THE COURT OF APPEAL OF BELIZE AD 2013
CRIMINAL APPEAL NO 25 OF 2011

VEOLA POOK Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Mr Justice Manuel Sosa	President
The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Mr Justice Douglas Mendes	Justice of Appeal

B Simeon Sampson SC for the appellant
Mrs Cheryl-Lynn Vidal, Director of Public Prosecutions, for the respondent.

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13 June 2013 and 14 March 2014

MORRISON JA

Introduction

[1] On 20 July 2011, after a trial before Lord J and a jury, the appellant was convicted of the murder of her common law husband, Mr Orlando Vasquez. Mr Vasquez, to whom we will refer in this judgment as 'the deceased', was also known as 'Mr Mai'.

[2] The deceased died as a result of pulmonary edema, having received first and second degree burns which affected 70% of the total surface of his body. The prosecution's case was that the burns suffered by the deceased were caused by the appellant setting him afire in the early evening of 31 December 2008.

[3] There were no eyewitnesses to the murder and the evidence against the appellant was almost entirely circumstantial. But, crucially, the prosecution also relied on evidence of an oral statement which the appellant was alleged to have made to a police officer, Sergeant Aaron Zuniga, shortly after he had arrived on the scene of the fire and while the deceased was still alive. The question whether this statement was properly admitted in evidence at the trial gave rise to the only ground of appeal filed by Mr Sampson on the appellant's behalf:

> "The learned trial judge erred in law when he accepted into evidence the alleged oral confession made by the appellant, ie, "da me ketch ah fire" to the arresting officer, Sgt. Zuniga…very shortly after the fatal incident … without first adverting his mind to sec. 90 of the Evidence Act: to ensure that it was freely and voluntarily made …"

A summary of the evidence

[4] Because of the manner in which the court has determined that this matter must be disposed of, we propose to confine the summary of the evidence at trial which follows to those aspects of it that are necessary to address the single issue raised by this ground.

[5] Ms Violet Yolanda Jeffords is the appellant's daughter and, at the material time, they were both residents of Rancho Dolores Village in the Belize District. Ms Jeffords' house and the house in which the appellant lived with the deceased ('the appellant's house') are in close proximity to each other ("across the other side of the street almost"). From her kitchen door, she had a view of the appellant's kitchen door across the road. Sometime between 6:00 and 7:00 pm on 31 December 2008, while she was in her kitchen, Ms Jeffords was alerted by "a loud scream or groaning sound". She

immediately ran outside through her kitchen door. From that position, she saw "everything look bright" and a flame coming from the appellant's kitchen. As she ran towards the blaze, Ms Jeffords saw the deceased, on fire, from "his head to his feet", lying at the kitchen door. Her brother Allen was standing right in front of the deceased and throwing water on him. The appellant was standing about 10 – 12 feet away, "close to the kitchen door but not exactly close…she wasn't doing anything she was only standing up". Ms Jeffords joined her brother in throwing water on the deceased, while the appellant remained, in silence, about 5 – 6 feet behind her. By this time, the fire in the appellant's kitchen was still not "completely out". After that, Ms Jeffords said, "the only thing I did was get some sheets put on him and wait for the ambulance and the police to arrive".

[6] Mr Evan Pook, the appellant's cousin, who also lived in Rancho Dolores Village, was at home between 6:00 pm and 7:00 pm on 31 December 2008. His house was about 150 yards from the appellant's house. At a point, he heard "a loud crying/bawling", which appeared to be coming from the appellant's house. As a result, he opened his door and went outside. From there, he saw "a blaze of fire" in the appellant's yard, after which, he said, "I just stand there and I see the fire ketch for approximately five (5) minutes. Then I see the fire just went down, I just hear crying." After that, Ms Jeffords came over and Mr Pook took her to a nearby house to make a call. That having been done, he went to the appellant's house, where he saw the deceased on the ground on the outside of the house in front of the kitchen door, "lying on his side, squinge up like…he was burn up". But the deceased did manage to speak to him, asking him to get a vehicle to take him to the hospital as quickly as possible. At this point, Mr Pook said, the appellant was "sitting right there under a custard apple tree on a bench", about 8 – 9 feet away. In due course, one of Mr Pook's friends, at the request of Sergeant Zuniga, who had by then arrived on the scene, used his truck to take the deceased away.

[7] Ms Thelma Tucker was also a resident of Rancho Dolores Village. It was to her home that Mr Pook had taken Ms Jeffords to request a telephone call and it was she

who had actually called the police on Ms Jeffords' behalf. After the arrival of the police, Ms Tucker went to the appellant's house. She described the appellant as "a friend and neighbour", whom she had known for 37 years. In the presence of Sergeant Zuniga, she spoke to the appellant, who told her that "nobody will understand". But when she was cross-examined, Ms Tucker agreed that what the appellant had actually said was "no-one will understand this". Her evidence was that she did not hear the appellant say anything else.

[8] On the evening of 31 December 2008, Sergeant Zuniga was on duty at the Bermudian Landing Police Station. As a result of a call received at about 7:15 pm, he went to the appellant's house in Rancho Dolores Village. Because much turns on Sergeant Zuniga's account of what happened next, we will set it out in full below:

> "Upon entering the premises of both persons I saw a crowd of people sitting down underneath a custard apple tree on a homemade chair which is a knock up chair, a possium chair we call them.
>
> I also saw Ms. Veola Pook sitting down on the said chair and also I saw one Orlando Vasquez who was laying outside of the kitchen on the floor in front of the door.
>
> I also observed on Mr. Orlando Vasquez his face appear to be burn.
>
> Q. Just his face?
> A. And also the remainder of his body was covered with blanket and sheet, he was still alive.
> Q. How do you now this?
> A. Because he was breathing. I went inside of the kitchen and upon entering the kitchen I observe as soon as you get into the kitchen on this side (witness indicates) I observe a partly burnt table and a stool.
> Q. What side?
> A. On the left handside was a partly burnt table and stool that was inside of the kitchen and also the wall of the building (kitchen) with black smoke.
>
> I then came outside and I approached Ms. Veola Pook and I asked her what happen, and she respond to me "da me ketch ah faiya".

> I immediately cautioned her, informed her of her constitutional rights and I even asked her if she was willing to give a statement in the presence of a Justice of the Peace, she said no.
>
> Before I go further I would like to mention that Ms. Veola Pook also her right hand was injured and it look pinkish.
>
> I then informed her that I will detain her pending investigation of dangerous harm.
>
> Mr. Orlando Vasquez who was mumbling but you cannot understand what he was saying.
>
> I then put Ms. Veola Pook inside of a pickup truck and also Mr. Orlando Vasquez he was placed inside the back of the pickup truck lying down on sheets and blankets.
>
> The vehicle was driven at that time by one Yasser Pook.
>
> We left Rancho Dolores Village enroute to the Karl Heusner Memorial Hospital and on our arrival at Double Head Cabbage Village I met up with BERT ambulance where I stop it and Orlando Vasquez was handed over to the personnel of the BERT ambulance.
>
> Thereafter we continued our way to Ladyville Police Station and on arrival at the Police Station in Ladyville, Cpl. James Mossiah accompanied us along with Ms. Veola Pook to Queen Street Police Station in Belize where I handed Ms. Pook over to the Police Office [sic] working at the time."

[9] As was to be expected, Sergeant Zuniga was cross-examined at great length by counsel who then appeared for the appellant. He denied the suggestion which was put to him that his evidence of what the appellant had told him ("da me ketch ah faiya") was "a blatant lie". But, after being considerably pressed on the matter, he finally appeared to accept counsel's suggestion that he did not make any written record of what the appellant had said to him until 12 June 2009, nearly six months after the event. This was, he said, the point at which "[he] got through with all that [he] needed for the investigation". However, he was insistent that his report was not written as a result of his having been told by the investigating officer to "fix mi up wid some evidence".

[10] In re-examining Sergeant Zuniga, Crown counsel revisited, without objection, the issue of what the appellant had allegedly said to him:

> "Q. You said Sgt. Zuniga…Counsel kept on repeating the words that were said to you "dah me ketch ah faiya", did you force Ms. Veola Pook to say these words to you?
> A. No ma'am.
> Q. Did you coerce her; compel her to say any of these words?
> A. No ma'am.
> Q. Did you put her in any form of fear of any sort when he said those words?
> A. No ma'am.
> Q. Did you promise her anything if she said those words?
> A. No ma'am.
> Q. Counsel Mr. Elrington suggested to you that Sgt Marin told you to fix a report in June; you understand what he meant by fix a report?
> A. I didn't understand it.
> Q. When he said it to you what you understand it to mean?
> A. Submit a report.
> Q. I will now ask you Sgt. Zuniga did Sgt. Marin tell you to make a false report about the incident?
> A. No ma'am.
> Q. Did he tell you to lie in that report?
> a. No ma'am.
> Q. Did you lie in your report?
> A. No ma'am."

[11] A few days later, at the Karl Heusner Memorial Hospital ('KHMH'), the deceased's sister identified his body to the pathologist, Dr Mario Estrada Bran, who conducted a post mortem examination of the body. Dr Estrada Bran's external findings were that there were first to second degree burns on the upper chest, the front of the pelvis area; different regions of the upper and lower extremities; and also by the occipital region to the upper back and pelvic area. Most of the burns, which covered up to 70% of the deceased's body surface, were situated on the front of the body, that is, the chest, the upper and lower extremities. Internally, the doctor observed edema, (which, he explained, was abnormal fluid collection), on different areas of the organs in the body. In his opinion, this edema was caused by the burns and the direct cause of death was

"acute pulmonary edema due to multiply [sic] organs failure due to 2nd degree burns up to 70% of body surface".

[12] Other witnesses at the trial included a crime scene technician, who gave evidence of the condition of the kitchen at the appellant's house when he arrived there late in the night of 31 December 2008 (where he observed a butane gas stove and a ham in a pan, as if "somebody was preparing it to be baked"). A firefighter attached to the National Fire Service, who visited the appellant's house on 5 January 2009, also testified to the presence of the odor of some kind of accelerant on the inside of the building.

[13] On 2 January 2009, a warrant for the arrest of the appellant was obtained and, when charged and cautioned later that day, the appellant remained silent. After she was taken to Court No 1 for arraignment, the appellant, on the instructions of the magistrate, was then taken to the KHMH, where she was seen by a doctor. The doctor's evidence was that her examination of the appellant revealed first degree burns on the right forearm, which were classified 'Harm'.

[14] That was the case for the prosecution. After an unsuccessful no case submission, upon which nothing now turns, the appellant elected to make an unsworn statement. This is what she said:

> "On the night of 31st December, 2008 I was inside my house getting ready to go to the Baptist Church which starts at 8 o'clock in Rancho Dolores, my gentleman came in Orland Mai or Orlando Vasquez, he came in with a ham and went to the kitchen.
>
> About 15 minutes or so I heard a loud noise, screaming, I then ran outside to the kitchen I saw him on fire, I tried to get close but it was too hot, I then shouted for help. Help came, we out the fire, we covered him with blanket and sheets; we then called for the police and ambulance, the police arrived Mr Aaron Zuniga.
>
> Now this statement Mr. Zuniga gave saying 'da me ketch ah faiya' I did not say anything to him or in anyway give him a statement; all I said to him was 'I will remain silent'.

That's all sir."

[15] And that was the appellant's case. After the trial judge had summed up the case to them (at great length), the jury returned a unanimous verdict of guilty of murder. The prosecution did not seek the imposition of the death penalty and, after hearing submissions from counsel, the court imposed a sentence of imprisonment for life, with a stipulation that the appellant should be eligible for parole after a period of 21 years.

The argument and the authorities cited on appeal

[16] In advancing the ground of appeal filed on the appellant's behalf, Mr Sampson referred us to section 90(2) of the Evidence Act, which provides as follows:

> "90.- (1) 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 and voluntarily made.
>
> (2) 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 in behalf of a person in authority."

[17] In addition, Mr Sampson placed much reliance on the decision of this court in **Lisandru G Matu v R (Criminal Appeal No 2 of 2001**, judgment delivered 25 October 2001), to which It may be helpful to come immediately. The appellant in that case was charged with murder, the allegation being that he and his brother Luis had murdered the deceased. We take the following summary of the relevant evidence from the judgment of the court (at pages 1- 2), which was delivered by Mottley JA (as he then was):

> "The evidence disclosed that the appellant and his brother were at a restaurant when a fight broke out between Luis and the deceased. Shortly afterwards the appellant joined the fight, [the deceased] fell to the ground where he remained.

> Karl Holder, a witness on behalf of the prosecution, said that while he saw the fight he did not see anyone with a knife or other instrument.
>
> The police officers who conducted the investigation gave evidence that the appellant had been taken into police custody. During an interview in which questions were being put to him by Sergeant Perez, the appellant is alleged to have said 'Da me juke di man but dah because he wan abstract mi brother.' After this was said, the police then cautioned him and advised him of his rights and continued the interview. No written statement was recorded from him."

[18] The only evidence which connected the appellant in **Matu** to the killing was the alleged oral statement to the police, which the appellant denied making. Mottley JA observed (at page 2) that "[n]o attempt was made by counsel for the prosecution to lay the appropriate evidential foundation for the receiving of this statement into evidence". On appeal from his ensuing conviction, the appellant contended that the trial judge had erred in law by admitting the alleged oral statement without first ascertaining whether the conditions set out in section 88 of the Evidence Act (the exact equivalent of the current section 90) had been satisfied.

[18] Mottley JA agreed (at page 4):

> "In our view, it is not permissible for the judge to assume that the admission was not induced by any promise of favour or advantage or by the use of fear, threat or pressure by or on behalf of a person in authority. The use of the word 'affirmatively' suggests that the prosecution must lead evidence which satisfied the judge that the admission was not induced by any promise of favour or advantage or by the use of fear, threat or pressure by or on behalf of a person in authority. This subsection makes it absolutely clear that before the admission is received into evidence certain things must be proved affirmatively. If there is no affirmative proof of the factors set out in the subsection, then the evidence relating to the admission cannot be given in evidence."

[20] After a discussion of some of the older authorities dealing with confessions, Mottley JA concluded as follows (pages 6 – 7):

> "16. Counsel for the prosecution did not lead any evidence regarding the circumstances surrounding the making of the alleged admission. No evidence was led to show that the alleged admission was not induced by any promise of favour or advantage by any person in authority. Evidence should also have been led to show that no fear, threat or pressure was used by anyone of authority.
>
> 17. In the absence of such evidence, we hold that it cannot be said that there was affirmative evidence upon which the judge could have been satisfied beyond reasonable doubt that the admission 'was not induced by any promise of favour or advantage or by use of fear threat or pressure by or an [sic] behalf of a person in authority. Failure to lead such evidence meant that, the condition required prior to the introduction of the alleged admission into evidence was not met.
>
> 18. The trial judge did not direct his mind to the requirement of section 88 of the Evidence Act. He permitted the prosecution to introduce the alleged admission into evidence without satisfying that provision of the section."

[21] Mr Sampson submitted that, as in **Matu**, section 90(2) was not satisfied by the prosecution in this case. On this basis, there being no evidence other than the statement which she was alleged to have made against the appellant, we were invited to quash her conviction.

[22] The learned Director submitted that the evidence led by the prosecution as to the circumstances surrounding the making of the oral statement were sufficient to satisfy the requirements of section 90(2). It was submitted further that the absence of an inducement in this context may be proved, not only by the direct testimony of a witness, but also by the circumstances leading up to the admission. In this case, it was submitted, there was nothing in the evidence of what transpired immediately before the appellant allegedly made the statement to suggest that it was extracted by an inducement or by the use of any form of intimidation.

[23] In seeking to distinguish **Matu**, the Director pointed out that the environment in which the statement in that case was allegedly made was entirely different, in that the appellant was in police custody and he was under questioning at the police station, in

the presence of a number of police officers, in connection with the offence. In this case, on the other hand, Sergeant Zuniga's evidence did not lend itself to any question of impropriety. But in any event, the Director submitted, there was some evidence in this case, albeit taken from Sergeant Zuniga in re-examination, that clearly sufficed to satisfy the requirements of section 90(2).

[24] During the course of the argument, the learned President brought to counsel's attention the decision of this court in **Chrisbert Berry v R (Criminal Appeal No 12 of 1995**, judgment delivered 17 October 1995). In that case, during an investigation into a case of alleged rape, the appellant was interviewed by a police officer while he was in custody at the police station. He had gone to the police station as a result of a message received at his home that he should visit the Criminal Investigations Bureau. Having identified herself to the appellant, the officer, WDC Reyes, told him that a report had been received about him. The appellant's reply was, "Miss Reyes mek a explain everything to you I did have sex with the young lady and she agreed to it". WDC Reyes then cautioned the appellant and asked whether he would give her in writing what he had just told her. He answered no, after which she arrested and charged him.

[25] At the appellant's trial, he gave evidence on oath, in which he denied having had sexual intercourse with the complainant, but said nothing about WDC Reyes' evidence of what he had told her.

[26] On appeal, renewing an unsuccessful submission made on his behalf at the trial, the appellant contended that the statement of which WDC Reyes gave evidence had been obtained in breach of the Judges' Rules, in that he was in custody and had not been cautioned before he made it. While it was conceded that, even if the statement had been obtained in breach of the Judges' Rules, it might nonetheless be admitted if it was considered to be voluntary, the appellant complained that the trial judge had failed (i) to consider whether it had been voluntarily made; and (ii) to warn the jury that they were not to act on it unless they were satisfied as to its voluntariness.

[27] The court rejected the appellant's contention that the case fell within any of the Judges' Rules which call for a caution in certain circumstances. Given the way in which the appellant had come to be at the police station, the court considered that the applicable rule was rule 1, which allowed a police officer endeavouring to discover the author of a crime to put questions in respect of it to any person, whether a suspect or not, from whom the officer thinks that useful information may be obtained. The court also noted that the appellant had made no reference in his testimony to WDC Reyes' evidence of his oral statement, with the observation that "[t]here is not the slightest evidence that it was not voluntary".

[28] It is true that in **Berry**, as Mr Sampson was quite properly anxious to point out, the court was considering an alleged breach of the Judges' Rules, which do not have the force of law, and not section 90, which obviously does. But what is significant about the case, in our view, is that there was absolutely no suggestion, in either the submissions or in the judgment of the court that, on the facts of that case, in which there was no challenge at all as to the voluntariness of the statement, section 90 was nevertheless required to be satisfied by some kind of formal procedure akin to a *voir dire*.

[29] In **Adjodha v The State of Trinidad & Tobago [1981] 2 All ER 183**, the Privy Council was concerned with the circumstances in which, in a case in which the prosecution relies on a confessional statement made by an accused person, it would be necessary for the trial judge to conduct a voir dire in the absence of the jury. The last of the four typical instructions considered by Lord Bridge (at page 202), who delivered the judgment of the Board, related to the case in which -

> "On the face of the evidence tendered or proposed to be tendered by the prosecution, there is no material capable of suggesting that the statement was other than voluntary. The defence is an absolute denial of the prosecution evidence. For example, if the prosecution rely upon oral statements, the defence case is simply that the interview never took place or that the incriminating answers were never given; in the case of a written statement, the defence case is that it is a forgery. In this situation no issue

> as to voluntariness can arise and hence no question of admissibility falls for the judge's decision. The issue of fact whether or not the statement was made by the accused is purely for the jury."

Conclusion on the appellant's ground of appeal

[30] It therefore seems to us to be clear that, in the absence of a challenge to the voluntariness of a self-inculpatory statement which is relied on by the prosecution, it is not necessary for the trial judge to conduct a *voir dire* in order to determine the admissibility of the statement. But, section 90(2) makes it equally clear, it nevertheless remains the duty of the prosecution, before the statement is received in evidence, to "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 in behalf of a person in authority". So how then, in a case such as this, in which there was no challenge to the voluntariness of the statement, is the judge to be satisfied that the requirements of section 90(2) have been met? The answer to this question will depend, in our view, on the particular circumstances of each case.

[32] In the usual case, it will be for the prosecution to lead evidence in examination-in-chief regarding the circumstances surrounding the making of the alleged statement, for the purpose of establishing to the judge's satisfaction that, as section 90(2) requires, it was not induced by any promise of favour or advantage or by the use of fear, threat or pressure by or on behalf of any person in authority. It is by this means, in our view, that what Mottley JA referred to in **Matu** as "the appropriate evidential foundation for the receiving of [the] statement into evidence" will have been laid, prior to the introduction of the statement in evidence. In the absence of any challenge to the statement's admissibility, no formal ruling will be required, once such evidence has been given in a manner that enables the judge to be satisfied that the requirements of section 90(2) have been met.

[33] There can be no question (and the Director did not suggest otherwise) that this is the preferred approach and the one which ought to have been adopted in this case. But

we are also clearly of the view that, despite the fact that counsel for the prosecution did not adopt this approach in her examination-in-chief of Sergeant Zuniga, this was a case in which affirmative proof of the voluntariness of the statement allegedly made by the appellant was available from all the circumstances described by him. As the learned Director pointed out, Sergeant Zuniga gave evidence of exactly what had taken place immediately before the admission was made; and it was clear from that evidence that there was nothing done by him that could amount to an inducement or intimidation of any kind. On that evidence, the statement attributed to the appellant by Sergeant Zuniga was plainly unprompted and spontaneous. In these circumstances, in the absence of any suggestion that it was not, Lord J was in our judgment justified in proceeding on the basis that the statutory conditions of its admissibility had been met.

[34] In coming to this conclusion, we must make it clear that we are not to be taken as departing from **Matu** in any way. The appellant in that case was in police custody and under questioning by a group of four police officers. It does not appear from Mottley JA's judgment that he was cautioned before making the statement. Unlike in the instant case, where the requirements of section 90(2) were amply supplied by the surrounding circumstances, it was those very circumstances which obviously demanded a more rigorous approach by the prosecution to the satisfaction of those requirements in **Matu**.

[35] And finally on this point, we cannot entirely discount the evidence which was belatedly elicited from Sergeant Zuniga by Crown counsel in re-examination. That evidence, which was not controverted in any way, explicitly established the voluntariness of the statement made by the appellant. Because this evidence emerged long after the evidence of the appellant's alleged admission had been given, it cannot be relied on in satisfaction of section 90(2). But it might have provided a basis, it seems to us, for the application in this case of the proviso to section 30(1) of the Court of Appeal Act, had we found it necessary to do so on this point.

[36] We have therefore come to the conclusion that the appellant's challenge to the verdict of the jury cannot succeed on the ground put forward on her behalf.

Further concerns and additional submissions

[37] However, while the judgment of the court was under consideration, we were detained by at least four further concerns arising from the judge's summing up to the jury. First, whether the jury should have been warned of the dangers of relying on an oral statement as the basis for a conviction and, if so, whether they were in fact so warned. Second, whether the judge's directions to the jury on the *mens rea* for the offence of murder were correct. Third, whether the judge, who gave a standard *Turnbull* warning, ought to have done so, in circumstances where the defence did not raise, and expressly informed the judge that it was not raising, identification as an issue. And fourth, the propriety of the judge's direction to the jury at the very end of the summing-up, that, if they were not sure that the appellant was guilty of murder or manslaughter, then they "may also return a verdict of Not Guilty on each charge" (emphasis supplied).

[38] We were led by these concerns to request through the Registrar additional submissions from counsel on them, and these were duly supplied by Mr Sampson and the Director on 10 and 30 December 2013 respectively.

[39] On the first issue, Mr Sampson submitted that, there having been no evidence implicating the appellant other than the alleged oral statement, the judge's failure to issue a warning was "fatal to the safety of the conviction". Mr Sampson did not address the second issue at all, but, on the third, he submitted that the judge's directions on identification were "most erroneous, prejudicial, and unfair" to the appellant. The direction that the case against the appellant depended "to a large extent on the correctness of the identification of her which may be mistaken", could only have "confused the jury into believing that this was factually so". Mr Sampson's position was that it was these unnecessary directions on identification which "sealed the fate of the appellant, as the judge fingered her [as] having caused the harm". And this error was aggravated, Mr Sampson submitted finally, addressing the fourth issue raised by the court, by the judge telling the jury that, if they were unsure of the appellant's guilt in

respect of murder or manslaughter, they "may return a verdict of not guilty of each charge".

[40] On the first issue, the learned Director regarded it as "unarguable" that, in a case in which evidence of an oral admission is the only evidence connecting the accused to the offence, the jury must be warned of the dangers of convicting on that evidence. She also conceded that no such direction had been given by the judge in this case. However, the Director submitted, the real issue in the case was whether Sergeant Zuniga's evidence of what the appellant had told him was credible and the judge did alert the jury to the matters in the case which affected his credibility, such as the fact that Ms Tucker, who was present at the time and standing close to the appellant, did not hear her say the words attributed to her by Sergeant Zuniga. The jury clearly accepted his evidence and, it was submitted, even if the judge had given a specific warning, they would have come to the same conclusion. On the second issue, the Director pointed out that the trial judge's directions as to the *mens rea* required for murder were in almost identical terms to the directions given by the same judge in **Glenford Bermudez v R (Criminal Appeal No 19 of 2011**, judgment delivered 1 November 2013), which were held by this court to amount to be misdirections. However, the Director submitted, the evidence for the prosecution was such that, even if properly directed, the jury would inevitably have come to the conclusion that the appellant intended to kill the deceased, particularly bearing in mind that they were also directed as to the lesser offence of manslaughter arising from a lack of intention to kill. On the third issue, the Director accepted that the judge's directions on identification were "clearly unnecessary". But she submitted that they could not have caused any prejudice to the appellant, as the jury could have been in no doubt that the only evidence linking the appellant to the offence was the statement allegedly made by her to Sergeant Zuniga. And finally, on the fourth issue, the Director accepted that the judge's use of the word "may" in the context of what the jury's duty if they were not sure of the appellant's guilt was an "inaccurate use of language". However, she pointed out, the judge had more than once during the course of the summing up given the jury the correct direction that, if they were not sure of the appellant's guilt, then their verdict "must be not guilty". In the

circumstances, it was submitted, the jury could not have been misled by what the judge said at the end.

Discussion on the further concerns

The first issue

[41] On the first issue, it is true that the judge did tell the jury more than once that it was for them to decide whether the appellant made the statement and, if so, whether it was true. Thus, he told them the following:

> "Members of the jury the defence's reply and case is that she did not make any confession/admission and that it has been fabricated.
>
> In deciding whether you can safely rely upon the admission or confession you must decide two issues –
>
> (1) Did the defendant in fact make the admission/confession?
>
> If you are not sure that she did, you should ignore it.
>
> If you are sure that she did make the confession then go to the second question
>
> (2) Are you sure that the admission/confession is true?
>
> When deciding this you should have regard to all the circumstances in which it came to be made and consider whether there were any circumstances which might cast doubt upon its reliability.
>
> You should decide whether it was made voluntarily, or was made, or may have been made as a result of oppression or other circumstances.
>
> You should also have regard to the contents of the admission itself and consider whether the defendant/accused appears to have made admissions to matters which cannot be true or could be true according to the evidence presented to you; and only according to the evidence.
>
> Then it is for you to assess what weight should be given to the admission if any.
>
> If you are not sure for whatever reasons that the admission is true you must disregard it.

> If on the other hand you are sure that it is true you may rely on it.
>
> This decision I leave to you as the judges of the facts."

(And again, closer to the end of the summing up, the judge reminded the jury that the appellant had denied making the statement, that Ms Tucker did not hear her make it and that it was a matter for them "whether you accept if it is true that she did say these words and that she did cause burns to the deceased".)

[42] In our view, these directions were unsatisfactory in at least two respects. The first relates to the judge's repeated characterisation of the statement allegedly made by the appellant as an "admission/confession" (see para [39] above). As this court also had occasion to point out (in relation to a summing up by the same judge) in **Bermudez** (at para [8]**)** –

> "…the finding as to whether a statement…amounts to a confession is one for the jury and not for the judge. Repeatedly to tell a jury that such a statement is in fact a confession is unnecessarily to imperil the fairness of a trial."

[43] We specifically adopt and repeat these words in this judgment, in the fervent hope that the judge's lapse in this regard, which now shows clear signs of becoming a habit, will not recur.

[44] Perhaps more substantially for present purposes, it is clear, as the learned Director readily conceded, that the judge did not in terms warn the jury of the dangers of convicting on the strength only of the appellant's oral statement. The question of the need for such a warning in an appropriate case was discussed by the Board, in a judgment delivered by Lord Kerr, in **Benjamin & Ganga v The State of Trinidad & Tobago [2012] UKPC 8**, (paras 23-27). The oral statement made by one of the appellants in that case had been followed by a written statement, which was eventually admitted in evidence at his trial. The trial judge left the oral statement to the jury simply as a matter for their consideration and the Court of Appeal of Trinidad & Tobago

considered that the judge's direction on this issue was inadequate. Their conclusion was based on a consideration of earlier decisions of the Court of Appeal in which it had been held that “in some cases juries need to be warned to be cautious in acting upon alleged confessions, especially if they are not in writing" (per Wooding CJ in **Belcon v R (1963) 5 WIR 526, 531**; see also **Frankie Boodram v The State (**Cr App No 17 of 2003), in which Sharma CJ gave as the rationale for such caution as “the inherent dangers of such evidence and how difficult it is to disprove"). Against this background, Lord Kerr said this (at para 26):

> “It appears to the Board that the question whether a warning is required about the dangers of relying on an oral statement as a basis for conviction must depend heavily on the particular facts of an individual case. Obviously, if this is the only evidence against an accused, there is plainly a need for caution, particularly if the statement has not been recorded contemporaneously and if it has not been verified in writing by the accused. But where the oral statement is but a minor part of the case against the defendant, a quite different position obtains. It would be wholly inapt, for instance, to tell a jury that they had to be very careful in attributing weight to an oral confession where an elaborate written statement (whose veracity was unchallenged) had been made by the accused.”

[45] Accordingly, in **Benjamin & Ganga**, where the appellant’s written statement had been admitted in evidence, the Board considered (at para 27) that it would have been potentially misleading for the judge “[t]o single out the oral statement as deserving of especial care”. But it seems to us that the instant case stands on a wholly different footing from that case. In this case, the oral statement allegedly made by the appellant, in addition to being substantially the only evidence implicating her in the killing of the deceased, was neither recorded contemporaneously nor verified in writing by her. In our judgment, therefore, this was a case in which an explicit warning to the jury as to the need for caution in acting on the oral statement of the appellant was clearly called for. In the circumstances, we cannot be satisfied, as the Director asks us to be, that the jury would inevitably have come to the same conclusion had they had the benefit of such a warning.

The second issue

[46] Turning now to the issue of the directions on the *mens rea* required for murder, the judge dealt with this in the summing up at several places. He started out by telling the jury this:

> "And here members of the jury you must find in this case as judges of the facts, you must find on the evidence that at the critical time when the harm (e.g. the using of the accelerant and the open flame) either together or simultaneously (eg) when Orlando Vasquez was burnt or caught afire and burnt to 70% of his body, the accused had the specific intention to kill Orlando Vasquez.
>
> Now an intention, members of the jury is a state of the mind, and this can be ascertained.
>
> This can be done by drawing inferences from the evidence before you.
>
> In respect of the accused you should consider what the accused did or did not do on the day or night in question the 31st December, 2008.
>
> What she said if anything before or thereafter.
>
> What she did immediately before, during and thereafter on the 31st December, 2008.
>
> So members of the jury intention is not capable of any positive proof but where intention is an essential ingredient in an offence, as here it must be proved like any other fact in the case.
>
> So the way to do this is as I outlined above, the only practical way of proving an intention is therefore to infer it from her words and her conduct at the time (e.g. the night of the 31st December, 2008).
>
> So in the absence of direct evidence to the contrary, you are entitled to regard this accused as a reasonable woman, that is to say an ordinary responsible person, capable of reasoning.
>
> In order then to discover her intention you look to what she did or said on the 31st December, 2008.
>
> **If you accept that she did do or said [sic] anything, then ask whether as an ordinary responsible person, she must have known that death or really serious bodily harm would result from her actions.**

If you find that she must have known, then you may infer that she intended the result.

And this would be satisfactory proof of the intention required to establish the charge of murder.

The result is that it is the actual intention of the accused that you are trying to discover.

So you must take into account any evidence given by the accused explaining her intention.

And then on the totality of the evidence in this case; you can come to your decision whether the required intention has been proved or not.

Members of the jury Section 9 of our Criminal Code states that you are not bound to infer an intention to kill from the mere fact that the killing was in your opinion a natural and probably result of the accused act.

This is relevant to the question of intent, and you will have to take it into account when considering all the evidence and the proper inferences to be drawn from all the evidence before you.

Now the law requires that you must be sure that when the accused did the act of harm, she intended to kill Orlando Vasquez if you so accept.

So you must be sure that when Veola Pook harmed Orlando Vasquez she had the requisite or specific intention to kill him, that is the law.

Now as I said you may gather or find the intention of the accused to kill Orlando Vasquez; if you so accept that she did have that intention from any number of circumstances in the case (eg) you may wish to draw the inferences from the whole of the evidence before you, or only certain of the evidence of the prosecution, I leave that to you.

And so you may come to your decision whether the required intention has been proved or not and this again I leave to you to decide as you see fit." (Emphasis supplied.)

[47] Returning to the question later in the summing up, the judge added this:

"**The prosecution is asking you to infer and find that at that instance [sic] the accused intended the result of her act, and that intention was to kill him (Orlando Vasquez) that is if you so accept the evidence presented by the prosecution.**

> The prosecution is also saying it is inviting you the jury if you so accept the evidence to say that the accused intention in this case could only be to cause his (Orlando Vasquez's) death." (Emphasis supplied.)

[48] And then, revisiting the matter of intention one last time, the judge said the following:

> "And so you may come to your decision whether the required intention has been proved or not and this again I leave to you to decide as you see fit.
>
> In respect of the accused you should consider what the accused did or did not do on the day or night in question the 31st December, 2008.
>
> What she said if anything before or thereafter.
>
> What she did immediately before, during and thereafter on the 31st December, 2008.
>
> So members of the jury intention is not capable of any positive proof but where intention is an essential ingredient in an offence, as here it must be proved like any other fact in the case.
>
> So the way to do this is as I outlined above, the only practical way of proving an intention is therefore to infer it from her words and her conduct at the time (e.g. the night of the 31st December, 2008).
>
> So in the absence of direct evidence to the contrary, you are entitled to regard this accused as a reasonable woman, that is to say an ordinary responsible person, capable of reasoning.
>
> In order then to discover her intention you look to what she did or said on the 31st December, 2008.
>
> **If you accept that she did do or said anything, then ask whether as an ordinary responsible person, she must have known that death or really serious bodily harm would result from her actions.**
>
> **If you find that she must have known, then you may infer that she intended the result.**
>
> And this would be satisfactory proof of the intention required to establish the charge of murder." (Emphasis supplied.)

[49] While, as the Director correctly observed, some correct directions were given by the judge in the passages quoted above "at intervals" (as, for instance, "that it is the actual intention of the accused that you are trying to discover", and also that "you must be sure that when Veola Pook harmed Orlando Vasquez she had the requisite or specific intention to kill him, that is the law"), several others were plainly wrong.

[50] First, there is the judge's direction to the jury (in the first of the two passages highlighted at para [46] above) that it was open to them to find that the appellant had the necessary intention to murder if they found that, as an ordinary responsible person, she must have known that death "or really serious bodily harm" would result from her actions. As the learned President observed of the virtually identical direction given by the same judge in **Bermudez** (at para [10]), this was "an astonishing direction", given the well-known fact that, in this jurisdiction, the required intention for the offence of murder is the intention to kill (see also **Clarence Hemmans v R**, **Criminal Appeal No. 6 of 2010**, judgment delivered 28 June 2013, para [20]).

[49] Next there was the judge's direction to the jury (in the second passage highlighted at para [46] above) that they could "gather or find the intention of the accused to kill…from any number of circumstances in the case (eg) you may wish to draw the inferences from the whole of the evidence before you, or only certain of the evidence of the prosecution". As the learned President said of the – again – virtually identical direction in **Bermudez** (at para [14]), "[t]he Court knows of no legal principle which would support the astounding proposition that such a novel option exists".

[50] And lastly, for present purposes at any rate, there was the judge's direction to the jury (having reminded them – correctly - that section 9 of the Criminal Code states "that you are not bound to infer an intention to kill from the mere fact that the killing was in your opinion a natural and probably result of the accused act") that if they found from anything said or done by the appellant that, as an ordinary responsible person, she must have known that death or really serious bodily harm would result from her actions, it was open to them to infer that she intended the result (see the passages highlighted

at paras [47] and [48] above). These contradictory directions were in our view, at the very least, misleading and potentially confusing (as this court found the very similar directions of the judge in **Bermudez** to be – see para [19]).

[51] Taking all of these matters together – and recognising, as the Director pointed out, that the judge did direct the jury on the requirements of the lesser offence of manslaughter – we find ourselves again unable to say that, had the jury been properly directed on the question of intention, they would inevitably have convicted.

The third issue

[52] The third issue relates to the judge's directions on identification. The topic was introduced in this way:

> "Members of the jury you also have to decide whether or not on the evidence before the court was there a proper identification of the accused by the witnesses.
>
> Now in this trial the case against the accused depends to a large extent on the correctness of the identification of her which may be mistaken.
>
> I must therefore warn you of the special need for caution before convicting the accused on the reliance of those evidences, of those identification alone.
>
> This is so members of the jury because it is possible for honest witnesses to make mistaken identification.
>
> And members of the jury I have to tell you that there have been wrongful convictions in the past as a result of such mistakes.
>
> So I say to you that you have to be careful in considering whether the identifications are proper ones or not.
>
> You should therefore examine carefully the circumstances under which the identification were [sic] made by the witnesses (eg)
>
> (1) How long did they have the person they say the accused was under observation?
>
> (2) At what distance?

(3) In what light?"

[53] The judge then went through the evidence in some detail, discussing with the jury the state of the light; how long the witnesses had had the appellant under observation; whether anything interfered with their observation of the appellant; whether the witnesses had ever seen the appellant before; and, if so, how often had they seen her. Having completed this exercise, the judge then repeated his earlier warning, saying "…I again warn you that there is a great need to approach this identification with great care when considering the evidence so brought out under the above enumerated circumstances". And he was not yet done:

> "Members of the jury the above evidences are the circumstances in which the prosecution is saying it was the accused Veola Pook who caused the harm which resulted in the death of Orlando Vasquez on the 2nd January, 2009.
>
> And the prosecution is inviting you to look at all the evidence together and it is inviting you to come to the conclusion if you so accept the evidence presented and if you arrive at the conclusion that it was Veola Pook who caused the harm which resulted in the death of Orlando Vasquez on the 2nd January, 2009. This matter of course I leave to you to decide as you see fit.
>
> Members of the jury I must also tell you that mistakes of close friends and even of relatives are sometimes made.
>
> And so you must be sure that it was the accused who was seen by the witness for the prosecution on the 31st December, 2008 at Rancho Dolores Village in the Belize District.
>
> But as I said the prosecution is asking you to consider all the evidence and it is requesting you, if you so find to accept its evidence and also to find from the evidence that it was the accused Veola Pook who caused the harm to Orlando Vasquez (the deceased).
>
> This I leave to you to decide as you deem fit."

[54] In our view, these directions were, as both counsel submitted, completely unnecessary. Identification was never an issue in the case It was common ground on

both the case for the prosecution and for the defence that the appellant was at the material time either in or in the vicinity of her house at Rancho Dolores Village. The only issue for the jury's consideration was whether the fire which engulfed the deceased and ultimately took his life was started by the appellant, as the prosecution alleged. And then, assuming that confirmation that identification was not in issue was needed (as it surely was not), it was provided in explicit terms by both counsel immediately after the judge had completed his summing up, when the question of whether additional directions were required from the judge was being canvassed with Crown counsel (Ms Grant) and counsel for the appellant (Mr Elrington):

> "MS. GRANT: And also that the issue of identification was not an issue for the defence, it was never contested whether or not the accused woman was identified, it was not an issue that was raised by the defence, it was not challenged by the defence.
>
> MR. ELRINGTON: We will agree with that, that part we will agree with.
>
> THE COURT: So you have raised it and the defence is accepting it.
>
> MR. ELRINGTON: We are not relying; we're not saying that we raised anything about identification."

[55] And, even then, the judge's only comment was, "So members of the jury the issue of identification was not raised but I had raise [sic] it when I was dealing with identification at the 3rd element for your purpose so that you can go through the whole evidence…" (It might, of course, have been possible for the judge to have, even at this late stage, expressly corrected what he had already told the jury about the importance of identification to the case, though we tend to doubt whether such a correction, even if properly and carefully made, could have been effective to dispel the impression so clearly conveyed to the jury in this case: see the discussion at para [12] of **Bermudez** as to how a judge should go about correcting an erroneous direction given at an earlier stage of a summing up.)

[56] So the only remaining question for the court on this issue is whether these unnecessary directions on identification were prejudicial and unfair to the appellant, as

Mr Sampson contended; or whether, because the jury must have appreciated that the only evidence linking the appellant to the offence was the statement allegedly made by her to Sergeant Zuniga, they could have caused no prejudice to the appellant, as the Director submitted.

[57] It is, of course, conceivable that uncalled for directions on identification such as were given in this case could work in a defendant's favour with the jury, by diverting their attention from the true issue in a case and leading them to acquit on the basis that the exacting standards on identification demanded by the *Turnbull* guidelines had not been met. But it is clear from the jury's verdict in this case that this did not happen. What is also conceivable, and perhaps more likely, is that the jury could have been misled by these directions into thinking that, once the *Turnbull* bar had been cleared, the appellant's guilt was established. On this question, it is in our view pointless to speculate. It suffices to say, we think, that when this issue is added to the other unsatisfactory features of the judge's summing up in this case, it serves only to fortify us in the clear view to which we have come that the appellant did not have a fair trial.

The fourth issue

[58] And, on that note, there is really no need to say too much on the fourth issue: a direction to the jury that, if they are not sure from the evidence for the prosecution that the defendant is guilty of the offence charged or any lesser or alternative offence that arises in the case, they may acquit, is patently wrong. It is true, as the Director quite properly reminded us, that the judge did at various other points in the summing up direct the jury that, if the prosecution's evidence did not satisfy them so that they felt sure of the appellant's guilt, their verdict must be not guilty. But it is surely troubling, to put it mildly, that, in his very last statement to the jury before inviting them to consider their verdict, what the judge said was this:

> "Now if you don't feel sure on all evidence of the prosecution that the accused is guilty of any of the charges (eg) murder or manslaughter. Then you may also return a verdict of Not Guilty on each charge. However that I

leave with you to decide as you deem fit based on the whole of the evidence placed before you."

Conclusion on the further concerns

[59] As will have already become clear, we consider the concerns broached by the court to be substantial and, in the result, unanswerable. Accordingly, as in **Bermudez** (para [23]), we are of the view that "…the cumulative effect of the…judicial errors in the trial below [is] sufficiently serious to justify the firm conclusion that the appellant was denied a fair trial, the subject of a constitutional right whose breach must inevitably result in the quashing of a relevant conviction".

Disposal of the appeal

[60] The appeal is therefore allowed. The appellant's conviction is quashed, the sentence is set aside and, in the interests of justice, a new trial is ordered.

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SOSA P

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MORRISON JA

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MENDES JA