BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 2 of 2014

BETWEEN:

RODERICK RICARDO WENT **Appellant**

AND

THE QUEEN **Respondent**

Before: The Hon. Sir Marston C. D. Gibson, K.A., Chief Justice, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal

2017: March 30

July 27

December 5

2018: December 20

Mr. Dennis Headley for the Appellant

Mr. Oliver Thomas for the Respondent

DECISION

GOODRIDGE JA:

INTRODUCTION

[1] On 7 April 2003, police officers received a report that there was a foul odour coming from the residence of Floretta Hyland situated at No. 25 Mayport Lane, Pine, St. Michael.

[2] The officers went to the residence where they observed that the house was closed. They called for Ms. Hyland. There was no response. Sgt Sedley Maynard noticed that a window was open. He gained entrance to the premises by putting his hand through the window and unlocking the door. He saw what appeared to be blood on the lock and on the curtains at the windows.

[3] After opening the door, the odour became stronger as Sgt Maynard walked towards a bedroom at the back of the house. There, he saw the partially decomposed body of Ms. Hyland on the floor of the bedroom and what appeared to be blood under her head. One of the drawers in a chest of drawers was open.

[4] The police medical officer, Dr. Andrew Murray, was summoned to the scene. PC Richard Bailey, the police photographer, arrived and took photographs of the body and the surroundings. Other police officers were also present and processed the scene.

[5] Investigations into the death of Ms. Hyland were conducted but they did not bear fruit.

[6] Seven years later in July 2010, at about 11.00 a.m, police officers led by Sgt Leslie Arthur of the Cold Case Unit, Criminal Investigations Department, went on duty to the Edgar Cochrane Polyclinic in Wildey,

St. Michael. Sgt Arthur saw the appellant at the clinic. When asked by Sgt Arthur why he was at the polyclinic, the appellant said that he was there because he had the flu and that he had received medication from the clinic, which he handed over to the officer.

[7] Sgt Arthur then informed the appellant that he was carrying out investigations into the murder of Ms. Hyland and invited the appellant to accompany him to the District "A" Police Station.

[8] According to Sgt Arthur, when the appellant was interviewed under caution about the matter, he told him "I killed "Flo" officer, I did want money and we scuffled and I killed her." The appellant gave a written statement about the incident which was recorded by Sgt Arthur and witnessed by Sgt Murray. The appellant was later charged with murder.

THE TRIAL

[9] On 18 March 2014, the appellant appeared before **Worrell J** and was arraigned on a charge that sometime between 3 April and 7 April 2003, he murdered Floretta Hyland. He pleaded not guilty to the charge. The appellant was represented by Mr. Keith Simmons QC and Mr. Alvan Babb.

[10] The trial took place on 18, 19, 20, 25, and 26 March 2014. The prosecution case rested on the oral and written statements which were said to have been made by the appellant.

[11] On 19 March 2014, Mr. Simmons QC informed the judge that the defence was objecting to the oral statements and the alleged written confession on the grounds that:

(i) the oral statements were never made by the appellant; and

(ii) the alleged written confession was had in circumstances which were most unfair to the appellant in that he was seriously unwell and had been taken from the polyclinic by police officers.

The Voir Dire

[12] The judge then conducted a *voir dire*. The police officers gave their evidence. They testified that the appellant had made the oral statements attributed to him and that he had dictated the written statement voluntarily. They also stated that no force or violence was used in order to obtain the statement which was recorded in accordance with the Judges' Rules.

[13] The appellant gave an unsworn statement. He said that on the day in question, he was feeling "real sick, I was coming down with something like pneumonia." He also said that the police came, took him to the station and charged him with murder.

[14] Dr. Shafiq Kapadia testified that he had attended to the appellant at the polyclinic. Dr. Kapadia's evidence was that the appellant had presented

with complaints of coughing, cold, congested nostrils and chest feeling tight.

[15] On examination, the doctor found that the appellant did not have a fever, his pharynx was red and inflamed and his chest was clear. There was no evidence of wheezing. Dr. Kapadia prescribed a one week course of antibiotics, amoxicillin, paracetamol, mequilon and a nasal spray. The doctor found no signs of pneumonia nor did the appellant make any such complaint to him.

[16] In the doctor's opinion, even though the appellant was suffering from the condition which he had, under normal circumstances, if he had to be interviewed by the police, the appellant would still be of sound mind to give coherent explanations to the officers. Further, the appellant would have been physically well enough to do so even without medication.

[17] According to **p 161** of the record, defence counsel then conferred and the following exchange occurred between counsel and the judge:

"MR. SIMMONS, QC: Yes, sir. We have discussed it and if you intend to go forward on the evidence of the doctor, really and truly, that's it and the voir dire is out.

THE COURT: The voir dire is out then?

MR. SIMMONS, QC: Yes, Sir.

THE COURT: You withdraw your application, then?

MR. SIMMONS, QC: Yes.

THE COURT: Okay. Very well.

Mr. Watts?

MR. WATTS: Accepted, My Lord. My friend is always a fair person in the courts, My Lord.

THE COURT: Yes. Very well. Okay. Well we will proceed. We can't (sic) have the jury back now then since the voir dire has come to a pre-mature end, then--in any event, I understand your position is that you've withdrawn your objection and your application.

MR. SIMMONS, QC: Yes. Yes."

[18] The trial continued. There was no objection by defence counsel to the admission into evidence of the oral and written statements. The defence strategy focused on cross-examination of the police witnesses about the absence of DNA and fingerprint evidence and the quality of the investigations generally.

[19] On 31 March 2014, the appellant was found guilty of murder and sentenced to death.

[20] On 1 April 2014, the appellant completed a notice of appeal in which he stated that he was appealing against his conviction and sentence. That notice was filed on 8 April 2014.

THE HISTORY OF THE APPEAL

[21] The appeal was first listed for hearing on 7 December 2015, but was adjourned at the request of Mr. Dennis Headley, counsel for the appellant. On 4 May 2016, Mr. Headley requested a further adjournment. Subsequent dates were set and other adjournments followed.

[22] On 29 March 2017, Mr. Headley filed amended grounds of appeal and an affidavit sworn to by the appellant.

[23] On 30 March 2017, when the appeal came on for hearing, Mr. Headley apologised for the late filing of the amended grounds of appeal. He pointed out that the appellant had made certain allegations concerning the legal representation which he had received during the trial.

[24] Mr. Headley was reminded that, in keeping with the guidelines set out by this Court in **Mervin Tyrone Weekes v The Queen, Criminal Appeal No 4. of 2000 (Weekes)**, the Registrar of the Supreme Court was required to send a copy of the appellant's affidavit with the attached waiver to the appellant's former counsel, Mr. Keith Simmons QC and Mr. Alvan Babb, so that counsel could make any response deemed necessary.

[25] On 5 July 2017, Mr. Simmons QC filed an affidavit in response, setting out his position in relation to the allegations raised by the appellant.

THE APPEAL

The Grounds of Appeal

[26] The appellant has challenged his conviction on the following grounds:

> "1. That under all the circumstances of the case the verdict is unsafe and unsatisfactory.
>
> 2. As a consequence of Defence Attorneys' conduct of the trial, the Defendant did not receive a fair trial. (See Appellant's Affidavit and attached waiver of legal professional privilege)."

The Appellant's Affidavit on Appeal

[27] In his affidavit of 29 March 2017, the appellant set out in detail the basis of his complaint. We consider it important to reproduce the salient parts of that affidavit below:

> "7. I am unhappy by the manner in which the trial was conducted on my behalf. I believe that my defence to the charge of murder was not put to the court in front of the jury or at all and as a consequence I did not receive a fair trial.
>
> 8. As a result of my contention at paragraph 7, I have agreed to a waiver of legal professional privilege between me and my former legal counsel. I mark and attach as ***Exhibit RRW1*** copy of that waiver.

9. I saw Mr. Keith Simmons Q.C on about four (4) occasions between the years 2011 and 2014 when the trial started. I first met Mr. Keith Simmons Q.C on or about the year 2011 when he visited me at H M Prison, Dodd's in the parish of Saint Philip and told me that he was my lawyer.

10. I met Mr. Simmons on a second occasion after I obtained pre-trial disclosure in the case and we spoke at greater length. I told Mr. Simmons that I did not kill "Flo". I further told Mr. Simmons that I had received unfair treatment at the hands of police officers who put plastic wrap over my face, that I could not breath (sic) as a result of this, and that I had a cold at the same time which made things worse; additionally, Sergeant Harte told me that I could either do "this" the "easy" or the "hard" way. I told Mr. Simmons that did not (sic) give the police a written statement or oral statements, but that I signed a statement which police brought to me and I initialled oral statements because I was frightened after being on the receiving end of the above treatment.

11. I further told Mr. Simmons that I was never a wanted man and that a woman by the name of Rhonda Hinds (Oliverth) called my name to the police; that police was at her property the night before I was arrested and when I was arrested at the polyclinic, she was in attendance at the polyclinic and that she called out my name several times before police came direct to me.

12. Mr. Simmons advised me that I do not have to mention anything about the statements and that if I did not walk then no-body should walk.

13. I had no meetings or dialogue with Mr. Babb, I first met Mr. Babb on the first day of trial.

14. Both the oral statements and the written statement allegedly given by me were objected to at the Magistrates Court preliminary enquiry stage by Mr. Simmons. I did not give Mr. Simmons any instructions not to object at the High Court stage neither was I consulted about him not objecting to the oral or written statements being entered into evidence.

15. I gave Mr. Simmons instructions that I cannot read and that I did not read the written statement."

Mr. Simmons QC's Affidavit in Response

[28] As stated earlier, Mr. Simmons QC filed his affidavit in response. In that affidavit, Mr. Simmons QC stated:

"4. That I admit that I should have cross-examined the Police Officer in respect of the statement of the accused man.

5. This was done on the spur of the moment because the accused had informed me that the same way in which he was arrested outside the Sir Winston Scott (sic) Polyclinic another man was also arrested. The accused man indicated that he knew the man and that he would be willing to give me a statement. I wrote the man, but he never responded.

6. That I relied on the fact that no DNA examination was done at the scene and furthermore the police seemed not to appreciate what the benefit of such an examination could be in an effort to find out who the person could be that committed the act."

SUBMISSIONS OF COUNSEL

[29] At the outset, Mr. Headley, counsel for the appellant, acknowledged that the authorities indicate that the circumstances in which an appellate court is entitled to overturn the jury's verdict when the ground of appeal consisted wholly or substantially of criticism of defence counsel's conduct of the trial are extremely rare. See **R v Clinton [1993] 2 All ER 998**, **Weekes** and **Boodram v The State [2001] UKPC 20**.

[30] Counsel submitted that the appellant did not enjoy due process during his trial. He contended that the case of the appellant was not properly put to the jury. Mr. Headley stressed that it was imperative that defence counsel cross-examine the police officers on the confession statements of the appellant, which formed the crux of the prosecution case. This not having been done, defence counsel's attack on the confession statement and the credibility of Sgt Arthur in his closing address was inconsistent with the conduct of the trial and the non-presentation of the appellant's case to the jury.

[31] Mr. Headley also pointed out that the case against the appellant was not a case of DNA evidence or analysis, which was a position advanced by defence counsel on behalf of the appellant.

[32] Counsel concluded his submissions by stating that, based on the manner in which the appellant's case was conducted, the appellant did not receive a fair trial. He submitted that in the exceptional circumstances of this case, this Court is duty bound to intervene and overturn the verdict of the jury on the grounds that that verdict is unsafe and unsatisfactory given all that transpired at the trial.

[33] In response, Mr. Thomas, counsel for the respondent, submitted that the appellant was not denied due process. He contended that, based on the appellant's instructions, a *voir dire* was embarked upon. The evidence which was given by the doctor did not measure up to what defence counsel would have anticipated and this caused counsel to take a certain course for tactical reasons.

[34] Counsel also submitted that when the case of **Lashley and Campayne v Singh [2014] CCJ 11 (Lashley and Campayne)** on the issue of incompetence of counsel is considered, it cannot be said that the appellant had not been afforded a fair trial.

COURT'S DISCUSSION AND CONCLUSION

THE ISSUE

[35] The issue for this Court's determination is whether defence counsel's conduct of the trial resulted in the appellant not being afforded a fair trial within the meaning of **section 18 (1)** of the **Constitution**.

[36] In seeking to resolve this issue, we consider it necessary to identify the legal principles relevant to the complaint raised by the appellant.

The Relevant Legal Principles

[37] We begin by reminding ourselves that **section 18(1)** of the **Constitution** provides, *inter alia*, that, if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing. This is the right to a fair trial provision, a right which is jealously protected by the courts as can be seen in various cases throughout our region and the Commonwealth concerning breaches of this right.

[38] We observe that there are a number of authorities which illustrate the approach to be taken when an appellant complains of serious deficiencies by defence counsel in the management and conduct of his trial.

[39] The principles to be adopted by this Court in approaching such complaints have been beautifully set out by **Simmons CJ** in **Weekes** where he traced the evolution of those principles. There, **Simmons CJ** began by noting at

paras [27] and **[28]** that in **R v Ensor [1989] 2 All ER 586,** the test propounded by Lord Lane CJ was that of flagrant incompetence by defence counsel. If a court of appeal had a lurking doubt that an appellant had suffered some injustice as a result of flagrantly incompetent advocacy, then the court could properly quash the conviction.

[40] At **paras [29]** to **[31] Simmons CJ** continued:

> "[29] In 1993 R v Clinton (supra) was decided in the English Court of Appeal. The Court, in stating the proper approach to cases alleging incompetence of trial counsel, moved away from the test of flagrant incompetence and held that the general principle requires the court to focus on the impact of counsel's faulty conduct on the trial. We quote from the head note in Clinton:
>
> "The circumstances in which the court was entitled to overturn the jury's verdict in a criminal trial when the grounds of appeal consisted wholly or substantially of criticisms of defence counsel's conduct of the trial would of necessity be extremely rare. Where defence counsel made decisions regarding the conduct of the trial, particularly whether or not to call the defendant, in good faith after proper consideration of the competing arguments and, where appropriate, after due discussion with his client, his decisions could not render a guilty verdict unsafe or unsatisfactory nor could allegations of incompetence on counsel's part amount to material irregularity.

Conversely, and exceptionally, where it was shown that defence counsel's decision whether or not to call the defendant was taken either in defiance of or without proper instructions, or when all the promptings of reason and good sense pointed the other way, it was open to the appellate court to set aside the verdict of the jury....if counsel's conduct of the trial rendered the verdict unsafe or unsatisfactory. In such a case the court would not attempt to assess the qualitative value of counsel's alleged incompetence but would seek to assess its effect on the trial and the verdict..." The Clinton principles were followed and applied by the Privy Council in Sankar v The State [1994] 46 WIR 452 and reiterated by the Board in Boodram v The State [2000] 59 WIR 493. The issue in Boodram was whether a retrial of the appellant on a murder charge was unfair in circumstances where her counsel, assigned by the Legal Aid Authority of Trinidad and Tobago, was unaware of the first trial until near the end of the retrial and, having become aware of the first trial, did not seek to obtain a transcript of the proceedings in the first trial to assess what could be done to redress any prejudice to his client. Lord Steyn described counsel's conduct as "the worst case of the failure of counsel to carry out his duties in a criminal case that their Lordships have come across. The breaches are of such a fundamental nature that the conclusion must be that the defendant was deprived of due process." (para [40]). It was held that the appellant did not have a fair trial and the conviction was quashed. It was not possible to say that after a full and proper deployment of the appellant's case a reasonable jury would inevitably have convicted.

> The Board approved the statement of the applicable principles by de la Bastide CJ in Bethel v The State (No 2) (2000) 451 unreported and this further refinement at pp 459-460 where the Chief Justice explained that, in cases of extreme misconduct resulting in a denial of due process, "the question of the impact of counsel's conduct on the result of the case is no longer of any relevance for, whenever a person is convicted, without having enjoyed the benefit of due process, there is a miscarriage of justice regardless of his guilt or innocence. In such circumstances the conviction must be quashed."

[41] In **Lashley and Campayne**, the CCJ stated that the proper approach of an appellate court to this issue does not depend on any assessment of the quality or degree of incompetence of counsel. Rather, the court was to be guided by the principles of fairness and due process. The CCJ stated that there was no need for any sliding scale of pejoratives to describe counsel's errors. Notably, at **paras [11]** to **[13]** of the judgment, the following views were expressed:

> "[11] ... This Court is therefore concerned with assessing the impact of what the Appellants' retained counsel did or did not do and its impact on the fairness of the trial. In arriving at this assessment, the Court will consider as one of the factors to be taken into account the impact of any errors of counsel on the outcome of the trial. Even if counsel's ineptitude would not have affected the outcome of the trial, an appellate court may yet consider, in the words of de la Bastide CJ in *Bethel* that the

ineptitude or misconduct may have become so extreme as to result in a denial of due process. As this Court said in *Cadogan v The Queen [2006] CCJ 4 (AJ) at [14]* the Court will evaluate counsel's management of the case "with a reasonable degree of objectivity". If counsel's management of the case results in a denial of due process, the conviction will be quashed regardless of the guilt or innocence of the accused. See also *Teeluck and John v The State*.

[12] An appellate court, in adjudicating on an allegation of the incompetence of counsel which resulted in an unfair trial, has to bear in mind that the trial process is an adversarial one. Thus all counsel, including in this case the police prosecutor and retained counsel for the Appellants, are entitled to the utmost latitude in matters such as strategy, which issue he or she would contest, the evidence to be called, and the questions to be put in chief or in cross-examination subject to the rules of evidence. The judge is an umpire, who takes no part in that forensic contest. Therefore, in an appeal such as the instant one where no error of the magistrate prior to sentencing is alleged, the trial does not become unfair simply because the Appellants or their counsel chose not to call evidence, or not to put the accused in the witness-box and to rely on their unsworn evidence.

[13] A conviction can only be set aside on appeal if in assessing counsel's handling of the case, the court concludes that there has not been a fair trial or the appearance of a fair trial: see *Boodram v The State*."

DISCUSSION

[42] Our **Constitution** demands that every person charged with a criminal offence should receive a fair trial. He or she must be afforded every opportunity to put his case to the jury. Counsel who defends such a person has the responsibility of ensuring that this occurs.

[43] The case against the appellant was based solely on oral statements and a written statement which the police officers testified were given by the appellant freely and voluntarily. When examined, these statements clearly indicate that the appellant had confessed to murdering Floretta Hyland. We are of the opinion that, in light of the appellant's not guilty plea to the charge of murder, there would have been the expectation of a challenge to the admissibility of this evidence. Such a course of action would have been a necessary part of the defence strategy.

[44] In his affidavit, the appellant deposed that he had instructed his former counsel that he:

(i) had not murdered "Flo";

(ii) had received unfair treatment at the hands of the police officers;

(iii) could not read and did not read the written statement; and

(iv) had signed the written statement and initialled the oral statements because he was frightened after being subjected to the unfair treatment.

[45] The appellant also deposed that he was advised by his counsel not to say anything about the statements. He further stated that Mr. Simmons QC objected to the oral statements and the written statement at the preliminary stage in the magistrate's court and that he had never instructed Mr. Simmons QC not to object to these statements at the trial in the High Court.

[46] Of importance is the fact that the appellant's assertions or contentions as to the nature and extent of his instructions to his counsel have not been challenged or rebutted by Mr. Simmons QC in his affidavit. With respect to the decision to abandon the *voir dire*, the record discloses that there was consultation between defence counsel. However, there is nothing to suggest that there was any consultation between the appellant and defence counsel before that decision was taken.

[47] There is also the unequivocal admission of Mr. Simmons QC at para 4 of his affidavit that he "should have cross-examined the police officer in respect of the statement of the accused man." Further, at para 5 of his affidavit, counsel stated that he had acted "on the spur of the moment."

[48] In our judgment, defence counsel's decision to allow the oral and written confession statements to be admitted into evidence without challenge

amounted to no effective defence being advanced by the appellant to the charge of murder and had serious implications for the case of the appellant.

[49] This is borne out by the fact that the prosecutor in his closing address to the jury was at pains to point out that confession statements, both oral and written, were uncontested by defence counsel. For example, at **p 265 line 14** to **24** the prosecutor stated:

> ".. But you saw counsel, both of them sat there and the accused, nobody said that is not the truth; nobody made any objection to the police standing up there and saying: We recorded this statement from him freely and voluntarily and he appended his signatures to it as well as he wrote something on it indicating that it was true and correct, and he had the opportunity to correct, alter or add anything he wished. He said by that statement, "I see a silver-blade cleaver in the drawer of she dressing table. I tek it up and "Flo" start hollering fuh "Murder", "Murder", and I just cut she throat wid it."

[50] In summing up the case to the jury, the judge referred to the fact that defence counsel did not cross-examine on the oral and written statements. The judge also commented that when the appellant gave an unsworn statement from the dock "He never said that he didn't make the written or the oral statements, but he has nothing to prove."

[51] Therefore, the inadvertence of defence counsel provided the opportunity for the above comments to be made by the prosecutor and the judge.

[52] Faced with this state of affairs, it is not surprising that the jury returned a verdict of guilty of murder against the appellant.

[53] We would add that, while it is entirely possible that the jury might have rendered the same verdict even if the statements had been challenged, it is difficult to see how the appellant would have received a fair trial, in the absence of defence counsel challenging the very evidence which pointed to the guilt of the appellant.

[54] We acknowledge the candour of defence counsel as to the manner in which the inadvertence occurred. The inadvertence of counsel in not challenging the oral and written statements is inconsistent with the appellant's plea of not guilty. However, we wish to stress that our concern is with the impact which that inadvertence had on the appellant's defence and consequently on the trial process.

[55] When viewed in the round, the circumstances of this case indicate that defence counsel's conduct resulted in a denial of due process to the appellant. As a consequence, there was a miscarriage of justice in that the appellant did not receive a fair trial as guaranteed by the **Constitution**.

[56] **Section 4 (1) (a)** of **the Criminal Appeal Act, Cap. 113A (Cap. 113A)** empowers this Court to allow an appeal against conviction where the Court is of the opinion that the verdict of the jury should be set aside on the

ground that under all the circumstances of the case the verdict is unsafe or unsatisfactory. If the Court allows an appeal, in an appeal against conviction, **section 4 (3)** mandates that the Court shall quash the conviction.

[57] We have therefore concluded that, in accordance with our findings above, we should allow the appeal and quash the conviction.

[58] Thus, the final matter which we have to determine in view of our conclusion above is whether a new trial should be ordered in the interests of justice. **Section 15** of **Cap. 113A** confers on this Court a discretion to order a retrial where the Court allows an appeal against conviction under **section 4**, and quashes the conviction and any sentence passed thereon, if it appears to the Court that the interests of justice so require.

[59] In determining whether or not to order a new trial, we have had regard to the Privy Council case of **Reid v The Queen 27 WIR 254 (Reid)**. In **Reid**, the Privy Council observed that "the power to order a new trial should not be exercised where, at the original trial, the evidence which the prosecution had chosen to adduce was insufficient to justify a conviction by any reasonable jury which had been properly directed." At the other extreme, "where the evidence against the accused at the trial was so strong that any reasonable jury if properly directed would have convicted the accused, prima facie the more appropriate course is to apply the proviso..., and

dismiss the appeal." The Privy Council further observed that in cases which fell between these two extremes, like this case, a court would be required to weigh certain factors.

[60] These factors are:

(i) the seriousness and prevalence of the offence;

(ii) the expense and length of time involved in a fresh hearing;

(iii) the length of time between the offence and a new trial;

(iv) the availability of evidence to support the defence's case; and

(v) the strength of the prosecution's case.

Of course, this list is not exhaustive, and a court must of necessity give consideration to what the interests of justice would require in any particular case.

[61] We consider that we can usefully apply these factors in our determination of this issue. The appellant was charged with a very serious offence, that is, murder, which is no doubt, of grave public concern. This Court must balance the public interest in ensuring that persons who have been charged with serious offences are brought to trial, against the constitutionally protected right of the appellant to a fair hearing within a reasonable time.

[62] In **Reid**, their Lordships stated that:

> "those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge in the conduct of the trial or his summing-up to the jury. There are…countervailing interests of justice which must also be taken into consideration."

[63] In this case, the murder occurred in 2003, the appellant was apprehended in 2010, and he was convicted on 31 March 2014. He has been in custody since that time. The Court acknowledges that the appellant would have spent a period of 8 years in prison, in circumstances where the Court has now determined that he was deprived of a fair trial and the verdict was unsafe and unsatisfactory. The Court must also consider that "any criminal trial is to some extent an ordeal for the accused, which the accused ought not to be condemned to undergo for a second time through no fault of his own."

[64] With regard to the expense and length of time involved in a fresh hearing, there is no doubt that expense would be incurred by the relevant authorities in securing witnesses and empaneling jurors in a fresh trial.

[65] The length of time between the offence and the commencement of a new trial is another relevant factor. In the Trinidadian case of **Bernard v The State [2007] UKPC 34**, delivered on 10 May 2007, a period of 15 years had elapsed between the date of the offence and the disposal of that appeal. After allowing the appeal and quashing the conviction, the Privy Council

decided that bearing in mind the lapse of time since the killing of Mr. Saroop in February 1990, it was not appropriate that there should be a retrial.

[66] Similarly, the offence in this case was committed in April 2003, and a period of 15 years would have elapsed between the date of the offence and the disposal of this appeal. We are cognisant of the fact that because of the state of the criminal calendar, some time will elapse before a new trial could take place.

[67] Finally, we consider the availability of the evidence for the defence's case and the strength of the prosecution's case. At the trial, the appellant gave an unsworn statement. No witnesses were called in his defence. The only evidence against the appellant was the oral and written statements allegedly made by him. The Board in **Reid** noted that "…it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction." We express no opinion as to whether the prosecution's evidence against the appellant was so strong "that any reasonable jury if properly directed would have convicted the accused."

[68] Having weighed the above factors, we have determined that it would not be in the interests of justice to order a new trial.

DISPOSAL

[69] The appeal is allowed. The conviction is quashed and the sentence is set aside.

Chief Justice

Justice of Appeal **Justice of Appeal**