IN THE COURT OF APPEAL OF BELIZE AD 2009

CRIMINAL APPEAL NO 2 OF 2009

MIGUEL HERRERA SR 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 Dennis Morrison	Justice of Appeal

O Twist and A Sylvester for the appellant.
C Branker-Taitt, Director of Public Prosecutions (Acting), for the respondent.

2009: 5 and 19 June and 30 October

SOSA JA

Introduction

1. On 16 September 2007, five days after 19-year-old Mirna Figueroa of the village of Silk Grass, Stann Creek District ('the deceased') went missing, a search-party comprising mainly police officers attached to the Dangriga Police Station came upon the decomposing body of a female person in a wooded area off a road which branches off from the road leading from the Southern Highway ('the highway') to the village of Hopkins, Stann Creek District. On that same day, Ernesto Andrews, the common law husband of the deceased, purported to

identify the corpse as hers. By the next day, four men, namely Norris Kelly, Miguel Herrera senior ('the appellant'), his son Miguel Herrera junior ('Miguel') and his brother Lucio Herrera ('Lucio'), had been arrested and charged with the murder of the deceased. Apparently, however, only one of these four men, namely the appellant, was later indicted. On 18 February 2009, after a trial before González J and a jury, the appellant was convicted of murdering the deceased and sentenced to life imprisonment. His appeal against conviction was heard and dismissed by this Court on 5 June and 19 June, respectively. Reasons for the decision to dismiss, promised by this Court on the latter date, are now given.

The Crown evidence

2. The evidence adduced by the Crown against the appellant was circumstantial in nature and was, for the most part, provided by four main witnesses. The first of these witnesses to testify was Delmy Figueroa, a younger sister of the deceased and the appellant's estranged common law wife ('Delmy'). She gave evidence of an incident which occurred on 24 August 2007, when, infuriated by her behaviour at a bar in Silk Grass, the appellant drove her to a secluded area where, after first beating her, he threatened about three times to kill one of her sisters if she ever left him. (Regrettably, Delmy ended up giving evidence of the beating only after (a) defence counsel, Mr Twist, successfully objected to prosecuting counsel's question as to whether the appellant had said anything while they were in the car and (b) prosecuting counsel settled for the

much less specific request: 'Tell us what happened.') Delmy went on to give evidence of a second incident, which took place on 31 August, when the appellant slapped her and repeated the threat he had made to her on 24 August. Delmy then testified that on the next day the appellant again threatened to kill one of her sisters if she left him, a step which she finally mustered up the courage to take on the next day, that is to say 2 September 2007, from which date she never went back to live with him.

3. According to the record, defence counsel, in cross-examination, suggested to Delmy that the appellant did not on the second occasion threaten to kill any member of her family. This suggestion was clearly rejected by the witness; and there is no indication on the record of any specific challenge to her evidence as to the threats said to have been made on the other two occasions.

4. By far the most salient evidence in support of the Crown case came, however, from Mr Kelly, the first of the men to be charged with the murder of the deceased. Having subsequently obtained immunity against prosecution, he went into the witness-box on the second day of the trial and testified of a conversation with the appellant on 8 September 2007, during which the latter, then a resident of Silk Grass, allegedly told him that he had a job for him (Mr Kelly) the nature of which he would not disclose 'until it was time to do it'. Complying with a request made of him by the appellant on 10 September, he called at the house of the latter on the next day. After having beer there and playing dominoes with the

appellant at a bar in Silk Grass, Mr Kelly was taken by the appellant, by pickup truck, to the address of the deceased, where Lucio, the deceased and her three-year-old son, Alejandro, were collected. The appellant then drove on to the highway. Lucio having been dropped off about a quarter of a mile out of Silk Grass, the others continued on their journey, the intended destination thereafter being stated by the appellant to be Hopkins. From the highway, the appellant turned into the road to Hopkins, but, rather than proceeding towards Hopkins, drove into what Mr Kelly variously called a farm road and a 'feeder road' and stopped the truck. He and the deceased then alighted, the latter on his orders, while Mr Kelly, again on the orders of the appellant, remained inside the truck with Alejandro.

5. Mr Kelly then heard what he called conversation between the appellant and the deceased, the appellant demanding that the deceased disclose to him the whereabouts of his 'girlfriend'. There followed what seemed to Mr Kelly to be argument. He was then called by the appellant, and went, to the back of the truck, where he watched as the appellant had sexual intercourse with the deceased, who was lying nude on the truck's 'tailgate'. Then he himself followed suit, forced to do so by the appellant. That imposition discharged, Mr Kelly was sent back into the truck to await the appellant's return to the driver's seat. Sometime later, it having become clear to both the appellant and Mr Kelly that the truck had run out of fuel, the appellant sent Mr Kelly to Silk Grass to fetch

some. At this point, the appellant was in the truck 'with [the deceased] and [Alejandro]'.

6. In Silk Grass, Mr Kelly sought out Miguel, who procured the fuel, after which the two set out for the spot where Mr Kelly had left the appellant, the deceased and Alejandro. Before leaving Silk Grass, they met Lucio, who joined them for the journey, by bicycle, to the spot in question. It was then about 11 or 11.30 pm. On their arrival there, the deceased was nowhere to be seen but her clothes were in the 'back' of the truck. The appellant, without a word of explanation as to her disappearance, put the fuel in the truck's fuel tank. Then, with only Mr Kelly, Miguel, Lucio and Alejandro as his passengers, he drove off. At some unspecified point after Mr Kelly boarded the truck, the appellant remarked that the appellant had gone to Honduras, the neighbouring Central American republic.

7. The appellant drove back onto the highway but, instead of heading for Silk Grass, went in the opposite direction all the way to the Kendal Bridge, where he ordered Mr Kelly to throw Alejandro over the side of the bridge but Mr Kelly refused to do so. The appellant drove on for a while before turning the vehicle around and heading back in the direction whence they had come. As they passed through the village of Maya Centre, ie before again reaching the bridge, Mr Kelly asked the appellant to stop in order for him to relieve himself. When the appellant stopped the truck, Mr Kelly alighted, bearing Alejandro, who was

asleep, and laid him on a bench in a nearby bus shelter. About two miles farther down the highway, the appellant asked what had become of Alejandro. On hearing from Mr Kelly that he had left Alejandro at the bus shelter in Maya Centre, he evinced a desire to return for him but Mr Kelly made it clear that he would not be going back and proceeded to alight from the truck, retrieve his bicycle and ride back to his house.

8. In cross-examination, it was suggested to Mr Kelly that he was at all times 'a willing participant with [the appellant] in whatever action you were going to take'. To this vague suggestion, his response was that he did not know what the appellant was doing. This was an indirect answer to an awkward question but, if nothing else, served as a fitting invitation to defence counsel to specify the action in which the witness was supposed to have participated. Effectively declining this invitation, counsel suggested that Mr Kelly 'participated with [the appellant] in everything that he did'. Counsel, in the face of a denial of participation, then suggested that non-participation was inconsistent with failure to flee the scene. Mr Kelly's reply to this was that he stayed because of his concern for the safety of Alejandro. Other suggestions, for example that Mr Kelly could have fled the scene taking Alejandro with him and that he failed to make a report to the police because he did not disapprove of the unspecified acts of the appellant, do not, with respect, merit individual comment. The Court would only observe, concerning not only these two suggestions but also much of the entire cross-examination, that counsel appeared not to have due regard to the fact that Mr

Kelly had, on his own showing, actually violated the deceased and thus severely reduced the options for public-spirited action open to him following the further unfolding of events.

9. Mr Kelly admitted under cross-examination that he had agreed with the Director of Public Prosecutions to give evidence against the appellant on terms involving his release from custody. He also accepted that, had he not entered into that agreement, he would be sitting next to the appellant, on trial for murder.

10. But Mr Kelly rejected suggestions to the effect that he had (a) stripped the deceased of her clothes, (b) had sexual intercourse with her while the appellant remained in the truck with Alejandro, (c) caused her to perform an act of fellatio upon the appellant, (d) carried the deceased into the bushes and re-emerged alone therefrom some 20-25 minutes later and (e) taken out the clothes of the deceased (from the truck, presumably) and put them in the bushes (a most surprising suggestion, as will be seen) and that it was Miguel, and not he, who had left Alejandro at the bus stop.

11. As indicated above, the decomposing body of a female person was found on 16 September at a location already described. About the finding of this body, evidence was given by two witnesses, namely Sgt Ira Castillo and Alex Sabal, who was a crimes scene technician in September 2007. Their evidence, direct

as regards the finding itself, proved circumstantial in respect of other aspects of the Crown case.

12. Sgt Castillo's presently relevant testimony, so far as admissible, was to the effect that he interviewed Mr Kelly, then being detained in custody, on the morning of 15 September 2007 and, on the next day, in the course of the continuing investigation into the disappearance of the deceased, found a body ('her' body, according to him) 'on the "feeder road" on Hopkins Village road'. On 17 September he returned to the scene in the company of police department personnel and, as well, of the appellant, who pointed to a pile of black soil and said that the clothing of the deceased was there, whereupon he (the sergeant) walked up to the pile of soil and found behind it a pair of blue jeans, a blouse, a brassière and a pair of pink ladies slippers.

13. Prosecuting counsel then, understandably if somewhat incautiously, asked Sgt Castillo how he had managed to find the body of the deceased. Sgt Castillo, though he had not testified to having personally known the deceased, asserted by his reply that it was indeed her body that had been found, saying that it was through information received from Mr Kelly that it (the body) was found. Thereafter, although no evidence had been led through Mr Kelly as to his having assisted the police to find the body in question, the following exchange was allowed to take place:

'Q. What was the nature of that information?

A. Well he told us that the body was on Hopkins Road on a "feeder road" about 20 to 75 feet in the bushes.

Q. He told you this?

A. Yes.' [Emphasis added.]

These answers, indicating intriguingly detailed knowledge on the part of Mr Kelly and thus favourable to the appellant, did not constitute evidence admissible for the purpose of proving the truth of the assertions contained in them. The right to a fair trial, it must be understood, does not entitle an accused person to advantages of this type. Erring on the side of caution is not, in circumstances such as these, an acceptable excuse for tipping the scales in favour of the defence. The interests of justice call, perhaps more urgently in this age of witness intimidation and liquidation than ever before, for balance in the conduct of a trial. Benefits derived from hearsay evidence are ill-gotten, even where the beneficiary is the accused and even where it is the prosecution who have opened the door to the hearsay.

14. The testimony of Mr Sabal, a fisherman by the time of trial, was supportive of that of Sgt Castillo in certain respects. But it also brought out clearly, unlike that of the sergeant, that it was to 'the Hopkins Road area' [emphasis added] that Mr Kelly had accompanied the search-party. Indeed Mr Sabal went so far as to

point out that, far from physically participating in the search, Mr Kelly was in the police pickup truck while it was being conducted, such truck being parked some 200-300 feet away from the spot where the body was found. He then testified as to a further visit to the scene on the next day, when the appellant was the one to accompany the party of police officers and others. His evidence is clear that the appellant, unlike Mr Kelly, physically participated in the search to the extent of going into the bushes and leading the way into a *picado* (which is, in his words, 'bush lined out in a little hole that someone will actually walk through'), where he pointed to a pile of soil behind which the police found a pair of blue jeans, a blouse, a brassière and a pair of slippers. This evidence as to the form taken by the appellant's supposed assistance to the investigators stands in sharp contrast to that of Sgt Castillo as to the form taken by Mr Kelly's: whereas the sergeant's impermissibly incorporates hearsay (what he claims to have been told by Mr Kelly), Mr Sabal's purports to be the result of his own direct observation of the appellant's actions at the scene.

15. Neither of these members of the party of investigators testified as to the presence in their midst on 16 and 18 September of Mr Andrews, who, as already stated above, was the common law husband of the deceased and purportedly identified the decomposing corpse as hers, and to whose evidence attention needs now to be directed. The Court must first note, however, that prosecuting counsel, before embarking on her examination-in-chief of Mr Andrews, informed the judge that defence counsel was consenting to the conduct of such

examination through the use of leading questions. In the experience of the Court, when defence counsel adopts such a course of action, the message to prosecuting counsel is unambiguous: that the defence will not be challenging the relevant witness's identification of the corpse in question. The Court further observes that, in its view, there can be no basis, on the facts of this case, for any criticism of the police's choice of Mr Andrews to be the identifier of the body. He and the deceased had been living together as man and wife for either a year or three years (record, pp 13-14) and he would therefore stand to be more familiar with the features of her adult body than even her mother. It was a material part of his evidence that at about 8 am on 11 September 2007 he left his home in Silk Grass for his place of work in the village of Sittee River. At home at the time were both the deceased and Alejandro. But, alas, they were no longer there upon his return at about 9 o'clock that night; and his ensuing enquiries in the village as to their whereabouts proved fruitless. On 13 September, realising that Alejandro had been found, he reported the deceased's disappearance to the police.

16. Towards the end of the examination-in-chief of Mr Andrews, the following climactic exchanges occurred:

> 'Q. On [16 September] 2007 you were taken to see [the deceased's] body in Hopkins Village?
>
> A. Yes.

Q. And you identified that body to be [the deceased's]?

A. Yes.

Q. On [18 September] 2007 at around 9.00 am you again went to the place where that body was?

A. Yes.

THE COURT: And this is where?

WITNESS: Hopkins.

Q. And you identified the body to Dr Estrada Bran and Sgt Castillo who were present?

A. Yes.'

A mere, but nonetheless surprising, semblance of a challenge to the identification evidence of Mr Andrews is captured in the following brief exchange which took place at the very end of his cross-examination:

'Q. Her body, her face was decomposed, right?

A. Yes.

Q Is it <u>possible</u> that you <u>may have</u> identified somebody that was not [the deceased]?

A No, sir.

Q. I am suggesting to you that you may have.' [Emphasis added.]

(The record shows no reply to counsel's suggestion.) Prosecuting counsel refrained, excusably in the view of this Court, from taking up the understated point in re-examination.

17. Astoundingly, Mr Twist returned with a vengeance to the topic of identification of the corpse, vigorously challenging the accuracy of Mr Andrews' identification, when he cross-examined Dr Estrada Bran, who performed the *post-mortem* examination of the body and who opined in evidence-in-chief that the person concerned died of strangulation by ligature on or about 11 September. On all accounts, the *post-mortem* examination was performed on 18 September, while the body was found on 16 September. As already stated above, Mr Andrews purported to identify it on 16 September and again on 18 September. It stands to reason that the state of its decomposition would be more advanced on the latter date than on the former. However, the doctor could only answer questions as to the actual state of the body in relation to the one date on which he saw it, that is to say 18 September, when he conducted his examination of it. The judge nevertheless permitted, and indeed himself contributed to (record, pp 122-123), extensive cross-examination of the doctor concerning the basis on which the corpse examined on 18 September had been purportedly

identified by Mr Andrews, going so far, indeed, as improperly to ask the doctor what Mr Andrews had said to him in that regard. Assertions never made by Mr Andrews while in the witness-box, that is to say, matters of hearsay, were thus brought to the forefront and sought to be exposed as unreliable and, indeed, ridiculous. As the Court has already stated above, Mr Andrews must be taken to have had an intimate familiarity with the body of the deceased; and there is no telling what he would have revealed if only he had been put, in person, to the test to which counsel later sought to subject him *in absentia*.

18. The appellant gave to the police a statement under caution to which reference may now conveniently be made. In this statement the appellant admitted that on 11 September he drove his truck to the house of the deceased, with Mr Kelly as his passenger, and collected the deceased and her 'baby'. He further admitted that he drove the truck thence to a point on a 'feeder road' off the Hopkins road. But the appellant then proceeded to place Mr Kelly in the position of protagonist. It was Mr Kelly, said the appellant, who took the deceased out of the truck, to begin with, and initiated her ordeal by having his way with her and who thereafter kept that ordeal going by causing her to perform an act of fellatio on another, namely himself (the appellant). It was also Mr Kelly who then took her into the bushes and re-emerged therefrom without her some 20-25 minutes later. In contrast, he (the appellant), so continued the statement, enquired after the safety of the deceased when she failed to return from the bushes. Moreover, it was Miguel who left the deceased's 'baby' on a seat at the

bus shelter in Maya Centre. But there was another admission, namely, that he 'took out' the deceased's clothes and placed them 'on the side of the bush'. (It is this admission which renders surprising, as noted at para 10 above, Mr Twist's suggestion to Mr Kelly in cross-examination that he, Mr Kelly, was the one who placed those clothes in the bush.) And the appellant went on to indicate, just before reaching the end of his statement, that he was not telling all. He said that, after dropping off Mr Kelly, he and his son 'still di panic … so we cut off the seat covering and soak it in a bucket of water'. Just what evidence was meant to be destroyed by the taking of such a step must remain a mystery.

The appellant's unsworn statement

19. Taking advantage of the fact that his mixed statement under caution had already been admitted in evidence, the appellant, at the close of the Crown case, made a short unsworn statement from the dock which he began by effectively incorporating, by reference, his statement under caution and ended by asserting that he had neither murdered the deceased nor ordered Mr Kelly to throw Alejandro into the river.

Consideration of the grounds and arguments

20. Of the seven grounds of appeal advanced at the hearing, three were argued by Mr Twist. The first of these three, namely ground 1, was as follows:

> 'The decision of the jury was unreasonable having regarded (*sic*) to the evidence of the prosecution in relation to one of the element (*sic*) they had to prove in order to convict the Appellant i.e. that Mirna Figueroa is dead.'

In his skeleton argument, Mr Twist made it plain that a central pillar of this ground was his contention that the relevant evidence of Mr Andrews suffered from four main weaknesses. The Court does not, however, agree with counsel's criticism. In the view of the Court, counsel was unable to demonstrate the alleged weaknesses. And if the full force of such evidence was not made manifest, that was not, in the peculiar circumstances of this case, the fault of the prosecution. Prosecuting counsel's relatively restrained leading of evidence through Mr Andrews is consistent with her having come to the logical conclusion, wrong as was soon to become clear, that defence counsel would not be challenging Mr Andrews' identification of the body. Nothing said or done by defence counsel during his cross-examination of Mr Andrews was, in the view of the Court, sufficiently indicative of an intention to mount such a challenge. In those circumstances, the Crown was entitled to 'let well enough alone'. Defence counsel's decision to seek a belated first bite at the cherry through Dr Estrada Bran seems to have been, at best, ill-advised and, certainly, ought never to have been entertained, much less inspired by judicial example. Dr Estrada Bran was hardly in any position to express a strong authoritative opinion on an identification purportedly carried out some two days before he first set eyes on the body in question. Nor was he in any position to give admissible evidence,

insofar as truth was concerned (and cross-examining counsel could hardly have been interested in anything else), as to what Mr Andrews may have said to him concerning the reason/s why he had concluded that that body was the deceased's.

21. Mr Twist suggested that the period during which Mr Andrews lived with the deceased was so short that his evidence of identification could not be regarded as strong. For the reason already given above, this Court considers that the police did well to choose Mr Andrews to attempt to identify the body in question. It fails to see how, having lived at least an entire year with the deceased, as husband and wife, he could be said to be insufficiently familiar with her to give strong evidence of identification. Counsel's even bolder suggestion that Mr Andrews, of all persons, might have been put at a disadvantage by virtue of the fact that the body was found completely nude simply takes one's breath away and, with respect, requires no further comment.

22. The major obstacle confronting counsel in arguing this ground, however, was not the strength of Mr Andrews' evidence but, rather, the chain of circumstantial evidence crafted by the Crown, particularly through Ms Figueroa, Mr Kelly, Sgt Castillo and Mr Sabal, coupled with the appellant's admission in his statement under caution that it was he who placed the clothes of the deceased, as he quaintly put it, 'on the side of the bush'. The relevant evidence has already been described above in some detail. In brief, however, Delmy gave evidence,

largely unchallenged, showing a motive on the part of the appellant to kill one of her sisters. Mr Kelly showed by his evidence, first, that left alone on the dark and lonely 'feeder road' with the deceased and her infant, the appellant was afforded the proverbial 'golden opportunity' to kill her. Secondly, he showed that upon his return to the spot in question, the deceased was missing and the appellant was silent on the matter. Two loved ones of the deceased, namely her mother Antonia Figueroa and Mr Andrews, each gave evidence to the effect that she/he did not see her alive again after 11 September 2007. Sgt Castillo and Mr Sabal both testified that the appellant actually went into the woods adjacent to the feeder road and pointed to the spot where they found the items of clothing and slippers already described above. Those items of clothing and slippers were, on the evidence of Mr Sabal, only about 60-70 feet away from the spot where the decomposing female corpse had been found. That, in the doctor's expert opinion, was the corpse of someone who had died on or about 11 September. Crucially, the appellant himself said in his statement under caution, which he espoused *in toto* at trial, that it was he who had placed the clothes in question in the bushes and that they belonged to the deceased. All of this, taken together, constituted, in the view of this Court, ample evidence that the body in question, bereft as it was of clothes and footwear, was that of none other than the deceased. The evidence of her death was, in short, nothing short of overwhelming. Against that evidential background, the suggestion of Mr Twist that the circumstantial evidence was consistent with an escape by the appellant from her tormentor/s smacked, with respect, of the wildly surreal. As counsel

himself readily acknowledged, there was no evidence whatever suggestive of an escape

23. Mr Twist complained in his skeleton argument that the judge misstated the evidence by telling the jury that the body found on '11th September 2007' was that of the deceased. It is not clear whether the point of this complaint was the date given or the seeming conclusion as to identity. The supposedly offending passage is presumably that which occurs at p 223 of the record and reads: '[The deceased's] body was found in that area where she had been with the [appellant] on the 11th of September 2007'. If the point of the complaint was the date given, it is obviously not supported by the record. If, on the other hand, the point was the seeming conclusion as to identity, the Court must say that, looking at the summation as a whole, it is satisfied that, at the end of the day, a reasonable jury would have had no doubt that theirs was the responsibility of deciding whether the body was that of the deceased. Just as unrealistic was the suggestion that the deceased might have simply left Mr Andrews without bothering to say anything to him. To begin with, the record does not disclose that, as Mr Twist represented to this Court, Mr Andrews ever testified that the deceased was wont to go away without telling him she was leaving. On the contrary, he expressly rejected a suggestion to that effect in cross-examination (record, p 16). Furthermore, the deceased could not have gone off as suggested without first escaping from her tormentor/s, a matter as to which, as has just been noted, it had already been conceded that there simply was no evidence.

24. Ground 4, also argued by Mr Twist, was, so far as material, as follows:

> 'The … judge erred in law in that he failed to direct the jury in relation (*sic*) a crucial piece of evidence coming from the prosecution witness [Sgt Ira Castillo] which showed that [Mr] Kelly pointed out the spot where the deceased (*sic*) body was found evidence being previously lead by the prosecution which allegedly showed that [Mr] Kelly was not present when the alleged murder took place.'

As Morrison JA pointed out in the course of oral argument, the record does not support Mr Twist's claim that the evidence of Sgt Castillo 'showed that [Mr] Kelly pointed out the spot where the lifeless body was found'. And, as the Court has noted in describing the Crown evidence, Sgt Castillo ventured into the forbidden territory of hearsay evidence when he responded to prosecuting counsel's ill-considered question as to the specifics of what Mr Kelly had said to him concerning the location of the body. Neither Sgt Castillo nor Mr Sabal testified of any pointing out by Mr Kelly of the spot where the body was found. In contrast, both of these witnesses gave evidence that the appellant indicated, by pointing, the spot where the clothing and footwear in question were found. The judge ought never to have allowed the hearsay evidence in question to be led; and the Court knows of no legal principle which requires a judge to highlight to a jury hearsay evidence which has been allowed, through inadvertence, to be given. Mr Twist pointed out in his skeleton argument that '[w]hat is good for the goose is

good for the gander'. But the Court must refuse the invitation to adopt such a simplistic approach. The trial judge had every right to accentuate the perfectly admissible and wholly unchallenged evidence as to the appellant's pointing out of the spot where the clothes and slippers of the deceased were found. Counsel could, however, quote no legal principle justifying the same approach where there was no admissible evidence as to the extent of the assistance supposedly given by a witness to the police.

25. Quite apart from the hearsay point, this ground of appeal ignores the fact that it was common ground between the Crown and the defence that Mr Kelly was himself at the spot where the appellant stopped the truck on the fateful night in question. His undisputed evidence was that the area was dark when he left to fetch fuel (and darker yet on his return), that the ground was wet and that the men's portable source of light was a cigarette-lighter. In the circumstances, he would not have required the intelligence quotient of a genius to conclude that, if the deceased had been killed, her body was unlikely to be far from the spot where the truck had been parked. For the judge to seize on and stress the unremarkable fact that, against that background, he had materially assisted the police to find the body and to suggest that he might therefore be the murderer would have been less than appropriate. After all, defence counsel had omitted to raise the matter in his lengthy and wide-ranging cross-examination of Mr Kelly and, moreover, had emphasised in his closing speech to the jury that the defence

was not pointing the accusing finger at Mr Kelly in regard to the murder of the deceased.

26. The true significance of this evidence, in the view of this Court, lay in its relevance, together with other factors, to the question whether a warning under section 92(3) of the Evidence Act ('the Act') was called for in this case. As the Court sees it, the jury were rightly directed to focus their attention on the fact that Mr Kelly was a witness with an interest to serve and properly spared from directions conveying grave allegations against Mr Kelly for which there was no basis in the evidence.

27. This ground, it needs to be pointed out, calls to mind the recent judgment of the Court in *Wayne Martínez v The Queen*, Criminal Appeal No 9 of 2007, handed down on 20 June 2008, in which it was said, at para **[16]**:

> 'The question is whether an appeal ought to be allowed to succeed in circumstances where the foundation of the material ground/s of appeal is that the appellant is in danger of being deprived of some potential benefit of a trial judge's demonstrably incorrect direction or step. The question is thus framed in order to take account of the fact that the direction of the judge relied upon by Mr Elrington quite obviously conferred on the appellant the intangible benefit of reducing to some extent (though plainly not sufficiently) the chances that he would be convicted … What is in

> reality at stake here, then, is not a potential miscarriage of justice (the Court having heard of none) but a potential 'cheating' of the appellant out of a yet-to-be-enjoyed fruit of the trial judge's unwarranted direction.'

and, at para **[20]**:

> 'There is no discernible peril here of the appellant falling victim to a miscarriage of justice. He stands only to be left in no position to take further advantage of a wholly unwarranted step regrettably taken, to his benefit, by the judge in the court of trial.'

28. In the instant case, the appellant seeks to squeeze the last drop, so to speak, not out of a judge's unwarranted direction but out of his evident failure to realise that a Crown witness had been led to give hearsay evidence favourable to the defence.

29. Counsel may well be right in suggesting that the judge probably forgot to address his (counsel's) grievance in this regard when he came to deal with the case for the defence but, even if the judge did fall victim to a memory lapse, that would only make this a case of forgetting to do the non-essential.

30. The Court considers, therefore, that there is no merit in this ground.

31. Ground 5, the last ground to be argued by Mr Twist, was that the judge 'erred in law in that he failed to give the jury a direction as required by the Evidence Act in relation to accomplice'.

32. The reference there was to the provisions of subsection (3) of section 92 of the Act. (The presence of those provisions in a part of the Act headed 'Corroboration' is anomalous given that they replaced older provisions requiring the giving of a corroboration warning and do not themselves require that such a warning be given.) Subsection (3) states as follows:

> '(3) Where at a trial on indictment –
>
> (a) a person is prosecuted for rape, attempted rape, carnal knowledge or any other sexual offence, and the only evidence for the prosecution is that of the person upon whom the offence is alleged to have been committed or attempted; or
>
> (b) an alleged accomplice of the accused gives evidence for the prosecution,
>
> the judge shall, where he considers it appropriate to do so, warn the jury of the special need for caution before acting on the evidence of such

person and he shall also explain the reasons for the need for such caution.' [Emphasis added.]

The Court considers that the evidence in, and circumstances of, the instant case were such that Mr Kelly could not properly be said to have been an 'alleged accomplice of the accused' by the time the judge came to sum up for the jury.

33. In the case of *Dean Tillett v The Queen*, Privy Council Appeal No 56 of 1998, an appeal from this Court, Lord Hobhouse of Woodborough, delivering the Board's judgment (the paragraphs of which this Court has numbered for ease of reference) on 28 June 1999, said at para 12:

'In the present context "accomplice" means a person who was an accomplice of the defendant in the commission of the crime with which the defendant is charged. The relevant crime is the murder of Suresh Gidwani (*Davies v Director of Public Prosecutions* [1954] A.C. 378, *Reg. v. Farid* (1945) 30 Cr. App. R. 168).'

In *Davies*, decided by the House of Lords, Lord Simonds LC, with whose speech the other members of the House agreed, said, at p 400:

'There is in the authorities no formal definition of the term "accomplice": and your Lordships are forced to deduce a meaning for the word from the

cases in which X, Y and Z have been held to be, or held liable to be treated as, accomplices. On the cases it would appear that the following persons, if called as witnesses for the prosecution, have been treated as falling within the category:-

(1) On any view, persons who are participes criminis in respect of the actual crime charged whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours).'

(Lord Simonds LC went on to consider two other categories of person which are not relevant to the present case.) Then, at p 40, he said:

'I can see no reason for any further extension of the term "accomplice".'

This Court, by the same token, sees no reason why the same restricted meaning of the term 'accomplice' that was held by the Board in *Tillett* to apply for the purposes of section 90(4) of the Act should no longer apply following the repeal of that subsection (as well as of subsection (3)) and their replacement by what has since become section 92(3) (4) and (5) of the Act.

34. On the other hand, the Board in *Tillett's* case did not have before it for interpretation the phrase 'alleged accomplice' which occurs in the current section

93(2)(b). Was there, then, any allegation at trial that Mr Kelly was an accomplice? There is a parallel between this case and *Davies'* case, in which counsel for the appellant argued in the House of Lords that Lawson, a Crown witness, was an accomplice. Lawson had, before the trial of the appellant, been indicted for the murder in question but the Crown had offered no evidence against him on, and the jury had entered a formal verdict of 'Not Guilty' of, that charge. Upon being subsequently arraigned on a charge of common assault, however, Lawson had pleaded guilty and been sentenced to a term of imprisonment. At Davies' relevant trial for murder, a retrial, Lawson testified for the Crown and the trial judge refrained from warning the jury that his evidence was, or should be treated as, that of an accomplice. It was the case that, at the instance of defence counsel himself, and with the consent of the Crown, any suggestion of a concerted felonious attack on the victim had been expunged from the Crown case and from the issues left with the jury. Lord Simonds LC, rejecting counsel's argument, said, at p 401:

> 'Your Lordships would, I feel, be slow to permit counsel for the defence, having got that suggestion buried, to disinter it for the purpose of suggesting that Lawson was constructively an accomplice to the crime of murder and for that reason attracted the rule as to warning.'

35. In the instant case, similarly, counsel for the defence portrayed Mr Kelly to the jury as 'an accomplice in whatever may have transpired' (record, p 177) while

running a defence of denial for the appellant. In those circumstances, it is decidedly intrepid to submit to this Court that Mr Kelly could have been an accomplice to the crime of murder. No such allegation was before the jury, as required by the language of section 92(3)(b). Prosecuting counsel's purely rhetorical question to the jury, ie 'Is there any evidence before you to suggest that he was an accomplice to the killing of [the deceased]?', was entirely apt. In truth, however, it was not only the evidence in support of the allegation, but the allegation itself, that was non-existent. And it must remain, for now, an open question whether a mere allegation, unsupported by evidence, suffices for the purposes of that subsection.

36. Taking the remaining grounds in the order in which they were argued by Mr Sylvester, the Court begins with ground 8, which reads as follows:

> 'The … judge erred in law in that he failed to properly direct the jury in relation to the statement of the [a]ppellant which was admitted as part of the prosecution's case and adopted by the [a]ppellant as part of his dock statement. The … judge ought to have given the jury a direction with regard to
>
> i. self-serving statement

ii. the fact that the [appellant] in this statement had said he took out [the deceased's] clothes and put them on the side of the bush

iii. the fact that he had said [Miguel] was in the vehicle when they returned from the feeder road and it was [Miguel] who took and placed [Alejandro] at the bus stop, not [Mr] Kelly.'

In arguing this ground, counsel referred the Court to *Reg v Duncan* (1981) 73 Cr App R 359 and *Reg v Sharp (Colin)* [1988] I WLR 7. In *Duncan*, Lord Lane CJ, giving the judgment of the Court of Appeal (Criminal Division), said, at p 365:

> 'Where a 'mixed' statement is under consideration by the Jury in a case where the defendant has not given evidence, it seems to us that the simplest, and, therefore, the method most likely to produce a just result is for the Jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the Jury that the exculpatory parts of the statement are something less than evidence of the facts they state. Equally, where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight. Nor is there any

> reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence.'

In *Sharp*, the House of Lords approved the decision in *Duncan*. In an opinion concurred in by the other members of the Appellate Committee, Lord Havers, having described the approach in the passage just quoted as one of 'respectable antiquity' (p 11), said, at p 15:

> 'I cannot improve upon the language of Lord Lane CJ in *Duncan* and will not attempt to do so. It is in my opinion rightly decided and should be followed.'

The instant case differs from *Duncan* in a material respect. In that case, the trial judge expressly ruled that the self-exculpatory parts of a mixed statement given by Duncan to the police under caution were not evidence. The gap between what the judge did and what he ought to have done was therefore wide. In the present case, Mr Sylvester's submission to the contrary notwithstanding, the record does not indicate that the judge ever told the jury, in so many words, that the appellant's mixed statement, or any part of it, was not evidence. It is essential in this regard to distinguish between what the judge told the jury (or said in their presence) in respect of the unsworn statement from the dock and what he told them in respect of the statement under caution.

37. In the case of the unsworn statement from the dock, the judge, in advising the appellant on his options at the close of the prosecution case, said, in the presence of the jury, that whatever the appellant said from the prisoner's dock would not be 'evidence that can prove anything', adding, 'The value of what you say from the dock, if you say it, has a persuasive value only.' In the circumstances, it is only of academic interest that the judge nowhere in his summing-up told the jury that the appellant's unsworn statement from the dock was not evidence.

38. As regards the statement under caution, the judge similarly refrained from telling the jury in his summing-up that that was not evidence. Mr Sylvester contended, however, that in telling the jury that

> 'What is in his statement is as if he said from the dock.'

the judge was equating the relevant statement, ie the statement under caution, with the unsworn statement from the dock, which, as just noted, was expressly said not to be evidence. That is not a contention that the Court can accept. Having carefully considered the sentence in question in its context, the Court is satisfied that all that the judge meant, or could reasonably be understood to have meant, thereby to convey was that the appellant should be taken to have incorporated, by reference, his entire statement under caution into his statement from the dock. In any case, unlike the judge in *Duncan*, he was not making it

next-to-impossible for the jury to consider any part of the statement under caution. On the contrary, as he immediately went on to tell them, it was for them to consider both the unsworn statement from the dock and the statement under caution and thereafter decide what weight and value to give to them. In directing the jury as to the evidence of Mr Kelly, the judge similarly indicated that it was for the jury to determine what weight and value to attach to it (record, p 228). And the Court does not agree that in telling the jury, 'if you noticed the [appellant] did not give evidence as all the prosecution witnesses did', he was, or could reasonably be understood to be, conveying to them that his statement under caution was not evidence. It was, undeniably, a fact that the appellant had not given evidence as the prosecution witnesses had done. In these circumstances, even if the judge had indeed said, say, by a slip of the tongue, that the statement under caution was not evidence, any complaint about the error could hardly have rung other than hollow. The Court notes, in fairness to counsel, that this point was not brought out in counsel's formulation of ground 8 but only in the heat of oral argument.

39. It is now necessary to turn to consider the first of the complaints made in ground 8, namely that the judge ought to have directed the jury with regard to the self-serving parts of the statement under caution. The reasoning behind this complaint is, with respect, difficult to follow. In the view of this Court, the passage quoted above from *Duncan* focuses on the interests of the accused person in its first two sentences but is, in the remaining sentences, concerned

with the interests of the Crown, the overall objective being the securing of the interests of justice through the holding of a trial fair to both sides. Those remaining sentences may, for convenience, be here reproduced again:

> 'Equally, where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight. Nor is there any reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence.'

Any legitimate complaint of failure on the part of the judge to deal with the self-serving aspects of the mixed statement in the instant case must be grounded on failure to adhere to the guidelines handed down in these two concluding sentences of the relevant passage from the judgment in *Duncan*. But the Court fails to see how judicial adherence to these guidelines would have assisted the appellant. In its view, the appellant was better off with the approach which was in fact adopted by the judge, which was, as already indicated, merely to direct the jury to take the statement under caution into consideration and to give to it such weight and value as they deemed proper. (It is not difficult, the Court considers, to see how judicial comments in relation to exculpatory remarks made in a statement under caution would often prove of scant value to the author of such statement when he/she has failed to go into the witness-box and repeat them

under oath.) While, however, the Court finds no cause for complaint in this case, it obviously does not hold out the approach of the judge as a good example for trial judges to follow in future cases.

40. Counsel's next complaint under ground 8 had to do with the absence of any direction in the summing-up concerning the 'fact that the [appellant] in this statement had said he took out [the deceased's] clothes and put them on the side of the bush'. As far as the Court could understand this complaint, the point being sought to be made was that, if the appellant had killed or had anything to do with the killing of the deceased, he would not have volunteered this piece of information to the police. But this approach, as it seems to this Court, does not take account of the full picture. As has already been demonstrated at para 22 above, this piece of evidence constituted a vital link in the formidable chain of circumstantial evidence marshalled in this case to show that the deceased was dead. What it further did, just as uncompromisingly, as such an evidential link, was to implicate the appellant himself in the murder. The lament that this piece of evidence was not sufficiently emphasised by the judge is, with respect, altogether inappropriate. The Court fails entirely to appreciate how the additional highlighting of evidence so predominantly damaging to the defence case could have proved of any real advantage to the appellant.

41. The appellant was, in the opinion of this Court, fortunate, albeit not sufficiently in view of the jury's verdict, that the judge, astonishingly ignoring the relevant admission in the statement under caution, told the jury:

> 'On the evidence - - on the statement of the [appellant], his caution statement. You might want to come to the conclusion it was not him [who placed the clothes of the deceased at the relevant spot], it was somebody else, but certainly not him.'

Given that that favourable but unwarranted direction proved insufficiently helpful to the appellant, it is not easy to fathom how a direction which accorded with the appellant's relevant admission would have afforded him greater benefit.

42. The third of Mr Sylvester's complaints under ground 8 can be disposed of even more summarily. That complaint was that the judge ought specifically to have directed the jury as to the fact that the appellant said in his statement under caution that Miguel was in the truck on the return from the 'feeder road' and that it was the latter who left Alejandro at the bus stop. The Court rejects without hesitation counsel's nonplussing suggestion that the evidence of an act by a third party which could, on one view, be regarded as perhaps merciful could have (if appropriately emphasised) somehow impelled the jury towards a conclusion that the appellant was not implicated in the murder of the deceased.

43. The ground of appeal next argued by Mr Sylvester was ground 2, which was, in terms, that:

> 'The … judge erred in law in that he allowed the prosecution to lead prejudicial evidence against the [a]ppellant. This evidence is in relation to the alleged incitement to throw the child over a bridge into a river which technically would amount to either murder or attempted murder. This failure resulted in injustice.'

At trial defence counsel objected to the admission of the evidence in question but the objection was overruled. Before this Court, Mr Sylvester, seeking support for his submission that the evidence was wrongly admitted, cited *R v Sang* [1980] AC 402. The Court fears, however, that no such support is to be found in *Sang*. The real issue before the judge was whether the admission of the evidence might have a prejudicial effect which would outweigh the evidence's probative value. That the evidence was not without probative value was frankly conceded by Mr Sylvester. But he argued that such probative value was outweighed by its prejudicial effect, which was that it showed the appellant to be a man of bad character. The Court finds itself quite unable to accept that contention. As was submitted by the Acting Director, the evidence in question was potentially highly probative in a case which depended heavily on circumstantial evidence. It was entirely right and proper that the jury should be placed in a position to decide what, if any, significance lay in the collocation of evidence (a) that Mr Kelly,

returning from Silk Grass to the scene with fuel, found the deceased conspicuous in her absence and (b) that the appellant, shortly after, saw fit to drive, not straight back to Silk Grass but all the way to the Kendal Bridge, and, once there, order Mr Kelly to throw the child of the missing woman over the edge of that bridge. Against an evidential background showing that the appellant had both the motive and the opportunity to kill a sister of the woman who had recently left him, the piece of evidence under consideration could well prove a necessary link in the chain of circumstantial evidence deployed by the Crown. Considered, not in isolation but in the context of all the other circumstantial evidence, surely this was evidence which in the collective mind of a reasonable jury could assist more deeply to implicate the appellant in the murder of the deceased.

44. Ground 3, the next to be argued by Mr Sylvester, was to the effect that:

> 'Nowhere in the summation did the … judge give the jury a proper direction on the prejudicial evidence despite his promise to do so. As a matter of fact at pace (*sic*) 224 of the transcript the … judge told the jury they could use this evidence along with other evidence to convict the [appellant].'

In overruling the objection of Mr Twist to the admission of the evidence in question, the trial judge stated:

> ‘I rule that the evidence in respect to the disposal of the child into the river and this witness, [Mr] Kelly taking out the child and placing it by the bus stop, is relevant to the prosecution’s case. And with the proper directions to the jury at the appropriate time no injustice will result to the [appellant] in terms of that evidence being prejudicial to him. Because I will then give the jury the proper directions as to why in the circumstances it is not prejudicial etc etc. In the circumstances I rule that this evidence can be adduced.’

That the judge in the event gave the jury no direction aimed at avoiding prejudice to the appellant consequent upon the admission of the evidence in question was not, and could not be, disputed by the respondent. At the end of his summing-up, the judge invited the Acting Director to indicate whether he had omitted to direct on ‘important legal points’ but she did not remind him of his promise to direct on this particular matter.

45. As is noted by counsel for the appellant in framing this ground, the judge, when he came to sum up for the jury, told them that they could use the evidence here under discussion, albeit only in combination with the other circumstantial evidence, to found a verdict of guilty of murder. That direction could hardly have come as a surprise to the defence. After all, it was plain from the submissions of the Acting Director on the defence’s objection that that was the intended purpose of the evidence, and the ruling on the objection left it in no doubt that those

submissions had found complete favour with the judge. It should also have been clear to prosecution, defence and judge at that stage that, once the judge directed the jury along the lines indicated, it would not be in keeping with self-respect for him further to direct them that the evidence in question, since it reflected badly on the appellant's character, could not be used to his prejudice on the issue of guilt. In the view of this Court, the two directions were mutually exclusive, in the circumstances of this case, and the judge was rash in promising later to direct the jury so as to prevent this particular piece of evidence from causing prejudice to the appellant. He may well have realised this when he came to sum up, and, if he did, he ought, in the view of this Court, then and there to have explained to counsel why he was unable to comply with his earlier promise, rather than merely leaving it unfulfilled. The evidence complained of by Mr Sylvester was, as the Acting Director put it, prejudicial to the appellant only in the sense of connecting him with the murder of the deceased. The mere fact that it did so cannot, in the view of this Court, be said to have worked injustice against the appellant. It was therefore evidence comparable to that of which Lord Griffiths, delivering the advice of the Privy Council in *Scott and another v R* and *Barnes and others v R* [1989] 2 All ER 305, said, at p 311: 'It was only prejudicial in the sense that it was on the face of it strong prosecution evidence that might well result in the conviction of the accused.'

46. In ground 6, the last to be argued by Mr Sylvester, the complaint was as follows:

'The … judge erred in law in that he misdirected the jury with regard to evidence which he regarded as circumstantial evidence to prove intention when in fact this was not in relation to the count the appellant was tried and should not have been lead in the first place.

The evidence is in relation to:

1. The alleged incitement to throw [Alejandro] over the bridge into the river.

2. The alleged beating and threats to [Delmy].

3. The alleged lie told by the [appellant] to [Mr] Kelly that [the deceased] went to Honduras.'

As will have already been appreciated, the complaint begins as one of misdirection but ends up including the matter of admission as well.

47. In fact, at the hearing Mr Sylvester chose to argue only the admission limb of the complaint. The Court does not agree that any of the three pieces of evidence in question was erroneously admitted by the judge.

48. With respect to the first item of evidence, what has already been stated at para 43 above, in disposing of ground 2, provides a complete answer to counsel's complaint and there is no need to recapitulate.

49. Regarding the second item, the circumstances in which Delmy ended up testifying as to her having been beaten by the appellant were, as has been pointed out above, unfortunate. Defence counsel's objection to prosecuting counsel's well-meaning narrow question had unintended consequences: the broad question which prosecuting counsel then (apparently) felt obliged to pose elicited the allegation of a beating which would in all likelihood have been avoided if the original question had been allowed. But the judge, albeit only after a last-minute reminder by the Acting Director, did direct the jury to disregard the evidence as to the alleged beating; and the Court disagrees with Mr Sylvester's laconic submission that that direction called upon the jury to perform 'mental gymnastics' and was thus less than adequate. It should be noted, for the sake of completeness, that despite the wording of the ground, counsel did not, at the hearing before this Court, suggest that the evidence as to the making of threats to kill a sister of Delmy was wrongly admitted.

50. Concerning the third item of evidence, the Court would begin by noting that, notwithstanding his choice of words in framing this ground ('the alleged lie'), there was no contention by counsel that the judge was under any obligation to give the jury a direction along the lines of that required in *R v Lucas* [1981] QB

720. Nor is this Court, for its part, inclined to suggest that any such obligation arose. Placed in its proper context within the totality of Mr Kelly's evidence, the alleged statement by the appellant that the deceased had gone to Honduras to be with her parents can hardly have been meant to deceive Mr Kelly or indeed to be a statement of fact. On his evidence, Mr Kelly had left the deceased at the scene of her initial humiliation and returned there some hours later to find her gone but her infant child present. Any utterance to the effect of that which he was now attributing to the appellant was more likely to have struck him as either an attempt at humour at its most macabre or a suggested explanation to offer to the inquisitive on and after the return to Silk Grass. In this connection, the Court notes, with no surprise, that, as far as the record goes, the judge nowhere referred to the alleged statement as a lie.

51. Secondly, as regards the matter of admission, the Court does not accept that this piece of evidence was admitted in error. In dealing with this part of ground 6, Mr Sylvester was at his most perfunctory and the end-product was unattractive. The Court agrees with, and adopts, the submission of the Acting Director in reply, which was to the effect that here was an utterance, perhaps implausible, on the part of the appellant, which the jury were entitled to hear and consider as another bit of circumstantial evidence. To this it should be added that, as one of the first of the few statements allegedly made by the appellant, obviously within minutes after Mr Kelly's discovery of the disappearance of the deceased, the utterance was plainly integral to, and indeed intricately interwoven

with, the surrounding facts and hence not to be excluded save on the strongest of grounds.

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MOTTLEY P

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SOSA JA

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MORRISON JA