

IN THE COURT OF APPEAL OF BELIZE AD 2025
CRIMINAL APPEAL NO 14 OF 2019

BETWEEN:

LEONARD NUNEZ

Appellant

and

THE KING

Respondent

Heard together with:

CRIMINAL APPEAL NO 15 OF 2019

BETWEEN:

HALLET KING

Appellant

and

THE KING

Respondent

Heard together with:

CRIMINAL APPLICATION NO 2 OF 2019

BETWEEN:

THE KING

Applicant

and

HALLET KING

Respondent

Heard together with:

CRIMINAL APPLICATION NO 3 OF 2019

BETWEEN:

THE KING

Applicant

and

LEONARD NUNEZ

Respondent

Before:

Honourable Mme. Justice Sandra Minott-Phillips KC	Justice of Appeal
Honourable Mr. Justice Peter I Foster KC	Justice of Appeal
Honourable Mme. Justice Michelle Arana	Justice of Appeal

Appearances:

Mr. Bryan Neal for Mr. Leonard Nunez
Mr. Arthur Saldivar for Mr. Hallet King
Director of Public Prosecutions Mrs. Cheryl Lynn Vidal SC for the Crown

2023: 24 June;
2025: 25 February.

JUDGMENT

[1] **Foster J.A.:** Mr. Leonard Nunez and Mr. Hallet King (together “the appellants”), were each convicted of a single count of manslaughter following a jury trial on 15th July 2019 and were each sentenced to nine (9) months imprisonment on 13th August 2019. The case against the appellants proceeded on the basis of joint enterprise. They have both appealed against their conviction alleging misdirection by the trial judge. The Crown has appealed against their sentences, contending that the sentences imposed were unduly lenient. The brief facts of the case are now set out.

Background Facts

[2] The prosecution’s case was that Mr. Hilbert Sotz was taken into custody on the morning of 8th June 2015, by Mr. Leonard Nunez, a police constable assigned to the Criminal Investigation Branch (“CIB”) of the Caye Caulker Police Formation, in connection with a burglary. Later that day, Mr. Sotz was taken from the cell block by Mr. Nunez to the CIB Office, where they met Mr. Hallet King, another police constable attached to the CIB Office in Caye Caulker.

- [3] The prosecution led evidence from Manuel Guerra who testified that he heard Mr. Sotz, whom he also knew as “Ketchi”, “bawling and shouting” while in the room with the police officers. His evidence was that he heard “like a slapping” and heard Mr. Nunez asking where the items were. He then heard Mr. Sotz bawling and begging “*please stop, please stop*” and then everything went silent. He testified that he next saw Mr. Nunez and Mr. King taking Mr. Sotz out of the Station. He appeared unconscious.
- [4] The prosecution led evidence that Mr. Sotz was placed on a golf cart by the officers and taken to the Caye Caulker Health Center. No treatment was provided at the Centre as Mr. Sotz was pronounced dead by the attending doctor, Dr. Jorge Diaz.
- [5] The parents of Mr. Sotz, Saturnio Sotz and Carmelina Sotz, testified that Mr. Sotz did not suffer from any illnesses prior to his death. Dr. Mario Estradabran, forensic examiner, testified that the cause of death was head trauma which led to blood clots which ultimately interfered with the functioning of the heart. The evidence was that this trauma would have occurred no more than two (2) to three (3) hours prior to his death.
- [6] The case for the Crown was therefore entirely circumstantial, based on the facts that Mr. Sotz, a person without a history of illness, was in the room with the officers, was heard being questioned, was heard shouting and making pleas to stop, then was taken out of the room unconscious, by the two officers, and upon arrival at the Health Center, was declared dead, this death later opined as having been caused by head trauma, not more than two to three hours prior his death.

The Appellants’ case

- [7] The appellants gave a different narrative of events. Mr. Nunez detained Mr. Sotz from the Caye Caulker Water Taxi area on 8th June 2015. He said that he smelled alcohol on Mr. Sotz and that he was acting “in a boisterous way”. As a result, he held him by the waist of his pants and escorted him to the police station

in Caye Caulker. Mr. Sotz started to curse and behave disorderly inside the police station while being processed. He placed Mr. Sotz in the cell block at 11:00 am with about nine (9) other detainees and had no contact with him until about 3:00 pm on that day when he took him out of the CIB office.

- [8] According to Mr. Nunez, Mr. Sotz was still speaking in a loud manner and was cursing the police when they tried to interview him about certain burglaries for which he was a suspect. While in the CIB office, Mr. Sotz started to complain about breathing problems in the presence of himself and Officer Hallet King. The appellants took Mr. Sotz to the Polyclinic because of his complaint about breathing problems. He was transported in a golf cart. When they left the station, Mr. Sotz was still alive and in fact walked to the golf cart. He was, however, later pronounced dead at the Polyclinic. Mr. Nunez stated that he returned to the police station and informed the officer in charge of the station (Corporal Palma) of Mr. Sotz's death and also informed Mr. Sotz's mother.

The Appeal

- [9] The appellants appealed against their conviction of manslaughter alleging several grounds upon which the learned judge's direction to the jury is said to have occasioned a miscarriage of justice. The grounds of appeal filed by Mr. Nunez are six (6) in number and are as follows:

1. The learned trial judge erred in his directions on secondary participation in manslaughter to the extent that the jury was directed that they could convict Mr. Nunez as a secondary party without proof of intention of his co-accused.
2. The learned trial judge erred in his directions to the jury on the burden of proof required to find Mr. Nunez guilty as a secondary participant.
3. The learned trial judge erred in that he did not properly direct the jury on the law relevant to circumstantial evidence.

4. The learned trial judge did not address the jury, regarding the issue of causation.
5. The learned judge erred in not withdrawing the case from the jury, in that the jury was asked to come to a verdict by considering evidence that they should not have considered.

[10] The sixth ground was the catch-all ground that as a result of the omissions of the learned trial judge in his summation, his conviction is unreasonable and should therefore be quashed.

[11] Mr. King, in his notice of appeal, sought to challenge his conviction on the following grounds:

1. The learned trial judge did not properly direct the jury on the law of inferences.
2. The learned trial judge did not properly distinguish between the Appellant's legal duty to investigate and the Crown's assertion of joint enterprise.
3. The learned trial judge did not address the jury on the issue of causation.
4. The learned trial judge allowed prejudicial evidence to be led before the jury.
5. The learned trial judge failed to give the jury a caution when dealing with the evidence of Manuel Guerra.

[12] The grounds of appeal contained in both appellants' notice of appeal pivot on the judge's direction to the jury in his summation. In our view, some grounds of appeal overlap to a significant extent and where they do, we will conveniently deal with them together.

[13] An examination of the grounds commences with some general observations regarding the trial judge's summation. It is the law as set out in **Jay Marie Chin v The Queen**¹ that the trial judge's omission to state or do certain things could be fatal only if it undermines the safety of the conviction. This Court in **Virgilio Banegas v the King**² accepted this to be an accurate statement of the law and it bears repeating that where a judge falls into error, the appellate court would only hold that the consequence of that error should result in the quashing of the conviction if the error undermines the safety of the conviction. Indeed, it is possible to say that the judge should have spelled matters out more fully or in a different fashion, but what an appellate tribunal must do is to look at the thrust of the directions and consider if they have adequately put the several issues before the jury and given them a proper explanation of their task in relation to those which they have to decide.³ In particular, the Court must determine whether, if there has been any defect, there has been any miscarriage of justice which requires their intervention.⁴

[14] We are guided by those principles. We also pay particular regard to the well-known principle that a summation has to be looked at as a whole, as hardly if at all, there will be a perfect summing up.⁵

[15] At the hearing of the appeal, the Court, on its own motion, invited counsel to make submissions on an issue which emerged from the summation – the adequacy of the judge's direction to the jury on the burden and standard of proof. At the commencement of the summing up to the jury, the judge stated:

“Now I am going to address what is called the burden and standard of proof. It is for the Prosecution and the Prosecution alone to prove anything to you during the course of this trial. The Defendants, singly or jointly, do not have to prove a single thing to you. They don't have to prove that they are innocent. They do not have to prove that they didn't do anything. It is for

¹ANUHCRA2012/0005 (delivered 5th April 2017, unreported).

² Belize Criminal Appeal No. 6 of 2020.

³ Daniel Dick Trimmingham v The Queen at paragraph 12.

⁴ Ibid.

⁵ Joseph Senhouse v The State DOMHCRA2015/0009; Carlton Bedminster, Careem Bedminster v the Queen ANUHCRA2008/0002, ANUHCRA2008/00020003.

the Prosecution to **satisfy you** that they are guilty of the offence as charged. You giving a verdict of guilty is the only thing that can change the status that they now enjoy by virtue of the Constitution that they are innocent because a man is innocent until he either pleads guilty or is proven to be guilty. But you must be sure in your minds that one or the other or both of the defendants are guilty before you say they are guilty.

Again, nobody has use the term really during the course of their addresses but I know we live in a society and we hear expressions on TV and so forth and these things might be on your mind and you hear how, you must prove beyond reasonable doubt. What we're saying is that **the standard of proof is really one so that you are sure**. You must be sure in order to say that any of the defendants are guilty.

So the formula is quite easy, if you're sure, in other words, you weren't there but based on the evidence that you have heard when you reason it out, you are confident that they committed an offence, well then, you are entitled to say guilty. Equally, if you are sure that they didn't do anything at all, they didn't commit the offence, your verdict has to be not guilty. If you are unsure what to believe, whether they are guilty or not guilty, your verdict has to be not guilty because always it is for the Prosecution to prove to you that they are guilty. **So if you are unsure as to what to believe, that means that the Prosecution has not met the threshold that the law requires them to, which is to satisfy you so that you are sure that they committed the offence as charged.**

Now what is the offence for which these men are charged? They are charged with the offence of one count of manslaughter, which says, it is manslaughter, contrary to section 116(1) read along with section 108(1)(b) of the Criminal Code of the Substantive Laws of Belize."

[16] However, later on in the summation, the judge stated

"I told you earlier that they have nothing to prove, that the burden of proof is on the Prosecution, if you disbelieve their story, you just have to cast that aside. You can only find them guilty if you are convinced on the evidence from the Prosecution that they are guilty."

[17] At pages 446 - 447, the judge stated:

"So if you don't give might weigh to Guerra's testimony that is the end of the Crown's case. If you give **some weigh** to

Guerra's testimony, you would have to believe him and accept his testimony and follow all inferences. But if you don't follow all the inferences, then you would not be able to arrive at the conclusion that one or the other or both men are guilty. You with me on that?"

[18] Towards the end of the summation, the judge stated:

"If you are satisfied on the Crown's case, your verdict is guilty, right. If you're satisfied on all the inferences to drawn from the Crown's case it is guilty. It is only upon the Crown's case that you can return a verdict of guilty once they have satisfied you. If you have any doubts as to the Crown's case, it is not guilty."

...

"If you are satisfied with what the defendants have said to you, it is not guilty. So you can only come to a finding of guilt of having listen to the directions that I have given you. Having applied your minds to the facts before you, you are satisfied that these defendants, singly or jointly, cause the death of Hilbert Sotz by an unlawful act, alright, then you can say that one or the other or both are guilty."

...

"Now agreement to act jointly, need not be formal. It doesn't have to be structured, alright. It can be arrived at in a jiffy, with a knowing nod or a wink; an agreement can be formed to do anything but you have to be satisfied Madam Fore-Person, ladies and gentleman of the jury."

[19] On the invitation of Mr. Nunez's counsel at trial to clarify the burden of proof, the judge said the following:

"Now Madam Fore Person, ladies and gentleman of the jury, earlier in my address, I try to raise with you the issue as to what we often hear as the term as to the standard of proof being, some persons use the term beyond reasonable doubt. I have instead resorted to the term, prove so that you are sure, alright. You have to be satisfied, you have to be sure, you know, as to the finding of anything. I wouldn't seek to define it other than that, that once you are satisfied, so that you are sure, that is the standard of proof. If you entertain doubts, if you are uncertain, you're not sure, alright. If you have question marks, if you say, it's not I think so or I believe, no, it is certainty."

[20] Having considered the judge's summation as a whole, it is indubitable that the jury was properly directed on the standard and burden of proof. The judge in the introductory part of his summation made it clear that the jury ought only to find the appellants guilty of manslaughter if they felt sure of their guilt. While some criticism can be levelled regarding the language used by the judge, we are not satisfied that the judge's recitation of the relevant burden and standard obfuscated the jury's appreciation of the standard to be applied. Indeed, the judge could have spelt matters out more fully or in a different fashion. However, the appellate Court must look at the thrust of the directions and consider if they have adequately put the several issues before the jury. Furthermore, at the end of the judge's summation, the judge revisited the standard and burden of proof to be applied at the request of counsel. The judge properly explained to the jury the burden and standard of proof to be applied in this case.

[21] In the Eastern Caribbean Court of Appeal case of *Nelson Abraham v the Queen*,⁶ the Court considered a similar issue regarding the adequacy of the judge's directions on the burden of proof. In that case, the judge used the words "you must be convinced" "burden" (on the prosecution), and "prove their case", without more, at different parts of the summing up. Counsel conceded that an adequate and proper direction was given by the trial judge at the commencement and again at the end of her summing up. The Court rejected the argument that the learned judge should have gone on to repeat to the jury the standard required and that in not doing so, it was open for the jury to regard the standard to be on a balance of probabilities and not necessarily beyond a reasonable doubt and that they must have been confused as to what standard they should apply. Byron JA found that nowhere in the summing up was the standard of proof on a balance of probabilities mentioned, and the proper direction having been given both at the commencement and towards the end of the summing up, the jury must have understood that when the above directions were given that the standard of proof remained throughout beyond a reasonable doubt.

⁶ SLUHCRAP1991/004 (delivered 25th May 1992, unreported).

[22] We are therefore fortified in our view that the judge’s directions to the jury on the burden and standard of proof were adequate. We now turn to the specific contentions of Mr. Nunez.

The Nunez Appeal

Grounds 1 and 2 – The judge’s directions on secondary participation and intention

[23] The essence of the appellant’s complaint is that the judge did not at all address the jury on Mr. Nunez’s intention. Counsel for Mr. Nunez, Mr. Neal, argued that the learned judge made no mention of what intention would have been required on the part of Mr. Nunez to prove that he in fact intended to cause harm or that he was reckless as to whether any harm was committed. In his written submissions, Mr. Neal argued that section 9 of the **Criminal Code Act**⁷ provides for how intention is to be treated whether by judge alone or jury. He submitted that the learned trial judge did not, in his summation, deal with the issue of intention as it relates to the joint participation of Mr. Nunez and Mr. King.

[24] He referred the Court to page 416 of the Record of Appeal, where the judge in his summation stated:

“However, they are saying that these two men were acting together. The Crown has not sought to say that either Mr. Leonard Nunez who is the number 1 accused or Mr. Hallet King the number 2 accused is the principal or the secondary party.”

[25] Mr. Neal submitted that the trial judge erred in not providing the jury with a proper direction on the intention required to find Mr. Nunez guilty. He told the Court that without this, the jury inevitably came to an unjust result in that they were not properly guided and as such the verdict returned by them is unsafe.

[26] In response, the learned Director of Public Prosecutions (“DPP”), Mrs. Cheryl - Lynn Vidal, SC argued that the jury was not directed that they could convict Mr. Nunez as a secondary party without proof of intention of his co-accused. She

⁷ Chapter 101 of the Laws of Belize R.E. 2020.

submitted that there was no legal requirement for the prosecution to show which of the accused actually inflicted the harm on the victim as the Crown's case was that the two accused acted jointly in causing harm to the victim and that harm led to his death. In this regard, she relied on **Brown and Isaacs v The State**⁸ and **Robateau and Pipersburgh v The Queen**.⁹

[27] The learned DPP submitted that the prosecution was alleging a physical assault of Mr. Sotz. The defence of the appellant was that he had done nothing to the victim - the victim had merely started complaining about breathing problems and he was then taken to the Clinic. She further submitted that there was no issue as to whether the harm was intentional. The appellants did not raise accident or negligence, nor was either raised on the evidence. According to the learned DPP, the issues before the jury were therefore just as the judge directed them: did they accept the evidence of the doctor that the victim died from harm? Did they accept the evidence of the prosecution that that harm must have been caused either by the appellant acting alone or together with the other accused? In support of her contention, the learned DPP referred the Court to the following passages in the judge's summation:

"The second element is that the death was due to harm. Well, the evidence of the Pathologist points towards harm but the defence is saying well, that is what the doctor is saying. Nevertheless, although that there is this cause, it could come from a number of sources. It may not have been applied by anyone, moreso the defendants. So you are to make a determination as to whether or not it was harm inflicted by either the first defendant Leonard Nunez or the second defendant Hallet King or both of them acting together.

They also have to satisfy you that this harm was unlawful, in other words there was no legitimate reason for applying the harm. Now one may well think that if indeed harm was applied to a defendant, it would only be lawful if it is covered by some legal excuse, some lawful excuse, some justification in law. So the major thing for you to decide first of all is whether or not that harm, that death was due to harm and they are also suggesting to you by their allegation that the accused were acting together. I already addressed you on that, in that, it is up to you to determine if even though they acted, they cause some

⁸ [2003] UKPC 10.

⁹ Belize Criminal Appeals No. 14 and 16 of 2011.

harm, whether they acted singly or jointly or whether it was one or the other. It is up to you to look at the evidence and distill it and come to a finding.”¹⁰

[28] It is notable that after the judge ended his summing-up counsel for Mr. Nunez requested that the judge clarify for the jury the issue of *mens rea* in addition to the burden of proof. The judge at pages 447 and 448 then told the jury:

*“Now I know that during the course of the address that you heard on Friday, the issue of whether or not there was any intent on the part of the defendants was canvassed before you. The thing is that ordinarily crime or offences are divided into two aspects that the law used these options and unique terms, actus reus and mens rea. Actus reus just means the act. So in other words any action that is done. So for example, shooting a person, the actus reus is shooting. **The mens rea now is the intent. What was in the mind, what was operating in the mind; was there an intent?** What the defence is saying, is look, there was no intent to cause any harm to this guy, to the deceased Hilbert Sotz. They have pointed to the fact that look, while he was in their custody he experienced distress and we took him to the health center. So, there is no intent to cause him harm. The Crown of course will have a different spin on it and will be saying, look, --- you try now to cover up what you wanted to do. What do you make of it; what do you make of it? That is within your province to try to understand because, you see, you don't always know what a person is thinking or what they intended but you have to look at the totality of the evidence, of the surrounding circumstances. What did people do or say, how they behave? What is reasonable to you and what do you understand from looking at all of that evidence, alright. So it is within your province to look at the totality of the evidence because a person need not have intended the consequence but you have to look at what they did or didn't do because there are acts of omission and act of commission. And you try to understand what a person intended from the surrounding circumstances, alright.”*

[29] It seems to me that the judge explained to the jury the essence of the Crown's case and that of the appellants' regarding intention. The judge directed the jury on how intent ought to be decided in accordance with section 9 of the Criminal Code, considering the consequences of their conduct and the totality of the evidence from which intent may be inferred. It was for them to determine from

¹⁰ Pages 465 and 466 of the Record of appeal.

all the surrounding circumstances whether the appellants had the requisite intention. Indeed, it is usual for judges when directing on intent to at least direct the jury that they should consider what the defendant did and said before, at the time of and after the incident, and then to draw conclusions from these things.¹¹

[30] However, in our view, the judge was required to address the jury on the requisite intention, *mens rea*, for the offence of Manslaughter with which the appellants were charged. The judge fell into error by not going further to direct the jury that it was for the Crown to prove that either or both of the appellants had the requisite intention of causing death by unlawful harm. Nowhere in the summation was that made clear to the jury. It is perhaps for this reason that the judge was asked by defence counsel at the end of his summation to clarify the issue of *mens rea*. The judge, despite that invitation did not address the jury properly or at all on the requisite intent for the offence of Manslaughter.

[31] This is not to say that the judge was required to give an elaborate direction regarding the appellants' intention. Indeed, it is the law that as set out in **Danny Joseph vThe King**¹² that a trial judge's directions on intent should be kept as simple as possible so as to not confuse the jury. A simple direction inviting the jury to consider whether they were sure that the Appellants had intended to cause death of Mr. Sotz by unlawful harm would have been sufficient. Every offence charged of an accused during a trial engages the consideration of the burden of proof which falls on the prosecution to establish clearly the two elements of that offence, the *actus reus* and the *mens rea* in relation to the accused. It cannot be a cursory reference to *actus reus* and *mens rea*, but must be, in relation to *mens rea*, that the accused, based on the particular offence, intended the commission of that offence. There was no reference in the address of the judge to the jury regarding the intention of the particular accused or any of the appellants in the commission of the offence for which they were charged.

¹¹ Danny Joseph v the King SLUHCRAP2023/0003(delivered 26th July 2024, unreported).

¹² Ibid

Ground 3 - The judge's direction on circumstantial evidence

[32] On this ground, Mr. Neal's submitted that the learned trial judge erred in that he did not properly direct the jury on the law relevant to circumstantial evidence and did not address the jury on circumstantial evidence in accordance with the relevant principles enunciated in **Gregory August v the Queen**.¹³

[33] We do not find any merit in this submission. As the learned DPP rightly pointed out the judge did give directions in relation to the drawing of inferences and circumstantial evidence. At pages 409 to 410 of the Record of Appeal, the judge did direct the jury on the drawing of inferences. He stated:

“Now you may draw sensible conclusions from the evidence you have heard but you must not guess or speculate about anything that was not covered by the evidence. So you may draw an inference from a set of facts but don't speculate if there is no evidence on that, as to something completely out of the way, as to what, you know, title to the CSI kinds of thing, you know all these movies that kind of dominate all eyes these days. So if there is a logical sequence, you can draw a logical sequence from a set of facts but you can't just, boy a wonder if or suppose, none of that. Because for you to decide as well, you heard addresses from the Crown as well from Mr. Selgado on behalf of the defence and it is for you to decide whether you are persuaded by any of these speeches. If you are persuaded by what they have to say, you decide whether their point made are important and whether there is evidence that supports the argument that they have put before you and you can adopt their reasoning if you so desire or you can reject it.”

[34] Further, at pages 417 to 418, the judge stated:

“In this case, the Crown of course has not been able to produce any direct evidence to say that there was any joint enterprise. The Crown has not been able to produce that. What they are saying, they would like you to infer that that was the case by considering the totality of the circumstances. Because Mr. Hallet King and Mr. Nunez were present together in CIB room, because they jointly carried the person to the hospital,

¹³ [2018] CCJ 7 (AJ).

therefore, they're jointly responsible. That is the kind of way that they would like you to arrive to say that they both conducted, they did an unlawful act together."

[35] As we have said above, the complaint of Mr. Neal was that the summation was not in accordance with **Gregory August v Queen**, a decision of the Caribbean Court of Justice. In our view, **Gregory August** is similar to the case at bar only to the extent that the prosecution's case in both instances was based purely on circumstantial evidence or as the Court put it, the convictions were "founded on a tapestry of circumstantial evidence woven by the prosecution". A description of the nature and value of circumstantial evidence can be found at paragraph 32 of the judgment in **Gregory August**:

"Circumstantial evidence is particularly powerful when it proves a variety of different facts all of which point to the same conclusion...[it] 'works by cumulatively, in geometrical progression, eliminating other possibilities' and has been likened to a rope comprised of several cords:

'One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a strong conclusion of guilt with as much certainty as human affairs can require or admit of.'

[36] At paragraph 38, the Court stated:

"A case built on circumstantial evidence often amounts to an accumulation of what might otherwise be dismissed as happenstance. The nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant's guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant's guilt is proved beyond reasonable doubt. There was therefore a serious misdirection wholly in August's favour when the trial judge directed the jury that each strand of the circumstantial evidence required its own proof of August's guilt beyond reasonable doubt. It is not the individual strand that required proof beyond reasonable doubt, but the whole. The cogency of the inference of guilt therefore was built not on

any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence. Accordingly, the circumstantial evidence, as a whole, adduced by the prosecution pointed sufficiently to August's guilt to entitle the jury to convict him"

[37] It is notable that there have been pronouncements to the effect that the strength of circumstantial evidence derives from its combination. The following direction to a jury, approved in the New Zealand case of **Thomas v The Queen**,¹⁴ is a clear statement of the principle:

"... the law says that a jury may draw rational inferences from facts which it finds to have been proved, and a jury may ultimately find a verdict of guilty by this process of reasoning ... Now whilst each piece of evidence must be carefully examined, because that is the accused's right and that is your duty, the case is not decided by a series of separate and exclusive judgments on each item or by asking what does that by itself prove, or does it prove guilt? That is not the process at all. It is the cumulative effect. It is a consideration of the totality of the circumstances that is important."

[38] It follows that in a case such as the present, where the Crown relies on circumstantial evidence, there is no inflexible rule that requires a trial judge to give any formulaic direction on circumstantial evidence. We accept the pronouncement of Lord Caswell in **Daniel (Marlon), Archibald (Curtis), Garcia (Anino) and Marshall (Curtis) v The State**,¹⁵ that:

"It is normally sufficient, as in a case of circumstantial evidence, to direct the jury that they must be satisfied beyond reasonable doubt of the accused's guilt, and it is a matter for the trial judge whether the facts are such as to make a special direction necessary".

[39] The House of Lords noted in **McGreevy v Director of Public Prosecutions**¹⁶ that even when the case for the prosecution depended wholly on circumstantial evidence the essential duty of a judge was to give the usual direction that the prosecution must prove the case beyond reasonable doubt. No further direction

¹⁴ 19 [1972] NZLR 34 at 36, cited by Lord Carswell CJ in McLean and McCreedy [2001] NICA 32 at paragraph 5.

¹⁵ (2007) 70 WIR 267.

¹⁶ (1973) 57 Cr App R 424.

needed to be given. It was not essential that the trial judge should make every point that can be made for the defence.

[40] In *Jay Marie Chin v The Queen*¹⁷ Blenman JA considered the direction required where the prosecution's case rests on circumstantial evidence. At paragraph 42 she stated:

"I am fortified in the view that where the prosecution's case rests on circumstantial evidence, no duty rests on the judge, in addition to directing the jury that they could only convict if the prosecution has proved its case beyond a reasonable doubt, to say that they must not convict on circumstantial evidence, that the facts proved are consistent with the guilt of the appellant and exclude every possible explanation other than guilt of the appellant provided that the judge indicated to the jury that there is no eyewitness and brings home to the jury that the case is based on circumstantial evidence and that the Crown has the duty to prove the case beyond a reasonable doubt, that will suffice."

[41] Accordingly, it was the duty of the judge to make clear to the jury that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the appellants. On one occasion, the learned judge directed the jury that the prosecution was required to prove the case to the jury that they were satisfied so that are sure of the Accused guilt. He outlined the evidence on which the prosecution relied to prove its case against the appellant. In my judgment, the judge's direction was consistent with the propositions laid down in *Gregory August v The Queen*. We are not at all persuaded that there was a miscarriage of justice since the judge brought home to the jury that they must consider all of the circumstantial evidence and that they cannot find the appellants guilty unless they were satisfied so that, they were sure. We have no hesitation in concluding that the judge properly put the issues before the jury.

¹⁷ ANUHCRA2012/0005 (delivered 5th April 2017, unreported).

Ground 4 - The judge's direction on causation

[42] Counsel for Mr. Nunez, Mr. Neal, argued that the learned trial judge did not address the jury on the issue of causation. He submitted that it was incumbent on the trial judge to direct the jury on causation in relation to the medical evidence and in light of the testimony of various witnesses. He told the Court that the judge's failure to do so was a material irregularity and as such the jury was misdirected. At the hearing of the appeal, Mr. Neal raised the issue of identification which he said is a critical issue when dealing with circumstantial evidence. Mr. Neal argued that the jury ought to have been directed on who identified Mr. Nunez and Mr. King as the persons who inflicted the injuries and how the evidence of Guerra was to be treated in relation to the issue of identification.

[43] In response, the learned DPP contended, and we agree, that the learned trial judge addressed the jury in relation to the element that the death was caused by harm. At page 465 of the record, the judge stated:

"The second element is that the death was due to harm. Well the evidence of the Pathologist points towards harm but the defence is saying well that is what the doctor is saying. Nevertheless, although that there is this cause, it could come from a number of sources. It may not have been applied by anyone, moreso the defendants. So you are to make a determination as to whether or not it was harm inflicted by either the first defendant Leonard Nunez or the second defendant Hallet King or both of them acting together."

[44] The judge then recounted, extensively, the evidence of the doctor in relation to the cause of death, from pages 442 to 450. The judge said at pages 446 to 447 of the Record:

"... All of that results to due to what he called post traumatic cerebral edema, which means, trauma to the head. He said that there was some, in his view, some trauma to the head. Trauma has a wide meaning in Forensic Medicine it's caused by different things. It may be caused, the doctor says, by a fall. It could be caused by an object. It could be caused by direct contact or something. He cannot say what caused the trauma"

in this specific case because it could be caused by many different things.”

This is where the Crown is inviting you to draw an inference based on the testimony that you heard from Guerra that something happened to him, happened to Sotz, that is, in that room. So if you don't give much weight to Guerra's testimony that is the end of the Crown's case. If you give some weight to Guerra's testimony, you would have to believe him and accept his testimony and follow all inferences. But if you don't follow all the inferences, then you would not be able to arrive at the conclusion that one or the other or both men are guilty. You with me on that?”

[45] The learned judge had also directed the jury in relation to the approach to be taken to expert evidence. We agree with the DPP's submission that the directions of the learned trial judge would have left the jury in no doubt that the doctor's opinion as to the cause of death was that the victim had sustained trauma to his head; that they were, as the judges of the fact, to determine whether they accepted that evidence, and further, if they accepted that the victim died from harm, whether that harm was caused by the appellant, was a matter for them to decide, looking at the whole of the evidence. There was therefore no miscarriage of justice in this regard.

[46] As the DPP pointed out the issue of identification was not a live issue and was not really canvassed in the court below and before this Court. It is clear from the evidence led that at no point was the identity of the appellants raised. In the circumstances, we find that there was no need for any identification procedure.

[47] Accordingly, we discern no error of law or deficiency on the part of the judge in directing the jury on causation.

Ground 5 - Judge's direction regarding treatment of evidence

[48] Mr. Neal submitted that the learned trial judge erred in not withdrawing the case from the jury and the jury was asked to consider a case they ought not to have been asked to consider. Further, Mr. Neal submitted that the learned trial judge, in his summation went through the evidence in sequential order. First, the

evidence of the father of the accused at page 425. He argued that nothing turned on his evidence and it proved nothing. The next witness was the mother of the Deceased. Again, he argued that her evidence did not assist in proving the case for the prosecution. She had no knowledge about the whereabouts of her son from around 9:30 am and therefore did not assist since the critical time in the matter for consideration by the jury was during the day, the Deceased had already been pronounced dead by the evening.

[49] According to Mr. Neal, the next witness was Rochelle Rivero [page 430] whom he said only testified as to the facts in issue in relation to the cause of death of the Deceased. He argued that the same case can be said about Jason Sutherland. Mr. Neal went on to consider the next witness Manuel Guerra. He submitted that the learned judge did not adequately deal with his evidence and its probative value and the fact that his evidence was to be approached with caution since he was of bad character and had an interest to serve. Mr. Guerra was a suspect and had been arrested by police for the same investigation. Furthermore, his evidence contrasted with another of the Prosecution's own witnesses - a police officer. Accordingly, the main thrust of Mr. Neal's argument is that the trial judge did not properly direct the jury on how to treat the evidence of prosecution witness Manuel Guerra.

[50] It is notable that at page 440 from line 11, after referring to the evidence of prosecution witness Edilberto Patt, whose evidence was at variance with Manuel Guerra's, the judge stated:

"In that same breath, Guerra was the co-suspect of Ketchi in the burglary. And Guerra is a person whose character is also tainted as an admitted felon. So you will bear all that in mind when you come to judging the witnesses, which one of those witnesses had an interest to serve or they both had an interest to serve and which despite an interest to serve, you believe one or the other. Because once you warn yourself that Guerra was a person who had crossed the law before. That Guerra was the friend of Ketchi. That Guerra was a co-suspect in the same burglary and that he might be trying to paint a certain [image] of the Police because of his own experiences, right. But after warning yourself of all that you are still satisfied that he's telling the truth, then you are entitled to act on his

evidence. But if having considered all of that, you think that you can't trust his evidence, then it is up to you to treat it as you will."

- [51] It follows that the judge did caution the jury on the treatment of Manuel Guerra's evidence. The judge properly and adequately put admissible evidence before the jury in this matter, with all the mandatory warnings in their treatment of the evidence of Manuel Guerra. The judge warned the jury that Guerra was a co-suspect who may have an interest to serve, and that it was up to them to treat the evidence as they wished having considered the warnings. The judge admonished the jury that they had to satisfy themselves that the witness was telling the truth. In our view, those directions were adequate and the criticism of the judge's direction on this issue is not well founded.

The King Appeal

Ground 1 – The judge's direction on the law of inferences

- [52] Counsel for Mr. King, Mr. Saldivar argued that the learned judge failed to direct the jury on the law of inferences. He submitted that as the evidence against Mr. King was purely circumstantial, the judge ought to have directed the jury that "if there exists an inference for the benefit of the appellant then they ought to do so". He said that the correct question is: 'Could a reasonable jury, properly directed, exclude all realistic possibilities consistent with the defendant's innocence: Masih [2015] EWCA Crim 477 per Pitchford LJ." Further, he submitted that "in a case dependent upon circumstantial evidence, the jury is required to draw inferences from the total circumstances: Belhaven and Stenton Peerage (1875) 1 App Cas 279 (UK HL)".

- [53] The judge addressed the jury in relation to inferences in this manner, at page 473 of the Record:

"In this matter, the Crown, once you are satisfied following the inferences that you can draw from the different things, you are entitled, if you are satisfied on the evidence from the Crown and you follow all the inferences and resolve them that leads to a single conclusion because, in law, what they say that if there are two inferences of equal weight. If they have equal

weight or if...the most favourable to the defendants must always be drawn. That is the law. **If there are two inferences of equal weight that the one most favourable to the defendant must be drawn.** However, if you are satisfied that there is only one inference, even though it is adverse to the defendants, you draw that inference. So inference as we said is based on evidence, looking at the evidence and coming to a conclusion based on things but all the inferences must indeed point to the [guilt] of the defendants before you can say one or the other or both of them are guilty, okay. So in this matter, once you are satisfied on the Crown's case, once you're satisfied with the evidence that they have produced and you have resolved everything in the Crown's favour, you are entitled to return a verdict of not guilty. If you are not convinced of the Crown's case, your verdict has to be. I told you the wrong thing a while ago, let me correct it, let me back up. Let me just back up, let me back up. If you are satisfied on the Crown's case, your verdict is guilty, right. If you satisfied on all the inferences to drawn from the Crown's case it is guilty. It is only upon the Crown's case that you can return a verdict of guilty once they have satisfied you."

[54] The judge had previously said to the jury:

"Now you may draw sensible conclusions from the evidence you have heard but you must not guess or speculate about anything that was not covered by the evidence. So you may draw an inference from a set of facts but don't speculate if there is no evidence of that, as to something completely out of the way, as to what, you know, title to the CSI kinds of things, you know all these movies that kind of dominate all eyes these days. You don't have to do that. What evidence is there? So if there is a logical sequence, you can draw a logical sequence from a set of facts but you can't just, boy a wonder if or suppose, none of that.

In this case, the Crown of course has not been able to produce any direct evidence to say that there was any joint enterprise. The Crown has not been able to produce that. What they are saying, they would like you to infer that that was the case by considering the totality of the circumstances. Because Mr. Hallet King and Mr. Nunez were present together in CIB room, because they jointly carried the person to the hospital, therefore, they're jointly responsible. That is the kind of way that they would like you to arrive to say that they both conducted, they did an act together.

Manuel Guerra is the first of the two witnesses that the Crown is seeking to rely on or to ground an inference for you to draw

that the defendants did something to the deceased. So if you don't give [much] weight to Guerra's testimony that is the end of the Crown's case. If you give some weight to Guerra's testimony, you would have to believe him and accept his testimony and follow all the inferences. But if you don't follow all of the inferences, then you would not be able to arrive at the conclusion that one or other or both men are guilty."

[55] The law is very clear on drawing inferences in criminal cases and was discussed by Baptiste JA [AG.] in **Delano Smith v Regina**¹⁸ where he stated:

"Inferences cannot be drawn in a vacuum. The drawing of inferences is really part of the fact finding role of the jury. From the facts found by the jury, they may draw inferences with respect to other facts and they may rely on those inferences in deciding whether or not the accused is guilty. The jury is entitled to draw inferences, that is, come to commonsense conclusions based on the evidence that they accept. They however cannot speculate. Fundamentally, if there are two or more inferences which can be drawn from the facts, the jury must draw the inference that is more favourable to the accused."

[56] Indeed, the judge directed the jury on the inferences that could be drawn based on the evidence. The judge asked the jury not to speculate. The essence of the direction was that the verdict must be based on the evidence in the case and the reasonable inferences that can be drawn from proved facts. In our view, those directions were adequate in assisting the jury in drawing inferences. Accordingly, this ground of appeal fails.

Ground 2 – The judge's treatment of King's legal duty to investigate and the Crown's assertion of joint enterprise

[57] Mr. Saldivar submitted that as a police officer Mr. King had a legal duty to investigate and interrogate the deceased about his involvement in any crime. In that regard, any agreement that existed between him and his co-accused was of a lawful nature. He argued that Mr. King in the pursuit of his legal duty was carrying out a lawful purpose in interrogating the deceased.

¹⁸ ANUHCRA2008/001 (delivered 22nd March 2010, unreported.)

[58] Mr. Saldivar referred the Court to section 11(3) of the Criminal Code of Belize which provides that:

“If an event is caused by the acts of several persons acting either jointly or independently, each of those persons who has intentionally or negligently contributed to cause the event shall, subject to sub-section (4), and to the provisions of Title IV with respect to abetment, be deemed to have caused the event, but any matter of exemption, justification, extenuation or aggravation which exists in the case of any one of those persons shall have effect in his case whether it exists or not in the case of any of the other persons.”

[59] Mr. Saldivar insisted that there is nothing on the record that displays or points to any joint enterprise on the part of Mr. King and his co-accused to do any illegal act. In this regard, he submitted that there existed no joint enterprise between the Appellant and his co-accused to kill or otherwise cause injury or harm to the deceased. Simply put, Mr. Saldivar’s argument under this ground is that the Crown did not lead any evidence to implicate Mr. King in a joint enterprise to harm Mr. Sotz

[60] It is clear that even on a cursory reading of the Record of Appeal, it is clear that the Crown led evidence that both officers were in the CIB Office with Mr. Sotz, who was, up to that time, not suffering from any injury, that Mr. Sotz was heard to be shouting and pleading, slapping was heard, Mr. Nunez was heard questioning Mr. Sotz, Mr. King remained in the room, and after silence, they both came out lifting Mr. Sotz and both took him to the Clinic. The jury clearly accepted this evidence and concluded that Mr. King was acting together with the co-accused.

[61] It was the Crown’s case that the questioning of Mr. Sotz was accompanied by an assault which led to his death. The Crown has not taken issue with Mr. King’s duty to investigate and interrogate the deceased about his involvement in the crime. According to the learned DPP, the issue surrounds the assault of a suspect in custody which cannot possibly be a lawful act.

[62] Whilst it is clear that a police officer has a legal duty to investigate a crime, this duty does not absolve the commission of an offence by the police officer in the carrying out of that duty.

Ground 3 –Judge did not address the jury on the issue of causation

[63] Counsel for Mr. King, Mr. Saldivar, referred the Court to Section 124 of the Belize Criminal Code which outlines special provisions as to causing death. He also urged the Court to consider the case of the *Queen v Edilberto Martinez*¹⁹ which he says is instructive on the issue of causation. Mr. Saldivar contended that Dr. Estradabran gave the cause of death as emanating from a blunt force type object and that there was no evidence led by the Prosecution to show what object was used to injure the deceased.

[64] In response to Mr. Saldivar's argument, the learned DPP submitted that there was no legal or evidentiary burden on the Crown to lead evidence as to the instrument used, and the absence of that evidence was not fatal to the prosecution's case. The Crown was required to prove that the victim sustained harm, that the harm was caused, unlawfully, by the appellant, acting jointly with the co-accused, and that the harm led to the victim's death. The Crown led evidence in support of each of these elements, and that evidence was accepted by the jury.

[65] We are in full agreement with the arguments of the learned DPP on this ground. We make an observation in relation to the case of *Queen v Edilberto Martinez* which in our view does not assist Mr. King's case that the judge did not direct the jury on causation. In *Martinez*, this Court found that the judge erred in asserting that, there was no evidence led as to the cause of death of the deceased. The Court highlighted that the evidence in the testimonies of the two (2) eyewitnesses and in the cautioned statement of the respondent provided the causal link. In addition, the expert's evidence in the testimony of Dr. Estradabran provided the direct scientific cause of death. It would be for the jury to decide in

¹⁹ Belize Criminal Appeal no. 4 of 2014.

the end, whether it would accept the evidence as sufficient proof of the cause of death of the deceased. It seems to us that this case is readily distinguishable on the basis that in the case at bar the prosecution did lead evidence as to the cause of death of Mr. Sotz and that the judge, in his summation did address the jury on the evidence of the doctor in relation to the cause of death.

Ground 4 – Judge’s failure to exclude prejudicial evidence

[66] Mr. Saldivar also complained that the judge allowed prejudicial evidence to be led before the jury. He told the court that such evidence was in the form of a wire and that there was no evidence before the court to show that the deceased was electrocuted or strangled. Mr. Saldivar submitted that the introduction of the wire by the Crown was therefore highly prejudicial. He further submitted that having allowed the prejudicial evidence to be led before the jury, the judge failed to direct the jury that they ought to exclude the wire from their deliberations in determining the case against Mr. King. Mr. Saldivar argued that there is nothing to say that this did not have any bearing on the jury’s mind in arriving at the guilty verdict.

[67] On this ground, the learned DPP stated that the photograph that was tendered showed *“the right side of the chest area of the deceased with small black colour marks around the areola and the nipple.”* The forensic examiner testified that he had not seen these marks at the time of the post-mortem examination but that he had noted them in the photographs. He was stopped by the trial judge and was not allowed to give further evidence on the point. The DPP conceded that the aim of the prosecution was clearly to have the jury infer that those marks were caused by the wires of the extension cord and was part of the treatment being meted out to the victim during the interview by Mr. King and the co-accused. The DPP further conceded that the evidence in support of this was, ultimately, not led by the Crown.

[68] However, the DPP told the Court that the effect on the jury would not have been to such an extent to have resulted in an unfair trial. The DPP submitted that the photograph of an extension cord and marks on his nipples would certainly not

have made any significant contribution to the jury's finding of guilt in the context of the screaming of the victim, the pleas to stop, the slapping sound and the fact that he was taken out of the room in an unconscious state and shortly thereafter pronounced dead.

[69] The judge addressed the jury in relation to this evidence at page 469 of the Record of Appeal. He stated:

“What is the relation of this wire to the matter? In other words, they are suggesting on the one hand from the doctor that the death was due to some trauma to the head but then producing an electrical cord to suggest that this electrical cord. So what the defence is saying, is that look, the Prosecution don't even know what it is, they're just throwing everything before you, Madam Foreperson, ladies and gentleman of the jury; they're throwing everything before you and want you therefore to sit and make a decision based on that. So they're saying, look, in circumstances where it is improperly investigated, and where they don't even know what they are alleging as to the proper cause of death, in that the underlying cause, what cause the thrombosis and the blockage and this kind of thing; it is improper to convict on that kind of evidence.”

[70] The learned trial judge having rightly stopped the Prosecution from adducing the evidence as it regarded the wire and the photograph that was tendered to show “the right side of the chest area of the deceased with small black colour marks around the areola and the nipple, ought to have properly addressed the jury admonishing them not to take this into account in anyway. We therefore agree with the submissions of learned Counsel Mr. Saldivar that this evidence was highly prejudicial to the appellants in that the jury was left with no direction on how to treat this evidence.

Ground 5 – The Judge's caution when dealing with the evidence of Manuel Guerra.

[71] This ground of appeal is similar to that advanced by Mr. Nunez in relation to the judge's treatment of the evidence of Manuel Guerra. Mr. Saldivar contended that the learned judge failed to give an adequate warning to the jury when dealing with the evidence of Manuel Guerra. He submitted that the learned judge

should have told the jury to approach the evidence of Manuel Guerra with caution as he was jointly charged with the deceased and may have given evidence for the Crown because of his self-interest.

[72] At paragraphs 53 and 54 of this judgment, we have considered the direction given in relation to the evidence of Manuel Guerra. I repeat that we discern no error on the part of the judge in the direction given. The judge told the jury that Guerra was the co-suspect of Mr. Sotz in the burglary and that he is a person whose character is also tainted as an admitted felon. The judge went on to warn the jury that Guerra's testimony may be as a result of his own experiences and because of his self-interest. This in our view amounts to an adequate caution to the jury in respect of Manuel Guerra's evidence. This ground of appeal is therefore entirely without merit and accordingly fails.

Conclusion

[73] In the premises, we would allow Mr. Nunez's appeal on the first and second grounds of appeal concerning the judge's direction on intention. We would also allow Mr. King's appeal on the fourth ground of appeal concerning the judge's failure to exclude prejudicial evidence. Despite Mr. Nunez having not appealed against the judge's failure to exclude prejudicial evidence and Mr. King having not appealed against the judge's direction on intention, the appellants having been tried together in the same proceedings, in our view, mean that those errors by the learned judge in his summing up to the jury render their convictions overall unsafe.

Accordingly, having allowed the appeals of both appellants we would quash their convictions. With this, the appeals against their sentences fall away.

Peter I Foster KC
Justice of Appeal

Sandra Minott-Phillips KC
Justice of Appeal

Michelle Arana
Justice of Appeal