likewise there is a junction of Banak Street with Central American Boulevard on the right hand side of the Boulevard.

As I looked across on the right hand side of the Boulevard just at the junction with Banak Street I saw that a male person was lying down on the side walk on the same right hand side of he Boulevard at its junction with Banak Street and at the same time I saw that there was another male person standing over this male person who was lying on the sidewalk. The male person who was standing over this male person had at the same time a black handgun which resembled a 9-millimetre pistol. I must say that he had the gun in his right hand and at the time he was at a distance of two feet away from the male person who was lying down on the sidewalk. The male person who I saw with the gun in his right hand is of brown complexion of about 5 feet 8 inches in height and at the time was wearing a red shirt and had on his head a light in colour fitted cap, he is also of medium built. At the time when I saw him I was just at the corner of Central American Boulevard with Banak Street on the left hand side and still on my bicycle and I was at a distance of about 40 feet away from both the gunman and the male person who laid on the sidewalk. I was able to clearly see his face because just at the right hand side of the Boulevard with Banak Street junction where he was there was a big lamp post that was well illuminated. I then saw when the gunman jumped on a bicycle and rode down that section of Banak Street in the company of another male person who was on another bicycle awaiting on him in the area where they both headed onto Partridge Street. I was not able to see the face of the male person who was waiting for him in the area. I must say that at the time when I saw all of this there was nothing obstructing my view and there were no traffic passing by. I did not see any other person passing in the immediate area. The weather was normal and it was not raining and it was already night time. The male person whom I saw with the gun is one whom I know as Japhet Bennett and I would see him regularly on the Boulevard. I know that he lives on Saint Martin's De Porres area, Belize City.

Japhet normally passes on the Boulevard during the daytime and nigh time riding a bicycle every week. I have known him for more than four months now

and the last time I saw him before this incident was about a week before. Just after I saw the gunman and his companion rode away from the area, I saw my sister Sheldon along with her brother-in-law Roshawn running out from the street where they live where Sheldon met up with me. As she met up with me I asked her if she had heard the gunshots where she told me that yes she did hear the gunshots and that she did not know where her husband Ellis Meighan Sr was. Upon hearing this I then jumped off my bicycle and went across the Boulevard where the man was lying down on the sidewalk and it was then that I noticed that the man was my brother-in-law Ellis Meighan Sr who was lying face up in a pool of blood near his head and also there was a hole in his face and was motionless. I then told Sheldon that it was her husband Ellis where she then came across along with her brother-in-law. The police then arrived at the same time and dealt with the scene and thereafter took the body to the Karl Huesner Memorial Hospital morgue."

[39] Crime Scene Technician, Mr Daniel Daniels, then gave evidence. He said that he found a 9mm expended shell on the sidewalk and another 9mm expended shell on the grass at the scene of the crime. He also took a number of photographs of the scene. He was not cross-examined by the Defence.

[40] Dr Mario Estrada Bran, an expert in forensic science, then gave evidence. He performed a post mortem on the deceased. In his opinion, the killer used a handgun of a medium calibre (38 to 9mm calibre) to fire a far distance shot (a distance of about 28 to 30 inches). He said that death was caused by massive brain damage due to head trauma caused by gunshot wound. The deceased's back was to the assailant and the shot ran from upwards to downwards. He explained that the direction of the wound did not necessarily mean that the shooter was taller than the deceased.

[41] Mrs Sheldon Middleton-Meighan, wife of the deceased, was thereafter called to the witness box. She said that on 16 September 2009 she went to the Karl Huesner Memorial Hospital morgue and met Dr Estrada Bran as well as Corporal Allison McLaughlin. She said that she was asked to identify her husband's body prior to a post mortem and she did.

[42] Corporal Allison McLaughlin was also called by the Crown and she confirmed that she was present at the Karl Huesner Memorial Hospital morgue on the day that the post mortem was conducted. She said that she asked Mrs Meighan to identify her husband's body prior to the post mortem and that she instructed Mr Jiro Sosa, a Scene of Crimes Technician, to take photographs of the deceased's body and injuries. She said that she witnessed Mr Sosa take three photographs. These were admitted as exhibits. She also said that she witnessed Dr Estrada Bran fill out a death certificate in her presence after the post mortem.

[43] Police Sergeant Manuel Espat was the Crown's final witness. He said that on 13 September 2009 at about 8:45pm he went to the corner of Banak Street and Central American Boulevard where he saw the lifeless body of the deceased in the street. He interviewed persons in the area, but no useful information was obtained. He then transported the body to the Karl Huesner Memorial Hospital where the deceased's body was examined by a doctor and then sent to the morgue. He returned to the corner of Banak Street and Central American Boulevard where he interviewed other persons but no useful information was obtained. Investigations continued and on 15 September 2009 a statement was obtained from Middleton. On 26 October 2009, he met Bennett at the Crimes Investigation Branch Office. He cautioned Bennett in the presence of his mother. Bennett remained silent and he was arrested and charged. Sergeant Espat then identified Bennett in the dock as the person he arrested and charged.

No Case Submission

[44] Mr Peyrefitte submitted that there was no evidence that Bennett shot the deceased. He relied heavily on the cross-examination of Middleton. Mr Peyrefitte contended that section 73A of the Evidence Act amended the common law to the extent that the previous inconsistent statement can now, at the discretion of the trial judge, be admitted into evidence as if the words were spoken in court from the witness box. There was no requirement however that it must be put to the jury. He said that Middleton did not say that he saw Bennett fire the deadly shot, but that he saw Bennett standing over the deceased's body with a gun. He said that the jury could only conclude that Bennett was the shooter by "speculation." He further argued that the Crown's case was severely weakened by the cross-examination of Middleton and that it fell within the second limb

of the *Galbraith* test; that is, the Crown's evidence taken at its highest was such that a jury properly directed could not properly convict on it and as such the trial judge was under a duty to stop the case. Mr Peyrefitte also relied on the decision in *R v Shippey*[24] where it was said that to take the prosecution's case at its highest did not mean "*picking out all the plums and leaving the duff behind*." The trial judge should assess the evidence and if the witness' evidence upon whom the prosecution's case depended was "self-contradictory and out of reason and common sense" then such evidence would be "tenuous and suffer from inherent weaknesses."[25]

[45] The Crown submitted in response that it was relying on the circumstantial evidence that: (i) on 13 September 2009 at about 8:35pm multiple gunshots were heard; (ii) shortly after these shots were heard, Bennett was seen holding what appeared to be a 9mm handgun whilst standing just about two (2) feet from the deceased; (iii) two (2) 9mm expended shells were found and photographed in the immediate vicinity consistent with what Middleton had heard; (iv) the deceased was shot and killed; (v) the autopsy revealed that the deceased died from a 3.8 or 9mm handgun; and (vii) the consistency of Middleton's statement with these facts. Furthermore, on the issue of identification, the Crown submitted that Middleton had said that he could have clearly seen Bennett's face because the area was well illuminated, that he had known Bennett for four months prior to the incident and had seen Bennett a week before the incident. It was also submitted that the Defence failed to show how the test in *Galbraith* was satisfied since the Defence had merely pointed out that there were inconsistencies between Middleton's previous statement and his evidence at trial. It was further submitted on behalf of the Crown that because the statement had been admitted pursuant to section 73A of the Evidence Act, the inconsistency was no longer relevant and that the matter should be put to the jury. Counsel for the Crown relied on the Belize Court of Appeal decision of R *v Melanie Coye et.al*[26] which cited the Privy Council decision of *DPP v Varlack*[27] where it was said that

> "If the case depends upon circumstantial evidence, and that evidence, if accepted, is capable of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is capable of causing a reasonable mind to

[24] [1988] Crim LR 767.
[25] ibid, p. 767.
[26] Criminal Appeal No. 16 of 2010.
[27] [2008] UKPC 56.

> exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence…"[28]

[46] Lucas J ruled that the evidence in the case was direct and circumstantial. He said it was circumstantial because in the written statement, Middleton did not witness the actual shooting of the deceased by the accused. He ruled however that it was not "speculation" if the jury were to accept Middleton's previous statement that Bennett was the one seen with a handgun in his hand two (2) feet from the deceased shortly after he had heard gunshots in the vicinity. He found that this was good circumstantial evidence falling within the dicta of *Ellis Taibo v The Queen*[29] where Lord Mustill stated:

> "All in all, although the case against the appellant was thin and perhaps very thin, if the jury found the evidence of…to be truthful and reliable there was material on which a jury could, without irrationality, be satisfied of guilt. This being so, the judge was not only entitled but required to let the trial proceed: *R v Galbraith*…"

[47] Accordingly, the trial judge overruled the no case submission and ruled that Bennett had a case to answer.

Bennett's Defence

[48] Bennett made an unsworn statement from the dock. He said that

> First of all, My Lord, I did not kill Ellis Meighan Sr. Second of all, I do know Ellis Meighan Sr. I was not even close to Ellis Meighan Sr. at the time they accused me. I was doing my usual bases at the present time playing with my dogs who I love the most. I don't know why I would have any intention to kill Ellis Meighan.

Directions to the jury and verdict

[28] ibid, [22], Lord Carswell citing King CJ in the Supreme Court of South Australia in *Questions of Law Reserved on Acquittal (No 2 of 1993)* (1993) 61 SASR 1.
[29] (1996) 48 WIR 74.

[49] Lucas J proceeded to warn the jury that there was special need for caution in order to convict Bennett on the identification evidence as witnesses were sometimes convinced in their own mind that they saw the accused but might nevertheless be mistaken. He warned the jury that mistaken recognitions could be made even when the accused was a close friend or relative. He highlighted certain material considerations for the jury and told them that it was their duty to determine the credibility of the witnesses especially in light of any inconsistency. Because of what he termed as "Middleton's unreliability", the trial judge gave special directions on Middleton's evidence warning the jury to be very careful in assessing his evidence and very cautious before relying on any part or parts of his evidence because of his inconsistency. The jury retired and returned a unanimous verdict of guilty of murder in under four (4) hours. I will consider the directions of the trial judge in greater detail later in this judgement.

Bennett's Appeal to the Court of Appeal

[50] Bennett appealed to the Court of Appeal and in relation to his conviction, it was argued that:

(c) Lucas J erred by not excluding Middleton's statement on the basis that its prejudicial effect outweighed its probative value. Mrs. Matura-Shepherd, counsel for Bennett in the Court of Appeal, argued that this was a fleeting glance case untested by cross-examination. She submitted that Middleton's statement was incapable of challenge by cross-examination and that the Crown did not offer any explanation as to why Middleton's sworn evidence departed from his prior statement. Therefore, the jury could have only convicted Middleton on the basis that he perjured himself in his sworn evidence. In all the circumstances, therefore, it was submitted on behalf of Bennett, the trial judge should have exercised his discretion not to admit the statement into evidence;

(d) Lucas J erred when he failed to accept the no case submission and withdraw the case from the jury given that the evidence was plainly insufficient to support a conviction;

(e) Lucas J failed to adequately direct the jury on the reliability of and/or the weight to be attached to Middleton's statement;

(f) Lucas J failed to give an adequate *Turnbull* direction; and

(g) The verdict was not supported by the weight of evidence presented before the court and that no reasonable jury could have convicted Bennett upon such evidence.

[51] The Court of Appeal, comprising Awich, Hafiz-Bertram and Ducille JJA, in the written judgment of Hafiz-Bertram JA, upheld Bennett's conviction. The court said that Bennett's position that Middleton's statement was unfairly prejudicial since it was incapable of challenge by cross-examination was misconceived. Middleton was in fact cross-examined as a hostile witness by the prosecution and there was no evidence that counsel for the defence was prevented from cross-examining Middleton. They agreed with the Crown that the statement contained highly probative evidence which was not outweighed by any prejudice which could have been caused to Bennett. The court also found no merit in the argument that the Crown had to offer an explanation for Middleton's departure from the statement he gave to the police. Middleton was deemed a hostile witness by the trial judge and there was no requirement for the prosecution to cough up an explanation for his departure from his previous statement. The trial judge therefore was correct to admit Middleton's previous statement.

[52] The court found that the quality of the identification evidence was adequate and the trial judge was correct in leaving it to the jury. The court said that this was a case of recognition and not a fleeting glance case as Middleton was able to see Bennett's face, he gave a description of the clothes Bennett was wearing; the colour of the handgun and the hand in which he held the weapon. The court also found the trial judge's directions to the jury were adequate. The jury was informed of the way in which they should treat Middleton's statement and the trial judge's directions satisfied the *Turnbull* principles and the weaknesses of the evidence as to identification.

[53] The Court of Appeal therefore affirmed Bennett's conviction and remitted his sentencing to the Supreme Court pursuant to section 106A(2) of the Criminal Code (Amendment) Act 2017. Bennett has appealed the decision of the Court of Appeal as to his conviction and sentence to the Caribbean Court of Justice ("the Court").

Bennett's appeal in relation to his Conviction

Should Middleton's previous inconsistent statement have been admitted pursuant to section 73A of the Evidence Act?

[54] It has been submitted on behalf of Bennett that this was a fleeting glance case untested by cross-examination and as such the previous inconsistent statement should have been excluded from evidence. In relation to the admission of the statement, Mrs. Matura-Shepherd in her written submissions and Mr. Anthony Sylvestre in his oral submissions before the Court accepted that there was no objection by Defence counsel at trial, but submitted that counsel might not have appreciated the point that section 73A of the Evidence Act provided that the statement was admissible, not that it had to be admitted: *Vincent Tillett Sr v The Queen.*[30] Despite this error on the part of counsel at trial, it was submitted that Bennett should not be punished for the errors of his counsel. Furthermore, the trial judge had an overriding duty to ensure that the trial was fair and so should have exercised his discretion to exclude the statement because (a) this was a fleeting glance case without any sworn evidence to support it and (b) Bennett would have been deprived of the usual opportunity to confirm or strengthen the inference that this was a mere fleeting glance case through cross-examination as Middleton was denying the truth of his previous statement.

[55] Counsel for Bennett also submitted that the statement should have been excluded because it was unclear, for example, (a) whether Middleton was still moving on the bicycle or stationary when he claimed to have identified Bennett; (b) how long he was able to see the face of the shooter- one second, two seconds or twenty seconds; and (c) how many times he had seen Bennett within the last 4 months. Counsel argued that contrary to the conclusion of the Court of Appeal, it did not follow that the mere fact that Middleton could say that the shooter was wearing a red shirt and had a particular gun meant that he was able to see the shooter's face, especially because he said the shooter was wearing a cap. There was also nothing in the mere description of the handgun, shirt and physical description of the shooter that linked the shooter to Bennett. It was simply not proven beyond a reasonable doubt that he had ample time to see the shooter's face. The identification evidence was therefore poor. Counsel accepted that if Middleton's statement had outlined more than a fleeting glance of the shooter's face or if there had been some corroborating evidence then the statement could have been admitted. However, it was submitted that this was not the case in these proceedings and

[30] Criminal Appeal No. 21 of 2013.

even if the evidence was capable of challenge by cross-examination, it could not fairly ground a conviction for murder and as such the statement should have been excluded.

[56] On the other hand, it was submitted on behalf of the Crown that the mere fact that Middleton did not specify how long he saw the shooter did not make this a fleeting glance case and that an analysis of the description of the shooter did not support such a conclusion. Middleton had said that he was able to see Bennett's face, recognized him and described his headwear, his clothes, the type of firearm and the hand in which he held the firearm. He described Bennett moving from over the body, getting on to a bicycle, joining another person and riding off onto Partridge Street. In these circumstances, it is submitted, it would not have been a proper exercise of the discretion of the trial judge to exclude the statement on the basis that the identification of Bennett was a fleeting glance.

[57] Middleton's statement given on 15 September 2009 was admitted pursuant to section 73A of the Evidence Act which provides that:

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

[58] Sections 71 and 72 provide that:

> "71 (1) A witness under cross-examination may be asked whether he has made any former statement relative to the subject-matter of the cause or matter and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion and, if he does not distinctly admit that he has made that statement, proof may be given that he did in fact make it.
>
> (2) The same course may be taken with a witness upon his examination-in-chief, if the judge is of opinion that he is adverse to the party by whom

he was called, or that his memory is in good faith at fault, and permits the question.

72 (1) A witness under cross-examination, or a witness whom the judge, under section 71 (2), has permitted to be examined by the party who called him as to previous statements, inconsistent with his present testimony, may be questioned as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause or matter, without the writing being shown to him or being proved in the first instance but, if it is intended to contradict him by the writing, his attention must, before contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of contradicting him.

(2) The judge may, at any time during the hearing or trial, require the document to be produced for his inspection, and may thereupon make any use of it for the purposes of the hearing or trial he thinks fit."

[59] Section 73A was introduced by section 3 of the Evidence (Amendment) (No 2) Act 2012. Prior to the amendment, the rule at common law was that a previous inconsistent statement could only be used to impeach a witness' credibility. The contents of such a statement could not be admitted as evidence of the truth of the statements therein. With the introduction of section 73A, a previous inconsistent statement which is either admitted or proved by section 71 or 72, is now admissible as evidence of the truth of its contents. I have perused some of the debate in the Senate of Belize at the time that they considered the enactment of section 73A. The debate suggested that this amendment to the law of evidence in Belize was part of the Government's "*attempt to use everything in its arsenal to combat this crime wave that we have and this surge in criminal activity.*"[31]

[60] Section 73A is similar to section 119(1) of the U.K. Criminal Justice Act 2003 ("CJA"). The CJA widened the categories of hearsay which may be admitted as evidence and was an attempt to modernise the hearsay rule.[32] The reforms were the product of the Law Commission's Report No. 245, "Evidence in Criminal Proceedings, Hearsay and related Topics." Section 119 (1) of the CJA was a reproduction of Recommendation 40 in the Law Commission's Report. Before making that recommendation, the Commission, criticising the common law position, noted that

[31] See the comments of Senators G. Hulse and L. Shoman at the Second Reading of the Evidence (Amendment) (No. 2) Bill, 2012, Wednesday 18 July 2012.
[32] *R v Joyce and another* [2005] EWCA Crim 1785 paragraph 16.

> *"10.89* The inconsistent statement is supposed to reflect only on the witness's credibility, and therefore the fact-finders may not treat it as evidence directly on the facts in issue. It may be argued that the first statement can only cancel out the oral testimony because rejection of the testimony does not entail acceptance of the statement. *Cross and Tapper,* rightly in our view, describes this argument as "simply another instance of the pseudo-logic occasionally indulged in by lawyers." Where it is possible (on the basis of other evidence, or the witness's response under cross-examination) to treat the earlier statement as the true one, we do not see why the fact-finders should not do so: if jurors or magistrates are trusted to decide that a witness has lied throughout, and to disregard that witness's testimony, why should they not be free to decide that the witness's previous statement was correct, and to take as reliable the parts of the testimony that they find convincing? As with other instances of the distinction between a statement going to credit and going to the issue, it may be doubted whether fact-finders appreciate or observe the distinction. (my emphasis)
>
> 10.90 Further, the current law creates an anomaly in that the statement of a frightened witness may be admitted as evidence (under section 23(3) of the 1988 Act) where the witness fails to attend, but if the effect of fear on the witness is to make him or her hostile, then the previous statement is not admissible as evidence of its contents – it simply negates the witness's oral evidence. The result is that the admissibility of the statement as evidence turns on the way the witness acts when afraid. (my emphasis)
>
> 10.91 The CLRC recommended that a previous inconsistent statement, where admitted, should be admissible as evidence of the truth of its contents, regarding it as too subtle a distinction to admit the statement only in order to neutralise the effect of the evidence given in court. They believed that "as under the Civil Evidence Act [1968], contradictory statements by the same person should confront one another on the same evidential footing". They claimed that in the case of "a previous statement by a person who is called as a witness there is a special reason for proposing to make the statement admissible", on the grounds that what is said soon after the events in question is likely to be at least as reliable as the evidence given at the trial, if not more so. Although this may not always be the case, they considered that "it is likely to be helpful to the court or jury to have both statements", especially where the trial takes place long after the events in question. Other jurisdictions have enacted such a reform, and we are not aware that any problems have resulted. In the consultation paper we indicated that we had in mind a recommendation along these lines. There was some support for it, although David Ormerod thought that the effect in relation to hostile witnesses called for detailed discussion. Those who were opposed to previous consistent statements being evidence of their trith (sic) were, naturally, also opposed to previous inconsistent statements being treated as evidence." (my emphasis)

[61] The Commission also outlined a number of safeguards to the defendant against whom hearsay is adduced. It noted that many of the safeguards already existed at common law, including judicial discretion to exclude evidence, burden of proof and standard of proof.

Section 114(2) of the CJA, having regard to the safeguards discussed by the Commission, outlines a non-exhaustive list of factors to be considered by the trial judge when deciding whether to admit the statement. Section 114(2) provides:

> "114 …
>
> (2) In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d), the court must have regard to the following factors (and to any others it considers relevant)—
>
> (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
> (b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);
> (c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;
> (d) the circumstances in which the statement was made;
> (e) how reliable the maker of the statement appears to be;
> (f) how reliable the evidence of the making of the statement appears to be;
> (g) whether oral evidence of the matter stated can be given and, if not, why it cannot;
> (h) the amount of difficulty involved in challenging the statement;
> (i) the extent to which that difficulty would be likely to prejudice the party facing it."

[62] The Evidence Act of Belize gives no guidance as to the factors a trial judge should consider before admitting a previous inconsistent statement. Section 73A merely provides that the statement is admissible in the circumstances provided in (a) and (b) of the section. This issue was discussed by the Court of Appeal of Belize in its decision in *Vincent Tillett Sr v The Queen*[33] a case in which the appellant had been convicted of murder. Morrison JA, although noting that the statutory amendment allowed for previous inconsistent statements to be admissible as evidence of the truth of its contents, observed that

> "the admissibility of such a statement will nevertheless remain subject to the rule of the common law that a judge in a criminal trial has an overriding discretion to exclude it if its prejudicial effect outweighs its probative value, or if it is considered by the judge to be unfair to the defendant in the sense of putting him at an unfair disadvantage or depriving him unfairly of the ability to defend himself."[34]

[33] Criminal Appeal No. 21 of 2013.
[34] ibid, [41] where Morrison JA cited the judgment of the Court of Appeal of Belize in *Micka Lee Williams v The Queen* Criminal Appeal No. 16 of 2006.

[63] Although pre-dating the CJA and Belize reforms, and concerning the admission of a sworn deposition of a witness who had died before the trial, *Scott v The Queen*[35] gives guidance as to when probative hearsay material in identification cases may not be admitted because its prejudicial effect outweighs its probative value. In *Scott*, the deposition was the only evidence of identification at the trial of the appellants for the murder of a special constable. Lord Griffiths, who delivered the judgment of their Lordships, observed that the discretion of a judge to ensure a fair trial included a power to exclude the admission of a deposition. That power, however, should be exercised with great restraint. The mere fact that the deponent would not be available for cross-examination was obviously an insufficient ground for excluding the deposition. Lord Griffith noted that

> "It is the quality of the evidence in the deposition that is the crucial factor that should determine the exercise of the discretion. By way of example if the deposition contains evidence of identification that is so weak that a judge in the absence of corroborative evidence would withdraw the case from the jury; then if there is no corroborative evidence the judge should exercise his discretion to refuse to admit the deposition for it would be unsafe to allow the jury to convict upon it… In a case in which the deposition contains *identification evidence of reasonable quality then even if it is the only evidence it should be possible to protect the interests of the accused by clear directions in the summing up and the deposition should be admitted*. It is only when the judge decides that such directions cannot ensure a fair trial that the discretion should be exercised to exclude the deposition."[36] (my emphasis)

[64] In the decision of the Supreme Court of Canada of *R v B (K.G.),*[37] the court reconsidered the common law rule that previous inconsistent statements (described in Canada as "prior inconsistent statements") could only be used to impeach a witness' credibility. The Supreme Court of Canada came to the unanimous decision that the old common law rule should be replaced by a new rule which allowed previous inconsistent statements to be admissible as substantive evidence of their contents. One of the requirements agreed to by the court was that the prior inconsistent statement had to be shown to be reliable before the statement could be admitted. The court was however split as to what would satisfy the requirement of reliability. In the decision of the majority (Lamer CJ

[35] [1989] AC 1242.
[36] ibid, at p. 1259.
[37] [1993] 1 SCR 740; 1993 CanLII 116 (SCC).

and Sopinka, Gonthier, McLachlin and Iacobucci JJ), as expressed in the judgment of Lamer CJ, the court said that the judge should look for certain indicia of reliability, including: (i) evidence that the statement was made under oath, solemn affirmation, or solemn declaration after an explicit warning to the witness that criminal sanctions may follow for the making of a false statement; (ii) the statement is videotaped in its entirety; (iii) if the opposing party, whether Crown or defence, has a full opportunity to cross-examine the witness at trial respecting the statement; Alternatively, other circumstantial guarantees of reliability may suffice to render such statements substantively admissible, provided that the judge is satisfied that the circumstances provide adequate assurances of reliability in place of those which the hearsay rule traditionally requires.

[65] Lamer CJ said that the judge should conduct a *voir dire* to satisfy himself that the indicia of reliability necessary to admit hearsay evidence of prior statements were present. If there were such indicia, he should examine the circumstances under which the statement was obtained so as to satisfy himself that the statement was voluntarily made and that there were "no other factors which would tend to bring the administration of justice into disrepute if the statement was admitted as substantive evidence."[38] These requirements must be proven on a balance of probabilities.

[66] The minority decision in *R v B (K.G.)* (L'Heureux-Dubé and Cory JJ) was delivered by Cory J. They agreed, for the most part, with the decision of the majority, however, they disagreed with the requirement to prove the "indicia of reliability" as outlined by Lamer CJ. Cory J said that at the *voir dire* the trial judge should satisfy himself that (i) the evidence contained in the prior statement was such that it would be admissible if given in court (ii) the statement had been made voluntarily by the witness and was not the result of any undue pressure, threats or inducements; (iii) the statement was made in circumstances, which viewed objectively, would bring home to the witness the importance of telling the truth; (iv) the statement was reliable in that it had been fully and accurately transcribed or recorded; and (v) the statement was made in circumstances that the witness would be liable to criminal prosecution for giving a deliberately false statement.[39]

[38] ibid, p. 37.
[39] ibid, p.51.

[67] Whilst the principles emerging from *R v B (K.G.)* are useful, there should be caution before they are applied wholesale to section 73A of the Evidence Act. The reform in Belize was statutory, as in the U.K, and not judge made as in Canada. The Evidence Act of Belize does not require proof of any "indicia of reliability". The courts of Belize should be slow to read into the statute any such requirement. Had the legislature intended to stipulate any such requirements, for example, that the evidence should be videotaped or that the statement be made under oath, they would have been explicitly provided for in section 73A. The legislation gives the judge a wide discretion to admit the statement once it was admitted or proved by virtue of section 71 or 72.

[68] There has also been discussion on the requirement for the trial judge to be satisfied of the reliability of hearsay evidence in a few U.K. decisions. Hughes LJ in *R v Riat and other appeals*[40] addressed the argument that there was language in prior decisions, in particular, *R v Horncastle, R v Marquis*[41] and *R v Ibrahim*[42] which suggested "that the hearsay evidence must be demonstrated to be reliable (ie accurate)" before it could be admitted. Hughes LJ pointed out that the issue in the Court of Appeal and in the Supreme Court in *Horncastle*, was whether English law knew an overarching general rule that hearsay which was sole or decisive evidence was not to be admitted or would inevitably result in an unfair trial if it was. He said that the Court of Appeal had answered no, and had pointed out repeatedly that any such inflexible rule would exclude hearsay which was perfectly fair either because it did not suffer from the dangers of unreliability or if it did, there were sufficient tools to assess its reliability. The Court of Appeal in those decisions therefore was "far from laying down any general rule that hearsay evidence has to be shown (or 'demonstrated') to be reliable before it can be admitted, or before it can be left to the jury."[43]

[69] Having considered the legislative framework of the Evidence Act, I note the absence of explicit statutory safeguards before a previous inconsistent statement can be admitted under section 73A. Any consideration of the reliability of the previous inconsistent statement would therefore form part of the trial judge's exercise of his discretion under the common law to refuse to admit the statement if its probative value is outweighed by

[40] [2013] 1 All ER 349.
[41] [2010] 2 ALL ER 359; [2010] UKSC 14.
[42] [2012] EWCA Crim 837; [2012] 4 ALL ER 225.
[43] [2013] 1 All ER 349, [5].

its prejudicial effect or if it would be unfair to the defendant to admit the statement in that it would put the defendant at an unfair disadvantage or deprive him unfairly of the ability to defend himself.[44] An assessment of the prejudicial and probative value of such a statement may no doubt include consideration of the factors mentioned in section 114(2) of the CJA and set out at [32] above. For example, assuming the statement to be true, how much probative value does it have in the trial; how important is the statement in the context of the trial as a whole; the circumstances in which the statement was made; how reliable is the maker of the statement. In addition, in the exercise of the judge's discretion, it would be useful for the judge to bear in mind the considerations expressed by the minority in *R v B (K.G)* at [37] above. For example, the judge could consider whether the statement had been made voluntarily by the witness and was not the result of any undue pressure, threats or inducements; whether the statement was voluntarily made in circumstances where the importance of telling the truth was brought home to the witness; whether the statement was accurately recorded. I agree with the position taken by Lamer CJ that it is not the duty of the trial judge to "decide whether the prior inconsistent statement is true, or more reliable than the present testimony, as that is a matter for the trier of fact."[45] Any such concerns must be dealt with by the trial judge in the directions given to the jury.

[70] I agree with the submissions advanced on behalf of the prosecution that the identification evidence provided in Middleton's statement did not support the view that this was a fleeting glance case, although Middleton did not state the length of time he was able to see Bennett at the scene of the crime. First, Middleton gave a detailed description of the male person he saw standing two (2) feet away from the deceased's body. Middleton said that he saw Bennett, whom he described as a 'medium built' male of 'brown complexion', about 5 feet 8 inches tall, wearing a red shirt and a light coloured fitted cap, standing about two (2) feet from the body with a black handgun which resembled a 9mm pistol in his right hand. He said that he could see Bennett's face because the area was well illuminated by a big lamp post. Second, he said that he had known Bennett for about four (4) months and had last seen him a week before the shooting. Accordingly, Middleton's evidence amounted to more than a mere identification of the potential

[44]See [41] of *Vincent Tillett Sr v The Queen*, Criminal Appeal No. 21 of 2013, where Morrison JA cited the judgment of the Court of Appeal of Belize in *Micka Lee Williams v The Queen* Criminal Appeal No. 16 of 2006.
[45] [1993] 1 SCR 740; 1993 CanLII 116 (SCC); p.38.

shooter but was the recognition of someone that Middleton had known for approximately four (4) months. Bennett was standing about 40 feet away in good lighting conditions. In my view, the quality of Middleton's identification evidence was not undermined by the fact that at trial, he became uncooperative, for whatever reason. Accordingly, assuming Middleton's statement to be true, it has significant probative value.

[71] Middleton's statement was also not made unreliable because Middleton chose to be uncooperative. Assistant Superintendent Anderson and Mrs Grace Flowers, Justice of the Peace, had both testified that Middleton gave his statement voluntarily and that the statement was not the result of any undue pressure, threats or inducements. Assistant Superintendent Anderson was able to properly explain that although the statement taken from Middleton was not a caution statement, but an open statement, a "Justice of the Peace is present in the recording of the open and caution statements particularly as it relates to major cases". Ms. Flowers also testified that Middleton made the statement on 15 September 2009. She was present when the statement was recorded by Assistant Superintendent Anderson and she was also present when the statement was signed by Middleton in four (4) places. She too signed and stamped the statement in the four (4) places where Middleton signed. Anderson then signed at the end of the statement. There can be no doubt that the statement was accurately recorded and that Middleton would have appreciated the importance of telling the truth when he gave his statement.

[72] As to the issue of reliability, I note that Middleton's statement was given some two (2) days' after his identification of Bennett as the person who was standing over the deceased holding a handgun and in the circumstances in which Middleton was present on the scene of the crime shortly after the killing. No explanation for Middleton's silence for those two (2) days has been proffered by the prosecution. I note as well that the deceased was the husband of Middleton's sister, Mrs Sheldon Middleton-Meighan, who was also present at the scene of the crime shortly after the killing. I have not been told however whether Middleton said anything about what he witnessed to his sister. When these matters are weighed in the balance with the others matters which I have considered earlier, I do not agree that the trial judge ought to have excluded Middleton's statement.

[73] I am also not convinced that the trial judge ought to have excluded Middleton's statement because the Defence was unable to cross-examine him. In the case of *R v Bennett* and *Turner*[46] the English Court of Appeal made it clear that the appellants had been perfectly entitled to and able to cross-examine the witness who had recanted. "Clearly, the fact that he was purporting not to remember what happened meant that they were unable to ask him to replicate the account but that did not prevent them from putting to him their case, cross-examining him in relation to the account, in relation to its internal inconsistencies such as they were or external inconsistencies such as they were; and of course it did not preclude them in any event from them being able to give their account, if they so wished, to the jury at a subsequent stage."[47] I note that Middleton was cross-examined by both the Crown, who called him as a witness, and by the Defence. The essence of the cross-examination was to assess whether Middleton had identified Bennett at the scene of the crime; whether he had given a previous inconsistent statement to the police that he had seen Bennett holding a gun two (2) feet away from the deceased in circumstances from which it could be inferred that Bennett was the shooter.

[74] Additionally, in the case of *R v B (K.G.)* earlier referred to, Lamer CJ had noted (and I agree) that commentators had observed that "the witness's recantation has accomplished all that the opponent's cross-examination could hope to: the witness now testifies under oath that the prior statement was a lie, or claims to have no recollection of the matters in the statement, thus undermining its credibility as much as cross-examination could have."[48] Lamer CJ further noted that Lee Stuesser had pointed out at page 60 of his article "Admitting Prior Inconsistent Statements For Their Truth" (1992), 71 *Can. Bar Rev.* 48], that "the mantle of a `hostile' cross-examiner in the case of a recanting witness is taken up by the caller of the witness."[49]

[75] It therefore cannot be said that the prejudicial effect of Middleton's previous inconsistent statement outweighed its probative value. Middleton's previous inconsistent statement

[46] [2008] EWCA Crim 248.
[47] ibid, [17].

48 [1993] 1 SCR 740, 1993 CanLII 116 (SCC).

[49] ibid.

was relevant to proving important elements of the offence of murder with which Bennett was charged. I am therefore of the view that the judge did not err in admitting the statement pursuant to section 73A of the Evidence Act. In my view, Bennett should fail on this ground.

Did the trial judge err in holding that there was a case to answer?

[76] Mr Sylvestre submitted that although Defence counsel at the trial did not emphasise the poor quality of the identification evidence in his no case submission, it was the duty of the trial judge to uphold the no case submission given the unsatisfactory nature and poor quality of the identification evidence. Reliance was placed on the very helpful dicta of Lord Widgery CJ in *Turnbull v R*[50] where he said that

> "In our judgment when the quality is good ... the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution.... When in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."[51]

[77] On the other hand, it was submitted on behalf of the prosecution that the judge was correct in holding that there was a case for Bennett to answer since the identification evidence was of good quality. Middleton identified Bennett, a person previously known to him, in good lighting. According to his statement, he had seen him regularly over the preceding four (4) months, knew where he lived and referred to him by his full name. At trial Bennett did not challenge this previous knowledge and in fact confirmed that he lived in the area identified by Middleton. The Crown argued that the degree of familiarity of the witness with the person he or she was identifying was a most relevant factor just as were the circumstances of the identification itself. Even if the circumstances could not be described as ideal, the identification evidence could not be described as being of poor quality. Whether Middleton had properly identified Bennett, it was further submitted, became a matter for the consideration of the jury.

[50] [1977] 1 QB 224.
[51] ibid, p. 229.

[78] Having admitted the statement, the trial judge was obliged to rule on the no case submission and to consider whether the case should be withdrawn from the jury based on the principles in *Galbraith*[52] or, alternatively, the principles in *Turnbull*.[53] The judge said that the case was one of good circumstantial evidence on which a jury properly directed could form the view that Bennett was the shooter once they believed the evidence in Middleton statement. As noted earlier,[54] the judge found that the case fell within the dicta of *Ellis Taibo v The Queen*[55] (per Lord Mustill). If the jury found the evidence of the witness to be truthful and reliable, there was material on which a jury could, without irrationality, be satisfied of guilt. The judge apparently looked to the second limb in *Galbraith* and determined that the matter was one that fell within the province of the jury as it depended on Middleton's credibility and whether the jury chose to believe his previous inconsistent statement or his oral evidence. The trial judge in his ruling on the no case submission, however, did not mention whether the case should have been withdrawn from the jury based on the principles in *Turnbull.*

[79] In identification cases, the authorities highlight a possible conflict between the test in the second limb of *Galbraith* and the test in *Turnbull*. Lord Mustill in *Daley v R*[56] (a murder appeal from the Jamaica Court of Appeal) explained how any contradictions between the two decisions should be resolved. He asked the question "How then are the principles able to co-exist?" He observed that

> "…A reading of the judgment in *R v Galbraith* as a whole shows that the practice which the court was primarily concerned to proscribe was one whereby a judge who considered the prosecution evidence as unworthy of credit would make sure that the jury did not have an opportunity to give effect to a different opinion. By following this practice the judge was doing something which as Lord Widgery CJ had put it, was not his job. By contrast, in the kind of identification case dealt with by *R v Turnbull* the case is withdrawn from the jury not because the judge considers the witness to be lying but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction and indeed as *Turnbull* itself emphasized, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the 'quality' of the evidence, under the *Turnbull* doctrine, the jury is protected from acting upon

[52] [1981] 1 W.L.R. 1039; [1981] 2 All ER 1060.
[53] [977] 1 QB 224.
[54] See [46] of this judgment.
[55] (1996) 48 WIR 74.
[56] (1993) 43 WIR 325 at p. 333-334.

> the type of evidence which, if believed, experience has shown to be a possible source of injustice."[57]

[80] This dictum was discussed by Morrison JA in a decision of the Jamaica Court of Appeal of *Herbert Brown and Mario McCallum v R.*[58] The appellants had been convicted of murder. Morrison JA noted that

> "So that the critical factor on the no case submission in an identification case, where the real issue is whether in the circumstances the eyewitness had a proper opportunity to make a reliable identification of the accused, is whether the material upon which the purported identification was based was sufficiently substantial to obviate the "ghastly risk" (as Lord Widgery CJ put it in *R v Oakwell* [1978] 1 WLR 32, 36-37) of mistaken identification. If the quality of that evidence is poor (or the base too slender), then the case should be withdrawn from the jury (irrespective of whether the witness appears to be honest or not), but if the quality is good, it will ordinarily be within the usual function of the jury, in keeping with *Galbraith*, to sift and to deal with the range of issues which ordinarily go to the credibility of the witnesses, including inconsistencies, discrepancies, any explanations proffered, and the like." [59]

[81] Since it was open to the jury to rely on the previous inconsistent statement, the real issue in this case was whether Middleton had a proper opportunity to make a reliable identification of Bennett, and therefore, whether his previous inconsistent statement was sufficiently substantial to obviate "the ghastly risk" of mistaken identification. In my view, the statement was sufficiently substantial, and the quality of the identification evidence was good. This was a case where an eyewitness sufficiently recognised someone known to him for approximately four (4) months, the eyewitness having last seen the shooter one (1) week before the killing. Middleton was about forty (40) feet away from the shooter. The lighting conditions were good and there was nothing obstructing his view. The detailed description of the accused, his complexion, build and height, his attire, and the description of the black handgun which resembled a 9mm pistol held in the shooter's right hand, all support such a conclusion. I reiterate that although Middleton did not state the length of time that he was able to see Bennett at the scene of the crime, his detailed description does not support a view that he only had a fleeting glance of the shooter.

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[57] (1993) 43 WIR 325 at 334.
[58] Criminal Appeal Nos. 92 and 93 of 2006.
[59] ibid, [35].

[82] Essentially, it remained a matter for the jury to determine which account posited by Middleton ought to be believed. *R v Joyce*,[60] a decision of the English Court of Appeal based on previous inconsistent statements admitted under section 119 of the CJA, demonstrates this principle. In that case, the prosecution relied on witness statements of three (3) witnesses who told the police that the applicants were involved in an incident which resulted in the applicants' conviction for possession of a shotgun with intent to cause fear of violence. At trial, all three (3) witnesses retracted their previous statements and said that they had mistakenly identified the applicants. The issue was therefore whether the retracted statements could be used to prove the guilt of the applicants. The trial judge ruled that the case ought to be left to the jury as the "identifications were made in broad daylight, by people who knew the applicants [and] those identifications did not become weak because they were subsequently retracted. The jury had to consider why the witnesses had changed their accounts and could come to the view that they were lying in court and that it was their original identification which was correct."[61] It was argued on behalf of the applicants before the Court of Appeal that the judge should have directed not guilty verdicts at the close of the prosecution case either under section 125(1) of the CJA or under the principles of *Turnbull* or possibly under *Galbraith* because the quality of the evidence was poor, unsupported, and so tenuous that no jury could properly convict on the basis of it. Counsel however conceded that the provisions of section 119 of the CJA had been fulfilled and the contents of the written statements were capable of supporting a conviction. The Court of Appeal agreed with the trial judge's ruling not to withdraw the case from the jury and observed that it would have been "astonished if the judge had reached a different conclusion."[62] As to the statutory provisions in relation to hearsay, the court noted that it would have been "an affront to the administration of justice, on a trial for offences based on this terrifying conduct", if the jury had not been permitted by the judge to evaluate the witnesses' oral evidence and be able to rely if they thought fit on their original statements.

[60] [2005] EWCA Crim 1785.
[61] ibid, [14].
[62] ibid, [26].

[83] I agree that provisions such as section 73A of the Evidence Act of Belize have "undoubtedly changed the landscape of a criminal trial."[63] As mentioned earlier, the English authorities of *Horncastle*[64] and *Riat*,[65] have made clear that there is no overarching rule that a defendant cannot be convicted solely or decisively on admissible hearsay evidence. Any risk to the defendant's right to a fair trial can be neutralised by the application of certain safeguards, including judicial discretion to exclude such material, the burden and standard of proof required to ground a conviction and proper directions to the jury. Additionally, in Belize, it is implicit from the judgment in *Tillett*[66] that an accused can be convicted solely or decisively on hearsay statements. In my view, Bennett should also fail on this ground.

Were the directions to the jury adequate?

[84] Counsel for Bennett further submitted that even if the case should have been left to the jury, Lucas J erred in his directions to the jury. It was argued on behalf of Bennett that although the trial judge pointed out certain weaknesses in the Crown's case, he failed to direct them that if they concluded that Middleton saw the shooter's face for only a fleeting glance (or where they were left in doubt on this point) then they should acquit him as the standard of proof would not have been met. It was submitted that there was therefore a real risk that the jury either did not consider properly, the fleeting glance point, or if they did, they did not appreciate that if they had doubts on it, they had to acquit. This was said to be a fundamental omission by the trial judge. Counsel for Bennett also contended that the judge did not relate his *Turnbull* directions to the point that Middleton's prior statement was an unsworn statement and that it was untested by cross-examination. Given the nature of the statement, it was argued, the judge was required to warn the jury of the special need for caution before convicting Bennett on such evidence. He also had to inform them that a miscarriage of justice has been known to arise in cases of mistaken identification on evidence given on oath and this consideration should apply, with greater force, or at least equally, in cases of unsworn statements.

[63] See *R v Bennett and Turner* [2008] EWCA Crim 248, [21].
[64] [2010] 2 ALL ER 359; [2010] UKSC 14.
[65] [2013] 1 All ER 349.
[66] Criminal Appeal No. 21 of 2013.

[85] On the other hand, it was submitted on behalf of the Crown that a direction to the jury that they may acquit Bennett if they determined that Middleton had a fleeting glance of the shooter was unnecessary or "inappropriate" in the circumstances of the case. It was submitted that the judge's directions were adequate as he pointed out the approach to be taken to Middleton's statement, the weaknesses in the identification evidence and the necessary *Turnbull* guidelines.

[86] Given the dangers of hearsay evidence, Lucas J was under a duty to give appropriate directions. At the beginning of the summation, the trial judge told the jury that a particular witness who had given a statement, a written statement, came to the court and said that he did not say most of those things in the statement. The judge told the jury that they might consider that that particular witness was not reliable. He went on to say:

> "According to the Crown Counsel - Ms. Grant, you are to find the accused guilty because there is evidence. Remember I am underlining the word, according to, because according to the statement which Middleton gave, he saw him shortly after he heard the shots. He saw him over this body and he's saying the shooter was about two feet away. According to the Counsel Mr. Peyrefitte, he is saying no. He even say that I am going to direct you to find the accused not guilty, I can't do that. What he was telling you, you cannot find the accused guilty because Middleton has rejected the statement that he gave. Middleton is saying, no, I didn't see this man. I didn't tell the police that. All that Middleton said in the witness box is that he heard shots, in brief, you heard, and then he saw this dead person who he later saw that it was his brother-in-law Ellis Meighan Sr."

[87] The trial judge reminded the jury that there was no evidence of any eyewitness who saw Bennett shoot the deceased. He also reminded them that there was no evidence that Bennett intended to kill the deceased; there was no confession from Bennett. He reminded them that Middleton did not see Bennett shoot the deceased. The Crown was relying on circumstantial evidence and the jury was being asked to draw certain inferences from the evidence as a whole. He reminded the jury that Middleton did not say in his statement or in the witness box that he had seen Bennett shoot the deceased. The judge said that the Crown wanted the jury to draw the inference that when Middleton heard shots and thereafter saw Bennett standing over the deceased with the gun in his hand, it was Bennett who was holding the gun and who had shot the deceased. The trial judge further stated that Middleton had said that he saw Bennett with what resembled a 9mm handgun and there was forensic evidence from the doctor who had testified that

the deceased was shot with a firearm, a 38 to 9mm. The judge warned that the jury must only draw the inference that Bennett was the shooter if it was the only reasonable inference to draw. If there were two reasonable inferences to be drawn from the same set of facts, one in favour of the Crown and one in favour of Bennett, they should draw the one in favour of Bennett.

[88] The judge also noted that at trial, Middleton was saying that he did not see Bennett at the scene of the crime. Middleton did not remember if he signed the statement and denied that the signature on the statement was his. This was in contrast to the evidence of Assistant Superintendent Suzette Anderson and Justice of the Peace Grace Flowers, that Middleton dictated the statement (which was read to the court) which the Superintended recorded and which all three (3) persons signed.

[89] Lucas J told the jury that it was their duty to determine the credibility of the witnesses, especially in relation to Middleton and the inconsistency between the oral evidence at trial and the prior written statement. In relation to Middleton's inconsistency, the trial judge stressed that the jury might consider him an unreliable witness. The judge said

> "But with respect to Marlon Middleton again, because of his inconsistency, Madam Forelady, members of the jury, I need to give you further instructions. Remember I told you, however, if you are sure that one of Marlon Middleton's accounts is true, then you say either the evidence from the witness box or from the witness statement, then it is evidence you may consider when deciding you (sic) verdict. But I need to tell you more with respect to Marlon Middleton's unreliability.
> Marlon Middleton denied signing the statement. He did not remember giving the statement.
> Marlon Middleton is a witness who changed his story and such changed sides. He has given one account in his statement and a different account in the witness box.
> You may regard Marlon Middleton, because of the inconsistency between the statement that he had made and with the evidence he gave here in court as a witness as being unreliable. You might regard him as a witness upon whom you would either not place much, if any, reliance or, if you do place reliance upon him, you would consider that you will have to be very careful in accessing (sic) him and be very cautious before relying on any part or parts of what he said or what he signed his name to. Because of his inconsistency you must be very careful in accessing (sic) him if you are relying on any part or parts of what he said or what he signed his name to, if you accept that he signed his name to the statement."

[90] As to Middleton's inconsistency and unreliability, the trial judge added:

> "You may be satisfied that Marlon Middleton made a previous statement which was inconsistent with the evidence he gave in Court.
> You may take into account any inconsistency when considering Mr. Middleton's reliability as a witness. It is for you to judge the extent and importance of any inconsistency. If you conclude that he had been inconsistent on an important matter, you should treat both his accounts with considerable care.
> If, however you are sure that one of Marlon Middleton's accounts is true, in whole or in part, that is either from the witness box or from the written statement, then it is evidence you may consider when deciding your verdict."

[91] Lucas J warned the jury that the case against Bennett depended wholly on the correctness of Middleton's identification evidence. To avoid the risk of injustice that had happened in some cases, the trial judge warned them of the special need for caution before convicting Bennett on Middleton's identification evidence because there could have been a mistaken identification. The trial judge warned that a witness could be convinced in his own mind and may be a convincing witness, but that witness may nevertheless be mistaken. He cautioned that mistakes could be made in the recognition of someone known to a witness, even of a close friend or relative.

[92] Lucas J highlighted certain important material considerations for the jury directing them to examine carefully the circumstances in which the identification was made by Middleton. The trial judge noted

> "(1) For how long did he have the person he said was the accused under observation?
> There is nothing in the statement or his initial testimony here in Court, the duration he saw the accused.
> This is what he said in his statement:
> "As I look across on the right hand side of the Boulevard part at that junction with Banak Street…'
>
> (2) At what distance?
> "l was at a distance of 40 feet away both the gunman and the male person who laid on the sidewalk...'
> (3) In what light?
> 'l was able to see his face because just at the right hand side of the Boulevard with the Banak Street junction where he was there was a big lamp post that was well illuminated.'
>
> (4) Did anything interfere with the observation?
> 'l must say that at the time when I saw all of this, there was nothing obstructing my view and there was no traffic passing by. I did not see any other person passing in the immediate area.'

(5) Had the witness ever seen the person he observed before?
'The male person whom I saw with the gun is one whom I know as Japhet Bennett as I would see him regularly on the Boulevard. I know that he lives in St, Martin's De Pores Area, Belize City. Japhet normally passes on the Boulevard during daytime and night time riding on bicycle every week. I have known him for more than four months and the last time I saw him before this incident was about a week before.'

[93] Importantly, the trial judge pointed to certain weaknesses in Middleton's statement. He told the jury that Middleton did not say how long he had seen Bennett that night. The trial judge further told the jury that Middleton in describing Bennett had said that Bennett had on a light in colour fitted cap. The judge noted that Middleton did not say the manner in which the cap was worn by Bennett for Middleton to see his face.

[94] It cannot be said that the judge erred in his directions or failed to give adequate directions. In my view, the trial judge's directions comprehensively covered the *Turnbull* requirements. I agree with the Crown that there was no duty on the trial judge to direct the jury that if they concluded that Middleton saw the shooter's face for only a fleeting glance (or where they were left in doubt on this point) then they should acquit him as the standard of proof would not have been met. I made the point before that this was a case of recognition and not a fleeting glance case.

[95] I am also of the view that the trial judge's directions adequately dealt with the inherent risks and weaknesses associated with Middleton's evidence. I recognize that the judge highlighted the issue of Middleton's reliability as a witness in the circumstances of the case. He stressed that the jury ought to assess Middleton's evidence in the light of the fact that he had changed his story and was saying that he did not sign the written statement. It was therefore for the jury to determine what weight should be given to the evidence in the statement and it was for them to decide whether they believed the evidence in the written statement or the oral evidence at trial. Having regard to the trial judge's comprehensive directions on Middleton's evidence, I do not agree that the trial judge erred in failing to point out that the evidence in Middleton's witness statement was unsworn or untested by cross-examination.

[96] The trial judge's approach was consistent with the cases of *R v Billingham and another*[67] and *R v Parvez.*[68] In *Parvez* for example, the court emphasised that the CJA changed the common law in "an important and radical respect" so that "even in the case of a witness made hostile by cross-examination on behalf of the prosecution, the statement that the witness retracts may be evidence of its truth and it is for the jury to determine whether the circumstances in which it was made and the contents of the statement are such that, notwithstanding its retraction, it can be safely, despite caution and care, relied upon."[69] This was the essence of Lucas J's directions.

[97] In my view, Bennett should also fail on this ground.

Conclusion on the appeal in relation to conviction

[98] In the circumstances, therefore, I find no error on the part of Lucas J in the admission of the statement, the dismissal of the no case submission and his directions to the jury. I would therefore have dismissed Bennett's appeal against the order of the Court of Appeal and affirmed his conviction.

JUDMENT OF THE HON. MR JUSTICE BARROW

[99] This appeal by Japhet Bennett (Bennett) brings for the first time before this Court a challenge to a conviction based on the identification made in a previous inconsistent statement of a witness, admitted into evidence as proof of its contents pursuant to the recently enacted section 73A of the Evidence Act, Cap. 95. At the trial, the witness totally denied every material part of the statement, which was the sole evidence that Bennett committed the murder.

The prosecution's evidence

[100] Ellis Meighan Sr, the deceased, lived at 27-B Banak Street in Belize City with his wife, Sheldon Meighan and family. Their home was about 200 feet away from Central

[67] [2009] EWCA Crim 19, [62], [63].
[68] [2010] EWCA Crim 3229.
[69] ibid, [18].

American Boulevard, which bisects Banak Street. That street continues on the far side of the Boulevard. It was at or near the corner of these two roads, on the far side of the Boulevard, that the deceased was shot and killed at around 8:40pm in the night of 13th September 2009.

[101] Marlon Middleton is the brother of Sheldon Meighan, the widow, and at the time of the killing he was riding his bicycle towards Banak Street, on the left-hand side of the Boulevard, coming from the direction of Belcan Bridge. As he was approaching the junction with Banak Street he heard gun shots and quickened his speed. On reaching the junction of the Boulevard and Banak Street he stopped his bike and looked at the scene of the killing on the other side of the Boulevard. The decisive question is, what did he see?

[102] On 15th September 2009, two days after the killing, Middleton gave a statement to a Superintendent of Police in the presence of a Justice of the Peace. These prosecution witnesses testified that Middleton gave the statement freely and he signed it multiple times. In summary, Middleton said as follows. When he stopped his bicycle and looked across the Boulevard he saw at the corner of Banak Street and Central American Boulevard a body lying on the ground with a person standing over the body. Middleton was "about 40 feet or more" away from the body. He said he saw a 'medium built' male of 'brown complexion', about 5ft 8 inches tall, wearing a red shirt and a light coloured fitted cap, standing about two feet from the body with a black handgun which resembled a 9mm pistol in his right hand. He could see the gunman's face because the area was well illuminated by a big lamp post. The gunman jumped on a bicycle and rode off along with another person who had been waiting. They rode off on Banak Street and onto Partridge street.

[103] Middleton continued by saying the person he saw with the gun was someone he knew as Japhet Bennett, who he would see regularly on the Boulevard. He said he knew Bennett lived in the St. Martin de Porres Area of Belize City and that Bennett normally passed on the Boulevard during the daytime and night time. He said that he had known Bennett for about 4 months and had last seen him a week before the shooting. The Record of Appeal shows that the trial judge agreed to expunge from the statement, as it was read into evidence, presumably to avoid damage to Bennett's character, the words

"I know him because my nephews Ellis and Tyrone Meighan often have problem with him."

[104] Just after he saw the gunman and his companion ride away from the area, Middleton stated, he saw his sister and her daughter-in-law come running up the street and they met up with him. He asked his sister if she had heard the shots and she replied that she heard the shots and did not know where her husband was. Upon hearing this Middleton said, he jumped off his bicycle and went across the Boulevard where he noticed that the man, lying face up in a pool of blood near his head and with a hole in his face, was his brother-in-law. Middleton told his sister it was her husband Ellis, "where she then came across with her daughter-in-law". The police arrived at the same time, the statement said, and dealt with the scene and thereafter took the body to the morgue.

[105] At the trial Middleton totally denied the material parts of his statement. His examination in chief began with contextual information: he testified that it was about 8:40 p.m.; he was going to his sister's, Sheldon Meighan's, house on Banak Street; he heard gun shots in the area; and he noticed a body on the ground on the opposite side of the street. The body was at the corner of Banak Street and Central American Boulevard, on the right-hand side when facing Cemetery Road. When he first observed the body, he was across the street; he was by Bagdad (sic) Street facing Cemetery Road. He was about 40 feet or more when he first observed the body and he pointed out 40 feet. He testified he was riding his bicycle on Central American Boulevard and when he saw the body he continued riding to his sister's house. His sister lives on the left-hand side of Banak Street. The body was well over 200 feet from his sister's house. He said he got from Bagdad (sic) Street to his sister's house by riding on his bike.

[106] Middleton testified that apart from the body he did observed 'nothing else'. He "did not observe the body as yet." He testified he remembered giving a statement to the police in the matter. He said he did not recall whether he told the police he saw the body. Then he said, after he heard the gun shots he observed the body for five minutes. He did not observe anybody and only saw the body on the ground. He saw the body for about five minutes; that is when he got to his sister's house. It was at this stage the prosecutor put to Middleton the statement he had signed and applied to have the witness declared a hostile witness.

[107] In the process of having Middleton declared a hostile witness, which did not succeed when first attempted, the prosecutor continued her examination in chief of Middleton and he denied every detail of his statement. He did say, after first denying it, that he saw the police come to the scene while he was there and take away the body. He also said that he did not speak with anybody in relation to what he observed that night. Asked why he gave the statement to the police he said the police came to his work and asked him if he had seen anything.

[108] After the judge had ruled that Middleton was a hostile witness the prosecuting counsel cross-examined him and, in short, he denied he had said any of the things in the statement about seeing anyone else but the body of the deceased. Under cross-examination by defence counsel Middleton agreed he did not see who shot the deceased and he did not see who was firing the shots he heard. After Middleton's testimony was completed his statement to the police was read into evidence.

[109] Two other witnesses testified concerning the scene of the crime. The Crime Scene technician testified that he went to the scene and saw the body and recovered two suspected 9 mm spent shells. Corporal Manuel Espat, the officer in charge of the investigation, testified he responded to the report made to the police station and went to the scene. The corporal said he interviewed persons in the area and obtained no useful information. He took the body away and returned to the scene. He interviewed other persons and no useful information was obtained.

[110] The widow, Sheldon Meighan, testified after her brother had testified and had resiled from his statement. She spoke only of identifying the body for the post mortem examination. She was not asked anything about the night of the killing.

The admissibility of the statement

[111] Section 73A of the **Evidence Act,** under which Middleton's previous inconsistent statement, identifying Bennett as the shooter, was admitted into evidence to prove the facts stated in it, reads

> 73A. Where in a criminal proceeding, a person is called as a witness for the Prosecution and –
>
> (h) he admits to making a previous inconsistent statement; or

(i) a previous inconsistent statement made by him is proved by virtue of section 71 or 72,

the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible and may be relied upon by the Prosecution to prove its case.

[112] This section was introduced into the Evidence Act by an amendment in 2012 and is almost identical to section 119 of the Criminal Justice Act 2003 (the CJA) of England. The section altered the previous law which provided that a previous inconsistent statement could be relied on only to challenge the credibility of the testimony of a witness in a trial but could not be relied on to prove what was contained in the previous statement. The alteration of that rule, now making the previous statement capable of proving the fact it states, removed the centuries-old exclusion of a statement that was not made in court, not made under oath and not tested by cross-examination.

The need for counterbalancing measures

[113] Before there was the legislative reform in England, from which Belize borrowed, Canada had reformed its law on the rule against hearsay to make a previous statement admissible to prove what it stated. That reform was made not by legislation but by the Supreme Court of Canada, which decided the reform could properly be made by the court, since the former exclusion of previous inconsistent statements was a judge made rule of evidence; see *R v B (K.G.)*.[70] In that case the court recognized that care must be exercised to ensure the new dispensation did not operate unfairly by allowing the admission of evidence not shown to be reliable, and identified factors that a court should consider so as to determine whether a statement was reliable. These include: if the statement is made under oath or solemn affirmation following a warning about sanctions and the significance of the oath or affirmation; if the statement is videotaped; if the opposing party has a full opportunity to cross-examine the maker of the statement; if the circumstances in which the statement was made indicate that it was not coerced, or they exclude the concern "that malign influences on the witness by police may precede the making of the statement and shape its contents."

[70] [1993] 1 S.C.R. 740.

[114] To the same effect, the English CJA contained extensive surrounding provisions to moderate the impact of the alteration, made by section 119 and other sections, that now allowed large scale admission of hearsay statements into evidence. Intended to ensure the fairness of a trial, the surrounding provisions were counterbalancing measures, as they have been called, and have no counterpart in the Belize amendment but, as will be seen, the effect of that legislative omission is to cast a greater burden on a judge when exercising his undoubted common law discretion to ensure the fairness of a trial. In essence, a judge in an English trial will have before him, codified in the counterbalancing measures in the CJA, the factors that fairness requires him to consider, while a judge in a trial in Belize will have to select the factors to consider by looking to where he can to find them – whether to comparable legislation or to judicial formulations from other jurisdictions.

[115] Most relevant to the present appeal, as examples of the English counterbalancing measures to ensure fairness, are sections 114 and 125 of the CJA. Section 114 is a governing provision which states:

> "114 Admissibility of hearsay evidence
>
> (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if -
>
> (a) any provision of this Chapter or any other statutory provision makes it admissible,
>
> (b) any rule of law preserved by section 118 makes it admissible,
>
> (c) all parties to the proceedings agree to it being admissible, or
>
> (d) the court is satisfied that it is in the interests of justice for it to be admissible.
>
> (2) In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d), the court must have regard to the following factors (and to any others it considers relevant –
>
> (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;

(b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);

(c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;

(d) the circumstances in which the statement was made;

(e) how reliable the maker of the statement appears to be;

(f) how reliable the evidence of the making of the statement appears to be;

(g) whether oral evidence of the matter stated can be given and, if not, why it cannot;

(h) the amount of difficulty involved in challenging the statement;

(i) the extent to which that difficulty would be likely to prejudice the party facing it.

(3) Nothing in this Chapter affects the exclusion of evidence of a statement on grounds other than the fact that it is a statement not made in oral evidence in the proceedings.

[116] Section 125 provides that if, on the trial of a defendant before a judge and jury, the court is satisfied at any time after the close of the case for the prosecution that (1) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings; and (2) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe, the court must either direct the jury to acquit of the offence or discharge the jury, if the judge considers there ought to be a retrial. Section 125(4) declares that this provision does not prejudice any other power a court may have to direct a jury to acquit a person of an offence or to discharge a jury; so the common law powers of a judge to ensure a fair trial are preserved.

Whether to admit the statement

[117] The basic ground of appeal was that the statement should not have been admitted into evidence. At the time of Bennett's trial,[71] the Court of Appeal had not delivered

[71] In February 2013.

judgment in *Vincent Tillett Sr. v The Queen*[72] and, therefore, counsel who appeared at the trial (not Mr. Sylvestre, who appeared in this Court) did not have the benefit of its determination, at [41], that while the new law made the statement admissible, it remained a crucial function of the judge to decide whether to admit the statement. The duty of a court to ensure fairness in the context of section 73A of the Evidence Act and in deciding whether to admit a hearsay statement was captured in the statement by Morrison JA (as he then was) that

> "[41] … the admissibility of such a statement will nevertheless remain subject to the rule of the common law that a judge in a criminal trial has an overriding discretion to exclude it if its prejudicial effect outweighs its probative value, or if it is considered by the judge to be unfair to the defendant in the sense of putting him at an unfair disadvantage or depriving him unfairly of the ability to defend himself."

[118] The absence of this guidance may explain why no objection was taken to the admission into evidence of Middleton's statement by defence counsel. In fairness to the judge, he asked counsel if he objected to the admission of the statement and counsel answered no. For his part, counsel may have been saving his objection for the no case to answer submission, which he later made. Thus, the statement was admitted. It is a virtual certainty that if counsel had had the benefit of the Vincent Tillett judgment the objection would have been taken.

[119] The duty of the judge to determine whether to admit the statement, at that stage, is settled. In *R v B (K.G.),*[73] the Canadian Supreme Court landmark decision which removed the prohibition against relying on previous statements to prove the truth of what they stated, the two lower courts had refused to allow the prosecution to rely on the truth of the contents of separate videotaped statements made by three youths, who had stated that a fourth youth had told them that he had fatally stabbed the victim. At the trial the three recanted and said they had lied to avert blame from themselves. In deciding the former hearsay rule should be abandoned the Supreme Court determined hearsay statements should be admissible on a principled basis, the governing principles being the reliability of the evidence and its necessity. Furthermore, the court decided, there must be a *voir dire* (or trial within the main trial) before such a statement is put before

[72] Criminal Appeal No 21 of 2013 (judgment dated 7th November 2014).
[73] [1993] 1 S.C.R. 740.

the jury, in which the trial judge satisfies him or herself that the statement was made in circumstances which do not negate its reliability. The requirement for the judge to hold a voir dire and satisfy himself on the matter of reliability has been consistently applied in Canada, as in *R. v U. (F.J.)*[74] and *R. v Khelawon*.[75]

[120] In England, there is a similar requirement for the judge to determine, at the stage when the statement is sought to be admitted, whether to admit the statement into evidence, as was stated in *Ibrahim v R*.[76] In that case three statements made to the police by an alleged rape victim, who died before the trial, had been admitted by the trial judge, pursuant to section 116 of the CJA which provides for the admission of statements made by witnesses who had died, and the defendant was found guilty. The English Court of Appeal exhaustively analysed the jurisprudence from the English Court of Appeal and Supreme Court and considered decisions of the European Court of Human Rights, regarding the right to a fair trial under article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[77] and how that right was implicated in a case where the sole or critical evidence against a defendant was a hearsay statement on which the defendant had no opportunity to cross examine.

[121] The court identified the relevant issues to be considered in dealing with the question whether the appellant had a fair trial and declared:

> "[91] The more central the untested hearsay evidence, the greater the need to ensure that there is proper justification for its admission; and the greater the need to ensure that the untested hearsay evidence is reliable and to ensure that there are adequate 'counterbalancing measures' which have been properly applied in this particular case. All three courts [the Court of Appeal, the Supreme Court and the Grand Chamber of the European Court of Human Rights] agreed that, ultimately, there is only a single test: did the defendant have a fair trial or not."

[122] In quashing the conviction, the court ruled, at [106], that the judge should not have admitted the hearsay statements into evidence because of the adverse effect the defendant suffered by "the admission of that untested hearsay evidence" which the prosecution had not shown to be reliable. The court confirmed that it was the duty of the trial judge to decide, at the stage of deciding whether to admit the statement, whether it

[74] [1995] 3 S.C.R. 764.
[75] [2006] 2 S.C.R. 787.
[76] [2012] EWCA Crim 837, [2012] 4 All ER 225 at [107].
[77] Incorporated into English law as schedule 1 to the Human Rights Act 1998. The right to a fair trial is included as a fundamental right in section 6 of the Belize Constitution.

was fair to do so and stated that it was wrong in law for the judge to admit the hearsay statements and leave it to the jury to decide what weight to give to them. It said at [107].

> "[107] We do not accept the submission that the question of reliability and the credibility of [the deceased's] evidence should have been left to the jury. It seems to us that the clear effect of the judgments of the Court of Appeal and Supreme Court is that it is a pre-condition that the untested hearsay evidence be shown to be potentially safely reliable before it can be admitted. That is also the view of the Grand Chamber of the ECtHR. That is a matter for the judge to rule on, either at the admission stage or after the close of the prosecution case pursuant to s 125 of the CJA."

Inability to cross examine

[123] A major contention of Bennett was that his trial was unfair because he was not able to cross-examine Middleton on what he had said in his statement since Middleton was saying, in his testimony in court, that what he had said in his statement, he did not say. The complaint that this situation made it impossible to cross examine Middleton to challenge the truth of this very central evidence of identification is undeniable. However, in assessing the impact on the fairness of the trial that this situation produced, it is necessary to consider the particular facts of this case because the inability to cross examine will not necessarily result in unfairness.

[124] Thus, it was seen in *R v Joyce*[78] that the fact that the witnesses subsequently denied the identification they made in statements did not necessarily make the identification weak and the inability to cross examine did not operate unfairly against the appellants. That was the situation on the facts of that case, in which three witnesses each identified the appellants in statements to the police about a shotgun attack on a family residence that occurred in broad daylight, at mid-day. As the appellate court noted, the witnesses had a significant length of time to observe the appellants, who were known to the witnesses for years and the witnesses had an unobstructed view of the appellants. The basis on which the appeal was decided was not as to the quality or accuracy of the hearsay identification or the lack of cross examination but whether it was right for the judge to

[78] [2005] EWCA 1785.

leave it to the jury to decide whether to believe that all three witnesses had been mistaken in their retracted identification, as they claimed at the trial, or whether to believe that the three statements, considered together and separately, had been truthfully made.

[125] Similarly, the effective withdrawal of the identifications in *Vincent Tillett v The Queen* did not make the statements unreliable because the facts readily supported the truth of the statements and identification was not an issue. In that case, the fatal stabbing took place in a room full of people celebrating the 'birthdays' of three persons and the accused was the former mate of one of the celebrants, to whose affection the victim (another celebrant) had succeeded. Two members of the gathering gave detailed statements to the police of the event including that one had acted to restrain the accused after he had stabbed the victim and that the other had been chased with the knife by the accused. The details in each statement confirmed the veracity of the other and, more, the identification of the accused was corroborated by his confession to the police. The day after the homicide the accused said to a police officer he would tell her why he killed the victim and told her it was because the victim had said he was going to kill the accused. In those circumstances, the accused could have suffered no prejudice from being unable to cross examine the witnesses to contest that he was the killer. Indeed, identification was not an issue and the challenge to the conviction was directed, in one instance, to the alleged animosity of the witness and, in the other instance, to whether the witness had actually given the statement.

[126] Another instance where untested previous statements were recanted but were still reliable is *R v Morgan*[79] where the two prior statements that the recanting witness had made had been preceded by a statement he made to the police at the scene, stating he saw the shooting from a very close range, saw who did the shooting and would be able to recognize the perpetrator if he saw him again. Beyond that, the witness subsequently identified the defendant at an identification parade. The question in that case was as to the credibility and weight the jury should give to the statements. There was no issue whether the admission of the statements on which the maker could not be cross examined operated to produce an unfair trial. The appeal was for a retrial based on alleged fresh evidence of police impropriety in the taking of the statements.

[79] [2007] EWCA 2236.

[127] The Director relied on the statement by the Privy Council in *Scott v R*[80] that neither the inability to cross-examine a deceased deponent nor the fact that the deposition contained the only identification evidence against the accused would justify excluding the depositions. The principle stated in that case was that a judge should only exercise the discretion to exclude depositions which identified an accused in exceptional circumstances, where he was satisfied that the directions he would give in the summing up would be insufficient to guarantee a fair trial. In *Scott*, in which two separate appeals were heard together, the hearsay statements in each case had been made by witnesses who died. The court decided there was nothing in the contents of the statements identifying the appellants that made them "of such poor quality that it would be unsafe to convict upon it if the jury had received appropriate guidance in the summing up"; see1259D-E.

[128] The pronouncement that the effect of inability to cross-examine did not in itself justify excluding a hearsay statement remains good law, as the cases discussed above indicate, but it must not be taken too far or out of context. Foremost, there is a significant difference between the out of court statement of a deceased witness, as was the situation in *Scott*, which remains his statement and the out of court statement of a witness who recants his statement. The recanting witness is saying what he said before is not true, and this immediately implicates its reliability. Further, the pronouncement in Scott was made in 1989, well before the CJA 2003 was passed, and the development of the jurisprudence, as expounded in Ibrahim, was decades in the future. What Ibrahim has brought to the fore and shown to be settled, is that a decisive issue is whether the untested statement has been shown to be reliable.

[129] The decision in *Scott* contributes to the discussion because it affirms the courts' common law power to do justice, recognizing that even where a hearsay statement was admissible in evidence by a statute that conferred no power to exclude the statement, there exists at common law a power in a court to refuse to allow the prosecution to adduce it in evidence; see 1255-6, 1257 and 1258. The heightened focus on the reliability of a statement that developed in cases decided after *Scott* was a natural consequence of the increase in the number of cases that came before the courts requiring the exercise of the

[80] [1989] A.C. 1242 at 1258G-H, 1259D-E.

exclusionary discretion, as a result of the CJA making hearsay statements admissible to prove the truth of their contents.

[130] On this analysis, it must be concluded that Bennett's legitimate complaint that he was effectively unable to cross-examine on the identification evidence in the statement, on which he was convicted, does not by itself make the trial unfair. However, that inability is certainly a factor to consider in assessing the reliability of the statement.

Factors going to reliability

[131] It has been seen that it is a threshold test for admitting a hearsay statement that it must be shown to be reliable, as the decisions in the Canadian cases and *Ibrahim* confirm, and what this entails needs to be examined. In *R v B (KG)*[81] the court distinguished between threshold and ultimate reliability, as the two aspects came to be called. In *R v Khelawon*[82] it was clarified that threshold reliability is, mainly, concerned not with whether the statement is true or not; which is a question of ultimate reliability and is a matter for the jury. Instead, it is concerned with whether or not the circumstances surrounding the statement itself provide *circumstantial* guarantees of trustworthiness. This distinction was recognized as not an absolute one, because in many instances the likely truth of the evidence is precisely what will establish its threshold reliability.

Reliability of the maker of the statement

[132] It was stated in *Ibrahim*[83] that the factors listed in section 114(2) of the CJA may be used as a checklist by the court when considering the reliability of the hearsay statement. This is a sound approach that merits adoption in other jurisdictions, because the factors listed are evidently useful and reasonable considerations for assessing reliability and are not so only because they were codified in legislation. It would, therefore, be appropriate for a court in Belize to use the factors in the CJA checklist when considering, in the exercise of its common law discretion, whether a statement has been shown to be reliable and fairly to be admitted. It would be similarly appropriate to use the factors identified in *R v B (K.G.)*, summarized at [15] above, with which the CJA checklist overlaps.

[81] [1993] 1 S.C.R. 740.
[82] [2006] 2 SCR 787.
[83] At [106].

[133] Two items of specific reliability are included in the checklist: how reliable the maker of the statement appears to be and how reliable the evidence of the making of the statement appears to be.[84] In this case these can be considered together especially as the second calls for little discussion.

[134] The testimony of the Superintendent of Police and the Justice of the Peace, who curiously was brought to witness the giving of a witness statement as distinct from the recording of a confession from an accused, would have left no doubt in the judge's mind that Middleton had given the statement with all its contents. This testimony provided reliable evidence of the making of the statement (even if it gave no clue as to how the previously mysteriously mute Middleton came to be identified as an eyewitness). Clear evidence of the making of the statement having been given, this naturally led to the conclusion that Middleton was an unreliable witness in recanting his statement and saying, under oath, he did not say in his statement the things that it contained.

[135] That conclusion would have obliged the judge to decide, as a threshold question if the admission of the statement had been challenged, what evidence existed that could allow him to find Middleton nonetheless a reliable witness, and make it fair to admit his statement and put it before a jury for them to believe or not.

[136] Two items call for consideration as possible answers to that question. The first item speaks to the objective truth of what Middleton said in his statement, which could show he made a reliable identification. The Court of Appeal accepted that the details of the description Middleton gave in his identification made it credible: he stated the shooter was wearing a fitted light-coloured cap and red shirt, was 5 feet 8 inches in height, had a stocky build, and held a 9 mm handgun. With respect, none of this is of any value as confirmatory or indicative of the truthfulness of Middleton's identification. If Middleton had said in the statement the gunman was wearing a Mexican sombrero and a multi-coloured dashiki it would have been of the same value as what was in the statement, because nothing confirmed the gunman was clothed as Middleton described: no other person said they saw Bennett so attired at any point in time, so Middleton's description was of little value.

[84] Section 114(2) (e) and (f) Criminal Justice Act 2003, reproduced at [115] above.

[137] Similarly, it was of no value that Middleton was able to state the height and build of a person who was known to him, because Middleton was able to give from memory such particulars. As to the calibre of the firearm, especially in the context of this case the judge would have needed to get past the feat of Middleton, from more than 40 feet away, at night under a street light, being able to determine the colour and, much more, identify the calibre of the gun in the gunman's right hand. Obviously, the gunman was not holding up the gun to Middleton to exhibit its colour and calibre. There was nothing indicating veracity from the fact that Middleton stated the calibre of the gun. Given Middleton's established untruthfulness, it would have been fair for the judge to consider that Middleton was on the scene when the spent 9 mm shells were recovered that night. Again, because Middleton had established his own unreliability, it would have been fair for the judge to consider that Middleton may have learned the colour and calibre of the weapon over the two days he took before he gave his statement. There were no verifiable objective facts in the statement to make it reliable.

[138] The second item proffered to confer reliability on Middleton and his statement is the motive for his recanting. The Director argued that it was to be inferred that the motive for Middleton's recanting may have been fear. There is an almost visceral reaction to the spectre of intimidation, which probably did not need to be conjured by the prosecution to have haunted the trial. In our small Caribbean societies, where crime stories and murder trials frequently make the headlines, judges, juries and the citizenry are highly distressed by media reports of witness tampering, intimidation and execution. These occurrences likely contributed to the amendment of the hearsay law in Belize and a court will be greatly concerned that the amendment should be used in a proper case to overcome the effect of witness intimidation. Precisely because that is the reflexive response to witness intimidation, a court must resist jumping to the conclusion that it has occurred in a given case. In this case, there was not a scintilla of evidence that fear operated as the motive for Middleton's recanting, in contrast to the situation in *Joyce*, for example, where there was direct testimony of fear operating as the motive for the witnesses recanting, and this served to bolster the reliability of the recanted statements.

[139] It would have been most unfair to Bennett for the judge or jury to have assumed fear was Middleton's motive for resiling from his statement, because the assumption that

Middleton had been intimidated imports wrongdoing on the part of Bennett or his clique. Worse, that assumption logically eliminates the availability to the judge and jury of the other conclusion: that Middleton concocted his identification out of hostility towards Bennett, with whom the Meighan sons, Tyrone and Ellis Jr, "often have a problem."

The circumstances in which the statement was made

[140] As the checklist from the CJA shows, in assessing reliability it may be relevant to consider the circumstances in which the statement was made[85] and this consideration is also adopted in *R v B. (K.G.)*.[86] Middleton's giving the statement on 15th September 2009, two days after the killing, is very significant in the circumstances of this case because he never said a word before to anyone about having seen the killer, so far as the evidence goes. By remaining silent, if truly he had seen the killer, Middleton left the known killer at large. If Middleton had seen and knew the killer, why did he say nothing? He was on the scene when the police responded to the report of the crime. Corporal Espat interviewed persons on the scene to obtain relevant information but, the corporal testified, no one said anything. It is an irresistible inference that Middleton also did not tell his sister (or else this would have been elicited in her testimony) that he had seen her husband's killer, when this dramatic knowledge, if it truly existed, would have been exploding in his mind.

[141] The effect on Middleton's reliability of his two-day silence as to the identity of the killer is starkly illustrated by considering another aspect of the law on hearsay statements, which is the rule that makes hearsay statements admissible in evidence when they are part of the *res gestae*. That expression, which is said to have no exact English translation, is now replaced by reference to 'spontaneous statements'.[87] The rule at common law, and now put on statutory footing in the CJA, is that a statement made by a person, whether victim, witness or accused, as an event was occurring or had just occurred, was admissible in evidence at a trial because the person making the statement would have been so emotionally overpowered by the event that the possibility of concoction or

[85] Section 114(2) (d) Criminal Justice Act 2003; reproduced at [115] above.
[86] [1993] 1 S.C.R. 740, summarized at [119] above.
[87] See Phipson On Evidence 17th ed. at 31-01.

distortion can be disregarded.[88] Admissibility was said to be based on the theory that something uttered:

> "[U]nder the immediate and uncontrolled domination of the senses and during the brief period when consideration of self-interest could not have been fully brought to bear by reasoned reflection … may be taken as particularly trustworthy (or at least lacking the usual ground of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him."[89]

[142] The factors that confer trustworthiness and reliability on a spontaneous statement – that there is no possibility of concoction or consideration of self-interest, and that the speaker was emotionally overpowered or under the immediate and uncontrolled domination of the senses when he made a spontaneous statement – drive home exactly what is wrong about Middleton's statement and make it unreliable. The fact is Middleton *did not* make a statement when he was emotionally overpowered and his senses were dominated by seeing the murder of his brother-in-law, as the theory behind spontaneous statements premises any normal human being would have been. To the contrary, Middleton made a statement after he had every opportunity to concoct what he said. He strengthened the suspicion of concoction when he recanted the statement.

The amount of difficulty involved in challenging the statement and the likely prejudice

[143] A further set of factors going to reliability, again drawn from the checklist[90], and again contained in the safeguards discussed in *R v B (K.G.)*[91] are the amount of difficulty involved in challenging the statement and the extent to which that difficulty would be likely to prejudice the party facing it. The absence of cross examination has already been considered as a ground of appeal and it was seen that inability to cross-examine the maker of a statement does not, in itself, require the exclusion of the statement. But, as was recognized, the inability to effectively cross-examine requires to be considered in assessing the reliability of the statement and the fairness of the trial.

[88] Sec 118(1), para.4 Criminal Justice Act 2003.
[89] Phipson op cit 31-03 quoting Wigmore on Evidence, Chabourn rev. (Boston. 1976) para.1747.
[90] Section 114(2) (h) and (i) Criminal Justice Act 2003.
[91] [1993] 1 S.C.R. 740.

[144] In contrast to some of the cases discussed above, in which the inability to cross examine the maker of the statement made little difference, in this case it could have made a great difference if the defence had been able to cross examine Middleton on the alleged identification and recognition. If the ability to cross examine on the identification had existed, even before defence counsel embarked on challenging the identification, counsel would have been driven to seek to elicit from the witness an admission that he had lied in giving the identification and the reason why he had lied. That questioning *could* have established that Middleton concocted the identification of Bennett and put beyond argument that the statement was untrue when it was made; and that would have brought an end to the trial.

[145] It has already been seen that because Middleton said in court he had not identified Bennett he could not be cross-examined about that identification. That presented this insurmountable difficulty: the defence could not challenge the identification, since no witness was saying it was true, but the prosecutor was free to say to the jury that the recanted identification was true. Because there was no evidence, of the sort discussed above, to make the disavowed identification reliable, it was unfair to the accused to leave it to the jury to believe this wholly unreliable evidence.

[146] The temptation must be resisted to address the things in Middleton's statement that, if he had not abandoned it, cried out for cross-examination, especially Mr. Sylvestre's argument that, if it was true that Middleton had seen the gunman, it was only a fleeting glance, which is a legally unacceptable identification.[92] The reality is that there was no cross examination on the identification because there could have been none, in the circumstances of this case. Identification was the sole evidence against Bennett and the inability to challenge it was the crowning feature of the unfairness in admitting into evidence the wholly unreliable statement and confirms the prejudice its admission caused.

Disposition

[147] A court should not allow a trial to proceed on the untested previous statement of a witness who abandons all material parts of it, where it is the sole evidence of

[92] *R v Turnbull* [1977] 1 QB 224.

identification, there is no other evidence to support the statement, it has not been shown by the circumstances or other factors to be reliable, and there is no other evidence against the accused. In such a situation it is unfair to admit the statement and the judge should halt the trial.

[148] In the instant case the Applicant did not receive a fair trial because the recanted hearsay statement was highly unreliable and should not have been admitted into evidence. The statement having been admitted without objection, at the stage of the no-case submission the judge should then have considered the threshold reliability of the statement and decided it was not reliable; and that the evidence was incapable of proving beyond a reasonable doubt that Bennett was the shooter. On this evidence the jury would have been left to guess and could only reach a guilty verdict on gut feeling.

[149] I would accordingly allow the appeal against conviction and sentence, direct a verdict of acquittal be entered and order the immediate release of the Applicant from prison for this conviction.

ORDER OF THE COURT

[150] Having regard to the judgments above, this Court, by a majority decision, allows the appeal of the Applicant and orders his conviction to be quashed.

/s/ J Wit

The Hon Mr Justice J Wit

/s/ D Hayton

The Hon Mr Justice D Hayton

/s/ W Anderson

The Hon Mr Justice W Anderson

/s/ M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ D Barrow

The Hon Mr Justice D Barrow