**IN THE COURT OF APPEAL OF BELIZE, A.D. 2008**

**CRIMINAL APPEALS NOS. 19, 20 & 21 OF 2006**

**BETWEEN:**

**GIOVANNI VILLANUEVA**
**JAVIER VILLANUEVA**
**SHARIM BAEZA** **Appellants**

**AND**

**THE QUEEN** **Respondent**

—

**BEFORE:**

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| **The Hon. Mr. Justice Mottley** | **-** | **President** |
| **The Hon. Mr. Justice Sosa** | **-** | **Justice of Appeal** |
| **The Hon. Mr. Justice Morrison** | **-** | **Justice of Appeal** |

**Mr. O. Twist for first & second appellants.**
**Mr. A. Sylvestre for third appellant.**
**Ms. M. Moody for the respondent.**

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**9, 10 October, 25 October 2007, 13 March 2008.**

**MOTTLEY P.**

1. On 5 October 2006, the first appellant Giovanni Villanueva (GV) was convicted of the murder of Wilfredo Baeza which occurred on 19 July 2003 at Corozal. He was sentenced to life imprisonment. On the same day, the

second appellant Javier Villanueva (JV) was convicted of abetment to the murder of Wilfredo Baeza and was sentenced to 15 years' imprisonment. The third appellant Sharim Baeza (SB) was convicted of conspiracy to commit murder and was sentenced to imprisonment for life.

2. Shortly after the conclusion of the hearing of the appeal, we dismissed the appeal of GV and affirmed his conviction. We allowed the appeal of the JV, quashed his conviction, set aside his sentence and entered a verdict of not guilty. In respect of SB, we allowed the appeal quashed his conviction, set aside his sentence and ordered a new trial on the charge of conspiracy to commit murder. At that time, we promised to put into writing the reasons for so doing.

3. The deceased Wilfredo Baeza (Wilfredo), also known as Fidos, was married to Tomasita who is the sister of GV and JV. SB is the son of Wilfredo and Tomasita. The case for the prosecution was that on 19 July 2003 GV went to the home of the deceased at 4th Avenue, Corozal Town at about 6pm and shot him while he was in his bathroom resulting in his death. On the count of abetment to murder the prosecution's case was that on 20 July 2003, the day following the death of Wilfredo, JV, still unaware that Wilfredo had been shot on the previous day, encouraged a fisherman by the name of Luke Tate to kill the deceased by offering him the sum of $6000 to kill Wilfredo.

**GIOVANNI VILLANUEVA**

4. The evidence in support of the count of murder came by way of a conversation which GV had with his sister Maria Catzim (Maria). Maria said that GV came to her home on 20 July 2003 and asked her if she was aware that Wilfredo was dead. He told her that he had killed Wilfredo and that Tomasita had asked him to kill him and he had done so because

Tomasita had promised to pay him $6000. During the conversation, he asked Maria to lend him some money as he wanted to leave Belize. After the shooting, GV said that he had thrown the gun in the sea. While GV was speaking to her, Maria said that he appeared as though he had been drinking as she could smell "the aroma of alcohol". In his statement from the dock, GV said that on 19 July he went to work at about 12 o'clock and remained there until 3 o'clock. He returned home after work where he then watched TV until 9 o'clock at which time he went to bed. On 20 July 2003, someone by the name of Manuel came to his home and informed him that Wilfredo had been killed. He went to his parents' home. His mother informed him that his father had gone to the sea side where he joined him about 9 o'clock. After spending some time with his father, he took a taxi and went and purchased three six-pack of Mexican Beer. He drank beer by the sea-side until 12:30 o'clock. Later, he met his father, Javier Richard and they drank four beers each. GV and his father then drank about one quarter of Caribbean, presumably rum. By 2 o'clock, his father appeared to be "kinda drunk". However, as his father wanted to drink some more, they decided to go to his mother's house. He again bought some more Mexican Beer. At about 3 o'clock he took beers and returned to his home where he remained until the following day. He denied speaking to Maria on 20 July. He denied telling Maria that he had shot Wilfredo. He denied killing Wilfredo.

**GROUND 1**

5. In his first ground of appeal, he complained that the judge failed to give the jury directions on the danger of acting upon the unsupported confession of GV who it is alleged was in a state of intoxication. Mr. Twist submitted that judge ought to have told the jury to consider the effects of alcohol on the mental state of GV in determining whether he was speaking

the truth when he told Maria that he had murdered Wilfredo or whether he was play acting due to his mental state.

6. The law governing the admissibility of a confession in criminal cases is contained in section 90 of the evidence Act, Cap. 95. Confession that a defendant has committed a crime is admissible in evidence against that defendant if the admission is freely and voluntarily made. However, before the admission can be admitted into evidence, the prosecution has to prove, to the satisfaction of the judge, that the admission "was not induced by any promise of favour or advantage or by use of fear, threats or pressure by or on behalf of a person in authority (section 90(2)). If the admission of guilt or confession is admitted into evidence, that admission is sufficient evidence upon which the defendant may be convicted. (section 91(1)). If the case against a defendant depends wholly or substantially on a confession made by him and, the court is satisfied that he is mentally handicapped and the confession was not made to an independent person, the Court is required to warn the jury that there is a special need for caution before the jury may convict the defendant acting in reliance on the confession. In addition, the Court must explain to the jury that the need for special caution arises because the prosecution's case against the defendant depends wholly or substantially on the confession and that defendant is mentally handicapped and that the confession was not made in the presence of an independent person.

Section 91)2) of the Evidence Act states:

> 91(1) …
>
> (2) Without prejudice to the general duty of the Court at a trial on indictment to direct the jury on any matter on which it appears to the court appropriate to do so, where at such a trial-

(a) the case against the accused depends wholly or substantially on a confession by him, and

(b) the court is satisfied-

(i) that he is mentally handicapped; and

(ii) that the confession was not made in the presence of an independent person,

the court shall warn the jury that there is a special need for caution before convicting the accused in reliance on the confession, and shall explain that the need arises because of the circumstances mentioned in paragraph (a) and (b).

Counsel for the appellant conceded that the statement to Maria was properly admitted into evidence. However, he submitted that a warning along the lines set out in section 91(2) ought to have been given. This submission was based on the contention that the appellant had been drinking and was so drunk that he was not in control of his faculties.

7. No evidence was led to show that he suffered from any mental handicap. In an effort to show that the appellant was not in control of his faculties, Mr. Twist relied on the evidence of Maria and the unsworn statement of the appellant given from the dock. In her evidence-in-chief, Maria, in reply to a question from counsel for the Crown, said that the appellant appeared as though he had been drinking. She reached this conclusion because she smelled "the aroma of alcohol" on his breath. In cross examination, Maria said that she and GV got on well except when he was drinking. On the occasions when GV was drinking, Maria said that he used to "talk things out of the way". By this, Maria said she meant that would be cursing and saying things to offend others. When pressed further by counsel, she said when he was drunk he used to make up things – make

up stories. When asked if GV used to drink a lot, Maria replied "a bit". While she did say that she could smell the aroma of alcohol on GV's breath, no questions were put to her as to what was his state of sobriety or whether she considered that he was drunk. However in response to a question posed by the court, Mr. Twist conceded that Maria's evidence did not show that GV was drunk when he admitted to her that he had killed Wilfredo for money.

8. Mr. Twist also relied on the unsworn statement of the GV from the dock. In his statement the appellant said:

> "I spoke with my father at the sea side and then I told my father if he wanted some beer and he told me, yes. So, indeed I take a taxi and I went to buy some Mexican beers. I bought three six-packs. When I returned back again where my father was, he was not there, so I sit there at the sea-side. I begin to drink there at the sea-side until 12:30 when I decided to go to Bumpers where I met my father, Javier and Richard and my father. We drank all about four beers each, and then me, and my brother, Javier begin to argue."

He continued:

> "Yes. Then Javier, he went outside. I don't know where he went, and then I told my father, "Let's go to Campecino Bar. We drink almost about one quarter of Caribbean there. We stayed there until almost two o'clock. From there, my father was ready kinda drunk and he wanted to drink more so I told him, "Let's go buy some Mexican beers and go home." When we get the Mexican beers, we arrived at my mother's house about three o'clock then I left my father there. I tek four beers with me, I went to my wife's house."

At no stage during his unsworn statement from the dock did GV say that when he spoke to Maria he was drunk. Indeed, he denied that he spoke to Maria on 20 July 2003.

9. Mr. Twist referred us to the summation where the judge told the jury:

> "But then, Members of the Jury, you might want again to ask yourselves: Why would a man then go and incriminate himself and then ask for money to leave the country? Does that look like a joke to you? Does that look as something a person under the influence of liquor would tell anyone? As men and women of this world, Members of the Jury, it is for you to apply your common sense and decide where you think the truth lies in this regard."

10. Mr. Twist submitted that there is no definition in the Act as to who is to be considered as being mentally handicapped. Consequently, he said, the category of persons who are to be considered as being mentally handicapped is not closed and therefore he submitted, it should include any person who is not in control of his faculties by reason of being drunk. But this submission overlooked the provision of section 91(4) which does provide a definition of mentally handicapped.

Mentally handicapped is defined as being "a person that is in a state of arrested or incomplete development of mind which included significant impairment of intelligence and social functioning." No evidence was led to suggest that GV was in a state of arrested or incomplete development which significantly impaired his intelligence and social functioning,

11. The case for the prosecution depended wholly or substantially on a confession but in our view the court was not under a duty to warn the jury of the special needs for caution as the evidence did not show that the

defendant was mentally handicapped. The confession was not made in the presence of an independent witness and there was no need that it should have been. The court was not required to explain to the jury why there was need for a special caution. There is, in law, a presumption that the appellant was sane.

12. In any event, the judge nevertheless pointed out the special need for caution. The judge did not make reference to any suggestion that GV was drunk he nevertheless gave the jury a direction on the need for special caution. The judge told the jury:

> "Now it is on this direct evidence of Maria Catzim where she has testified that the accused admitted that he kill Wilfredo Baeza that the prosecution is asking you to find the accused guilty. There is no confirmation, nothing to link the accused, nothing to confirm what Maria Catzim has said on reference to Giovanni Villanueva, nothing to confirm it. Worse, there is no corroboration by any other witness or any other thing. All you have is the evidence of Maria Catzim. So, it is very important, Members of the Jury, and I will ask you to be cautious in considering her evidence because of the lack of confirmation and the lack of corroboration. You see, you have to be careful. But if at the end of the day, having taken into account her demeanor in the witness stand, having taken into account how she testified in examination-in-chief and in cross-examination, and you believe that she has told you the truth then, Members of the Jury, that is good evidence on which you can act. Good evidence."

So the judge is clearly warning the jury that in considering the evidence of Maria, they had to be careful because her evidence was not in any way confirmed or supported by any other witness.

**GROUND ii**

13. Ground ii alleged that the judge "too freely" expressed his views on important aspects of the case as a result of which the appellant sustained prejudice and was denied a fair trial. We were referred to the summation where the judge, in referring to the evidence of Maria, told the jury:

> "This witness further said in her evidence that Giovanni Villanueva asked her to lend him some money in order to leave the country. Well, one wonders, why should person borrow money to leave the country after he has killed a person? What is that showing to you? In my view, Members of the Jury, and it's only my view, that mind is a guilty mind. But, Members of the Jury, you must first consider the evidence of Maria Catzim and come to a conclusion that what she said in court, having seen her testified in the way she did, whether she was in fact telling the truth. It is only if you accept that she was telling the truth that you can take everything into consideration, as I have said to you, and then come to a definitive conclusion that in fact it was Giovanni Villanueva who did the killing of Wilfredo Baeza as Maria Catzim said he had told her."

14. Mr. Twist submitted that, even though the judge told the jury that they were free to disregard his opinion, nonetheless by expressing his view in the way he did he would have made such an impression on the mind of the jury that they may have concluded that they should accept as their own the comment of the judge. Counsel contended that what the judge was in fact saying was that they could forget what he had told them and all they need to do was to examine the evidence Maria had given and then come to a conclusion. In his written submission, counsel also submitted that no where in her testimony did Maria say that GV wanted to borrow money from her to leave Belize because he had murdered Wilfredo.

15. Dealing firstly with the written submission, Maria, in her evidence-in-chief, said, GV asked her if she was aware that Wilfredo had died. GV then informed her that he had killed Wilfredo and that he had done so at the request of Tomasita who had paid promised to pay him $6000. Later, also in evidence-in-chief, Maria said that GV "was borrowing money from me so that he could leave" Belize. While it may be correct that Maria did not say that GV wanted to borrow money from her so that he could leave Belize because he had murdered Wilfredo, it is clear from her evidence that Maria was saying that GV told her that he had killed Wilfredo and that he wanted money to leave Belize. The clear inference to be drawn from this evidence is that he wanted money to leave Belize and that the reason why he was leaving Belize was because he had killed Wilfredo at the behest of Tomasita who had promise to pay him $6000. It is necessary to have regard to the circumstances under which Maria stated that GV asked her to borrow money so that he could leave Belize. In our opinion, it is logical to infer that, when Maria stated that GV said he had killed Wilfredo and that he wanted to borrow money from Maria to leave Belize, GV was leaving Belize because he had killed Wilfredo.

16. In respect to the first submission that the judge had "too freely" expressed his views, the Court considers that the observations made by the Privy Council in **Mears (Byfield) v R (1993) 42 WIR 284** are apposite. In that case complaint had been made that the summation of the trial judge had been unfair and unbalanced on the ground that comments made by him were weighted against the defendant. The Court of Appeal in Jamaica applied the test of whether the judge's comments amounted to a usurpation of the function of the jury. In delivering the advice of the Board, Lord Lane rejected this test as being too favourable to the prosecution and at page 289 approved what was said by Lloyd LJ in the unreported case of R v Gilbey 1990:

> "A judge … is not entitled to comment in such a way as to make the summing-up as a whole unbalanced … It cannot be said too often or too strongly that a summing up which is fundamentally unbalanced is not save by the continued repetition of the phrase that it is a matter for the jury."

17. It is necessary to examine the summation as a whole. In so doing, we refer to particular aspects of the summation. Early in his summation, the judge had informed the jury that the prosecution case against GV was based entirely on the evidence of Maria who stated that GV had admitted to her that he had killed Wilfredo for money. The judge told the jury:

> "If you accept this evidence of Maria Catzim that he did the shooting and did it for money, the prosecution is inviting you to come to the conclusion that when this accused, Giovanni Villanueva, shot Wilfredo Baeza, he was not acting in lawful self defence, his act was not justified, therefore his action was unlawful. If you accept that he is the person who pulled the trigger, he is the person who shot Wilfredo Baeza and caused the harm, and you accept the evidence of Maria Catzim, his act then is unlawful because he was not justified in killing Wilfredo Baeza."

The use of the phrase if you accept this evidence of Maria that GV said that he did the shooting for money, the judge was clearly leaving the issue of the guilt or innocence of the appellant to the jury for their determination.

18. The judge had previously given the jury the general direction that it was for the jury to decide what evidence they accepted and what evidence they rejected. The judge also told the jury, in the course of the summation, that he would probably "analyze and evaluate" the evidence and, that in doing so, if he expressed any view of the facts, they could accept it if it accorded

with their assessment or they could reject it, but in any event the issue of guilt or innocence was a matter for them.

19. Later, the judge reminded the jury that they could only convict the appellant if they decided that Maria was speaking the truth. He pointed out to them how they should regard the evidence of Maria. The judge told the jury:

> "She ended this portion of her evidence by saying that she did not loan Giovanni Villanueva the money and that Giovanni Villanueva left her yard. Members of the Jury, you saw as I said before, that witness testified and I am asking you not to take into account only what she said from the evidence, but recall the manner and the way in which she testified. That is the witness who when confronted by the force of cross-examination appears to lost memory; or in any event, that was the witness who said that at the relevant times when she was to correct certain things, when she was to correct her story where she told the police that Giovanni Villanueva said that the money was not $600.00 but $200.00, she said she could not correct it because you know, she was frighten and she fainted. And when she was confronted again, she said, on, you know, I fainted again, so I can't remember. So, clearly, Members of the Jury, I don't know if you will want to take that witness solely as a witness of the truth. It is a matter for you. You saw her demeanor, it is for you to decide whether in spite of how she behaved in the witness stand you still think that she is credit worthy and therefore she is to be believed. Remember, Members of the Jury, that you must be sure that a witness is telling you the truth so that you can be sure of the guilt of an accused person. If you have lingering doubts as to whether that witness was telling you the truth, then you can't believe what she said. And if you have those lingering

doubts then you must be doubting the guilt of the accused person, Giovanni Villanueva, and it is your duty to return a verdict of not guilty."

20. In dealing with the issue of what the judge call confirmatory or supporting evidence the judge, at the portion, cited earlier in paragraph 12 above had told them that "there was no corroboration by any other witness or any other thing". The judge went on to point to the jury that they had to approach the evidence of Maria with caution. In addition, they had to consider her demeanor on the witness stand in particular how she had testified in her evidence-in-chief and in cross-examination. He reminded that it was only if they were satisfied that Maria had told the truth that they could convict.

21. The judge indicated to the jury that:

> "… it is for you as judges of the facts to decide whether you think, despite this apparent weaknesses in the evidence of Maria Catzim, she is a witness of the truth. As I said before, you have seen and you have heard her testified, so you can make up your minds whether or not she is indeed a witness of the truth or not."

Later he reminded them:-

> "But whether there has been honest mistakes or wicked intention, is essentially a question for the determination of you the jury. You are to decide this, whether there has been an honest mistake or whether there has been invention of evidence. You have seen and heard the witnesses and so it is for you to say whether any inconsistency you find is profound and is unexplainable or whether the reasons which had been given for the inconsistencies are

satisfactory to you. Is it satisfactory, for instance, that the witness, Maria Catzim said when confronted with the bounty for the killing, that she could not correct her story to the police because she fainted? That, Members of the Jury , is a matter for you. In this case, Members of the Jury, I have not seen any serious inconsistency that goes to the meat of this case. This, of course, is only my view and you may have a different view and it is your view that counts."

22. Later, the judge identified to the jury certain issues which he considered to be of importance in the context of the trial. It was entirely within the province of the judge so to do. The judge told the jury:

> "But then, Members of the Jury, you might want to ask yourselves: Why would a man then go and incriminate himself and then ask for money to leave the country? Does this sound like a joke to you? Does that look as something a person under the influence of liquor would tell anyone."

Having raised these issues for the consideration of the jury, the judge correctly went on to tell them that as men and women of the world they had to apply their common sense to ascertain where the truth lies. The judge was thereby leaving it to the jury to decide whether Maria was speaking the truth when she said that GV had told her that he had killed Wilfredo.

23. We adopt the approach recommended by Lord Lane in the case of **Mears** (supra). His Lordship said at p 289:

> "Here their Lordships have to take the summing-up as a whole … and then ask themselves in the words of Lord Sumner in **Ibrahim v R [1914] AC 599** at p 615 whether there was a -
>
> > "Something which … deprives the accused of the substance of a fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future."

24. Considering the summation as a whole, we do not consider that the appellant was denied a fair trial. While some of the comments of the judge may be considered robust nevertheless, in our view, the summation was not unbalanced. The summation shows that it was made abundantly clear to the jury at all stages that it was entirely their responsibility to decide the guilt or innocence of the defendant. So far as the prosecution's case against GV was concerned, it resolved into an issue of whether the jury accepted that Maria was speaking the truth when she said that GV had admitted to her that he had shot and killed Wilfredo. There was nothing in the summation to suggest that the judge had so fashioned his summation that the jury would conclude from his comments that he was in fact suggesting they should convict GV.

25. Complaint is also made that in the summation the judge told the jury:

> "Why did he incriminate himself? Why did he incriminate himself? Why would a person incriminate himself? You may feel therefore that the incriminating portions of that statement are likely to be true. Proof of it, because why else would he have said it? This is what crown counsel meant when she said that the statement given to Maria Catzim is good evidence because it is evidence of admission

by the accused against his own interest. You won't go and tell people, bwai, I kill somebody, or, bwai, I rob somebody. People don't do that, unless it's in you mind and it's bothering you, so you go and you confess."

Mr. Twist submitted the person confessed to having committed crimes for a variety of reasons. He accepted that a person may confess because of guilt or remorse. However, he contended that the admission by GV could have been as a result of play acting as he did not consider that his sister would have incriminated him or it could have been for false publicity. He was of the view that the judge ought to have left these alternative reasons for making the admission that GV made. There was no evidence upon which it could be stated that the inference for which Mr. Twist contended could properly be left to the jury. GV throughout the trial denied that he had spoken to Maria on 20 July.

**GROUND 3 AND 4**

26. These grounds will be dealt with together as they both relate to the unsworn statement of GV made from the dock. In Ground 3, the appellant alleged that the judge did not in his summation, put the case of the defence adequately as a result of which the appellant did not have a fair trial. The appellant contended that the judge did not inform the jury that GV had alleged that the motive for Maria giving evidence against him was because GV had previously flogged her with a machete. Mr. Twist submitted that in the context of the case this was a crucial factor.

27. In directing the jury how they should approach the admission alleged to have been made by the GV to Maria, the judge pointed out to the jury that they first had to accept whether GV made the statement to Maria and then to ask themselves whether the statement was true. He pointed out to

them what they should take into consideration in determining whether the statement was true. The judge then went on to remind the jury that before they could consider whether the contents of the statement alleged to have been made to Maria were true they had:

> "……first to determine whether you believe Maria Catzim when she said that the accused gave her that statement. The defence position is that Maria Catzim gave that statement because she had an axe to grind. To put it in layman's terms, she had a previous beef with Giovanni Villanueva and therefore this was the opportunity she used to get at him. Members of the Jury, the problem with that is that there is no evidence that there was a beef because that was – and a beef simply means a disagreement, a dispute – put to Maria Catzim she denied it and the accused never said that under oath. He may have said it from the dock, but never under oath. But be that as it may, whatever he said on the dock, you Members of the Jury, should consider it and give it what weight you think it deserves when considering the case for the prosecution. And, here, you would be considering the evidence of Maria Catzim so you should take it."

In cross-examination Maria denied that she was making up the evidence that GV had told her that he had killed Wilfredo for money at the request of Tomasita. She further denied that she had made up her evidence because on 15 July 2003 GV had flogged her with a machete.

28. The judge did tell the jury that in considering whether Maria was speaking the truth they had to consider that GV had suggested that she was lying because he had flogged her with a machete. He pointed out to the jury that there was no evidence to support this suggestion as Maria had denied it in cross examination. The judge however reminded the jury that GV had

said in his unsworn statement that he had flogged her with his machete and that this was the reason why she was saying that he had made the admission on 20 July. The judge correctly indicated to the jury that it was for them to give such weight to this unsworn as they considered that it deserved.

29. In respect to Ground 4, there is a general assertion that the judge erred in law as he misdirected the jury with regard to the "unsworn statement of Giovanni Villanueva from the dock".

30. In directing the jury as to the manner in which they should approach they should approach the unsworn statement made by GV from the dock the judge told them:

> "In any criminal trial, Members of the Jury, an accused person does not have to say anything, he does not have to prove his innocence or that he is not guilty. On the contrary, it is for the prosecution to prove the case against him. In this case, after I had explained to the three accused persons their rights not to say anything and if they wish to say anything they could do so either from the witness stand or from the prisoner's dock, Giovanni Villanueva and Javier Villanueva, elected to make a dock statement, not a sworn statement, a dock statement; while Sharim Baeza elected to testify or give sworn evidence. And this is their right. The law with respect to dock statements, Members, of Jury, is that a judge will not necessarily read out the statement made by any accused person, but only to remind you, the jury, of it and to tell you, as I am now doing, that these two statements of Giovanni Villanueva and Javier Villanueva, they are not sworn evidence that was cross-examined to. They are not evidence, but nevertheless, you the jury, can attach to it whatever weight you think the particular

statements deserve. And you should take them into account in deciding whether the prosecution have made out their case against these two accused persons so that at the end of the day you feel sure that they are guilty."

31. Mr. Twist, in his written submission, stated that the judge should not have told the jury that the appellant dock statement was not evidence. He contended that the judge should have given the jury a direction in accordance with para 8 of **Calbert Smith v The Queen, Criminal Appeal No. 3 of 2003**. Rowe P, giving the judgment of the court, had to say:

> "In Marcutulio Ibanez v. The Queen (Privy Council Appeal No. 76 of 1996). Lord Hutton have express guidance on the approach a trial judge should take to an unsworn statement by an accused person in this jurisdiction. He said:
>
> > "In directing the jury in respect of the appellant's statement from the dock the trial judge should have directed them in accordance with the guidance given by this Board in its judgment in Director of Public Prosecution v. Walker [1974] 1 W.L.R. 1090, 1096E, where Lord Salmon said:
> >
> > "The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should give the accused's unsworn statement only such weight as they may think it deserves."

32. The judge was required to tell the jury that it was exclusively for them to make up their minds whether the unsworn statement had any value and, if it did, they had to consider what weight should be attached to it. In considering whether the prosecution evidence had satisfied them of the guilt of GV beyond reasonable doubt and they had to take the statement into consideration.

33. The judge told the jury that the unsworn statement of GV was not evidence but, nonetheless, it was for them to attach to it such weight as they considered that it deserved and they had to take it into account in deciding whether the prosecution had made out its case against the accused so that they were sure of the guilt of the accused. We consider this direction to be in accordance with what this court said in **Calbert Smith's case**. We do not consider that there is any merit in either ground of Appeal.

34. The appellant abandoned ground 5.

**JAVIER VILLANUEVA**

35. The third count of the indictment charged JV with abetment of murder contrary to section 20 (1)(a) read along with section 106(1) of the Criminal Code, Cap 101 (the Code). The particulars of the count alleged JV on 20 July 2003 encouraged Luke Tate by having offered Luke Tate $6000 to commit the murder of Wilfredo Baeza

36. The prosecution's case against JV depended largely, if not exclusively, on the evidence of Luke Tate. Tate, a fisherman, who worked at Gabriel Hoare Market in Corozal Town, said that on 20 July 2003 he saw JV and his father at the Gabriel Hoare Market. JV told Tate that he wanted him to shoot Wilfredo and an old lady who lived upstairs of Wilfredo. For

shooting these two persons, JV would pay Tate the sum of $6000. Tate told JV that he was not the kind of person who would shoot someone and he would have to find someone else. The reason given for wanting to shoot Wilfredo was that Wilfredo had received $250,000. Tate did not immediately inform the police of the offer made to him.

37. In an unsworn statement from the dock, JV said that at about 9 am on a Sunday in July 2003 he left home to buy a lottery ticket in the middle of Town. After this, he met Richard and went and sold a fishing net. After the sale, he met his father Thomas Villanueva and, along with Richard they went to Bumbers' restaurant. He met Giovanni who "looked like someone who was drinking alcohol dinks" and who wanted to fight with him. He said that he did not hear Giovanni Villanueva say anything about being paid to kill Wilfredo Baeza. While he knew Tate, he denied having any conversation with him on 20 July 2003.

38. The particulars of the first count of the indictment alleged that on 19 July 2003 GV murdered Wilfredo Baeza. The evidence showed that Wilfredo Baeza died on 19 July 2003. The issue that arose in relation to this appeal may be put in this way: Can the offence of abetment of murder be committed where the evidence showed that Wilfredo Baeza was already dead?

39. Section 20(1)(a) of the Code, Cap 101 provide as follows:

> "20(1) Every person who:
>
> (a) directly or indirectly instigates, commands, counsels, procures, solicits or in any manner purposely aids, facilitates, encourages or promotes the commission of any crime, whether by his act, presence or otherwise; or
>
> (b) ……

shall be guilty of abetting that crime and of abetting the other person in respect of that crime.

40. In **DPP v Nock and another [1978] AC 979** The House of Lords held:

> "that when two or more persons agreed on a course of conduct with the object of committing a criminal offence but unknown to them, it was not possible to achieve that object by that course of conduct, they did not commit the crime of conspiracy, and accordingly the limited agreement entered into by the defendants, which could not in any circumstances have involved the commission of the offence created by statute, did not amount to the crime of conspiracy."

In this case The House of Lords had to consider whether the defendants who had agreed to produce cocaine by separating it from substances which they believed to be a mixture of cocaine and lignocaine. No cocaine could be produced from the substances. The defendants were indicted for conspiracy to produce cocaine in contravention of s. 4 of the Misuse of Drug Act 1971. In his summation to the jury the trial judge and the Court of Appeal in their judgment, treated the impossibility of the commission of the offence as an irrelevance. Both the judge and the Court of Appeal considered that what was important was that agreement. Neither considered that it was necessary to consider whether the offence could be committed. Lord Scarman rejected the approach of both the trial judge and the Court of Appeal. His Lordship said at p. 995:

> "But neither contains any reference to the limited nature of the agreement proved: it was an agreement upon a specific course of conduct with the object of producing cocaine, the two appellants, who did get a chemist to take on the impossible job of extracting

> cocaine from the powder, may perhaps be treated as having completed their agreed course of conduct: if so, they completed it without committing the statutory offence … If therefore, their agreement, limited as it was to a specific course of conduct which could not result in the commission of the statutory offence, constituted (as the Court of Appeal held) a criminal conspiracy, the strange consequence ensues, that by agreeing upon a course of conduct which was not criminal (or unlawful) the appellants were guilty of conspiring to commit a crime."

Lord Scarman went on to conclude that "performance of the limited agreement proved in this case could not in any circumstances have involved the commission of the offence created by statute." His Lordship expressed the opinion that "… commonsense and justice combine to require of the law that no man should be punished criminally for the intention with which he enters an agreement unless it can also be shown that what he has agreed to do is unlawful."

41. In **Robert Fitzmaurice v R (1983) 76 Cr. App. R. 17**, the Court of Appeal in England expressed the view that:

> "the right approach in the case of incitement is the same as that which was underlined by Lord Scarman in DPP v Nock ([1978] AC 979 (1978) 67 Cr. App. R. 116) when he considered the offence of conspiracy. The court went on to point out that "in every case it is necessary to analyze the evidence with care to decide the precise offence which the defendant is alleged to have incited."

The Court of Appeal took the view that

"… if B and C agree to kill D, and A, standing beside B and C, though not intending to take any active part whatever in the crime, encourages them to do so, we can see no satisfactory reason, if it turns out later that D was already dead, why A should be convicted of incitement to murder whereas B and C at common law would be entitled to an acquittal on a charge of conspiracy. The crucial question is to establish on the evidence the course of conduct which the alleged inciter was encouraging."

42. In **Mohammed Sirat (1986) 83 Cr. App. R. 41** Parke LJ observed at page 43:

"There is no doubt at common law incitement to commit a crime is an offence. This being so, it follows logically that if A incites B to incite C to commit a crime, e.g. to wound D, A is guilty of incitement to commit a crime, namely, incitement. This however is subject to the qualifications that if C is non-existent, being either dead or fictional, A would not be guilty, because he would be inciting the commission of an impossible crime, B cannot incite C, because C does not exist."

. In this example Parke LJ was saying that as C did not exist in that he was either dead or merely a fictional character, it would have been impossible for B to incite "C" as C did not exist. The scope of the agreement was specific. It was impossible to commit the offence because C did not exist.

43. The offence under section 20(1) of the Code is committed where the person encourages the commission of any crime by any act or by his presence. The prosecution was required to show that JV encouraged Luke Tate to commit the crime of murder – the murder of Wilfredo. The encouragement occurred on 20 July 2003. The scope of the agreement was specific – the murder of Wilfredo. The evidence showed that on 20

July 2003 Wilfredo was dead. He was murdered on 19 July 2003. The question to be answered is whether on 20 July 2003 the crime of murder could have been committed. By section 3 of the Code, "crime" is defined as including "an offence punishable under this Code or any other statute." In order for murder to be committed, a person must intentionally cause the death of another person by unlawful harm (see section 117 of the Code). In order for the offence of murder to be committed, the person who is to be murdered would have to be alive. The unlawful harm must have been inflicted on a living person with the intention to kill and that harm must have caused the death of the person. It is clear that the crime of murder of Wilfredo could not have been committed on 20 July 2003.

**SHARIM BAEZA**

44. SB was charged in the second count with the conspiracy to commit murder contrary to section 24(1) of the Code along section 106(1). The particulars of the offence alleged that SB and others conspired together to murder Wilfredo. Five grounds of appeal were filed by SB. This appeal was allowed on a discrete point and a new trial was ordered. We do not intend in the circumstances to comment on the facts as we do not consider it necessary having regard to the decision reached and the order made.

45. The trial of this matter commenced on Monday 18 September 2006. On 1 October 2006, counsel who appeared for SB sent a copy of a letter to the trial judge informing him among other things that he had not been properly retained by SB. In the presence of the jury, the trial judge addressed SB in the following terms:

> THE COURT: Yes Sharim Baeza, stand up. I have a copy of a letter from …, your counsel which states that

he's not been properly retained. Proper (sic) retained is a nice way of saying, I have not been paid any money. He had not proper (sic) been retained, therefore, he's no longer representing you. I have spoken to your family – I might not have been (sic) so in your presence, but one had to realize that there is no such thing as a free lunch. Somebody has to pay for a service, or for a good. You understand? If you cannot pay then you can't have man working for you. You can't have an attorney coming all the way from Belize, working whole day and not get paid. And he has worked for you almost three weeks. You understand that?

THE ACCUSED: Yes, sir.

THE COURT: He has decided to pull out, and I am not so sure that I am in total disagreement with him. In the circumstances, what do you plan to do you? You will do your own defence?

THE ACCUSED: Yes, sir.

THE COURT: What I am going to do, in all fairness to you, I am going to designate Mr. Twist who is here – you see, the court has a court power to cite any attorney who is in court to represent any accused person if the court feels that that person needs that assistance. So I'll ask Mr.

Twist to assist you in terms of advising you as to what you are going to do. You understand, Mr. Twist?

MR. TWIST: Yes, My Lord.

THE COURT: The reason I am doing that is because he was here all throughout the trial and so he's in a best position to advise you, unless you have another attorney to step in and assist you?

THE ACCUSED: No, sir.

46. The law governing the withdrawal of counsel for a defendant in a trial of capital murder is set out in the judgment of the Privy Council in **John Mitchell v. The Queen**, **[1999] 1 W.L.R. 1679**. Lord Slynn of Hadley at page 1686 adopted what was said by the Privy Council in **Dunkley v The Queen [1995] 1 AC 419** at page 428:

> "In the first place where counsel appearing for a defendant on a capital charge seeks leave to withdraw during the course of the trial the trial judge should do all he can to persuade him to remain. If the proposed withdrawal arises out of an altercation with the trial judge he should consider whether it would be appropriate to adjourn the trial for a cooling-off period. The trial judge should only permit withdrawal if he is satisfied that the defendant will not suffer significant prejudice thereby. If notwithstanding his efforts counsel withdraws the judge must consider whether, and if so for how long, the trial should be adjourned to enable the defendant to try and obtain alternative representation. In this case although the judge did not exactly encourage Mr. Frater to withdraw he made no

attempt to dissuade him and it does not appear that he considered the possibility of the first defendant trying to obtain alternative representation. Indeed he allowed the trial to proceed as though nothing had happened without even so much as an adjournment until the following morning. Their Lordships can sympathize with the anxiety of the judge to proceed with a trial whose start had already had to be postponed on many occasions but where a defendant faces a capital charge and is left unrepresented through no fault of his own the interests of justice require that in all but the most exceptional cases there by a reasonable adjournment to enable him to try and secure alternative representation."

We are of the opinion that this statement is applicable to all cases of murder and conspiracy to murder. Whether murder is to be treated as capital is determined at the sentencing phase.

47. The trial judge did ask SB whether he wanted to continue with the trial. In addition, the judge asked Mr. Twist counsel for GV to assist SB with his defence. It does appear from the record that the withdrawal of counsel was something which arose suddenly. The trial had reached a critical stage and SB was in fact left without the assistance of his counsel.

48. In allowing counsel to withdraw in this matter, the trial judge acted upon a copy (emphasis added of a letter which was received from counsel who was appearing for SB indicating that he was no longer appearing on behalf of SB because SB had not paid him his fees. At this stage, the judge admonished SB in the presence of the jury by telling him that he could not expect an attorney to come from Belize and work and not get paid. The judge went on to tell SB that he was not sure that he was not in total agreement with his counsel in withdrawing from the case.

49. In our view the judge ought not to have acted upon a copy of the letter sent to him by counsel. He ought to have sent for counsel to appear before him so that he could seek to persuade him to continue to appear for SB. The record does not show that the judge made an effort to call counsel before him or sought in any way to persuade him to continue to appear on behalf of SB.

50. It appears from the record that the judge did not fully consider, if he did at all, what prejudice, if any, would have been suffered by SB. The judge had a duty to protect the interest of SB. Merely to say to SB that he had spoken to his family was not the kind of protection which the law envisages. Neither, was it sufficient to ask him whether he was going to conduct his own defence or assigning Mr. Twist to advise SB. While it is accepted that by s 6(3) of the Constitution of Belize that a defendant is entitled to defend himself, we are of the view that the trial judge was required to advise the defendant that "it was in his own interest to be legally represented and should offer to adjourn the case for a short period to enable him to secure such representation." (see **Leslie Tiwari v The State**, Privy Council Appeal No. 76 of 2001).

51. It is recognized by section 36 of the Legal Profession Act Cap 320, that counsel has the right to withdraw his services where the client, inter alia, failed to pay him his fees. The section states:

> S 36. An attorney may at any time withdraw his services-
> "(a) where the client fails, refuses or neglects to carry out an agreement with, or his obligation to, the attorney as regards the expenses or fees payable by his client; or
> (b) ……..
> (c) ……..
> (d) ……..

(e) ……..

52. As stated earlier, the judge, before proceeding further, ought to have required the presence of counsel and to have drawn counsel's attention the provision of section 22(2) of the Legal Profession Act. This section states:

> S 22 (2) The interest of his client and the exigencies of the administration of justice should always be the first concern of an attorney and rank before his right to compensation for his service.

53. The prosecution had closed its case against all the defendants. The case had reached a critical stage where SB would require legal advice on whether he should give sworn testimony or should make an unsworn statement from the dock. In addition, the address to the jury would have been of great importance. Counsel had represented SB during the previous ten days of the trial. SB would now be on his own and would be required to address the jury after having had counsel for the previous ten days of the trial. It was not a case where he had been unrepresented from the commencement of the proceedings and could have been expected to have paid attention to the evidence that was being given.

54. The judge, in our view, ought to have called counsel before him and, in the absence of the jury, pointed out to him that, while it was his right to withdraw his services because of non-payment of his retainer, he ought to consider what effect his withdrawal would have on SB's case, particularly at the stage at which the case had reached, and whether it would cause irreparable harm to SB in the sense that it would have been difficult for another counsel to come into the case after ten days of trial. The judge ought to have pointed out to counsel that, before he withdrew his services, he ought to be mindful of the interest of his client and the exigencies of the

administration of justice before exercising his undoubted right to withdraw. It was incumbent on the trial judge to seek to persuade counsel that he ought not to withdraw at that stage. SB was arrested and charged while he was still a minor.

55. Their Lordships pointed out in **Dunkley's case** that "the trial judge should only permit withdrawal if he is satisfied that the defendant will not suffer significant prejudice thereby". It does not appear from the record that the issue of prejudice to SB was considered by the judge. On the contrary the judge admonished SB by telling him in the presence of the jury that he could not expect counsel to work free of charge.

56. The judge concluded that, as he did not pay his counsel, it did not make sense adjourning the case because he would not have had any money to pay another counsel. This may have appeared to the judge to a logical conclusion but that was not what he was required to do. The judge allowed the trial to continue after requesting counsel for the other defendant to advise SB. In short, the judge allowed the trial to continue as though nothing had happened. In so doing the trial judge was wrong.

57. Although the judge did ask SB whether he wanted to proceed with the trial, he ought to have been mindful that the right to representation "imposes the serious and weighty responsibility up the trial judge of determining whether there is an and competent waiver by the accused" (**Johnson v. Zerbst (1938) 304 US 458, at page 465, Von Moltke v Gilles (1948) 332 US 708 at 723**). This observation was referred to by their Lordship in John Mitchell's case (supra).

58. As indicated earlier the judge ought to have called counsel before him and pointed out his responsibilities under the Legal Profession Act. In addition, he ought to have adjourned the matter to afford SB an

opportunity to retain counsel. He ought not to have concluded that an adjournment would serve no useful purpose. Having regard to the manner in which counsel was permitted to withdraw, and the failure of the judge to protect the interest of SB, the court concluded that SB could not be said to have had a fair trial.

59. It was for these reasons that we dismissed the appeal of Giovanni Villanueva and affirmed his conviction.

We allowed the appeal of Javier Villanueva, quashed his conviction and set aside the sentence and directed a judgment and verdict of acquittal to be entered. In view of the conclusion reached on this ground it was not necessary to consider the other grounds of appeal.

We also allowed the appeal of Sharim Baeza quashed the conviction, set aside the sentence and ordered a new trial.

**MOTTLEY P**

**SOSA JA**

**MORRISON JA**