IN THE COURT OF APPEAL OF BELIZE AD 2007

CRIMINAL APPEAL NO 6 OF 2007

AGRIPO ICAL Appellant

v

THE QUEEN Respondent

BEFORE

The Hon Mr Justice Elliott Mottley	President
The Hon Mr Justice Manuel Sosa	Justice of Appeal
The Hon Mr Justice Boyd Carey	Justice of Appeal

O Twist for the appellant.
M Moody, Senior Crown Counsel, for the respondent.

2007: 17 and 26 October
2008: 13 March

SOSA JA

[1] Having commenced on 19 March 2007, the trial proper of Agripo Ical ('the appellant') before Hafiz J and a jury for the murder, on 13 November 2005, of Ms Julia Armstrong Minard, a United States citizen ('the deceased'), ended on 2 April with his conviction of that murder and was followed on 10 April with the imposition on him of a sentence of life imprisonment. His appeal against conviction ('the appeal') and application for leave to appeal against sentence ('the application') were heard by this Court on 17 October. On 26 October, for the reasons given below, the appeal was dismissed and the application refused.

[2] The prosecution case centred mainly around (a) evidence of visual identification provided by two eyewitnesses, (b) admissions alleged to have been made orally as well as in a statement under caution ('the statement under caution') by the appellant to the police and (c) expert evidence given by the doctor who performed the autopsy on the body of the deceased. Each of the eyewitnesses, namely Mr Pablo Teck and Mr Venancio Choc, testified that he, on the night of 13 November 2005, saw the appellant on the scene of the murder, Mr Teck stating that he saw the appellant not only on top of the deceased but actually choking her and Mr Choc saying that he saw the appellant running away, not far from the spot where the deceased was lying. The alleged oral admission of the appellant, said to have been made to a Sergeant Pérez, was to the effect that a pair of sandals and a sun visor found on, or near to, the scene of the murder belonged to him. In the statement under caution, there was a further admission to the effect that the appellant engaged in a struggle with the deceased on the scene of the murder. However it was made clear elsewhere in the statement that this reference to a struggle meant only that the appellant had '... hold (*sic*) [the deceased] on her neck and mouth not to let her scream'. And the statement under caution featured a further exculpatory element in the form of the clearest of assertions that the deceased was alive when the appellant left the scene of the struggle. On the other hand, the medical evidence, given by Dr Estrada Bran, must have seemed to the jury to carry a deadly precision. It was the doctor's opinion that the direct cause of death was manual strangulation asphyxia and that such strangulation must

have taken the form of the application of mild to moderate pressure to the neck of the deceased for at least three minutes. At the end of the prosecution evidence, a submission that there was no case to answer was made on behalf of the appellant but rejected by the trial judge.

[3] This glimpse at the shape of the prosecution case paves the way for consideration of the first of the grounds of appeal argued by Mr Twist, who was counsel for the appellant before this Court as well as at trial. In terms, this ground was that the judge 'erred in law when she failed to uphold the no case submission in relation to murder proferred by Defence Counsel ...' Counsel submitted, as he had essentially done before the trial judge, that it was apparent from the statement under caution that the appellant did not intend to kill the deceased and that 'therefore the prosecution had failed to provide (*sic*) one of the key element (*sic*) for the crime of murder'. Counsel sought to convince this Court that the submission derived force from the declaration made in the statement under caution to the effect that the appellant held the deceased 'on' the neck and mouth to prevent her from screaming. The Court is, however, not so convinced. The basic principles governing this area of the law must not be lost sight of. They were stated fairly long ago in *R v Galbraith* (1981) 73 Cr App R 124 and, as this Court observed in *Cardinal Smith v The Queen*, Criminal Appeal No 35 of 2005, have become trite law. That fact notwithstanding, counsel patently failed to show regard for the following passage taken from the second 'limb' of *Galbraith*, as set out at p 127:

> 'Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking 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.'

It was for the purpose of accentuating the relevant point in this limb that, in *Smith*, *supra*, this Court said, at para 44:

> 'But, in the final analysis, it has to be remembered that what matters in the context of a submission of no case to answer is whether on one (rather than every) possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the accused is guilty.'

Despite Mr Twist's refusal down to the bitter end so to acknowledge, one obviously possible view of the facts here was that the appellant was not being entirely truthful in the statement under caution. The view could rationally be taken that he was truthful in admitting that he had struggled with the deceased on the scene in question and that the pair of sandals and the sun visor were his, but untruthful in describing the 'struggle'. On that view a jury could reach the conclusion, on evidence already referred to above, that the appellant was the

person seen choking the deceased at the material time and place and that he did so for the required length of time of at least three minutes. That would be synonymous with an emphatic conclusion of guilt against the appellant on the charge of murder. A conclusion such as this could properly be arrived at if the jury, after receiving due directions from the judge, saw it fit to draw from the evidence the inference that the appellant had intended to kill the deceased while choking her. The judge was bound to give the jury the opportunity to decide whether they would draw such an inference from evidence whose existence was undeniable. Given this possible (a) view of the facts and (b) inference and the reality of this evidence, it was not the proper function of the trial judge to concern herself with any other possible view of the facts such as that propounded by Mr Twist, that is to say, that the description of the struggle contained in the statement under caution was, or may have been, accurate.

[4] Counsel also directed our attention to the fact that there was in the statement under caution reference to the consumption of liquor by the appellant and, indeed, a claim that he had become drunk at some point prior to his 'struggle' with the deceased. For the reason already given, however, this was not a matter of legitimate concern for the judge, dealing, as she then was, with a submission of no case.

[5] In his skeleton argument, but not in the course of oral argument, counsel for the appellant cited the decision of this Court in *Estevan Sho v The Queen*

and *Allan Cal v The Queen*, Criminal Appeals Nos 19 and 20 of 2000, as authority for the proposition that, where the Crown case rests on an admission made by the accused, his intention is to be gathered only from that admission. There is need for two observations in this regard. First, as this Court has already pointed out at para **[2]**, *supra*, the foundation of the Crown case against the appellant consisted of not only of admissions made by the accused but also of evidence of visual identification and medical evidence. Secondly, in the appeals of *Sho* and *Cal*, decided by a panel which included two members of the Court as presently constituted, the Court had one overriding purpose in saying:

> '12. In the judgment in the case of *Barillas and Rivera v The Queen*, Criminal Appeals Nos 3 and 4 of 1990, the Court gave guidance that where the prosecution's case rests on the admissions of the accused, the intention of the accused could only be determined from those admissions and the application of the doctrine of common design or joint enterprise.' [Paragraph number added for ease of reference.]

That purpose was to highlight that in cases, unlike the instant one, where there are two or more co-accused, each of whom are alleged to have given statements under caution to the police, the intention of each co-accused is to be gathered *primarily* (rather than 'only' as the Court admittedly said) from the particular statement allegedly given by him (if, of course, that was the sole basis for the Crown case), considered in the light of the doctrine of joint enterprise.

]

What this Court was, on that occasion, at pains to show was simply that the statement under caution of one co-accused could not be used against another in such a situation. Mr Twist could only have had the above-quoted passage from *Sho* and *Cal* in mind in citing these two appeals in his skeleton argument but, for the reason given, we consider that any quotation of that passage in the instant case is altogether out of context. In concluding this second observation, it is important to add that the above-quoted passage from *Sho* and *Cal* was meant to echo, rather than modify, what was said with respect only to the appeal of the first appellant in *Barillas* and *Rivera*, *supra*, namely, that the question whether he intended to kill 'would primarily have to be determined from his statement and by application of the doctrine of common design ...': see p 7 of the judgment in *Barillas* and *Rivera* as published in the Government Gazette.

[6] The Court now turns to consider ground VII, which was the next to be argued by Mr Twist. This ground, as originally framed, complained only that the verdict of the jury was unreasonable having regard to the evidence; but, upon being reminded by the Court of the language of section 30 (1) of the Court of Appeal Act, counsel, adopting such language as his own, stated that his complaint was in reality that the verdict of the jury was unreasonable or could not be supported having regard to the evidence. The thrust of the submissions with which counsel attempted to support this ground was that the finding of the jury that the appellant intended to kill the deceased was unreasonable. Counsel suggested that this was so because there was evidence capable of

supporting a contrary finding, namely that the appellant lacked such an intention. In our view, that is not a sufficient basis for an attack on the verdict of a jury; but, even if it were, we do not regard it as sound to say that there was such evidence in this case. Counsel directed the attention of the Court to three main areas of the evidence. The first of these was the portion of the statement under caution, already adverted to above, in which the appellant spoke of his having held the deceased to prevent her from screaming. The truth, however, is that what the appellant was saying in the statement under caution, which was largely exculpatory in nature, was not that he had unintentionally killed the deceased, but that, having held her by the neck and mouth at the scene to prevent her from screaming, he had proceeded to leave her there, alive. Mr Twist alluded in the same breath to an unsworn statement from the dock made by the appellant ('the dock statement') as clearly showing that the appellant lacked the required intention to kill. But this, again, was an effort wholly incapable of bearing fruit, for the dock statement, while containing, like the statement under caution, no admission that the appellant had killed the deceased, went so far as to suggest that another man, a Michael Jangl, was the killer. It would have been a serious affront to the intelligence of the jury to suggest to them that, from evidence such as this, even if it had been sworn, indicating that someone other than the appellant had killed the deceased, they could reach the conclusion that the appellant (if he killed her) had done so without a murderous intention.

[7] The second main area of the evidence pointed to by Mr Twist was the medical testimony of Dr Estrada Bran to the effect that the degree of pressure applied in the manual strangulation of the deceased must have been mild to moderate. The verdict of the jury is not, however, inconsistent with that part of the medical evidence. There is, indeed, in the view of this Court, every reason to believe that the jury accepted this evidence. What they most obviously refrained from doing was to separate it from, and reject, the evidence to which it was rightly linked by the doctor, namely that the mild to moderate pressure would have had to be applied for no less than three minutes in order to produce the effect it did. An exercise involving such separation and rejection would, we think, have amounted to unacceptable mental gymnastics, and we consider that it is a verdict resulting from such an exercise, rather than one avoiding it, that would find itself in grave danger of being labelled 'unreasonable'.

[8] The third area of the evidence which Mr Twist endeavoured to exploit was that concerning the alleged consumption of alcohol by the appellant. Mention of such consumption was made by the appellant in the statement under caution as well as in the dock statement. It suffices to examine the statement under caution, in which the appellant spoke of his having engaged in drinking on four separate occasions and at two different places in the course of the day of the murder. There are in this statement a clear description of his alleged movements, before as well as after dark, and several references to approximate times at which he allegedly did different things. While the

statement under caution does say that, when the drinking ended at about 10 pm, 'we were already all drunk', there follows a fairly detailed description of what immediately ensued, with allusions to (a) a request by the deceased to be accompanied to her place of lodging, (b) hugging and kissing on the street, (c) a request by the appellant for a sexual favour, (d) the deceased's voluntary removal of her pants, (e) the mounting by the appellant of the deceased, (f) the deceased's sudden change of heart and the reason for it, (g) the overwhelming temptation to go on and obtain sexual gratification and (h) the culminating struggle. Implicit in all of this is the formation by the appellant, prior to this struggle, of a firm and fixed intention to engage in sexual relations with the deceased. In our view, therefore, the jury had no reason to entertain doubts as to the ability of the appellant, whether intoxicated or not, to form an intention to kill the deceased. In the circumstances, this ground of appeal must fail.

[9] The complaint in the case of ground II was that the judge 'admitted statements allegedly made by the appellant while in police custody which were not voluntary and in contravention of section 90 (1) [and] (2) of the Evidence Act'. The supposed basis of this complaint was evidence given by the appellant to the effect that a Superintendent Aragón told him: 'Let your conscience guide you.' Although counsel for the appellant advanced the above complaint as one referable to both the statement under caution (recorded by a Corporal Parham) and certain oral admissions (made to Superintendent Aragón), it is plain that the supposed basis of the complaint can have no relation to the relevant oral

admissions. This appears from the evidence of the appellant at the *voir dire*. What was alleged in that evidence was that Superintendent Aragón used the words in question to the appellant immediately after saying he was 'going to eat' and immediately before leaving the office in which the appellant was then being held. The appellant did not admit in his evidence at the *voir dire* that he made any oral admissions to Superintendent Aragón. He did say that he told the superintendent that he would 'accept the charge' but, on his evidence, the point at which he said that was before, rather than after, he was told to let his conscience guide him. Nor did he suggest that Superintendent Aragón, having left the office in question, returned to it during any part of the remainder of the time that he (the appellant) spent in it. Hence, the complaint under this ground must be treated as one confined to the statement under caution. Thus circumscribed, is the complaint valid? In this jurisdiction the governing principles are found in statute law rather than the common law. It is a fact that section 4 of the Evidence Act ('the Act') provides:

> 'Subject to the provisions of this Act and any other statute for the time being in force, the rules and principles of the common law of England relating to evidence shall, so far as they are applicable to the circumstances of Belize, be in force therein.'

However, by section 90 (1) and (2) of the Act:

> 'An admission at any time by a person charged with the commission of any crime or offence which states, or suggests the inference, that he committed the crime or offence may be admitted in evidence against him as to the facts stated or suggested, if such admission was freely or voluntarily made.
>
> Before such admission is received in evidence the prosecution must prove affirmatively to the satisfaction of the judge that it was not induced by any promise of favour or advantage or by use of fear, threat or pressure by or on behalf of a person in authority.'

Mr Twist no doubt had the provisions of these two subsections in mind when he submitted to the judge in the *voir dire* that the words 'Let your conscience guide you' were 'tantamount to an inducement'. He referred in general terms to, among other cases, *Patrick Joseph Cleary* (1964) 48 Cr App R 116, which he held out as 'a case which gives guidance as to what is inducement'. The judge in her ruling adverted to the admission made by Superintendent Aragón in cross-examination that he had told the appellant to let his conscience guide him. She concluded that the authorities cited by Mr Twist were all distinguishable since, in her words, 'the words used in those cases are not the same as in this case'. Finding that '[t]here was no promise of anything by Mr Aragón to the accused', she held that his words did not constitute an

inducement. On that finding, and others not material on this appeal, she effectively ruled that the statement under caution was admissible.

[10] In his written submissions to this Court, Mr Twist limited himself to arguing that the admission of the statement under caution was wrong for the sole reason that Superintendent Aragón told the appellant to let his conscience guide him. The Court, while fully recognising that the superintendent admitted having used the words in question to the appellant, is nevertheless convinced that the judge below was correct in finding that the superintendent promised nothing to the appellant by telling him to let his conscience guide him. As the judge rightly pointed out, the words used in the cases prayed in aid by counsel were different from those employed in the present case. But more important, in our view, is the fact that, having regard to the express provisions of section 90 (2) of the Act, the sole question for the judge on the point now the subject of ground II was whether the words constituted a promise of favour or advantage by the superintendent. *Cleary* was not a case concerned with so precise a question. It had nothing to do with a statutory provision. The question in that case was the broad one whether the words used to the appellant by his father could amount to an inducement of any kind and should have been left to the jury as such. Like the other cases cited by Mr Twist, it is of no assistance to this Court, which is not concerned with whether the words of the superintendent constituted any kind of inducement at all but with whether it constituted one in the specific form of a promise of favour or advantage.

[11] Mr Twist, indeed, eventually accepted in oral argument that the relevant words of the superintendent constituted no promise of favour or advantage. On the heels of that concession, however, he submitted that the words gave encouragement to the appellant to make the statement under caution. He made no attempt to demonstrate how the giving of encouragement could engage the provisions of section 90 (2) of the Act but, in our respectful view, he was wise to expend no energy on such a hopeless enterprise. And it must be observed that the appellant's failure to allege either inducement or encouragement by the words in question (in testifying at the *voir dire*) did not assist his cause.

[12] In ground III the original complaint was merely that the trial judge was wrong in law to admit 'the statement allegedly made by the Appellant whilst in police custody' since this was obtained in breach of the Judges' Rules and section 5 (2) (b) and (c) of the Belize Constitution. In his skeleton argument Mr Twist made it clear that this complaint related only to oral admissions made by the appellant to Superintendent Aragón on the morning of 14 November 2005. In oral argument, however, Mr Twist, with the leave of the Court, expanded this complaint to cover the statement under caution as well, which thus became the main target of his attack.

[13] Despite the reference to the Constitution in this ground, no point of constitutional law was argued, whether in writing or orally, by Mr Twist. His

central submission was that the statement under caution should not have been admitted since the officer who recorded it, Corporal Parham, had breached Rule 7.3 of the Judges' Rules in the course of so doing. That rule states:

> 'A person in custody making a voluntary statement must not be cross-examined on it, and no questions should be put to him about it except for the purpose of clarifying ambiguity about what he has actually said. For instance, if he has mentioned an hour of the day without saying whether it was morning or evening, or has given a day of the week and a day of the month which do not agree, or has not made it clear to what individual or what place he intend (*sic*) to refer in some part of his statement, he may be questioned to clear up the point.'

[14] Corporal Parham recorded the appellant as having said in the statement under caution that, after the deceased had signified her consent to sexual intercourse with him, she changed her mind. The statement continued:

> '... due to the temptation, I couldn't resist and I started to struggle with her. At the moment of the struggle, at a certain distance, I heard some people that were coming towards where we were, and there I left.'

At the end of the statement proper, the corporal recorded a series of questions posed by him to the appellant together with the corresponding answers of the

latter. The pertinent questions and answers, for the purposes of *counsel's* complaint, were recorded as follows:

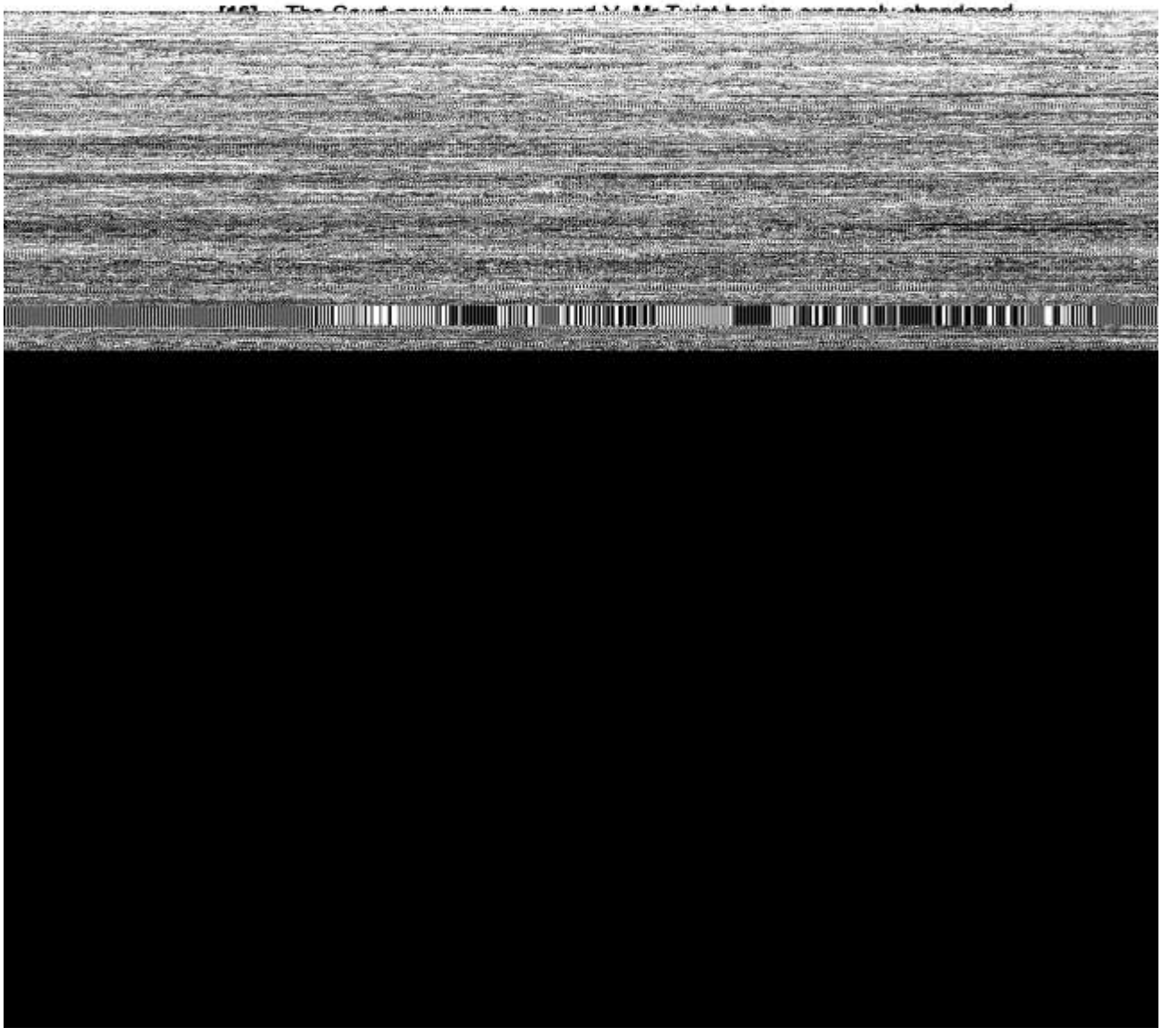
> 'Q. You said you struggle with her, what kind of struggle did you have?
>
> A. I hold her on her neck and mouth not to let her scream.'

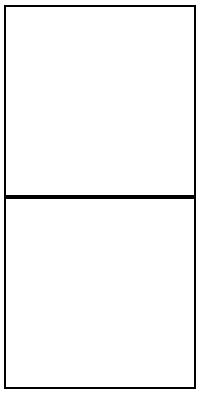
Mr Twist contended that this question amounted to cross-examination in breach of Rule 7.3. This Court does not agree. The corporal was not, in our view, cross-examining the appellant within the meaning of the rule. Nor was he otherwise transgressing the rule. The purpose of his question appears to us clearly to have been to clarify an ambiguity arising from what the appellant had said in his statement proper. One meaning of the word 'ambiguity', according to The Concise Oxford Dictionary, 8th ed, is an 'expression able to be interpreted in more than one way'. Corporal Parham's question was essentially: 'What do you mean by "struggle"?', an unmistakable indication, to this Court, that he found the word 'struggle' ambiguous in the context in which the appellant had used it.

[15] This leaves us with Mr Twist's complaint reduced to its original ambit as defined in his skeleton argument and adumbrated at para **[12]**, *supra*. The difficulty, insurmountable in our opinion, at once confronting Mr Twist is that he is left to complain on appeal of the admission of evidence which he glaringly omitted to challenge at trial. On our reading of the record, the purpose of the

voir dire was to obtain the ruling of the judge on the admissibility of (a) the statement under caution and (b) the oral admission of the appellant as to his ownership of the sun visor and pair of sandals. The judge explicitly so stated (with no dissent from either counsel) both at the beginning and at the end of her ruling; and there is nothing in the addresses of counsel which preceded the ruling to indicate that the judge was mistaken in this regard. In the circumstances of this case, we consider that the unchallenged admission of the relevant parts of the evidence of Superintendent Aragón, who expressly disclaimed the use of promises, threats, pressure or force against the appellant, cannot give rise to a ground of appeal.

[46] The Court now turns to ground V. Mr Twist having expressly abandoned





As the Court has already stated above, there was a case of murder to go the jury at the close of the Crown evidence. That being so, we can find no fault with this direction. The judge rightly told the jury that they could, rather than should, reach the conclusion in question.

[26] The second complaint was that the judge wrongly told the jury that the defence was not disputing that harm had been done to the deceased without legal justification. Mr Twist said that this was prejudicial to the appellant since the defence was contending that 'it was one Michael Jang (*sic*) who did the killing'. We were surprised that it could be thought right to make a complaint such as this. As the Court pointed out in oral argument, the logical result of contending that Jangl was the killer was that the defence could not dispute the unlawfulness of the harm done to the deceased on the ground of justification.

[27] The third and fifth comments complained of were made by the trial judge and prosecuting counsel, respectively, in regard to the absence of DNA evidence at trial. Counsel's point at trial was that, although fingernail samples had been taken from the appellant, no DNA evidence had been adduced to connect the appellant with the choking of the deceased. For his complaints of prejudice before us to be invested with any degree of cogency, it was, we think, essential for counsel to have mounted a collateral attack on the sufficiency of the evidence of visual identification adduced through Mr Pablo Teck against the appellant at trial. (As will be recalled, Mr Teck testified that he saw the

appellant choking the deceased.) Such an attack was, however, conspicuous in its absence in this appeal. Had counsel seen the basis for such an assault (a basis hard to find in circumstances where the appellant placed himself on the scene of a struggle with the deceased), he could properly have staged it in the context of ground VII, which we have already disposed of above. But counsel's sole complaint under that ground had to do with the ever-recurring theme of the proof of an intention to kill. In any event, it is our view that the judge was being much too generous to the appellant in telling the jury that it was a matter for them whether DNA evidence was necessary.

[28] Counsel's fourth complaint under ground VIII related to the following passage in the summing up (Record, pp 643-644):

> 'Members of the jury if you accept the caution statement as voluntary you have to look at what the appellant said in that statement. He said – I hold her on her neck and mouth not to let her scream – you have to ask yourself whether the deceased should have been restrained and kept quiet by force if necessary. A force which lasted for more than three minutes and caused her death. You have to take into account in determining the intention, is the likelihood that someone who choked someone's neck so no air can pass, had the intention to kill that person.'

[29] Counsel pointed out that the appellant had not said in his statement under caution (or elsewhere) that his intention was to stop air from passing into the lungs of the deceased. The criticism is misconceived. The judge was not suggesting to the jury that the appellant had so said; and we are satisfied that there was no risk of the jury thinking that she was so suggesting. The jury had, after all, heard the statement under caution read in open court immediately following its admission in evidence. They were, furthermore, to be provided with it for use during their deliberations. In addition, the judge had earlier in her summing up twice quoted from it to show what the appellant had said concerning his reason for holding the deceased 'on her neck and mouth' - first, in dealing with the fourth ingredient of the murder charge (relating to the person who killed the deceased) and, secondly, in dealing with the very ingredient to which the passage under attack related (concerning the intention to kill). And she had just made it abundantly clear that the evidence as to the degree of pressure or force applied was the doctor's (Record, pp 642-643).

[30] The sixth complaint under this ground set out in Mr Twist's skeleton argument was the second of those not pressed in oral argument. Its subject was prosecuting counsel's reference in her closing speech to the admission in evidence of the statement under caution. The Court has, in fact, already dealt with counsel's earlier attempt to impugn the comment in question: see para **[20]**, *supra*.

[31] Mr Twist's short argument of ground IX, a complaint that the sentence imposed was harsh and excessive, was, at best, desultory. He referred the Court to *Adolph Harris v Attorney General*, Claim No 330 of 2006, a decision of the court below, as authority for the proposition that a mandatory sentence of life imprisonment is contrary to the Belize Constitution but he did not attempt to direct this Court to any passage in the relevant judgment which might be said to constitute such authority. On our reading of it, that judgment does not indicate that counsel for Harris advanced, still less argued in support of, the pertinent proposition. Without the benefit of full argument on the point, we are not prepared to regard this judgment of the court below as containing more than *obiter dicta* on the subject-matter of this ground. We consider, in these circumstances, that the sentence of life imprisonment, being one fixed by law, was rightly imposed on the appellant.

MOTTLEY JA

SOSA JA

CAREY JA