[2022] CCJ 14 (AJ) GY

IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No GYCR2021/003
GY Criminal Appeal No 5 of 2015

BETWEEN

JARVIS SMALL	**APPELLANT**

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS	**RESPONDENT**

And

CCJ Appeal No GYCR2021/004
GY Criminal Appeal No 6 of 2015

BETWEEN

BIBI SHAREEMA GOPAUL C/D NARI	**APPELLANT**

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS	**RESPONDENT**

[Consolidated by orders of the Court dated 31 January 2022]

Before The Honourable: **Mr Justice Saunders, PCCJ**
Mr Justice Wit, JCCJ
Mme Justice Rajnauth-Lee, JCCJ
Mr Justice Barrow, JCCJ
Mr Justice Jamadar, JCCJ

Appearances

Mr C A Nigel Hughes, Mr Ronald Daniels and Ms Narissa Leander for Jarvis Small
Mr Arudranauth Gossai for Bibi Shareema Gopaul c/d Nari

Mrs Shalimar Ali-Hack SC and Mrs Teshana Lake for the Director of Public Prosecutions

Criminal Law – Joint trial – Murder – Appeals against conviction and sentence – Whether separate trials ought to have been granted – Whether the trial judge should have upheld a no

case submission – Whether the failure of the trial judge to direct the jury as required caused a substantial miscarriage of justice – Criminal Law Offences Act, s 100 – Application of the Proviso - Court of Appeal Act, s 13(1).

Sentencing – No sentencing hearing conducted – Whether sentence manifestly excessive – Criminal Law Offences Act, s 100(2), 100A(1)(b), s 100A(3)(b)(ii).

SUMMARY

On 2 October 2010, the body of sixteen-year-old Neesa Gopaul was found inside a suitcase which was submerged in a creek near the Linden-Soesdyke Highway. Her mother, Bibi Gopaul and the mother's lover, Jarvis Small were charged with murder under s 100 of the Criminal Law Offences Act ('CLA'). Small's attorney applied for separate trials, but this was refused by the trial judge. At the close of the prosecution's case, Small's attorney submitted that there was no case for him to answer but this too was refused by the trial judge. The jury returned guilty verdicts and the trial judge imposed sentences of 106 years and 96 years imprisonment for Gopaul and Small respectively. They appealed separately to the Court of Appeal and that court upheld their convictions but reduced their sentences to 45 years.

Gopaul and Small filed separate notices of appeal to this Court against their conviction and sentence. This Court consolidated the appeals. The judgment of the Court was delivered in two parts by Barrow JCCJ and Jamadar JCCJ. The Court separately reviewed the evidence against the appellants. In relation to Small, there were three matters: reports that he sexually assaulted Neesa; a pair of dumbbells which were found with the suitcase in which Neesa's body was found; and a statement by Small that he did not murder Neesa but he knew who did.

The Court rejected the State's argument that the reports of sexual assault proved motive as it was pure speculation that Small had the motive to kill Neesa to avoid prosecution for sexual assault. The Court found there was no evidence that Small had retained possession of the dumbbells to have placed them with the body. In relation to Small's statement of knowledge of the identity of the murderer, the Court found that it was impossible to conclude that because Small said he knew about the killing, that he was the killer. As these were the only matters of evidence against Small, the Court was satisfied that the trial judge should have upheld the submission that there was no case for Small to answer and directed his acquittal.

The paucity of evidence against Small would have been apparent at the beginning of the trial, when the application was made by Small for a separate trial and when it was clear that evidence of a confession that Gopaul had made to a cell mate was inadmissible against Small and would be highly prejudicial to him. This made it an exceptional case where the trial judge ought to have directed that there would be separate trials. Small was gravely prejudiced by the joint trial because he was convicted on the strength of evidence which was completely inadmissible against him.

In relation to Gopaul, the testimony of Simone De Nobrega, who was at the time awaiting trial for offences relating to obtaining credit by false pretence, was that she met Gopaul in the lock-ups and Gopaul confessed her and Small's role in Neesa's murder. As the Court strongly stated, this evidence should not have been placed before a jury trying the case against Small. The Court was also careful to state that it was a question for the jury whether they believed De Nobrega was truthful in telling them what Gopaul told her and, also, how much of the story told they believed.

The evidence given by De Nobrega was that while in the lock-ups with Gopaul, the latter told De Nobrega that she (Gopaul) and Small had an extra-marital affair and Small eventually encouraged Gopaul to kill her husband which she did by poisoning him. Neesa, the daughter who later was murdered, found out about the poisoning and made a report to the police and later talked of pursuing the report, and this led Small and Gopaul to make plans to get rid of her. On the day of the murder, Gopaul was driving her two daughters and Small in a car on the Linden Highway. While the younger daughter was sleeping Small began strangling Neesa in the car. Gopaul then stopped the car in a trail. Small then dragged Neesa out of the car and bludgeoned her on the head with a piece of wood. He then put Neesa's body into the trunk, and they left the scene of the crime. The body was left overnight in the car at Gopaul's home. Gopaul said that on the advice of Small, she took from her home personal items that belonged to Neesa such as her bank book, passport, and Muslim robe, to make it look like Neesa had run away. She and Small also took a pair of dumbbells that Small had given her and a length of decorative rope to attach the weights to the suitcase in which they would place the body to keep it submerged. They returned to the scene of the murder on the following day and placed the body in a suitcase with the personal items, then submerged the suitcase into a creek by weighing it down with the dumbbells and rope.

The Court rejected Counsel's argument that the jury was not adequately warned about the danger of acting on De Nobrega's testimony and that this rendered the conviction unsafe as there was no other material evidence connecting Gopaul to the murder. The Court also rejected the argument that there was no material evidence connecting Gopaul to the murder and pointed to the items found with the body that a jury could reasonably find came from Gopaul's home and were provided by her. The Court found that the trial judge delivered an adequate warning, and the jury would have clearly gotten the sense that he was telling them to be careful in deciding whether to believe the witness. Counsel argued also that the trial judge failed to warn the jury of the prejudicial nature of the part of De Nobrega's testimony concerning Gopaul poisoning her husband. The Court found no reason to interfere with the Court of Appeal's finding that though the trial judge failed to warn the jury not to use the alleged poisoning of Gopaul's husband as proof of guilt of this crime, no substantial miscarriage of justice had thereby been caused.

Jamadar JCCJ delivered the decision of the Court on the issue of sentencing. Gopaul was subject to sentencing according to s 100A(1)(b) of the CLA which prescribes that a person should be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years. The Court found that in this case there had been no fair and just sentencing process.

The sentence imposed by the trial court, 106 years with a starting point of 60 years, exceeded the life expectancy of a human being and was grossly disproportionate and manifestly excessive. The sentence and the manner in which the trial court went about it were contrary to the s 144 constitutional guarantee of a fair hearing by an independent and impartial court, and to s 141 as the disproportionate and excessive penalty imposed was tantamount to inhuman and degrading punishment.

The resentencing by the Court of Appeal was also reviewed. The Court noted that the Court of Appeal did not discount pretrial custody in accordance with this Court's guidance in *Da Costa Hall v R*. The Court considered that the sentence itself of 45 years, though not as grossly disproportionate as the trial judge's sentence was still manifestly excessive, and the Court of Appeal did not indicate the period of ineligibility for parole consistent with the legislative intent in s 100A(3) of the CLA.

The Court considered local cases which were cited (which did not include murder of minors), focussing on the inherent aggravating and mitigating factors relative to the offence and not the offender, and determined that a reasonable generic starting range was fifteen to twenty years imprisonment. There was justification for choosing a starting point at the higher end because the case involved the murder of a minor. Further, there were unique aggravating factors, in that it was the murder of a child by her parent which was associated with the vulnerability of a minor, the betrayal of trust and responsibility by a parent, and the degree of violence used to commit the offence including the wanton disregard for the personhood of the minor. As such the Court found that there were good reasons to increase the upper limit of the starting range to twenty-two years and to select a starting point at the upper end of the new range.

The Court then identified the following considerations which would justify a stage two uplift relative to the commission of this particular offence: (i) there was a special relationship of trust and responsibility; (ii) the degree of blunt force to the head; (iii) the method of disposal of the body; and (iv) the lack of any remorse by Gopaul, and any evidence of motivation to murder her child. The Court also considered that it had appeared from the record that Gopaul had no prior convictions, and she was at the time of sentencing undergoing rehabilitation. The Court termed these as 'potentially mitigating circumstances'. The Court also considered as a special circumstance, the public interest in the welfare and protection of minors. Having regard to all these factors, an uplift of between five to eight years was justified. The Court found that a fair and just sentence of imprisonment for a term of thirty years with parole eligibility not before fifteen years would meet the penological objectives of sentencing. From that sentence, the period of five years would be deducted for time spent in pretrial custody.

In a dissenting judgment, Wit JCCJ opined that both the convictions of Small and Gopaul were unsafe due to the lack of evidence of sufficient quality. Wit JCCJ did not agree with the majority that the personal items found with Neesa's body were tantamount to the 'strength of fingerprints'. In his opinion, it was a stretch to conclude that the personal items materially connected Gopaul to the disposal of Neesa's body and even more so, the actual murder. De Nobrega's evidence was the only substantial evidence but that could not have been safely used by the jury. Data unearthed by many studies show that evidence from a prisoner awaiting trial, a 'jailhouse snitch' was unreliable. The warning given by the trial judge in the present case was inadequate and far from robust and the jury could not have been effectively educated on the

dangers of the evidence. Additionally, De Nobrega's evidence was substantially uncorroborated and unnecessarily so as there were serious investigative flaws. The other, supporting evidence, was weak or equivocal. In a postscript the Judge also made some critical remarks about the "universal" rule that the use of an out of court admission against a co-accused would always and in all circumstances be unfair.

The Court allowed the appeal of Jarvis Small and allowed in part the appeal of Bibi Gopaul against the sentence imposed by the Court of Appeal. Her appeal against conviction was dismissed. The Court substituted a term of thirty years imprisonment with no eligibility for parole before the expiration of fifteen years. From this sentence the period of five years will be deducted for time spent in custody while on remand.

Cases referred to:

Alexander v R (2020) 97 WIR 34 (BB CA); *Alleyne v R* [2019] CCJ 06 (AJ) (BB), (2019) 95 WIR 126; *Allicock v The State* (Guyana CA, 21 December 2020); *Arthurton v R* [2005] 1 LRC 210 (VG PC); *August v R* [2018] CCJ 7 (AJ) (BZ), [2018] 3 LRC 552; *Benedetto v R* (2003) 62 WIR 63 (VG PC); *Bennett v R* [2018] CCJ 29 (AJ) (BZ), (2019) 94 WIR 126; *Browne v The State* (Guyana CA, 7 May 2021); *Budhoo v The State* (Guyana CA, 1 July 2021); *Chee-Yan-Loong v Ramchandarsingh* (1947) LRBG 93; *Da Costa Hall v R* [2011] CCJ 6 (AJ) (BB), (2011) 77 WIR 66; *Edwards v R* [2017] CCJ 10 (AJ) (BB), (2017) 90 WIR 115; *Fredericks v The State* (Guyana CA, 30 August 2021); *Hinds v The State* (Guyana CA, 1 February 2022); *Gopaul v The State* (Guyana CA, 31 August 2021); *Jordan v The State* (Guyana CA, 25 July 2018); *Maduboku v R* [2011] NSWCCA 135; *Makin v A-G for New South Wales* [1894] AC 57; *Maxwell v DPP* [1935] AC 309; *Mohamed v R* [1949] 1 All ER 365 (GY PC); *Outar v The State* (1982) 36 WIR 228 (GY CA); *Persaud v R* [2018] CCJ 10 (AJ) (BB), (2018) 93 WIR 132; *Pham v R* [2006] NSWCCA 3; *Pop v R* (2003) 62 WIR 18 (BZ PC); *R v Bissonnette* [2022] SCC 23; *R v Hayter* [2005] 2 All ER 209; *R v Khela* 2009 SCC 4; *R v Lake* (1976) 64 Cr App R 172; *R v Lawrence* (2014) 84 WIR 410 (JM PC); *R v Middis* (New South Wales SC, 27 Mar 1991); *R v Moghal* [1977] 65 Cr App R 56; *R v Pettman* (United Kingdom CA, 2 May 1985); *R v Sims* [1946] KB 531; *R v Spencer* [1986] 2 All ER 928; *R v Towle* (1955) 72 WN 338; *R v Williams* (1986) 84 Cr App R 299; *Ramcharran v DPP* [2022] CCJ 4 (AJ) GY; *Sooklal v The State* (1999) 55 WIR 422 (TT PC); *The State v Chaitlal* (Trinidad and Tobago HC, 11 November 2009); *The State v Mitchell* (1984) 39 WIR 185 (GY CA); *The State v Persaud* (1971) 17 WIR 234 (GY CA); *The State v Seepersad* (Trinidad and Tobago HC, 13 January 2006); *Stephen v The State* (Trinidad and Tobago CA, 23 November 2001); *Swamy v The State* (1991) 46 WIR 194 (GY CA); *Verwayne v The State* (Guyana CA, 10 March 2020); *Vetrovec v R* [1982] 1 SRC 811; *W v R* [2020] 1 NZLR 382; *Ward v The State* (Guyana CA, 25 July 2018).

Legislation referred to:

Barbados – Evidence Act, Cap 121; Canada – Canadian Charter of Rights and Freedoms; **Guyana** – Constitution of the Co-operative Republic of Guyana 1980, Court of Appeal Act, Cap 3:01, Criminal Law (Offences) Act, Cap 8:01.

Treaties and International Materials referred to:

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

Other Sources referred to:

Bellin J, 'The Evidence Rules That Convict The Innocent' (2021) 106 Cornell L Rev 305; Covey R D, 'Abolishing Jailhouse Snitch Testimony' (2014) 49 Wake Forest L Rev 1375; Dufraimont L, 'Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?' (2008) 33 Queen's L J 261; Findley K A, 'Judicial Gatekeeping of Suspect Evidence: Due process and Evidentiary Rules in the Age of Innocence' (2013) 47 Ga L Rev 723; Glover R, Murphy on Evidence, (14th edn, Oxford University Press 2015); High A, 'The Exclusion of Prison Informant Evidence for Unreliability in New Zealand' (2021) 25 Int'l J Evidence & Proof 217; Manitoba Department of Justice, Prosecutions Policy Directive: In-Custody Informer Policy (Guideline No 2:INF:1, November 5, 2001); National Association of Criminal Defense Lawyers, Amicus Curiae brief in support of Respondent in *State of Kansas v Ventris*, 556 U.S. 586 (2009); Roach K, 'Wrongful Convictions in Canada' (2012) 80 U Cin L Rev 1465; Spencer JR, *Hearsay Evidence in Criminal Proceedings* (2nd edn, Bloomsbury Publishing 2014).

JUDGMENT

of

The Honourable Mr Justice Saunders, President

and The Honourable Justices Rajnauth-Lee, Barrow and Jamadar

Delivered by

The Honourable Mr Justices Barrow and Jamadar

and

DISSENTING JUDGMENT

of

The Honourable Mr Justice Wit

on 19 August 2022

JUDGMENT OF THE HONOURABLE MR JUSTICE BARROW, JCCJ:

Introduction

[1] These are separate appeals of the two appellants, Jarvis Small and Bibi Shareema Gopaul, which were heard together by this Court, against their convictions and sentences for murder after a joint trial. The dispassion of judicial restraint inhibits expression, beyond the basic statement we now make, of the Court's sorrow for the innocent sixteen-year-old girl who ceased to be a person and became a victim, of murder most foul.

Overview of the Proceedings

[2] On 2 October 2010, the body of sixteen-year-old Neesa Gopaul was found inside a suitcase which was submerged in a creek near the Linden-Soesdyke Highway. It was determined that the cause of death was multiple blunt force trauma to the head. Her mother, Bibi Shareema Gopaul, and Jarvis Small, the mother's lover, were charged with the offence of murder contrary to s 100 of the Criminal Law Offences Act (CLA).[1] They were tried jointly and on 5 March 2015 the jury returned guilty verdicts. In a decision delivered on 31 August 2021, the Court of Appeal dismissed the appeals against conviction but reduced the sentences from 106 years and 96 years respectively for Gopaul and Small to 45 years imprisonment.

[3] Separate notices of appeal were filed against both conviction and sentence. The leading grounds of appeal for Small, in relation to conviction, were that the Court of Appeal erred in law in upholding the trial judge's decision to conduct a joint trial and to reject the submission of no case to answer. The leading ground of appeal for Gopaul, in relation to conviction, was that the Court of Appeal erred in failing to quash the conviction on the ground that the trial judge had misdirected the jury in relation to the evidence of a cell mate of Gopaul's, who testified that Gopaul had confessed to the murder.

[4] As was fully accepted in all courts, Gopaul's confession and the information or allegations it contained were not evidence against Small. In application of this basic principle of criminal law, this Court will adopt the approach of considering Small's

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[1] Cap 8:01.

appeal, and the evidence against him, separately from Gopaul's appeal and the evidence admissible against her.

<u>Small's Appeal</u>

[5] Along with the formal evidence, the evidence against Small consisted of three matters.

The Evidence

(i) *Alleged Sexual Assault of the Deceased*

[6] The first matter of evidence against Small was that two reports had been made to the Police that Small had sexually assaulted the deceased, Neesa. The first report was made by Gopaul in August 2010, and she withdrew it a few days later. Small had been arrested by the police on the strength of the report. The second report was made by Gopaul's sister, accompanied by Gopaul, on 15 September 2010 and on the following day Neesa attended the police station and provided information. Instructions were given to arrest Small. Two days after the second report was made, Gopaul sought to withdraw the allegation. At the time of the reports Neesa was 15 years of age; she celebrated her 16th birthday on the day she went to the police station to supplement the second report.

[7] The officer who had dealt with the reports testified that on 25 September 2010, Gopaul returned to report that Neesa was missing. Following the discovery of the body, on 3 October 2010 the police arrested and charged Gopaul and Small that sometime between 23 September and 3 October they murdered Neesa.

[8] Evidence was given that subsequent to the report that Neesa was missing, a team of police officers went to a hotel where they found Gopaul and Small sitting on a bed next to each other and the two appeared uneasy. The police were looking for a handgun; they searched Small and found none.

(ii) *The Dumbbells*

[9] The second matter of evidence against Small was a pair of dumbbells. Evidence was given by a police witness who found Neesa's body. He testified that on or around 2 October 2010 he and others visited a locale where they found a black suitcase, with the brand 'Kelly'. The suitcase was partially submerged in a body of water. Inside the suitcase was a dead body and part of the head was 'bashed in', and there was also a

passport, bank book (or card), and a Muslim robe. Two dumbbells had been attached with a red rope to the suitcase, apparently to keep it submerged.

[10] The Commissioner of Police testified to Small being the owner of the dumbbells which accompanied the suitcase. Another officer testified that he showed Gopaul's sister the dumbbells with the red rope attached and the sister said that she had seen those items in Gopaul's home. An officer also testified that Small told him that he bought the dumbbells.

[11] A witness testified that he had known Small since 2006 and Small was the owner of a gym. The witness was shown the weights and he stated that he sold them to Small. Another witness stated that he would make dumbbells and paint them. He said that the weights in question were welded by him. A further witness stated that he was shown the dumbbells and he identified them as belonging to Small. He also stated that he had seen those dumbbells at Small's home. The trial judge noted that Small initially denied that he owned the dumbbells in question.

(iii) ***Small Knew About the Murder***

[12] The third matter of evidence against Small was the testimony of an Assistant Superintendent of Police that on 6 October 2010, in a police interview, Small said he did not murder Neesa but he knew who did, and if he told them what happened, Gopaul would be an accessory. This witness stated that Small further said that when his attorney arrived, he would relate what transpired. When the said attorney arrived, the attorney stated, 'I am giving you 45 years of advice I won't sit in any conversation between you and the police', then left. Small did not, thereafter, tell what he said he knew.

Submission of No Case to Answer

[13] With that as the only admissible evidence against Small, his counsel submitted to the judge that there was no case for Small to answer. The trial judge rejected the submission and called upon Small to present a defence. As mentioned, a primary ground of Small's appeal was that the Court of Appeal erred in law when it upheld the decision of the trial judge to reject the submission. In brief, the submission for Small is that the evidence against him was legally incapable of proving that he murdered Neesa. Consistent with

the learning presented by Chancellor Massiah in *The State v Mitchell*[2], a judge ought not to send the case to the jury unless there is sufficient evidence upon which a reasonable jury, properly directed, might convict.

[14] The Director of Public Prosecutions, appearing for the State, opposed the submission. She argued that the evidence of the reports that Small had sexually assaulted Neesa provided 'background evidence' of a motive for Small to have murdered the girl.

[15] The State further argued that the dumbbells provided objective evidence of Small's commission of the murder. It was argued that the dumbbells belonged to Small, that he used them, and they were too heavy for Gopaul to have used. Thus, the argument went, the finding of the dumbbells attached to the suitcase containing the body physically tied Small to the murder.

[16] Finally, the State argued, Small's statement to the Police that he knew about the murder was evidence that pointed to his being the killer.

Consideration

[17] *Small's knowledge*: This Court's consideration of these arguments begins with the last argument because it is easily disposed of. Without more, it is simply impossible to conclude, because Small claimed to know about the killing and who did it, that this amounted to evidence that he was the killer. The rejection of this purely speculative conclusion does not even need to refer to the fact that Small specifically stated he was not the killer. Just how entirely speculative is this conclusion may be seen by considering the obvious possibility that Small's supposed knowledge could have been based on information given to him, in the same way that the witness against Gopaul knew about the killing and who did it – that is, from information given to her. Speculation could easily come up with a likely source of Small's information, but such speculation would be just as improper as the speculation that Small's knowledge flowed from his supposed guilt. The State's case that Small's knowledge of the murder meant he was the guilty one was baseless.

[2] (1984) 39 WIR 185 at 190 (GY CA).

[18] *Sexual misconduct*: As regards the admission of evidence of the reports of alleged sexual misconduct, the State argued that this evidence provided background evidence because it proved motive, but the State did not say in what way it proved motive. It is notable that the State avoided putting into actual words what it is nonetheless imputing, which is that Small killed Neesa to silence her. This was a tactical avoidance, perhaps, because the direct statement of the proposition would have immediately elicited the natural question, where is the evidence of this? There is no answer to that question because a survey of the evidence reveals there is no evidence Small had any motive. The contrast with the State's case against Gopaul is towering. On the case against Gopaul, there is direct evidence that she confessed to both motive and intention to kill; see [35] below. Evidence that Gopaul committed an earlier crime, although obviously prejudicial, was properly admissible because, on the State's case, her motive for killing Neesa was to suppress the report of this earlier crime to the police. Gopaul, herself, confessed that was her motive. In the case of Small, there is simply no evidence that he had the motive to kill Neesa to avoid prosecution for sexual assault. To ascribe that motive to Small was utterly beyond the reach of any reasonable jury.

[19] When examined, the submissions for the State do not get past the absence of evidence of motive of Small; rather they address the exercise to be conducted by a trial judge, when deciding whether to admit evidence of the commission of a previous offence, of balancing the prejudicial effect versus the probative value of that evidence; see *Chee-Yan-Loong v Ramchandarsingh*;[3] and *The State v Persaud.*[4] But the need to do that balancing does not arise in this case because what is seen is that the evidence of the alleged previous sexual crime is quite incapable, on any reasonable basis, of connecting to the crime of murder. The need for there to be a connection was highlighted by the State's quote from *R v Pettman*[5]:

> … where it is necessary to place before the jury evidence of part of a continual background or history relevant to the offence charged in the indictment, and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence.

[3] (1947) LRBG 93.
[4] (1971) 17 WIR 234 (GY CA).
[5] (United Kingdom CA, 2 May 1985) cited in *R v Williams* (1987) 84 Cr App R 299 at 301.

[20] A good example of previous bad conduct being admissible because it is connected, and so relevant to the offence being tried is *Outar v The State*[6] in which evidence of the appellant's previous beatings of the murdered wife was held admissible, even though prejudicial, because it was relevant to proof of guilt. The beatings were regarded as an incident in the transactions or chain of facts under investigation, including the continuing violent treatment of the wife, which the prosecution sought to prove ended in the gruesome slaying of the wife.

[21] The facts of *Outar* give substance to the statement from *Pettman* and, by contrast with the present facts, support the principle that where, as here, there is no connection between the reports of sexual assault and the charge of murder, in contrast to the connection between the previous beatings and the charge of murder, there is no basis for admitting the evidence of an alleged previous offence. This is especially so because, on the State's case, and on the only admissible evidence as to motive, as will be seen when reviewing the evidence against her, Gopaul was the one who had a motive - to prevent her daughter from persisting in her earlier report to the police Gopaul had previously murdered her husband.

[22] In the submissions on this ground, it was recognised that the purpose of adducing evidence of previous crime is not for it to be used to infer guilt. As declared in the famous case of *Makin v Attorney General for New South Wales*[7]:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would be otherwise open to the accused.

[23] It is clear there was no evidence connecting Small with the murder (because the dumbbells did not do so, as discussed below), therefore the evidence of the reports of sexual misconduct could serve no purpose and, because it had no relevance, did not fall

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[6] (1982) 36 WIR 228 (GY CA).

[7] [1894] AC 57 at 65.

into the ambit of admissibility recognised in *Makin*. The evidence should not have been admitted. Having been admitted, that evidence had no probative value, and the courts below were wrong to regard it as capable of supporting a decision that there was a case to answer.

[24] *The dumbbells*: This leaves for consideration the dumbbells as physical evidence connecting Small to the disposal of the body and, by extension, the commission of the murder. The State vigorously argued that Small's ownership and usage of the dumbbells provided that connection and supported the inference of guilt. But it was unarguable that the dumbbells were kept at Gopaul's home and not at Small's home or gym. Gopaul's home is the last place they were seen before they were found with the body. With no evidence to the contrary, the only inference that was properly available to the jury was that it was from Gopaul's home that the dumbbells and the red rope, along with Neesa's passport, bank book and other items, were obtained and placed with the body. That evidence completely overshadows the other evidence concerning the history of the dumbbells and makes insignificant the evidence of Small's connection with the dumbbells. In the absence of other evidence, it was not an available inference that Small placed the dumbbells with the suitcase. On the admissible evidence, he did not have possession of them to place them.

[25] In summary, therefore, none of the matters of evidence upon which the State relied to argue there was a case for Small to answer could support a ruling to that effect. Accordingly, this Court is satisfied that the Court of Appeal erred in upholding the ruling of the trial judge and should have reversed him and set aside Small's conviction.

Separate Trial

[26] It follows from the preceding reasoning and decision on the no case submission that this Court must also allow Small's appeal on the other ground, that the Court of Appeal erred in upholding the trial judge's refusal to order separate trials. It follows because when the application was made, the weakness of the evidence against Small, elaborated above, was already clear. And equally clear should have been the huge difference that would be made by having before the jury who would be deciding Small's case, the legally

inadmissible but cognitively unignorable information, in the story Gopaul told, that he allegedly bludgeoned Neesa to death.

[27] The principles upon which courts act in deciding upon joint and separate trials start from the premise that it is only in exceptional cases separate trials are ordered for two or more defendants who are jointly charged with participation in one offence. There are powerful public interest reasons why joint offences should be tried jointly.[8] The importance is not merely the saving of time and money; it also concerns the desirability that the same verdict and the same treatment are returned against all persons concerned in the same offence, as the State submitted.[9] If joint offenders were widely to be tried separately, all sorts of inconsistencies might arise.

[28] Even though jointly trying persons who are accused of a joint offence will involve evidence being given before the jury that is inadmissible as against a co-accused, and the possible prejudice which may result from that, it is accepted that persons accused of a joint offence can properly be tried jointly.[10] This course is considered fair because the law attempts to mitigate possible prejudice by a number of practices, such as requiring the trial judge to warn the jury that such evidence is not admissible as against a particular defendant or defendants.[11] Another practice is for the judge, at the point when the prejudicial evidence is about to be given, to draw to the jury's attention that what will be said must not be heard or received by them as evidence against a co-accused.[12] A further practice is for the judge in directing the jury to direct them separately in relation to the evidence admissible against individual defendants.[13]

[29] These practices, designed to reduce the prejudice that may arise on a joint trial and that make it fair to hold a joint trial, were summed up in *R v Towle*[14] as follows:

> While it is undoubtedly wise and proper in a joint trial when evidence is being tendered to tell the jury at that point of time the bearing and relevance of that particular piece of evidence in relation to the particular accused concerned, that does not obviate the necessity of giving to the jury full and adequate directions at the conclusion of the case when all the evidence has been tendered and when

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[8] *R v Lake* (1977) 64 CrApp R 172 at 175.
[9] ibid. See also *R v Sims* [1946] KB 531 at 536.
[10] ibid.
[11] In *R v Moghal* (1977) 65 Cr App R 56; *R v Lake* (1976) 64 Cr App R 172 at 175.
[12] *R v Towle* (1955) 72 WN 338.
[13] ibid.
[14] ibid at 340.

> the matter is being finally left to them for their determination… Where more than one are being tried together, except in unusual cases, it is a clear duty of the trial judge to separate for the jury's consideration the evidence properly relevant and material in the case of each, and to present the case made against each of the accused separately. The jury should be specifically told of the evidence which they may consider against each individual accused, together with appropriate directions as to the legal principles involved. In this connection it is insufficient to rest such a direction upon the formula that each case must be considered separately without further explanation. To this extent we are of opinion that the summing up was defective by reason of the omission to give the jury such directions as would enable them to consider only the evidence admissible against each of the accused as if they had been tried separately.

[30] The law recognises, however, that there will be exceptional cases where it is just to order separate trials to avoid a miscarriage of justice that would result from accused persons being tried together. Mr Hughes, counsel for Small, assisted the Court by citing the Australian decision of *R v Middis*[15] which was summarised in the headnote as follows:

> The principles upon which an application for separate trials will be considered are: (1) where the evidence against an applicant for a separate trial is significantly weaker than and different to that admissible against another or the other accused to be jointly tried with him, and (2) where the evidence against those other accused contains material highly prejudicial to the applicant although not admissible against him, and (3) where there is a real risk that the weaker Crown case against the applicant will be made immeasurably stronger by reason of the prejudicial material, a separate trial will usually be ordered in relation to the charges against the applicant.

[31] The court added that the applicant must demonstrate that there is a real risk (as opposed to a remote possibility) that there will arise in a joint trial, prejudice of the type which - if it arises - would result in positive injustice to him.[16] He must also show that such prejudice outweighs the public interest in the efficient dispatch of trials, the conserving of costs and the avoidance of any inconvenience to witnesses by having to attend a number of trials.[17]

[32] The submissions for the State did not reduce the force of those considerations even though they pointed to later Australian decisions as suggesting that the fact that the case against one co-accused is weaker than the case against the other is not a relevant

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[15] (New South Wales SC, 27 Mar 1991).
[16] ibid at 4-5.
[17] ibid at 7.

consideration in determining whether to grant separate trials.[18] This Court is satisfied as to the cogency and value of the statement of the principles in *Middis* and considers that the weight to be given to each of the considerations may be a matter of degree, especially when all three considerations are present, as in this appeal. As would be gathered from its decision on the no case submission, the Court is satisfied that Small's application for a separate trial was one of the exceptional cases where it clearly should have been granted. The prejudice that Small suffered from the joint trial produced an undoubted miscarriage of justice. Fundamentally, he was convicted on the strength of evidence that was totally inadmissible against him because, without the shadow cast by the inadmissible evidence, there was no basis, in the evidence that was admissible against him, upon which to convict him. Without the story told by Gopaul, there was simply no evidence to connect Small to Neesa's death. His conviction was unsafe and must be set aside.

<u>Gopaul's Appeal</u>

[33] The evidence admissible against Small was equally admissible against Gopaul, but there was additional evidence against her, in the form of the highly incriminating testimony of Simone De Nobrega. At the trial, counsel then appearing for Gopaul tried to exclude this testimony but failed. Before this Court, her new counsel focussed on how the Court of Appeal dealt with the trial judge's misdirection to the jury on how to treat De Nobrega's evidence. Counsel also focussed on the reception at the trial of prejudicial evidence, from De Nobrega, that Gopaul had murdered her husband, Neesa's father. It is now accepted that the evidence from De Nobrega was properly before the court, although the appellant maintains objections to aspects of it. It is important to emphasize in summarising the evidence of De Nobrega that this Court makes no observations on its credibility, either as to authenticity or content, as it was entirely for the jury to decide whether they believed De Nobrega was truthful in telling them that Gopaul had told her what she narrated and, also, how much and what parts of the story told they believed.

[18] *Maduboku v R* [2011] NSWCCA 135 approving a comment in *Pham v R* [2006] NSWCCA 3.

The Evidence

(i) *Evidence of Simone De Nobrega*[19]

[34] De Nobrega testified to meeting Gopaul at a police lock-ups on 5 October 2010, two days after Gopaul was arrested. De Nobrega's testimony is summarised as follows. Over a period of five days, De Nobrega and Gopaul became better acquainted. Gopaul began telling of the murder after De Nobrega awakened her from a nightmare, during which she was saying, 'Barry stop.'[20] Gopaul related that in March 2010, while married, she met Small, a gym instructor, who was also married. They began an intimate relationship and at one point she moved out of the matrimonial home, for two weeks. Small told her the only way they could have a relationship was if her husband was out of the picture and so Small encouraged her to poison her husband. Over a period of time, she did so with poison supplied by Small, which she placed in the husband's food, resulting in the husband's death. A couple of weeks later, according to Gopaul, Small moved in with Gopaul and her children (although other evidence indicated he was living with his wife at the material time). After this, Gopaul became aware of Neesa's attraction to Small and this was something to which Small drew her attention.

[35] Shortly after this point, Gopaul said, Small told her (Gopaul) that Neesa had overheard a conversation in which Gopaul had stated she had poisoned her husband, Neesa's father, and that she (Neesa) was prepared to make a police report. However, as Gopaul told it, she managed to persuade Neesa to tell the police that the story was fabricated.[21] Subsequently, Small told Gopaul that 'Neesa was trouble' and the two of them discussed plans to get rid of Neesa and had several such discussions. On one occasion when Gopaul scolded her, Neesa told Gopaul that she knew Gopaul had poisoned her father. During this period, also, Gopaul stated she had seen Neesa in a compromising position with Small and became angry and threatened Small with a knife. Also, during this period, Gopaul said, Small was pressing her for them to get rid of Neesa who was causing so much trouble that 'she had to join her father'.

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[19] Record, 131.
[20] This was Small's nickname.
[21] It is noted there was no evidence from the police of such a report.

[36] Gopaul said that a few days later, they were driving along the Linden Highway; Small was in the back seat with Neesa's younger sister, Gopaul was in the driver's seat and Neesa was in the front passenger's seat. Small placed a rope around Neesa's neck and strangled her. During this occurrence the younger sister remained asleep. Gopaul then turned into a trail and eventually stopped. Small took Neesa out of the car, and Gopaul turned up the music in the car, so as to not awaken the younger sister. Gopaul got out of the car to ensure that no one was around. Small then took a piece of wood and struck Neesa on her head until she fell to the ground. He then picked Neesa up and placed her body in the trunk of the car. Gopaul then dropped Small back to Vreed-en-Hoop where they met his wife. Small's wife told Gopaul that she had recordings of conversations where Gopaul admitted to killing her husband and if she did not discontinue her relationship with Small, she would report them to the Police. Gopaul said she got on her knees and pleaded with Small's wife. After this, she drove home.

[37] The next morning, Gopaul checked Neesa's body which had remained in the trunk of the car to ensure that she was dead. She said that Small advised her to get various items (passport, bank card) to make it seem like Neesa ran away from home. Small said that they would use the dumbbells from her home along with some rope in order to dispose of the body. At midnight the following night, they returned to the scene of the murder, wrapped the body in a sheet and placed it in a suitcase along with the passport and bank card that had belonged to Neesa. They then used the rope to attach the dumbbells to the suitcase and dragged the suitcase to a creek to sink it. They went home and the following morning, Small told Gopaul to buy fresh meat and place it in the trunk with their dog and leave it there for the entire day.

(ii) ***Items Recovered from Gopaul's Home***

[38] A police officer testified that on 4 October 2010 he went to Gopaul's home. He noticed a mattress with what appeared to be blood, a door which had an unknown substance on it, a sheet which was soaking in soap water which he examined, and apparent blood stains on it. He also stated that he found a small suitcase with a knife which appeared to have blood stains on it. He stated that he took the items for testing, but he received no

results.[22] There was also evidence that a suitcase with the brand 'Kelly' was found in Gopaul's home. This was the same brand on the suitcase that contained the body.

Warning About De Nobrega's Evidence

[39] Counsel submitted that the only material evidence which connected Gopaul to the murder was De Nobrega's evidence and that the Court of Appeal had agreed that the trial judge inadequately directed the jury on the need to approach that evidence with caution. Before examining the directions that the trial judge gave to the jury, it is necessary to dispel the misconception that De Nobrega's evidence was the only evidence that implicated Gopaul. Counsel's submissions ignored evidence of the red rope and the dumbbells used to anchor the suitcase with the body; the Kelly brand suitcase found at Gopaul's home; and the passport and bank book found with the body.

[40] It was fully open to the jury to have found that each of the items that were found with the body came from Gopaul's home and possession. Similarly, the suitcase found in Gopaul's possession, at her home, was of a matching brand to the Kelly brand suitcase in which the body was found. When considered together with the other objects, there was a strong inference that the suitcase containing the body also came from Gopaul's home and possession. These things objectively and materially connected Gopaul to the disposal of the body and, hence, the murder. They were almost of the strength of fingerprints found at the scene of a crime, the probative force of which is that they connect the owner of the prints to the crime by placing that person at the scene of the crime. In a similar way, the stated objects connected Gopaul with the body because, with no evidence or explanation to the contrary, they led to the conclusion that she participated in the disposal of the body by furnishing these objects, which had been in her singular possession. They also lead to the conclusion that no one else could have furnished them.

[41] As regards the judge's direction to the jury on how to deal with De Nobrega's evidence, counsel submitted that the Court of Appeal acknowledged that the judge's use of the word 'needful' (as it was recorded) as opposed to careful, in warning the jury about De

[22] The objection was taken in the Court of Appeal that this evidence was prejudicial and had no probative value and, therefore, should not have been admitted. Although no longer pursued, there was undoubtedly merit in the objection.

Nobrega's evidence, was an error. Therefore, counsel submitted that the Court of Appeal erred in law in finding that the conviction was safe in the absence of that clear warning.

[42] The need for a warning arose from the fact that De Nobrega, at the time she gave evidence, was awaiting trial for offences of obtaining credit by false pretence. The danger of acting on evidence from a person awaiting trial, and who therefore may wish to ingratiate themselves with the police, is well known, as seen in *R v Lawrence*[23]; *Benedetto v R*[24]; and *R v Spencer*[25]. There needs to be a robust warning of this danger.

[43] The Court of Appeal concluded that the trial judge in fact gave the warning to the jury to be cautious in accepting De Nobrega's evidence, because she may have had an improper motive for giving that evidence. The Court of Appeal reached that conclusion after considering the direction that the trial judge gave to the jury, in these words:

> 'Firstly, at the time this witness told the police this story was told to her, she was not a convicted prisoner. She was there awaiting trial on charges. It is not unknown for persons in such a position to place themselves in favour with the police and to give the police information that an accused with them in the same cell had admitted to and which they are presently held and hope to get an advantage by doing so with the police.'

[44] The Court of Appeal noted that the trial judge went on to say:

> 'Members of the jury, when considering the evidence of De Nobrega you would be <u>needful</u> when considering the witness's evidence. You first have to consider whether you believe Bibi Gopaul did tell De Nobrega this story before you accept it and if you accept that she did tell her the story, then you'll have to determine whether you feel sure that the contents of the story is true before you can act on it.' (emphasis added).

[45] The Court of Appeal also considered the trial judge's further direction to the jury about De Nobrega, at another point in the summing up, when he said:

> 'The Defence is saying, firstly, De Nobrega is not a person that you can trust since she has already committed a number of fraudulent transactions and in fact was convicted on at least one that we know. They're saying that she got her facts from the newspapers and told this story to the police to avoid her charges and has now come here to avoid serving time for the offence she was convicted of.'

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[23] (2014) 84 WIR 410 (JM PC).
[24] (2003) 62 WIR 63 (VG PC).
[25] [1986] 2 All ER 928.

> ‘Further, De Nobrega has also accepted that between her story in the Magistrates’ Court to here, there were parts that were inconsistent.’

The Warning was Given

[46] We do not accept the submission by counsel for the appellant that the Court of Appeal ‘agreed, accepted, and held that the learned trial judge failed to direct the jury to view De Nobrega’s evidence with caution …’. In fairness to counsel, there are statements in the decision of the Court of Appeal that could support counsel’s interpretation, but we are satisfied that the true position was as stated in the decision by the Court at the end of its treatment of this aspect. In concluding on this aspect, the Court stated that the trial judge did alert the jury to the required factors; that he could have given more directions in relation to the warnings; but that, ‘…Nevertheless, the warning was given to the jury.’ In our review of the directions given by the trial judge, we are satisfied that the Court of Appeal was right: that the warning was given. Therefore, we are satisfied that Gopaul did not suffer any unfairness.

[47] That conclusion by this Court, that there was no unfairness, applies also to what became the nub of counsel’s submission regarding the warning the judge gave to the jury about the danger of acting on De Nobrega’s evidence. The submission was that the judge misdirected, or failed to direct, the jury when he told them they should be ‘needful’ in considering De Nobrega’s evidence (see the quote at [44], above). Counsel submitted the trial judge should have said ‘careful’ and the failure to use that word meant the proper warning was not given.

[48] Much attention was paid by the Court of Appeal to this malapropism, but it is clearly nothing more than that. We consider this trifling. Without concluding on the point, it seems at least a probability to this Court that, in the transcription of the judge’s voice recording by the court stenographer, the wrong word, ‘needful’, was substituted by the transcriber for the right word, ‘careful’. That seems a sensible explanation, and logically preferable to the proposition that the judge committed this aberration. But, if he did, it is a virtual certainty that the jury would immediately have mentally supplied the right word; they would have gotten clearly the sense that the judge was telling them to be careful in deciding whether to believe De Nobrega. That was ineluctable, given what the judge said before and after he made the statement under consideration.

[49] As the discussion of the adequacy of the warning indicates, there was no argument in this trial or appeal that the evidence of De Nobrega was not legally admissible or not to be relied on because of the characteristic of the witness – colourfully called a 'snitch'. However may develop the law of evidence in relation to such evidence, whether arising from future cases before our courts including this Court or from legislative intervention, it would not be fair to the State or the courts below for this Court to now consider the exclusion of such evidence or denying it any weight.

Prejudicial Evidence

[50] Counsel for Gopaul submitted that the appellant was prejudiced by the trial judge allowing evidence to be given that Gopaul had murdered her husband. This was compounded by the failure of the trial judge to direct the jury on how to treat that evidence, which failure, as counsel correctly noted, the Court of Appeal found, had occurred. The prejudice caused to Gopaul, it was submitted, was that this evidence may have led the jury to conclude that Gopaul, having murdered her husband was a murderer, and to therefore conclude that she murdered Neesa. That made it necessary to set aside the conviction, counsel submitted, citing *Mohamed v R*[26] and *Arthurton v R*[27].

[51] The principle underlying the submissions as to prejudice is that a court will not admit evidence of a previous crime to be relied on as showing a tendency to commit crime and, therefore, a likelihood of having committed the crime being tried, as was famously stated in *Makin*,[28] in the extract at [22], above. In *Maxwell v DPP*[29] this principle was said to be 'one of the most deeply rooted and jealously guarded principles of our criminal law' and to be 'fundamental in the law of evidence as conceived in this country'. On the other hand, as mentioned at [19]-[20] above, it is well established that a court will allow admissible evidence if it is relevant, even though prejudicial, if its probative value exceeds its prejudicial effect.

[52] The true nature of the prejudicial evidence and its clear purpose, in this case, was not to prove that Gopaul had committed murder in the past, in order to lead to the conclusion that she committed murder in this instance. The evidence was that Gopaul, herself, had

[26] [1949] All ER 365 (GY PC).
[27] [2005] 1 LRC 210 (VG PC).
[28] *Makin* (n7) at 57.
[29] [1935] AC 309 at 317-320.

stated her motive for murdering her daughter. In *R v Williams*[30] the Court noted that a distinction should be drawn between evidence of similar facts, usually relating to offences against other persons, and evidence of other acts or declarations of the accused indicating a desire to commit or reason for committing the offence charged, that is the motive.

[53] The significance and probative value of De Nobrega's evidence were expressed in language taken from *R v Pettman*,[31] in the passage reproduced above at [19], where it was stated that evidence indicating commission of a previous offence may be given to provide the jury with an intelligible account.

[54] It is recalled that the evidence from De Nobrega of what Gopaul told her was that Neesa was proposing to persist in her report to the Police of having overheard Gopaul admitting to poisoning her husband and that she (Gopaul) then discussed a plan to get rid of Neesa.[32] There was abundant evidence of Gopaul discussing killing Neesa to prevent her from reporting to the police that Gopaul had murdered her husband. The real prejudice of this evidence, more than the admission of having committed an earlier murder, was the statement of the motive and intention to murder Neesa. In criminal trials, as stated earlier, evidence is not excluded only because it is prejudicial: hence, a court is not asked to exclude evidence of the statement by an accused of their intent to commit the crime for which they are being tried. The statement by an accused of her motive for committing the crime being tried is of the same character and admissibility. There was no justification for excluding that evidence, which was information coming directly from Gopaul, through De Nobrega.

[55] To his credit, counsel for Gopaul did not suggest the evidence of motive was inadmissible or irrelevant, nor did he doubt its probative value. Counsel directed himself to the failure of the trial judge to warn the jury of the prejudicial nature of the information of the alleged previous murder and that the jury should not rely on it to infer guilt of the current murder. As mentioned, the Court of Appeal accepted that the trial judge had failed to so direct the jury, but they considered that this failure caused no substantial miscarriage of justice and applied the proviso in s 13 of the Court of Appeal

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[30] (1987) 84 Cr App R 299.
[31] *Pettman* (n 5) cited in *R v Williams (n 30)* at 301.
[32] See [35] above.

Act[33]. The proviso confers power on the court to dismiss an appeal, notwithstanding they are of the opinion that a point raised in an appeal might be decided in favour of an appellant, if they consider no substantial miscarriage of justice has actually occurred.

Application of the Proviso

[56] Counsel submitted that the Court of Appeal erred in applying the Proviso, even though he accepted that this Court will not lightly interfere with the Court of Appeal's exercise of its discretion to apply the proviso, when this has been done after due consideration of the weight of the evidence, see: *Alexander v R*[34]. Counsel submitted that the Court of Appeal failed to consider or adequately consider that the only material evidence connecting the appellant to the crime was the evidence of De Nobrega and, therefore, having found that the trial judge failed to direct the jury on the danger of acting on such evidence, the decision to apply the proviso would have been manifestly unfair, unjust and unreasonable, see: *Swamy v The State*;[35] *Pop v R*[36] and *Sooklal v The State*.[37]

[57] At [39] and [40] above, this Court determined that the testimony of De Nobrega was not the only evidence against Gopaul. At [46] above, this Court determined that the Court of Appeal did not find that the trial judge failed to direct the jury on the danger of acting on that evidence and, also, determined on its own review that this was a right finding. It follows, therefore, that counsel's submission that the Court of Appeal erred in applying the Proviso, founded on those two rejected propositions, is unfounded and must be rejected.

[58] In the result, Gopaul's appeal against conviction fails. The Court now considers her appeal against the sentence of 45 years imprisonment reduced by the Court of Appeal from 106 years.

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[33] Cap 3:01.
[34] (2020) 97 WIR 34 (BB CA).
[35] (1991) 46 WIR 194 (GY CA).
[36] (2003) 62 WIR 18 (BZ PC).
[37] (1999) 55 WIR 422 (TT PC).

JUDGMENT OF THE HONOURABLE MR JUSTICE JAMADAR, JCCJ:

Introduction

[59] The murder of sixteen-year-old Neesa Lalita Gopaul by her mother Bibi Gopaul in 2010 was as gruesome as it was callous and inflicted as it was by a mother on her daughter, an act of betrayal and cruelty. Neesa was born in 1994; she would have been celebrating her twenty-eighth birthday this year. Shortly after her birth, the Gopaul family moved from Anna Katherina to Leonora, a village in West Demerara Guyana where Neesa spent her childhood days. She attended Leonora Nursery then Leonora Primary School where she excelled. Neesa performed outstandingly at her Common Entrance Exams, placing in the top fifteen in Guyana which earned her a spot at the prestigious Queen's College in Georgetown. She was a Muslim, she had a younger sister, a grandfather, friends, a dog named 'Tiger' and was surely loved and admired by many. No doubt, her death and the inhumane way in which she died has left painful and enduring scars in the hearts and minds of family, friends, and communities. She was denied her right to live in a safe and nurturing environment, and her chance to learn, grow, and realise her full potential. We cannot help but feel empathy for Neesa and all concerned for their irreparable loss and suffering.

[60] This appeal also requires the application of fundamental values of Guyanese society enshrined as Constitutional rights and freedoms, including the commitment to upholding the rights guaranteed to all individuals, murderers as well. It is not always an easy task for judicial officers living in a society plagued by a prevalence of violent crimes against women and children in particular to hold these constitutional balances. But we must do so. It is in this unavoidable context that the issue of sentencing arises.

[61] Gopaul was charged under s 100 of the CLA. Specifically, she was treated as charged under s 100(2), and so subject to sentencing in accordance with s 100A(1)(b). That section (s 100A(1)(b)) provides that such a person 'shall be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years.' Thus, minimum and maximum terms of imprisonment are statutorily prescribed and within these limits, judicial discretion permitted. There is no challenge in this case to either of these limits.

The Trial Judge's Sentence[38]

[62] In March 2015, upon the jury's finding of guilt, the trial judge imposed a sentence of 106 years imprisonment in relation to Gopaul. The transcript of proceedings is remarkable in its demonstration of deficit. After the jury returned their verdicts of guilty, the Court's Notes of Evidence reveal that Gopaul was allowed to speak, and she used that opportunity to tell the Court that she had not received any justice. Following this, the Court's Notes indicate that her then counsel related to the court that she was 42 years old, this was her first offence, and that she is in the process of rehabilitation. The State is noted as having 'nothing to say'. The trial judge did not appear to have considered any of that information and proceeded immediately to deliver a sentence.

[63] In another court document, a summation of proceedings, this is what was recorded as having transpired in relation to Gopaul:

JURY RETIRED AT 12:08 HOURS

JURY RETURNED AT 15:15 HOURS WITH A UNANIMOUS VERDICT AS FOLLOWS:

(Small dealt with – guilty, 96 years imprisonment)

THE NUMBER TWO ACCUSED BIBI SHAREEMA GOPAUL – GUILTY OF MURDER AND WAS SENTENCED TO 106 YEARS BROKEN DOWN AS FOLLOWS:

BASE – 60

PREMEDITATION – 10

BEING A CHILD – 10

EXCEPTIONAL BRUTALITY -10

DOMESTIC VIOLENCE – 6

BEING THE MOTHER – 10

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[38] Record, 130 – 180.

[64] From the transcript, the factors considered by the trial judge were those itemised above. Indeed, the Court's Notes of Evidence record the following: 'Sentence – Sixty plus to (60 + 10) for premeditation plus ten (10) for murdering child plus ten (10) for exceptional brutality plus six (6) for domestic violence plus ten (10) for the fact that it is the Accused's daughter.' There is no record of any evidence or information being sought or tendered, or of any written submissions made or received, whether in mitigation or otherwise, at the time of sentencing.[39] The trial judge offered no meaningful reasoning at all for the sentence imposed, except for the factors itemised, and no explanation for his choice of a starting point (base) of sixty years.

[65] As well, there seems to be some confusion as to the age of Gopaul at the time of the commission of the offence and sentencing. The Court of Appeal treated these as forty-five and fifty respectively,[40] but Gopaul's counsel seems to have suggested that she was forty-two at the time of sentencing.[41] And in the statement of Gopaul given during the course of the investigations, she gives her age as thirty-eight years.[42] The Court of Appeal's ages will be used in this analysis, no issue having been taken with them before this court, though in the final analysis if these ages are otherwise it would not materially change this opinion in terms of final outcomes.

<u>The Court of Appeal's Approach to Sentence</u>[43]

[66] In August 2021, the Court of Appeal concluded that the trial judge had erred in both the sentencing process and outcome.[44] That court found that: the sentence in relation to Gopaul was excessive; the trial judge failed to give any analysis or breakdown of the sentence; no evidence was led in relation to sentence; the trial judge failed to disclose whether there were any mitigating considerations; and the trial judge failed to hold a separate sentencing hearing. The court also held that the trial judge failed to give any reasons for selecting a starting point (base) of sixty years.[45]

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[39] Noting what is recorded in the Court's Notes of Evidence.
[40] See below [68].
[41] See [62] above.
[42] Statement made at the Criminal Investigation Department, on the 7th October, 2010.
[43] See Judgment of the Court of Appeal (31 August 2021) at [62] to [70].
[44] ibid at [63], 'We are of the view that the Trial Judge erred in his consideration of the sentencing principles as well as the sentence imposed.'
[45] ibid at [64].

[67] For its part, the Court of Appeal undertook a review of sentence itself, rather than remitting the matter to the High Court for re-consideration of sentence. It however did not appear to consider it appropriate to receive any further evidence or information in relation to the offender, or victim, or otherwise relevant to the sentencing process. This is regrettable, starved as these proceedings are of any additional information that may have been relevant and useful for the sentencing process.[46] However, it is also understandable that the Court of Appeal would itself undertake the re-sentencing process, given that the murder occurred in 2010, the conviction was decided in 2015, and the appeal determined in 2021. The Court of Appeal determined that an appropriate starting point in this case was thirty-five years. The factors considered were: (a) the age of the victim; (b) the relationship of the offender to the victim; (c) the amount of violence used in the commission of the crime; (d) the method of disposal of the victim's body; (e) factors relevant to the offender – that she was forty-five years[47] at the time of the crime. The Court of Appeal then determined that there were no mitigating factors (including no evidence of remorse). And that the aggravating and special features of this case, which included: (a) Gopaul was the mother of the victim; (b) the level of cruelty; (c) the betrayal of trust; and (d) the lack of protection for a child, justified adding a ten-year uplift to the starting point. The court imposed an overall sentence of forty-five years imprisonment in relation to Gopaul. No deductions were made for the five years spent by Gopaul in pretrial custody because of 'the aggravating factors'.[48]

<u>Analysis and Comment</u>

[68] In two recent cases, this Court has carefully considered and set out the appropriate approaches to be taken to sentencing in cases such as this one, where long custodial sentences are likely to be imposed on a finding of guilt.[49] In doing so, it has built and elaborated on its earlier jurisprudence in response to continuing deficits in both sentencing processes and outcomes.[50] It is hoped that both trial and appellate courts will pay due regard to this body of jurisprudence and guidance.

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[46] See *Ramcharran v DPP* [2022] CCJ 4 (AJ) GY.
[47] The Court of Appeal considered Gopaul's age at the time of the offence as forty-five, however, her Counsel seemed to suggest that she was forty-two at the time of sentencing. See, Record, 'Notes of Evidence' 1262 - 1264.
[48] ibid at [70] to [71].
[49] *Pompey v DPP* [2020] CCJ 7 (AJ) GY; *Ramcharran* (n 46).
[50] *Persaud v R* [2018] CCJ 10 (AJ) (BB), (2018) 93 WIR 132.

[69] However, it is worth repeating two points made by this Court in: (i) *Pompey v DPP*; and (ii) *Ramcharran v DPP*[51] which emphasise the duty of courts to conduct proper sentencing hearings:

> (i) … the practice of passing sentence immediately after verdict should generally be eschewed, especially in cases where there is a likelihood that a lengthy prison term may be imposed. In such cases, the judge should hold a separate sentencing hearing at which mitigating and aggravating factors, including mental health or psychological assessments, can better be advanced and considered.[52]
>
> (ii) If the Court of Appeal forms the view that the sentencing hearing before the trial judge was flawed and produced an inappropriate sentence because of evidential deficits (because of a lack of relevant evidence, information, reports, assessments, or statements), what is it to do? The re-sentencing duty of the court is to pass a sentence in substitution which is appropriate and warranted in law by the verdict.
>
> [The] failure of the Court of Appeal to effectively conduct a sentencing re-hearing, can also constitute a ground of appeal. To wit, the failure to exercise its discretionary constitutional and statutory powers and to hold a proper sentencing hearing before substituting a fit and proper sentence.[53]

[70] In this case, both the trial judge and then the Court of Appeal in the re-sentencing process had a discretion to impose a life sentence or a term of years imprisonment for the conviction of murder. Neither chose a life sentence and both preferred a term of years. Neither opted to conduct a sentencing hearing.

The Trial Judge's Sentence

[71] The Court of Appeal was correct in their evaluation of the deficits in the trial judge's sentencing process. They were also correct in their criticisms of the trial judge's determination of a starting point, approach to sentencing, and final sentence. In short, and if the transcript is an accurate reflection of what occurred, there was in law no fair or just sentencing process or hearing. Indeed, what seems to have occurred can aptly be described as a non-hearing and as such contrary to the s 144 constitutional guarantee of a fair hearing by an independent and impartial court.[54] As a matter of principle, not only

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[51] *Pompey* (n 49) at [32]; *Ramcharran* (n 46) at [74] – [75], and at [130] – [135].
[52] *Pompey* (n 49) at [32] (Saunders PCCJ).
[53] *Ramcharran* (n 46) at [134] – [135](Rajnauth-Lee and Jamadar JJCCJ).
[54] Constitution of the Co-operative Republic of Guyana 1980. See also the constitutional duty and imperative to truth (s 144(2) and its constitutive elements.

fairness, but arguably also independence and impartiality are likely compromised. Certainly, the perception of a fair hearing by an open-minded court is called into question.[55]

[72] Furthermore, the sentence imposed of 106 years on a fifty-year-old person (forty-five at the time of the crime)[56], constitutes the imposition of a penalty that is tantamount to 'inhuman or degrading punishment' and so contrary to the constitutional guarantee enshrined in S141 of the Constitution.[57] In this regard also noteworthy is the s144(4) constitutional guarantee that 'no penalty shall be imposed for a criminal offence that is more severe in degree or nature than the most severe penalty that might have been imposed for that offence …'. These points may need some further elaboration.[58]

[73] The S141 guarantee must be understood contextually, including through the prism of core International Human Rights values and principles, particularly Articles 1 and 5 of the Universal Declaration of Human Rights (1948).[59] In essence, its purpose is to protect human dignity and ensure respect for the inherent and intrinsic value and worth of every individual. Thus, even as dignity *per se* is not articulated as an independent constitutional right, it is a fundamental value that underpins and informs all rights.[60] Human dignity concerns the entire society and includes the dignity and value/worth of criminal offenders.

[74] Section 141 and s 144(4) of the Constitution together introduce the principle of proportionality and prohibit the imposition of a punishment that is grossly disproportionate in relation to a particular offence or offender. They also prohibit either prescribing (statutorily) or imposing punishments that are inherently incompatible with human dignity (that is, punishments that are inhuman or degrading).[61]

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[55] *Ramcharran* (n 46) at [92] – [94], [128]; and more generally at [99] – [105] and [113] – [118].
[56] The age of Gopaul at the commission of the offence and sentencing is somewhat uncertain. The Court of Appeal treated these as forty-five and fifty respectively. However, it appears that her counsel indicated that she was forty-two at the time of sentencing.
[57] Section141(1) 'No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.'
[58] See also, in the context of the Canadian Charter of Rights and Freedoms, *R v Bissonnette* [2022] SCC 23.
[59] Preamble, first clause: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' Article 1: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' Article 5: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'
[60] The equality rights (s149D, E, F, G); education rights (149H); right to work (149A); and protection from discrimination (149 (1) & (2)) are all easy examples.
[61] See also, *R v Bissonnette* [2022] SCC 23 at [60] – [61] ' … the two prongs of the right not to be subjected to cruel and unusual punishment may now be considered. Section 12 protects, first, against the imposition of a punishment that is so excessive as to be incompatible with human dignity and, second, against the imposition of a punishment that is intrinsically incompatible with human dignity.' And 'This distinction is

[75] In this case, the maximum sentence that could be imposed was life imprisonment. The sentence imposed by the trial judge so exceeds the life expectancy of any human being, and certainly that of a forty-five-year-old offender (fifty at the time of sentencing), that its imposition brings the entire administration of justice into disrepute. Such a punishment is inhuman and degrading also because teleologically, it effectively undermines the penological objective of rehabilitation; an objective directly linked to human dignity since it embraces the belief that every person can potentially be reformed and aspirationally rehabilitated to return to a meaningful life in society.

[76] To be clear, this approach requires a balancing of all the penological objectives[62] - punishment, denunciation, deterrence (specific and general), prevention, and rehabilitation[63] (the latter two being offender specific). Clearly the nature of the crime and the characteristics of the offender, as well as the prevailing contexts and conditions in the society, are relevant considerations. For these reasons the principle of proportionality is apt.[64]

[77] A sentence must be severe enough to punish, denounce, deter, prevent, and must also be appropriate enough to embrace the possibilities of rehabilitation and reintegration into society. Thus, punishment must aspire to be just and proportionate, given the guilt and idiosyncrasies of the offender and the circumstances and gravity of the offence. Proportionality in sentencing helps maintain public trust and confidence in the fairness and justness of the criminal justice system. It is now wholly inappropriate and constitutionally egregious to impose a grossly disproportionate sentence in an individual case in order to deter or discourage other potential offenders.

[78] In Guyana, the objective of rehabilitation in cases of murder is given statutory recognition and context in s 100A(3) CLA, which prescribes time limitations on eligibility for parole. In cases of murder falling within s 100A(1)(b), as in this case, s 100A(3)(b) is apposite and requires a court to specify a period before which a person

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often blurred, and it would be helpful … to clarify certain points in this regard. The first form of cruel and unusual punishment involves punishment whose effect is grossly disproportionate to what would have been appropriate. A punishment oversteps constitutional limits when it is grossly disproportionate, and not merely excessive. A grossly disproportionate sentence is cruel and unusual in that it shows … disregard for the specific circumstances of the sentenced individual and for the proportionality of the punishment inflicted on them.'

[62] See, *Pompey* (n 49) at [52]; *Ramcharran* (n 46) at [51].

[63] Rehabilitation is intended to reform offenders with a view to their reintegration into society so that they can become law-abiding citizens. It presupposes that with help offenders are capable of change.

[64] *Pompey* (n 49) at [16](Saunders PCCJ) 'The sentence imposed upon a convicted person should ultimately be neither too harsh nor too lenient. It must be proportionate.' And '… ultimately, the total or overall sentence must be just and proportionate.'

shall not be eligible for parole. Where the sentence imposed is life imprisonment, that period shall not be less than fifteen years.[65] Where the sentence imposed is 'any other sentence of imprisonment', that period shall not be less than ten years.[66] In this case there is the paradoxical (if not legally absurd) situation, where the sentence imposed was not a life sentence and therefore the limitation on eligibility for parole is the lesser period of ten years, but the term of imprisonment is way beyond what could in pragmatic terms amount to a life sentence.

[79] In addition, and as will be seen in the discussion below, the starting point selected, and sentence imposed by the trial judge are manifestly excessive given the statutory minimum and maximum sentences for this offence and the relevant corpus of local cases.

[80] For all these reasons, the sentence imposed by the trial judge on Gopaul was a wholly wrong exercise of judicial sentencing discretion. However, there is no need to make formal declarations of unconstitutionality in this case, as there is no challenge raised to the mandatory minimum sentence or any suggestion that the statutory punishment is unconstitutional. The imposition of a sentence that is acceptable by its nature, but that proves to be disproportionate in a particular case can be rectified by way of an appeal against sentence and does not necessitate a declaration of unconstitutionality.[67]

The Court of Appeal's Approach to Sentencing

[81] The Court of Appeal opined that an appropriate starting point was thirty-five years, and enumerated the reasons for this,[68] which included some consideration of relevant and comparable cases. Noteworthy, is that a statutory minimum starting point has been set for all murders in this category – fifteen years. A point to which we will return.

[82] Moving next to any identifiable aggravating factors attributable to and mitigating circumstances in favour of the offender, and other considerations applicable to the case,[69] the Court of Appeal identified several aggravating factors and special

[65] Section 100A(3)(b)(i).
[66] Section 100A(3)(b)(ii).
[67] *R v Bissonnette* [2022] SCC 23, at [63].
[68] See [67] above: (a) the age of the victim; (b) the relationship of the offender to the victim; (c) the amount of violence used in the commission of the crime; (d) the method of disposal of the victim's body; and (e) factors relevant to the offender – that she was forty-five years at the time of the crime.
[69] *Ramcharran* (n 46) at [137], [150].

considerations.[70] The court found no mitigating circumstances. In light of this, they applied an uplift of ten years to the starting point. However, no allowance was made for the five years that Gopaul spent in pre-trial custody.

[83] The re-sentencing by the Court of Appeal neglected properly to address the following three factors. Twelve years on from the commission of the offence, this Court finds it pragmatically appropriate to undertake the re-sentencing review that now arises using the limited information available but reiterates the desirability of having separate and adequate sentencing hearings in fulfilment of constitutional fair hearing standards.

(i) *A Discount for Pre-trial Custody*

[84] First, failing to discount the time spent in pre-trial custody. Gopaul spent five years in pre-trial custody (remand). In applying the principles established by this Court in *Da Costa Hall v R*[71] the Court of Appeal ought to have granted full credit for time spent in pre-trial custody. This is the governing principle, only to be varied as explained in *Da Costa Hall*:[72] (a) where the defendant has deliberately contrived to enlarge the amount of time spent on remand; (b) where the defendant is or was on remand for some other offence unconnected with the one for which a sentence is being imposed; (c) where the period of pre-sentence custody is less than a day (short) or the post-conviction sentence is less than two or three days (short); (d) where the defendant was already serving a sentence of imprisonment during the whole or part of the period spent on remand; and (e) generally where the same period of remand in custody would be credited to more than one offence. Given the foregoing, the court's reason that there were 'aggravating factors' does not justify a refusal to take into account time spent in remand.[73] These factors have already been reckoned with in the determination of the term of imprisonment.

[85] On an aside, Gopaul spent a further six years in custody from the filing of her Notice of Appeal to the determination of the appeal. In total, this matter has been in the judicial

[70] See [67] above: (a) Gopaul was the mother of the victim; (b) the level of cruelty; (c) the betrayal of trust; and (d) the lack of protection for a child.
[71] [2011] CCJ 6 (AJ) (BB), (2011) 77 WIR 66 at [26], [27]. The *prima facie* and primary rule is to give full credit for time served on remand prior to the sentence.
[72] ibid at [17], [18]. In this appeal there has also been no invitation or submissions made to reconsider the approach advised by the majority as to when the date for commencement of a sentence should begin; time therefore runs from the date of conviction.
[73] It appears that the trial judge may have wanted this to be taken into consideration as the Court's Notes of Evidence state in relation to Gopaul: 'Time on remand to be deducted by the Prison Authority.'

system for about twelve years. These time periods are not ideal in the context of the fair and timely disposition of criminal matters. On a successful appeal against sentence, too long an elapse of time may limit what can effectively be undertaken in the event that re-sentencing is required.

(ii) ***A Proportionate Sentence***

[86] Second, the sentence of the Court of Appeal though not as grossly disproportionate as the trial judge's, is also manifestly excessive. The maximum sentence for this category of murder is life imprisonment. An imprisonment sentence ordinarily runs from the date of conviction. Gopaul was fifty years old at that time. A sentence of forty-five years would run until she was ninety-five years old.[74] This begs the question, is such a sentence greater than a sentence of life imprisonment, which is the maximum penalty for this category of murder?

[87] In May 2019, in *Alleyne v R*,[75] this Court opined that twenty-five years imprisonment approximates to life imprisonment which is the maximum penalty for the offence of manslaughter in Barbados, and this is in very severe cases. In September 2010, Mr. Alleyne, along with an accomplice, robbed the Campus Trendz Clothing Boutique in St. Michael in Barbados. Mr. Alleyne threw two Molotov cocktails into the store which caused a fire. Six young women, who had hidden in the store during the robbery, died as a result of smoke inhalation. Alleyne was charged with six counts of murder but pleaded guilty to 6 counts of manslaughter (which pleas were accepted by the DPP). On 15 August 2012, the trial judge sentenced Mr Alleyne to six concurrent life sentences. In October 2017, the Court of Appeal affirmed the life sentences.

[88] In that appeal the issue arose as to whether the imposition of a life sentence meant incarceration for the natural life of the offender or for some shorter term.[76] As an adjunct to this issue, the imperative for consideration of rehabilitation by a sentencing court was

[74] And if she was in fact forty-two at the time of sentencing, the sentence imposed would run until she was eighty-seven.
[75] [2019] CCJ 06 (AJ) (BB), (2019) 95 WIR 126.
[76] ibid at [17] and [30].

affirmed.[77] In discussing 'the practical meaning of a sentence of life imprisonment', Anderson JCCJ, delivering the judgment of the Court, opined as follows:[78]

> Increased focus on restorative justice and prison reform, including the introduction of parole systems, has meant that prisoners sentenced to life imprisonment do not necessarily remain incarcerated for the rest of their natural lives. In some jurisdictions there are clear guidelines. For example, in Belize life can be 15–20 years and in Trinidad and Tobago, the range of incarceration is 15-25 years although in some cases considered to be the 'worst of the worst' the Trinidad and Tobago judiciary has imposed minimum sentences which ranged from 30-35 years.

[89] Summing up the Court's view, Anderson JCCJ stated: 'For present purposes it suffices to indicate that the imposition of the life sentences on the Appellant does not necessarily mean that he will spend the rest of his natural life in prison.'[79] In this context the Court explained, that 'in order to secure the sentencing objectives …, whilst not ruling out the possibility of rehabilitation, it appears necessary that … a minimum period of incarceration for twenty-five (25) years is necessary to satisfy for the objectives of punishment and deterrence.'[80]

[90] Saunders (PCCJ) in a concurring judgment, stated that Mr Alleyne's crime 'was a serious one deserving of a stiff sentence'.[81] He opined:[82]

> Life imprisonment is an indeterminate sentence. In practical terms, its execution could mean different things to a 20-year-old than to a 70-year-old offender. We must also bear in mind that, as pointed out in the main judgment, life imprisonment in practice in Barbados rarely ever means that the prisoner dies in prison. The historical experience suggests that he may spend anywhere from 8 (the shortest mentioned minimum) to 33 (the longest) years in prison.

[91] However, and for the moment only considering the local cases of offending that were cited (which did not include any cases of murder of minors), focussing on the inherent aggravating and mitigating factors relative to the offence and not the offender, a

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[77] ibid at [44].
[78] ibid at [52]. Citing, *August v R* [2018] CCJ 7 (AJ) (BZ), [2018] 3 LRC 552; *The State v Seepersad* (Trinidad and Tobago HC, 13 January 2006); *Stephen v The State* (Trinidad and Tobago CA, 23 November 2001); *The State v Chaitlal* (Trinidad and Tobago HC, 11 November 2009).
[79] *August v R* [2018] CCJ 7 (AJ) (BZ), [2018] 3 LRC 552 at [54].
[80] ibid at [68].
[81] ibid at [85].
[82] ibid at [83].

reasonable starting range that includes the main features that approximate somewhat to this case should be 15 to 20 years imprisonment.[83]

[92] This starting range analysis has benefited from the DPP's written submissions before this court, which included case summaries of eight relevant comparators.[84] This information was not contested, and its accuracy accepted by the Appellant's attorneys. In seven of the cases,[85] the final terms of imprisonment imposed by the Court of Appeal in its re-sentencing exercises ranged from between twenty-five (25) to thirty (30) years. In all these cases, the sentences reviewed were reduced, from sentences of death and terms ranging from seventy-eight (78) to sixty (60) years. In two of these cases starting points were identified, and in both it was thirty (30) years.[86] Interestingly however, in both of these cases though the starting points were set at thirty (30), the final sentences were twenty-five (25) years and twenty-seven (27) years (reduced from sixty (60) and sixty-five (65) years respectively) – in *Budhoo* it was because of a discount for pretrial detention. [87]

[93] The eighth case[88] is a bit of an outlier (in relation to the other seven) for the purposes of determining starting ranges or starting points.[89] The original sentence was eighty-one (81) years imprisonment, which was reduced to fifty (50) years, with a starting point of thirty-five (35) years.

[94] The case of *Abdul Budhoo* is however a useful decision of the Court of Appeal, decided as it was in 2021 and given that it studiously applied the *Pompey* guidance and methodology for sentencing. At the first stage, a starting point of thirty (30) years was agreed because of 'the seriousness of the offence, in particular, the violent use of a knife.'[90] At the second stage analysis, it was opined that 'an upward adjustment of five years was too high' and it was limited 'to three years instead' given relatively minor

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[83] *Pompey* (n 49) at [65] – [68], [79] to [81], [114] 'The starting point approach to sentencing admits to a four-stage methodology. First, fix a starting point having regard only to the aggravating and mitigating factors relative to the objective gravity, seriousness and characteristics of the particular offence. Second, take into consideration the aggravating and mitigating factors relative to the particular offender and, based on these, adjustments may be made upwards or downwards to the selected starting point. Third, where relevant factor-in an appropriate discount for guilty pleas. Fourth, give credit for time spent in pre-trial custody.'; *Ramcharran* (n 46) at [137].
[84] *Pompey* (n 49) at [77].
[85] *Ward v The State* (Guyana CA, 25 July 2018); *Jordan v The State* (Guyana CA, 25 July 2018); *Verwayne v The State* (Guyana CA, 10 March 2020); *Browne v The State* (Guyana CA, 7 May 2021); *Allicock v The State* (Guyana CA, 21 December 2020); *Budhoo v The State* (Guyana CA, 1 July 2021); *Fredericks v The State* (Guyana CA, 30 August 2021).
[86] *Budhoo v The State* (Guyana CA, 1 July 2021); *Fredericks v The State* (Guyana CA, 30 August 2021).
[87] *Budhoo* (n 86) at, [50] to [52].
[88] *Hinds v The State* (Guyana CA, 1 February 2022).
[89] See *Pompey* (n 49) at [71] to [75].
[90] ibid at [45].

aggravating circumstances.[91] There were mitigating factors, a favourable probation report, no prior antecedents, and expressions of remorse, all of which resulted in an applied deduction of three years.[92] The net result was a term of imprisonment of thirty (30) years.

[95] As well, *Verwayne's* case is also instructive, the appeal having been decided in 2020. It was among the more vicious murders in the group of precedents. The murder was inflicted by the male cohabitant (in an intimate partner relationship) and death was by asphyxiation due to compression of the neck and submersion. There was also associated blunt cranial trauma. In simple terms, death was caused by strangulation, drowning, and the infliction of head injuries. The decomposed body was found in a canal. At trial the offender was convicted of murder and sentenced to seventy-eight (78) years imprisonment. On appeal, the sentence was reduced to twenty-five (25) years, and time spent in pre-trial custody was deducted. Noteworthy is that in Guyana prevalence of intimate partner violence affecting mostly women is a consideration.[93]

[96] In all eight cases there were aggravating factors relative to the offenders that justified stage two uplifts.[94] Rationally therefore, a starting range that focusses on the characteristics of the offence ought to be lower than the final sentences imposed. In fact, in all these cases a special consideration that goes to the stage two uplift is prevalence (the trend is of an increase in murders over the period 2018 to 2021 into 2022),[95] which also indicates that a rational starting range should be lower than the final sentences imposed. Hence the suggested range of 15 to 20 years, informed by the above and the range of final sentences imposed in roughly comparable local decisions.

[97] In this case however, it is appropriate to begin with the relevant legislation that prescribes a minimum sentence for this category of murder – fifteen years. Neither the trial court nor the Court of Appeal seemed to have considered this. It would appear therefore that a starting point of thirty-five years in the context of a statutory minimum

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[91] ibid at [47].
[92] ibid at [48].
[93] See, *Budhoo* (n 84), [42] i. referencing *Ward's* case.
[94] ibid at [42] & [43] (Gregory JA) referring to *Ward*, *Jordan*, *Allicock*, and *Verwayne*: 'The terms of imprisonment in the above appeals … were imposed after aggravating and mitigating factors apparent on the record were considered.'
[95] Record, 140.

of fifteen years, the s 144(4) constitutional guarantee,[96] and the discussion above on the meaning of life imprisonment and the significance of rehabilitation, is excessive, and in any event was done without regard for the statutory minimum.

[98] There is no justification given by the Court of Appeal for moving away from the statutory minimum. Yet, this statutory minimum is the legislature's baseline and functions as an anchoring device in the sentencing process. Not only should courts not go below it, but there ought also to be justification for beginning above it as a starting point. In theoretical terms, a starting point of thirty-five years for a fifty-year-old offender means that she would be eighty-five at the end of this period. But more importantly, what justifications exist for a twenty-year increase in the starting point over and above the statutory minimum?

[99] The reasons enumerated by the Court of Appeal: (a) the age of the victim; (b) the relationship of the offender to the victim; (c) the amount of violence used in the commission of the crime; (d) the method of disposal of the victim's body; and which factors relevant to the offender – that she was forty-five years at the time of the crime, serious and material considerations as they are, do not provide a sufficient justification for a twenty-year uplift in the starting point over and above the statutory minimum.

[100] Rape is not murder. However, both (in instances of murder under s 100A(1)(b) of the CLA carry life imprisonment as the maximum sentence. Two recent rape cases decided by this court involving a minor,[97] and a young person,[98] are illustrative of how this court seems to approach custodial sentencing for serious crimes. In the former, which involved the double rape and sexual assault of a fourteen-year-old minor by a fifty-year-old relative, a majority of a seven-member panel agreed that seventeen years imprisonment was a fit sentence. A minority (two members) thought nine years imprisonment was appropriate. For the majority, a starting point of fifteen years was considered appropriate in a context of undisputed crisis proportion prevalence. The minority considered a starting range of five to eight years as appropriate. All judges agreed that the lower courts' sentence of thirty-seven years was disproportionate and

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[96] See [72] above: 'no penalty shall be imposed for a criminal offence that is more severe in degree or nature than the most severe penalty that might have been imposed for that offence …'.
[97] *Pompey* (n 49).
[98] *Ramcharran* (n 46).

excessive. In the latter case, which involved a prolonged rape with associated acts of serious violence and dehumanisation, the court found a term of imprisonment of twenty-three years was disproportionate and manifestly excessive. A majority of three substituted a term of imprisonment of twelve years, and a minority of two would have imposed a sentence of sixteen years imprisonment. For the majority a starting range of eight to ten years was applied; the minority preferred a starting range of twelve to thirteen years imprisonment.

[101] This appeal concerns murder and not rape. However, there are some benefits from cross referencing approaches, as sentencing courts are expected to be consistent in methodologies and approaches – though not in outcomes, for different species of crimes.

[102] It would therefore seem to be both rational and reasonable, anchored in the statutory minimum of fifteen years, and bearing in mind the case law analysis above, to begin this analysis with a starting range in this case (for the general offence including its inherent aggravating and mitigating factors) of fifteen to twenty years. This approach is reinforced considering the precedential regional ranges for life imprisonment where that interrogation and computation has been undertaken. Also, bearing in mind the requirement that any punishment imposed ought not to exceed the maximum penalty that can be imposed.

[103] However, and in this case, there is justification for creating a new starting range and choosing a starting point at the higher end of this range for two reasons: (i) this case involves the murder of a minor and none of the precedents cited are so concerned; and (ii) this case has unique aggravating factors relating to the offence of a murder of a child by a parent. These latter factors include the vulnerability of a minor, the betrayal of trust and responsibility by a parent, and the degree of violence used to commit the offence including the wanton disregard for the personhood of the minor. Thus, there are good reasons in this case for an increase in the upper limit of the starting range to twenty-two years, and for selecting a starting point from within this new range and at the upper end of it.[99]

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[99] Though not cited to this court, independent research has turned up two relatively recent unreported cases of murder of minors in Guyana: *Roberts v The State*, 2019 – murder by submersion of 18-month niece by uncle; and *Blanchard v The State,* 2016 – stabbing murder of three

[104] Applying the second stage sentencing analysis (aggravating, mitigating factors relative to the offender and any special circumstances), the Court of Appeal's factors included: (i) Gopaul was the mother of the victim; (ii) the level of cruelty; (iii) the betrayal of trust; and (iv) the lack of protection for a child). However, one has to be careful to distinguish between aggravating factors relative to the offence (stage one) and aggravating factors relative to the offender (stage two), and to avoid overlap and double punishment.

[105] In this case, the relevant stage two considerations include: (i) the fact that the minor was in a single parent household with Gopaul as her mother which gave rise to a special relationship of trust and responsibility; (ii) the degree of blunt force to the head and the bashing in of the child's face to the extent that it was unrecognisable; (iii) the method of disposal of the body by placing it in a suitcase and submerging it in a creek; and (iv) the lack of any remorse by Gopaul, and any evidence of motivation to murder her child.

[106] The Court of Appeal found that there were no mitigating circumstances. However, there seems to have been no inquiry into or consideration of potentially mitigating factors such as Gopaul's actual role in the murder, whether it was limited, whether she had a criminal record, and the mental and psychological state of Gopaul at the time of the murder and during the course of her relationship with Small.[100] The murder of an innocent child, one's own child – filicide, is infrequent, even as it is reprehensible, and when considering a sentence for this offence, a sentencing hearing is necessary; the court must perform a special, detailed analysis before handing down a sentence which fits the offence and the offender, having due regard for the victim, family, community, and society.

[107] In fact, from the Court's Notes of Evidence it appears that Gopaul had no prior convictions and this was her first offence, and that she was at the time of sentencing in rehabilitation. These are all potentially mitigating considerations.

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children, ages 10, 6, and 4 by their father. In both matters life sentences here imposed. In *Blanchard* the life sentence was affirmed by the Court of Appeal in 2020. In the former the ineligibility for parole period was set at 20 years, and in the latter, it was set at 30 years. In both cases the courts found that there were relevant aggravating factors.

[100] Having accepted the evidence of Simone De Nobrega as credible and relevant as against Gopaul for the purposes of conviction, it remained evidence of relevance in relation to sentencing, and certainly in relation to the areas of inquiry stated. De Nobrega's testimony ascribes a secondary role to Gopaul in the actual commission of the offence, and suggests a person who may have been under the mental and psychological power and influence of Small and as well conflicted in relation to Neesa. For the purposes of sentencing, a psychiatric and/or psychological assessment of Gopaul (and other related and relevant information) should have been considered and requested in this case.

[108] Finally, a special circumstance in this case is the public interest in the welfare and protection of minors that has constitutional recognition in Guyana, and widespread international support.[101] Indeed, the preamble to the Constitution states:

> WE, THE GUYANESE PEOPLE, Acknowledge the aspirations of our young people who, in their own words, have declared that the future of Guyana belongs to its young people, who aspire to live in a safe society which respects their dignity, protects their rights, recognises their potential, listens to their voices, provides a healthy environment…and affirm that their declaration will be binding on our institutions and be a part of the context of our basic law.

[109] Considering these factors would yield a proportionate stage two uplift of between five to eight years. This assessment includes the prevalence factor in relation to both murders and violence against minors in Guyana. The result being an overall sentence range of imprisonment of between twenty (20) to thirty (30) years (considering the lower and higher ends of the starting range). However, for all of the reasons given above in relation to this offence and offender and in the circumstances of this case, doing the best that can be done without an adequate sentencing hearing, and applying the upper limits of both the starting range and stage two uplift, a fair and just sentence of imprisonment for Gopaul is a term of thirty years. That is from the date of conviction in 2015.

(iv) ***A Period of Ineligibility for Parole***

[110] Finally, the Court of Appeal ought to have indicated the period of ineligibility for parole, consistent with the legislative intent in s 100A(3) of the CLA. Indeed, pursuant to s 100A(3)(b)(ii) of the CLA, Gopaul's statutory minimum period before eligibility for parole would take her to sixty years (she was sentenced in 2015 at age fifty and is statutorily ineligible for parole for ten years from that time).[102] A sentencing court was required to address its judicial mind to this issue in this case, an issue which directly involves the penological objective of rehabilitation.

[111] In this case, parole eligibility not before fifteen years would meet the penological objectives of sentencing, including that of rehabilitation and reintegration into society.

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[101] See Constitution of Guyana, art 154(A)(1) ; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 24; The United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Articles 18, 19 and 27.

[102] Or to ten years from the date of conviction if her age was otherwise than as stated by the Court of Appeal.

Gopaul will at that time, in 2030, be sixty-five.[103] In determining this period, the age of the offender is a relevant and practical consideration if meaningful rehabilitation and reintegration into society are to be taken seriously. Of course, the actual issue of parole is for the independent body responsible for processing and considering such matters.

Conclusion

[112] In all of the circumstances and doing the best that can be done with the limited information available, a just and proportionate sentence is thirty years imprisonment, with no eligibility for parole before the expiration of fifteen years. From this sentence, the period of five years will be deducted for time spent in custody while on remand, with the practical consequence that from the date of conviction in 2015 Gopaul will spend a maximum of twenty-five years incarcerated.

JUDGMENT OF THE HONOURABLE MR JUSTICE WIT, JCCJ:

Introduction

[113] Article 144(2) of the Constitution requires the courts to ascertain the truth in every case a person has been charged with a criminal offence, provided that that person is afforded a fair trial. Truth finding is therefore at the heart of the criminal procedure. The duty to ascertain the truth requires the court and its procedures to ensure, as far as reasonably possible, the fostering of an accurate verdict. If that verdict is a conviction, factual accuracy is an absolute must. For a conviction to be accepted as the truth, therefore, the evidence on which it is based must be material, relevant, cogent, and reliable. The charge must be proved to be true, beyond a reasonable doubt.

[114] In this case, both Small and Gopaul have been convicted of having murdered Gopaul's 16-year-old daughter Neesa, a gruesome and senseless murder without any doubt.

[115] I do not agree that the evidence dealing with the repeated filing and subsequent withdrawals or attempted withdrawals by Gopaul of complaints about Small's sexual escapades with Neesa were irrelevant. It was useful background evidence. It could not

[103] Again, based on the Court of Appeal's assessment of her age.

be used to show that Small had actually sexually assaulted her, but if this evidence showed anything, then it was the fact that the situation in the household of Gopaul was far from normal and that there were tensions between Small, Gopaul and Neesa. At a minimum, this evidence strongly suggests that Gopaul was very much under the influence of Small. And to say that there is no evidence that Small had a motive to kill Neesa to avoid prosecution for sexual assault and that such an inference would be 'utterly beyond the reach of any reasonable jury', is in my view much too strong.

[116] But I do agree that even if the evidence of motive was very clear and abundant, it would not make the conviction of Small safe. Without the cellmate evidence of De Nobrega (which, all parties agreed, was inadmissible against Small) there was simply no evidence to carry a conviction. But it is also true in my view that without De Nobrega's testimony, there wouldn't be enough evidence of sufficient quality to properly convict Gopaul either (although it would be slightly more than in Small's case). The majority states that it was open to the jury to have found that each of the items that were found with Neesa's body came from Gopaul's home and possession: the dumbbells, red rope (possibly but not so clear), documents, suitcase with brand Kelly (possibly, but *strong* inference?). That may be so, but to say that these things are almost of the strength of fingerprints seems really a stretch to me. To suggest that it was also open to the jury to have reasoned that these things objectively and materially connected Gopaul to the disposal of the body is in my view also debatable but 'hence (connected to) the murder' certainly seems a bridge too far.

[117] The conclusions that the jury according to the majority would have drawn based on the objects found are twofold: 1). Gopaul participated in the *disposal of the body* (this is not necessarily the same as participating in the murder) by *furnishing* these objects (is there any evidence that she furnished them?) which had been in her *singula*r possession (the jury may have thought so but were they?) and 2). that no one else could have furnished them. This seems too strong an inference. Not only the items mentioned here came from Gopaul's home, so did Neesa, who, according to De Nobrega's evidence had spent a night in a hotel with Small, and who seemed to have a mind of her own. It is probably only with the evidence of De Nobrega in mind that such conclusions can reasonably be drawn. But could De Nobrega's evidence, which was admittedly not the sole but, in my

view, the only substantial evidence in this case, given by an in-custody informer or in-prison informant or, using the more colourful expression, jailhouse snitch, safely be used by the jury? I answer that question with a resounding no. Hence my (partial) dissent.

Unreliable Snitch Evidence

[118] In the last two decades there has been an avalanche of research, studies, reports, official police and prosecutorial policies, and academic writings about the notorious unreliability of, what in colloquial language is called, snitch evidence. This is evidence given by a prisoner, the snitch, claiming that a fellow prisoner, the accused, would have admitted or confessed to him or her having committed the criminal offence the accused is charged with. A lot of the learned material on this topic, to a great extent produced in the United States and Canada, has amply been referred to and discussed in a very recent and important judgment of the New Zealand Supreme Court in *W v R*.[104] Several of the studies, dealing with wrongful conviction data, show that snitch evidence is one of the main causes of wrongful convictions or miscarriages of justice (roughly 20 percent or more)[105]. Most of these snitches are criminals with a history of dishonesty, who 'often lie to investigators and on the stand with a reassuring combination of fluency, comfort and apparent conviction.'[106] They have strong and almost irresistible incentives to manufacture or fabricate whatever confession they think law enforcement or the prosecution would be interested in[107]. Sometimes these incentives are calculable, sometimes subtle. Sometimes they are laid down in written agreements with the prosecution but most of the times they are not. But even if there is no clear *quid pro quo*, for snitches there is always their expectation that some advantage will fall upon them, that there will be an award of some sort. There is also the expectation, which is really a fact, that the snitch has little or nothing to lose but a lot to gain.[108]

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[104] [2020] 1 NZLR 382, see especially the many legal materials referred to by the majority of that Court in [74]–[92] and by the minority in [211]-[247]. See also the legal literature referenced in an article in Anna High, 'The exclusion of prison informant evidence for unreliability in New Zealand', (2021) 25 Int'l J Evidence & Proof 217. See further Kent Roach, 'Wrongful Convictions in Canada' (2012) 80 U Cin L Rev 1465.

[105] Jeffrey Bellin, 'The Evidence Rules That Convict The Innocent', (2021) 106 Cornell L Rev 305, 338; Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in support of Respondent, 15, *State of Kansas v Ventris*, 556 U.S. 586 (2009); Russell D Covey, 'Abolishing Jailhouse Snitch Testimony' (2014) 49 Wake Forest L Rev1375, 1378.

[106] Lisa Dufraimont, 'Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?' (2008) 33 Queen's L J 261, 274.

[107] Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in support of Respondent, 5, 7, 9, 10, 22, *State of Kansas v Ventris*, 556 U.S. 586 (2009); Russell D Covey, 'Abolishing Jailhouse Snitch Testimony' (2014) 49 Wake Forest L Rev1375, 1379 - 1380.

[108] Russell D Covey, 'Abolishing Jailhouse Snitch Testimony' (2014) 49 Wake Forest L Rev1375, 1383 - 1384.

[119] Covey, in his article ‘Abolishing Jailhouse Snitch Testimony’, made an important point, also to be found in other studies (and accepted by the New Zealand Supreme Court in *W v R):* ‘In the vast majority of cases in which jailhouse snitch testimony is sought there will be at least some other evidence implicating the defendant. In those cases, however, prosecutors want to use the jailhouse snitch for precisely the reason they should not be allowed to do so. The other evidence in the case is weak or equivocal making the jailhouse snitch testimony unduly influential in determining the outcome of the case.’[109] This is dangerous because prosecutors following little else but their gut feeling will ‘too readily regard the snitch evidence as credible’, a form of tunnel vision[110]. And ‘many jurors might perceive jailhouse snitch testimony as worthy of enhanced credence because of implicit or explicit prosecutorial bolstering of the witness’s credibility.’[111] The problem is also that while the snitch evidence is meant to bolster the weak or equivocal evidence that exists, the argument is made that the latter corroborates the snitch evidence. Given the usually stellar performance of most snitches in the witness box, the fact that their evidence tells the jury about a ‘confession’ of the defendant[112], the fact that snitches have many ways to gather information, for example, from the media, other prisoners or the defendant him or herself, even if the latter denies the charges[113], and the fact that jurors do not understand how easy it is for jailhouse snitches to fabricate false confessions[114], snitch evidence often proves to be highly persuasive, even when it has become clear that the State has given them substantial incentives.

[120] The many studies suggest that the adversarial process is ill equipped to effectively expose the unreliability of this kind of evidence[115]. Corroboration or the existence of supporting evidence, as we saw, is often too easily accepted; very robust and serious corroboration is usually not required.[116] Cross-examination of snitches is usually ineffective because possible incentives for the snitch are often undiscoverable and almost all the fabricated evidence is usually of such a ‘he said, she said’ character that

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[109] ibid 1418.
[110] Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in support of Respondent, 20, *State of Kansas v Ventris*, 556 U.S. 586 (2009).
[111] Covey (n 108) 1394.
[112] ibid 1390 – 1391. See also, Keith A Findley, ‘Judicial Gatekeeping of Suspect Evidence: Due process and Evidentiary Rules in the Age of Innocence’, (2013) 47 Ga L Rev 723, 752.
[113] Amicus Brief(n 110) 17,18.
[114] Covey(n 108) 1394.
[115] Amicus Brief (n 110) 4; Covey(n 108) 1376.
[116] Covey(n 108) 1418 – 1419.

it would be difficult to debunk or impeach it.[117] Even jury directions have generally been found faulting in effectiveness. First, 'Jury instructions can seem legalistic and get easily lost in the sea of other instructions.'[118] Jurors are said to be 'generally … poor at understanding traditional jury instructions or applying those instructions in deliberations' and 'instructions to disregard relevant evidence do not prevent jurors from incorporating that evidence into deliberations.'[119]Another academic, Findley, remarks that 'empirical evidence suggests that jurors, even when educated about things like snitch testimony and confessions, still find them compelling.'[120] He points out that 'to the extent the courts do utilise instructions, they must be empirically based and specific, so that they can be a meaningful source of decisional information.'[121]

[121] It is not only academics and judges who have become increasingly aware of the difficulties with snitch evidence. Several prosecution authorities, especially in the United States and Canada, have also been shown to be very critical of it. And many of them have developed policies cautioning prosecutors to curb their natural enthusiasm for using cellmate evidence. Just to mention two examples, the Los Angeles District Attorney's Office 'enacted a policy that prohibited snitches from testifying 'to a defendant's oral statement, admission or confession unless strong evidence exists which corroborates the [snitch's] truthfulness.' And District Attorneys seeking to use a snitch must request written approval from a committee made up of the Office's senior leadership.'[122]A Policy Directive from the Manitoba Department of Justice Prosecutions, dated 5 November 2001, stating that the testimony of in-custody informers is 'inherently suspect', directs that *such informers should not be called to testify* on behalf of the Crown 'except in the unusual circumstances permitted by this policy'. The statement of the in-custody informer, the snitch, must be thoroughly reviewed and checked 'before it can even be considered.' At this stage already the prosecution would have to investigate if the information provided by the snitch could have been garnered from other sources, there should be a full assessment of the informer's background and one of the many questions that should be answered is to what extent 'the statement

[117] ibid 1401.
[118] Jeffrey Bellin, 'The Evidence Rules That Convict The Innocent', (2021) 106 Cornell L Rev 305, 348.
[119] Covey(n 108) 1420 – 1421.
[120] Keith A Findley, 'Judicial Gatekeeping of Suspect Evidence: Due process and Evidentiary Rules in the Age of Innocence', (2013) 47 Ga L Rev 723, 771.
[121] ibid 773.
[122] Amicus Brief (n 110) 26, 27.

contains details and leads to the discovery of evidence known only to the perpetrator'. The decision to call the snitch is not in the hands of the prosecuting counsel but in those of a committee of senior functionaries in the organisation. And once it is decided that the snitch will be called as a witness for the Crown, additional disclosure responsibilities for the prosecuting Crown attorney will arise.[123]

[122] Given the rich data unearthed by the many studies and reports on the topic of snitch evidence and its unreliability, there can and should at some point be a fundamental discussion before our courts whether, to what extent and under which circumstances snitch evidence should be excluded. A first and cautious step in this direction has already been taken by the New Zealand Supreme Court in *W v R*. Several academics have argued that exclusion of this kind of evidence would be the proper thing to do. It must be said, though, that no court has gone that far. In any event, this is not the case to embark on such an exercise. Exclusion was not pleaded by counsel for Gopaul. His point was that the judge failed to properly instruct the jury with respect to the snitch evidence. I think he is right.

Inadequate Warnings

[123] First, the evidence of De Nobrega was substantially uncorroborated and unnecessarily so. The other evidence (mainly to be inferred from the objects found) was weak or equivocal. No attempt was made by the police to find supporting evidence for the alleged murder of Gopaul's husband which, if De Nobrega is to be believed, was at the root of the motive to kill Neesa. This could easily, and should in fact, have been done through exhumation of the man's body who was only dead for one year when De Nobrega informed the police in October 2010 about Gopaul's alleged confession. If Gopaul's husband had been poisoned, poison would have been found. There was also the story about Small's wife who was supposed to have tapes of conversations between Small and Gopaul about that murder. No search was done. She was not heard. These were very serious investigative flaws. What is more, the evidence of De Nobrega was that Gopaul had told her that Neesa had reported to the police that she overheard her mother tell someone on the phone how she had poisoned Neesa's father, that the police had sent

[123] Manitoba Department of Justice, Prosecutions Policy Directive: In-Custody Informer Policy (Guideline No 2:INF:1, November 5, 2001).

Neesa home to get her mother and return and that Gopaul had gotten Neesa to tell the police that it was a lie. However, if this part of the evidence of De Nobrega, was true, there would and should have been confirmatory evidence from the police. There was no such evidence, but this was not pointed out by the trial judge in his summation. Nor did he tell the jury that they could not establish as a fact that Small had sexually assaulted Neesa or that Gopaul actually murdered her husband (at the instigation of Small).

[124] Against that background, the warnings given by the judge to the jury were rather standard if not weak, and far from robust. In the first warning, the judge merely indicated that 'it is not unknown for a person' like De Nobrega, a prisoner awaiting trial, to place themselves in favour with the police to give them information 'that an Accused with them in the same cell had admitted to (a crime) for which they were presently held and hope to get an advantage by doing so with police'. This did not in any way refer to the possibility of a lying snitch. In his second warning, the judge told the jury to be cautious (I agree with the majority that this is the word the judge must have used) because they had to be sure of two things, first that De Nobrega had truthfully reported what Gopaul had told her, and second, having crossed that bridge, whether Gopaul told her the truth. This, in my view, was not much of a warning against snitch evidence.

[125] Only in his third warning did the judge refer to a possible fabrication of evidence. He spent one sentence on that possibility: 'The Attorneys are saying that all of these things she read in the newspapers and came up with a story'. But this was directly followed by giving the jury the full counter argument of the State: how could De Nobrega have known about Gopaul's husband dying a year before and that he last went to the St Joseph' Mercy Hospital? Of course, these were details that De Nobrega could simply have heard from Gopaul herself, even if she had denied any wrongdoing to De Nobrega. The judge did of course not mention the question 'how could the witness have known that Gopaul had murdered her husband?' because no such a murder was established on the evidence. In short, these directions were certainly not 'empirically based and specific'; they did not effectively educate the jury on the dangers of this evidence.

[126] As I already indicated, research has shown that standard warnings usually have little or no effect. In this case, the proof is glaringly in the pudding. For example, the judge twice warned the jury that they could not use the evidence of De Nobrega against Small. As

we have seen, this had no effect whatsoever. As was reported in several studies, jailhouse snitches can put up a very convincing performance and even cross examination usually does not work very well to get a grip on them. But here not only the jury fell into that trap. The trial judge himself did. He thought it was perfectly possible for a properly directed jury to properly convict Small on the few weak pieces of evidence that existed apart from the (in Small's case inadmissible) snitch evidence. Also, three appeal judges, who saw nothing wrong with the judge's reasoning on this point, fell prey to this all too human phenomenon called confirmation bias. The evidence was clearly evaluated by all of them in the context of what was obviously in the back of everybody's mind, the evidence of the snitch. Unconsciously, they all, jurors and judges alike, had eaten from the forbidden fruit which apparently made them interpret whatever weak evidence there was in alignment with that 'knowledge'.

[127] That the directions of the trial judge were fatally inadequate, can also be illustrated by the Barbados case of *Edwards v R*[124], where both Anderson JCCJ and Saunders JCCJ delivered judgments. The two appellants had been convicted for murder solely on the oral evidence of some police officers that the appellants had orally confessed the crime, at a police station, during a formal interview, with only police officers present, with nothing to corroborate its content. Such evidence, even though given under oath by police officers, is considered by the law of Barbados evidence that is potentially unreliable. Section 137(1)(d)(ii) of the Evidence Act, however, contemplates that this oral evidence may be admitted into evidence provided the judge gives an appropriate warning to the jury of the potential unreliability of such evidence. For the warning to be appropriate, as stated in s 137, the judge has to do three things. Firstly, the judge must warn the jury that the evidence may be unreliable. Second, the judge is obliged to inform the jury of matters that may cause the evidence to be unreliable (why it is so). Third, the judge must warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

[128] The Court made clear that the warning should be clear and to the point. No beating around the bush. It should say, for example. that it is 'not unknown for police officers to manufacture or embellish evidence against a person whom they believe has

[124] [2017] CCJ 10 (AJ) (BB),(2017) 90 WIR 115 at [56], [57].

committed an offence' and 'that the evidence of the police must be approached with caution'. The warning should also include the circumstance that 'generally, in the absence of sound recording or some person independent of the police present at the interview who can confirm that the admissions were made, it is easier for police officers to lead evidence of admissions that were not in fact made by the accused than it is for the accused to have evidence available to challenge what the police have said'. Where appropriate, the judge should also instruct the jury to 'take into account that police officers are generally experienced in giving evidence in court and it is not an easy task to decide whether a practiced witness is telling the truth or not. If a witness appears to be confident and self-assured, it does not necessarily follow that the witness is giving honest evidence'. There is not a word of French in these directions. They are crystal clear. However, if it necessary to give such stern warnings about the possible unreliability of police officers, should such warning also not be given when the evidence of jailhouse snitches is discussed with the jury? I would think that there is good reason for such an approach.

[129] It could, of course be said, that these stern warnings are grounded in Statutory Law. But that is only partly so, the words of sternness, inspired as they may be by the legislation, flow from the judicial pen. Moreover, similar directions have been developed jurisprudentially without such legislative grounding. In Canada, the Supreme Court developed in cases of unreliable witnesses, jailhouse snitches prominent among them, the 'clear and sharp' *Vetrovec* warning.[125] The framework of this warning is composed of four main foundation elements: (1) drawing the attention of the jury to the testimonial evidence requiring special scrutiny; (2) explaining why this evidence is subject to special scrutiny; (3) cautioning the jury that it is dangerous to convict on unconfirmed evidence of this sort, though the jury is entitled to do so if satisfied that the evidence is true; and (4) that the jury in determining the veracity of the suspect evidence, should look for evidence from another source tending to show that the untrustworthy witness is telling the truth as to the guilt of the accused.

[130] It seems to me that this warning is quite similar to that expounded by this Court in *Edwards*. Interestingly, the Canadian Supreme Court clarified the fourth pillar of this

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[125] *Vetrovec v R* [1982] 1 SRC 811.

warning in *R v Khela*[126]. The Court considered that '[i]t is not 'overly formalistic' to ensure that triers of fact attain the appropriate level of comfort before convicting an accused on the basis of what has for centuries been considered unreliable evidence. A truly functional approach must take into account the dual purpose of the *Vetrovec* warning: first, to alert the jury to the danger of relying on the unsupported evidence of unsavoury witnesses and to explain the reasons for special scrutiny of their testimony; and second, in appropriate cases, to give the jury the tools necessary to identify evidence capable of enhancing the trustworthiness of those witnesses'.[127] In *Bennett v R*, this Court also stressed the fact that the jury must have tools or evidential material available to rationally test and evaluate the truth and accuracy of substantial but questionable evidence (in that case a previous inconsistent statement of the main witness)[128].

[131] In this case there was little or no evidence that could have provided comfort to the jury that De Nobrega, a suspect witness, was telling the truth. There could have been such evidence, as I indicated above, but no efforts had been made to obtain it. The trial judge did not point this out to the jury. Looking at his summing up as a whole, it was no doubt deficient to such an extent that we cannot at all be sure that the trial of Gopaul resulted in an accurate verdict. To conclude that in those circumstances no substantial miscarriage of justice has occurred, would be unjust and unreasonable. In my view, therefore, also Gopaul's appeal should have been allowed.

<u>Post Scriptum</u>

[132] In this case it was agreed between the parties, and it was accepted by the courts below and by this Court, that De Nobrega's evidence was not admissible against Small. At common law, by way of an exception to the hearsay rule, it is considered a fundamental rule that an out of court admission is only admissible against the maker herself. It was, and in many ways still is, considered a 'universal rule' even though it was 'modestly adjusted' by the House of Lords in *Hayter.*[129] And even this modest adjustment unleashed a storm of criticism within the circles of common law orthodoxy. Murphy, for example, called it 'disturbing' and 'incorrect', 'wrong and contrary to principle', 'a

[126] 2009 SCC 4.
[127] ibid at [47] (Fish J).
[128] [2018] CCJ 29 (AJ) (BZ), (2019) 94 WIR 126 at [25].
[129] *R v Hayter* [2005] 2 All ER 209.

radical and serious assault on the traditional protection afforded to the accused'. He even contemplated that 'the breach of this principle may well raise issues of fairness under article 6 of the European Convention of Human Rights.' [130]

[133] Why the use of an out of court admission against a co-accused would *always and in all circumstances* be unfair, escapes me. In other, even very sophisticated criminal justice systems –admittedly all civil law jurisdictions – such an absolute rule does not exist and that, as such, has not made the system unfair. Of course, it goes without saying that this kind of evidence needs to be handled with the greatest of care and can only be accepted if there is enough cogent and independent supporting evidence. But excluding this kind of evidence without more may be very well a recipe for unfairness to victims of serious crimes and their families

[134] It is remarkable that in 1972, the English Criminal Law Revision Committee, by a majority, proposed a change in the law to make one co-defendant's out of court confession admissible against the other. The Committee reasoned that 'there are many cases where the interests of justice require that what any of the accused have said out of court about the part played by the others in the events in question should be before the court.' The Committee made the point that a change of the 'universal rule' was desirable because it would get 'rid of the absurd situation which occurs under the present law that, when A has made a statement implicating himself and B, it is necessary to direct the jury that the statement is admissible against A but not against B. *This is a subtlety which must be confusing to juries and in reality they will inevitably take this statement into account against both accused* (italics added).'[131]

[135] Reflecting on the case before us, these last words of the Committee are well understood. It was clear that the jury believed De Nobrega and her evidence. It did not believe half of her story. Had there been a proper police investigation, there could perhaps have been strong supporting evidence against both defendants, providing sufficient comfort to the jury that De Nobrega's evidence was truthful. Yet even then the universal rule would have led to an acquittal for Small and a conviction for Gopaul. Had that been the case, would that not have amounted to the absurdity to which the Committee spoke? And if

[130] Richard Glover, *Murphy on Evidence* (14th edn, Oxford University Press 2015) 368-370.
[131] As cited by JR Spencer, *Hearsay Evidence in Criminal Proceedings* (2nd edn, Bloomsbury Publishing 2014) 165-166.

the application of a rule provides an absurd result, does that not lead to the conclusion that the rule must be wrong? I am inclined to think so.

Disposal

[136] The Court makes the following orders:

i. The appeal of Jarvis Small is allowed.

ii. The appeal of Bibi Shareema Gopaul is allowed in part against the sentence imposed by the Court of Appeal. Her appeal against conviction is dismissed. The sentence of forty-five years imposed by the Court of Appeal is set aside and the Court substitutes a term of thirty years imprisonment with no eligibility for parole before the expiration of fifteen years. From this sentence, the period of five years will be deducted for time spent in custody while on remand.

/s/ A Saunders

The Hon Mr Justice Saunders (President)

/s/ J Wit

The Hon Mr Justice Wit

/s/ M Rajnauth-Lee

The Hon Mme Justice Rajnauth-Lee

/s/ D Barrow

The Hon Mr Justice Barrow

/s/ P Jamadar

The Hon Mr Justice Jamadar