IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No BZCR2019/002
BZ Criminal Appeal No 2 of 2017

BETWEEN

THE QUEEN **APPELLANT**

AND

CALANEY FLOWERS **RESPONDENT**

Before The Honourables **Mr Justice A Saunders, PCCJ**
Mr Justice J Wit, JCCJ
Mr Justice W Anderson, JCCJ
Mr Justice D Barrow, JCCJ
Mr Justice A Burgess, JCCJ

Appearances

Mrs Cheryl-Lynn Vidal SC for the Appellant

Mr Anthony Sylvestre for the Respondent

Court of Appeal Act Chapter 90 – Indictable Procedure Act Chapter 96 – Act No. 5 of 2011 – non-textual amendments – trial by judge alone – acquittals – finality of acquittals – prosecution appeals – statutory interpretation – statutes in pari materia – plain meaning rule – double jeopardy – directed verdicts – miscarriage of justice – retrials

Cases referred to

Chefette Restaurants Ltd v Harris [2020] CCJ 6 (AJ) (BB)
Chung v AIC Battery and Automotive Services Co Ltd [2013] CCJ 2 (AJ), (2013) 82 WIR 357
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Davern v Messel (1984) 155 CLR 21
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International Environments Ltd v Commissioner of Income Tax [2019] CCJ 18 (AJ)
R v Dorking Justices, ex p Harrington [1984] 3 WLR 142
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Kodagali (Dead) v The State of Karnataka (India CA, 12 October 2018)
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Luximon v Minister for Justice and Equality [2018] IESC 24, [2018] 2 IR 542
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Whitehorn v R [1983] HCA 42, 152 CLR 657

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Code of Criminal Procedure 1898, s 417

Barbados
Criminal Appeal Act, Rev Ed 1971, Cap 113A

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Court of Appeal Act, Rev Ed 2011, Cap 90, ss 3, 49 (1) and (2)(b)
Indictable Procedure Act, Rev Ed 2011, Cap 96, s 65C

Botswana
Court of Appeal Act 1972, s 12(1)

Canada
Canadian Charter of Rights and Freedoms
Criminal Code of Canada, R S C 1985, c C-46, ss 676, 686 (4)(b)(ii)

Cayman Islands
Criminal Procedure Code (2011 Revision), s 129

Dominica
Eastern Caribbean Supreme Court (Dominica) Act, Rev Ed 2009, Chap 4:02

Grenada
West Indies Associated States Supreme Court (Grenada) (Amendment) Act 2012

Guyana
Court of Appeal Act, Rev Ed 2010, Cap 3:01

India
Code of Criminal Procedure 1973, ss 372, 377, 378

Jamaica
Gun Court Act 1974
Child Care and Protection (Amendment) Act 2018
Trafficking in Persons (Prevention, Suppression and Punishment) (Amendment) Act 2018

Kenya
Criminal Procedure Code Cap 75, s 379(5)

Malaysia
Courts of Judicature Act 1964, s 50(2)

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Code of Criminal Procedure Act 1979, s 337 (1)

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Court of Appeal Rules
Miscellaneous Provisions (Trial by Judge Alone) Act 2017
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Criminal Procedure Ordinance, Rev Ed 2009, Ch 3.03, ss 57-63

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JUDGMENT
of
The Honourable Mr Justice Saunders, President
and the Honourable Justices Wit, Anderson, Barrow and Burgess, Judges

Delivered by
The Honourable Mr Justice Anderson

and

CONCURRING JUDGMENTS OF

The Honourable Mr Justice Saunders
and The Honourable Mr Justice Wit

on the 29th day of September 2020

JUDGMENT OF THE HONOURABLE MR JUSTICE ANDERSON, JCCJ:

Introduction

[1] This appeal involves a narrow but vital point of statutory interpretation that traverses two important statutory provisions dealing with criminal appeals in Belize. Section 49 of the Court of Appeal Act of 1968[1] gave a right to the Prosecution to appeal acquittals on indictment in three specific circumstances and stipulated the grounds on which, and the procedure by which, such appeals could be made. At the time when the Act was passed criminal trials were conducted by judge and jury. Forty-three years later, the Indictable Procedure Act was amended in 2011[2] to make the novel provision for certain offences to be tried before a judge alone without a jury. Without specific reference to Section 49 of the Court of Appeal Act, Section 65C of the Indictable Procedure Act provided for a right of appeal by the accused person and the prosecution from conviction or acquittal.

[2] The point for determination that has arisen in this case is whether section 65 C of the Indictable Procedure Act is to be interpreted as recognising the right of the prosecution to appeal only in the three types of circumstances covered ins section 49 of the Court of Appeal Act; or whether section 65C is to be interpreted as conferring a new right of appeal on the prosecution, independent of and additional to the three types of circumstances covered in section 49. This decision evidently will have a significant impact on the judge alone trials which were introduced in Belize almost a decade ago, and which is being introduced in other countries of the Commonwealth Caribbean. [3]

[3] The appeal to determine the point in dispute was heard by this Court on 10 July 2020 and on 14 July 2020 we ordered that the appeal would be allowed and that the orders prayed for by the Director of Public Prosecutions would be granted. In the order we also said that our reasons would follow. The following are those reasons.

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[1] Chapter 90 (With amendments in force as at: 31st December 2000).
[2] Chapter 96 as amended by Act No. 5 of 2011.
[3] Trinidad & Tobago through the Miscellaneous Provisions (Trial by Judge Alone) Act No. 10 of 2017 has established trials by judge alone.

[4] The respondent was tried between 10 and 30 May 2016 before the Honourable Justice Troadio Gonzalez, as he then was, sitting without a jury, on an indictment charging her with one count of murder and one count of attempt to murder. At the close of the case for the Prosecution a 'no case' submission was made on behalf the respondent. On 30 May 2016, the learned trial judge ruled that the respondent had a case to answer and the following day the respondent presented her defence which included her unsworn statement and the calling of one witness.

[5] On 24 March 2017, Justice Gonzalez delivered a written judgment in which he rendered a verdict of not guilty on both counts on the indictment and discharged the respondent. The learned judge gave as the reason for his decision, that, based on the evidence, he did "not find that the accused had the intention to kill either of the two persons"[4] named in the indictment.

[6] Pursuant to section 65C (3) of the Indictable Procedure Act the appellant applied to the Court of Appeal for leave to appeal the verdict of the trial judge to acquit for the offence of murder. The application came on for hearing on 21 October 2019 but the Court of Appeal declined to hear the application on the ground that it had no jurisdiction to do so.

[7] The appellant sought, and by Order of this Court dated 14 February 2020, was granted, special leave to appeal to this Court. The single ground of appeal was that:

> [T]he Court of Appeal erred in law in its interpretation of section 65C (3) of the Indictable Procedure Act in so far as it found that the section does not operate to give the Crown a right of appeal against the verdict of acquittal of a judge in a trial conducted without a jury.

[8] Before considering the contentions of the parties it is necessary to set out in greater detail the decision of the Court of Appeal as well as the relevant legislative framework.

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[4] At para [99].

The Decision by the Court of Appeal

[9] The Court of Appeal delivered its written judgment on 16 March 2020. In dismissing the application for leave to appeal the acquittal for murder, the Court of Appeal expressed the view that section 65C (3) did not give the Crown an independent right of appeal in cases where a judge, sitting alone, had delivered a verdict of not guilty in a judge alone trial. The Court of Appeal stated that section 65C (3) was limited by section 49(1)(a) of the Court of Appeal Act[5] which provided for the Prosecution's right of appeal to be limited to instances where the trial judge directed the acquittal of the accused at the close of the case for the Prosecution.

[10] The reasoning of the Court of Appeal is captured in paragraphs 24 and 25 of its judgment. In those places, Hafiz-Bertram JA, writing for the majority of the Court, said the following:[6]

> [24] The Court had carefully considered the three cases under section 49(1) and has come to the conclusion that it cannot import the right under section 65C into section 49(1) because of material differences …. Section 49(1)(a) provides for an appeal of an acquittal as well as section 65C. But the circumstances of acquittal in both sections are materially different. Section 49(1) (a) provides for an appeal by the Director of an acquittal by the direction of the judge at the close of the case of the prosecution, where a person is tried on an indictment. Section 65C provides for an appeal by the Director of the judgment of the trial judge sitting alone and stating reasons for the acquittal at the conclusion of the trial. Section 65C is not a directed acquittal as in 49(1)(a) at the close of the case for the prosecution. (See the case of *Fabian Bain* which explains section 49(1)(a) directed verdict of acquittal). It was the view of this Court, that it had no power to hear an appeal created under section 65C. In our opinion, the powers under section 49(5) to hear appeals is limited to appeals under section 49(1)(a).
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> [25] The Court had also considered whether it can properly add that additional right of appeal by the Director provided for under section 65C, by applying the principle of fairness. Mr Sylvestre assisted the Court with

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[5] Section 49 (1) provides as follows:
(1) Without prejudice to any right of appeal granted to the Prosecution by any other provision of this Act, an appeal shall lie to the Court at the instance of the Director of Public Prosecutions in the following cases:
(a) where a person tried on indictment has been acquitted by the direction of the trial judge at the close of the case for the Prosecution whether in respect of the whole or part of the indictment; or
(b) where the judge quashes the indictment; or
(c) against the sentence passed on conviction on a trial on indictment.

[6] At paras [24] and [25].

> authorities including that of *Dioniocio Salazar*… where that Court pointed out the constitutional requirement "that any criminal trial needs to be fair". It was the opinion of the Court, that it cannot assume jurisdiction to hear the appeal on the basis of fairness even if an error of law had been made by the trial judge. There must be expressed statutory provisions in the Court of Appeal Act, giving it the power to hear an appeal which resulted from an acquittal by a judge alone trial. Unfortunately, this Court cannot step in the shoes of the legislature to add the right of appeal provided under section 65C which addresses judge alone trial, to section 49(1)(a) which addresses jury trial. Further, section 49(2) relied upon by Ms Smith cannot be read in isolation as it is inextricably linked to section 49(1). Also, the Court had a difficulty (for reasons already discussed) in accepting the argument of Ms Smith that section 65C is not to be read subject to the restrictions contained in section 49(1)(a), and her further submission that section 49(2) is to be read together with section 65C (3) of the Indictable Procedure Act.

[11] The rationale of the decision of the Court of Appeal may be encapsulated in the following four points: (i) section 49 and section 65C could not be construed cumulatively because the sections were not in *pari materia;* (ii) the sections were not in *pari materia* because of two material differences between them: (a) section 49 dealt with a directed verdict of acquittal and section 65C dealt with a verdict of acquittal after trial, and (b) section 49 dealt with trials by judge and jury whereas section 65C dealt with trials by judge alone; (iii) the power to hear appeals by the Crown was granted by section 49(5) of the Court of Appeal Act and was limited to appeals under section 49(1)(a) – if the legislature had intended to grant the power to hear an appeal to the Court of Appeal, it had to provide that power in the Court of Appeal Act; and (iv) section 65C (3) was to be read subject to section 49(1)(a).

The Legislative Framework

[12] The following are the statutory provisions that are relevant to the issue of interpretation in this case.

[13] Section 49 of the Court of Appeal Act provides for appeals by the Director of Public Prosecutions. It states as follows:

49.- (1) Without prejudice to any right of appeal granted to the Prosecution by any other provision of this Act, an appeal shall lie to the Court at the instance of the Director of Public Prosecutions in the following cases,

(a) where a person tried on indictment has been acquitted by the direction of the Judge at the close of the case for the Prosecution whether in respect of the whole or part of the indictment; or

(b) where the Judge quashes the indictment; or

(c) against the sentence passed on conviction on a trial on indictment.

(2) An appeal under subsection (1) may be made on the following grounds,

(a) against the acquittal, on any ground of appeal which involves a question of law alone.

(b) with the leave of the Court or upon the certificate of the Judge who tried the accused that it is a fit case for appeal against the acquittal, on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the Court or Judge to be a sufficient ground of appeal.

(c) with the leave of the Court, against the sentence passed on conviction on the ground that it is unduly lenient, unless the sentence is one fixed by law.

(3) On any such appeal against acquittal the Court may, if it thinks that a miscarriage of justice has occurred, allow the appeal and order a retrial.

(4) On an appeal against sentence, the Court may, if it thinks that the sentence passed by the trial Court was unduly lenient, pass such other sentence in substitution therefor as it thinks ought to have been passed.

(5) Subject to this section, the foregoing provisions of this Part respecting the time for appealing, filing of notice of grounds of appeal, costs of appeal and the powers of the Court shall mutatis mutandis apply to appeals under this section, and the Court may make all such orders and issue all such directions as it considers necessary to give effect to its decision.

[14] Section 65C of the Indictable Procedure Act states as follows:

> 65C.- (1) Where a trial is conducted without a jury, the judge shall, at the conclusion of the trial, give a written judgment stating the reasons for the conviction or acquittal of the accused person (as the case may be) at, or as soon as reasonably practicable after, the time of conviction or acquittal.
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> (2) The date of the judgment referred to in subsection (1) of this Act shall be deemed to be the date of conviction or acquittal of the accused person.
>
> (3) An appeal shall lie to the Court of Appeal, at the instance of the accused person or the prosecution, from the decision of the judge given under subsection (1) of this section, convicting or acquitting the accused person.

Contentions of the Parties Before the CCJ

[15] The appellant argued in written and oral submissions that Section 65C of the Indictable Procedure Act gave a clear and unambiguous right of appeal to the prosecution independent of Section 49(1)(a) of the Court of Appeal Act. The appellant further contended that the procedures for exercising that right were those set out in section 49(2) and (5) of the Court of Appeal Act, respectively.

[16] The respondent maintained in her written and oral submissions that the Court of Appeal was correct to find that it lacked jurisdiction to entertain the application by the prosecution for leave to appeal. This was so in consequence of the expressed wording of the Court of Appeal Act. Section 3 of that Act providing for the Constitution of the Court of Appeal stated that that Court had "such powers and jurisdiction" as were conferred by the Act. Section 49(1) of the Court of Appeal Act provided for the circumstances in which the Director of Public Prosecutions could appeal an acquittal on trial on indictment. For some significant part of his submissions, though not all, counsel for the respondent, Mr Sylvestre, argued that the only way that those circumstances could be enlarged would be through amendment of the Court of Appeal Act.

[17] The respondent further argued that the finding by the Court of Appeal that it had no competence to entertain the application for leave to appeal by the prosecution was

supported by the approach to statutory interpretation highlighted in the decision of this Court in *Chandroutie Persuad & Anor v Javen Jason Nizamudin.*[7] Mr Sylvestre argued that "when an evaluation of textual meaning, legislative intent, context, coherence, local legal custom, precedent, pragmatism and policy is undertaken, it is to be seen that it could never have been the intention of the Legislature to amplify the Prosecution right of appeal of acquittals to circumstances other than those set out in section 49(1)(a), as the effect of the interpretation contended by the Appellant would lead to an incongruous system for Prosecution appeals of acquittals on indictment, where the right is circumscribed for acquittals in jury trials but enlarged for acquittals in non-jury trials." This oddity would create an anomaly whereby a person acquitted after trial by judge and jury could be assured that there could be no appeal outside the narrow grounds spelt out in section 49 of the Court of Appeal Act, and therefore no possibility of a retrial, again outside those limited circumstances; whereas a person acquitted after trial by judge alone was exposed to the possibility of an appeal by the prosecution and the further possibility of a retrial.

[18] We shall return to this oddity and the possibility that the right to appeal acquittals could lead to an abuse of the power of retrial towards the end of this judgment.[8] However, to appreciate the force of the arguments by the respondent, it is necessary to explore, more fully, the common law rule of the finality of acquittals and the concomitant need for express statutory provision and language to depart from that rule. We must then decide whether the language used by the legislature in the Section 65C of the Indictable Procedure Act was sufficient to indicate with certainty the intention to depart from the common law rule of the finality of acquittals.

Common Law Rule on the Finality of Acquittals

[19] The common law recognized asymmetry in the right to appeal criminal verdicts. Following a verdict on indictment, only a person who had been convicted could

[7] [2020] CCJ 4 (AJ).
[8] See [43]-[45].

appeal. The prosecution had no right of appeal. In *Smith v. the Queen* [9] Lord Steyn accepted that it was "a settled principle of English law that an acquittal recorded by a Court of competent jurisdiction, although erroneous in point of fact, cannot generally be questioned before any other Court. An acquittal is final." *Smith* was referenced by the Privy Council in *The State v Brad Boyce*,[10] on the way to making the observation that under "the ancient rules of common law, … [t]he Prosecution had no right to appeal against a jury's verdict of not guilty on a trial by indictment."

[20] The reasons for not recognising a right in the prosecution to appeal an acquittal are embedded in considerations akin to (but not the same as) those justifying the related rule against double jeopardy. I am indebted to my brother, Justice Barrow, JCCJ, for drawing my attention an article by Matteo Rizzolli, "Why Public Prosecutors Cannot Appeal Acquittals."[11] That article traces the origin of double jeopardy like rules to the Romans where, in the Digest of Justinian, it is stated that *the governor must not allow a man to be charged with the same offence of which he has already been acquitted.*[12] English legal tradition from the 17th Century recognized, among other common law pleas, the doctrine of *autrefois acquit* (previous acquittal) which one century later, Judge Blackstone explained as "grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence."

[21] Double jeopardy had its greatest impact in the United States where the Fifth Amendment to the Constitution adopted in 1791, provided: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The Fifth Amendment was interpreted in 1904 by the Supreme Court in *Kepner v United States*,[13] to mean that reversing an acquittal on appeal amounted to being tried twice for the same crime, and therefore this possibility should be confined by the double jeopardy constitutional provision. The 4 to 5 majority decision was highly

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[9] [2000] 1 WLR 1644 at 1653.
[10] [2006] UKPC 1 5] at para 8.
[11] (2010) Vol. 15 Issue 1 *Studi e note di economia* (Economic studies and notes) 81.
[12] Matteo Rizzolli, ibid., at page 4.
[13] *195 U.S. 100 (1904).* Kepner was a lawyer acquitted of embezzlement. An appeals court reversing the acquittal, found the lawyer guilty.

controversial and since then has been consistent efforts, through two major statutory revisions of prosecutors' appeal powers, and major Supreme Court cases.[14]

[22] By the end of 18th century, the double jeopardy rule in the Commonwealth was that a criminal acquittal could be appealed by prosecutors but only in a very limited number of cases.[15] More expansively, the House of Lords held in R v. *Dorking Justices, ex parte Harrington,*[16] that prosecutorial appeals are permitted if the initial trial had so many flaws that it did not amount to any real jeopardy. And Section 11(h) of the Canadian charter of rights and freedoms states that *any person charged with an offence has the right […] (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again.* Evidentially the double jeopardy safeguard is significantly narrowed in Canada in that it applies only after the trial is finally concluded, and because it allows a broad range of possibilities for the prosecution to appeal questions of law.

[23] In the CCJ case of *Queen v Lewis*[17] Justice de la Bastide PCCJ recognised that the finality accorded to acquittals was rooted in the principle that no one should be tried twice for the same offence. The former President of this Court further explained the rationale for treating an acquittal as final by quoting from Gibbs CJ in *Davern v. Messel*:[18]

> The purpose of the rule [against double jeopardy] is of course to ensure fairness to the accused. It would obviously be oppressive and unfair if a prosecutor, disappointed with an acquittal, could secure a retrial of the accused person on the same evidence, perhaps, before what the prosecutor "considered to be a more perspicacious jury or tougher judge: *Reg. v. Humphrys* [1977] AC at p. 47."

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[14] Matteo Rizzolli ibid., at page 7.
[15] Matteo Rizzolli, ibid., at p. 8: "when the initial indictment was irremediably defective; and when, facts demonstrating that the offence charged had been committed were found, but at the same time, the trial court erroneously acquitted supposing that the offence fund was not a crime."
[16] (1984) 3 W.L.R. 142.
[17] [2007] CCJ 3 (AJ) at [9].
[18] Ibid., at [18], quoting (1984) 155 CLR 21, at page 30.

[24] As we have seen, the dictum of Gibbs CJ on double jeopardy is not exactly on all fours with the historical evolution of the rule preventing prosecution from appealing acquittals. This is because, as this Court held in *James Anthony Hyles and Mark Royden Williams v. the DPP*,[19] the statutory grant of a right to appeal by the DPP was not contrary to the principle of double jeopardy because, *inter alia*, the rule against double jeopardy was not absolute. This Court decided that in principle double jeopardy only protected acquittals which had become final after being affirmed by an appellate Court; an accused who was still subject to the appellate process was therefore not protected against double jeopardy. Speaking for the Court Justice Wit JCCJ said:[20]

> [32] The Appellants submitted that the amendment to the Court of Appeal Act encroached upon Article 144(5) of the Constitution of Guyana which offers a protection against double jeopardy.
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> [37] We cannot agree with that argument. There is no support for the argument presented by the Appellants that the amendment breaches the right to protection of the law in Article 144(5) of the Constitution. First, the very wording of Article 144(5) contemplates the possibility of an appeal against acquittal….
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> [38] Second, Article 144(5) should be understood against the background of Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR), to which Guyana is a signatory. Article 14(7) states: "No one shall *be liable to be tried* or punished *again* for an offence for which he has already been *finally* convicted or *acquitted* in accordance with the law and penal procedure of each country." (emphasis added). This provision embodies the principle of *ne bis in idem* or, as it known in the common law, the rule against double jeopardy. However, this is not an absolute rule. It mainly protects a person who has been acquitted at first instance and whose acquittal, after having been affirmed by an appellate Court, has become final in accordance with the law and penal procedure of the country where he or she was tried.

[25] Therefore, if criminal proceedings are instituted against the accused and at the end of those proceedings, the accused is acquitted of the offence listed on the indictment, the rule against double jeopardy protects the accused from being indicted for that offence again. But the rule does not operate to safeguard the accused from the

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[19] [2018] CCJ 12 (AJ).
[20] At paras [32], [37], [38].

appellate courts because the appellate process is part and parcel of the criminal proceedings. As stated by Edwin E. Bryant in The Law of Pleading under the Codes of Civil Procedure:

> "Proceeding" is a word much used to express the business done in courts. A proceeding in court is an act done by the authority or direction of the court, express or implied. It is more comprehensive that the word "action," but it may include in its general sense all the steps taken or measures adopted in the prosecution or defence of an action, including the pleadings and judgment. As applied to actions, the term "proceeding" may include – (1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of *ne exeat*; (4) the pleadings; (5) the taking of testimony before trial; (6) all motions made in the action; (7) the trial; (8) the judgment; (9) the execution; (10) proceedings supplementary to execution, in code practice; (11) *the taking of an appeal or writ of error;* (12) *the remittitur, or sending back of the record of the lower court from the appellate or reviewing court;* (13) the enforcement of the judgment, or a new trial, as may be directed by the court of last resort.[21]

[26] Notwithstanding the peculiar place of appeals in the jurisprudence of double jeopardy, the point *is* taken that, for good and sufficient reason, a right in the prosecution to appeal an acquittal on indictment cannot be presumed at common law. Time and again the cases have held that at common law an acquittal on indictment was final. The legislature could always intervene to abolish or qualify this rule but in order to be effective, "such legislative inroad on the principle requires clear and specific language": Per Lord Steyn in *Smith*.[22] See also: Mottley P. in *Criminal Appeal No. 6 of 2005 Director of Public Prosecution v Fabian Bain*; [23] *Commonwealth Caribbean Criminal Practice and Procedure.*[24] Apart from section 49 of the Court of Appeal Act of Belize, legislation grants the prosecution a limited right of appeal usually against sentence or a directed verdict of acquittal in Antigua and Barbuda, the Bahamas, Barbados, Dominica, Grenada, Guyana, St. Kitts and

[21] Emphasis added.
[22] [2000] 1 WLR 1644 at 1652.
[23] Criminal Appeal No 6 of 2005.
[24] Ramgoolam, R. Seetahal D. S., Commonwealth Caribbean Criminal Practice and Procedure. Fifth Edition. Page 319 (2019).

Nevis, St. Vincent and the Grenadines and Trinidad and Tobago.[25] A similar jurisdiction is conferred in England by the Criminal Justice Act 2003.[26]

[27] The argument of the respondent was therefore solidly grounded in the ingrained presumption of the finality of acquittals. Applied to the circumstances of the present case, Mr Sylvestre argued that there could be no appeals from a verdict to acquit pronounced in the new legislative procedure establishing trial by a judge alone, even where the circumstances fell within section 49(1) of the Court of Appeal Act, unless there was an express statutory right to such an appeal. Therefore, section 65C did no more than to permit the right to appeal in respect of the cases covered in section 49(1). And only in those cases. In the words of counsel, section 65C was "circumscribed" by section 49(1).

Methods of Legislative Amendments to Integrate Judge Alone Trials

[28] The argument that specificity is required in legislative language to effect an independent right of appeal outside the Court of Appeal Act gains traction by reference to the methods adopted to express the legislative amendments necessary to integrate judge alone trials into the traditional judge and jury trial system. With the advent of judge alone trials where the judge (in place of the jury) was both the trier of the facts, the authority on the law, and responsible for the conduct of the trial, legislative amendments were necessary to ensure the integration, efficacy and full functionality of this new system. The amendments took two forms. The first, which Bennion[27] refers to as 'textual amendments' involved express and specific modification to existing statute. In Trinidad and Tobago, the Miscellaneous Provisions (Trial by Judge Alone) Act ("MPA") is a textual amendment.[28] That Act replaces, removes, or substitutes specified words in various provisions of the

[25] Antigua: Criminal Procedure (Amendment) Act No 14 of 2004; Barbados: Act No 5 of 2000, the Criminal Appeal (Amendment) Act (proclaimed July 2002); Dominica: Eastern Caribbean Supreme Court (Dominica) Act, Cap 4:02, s 37(2); Grenada: Act No 21 of 2012 creating a new Section 40 A in the West Indies Associated States Supreme Court (Grenada) Act 2012; Guyana: Court of Appeal (Amendment) Act No 4 of 2010; St Kitts and Nevis: Easter Caribbean Supreme Court (Saint Christopher, Nevis) Act, Cap 3:11, s 42; St Vincent: Act No 10 of 2007, creating a new Pt IIA in the Eastern Caribbean Supreme Court (St Vincent and the Grenadines) Act; Trinidad and Tobago: Supreme Court of Judicature Act, Cap 4:01, ss 65E-65Q.

[26] See Part 9 "Prosecution Appeals".

[27] Pages 193-197.

[28] Bennion on Statutory Interpretation. Seventh Edition. At page 194: "A 'textual amendment' adds, removes or replaces words in a way that is intended to make it possible to produce a version of the text as amended."

Supreme Court of Judicature Act (and the Court of Appeal Rules),[29] the Summary Courts Act,[30] and the Offences Against the Person Act.[31] These changes firmly implanted the trial by judge alone system into the legislative landscape of Trinidad and Tobago.

[29] The second approach, which Bennion[32] refers to as 'non textual amendments' expressly alters the meaning of legislation without changing the actual text. A non-textual amendment will typically use words such as 'has effect as if', 'is to be treated as if', or 'is to be read as if'. In Belize there is no textual amendment. Instead, section 65E of the Indictable Procedure Act effects a non-textual amendment, evident by use of the words "shall be read and construed with such modifications, adaptations…" Even though the method of amendment in Belize differed, both its Indictable Procedure Act and the Trinidad and Tobago MPA had the same intention of amending pre-existing applicable pieces of legislation to bring them into conformity with trials by judge alone.

[30] Accordingly, it was argued for the respondent, the combined consequence of the traditional presumption that an acquittal is final and section 65C and 65E of the Indictable Procedure Act is to effect the non-textual amendment of Section 49 so as to allow the prosecution a right to appeal in the cases covered by Section 49(1). But only in the cases covered by section 49(1).

[31] This is an undoubtedly an impressive and ingenious argument. When coupled with the 'oddity' that an independent right in the prosecution would create the anomaly that acquitted persons may be treated differently depending whether they were tried by judge and jury or by judge alone, this contention gave cause for pause. However, after prolonged consideration the Court is convinced that the argument of the respondent must fail, largely for the reasons put forward by the appellant.

Was there a Clear Conferral of the Right of Appeal?

[29] Chapter 4:01.
[30] Chapter 4:20.
[31] Chapter 11:08.
[32] Ibid.

[32] It was contended by Director Vidal, and agreed (eventually) by Mr Sylvestre, that legislation other than the Court of Appeal Act could provide for a right in the prosecution to appeal an acquittal. This agreement is in harmony with what this Court said in *Hyles and Williams* and agrees with section 100 of the Constitution of Belize[33] which states as follows:

> 100.- (1) The Court of Appeal shall have such jurisdiction and powers to hear and determine appeals in civil and criminal matters as may be conferred on it by this Constitution or any other law.

[33] This constitutional provision permits the legislature to confer upon the Court of Appeal jurisdiction to hear and determine appeals in criminal matters through statutes other than the Court of Appeal Act. We therefore cannot agree with the Court below that: "There must be expressed statutory provisions in the Court of Appeal Act, giving it the power to hear an appeal which resulted from an acquittal by a judge alone trial." Given section 100 of the Constitution, there is no basis for the suggestion that only the Court of Appeal Act could confer the power to hear an appeal upon the Court of Appeal.

[34] The real question, therefore, is whether the language employed in section 65C is sufficiently clear and unambiguous to grant of a right of appeal to the prosecution. We entertain no doubt that the language clearly confers, and was clearly intended to confer, this right. Section 65C (3) stipulates in express terms, that "… an appeal shall lie to the Court of Appeal…" equally by the accused person on conviction as by the prosecution on acquittal. This is the very language used in section 49(1) of the Court of Appeal Act to confer the right of appeal to the Court of Appeal by the Director of Public Prosecutions.

[35] The intention to invest the prosecution with a right of appeal is also evident in the statutory requirement for the judge to provide reasons. The side note to section 65C

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[33] Chapter 4 of the Substantive Laws of Belize (Revised Edition) 2011.

of the Indictable Procedure Act requires the judge trying a case alone "to give *reasons* for conviction *or acquittal* and right to appeal" (emphasis added). The supplied emphasis is meant to focus the attention on the requirement to give reasons in the case of acquittal no less than in cases of conviction. There seems no logical reason to give reasons in the case of acquittals other than to provide the basis for the prosecution to decide whether to mount an appeal. To provide reasons for an acquittal where nothing can be done to correct, for example, an egregious error evident on the face of the record makes no sense whatsoever. The possibility of demonstrating that there was an egregious error whilst not being able to do anything about it would undoubtedly expose the law to the risk of the scorn and rebuke of reasonable members of the society.

[36] It may therefore be accepted that the words of section 65C were clearly meant to create an independent right of appeal, separate and apart from that contained in the section 49(1) of the Court of Appeal Act. The words admit of no other reasonable meaning and the words do not limit the right to an acquittal at the close of the case for the prosecution, as does section 49(1) in relation to acquittal before a judge and jury.

[37] Support for this literal and logical approach is found in the rules of statutory interpretation. It is a cardinal principle of statutory interpretation that a statute should be interpreted according to the intention of the legislature, which is to be inferred from the words used in the piece of legislation. Those words used must be given their natural and ordinary meaning. Where there is no ambiguity, no further interpretation is needed. As long ago as 1931 the Court in the case of *Spillers, Limited v Cardiff Assessment Committee and Pritchard*[34] said the following:

> Another argument was hinted at, though the various counsel had not the hardihood to advance it – namely, that in the use of any language by the Legislature one should expect the loose and inexact, rather than the correct and exact. It is true that one who spends much time in this Court might be tempted in his haste to make some such assertion. But if he allowed cynicism to be tempered with sympathy for the harassed Parliamentary

[34] [1931] 2 KB 21 At pages 42 and 43

> draftsman, he would reflect that it is only in regard to phrases of doubtful import that this Court is called upon to apply a toilsome scrutiny. The task is pathological and too much immersion in it may well induce oblivion of the fact that in comparison with the vast bulk of our legislation these difficult passages are rare. It ought to be the rule, and we are glad to think that it is the rule, that words are used in an Act of Parliament correctly and exactly, and not loosely and inexactly. Upon those who assert that that rule has been broken the burden of establishing their proposition lies heavily. And they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred. This indeed, must be not merely legal, but also the literary canon of interpretation.

[38] Lord Reid in the House of Lords case of *Pinner v Everett*[35] stated:

> In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for the words of the statute.

[39] Likewise, Lord Bingham said in the House of Lords case of *R v Bentham*[36] that:

> Rules of statutory construction have a valuable role when the meaning of a statutory provision is doubtful, but none where, as here, the meaning is plain. Purposive construction cannot be relied on to create an offence when Parliament has not created. Nor should the House adopt an untenable construction of the subsection simply because Courts in other jurisdictions are shown to have adopted such a construction of rather similar provisions.

[40] The "plain meaning rule" was also adopted by this Court in *Chung and Campbell v AIC Battery and Automotive Services Co Ltd*.[37] So too in the recent application for special leave in *Persaud and Nizamudin v Nizamudin*[38] where Justice Jamadar, JCCJ, said:[39]

> This interpretation changes the plain language of the subsection, narrows its application, and is conceptually and contextually flawed. There is no warrant

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[35] [1969] 3 All ER 257.
[36] [2005] 2 All ER 65 at para 10.
[37] [2013] CCJ 2 (AJ).
[38] Paragraphs 10 and 13 in particular.
[39] Paragraph 13.

for this re-writing, there being no ambiguity, uncertainty or inconsistency as to meaning or intention.

[41] We cannot accept the suggestion in the Court of Appeal and adopted before us by Mr Sylvestre that the addition of words, such as "*Notwithstanding section 49(1)(a)",* were needed to give clarity and specificity to a right to appeal in the prosecution. As the DPP argued, correctly in our view, there was no need to use the formulation "*Notwithstanding section 49(1)(a)"* for the very simple reason that section 65C (3) is not in conflict with section 49 at all. Section 49(1)(a) deals with directed acquittals at the close of the case for the Prosecution while section 65C (3) deals with acquittals by trial judges at the very end of the case. Section 65C (3) therefore confers an *additional* and not a *conflicting* right of appeal.

Hansard Record of the Parliamentary Debate

[42] A review of the record of Hansard record of the parliamentary debate supports the view that it was the intention of the legislature to grant a right of appeal to the prosecution against acquittals. A key motivation for the passage of the amendment of the Indictable Procedure Act was to avoid the intimidation of jurors in trials for murder and associated serious offences. In the Lower House, the Prime Minister, the Hon Dean Barrow, offered that it would be far less difficult for the criminals to intimidate the Judge 'than it is for them to get to one member of a jury'.[40] The Prime Minister also linked the requirement in Section 65 C to 'give written reasons for conviction or acquittal of the accused' with the existence of an appeal 'to the Court of Appeal against the decision of the Judge to acquit or convict the accused'.[41]

[43] In the Senate debate in the Upper Chamber, Senator Hulse, the Leader of Government Business, noted that the bill was an important tool 'in the arsenal of the government to get on top of the crime situation'. In relation to the remit of the right to appeal in section 65C (3), the Senator considered that the appeal against an acquittal by the Prosecution 'was new' and presented tension with the 'double

[40] Introduction of Bill at page 9.
[41] Ibid. at page 8.

jeopardy' rule. However, he justified the inclusion of the provision on the ground that the single Judge was not immune from threats. He explained that even though a single Judge would be easier to protect than a twelve-man jury, it did not mean that the Judge could not be the subject of threats or intimidation, particularly in the context of a small society. The Senator stated: 'If the Prosecution felt that the case was water tight, the evidence was so compelling that a guilty verdict should have been rendered but the Judge instead acquitted the accused, then the Prosecution has the right under section 65C(3) to bring the matter again by appealing to the Court of appeal and then ultimately the CCJ.'[42]

Interpretational Assistance from Foreign Statutes on Appeal of Acquittals

[44] In our recent decision in *Chefette Restaurants Ltd. v. Harris*[43] this Court emphasised that although assistance in the interpretation of local statutes could be obtained from foreign cases, the substantive intendment of the local statute was not to be watered down by interpretational glosses from foreign decisions.[44] *Chefette* was a civil law case in the area of employment law but the same principle applies to the interpretation of criminal law statutes, such as this one. On the other hand, the fact that in the debate on the passage of the amendment of the Indictable Procedure Act the Prime Minister of Belize specifically identified various jurisdictions which allow appeals by the Prosecution against acquittals in judge alone trials means that these foreign statutes may shed some light on the parliamentary understanding in enacting section 65C (3) of the Indictable Procedure Act.

[45] Among the statutes most in *pari materia* are those in Singapore and Nigeria. In Singapore[45] the Public Prosecutor may appeal against the acquittal of an accused on a question of fact or law or mixed facts and law. The Prosecutor can also appeal the sentence imposed on an accused. In Nigeria[46] the Court of Appeal 'shall' allow the appeal, whether against conviction or acquittal, if it thinks that the verdict should

[42] Senate debate at page 10.
[43] [2020] CCJ 6 (AJ) (BB).
[44] At paragraph 45 of the judgment.
[45] Section 374(3) of the Criminal Procedure Code Chapter 68 of Singapore.
[46] Section 20(1) of the Court of Appeal Act Chapter 75 of Nigeria.

be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court below should be set aside on the ground of a wrong decision on any question of law or that on any ground there was a miscarriage of justice.

[46] Apart from Nigeria, other countries in Africa also provide for appeals by the Prosecution in case of acquittals. These include Botswana,[47] Kenya,[48] Namibia,[49] Zambia,[50] Uganda law,[51] and South Africa.[52] A right of appeal is also given in India,[53] and in neighbouring Pakistan.[54] There are also opportunities to appeal against acquittals in Malaysia,[55] Papua New Guinea,[56] and Bangladesh.[57]

Relationship Between Section 65C Right to Appeal and Section 49

[47] Section 49(1) deals with the cases within which the Director of Public Prosecutions may appeal. Three such cases are specified. Section 49(2) is inextricably bound to section 49(1) in that section 49(2) specifies the grounds on which it may be argued that a case has been made out to allow the appeal.

[48] The Court of Appeal declined to read section 49 and section 65C together as it was of the view that the sections had "*material differences*". However, it is clear the sections are, in fact, *in pari materia* as they both deal with the same subject matter, namely, the competence of the prosecution to appeal acquittals: *R v Palmer;*[58] *Rainey v Greater Glasgow Health Board;*[59] *Ex p Copeland;*[60] Xanthaki's text Drafting Legislation;[61] and Bennion on Statutory Interpretation.[62] The cases on the

[47] Section 12(1) of the Court of Appeal Act 1972 of Botswana.
[48] Section 379(5) of the Criminal Procedure Code Chapter 75 of Kenya.
[49] Section 316A 1(a) of the Criminal Procedure Act 1977 of Namibia.
[50] Section 13(3) of the Court of Appeal Act 2016 of Zambia.
[51] Section 45 of the Criminal Procedure Code Act 1950 of Uganda.
[52] Section 310(1) and (2) of the Criminal Procedure Act 1977 of South Africa.
[53] Sections 377 and 378 of the Code of Criminal Procedure 1973 India.
[54] Section 417 of the Code of Criminal Procedure 1898 Pakistan.
[55] Section 50(2) of the Courts of Judicature Act 1964 of Malaysia.
[56] Section 219(3) of the District Courts Act Chapter 40 of Papua New Guinea.
[57] Section 417 of the Code of Criminal Procedure 1898 of Bangladesh.
[58] (1784) 2 East PC 898.
[59] [1987] AC 224.
[60] (1852) 2 De GM & G 914.
[61] Drafting Legislation, Art and Technology of Rules for Regulation by Helen Xanthaki, at page 330.
[62] Fifth Edition, Lexis Nexis, at page 604.

in pari materia rule are usually concerned with whole Acts which deal with the same subject-matter, but several cases suggest that the same principle is also applicable to sections in different statutes.[63] This must logically be so since the reason for the *in pari materia* rule, that is that the legislator is deemed to know the law as it stands, and that in legislating a new law on a subject-matter of an existing law, must be deemed to intend the two laws to operate harmoniously, is also to be applied in relation to sections of statutes no less than the general statutes themselves.

[49] When sections 49(1) and 65C (3) are read together, in relation to the right of appeal by the Crown, it is clear that an additional right of appeal has been granted to the Crown and can be read as part of section 49(1) (a). Further, in reading the sections together, the procedure for exercising that right becomes the procedure set out in section 49(2) conditioned by section 49(5).

[50] This is the only interpretation of the section 65C of the IP Act and section 49 of the COA Act that makes sense of the intention of the legislature in giving the prosecution a right of appeal against the verdict of acquittal by a trial judge. The interpretation proffered by the respondent would render the right intended by the legislature for the prosecution, inoperable devoid of any effect.

Applicability of the Concept of Fairness

[51] In its judgment the Court of Appeal rejected the notion that it could have accepted jurisdiction to hear the prosecution's application to appeal simply on the ground of fairness. With respect, we consider that the court was entirely right to do so. We wholly accept that it is not possible for a court to "step into the shoes of the legislature to add the right of appeal" where none was given by the legislature. However, for the reasons given, we consider that the legislature clearly and unambiguously granted the right the additional right of appeal to the prosecution

[63] *Masper and Wife v Brown* (1875) 1 CPD 97 per Lord Coleridge CJ at p 98; *Luximon & Others v Minister for Justice and Equality* [2018] IESC 24 paras 36-40; *Popular Democratic Movement v Electoral Commission & Anr* [2012] 5 LRC 129 at para 59; *Pryor v The City Offices Company* (1883) 10 QBD 504 per Brett MR at p 508; *Regina v Newcastle upon Tyne Justices Ex Parte Skinner* [1987] 1 WLR 312 per Glidewell L.J. at pp 314 to 315; *R v Hussain Ex Parte DPP* (1965) 8 WIR 65 per Crane J at P 85.

and the accused under section 65C in judge alone trials. That being so, we accept the DPP's suggestion that the following passage from Bennion is apposite:[64]

> It is a principle of legal policy that law should be just, and that Court decisions should further the ends of justice. The Court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. The Court should therefore strive to avoid adopting a construction that leads to injustice. The Courts nowadays frequently use the concept of fairness as the standard of just treatment.

[52] In the circumstances we are driven to accept that the interpretation given by the Court of Appeal, in light of the very clear intention of the legislature, as shown in the plain language of section 65C, to grant the prosecution a right of appeal, is a construction which could lead to injustice.

Abuse of the Competence of Retrial

[53] The Court has given anxious consideration to the suggestion that the right of appeal by the prosecution of acquittals in judge alone trials could lead to multiple retrials of an accused person until, perhaps, a conviction is secured. This might be a theoretical possibility, but we are not convinced there is any real likelihood that this will happen in practice because of the numerous safeguards that have been built into the system. These safeguards reflect the protections which this Court highlighted in the *Hyles and Williams*[65] as necessary to ensure compatibility with the constitutional rights of the accused person.

[54] The provisions of the Court of Appeal Act, when read along with section 65A and 65C of the Indictable Procedure Act, require the following: (1) observance of strict timelines when appealing. The Prosecution must commence the appeal within 21 days of the perfection of the verdict. This helps in creating legal certainty for the acquitted person. (2) The competence to appeal exists only in relation to serious

[64] Fifth Edition, Lexis Nexis, at page 795.
[65] [2018] CCJ 12 (AJ) at paras 45 and 46.

offences – murder, attempt to murder, conspiracy to murder and abetment of murder. (3) The appeal is as of right only on a question of law alone; the Crown requires leave to appeal otherwise. It is only where the appellate Court is satisfied that leave should be granted that that there will be an appeal against the verdict of acquittal. (4) The basis on which the appellate Court allows the appeal is that a miscarriage of justice has occurred. (5) Even if the Prosecution succeeds and the appeal is allowed there is not an automatic right to retry the accused person. Section 49 (3) provides that on an appeal against acquittal the Court may, if it thinks that a miscarriage of justice has occurred, "allow the appeal and order a retrial." It follows that the appellate Court may allow the appeal and so vindicate the point taken on appeal but refuse to allow a retrial in the specific case if in all the circumstances of the case it would be unfair and unjust on the accused person to order a retrial.

[55] The criminal justice system is intended to ensure that all parties are treated fairly. This means that an accused person must not be unduly harassed by multiple trials for the same offence through the avenue of a right in the Prosecution to appeal an acquittal. This is especially important because of the usual disparity in the resources available to the private person as compared with those available to the state and resonates with the rule against double jeopardy. At this same time, fairness to the Prosecution, and to the public which the Prosecution represents, must also mean the availability of redress to correct an egregious error that results in an acquittal. The availability of redress is intended to prevent a miscarriage of justice.

Conclusion

[56] We conclude that section 65C clearly provides for an additional right to section 49(1) (a) right in the Prosecution to appeal in judge alone trials. This additional right is subject to the procedures and safeguards specified in section 49 (2),

CONCURRING JUDGMENT OF THE HONOURABLE MR JUSTICE SAUNDERS, PCCJ:

Introduction

[57] There is reason to believe that trial by jury was brought to England by the conquering Normans. Whether this is so or not, within 150 years of the conquest, as the Magna Carta attests[66], jury trial had become established as an endemic feature of English law. It was a mode of trial so revered, eminent British jurists referred to it as a sacred bulwark of the nation, securing liberty.[67] Trial by one's peers was exported to former colonies of Britain. In Belize, juries were empanelled for the trial of the most serious crimes and, as in England, the fabric of the indictable criminal procedure was threaded with laws, rules, and practices to accompany jury trials.

[58] The bulwark is no longer sacred. Not in Belize. Jury trials have actually become somewhat fraught. Many Commonwealth countries have abolished this mode of trial. That jurors are absolved from giving reasons for their verdicts does not sit well with society's increasing emphasis on transparency. Today, all manner of information is easily and readily available to jurors. It is impossible to ensure that at least some of them will not be improperly influenced by material they access, whether inadvertently or otherwise, that is pertinent to the trial or the accused. Jury management is expensive and onerous. And jury tampering and juror intimidation have been a problem in some States.

[59] In 2011, the National Assembly of Belize decided to do away with the jury in murder cases. This was done by an amendment to the Indictable Procedure Act ("the amendment")[68]. Substituting for trial by jury, trial by a single judge naturally implicates swathes of criminal procedure. Such an amendment has to be deliberately worded to ensure that it aligns itself and is compatible with all the many strands of criminal procedure law that are premised on jury trial. If the amendment does not succeed in accomplishing this objective, various facets of the procedural law,

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[66] See: 'Full-text translation of the 1215 Magna Carta' <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation> accessed (27 July 2020).
[67] See: The Honourable Sir Patrick Devlin, Trial By Jury (Stevens & Sons Limited 1956) 165 citing Sir William Blackstone, Commentaries on the Laws of England (16th edn, J Butterworth and Son 1825) vol IV, pp 349-350.
[68] See: Indictable Procedure (Amendment) Act 2011.

textually untouched by the amendment, will need to be examined to see the extent to which, if at all, they accommodate the amendment.

[60] This case provides an instance of the need to examine one such aspect of criminal procedure. It relates to the matter of appeals by the Prosecution when a judge, sitting alone, acquits the accused upon the conclusion of a trial. Section 65C(3) of the Indictable Procedure Act, as amended, expressly grants the Prosecution a right of appeal to the Court of Appeal in such circumstances, but the Court of Appeal Act[69] was not explicitly amended to facilitate this amendment. It is the Court of Appeal Act, however, that normally would spell out the jurisdiction of that court to hear appeals. The salient issues in this case, therefore, are whether the jurisdiction of the Court of Appeal has impliedly been altered by this amendment to the Indictable Procedure Act and what right of appeal, if any, does the Prosecution have in judge alone criminal trials.

[61] The factual background that has given rise to these issues has been addressed by Anderson, J. There is no need for me to traverse that ground. Instead I wish to focus on how and why the two pieces of legislation in question should be reconciled. In doing so, I propose to: a) comment briefly on the amendment and the Court of Appeal Act respectively; b) identify what I consider to be the issues that relate to the reconciliation; and c) give my views on how those issues should be resolved.

[62] In *International Environments Limited v Commissioner of Income Tax*[70] at paragraph [20], this Court set out a definitive approach to statutory interpretation where two or more statutes must be reconciled. We said then:

> When we interpret the words of a statute, we must examine the object and scheme of the enactment and the entire context in which the legislation is situated. The surrounding context should be fully considered. That surrounding context must, in particular, include statutes or general laws that were enacted at different times but which pertain to the same subject or object. They can assist us by shedding light on the meaning that must be given to the words of the statute we are interpreting. [The provisions of a

[69] Rev Ed 2011, Cap 90.
[70] [2019] CCJ 18 (AJ).

> statute] ought not therefore to be interpreted in isolation, outside of the statutory framework ….

That is the approach that should be borne in mind here when we construe each of these two Acts of Parliament.

The Indictable Procedure Amendment Act 2011

[63] The objective of the amendment to the Indictable Procedure Act was to make provision for trial without a jury in certain classes of criminal cases and for matters related to such trials. Trials for the offences of murder, abetment of murder, attempt to murder and conspiracy to murder were to be conducted by a single judge without a jury.[71] In other criminal cases tried on indictment, Parliament gave to both the Prosecution and the accused, in certain specified instances, the right to apply to a judge for the trial to be held without a jury.[72] We were fortunate to receive a copy of Hansard and it was made very clear during the parliamentary debates on the Indictable Procedure Amendment Bill that, so far as appeals from judge alone trials were concerned, the intention was to give the Prosecution a new and additional right of appeal.[73] This is also reflected in s 65C(3) of the Indictable Procedure Act, as amended.

[64] Section 65E was the legislature's attempt to fit judge alone trials into the overall tapestry of the criminal procedure. It is worth indicating what that section states:

> 65E.– (1) Except where the context otherwise requires, a reference in this Act or any other law to a jury, the verdict of a jury or the finding of a jury shall be read, in relation to a trial conducted without a jury, as a reference to the judge, the verdict of the judge or the finding of the judge.
>
> (2) Without prejudice to subsection (1) above, ***where a trial is conducted without a jury*** under section 65A or section 65B of this Act, ***the provisions of*** this Act or ***any other law, insofar as they are predicated on a trial with a jury,*** shall not apply or ***shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with a trial by a judge sitting alone without a jury*** (emphasis added).[74]

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[71] See Indictable Procedure Act, Cap 96 as amended by the Indicatable Procedure (Amendment) Act 2011, s 65A,
[72] See s 65B Indictable Procedure Act Cap. 96
[73] See the *Hansard*, Senate, 20 June 2011, p 10 (Godwin Hulse).
[74] Indictable Procedure Act, Cap 96 as amended by the Indicatable Procedure (Amendment) Act 2011, s 65E (emphasis added).

The Court of Appeal Act

[65] Courts of Appeal are creatures of statute. They have only such jurisdiction as is conferred upon them by the legislature. As indicated above, in the normal course, it is to the Court of Appeal Act that one will normally turn to see whether and, if so, what jurisdiction has been conferred on that court to treat with any particular right of appeal. But this is without prejudice to the possibility that the Constitution or any other law might augment, abridge or modify the jurisdiction conferred by the Court of Appeal Act.[75]

[66] When section 49 of the Court of Appeal Act was drafted, only jury trials were contemplated. There were no judge alone indictable trials conducted in Belize at the time. Albeit in the context of jury trials, s 49 sets out a complete code for dealing with appeals by the Prosecution in criminal cases. Section 49(1) gives the DPP certain rights of appeal and s 49(2) stipulates the grounds that may be used to base those rights. The decisions that could be appealed extended to the orders of a judge to: a) direct an acquittal at the close of the case for the Prosecution; b) quash the indictment; or c) give a sentence considered by the DPP to be overly lenient.

Reconciling the Two Acts

[67] In treating with the relationship between the amendment and the Court of Appeal Act, I reject any notion that, so far as appeals go, we should construe s 65C without reference to the Court of Appeal Act. That approach would leave too much to be read into the section to render it efficacious.

[68] Bearing in mind that the Court of Appeal Act gives the Prosecution a right of appeal in jury trials,[76] and given that s 65C also grants to the Prosecution a right of appeal, the questions that must be asked are: What is new and additional about the right of appeal afforded by the amendments to s 65? How is this new right to be exercised?

[75] Belize Constitution Act, Rev Ed 2011, Cap 4, s 100.
[76] See: Court of Appeal Act, Rev Ed 2011, Cap 90, s 49(1) and (2).

What consequences result when the Prosecution successfully claims this new right? When these questions are asked it is readily apparent that the answers to them may be derived only from a construction of the Court of Appeal Act and that, to render it intelligible, s 65C *must* be melded into s 49 of the Court of Appeal Act.

What is New and Additional About the Right of Appeal Afforded by the Amendment to section 65?

[69] To determine the jurisdiction of the Court of Appeal to entertain appeals by the DPP in judge alone trials, one cannot now simply look at s 49 of the Court of Appeal Act and ignore what is stated in s 65C and 65E of the Indictable Procedure Act, as amended. Section 49 plainly did not cater for judge alone trials. Nor would it be appropriate to give effect to s 65C by ignoring s 49. It could not have been the intention of Parliament, when there is a judge alone trial, to deprive the Prosecution of the rights of appeal granted by s 49 of the Court of Appeal Act in the context of jury trials. In enacting s 65C, the National Assembly was, after all, adding to and not reducing the rights of appeal of the DPP.

[70] In a judge alone trial, therefore, if it is thought that a judge wrongly acquitted the defendant by upholding a submission of no case to answer or by quashing the indictment; or if the judge gave an overly lenient sentence, the trial judge must give a reasoned judgment for the acquittal[77] or sentence, as the case may be, and the DPP is conditionally entitled to lodge an appeal against it. We must interpret s 49(1)(a), (b) and (c) of the Court of Appeal Act as being just as applicable to judge alone trials as they are to jury trials. And Parliament's instruction that an appeal shall lie to the Court of Appeal at the conclusion of a judge alone trial[78] must be afforded a full and reasonable meaning.

[71] What is new and additional about s 65C is not that it affords the DPP a right of appeal against an acquittal. Before the amendment was passed, the Prosecution enjoyed the right to appeal an acquittal. What is essentially new and different is that s 65C affords

[77] See Indictable Procedure Act, Cap 96 as amended by the Indicatable Procedure (Amendment) Act 2011, s 65C (3).
[78] See s 65C (3) of the Indictable Procedure Act.

the Prosecution the right to appeal an acquittal even *after* the accused has been put to his election and a verdict of Not Guilty is reached on the merits. The DPP never had any such right prior to the introduction of s 65C.

How is this New Right to be Exercised?

[72] The Director is right to state that the amendment to the Indictable Procedure Act must be read along and be reconciled with s 49 of the Court of Appeal Act. In particular, s 49(2) is to be interpreted as being applicable to s 65C. Section 49(2)(a) and (b) must now encompass the reasoned written judgment a judge is obliged to give at the conclusion of a judge alone trial. In light of what is stated in s 65C and s 65E, we must now interpret s 49 as if Parliament had inserted an additional 'or' immediately after s 49(1)(c) and followed this with a new paragraph, namely:

> (d) where a trial is conducted without a jury and at the conclusion of such trial the judge gives a written judgment acquitting the accused person.

[73] The Court of Appeal was loath to adopt this approach. They were troubled by what they considered to be the 'very vague and general' language used by Parliament in s 65C. In agreement with the Director, however, re-interpreting s 49 so as to read s 65C into it is the prudent manner of giving effect to the clear intention of Parliament and of marrying the amendment of the Indictable Procedure Act to s 49 of the Court of Appeal Act. It is precisely this kind of judicial engineering that Parliament authorised and invited courts to engage in when it crafted s 65E as part of the amendment.

[74] The practical effect of all this is that, after a judge alone trial, the Prosecution may lodge an appeal against the sentence imposed by the judge. If the DPP desires to appeal an acquittal, she may do so on any ground which involves a question of law alone. Alternatively, the Director may, with the leave of the Court of Appeal or upon a certificate of the trial judge that it is a fit case for appeal, appeal against the acquittal where the ground of appeal 'involves a question of fact alone, or a question of mixed

law and fact, or any other ground which appears to the Court or Judge to be a sufficient ground of appeal.'[79]

What are the Consequences when the Prosecution Successfully Claims this New Right?

[75] Mr Sylvestre correctly noted that these conclusions create two categories of persons convicted on indictment. A person who is tried and acquitted by a jury (when the jury is not directed to acquit by the judge) can rest easy in the knowledge that his ordeal is over. He faces no further prospect of being placed in jeopardy. On the other hand, an accused who is put to his defence and is later acquitted by a judge sitting alone, must hold his breath to see whether the DPP will appeal his acquittal. If the DPP does, his ordeal may not be over. I agree that this situation is not entirely desirable, but, regrettable as it may seem, it is unavoidable. Parliament, in debating the amendment, specifically alluded to this matter and took it fully into account.

[76] In any event, the undesirability is overblown. As compared with jury trials, it must be stressed, the only substantial difference is that the DPP's right to appeal in judge alone trials extends to acquittals ordered *after* the accused has given evidence and/or called witnesses. The DPP already had a right of appeal. In particular, the Prosecution enjoyed the right to appeal an acquittal ordered when a submission of no case to answer was upheld. Further, as Justice Anderson points out at [53] to [55], there are several safeguards and other factors that ameliorate any perceived undesirability. Ultimately, it must be borne in mind that a criminal trial is not just about securing the interests of the accused. The victims of crime, their loved ones, the criminal justice system and society as a whole all have a deep interest in ensuring that, where practicable, the reversible errors of a professional judge should not be left un-attended.

[77] In all the circumstances, I too would allow this appeal and I agree with all the Orders the Court had previously published.

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[79] See Court of Appeal Act, Rev Ed 2011, Cap 90, s 49(2)(b).

CONCURRING JUDGMENT OF THE HONOURABLE MR JUSTICE WIT, JCCJ:

Introduction

[78] Criminal procedure in the Commonwealth Caribbean is still very much steeped in tradition and the old ways of the ancient common law. It is true that especially in the last few decennia there have been relevant, although sometimes perhaps overly cautious moves to modernise the law so that it may conform to the requirements of modern times but to a great extent, these steps have been haphazard and piecemeal. Overlooking the field of criminal procedure in the region, one is struck by its patchy and kaleidoscopic structure. Up to now there appears to be no thorough and comprehensive approach to this important part of the law. Changes in the law are usually made nationally and for narrow, practical reasons and almost always with an eye at the developments in the United Kingdom, without regarding the broader philosophical underpinnings of criminal procedure.

[79] All of this is quite clear when one considers that most countries in the Commonwealth Caribbean persistently, some would say stubbornly, hold fast to the idea that trial by jury is the best method of dealing with serious criminal cases and that prosecution appeals should either be impossible or at least sparingly allowed. Interestingly, five countries have now accepted the possibility of judge alone trials with respect of indictable, serious, criminal cases and several, but certainly not all, of the Commonwealth Caribbean states have embraced some form of prosecution appeals against acquittals. Most of these countries, however, have not accepted judge alone trials[80].

Judge Alone Trials in the Wider Commonwealth Caribbean

[80] Antigua and Barbuda, Dominica, Grenada, Guyana, St Kitts and Nevis and Sint Vincent and the Grenadines. See: for the legislation fn 25.

[80] The countries that, to a certain degree, have accepted judge alone trials are Jamaica[81] (where this mode of trial is mandatory in most gun-related and some other cases), Belize[82] (where they are mandatory in cases of murder, attempted murder, abetment of murder or conspiracy to commit murder, and optional in other cases as this trial mode can be imposed by the trial judge in the interest of justice on the application of the prosecutor or the defendant), Trinidad and Tobago[83], the Cayman Islands[84] (in both countries at the request of the defendant only), and Turks and Caicos Islands[85] (at the behest of the trial judge in the interests of justice or at the request of any of the parties in the proceedings for certain other reasons). In two of these countries, Jamaica and Turks and Caicos, acquittals cannot be appealed. In Trinidad and Tobago, the prosecution may only appeal a "directed" acquittal (usually when the judge upholds a no case submission) "on any ground of appeal that the decision of the trial judge is erroneous in point of law" but not an acquittal after a full trial[86]. In the Cayman Islands, the prosecution appeal is on the same footing as in Trinidad where the verdict of acquittal is given by the jury. However, any such verdict given by the trial judge sitting alone, directed or not, can be appealed so far as that decision is "erroneous on a point of law" (which includes a question of mixed law and fact)[87].

The Interaction Between section 49 and section 65 C

[81] With respect to Belize, when section 49 of the Court of Appeal Act and section 65C of the Indictable Procedure Act are read together what emerges is that any decision of the trial judge sitting alone to acquit the defendant can be appealed by the prosecution as of right :on any ground of appeal which involves a question of law alone, and, with leave of the Court of Appeal; upon the certificate of the Judge who has tried the accused that it is a fit case for appeal against the acquittal, on any ground

[81] Gun Court Act 1974, Child Care and Protection (Amendment) Act, 2018, The Trafficking in Persons (Prevention, Suppression and Protection) Act, 2018.
[82] Indictable Procedure Act, ss 65A – 65.
[83] Miscellaneous Provisions (Trial by Judge Alone) Act No. 10 of 217, s 4, amending s 6 of the Criminal Procedure Act and inserting s 6A in that Act.
[84] Criminal Procedure Code (2011 revision), s 129.
[85] Criminal Procedure Ordinance, Ch 3.03, ss 57-63.
[86] Supreme Court of Judicature Act, s 65E.
[87] Court of Appeal Law (2011 revision), s 28 (amended in 2010: see Official Hansard Report of 10 September 2010, see also *DPP v Anglin*, Court of Appeal of the Cayman Islands, 6 November 2014, [8] – [13]).

of appeal which involves a question of fact alone; or a question of mixed law and fact, or any other ground which appears to the Court or the Judge to be a sufficient ground of appeal. On any such appeal against acquittal the Court of Appeal may, if it thinks that a miscarriage of justice has occurred, allow the appeal, and order a retrial. It is obvious that this goes much further than the prosecution appeals in Trinidad and Tobago and Cayman Islands but is this statutory arrangement also in any way exceptional? As will be shown, it is not.

[82] Before exploring this point further, I pause to make a few remarks. Although judge alone trials and prosecution appeals are generally still looked upon with some suspicion in the Commonwealth Caribbean, it is a fact that the vast majority of criminal cases in our region are tried by judges without a jury, in the so-called inferior courts (an awkward name as there is nothing inferior about them). Moreover, no-one seems to consider it strange that the decisions in these cases can be appealed by both defendants and prosecution. Usually, the counter argument is that serious criminal cases simply require a more august body of adjudication and therefore a trial by judge and jury, and that an acquittal resulting from the verdict of the jury must be seen as the sacred confirmation of what was in law presumed from the very start: that the defendant was innocent. Interestingly, in Jamaica, it is the very serious, gun-related crimes that are dealt with by a Judge alone (in camera). And here I must say that there is something terribly odd about the fact that the rapist who has verbally threatened his victim, will be tried by judge and jury in a public trial while the rapist who has threatened and also hurt his victim with a gun will go before a judge alone in a non-public trial. In Belize, the most serious crimes are the very cases that are now tried by a judge alone. Although one understands the practical reasons behind these arrangements, from a philosophical or doctrinal point of view, this is surely anomalous.

[83] Of course, as to prosecution appeals against acquittals, the obvious point to make is that with respect to judge alone trials on indictment there is basically no difference with summary trials in the lower courts: in both cases, what results from the trial is not an oracle from a sacrosanct institution but only the decision of a judge, a mortal

being educated in the law, who gives reasons. There is therefore, in any event, at first blush no good reason to be overly hesitant about the possibility (or the scope) of an appeal against acquittal, although, as we will see, appeals against verdicts (conviction or acquittal) will of necessity in the end always be asymmetrical. As an aside, a restrictive construction of the Belizean legislation, as Mr Sylvestre for the Respondent sought to advance would create the same trap that lies hidden in the Trinidadian (and English[88]) legislation. If, for example, in a weak case, counsel for a defendant brings a no case submission, the trial judge, knowing that the decision would be appealable, might be tempted to dismiss it and then, at the close of the defendant's case, even if the defendant had not offered a defence, acquit the defendant (a non-appealable decision), thus escaping appellate scrutiny. Or defense counsel would simply deliberately omit bringing a no case submission thus seeking to ensure a reasonable chance on an unappealable acquittal.[89]

[84] As almost all constitutions of the Commonwealth Caribbean, the Constitution of Belize does not require trial by jury. It does require, in section 6(2), that all criminal cases shall be afforded "a fair hearing within a reasonable time by an independent and impartial court established by law." In most Commonwealth states in Africa, Asia, and the Pacific[90], although having been influenced by and/or having adopted the English common law, the jury system has never taken root or has long since been abolished completely. Belize and the four other Caribbean countries that have introduced the judge alone trial are therefore certainly not exceptional. What in my view is exceptional or at least remarkable, is the trepidation and caution with and the limited scale in which this has taken place, although I permit myself to observe that Belize seems not too far away from a wholesale acceptance of this trial mode.

"<u>Double Jeopardy</u>"

[85] Although the term "appeal" is very familiar in common law jurisdictions, its concept does not originate in the common law. It belonged to another separate legal system

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[88] Criminal Justice Act 2003, ss 48 and 58.
[89] See also: the remarks of Michael Bohlander in his article *Prosecution Appeals against Acquittals in Bench trials – The Criminal Justice Act 2003 and the Government's Fear of the Dark*, 69 J. Crim.L. 326,329 (2005).
[90] See: [43]-[44].

of English courts that were governed by canon and civil law, going back to Roman law[91]. In that system "appeal" referred to a procedure "under which a higher tribunal could completely and broadly rehear and redecide not only the law but also the entire facts of the case."[92] This procedure "represented a substantive theory of justice, emphasizing the importance of equity and a particular attitude towards the hierarchy of authority."[93] Given this idea, it was not more than normal that both parties to the proceedings, whether civil or criminal, could take their case "higher up" to have it fully heard again with little or no regard to what the lower court had found or judged. In such a system, a prosecution appeal in a criminal case is allowed on a footing that is practically equal to an appeal by the defendant.

[86] The common law courts initially created a much narrower system that especially focussed on correcting (formal) errors, first by co-equal courts and later by superior courts.[94] This procedure was gradually referred to as an "appeal" but even as it later became broader and more flexible, it still carries the DNA of its ancestors, fully focussed as it is on the decision and reasons, if any, of what is called the trial court and with great deference for the factual findings of that court. As a consequence, common law appellate courts are generally more restricted in their dealing with appeals than their civil law colleagues, even though they will seek as far as possible to do justice, and their hierarchical authority ensures as much as possible consistency of the law. Thus, in criminal cases, the focus of the appeal court used to be entirely directed at the accused whose life, limb or property was in jeopardy. The court would therefore look for errors that might have led to a wrongful conviction. To avoid such a miscarriage of justice became the main mission of Courts of Appeal in criminal matters. Against this background, under the ancient rules of the common law it would be unthinkable to put an acquitted defendant once more in jeopardy by having him go through another trial. In those circumstances, a prosecution appeal was out of the question. In today's world, however, things have drastically changed.

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[91] Peter D. Marshall, *A Comparative Analyses of the Right to Appeal*, Duke Journal of Comparative & International Law, Vol 22:1, pp 1 – 45, Mary Sarah Bilder, *The Origin of the Appeal in America*, Hastings Law Journal, Vol. 48, pp 913-968.
[92] Bilder, op cit. p 914.
[93] Ibid.
[94] Marshall, op cit. pp 4-8, Bilder, op cit. p 927.

[87] Not only the rights of the accused are important, victims and witnesses also have rights and certainly, the interests of society must be taken in account. This is reflected, among other things, in a broader concept of the *ne bis in idem* principle or the rule against double jeopardy as expressed in the international human rights instruments. For example, article 14(7) of the International Covenant on Civil and Political Rights (ICCPR), a treaty to which Belize is a party provides that "no one shall be liable to be tried or punished again for an offence for which he has already been *finally* convicted or acquitted in accordance with the law and penal procedure of each country. Similar expressions can be found in Article 8(4) of the American Convention on Human Rights and Article 4 of Protocol No 7 to the Convention[95] for the Protection of Human Rights and Political Freedoms. All these instruments take as their point of departure that as long as appeals are possible and pending under the national law of a country, the decision is not yet final, ergo, it has not acquired the force of *res judicata* and therefore, the rule against double jeopardy does not kick in. International human rights law, therefore, presumes the existence of appeals against acquittals and certainly does not prohibit legislatures to enable such appeals.

[88] I note here that even where a court decision has reached the status of *res judicata* and becomes "irrevocable", there appears to be some room for exceptions. The principle of *ne bis in idem* is not absolute. General Comment no 32 of the United Nations Human Rights Committee (the treaty body charged with the implementation of the ICCPR), states, for example, that "the prohibition of article 14, paragraph 7, is not at issue if a higher court quashes a conviction and orders a retrial….."[NB in the past the Privy Council has exceptionally accepted second appeals against convictions after they had dismissed a first such appeal[96]]. Furthermore, it does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal." Also, Article 4 of Protocol 7 stipulates in its second paragraph that the rule of double jeopardy as stated in its first paragraph "shall not prevent the

[95] European Convention on Human Rights as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16.
[96] Dana Seetahal, *Commonwealth Caribbean Criminal Practice and Procedure*, 5th Ed, pp 324,325.

reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case." The exceptions here can be categorized as *falsa* (situations where the acquittal has been obtained through intimidation of the judge, a juror or a witness, the so-called "tainted acquittals": see, for example, the English Criminal Procedure and Investigations Act 1996, ss. 54 to 57) and *nova* (cases where, after an acquittal has become res judicata, new and compelling evidence has emerged and "resumption" of the prosecution is in the interest of justice: see, for example, ss 75 to 79 of the English Criminal Justice Act 2003). It must be understood, though, that procedures under these exceptional circumstances are not to be qualified as prosecution appeals. The latter are regular devices that can be employed by the prosecution without ever being in tension with the rule against double jeopardy, whilst the former is exceptionally allowed, despite being in tension with that rule. Typically, the exceptional procedures can be embarked upon even many years after the acquittal has become "final", whereas appeals are bound by timelines.

[89] Section 6(5) of the Constitution of Belize starts out in traditional common law fashion: "A person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall not again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence" but then opens the gates to new legal horizons wide with "save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal." This formulation which can be found in all relevant Commonwealth Caribbean Constitutions, allows the legislature a vast space to design a legal framework of appeals and other mechanisms which could cater for a fuller protection of the fundamental rights of all members of society, not only persons accused of crimes, even though, as we said in *Hyles v DPP*[97], other constitutional principles, written and unwritten, will dictate the necessary limitations.

[97] [2018] CCJ 12 (AJ).

Variation of Prosecution Appeals

[90] Through a Caribbean lens, the relevant legislation of Belize is ostensibly a giant leap but the reality is that it is a comparatively modest step in the legal landscape of the wider Commonwealth and beyond when we consider the international law discussed above and the statutory criminal procedure of other jurisdictions. In all the jurisdictions that have abolished trial by jury or that at least have introduced judge alone trials, and in some who did not, prosecution appeals against acquittals are widely accepted. It is true, though, that there are many variations: no two jurisdictions share precisely the same forms of prosecution appeal. There are several variables based on which a model may differ from others, for example, whether final acquittals (after a full trial) or only "directed" acquittals (at the end of the prosecution case) may be appealed; whether jury verdicts can be appealed, or only verdicts of a judge sitting alone, or both; whether the appeal is confined to questions of law; or whether it extends to questions of fact or questions of mixed fact and law; whether the appeal is of right or with leave either from the appellate court or the court that has tried the case and acquitted the defendant; whether there are limited grounds upon which an appeal can be allowed or whether no such grounds have been prescribed; whether there is provision enabling the parties to adduce further evidence before the Court of Appeal or not; and whether the powers of the Court of Appeal are limited to either dismissing or allowing the appeal (including the setting aside of the verdict) and ordering only a retrial of the case by the trial court, or whether the appellate court has the power to rehear the case and/or, if it thinks the appeal must be upheld, decide the matter itself, find the defendant guilty and pass sentence on him or her. There is also the question of who exactly may appeal an acquittal: someone with prosecutorial power, and if so, of a certain constitutional position or not, or also others who may have an interest in conviction of the accused person[98].

[98] In India, for example, not only the Public Prosecutor and, in cases instituted upon complaint, the complainant but also the victim "shall have a right to prefer an appeal against any order passed by the Court acquitting the accused": Code of Criminal Procedure, sections 372 and 378. Interestingly, both the Prosecutor and the complainant require leave or special leave from the High Court if the case is appealed to that court, but the victim has an appeal as of right: Supreme Court of India, *Mallikarjun Kodagali (Dead) v The State of Karnataka*, 12 October 2018.

[91] Given that all these variations, some of which may come quite close to the original concept of an "appeal" as it still exists in most civil law countries have found their place in that Gaudian basilica of the common law, the Belizean statutory construct arising from the two provisions referred to above, is not as exceptional or far-reaching as it first may have seemed to some. The Belizean approach is well centred in both global common law and common sense. Keeping this in mind as well as considering the clear expressions of Parliament's intention with respect to the relevant provisions of the Indictable Procedure Act (as found in the Hansard record), one feels compelled to conclude that there can be no doubt that appeals against acquittals must be entertained by the Court of Appeal, even though I would agree with Mr Sylvestre that the wording of section 65C could have been better. For these reasons and the reasons given by the President and Justice Anderson, I agree that the appeal must be allowed and be remitted to the Court of Appeal to hear the application for leave to appeal.

Leave to Appeal Under section 49

[92] Leave to appeal is a sifting mechanism. It will usually be given if the proposed appeal is arguable and has a prospect of success. But to decide whether this is the case, the Court of Appeal must have an idea of the test that should be applied when confronted with an appeal against an acquittal. As these are uncharted waters, I consider it necessary to develop some general thoughts about this subject.

[93] Section 49(3) of the Court of Appeal Act seemingly contains the key to answering this question: the appeal against an acquittal *may* be allowed by the Court of Appeal if it thinks that a *miscarriage of justice* has occurred, in which case it *may* order a retrial. The miscarriage of justice could involve a question of law alone (in which case leave is not even necessary) or questions of fact alone, or of mixed law and fact: section 49(2)(a) and (b). To understand this provision fully, it must be compared with section 30 (read together with section 23) of the same Act which provides that an appeal against conviction *shall* be allowed by the Court of Appeal if it thinks that the verdict of the jury (or, one has to read into the text now, the judge sitting without

a jury) should be set aside on the ground that it is unreasonable or cannot be supported having regards to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground (legal, factual or any mix thereof) there was a *miscarriage of justice*. In any other case, the Court *shall* dismiss the appeal. However, even if the Court is of the opinion that the point raised in the appeal might be decided in favour of the appellant, it *may* dismiss the appeal if it considers that no *substantial miscarriage of justice* has actually occurred (the proviso). If the Court allows an appeal against conviction, it *shall* quash the conviction and direct a judgment and verdict of acquittal to be entered, or if the interests of justice so require, order a new trial: section 30(2).

[94] Comparison of sections 49(3) and 30 of the Court of Appeal Act makes immediately clear that the two appeals are asymmetrical. It would seem that an acquittal cannot be overturned on the ground that the verdict is "unreasonable or cannot be supported having regards to the evidence." Section 49(3) also seems to say that even if the Court of appeal thinks a miscarriage of justice has occurred, which is basically the only ground upon which an appeal against an acquittal can be allowed, the court may still leave the acquittal intact and dismiss the appeal. There is no mention of a *substantial* miscarriage of justice having actually occurred, and no indication of the mental acrobatics as would seem to be required in an appeal against conviction. Importantly, if the Court of Appeal allows an appeal against an acquittal it cannot go further than ordering a retrial. It cannot direct a guilty verdict and pass sentence on the appellant as is possible in many other Commonwealth jurisdictions.[99]

[95] Interestingly, in Belize the statutory arrangements for criminal appeals from the "inferior" courts to the Supreme Court are very different from those in the Court of Appeal. Any person (including the prosecutor) dissatisfied with any decision (except a few specifically mentioned) of an inferior court may appeal to the Supreme Court (section 107 Supreme Court of Judicature Act). This may be done on a multitude of

[99] For example, Nigeria, Namibia, India, Bangladesh, Singapore, Malaysia, Sri Lanka, Canada. I would also mention here a non-Commonwealth country, Israel, that inherited its criminal procedure from the British, although it never adopted the jury system.

grounds, both legal and factual, without distinction between conviction or acquittal appeals (section 111). The Supreme Court may, among other things, direct that a case be re-heard before the Court itself and any person may be called as a witness, whether he gave evidence before the inferior court or not, or remit the cause to the inferior court to take the evidence of any witness or witnesses, and either direct the inferior court to adjudicate afresh after taking the evidence subject to such directions in law, if any, as the Court thinks fit to give, or may direct it, after taking the evidence, to report specific findings of fact for the information of the Court (section 119). The Court may affirm, modify, amend of reverse, either in whole or in part, the decision made by the inferior court or remit the case with the opinion of the Court thereon to the inferior court for hearing, judgment or execution (section 120). The inferior courts, of course, do not sit with a jury.

[96] Coming back to the Byzantine structure of section 30, this provision was copied from the English Criminal Appeal Act 1907, as has happened in many other jurisdictions that once belonged to the British Empire, and provisions like these, or remnants of it, are still found throughout the Commonwealth. As is well known[100], at the time the intention of the legislature was that judges would go to great lengths in their assessment of possible miscarriages of justice, but this has never happened. In practice, the assessments always remained as limited as possible, even after the test in the English legislation was changed several times to the extent that eventually the judges were asked to decide whether the conviction was safe or unsafe. Although in several Commonwealth Caribbean jurisdictions the wording of the old test remained more or less as it was, the courts in the region abandoned the idea of detailed interpretation of each of its elements, including the proviso, and, led by the Privy Council, started to apply a more liberal interpretation of the old statutory language, the test simply being whether the conviction was safe or not[101]. It is clear, though, that this test cannot be applied in a prosecution appeal: there is no such thing as a safe or unsafe acquittal. These are words that can only be appropriate for convictions.

[100] Dr Stephanie Roberts, *Preventing Miscarriages of Justice*, paper presented at Institute of Law Jersey Conference - Does Jersey need a Criminal Code? 2 November 2015.
[101] Dana Seetahal, op cit. pp 348, 349.

The principle is pellucid: only guilty persons should be convicted, and their guilt must be proved beyond a reasonable doubt. Innocence, however, is fundamentally presumed and does not require proof. Acquittals are therefore not only proper outcomes for truly innocent persons. Persons that might very well be (or even probably are) guilty must also be acquitted: "probably guilty" is not enough for a conviction. It is for this reason that Scottish criminal law acknowledges two acquittal verdicts: not proven and not guilty, "indistinguishable in legal consequence but different in connotation"[102].

[97] Given the above, what then should we understand by a "miscarriage of justice" within the meaning of section 49(3)? Approaching this question from the perspective of a technical, statutory interpretation, the following emerges. As we saw, section 49(3) only allows the Court of Appeal to overturn an acquittal "if its thinks that a miscarriage of justice has occurred." At first sight, this would seem to be a narrower basis than the grounds for overturning a conviction. According to Archbold, however, the general words "On any ground there was a miscarriage of justice" in the 1907 Act "cover cases where there has been a misdirection as to the evidence, or where the court allows further evidence owing to insufficient time to call it at the trial, or other sufficient reason, or where the trial was conducted unfairly."[103] Case law from Australia and New Zealand shows that this ground is seen as wide enough to overlap with the grounds of an unreasonable verdict (a verdict that is "unreasonable or cannot be supported having regards to the evidence") and a wrong decision on a question of law.[104] In other words, the phrase is something like a catch-all.

[98] Approaching the question from a much broader perspective, is also a useful exercise. As Lord Bingham has remarked in *Mullen*, miscarriage of justice "is an expression which, although very familiar, is not a legal term of art and has no settled meaning."[105] What it means depends very much on the context in which it is used[106].

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[102] Samuel Bray, *Not Proven: Introducing a Third Verdict*, The University of Chicago Law Review [72] at p 1299.
[103] 1966 ed.
[104] *M v R*, (1994) HCA 35, *Whitehorn v R*, (1983) HCA 42; 152 CLR 657, *Matenga v R*, (2009) NZ SC, p 152, [11].
[105] *Mullen R (on the application of) Secretary of State for the Home Department*, [2004] UKHL 18 at [9.1].
[106] Ibid, Lord Steyn at [36].

Usually and given the historical development of the common law understandably, the term is used to point out a seriously flawed conviction. In that context it is defined as "a grossly unfair outcome in judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime"[107] or it is said to occur "when by reason of a mistake, omission or irregularity during the trial the [defendant] has lost a chance of acquittal which was fairly open to him."[108] We must acknowledge that the defendant is entitled to such a chance even though he or she might not at all be innocent. The defendant is presumed to be innocent and has nothing to prove. To turn this around would be wrong and look odd: a prosecutor is not entitled to a fair chance of having the defendant convicted even though he or she might not be guilty. The prosecutor is not assisted by any presumption and has everything to prove.

[99] Miscarriages of criminal justice belong to the broader category of what may be called "unjustified avoidance of conviction" [109]. This includes, alleged defects in substantive criminal law (conduct that should be sanctioned by the criminal law but is not) or alleged defects in criminal procedure (prohibiting a just result), both typically situated in the area of policy and politics. It also comprises serious flaws stemming from behaviour of criminal justice agencies. Here, three distinct sources of injustice can be identified: decisions which result from external pressure on the investigation and prosecution system, decisions which derive from mistakes or malpractice by the police or prosecutors themselves, and decisions to investigate or prosecute a lesser offence than warranted. These injustices should be addressed by the executive and ultimately, in my view, also by the judiciary through constitutional review.

[100] The category of miscarriages of justice that is particularly relevant here is unjustified acquittals: those which result from deliberate external interference with the trial process (for example, though intimidation or bribery) and those which stem from

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[107] Black's Law Dictionary, Seventh Edition.
[108] *R v Haddy* (1944) 29 Cr App R 182.
[109] Steven Greer, *Miscarriages of Criminal Justice Reconsidered*, The Modern Law Review, January 1994, Vol. 57, pp 58 -74. This and the following paragraph summarize some of the thoughts expressed in this interesting article.

inherent bias on the part of the decision maker (judge or jury). Also relevant are questionable acquittals: those may be, but are not necessarily, the same as an unjustified acquittal. The remarks of Steven Greer are apposite in this respect:

> There is … a fine line between, on the one hand cases in which the real offender is acquitted because of reasonable doubts about his guilt – which should not be regarded as injustices – and, on the other, cases where the prosecution of the true offender is handled so incompetently that the tribunal of fact is left with no option but to acquit or where the jury [or Judge] ineptly mistakes the point of the prosecution case – which could be considered as injustices. This distinction will often be difficult to draw in practice, however.[110]

[101] It is important for any appellate court to keep all of this in mind when assessing an acquittal by a trial court, whomever the trier of facts may have been (but even more where a jury is involved). It adds an extra layer of caution on the appellate court's approach on how to deal with a criminal appeal. The tendency of appellate courts to review criminal appeals (against conviction) with restraint has of course always existed. As indicated before, the courts have always taken the view – and this is their first argument - that they are "not privy to the jury's deliberations and must not intrude into territory which properly belongs to the jury"[111] or in the words of the English Court of Appeal (Lord Judge (LCJ), "the constitutional primacy and public responsibility for the verdict rests not with the judge, nor indeed with this court, but with the jury."[112] The fact that juries do not give any reasons is a second argument for appellate restraint. The third argument is that juries have seen and heard the witnesses and are therefore in a better position than the appellate court to assess their credibility.

How Appellate Courts Treat with Appeals Against Acquittals: A Comparative Analysis

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[110] Greer, op cit. p 66.
[111] *R v Pendleton*, 13 December 2001, [2001] UKHL 66 at [17].
[112] *R v Pope* [2012] EWCA Crim 2241 at [14].

[102] In trials by judge alone, two of these three traditional arguments for judicial restraint do not apply. In *Law Officers v Guest*[113], this was eloquently expressed by the Court of Appeal of Guernsey:

> Usually this Court is considering the verdicts of the Jurats [a special group of jurors] in the Royal Court. Such verdicts are not 'speaking' verdicts, and it is not, therefore, possible to discern by what process of reasoning, or the lack of it, the Jurats have reached their conclusions. In those circumstances, if the summing up is sound, the Court may well not be able to interfere unless the verdict is obviously wrong. But whereas here, the verdict is one of a legally qualified Magistrate it is a 'speaking' verdict because the Magistrate has to state reasons for his verdict in his judgment. In such a case it is possible for this Court to review the Magistrate's process of reasoning, and to consider whether, by that process, the Magistrate has reached a verdict which is 'unreasonable', or one which 'cannot be supported having regard to the evidence' or whether 'on any ground there was a miscarriage of justice'.

[103] Whether it is a judge or a jury who is the trier of facts must therefore have some bearing on the assessment of an acquittal. This is illustrated in the statutory arrangements for acquittal appeals in Canada and Sri Lanka. In Canada, the Attorney General may appeal a judgment or verdict of acquittal of a trial court on a question of law alone. It does not matter whether the trial court consists of a judge alone or a judge with a jury[114]. However, only when the verdict is that of a court composed of a judge alone, the Court of Appeal may, if it allows the appeal, enter a verdict of guilty with respect of the offense of which the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law (or remit the matter to the trial court for sentencing)[115]. In Sri Lanka, the Court of Appeal may, if it allows an appeal against acquittal, find the accused guilty and pass sentence on him or her in accordance with the law, whether the acquittal is obtained in a trial

[113] 9 January 2003 (No 2), Cr App 290.
[114] Criminal Code, section 676 (a).
[115] Criminal Code, section 686 (4)(b)(ii).

with or without a jury.[116] However, only when the acquittal was obtained in a trial without a jury, the appeal by the Attorney General may also cover questions of fact alone or of mixed law and fact. Prosecution appeals on a question of law alone, on the other hand, are possible from an acquittal obtained in a trial either with or without a jury[117]. What emerges from these specific statutory arrangements is that only in judge alone trials an appellate court, where it is allowed to do so, may go so far as re-judging a criminal matter before it and even convict and pass sentence on an accused earlier acquitted by the trial judge based on its assessment of not only the trial judge's legal reasoning but, in principle, also of the merits of that judge's factual findings.

[104] The Court of Appeal of Belize, when it allows an appeal against an acquittal ordered by a judge alone does not have the power to fully re-judge the matter so as to find the defendant guilty and impose a sentence, as is the case in Canada, Sri Lanka and many other Commonwealth jurisdictions. The most it can do, is to order a retrial. A re-trial, however, must comply with the constitutional requirements of providing a *fair hearing* within a reasonable time by an *independent* and *impartial court* established by law. The test to be applied by the Court of Appeal when dealing with an acquittal must therefore leave enough space for the trial court to make its own independent decision, albeit within the parameters flowing from the Court of Appeal's decision. These parameters must not be so narrow that a guilty verdict in the re-trial would be a foregone conclusion. The test could therefore not be – and I am using here a formulation that can be found in matters dealing with conviction appeals where the proviso is invoked – that the Court of Appeal must be satisfied that, had the miscarriage of justice not occurred, on the whole of the facts and with a correct direction the only reasonable and proper, if not inevitable, verdict would have been one of guilty. To overturn an acquittal only when the errors constituting a miscarriage of justice would *necessarily* have been material to that outcome is too high a threshold.

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[116] Criminal procedure Code, section 337 (1).

[117] Judicature Act, section 15.

[105] On the other hand, to overturn an acquittal when there is merely a possibility that a different verdict would have been the outcome of the trial had the miscarriage of justice not occurred, is too low a threshold. Such a test may be proper for an appeal against conviction because the court needs to ensure, as much as possible, that the conviction is safe and that the convicted person can properly be considered guilty. Nothing less is acceptable. And so, if there were some flaws in the trial as a consequence of which a small but not unrealistic chance exists that the accused may not be guilty (even if he probably is), that could be enough for an appellate court to find the conviction unsafe. This is different in the case of an acquittal. As pointed out by Greer, there is a fine line between a proper acquittal and, what is sometimes called, a perverse acquittal. That distinction is often not easy to draw in practice as an acquittal is not only required in case of an innocent defendant but may as well cover any matter where the defendant may be or probably is guilty. So, what then may be a proper test?

[106] In Canadian jurisprudence, described and analysed by this Court in *Hyles*[118], the golden middle way between the possible thresholds has cautiously been identified as follows: an error about which there is a "*reasonable degree of certainty*" of its materiality is at the required threshold[119]. In *Hyles* we concluded that "the prosecution must satisfy the Court that, given, on the one hand, the nature and weight of the evidence as a whole and, on the other hand, the seriousness of the judicial error(s) or procedural flaw(s), it can with a *substantial degree of certainty* be inferred that had the error(s) or flaw(s) not occurred, the trial would not have resulted in an acquittal of the accused. The main difference between the Guyanese and the Belizean legislation is that in Guyana the jury is the trier of facts and that, therefore, as the jury is held to be blameless, the serious errors and flaws that may have caused a wrongful acquittal will be attributable to others, most notably the judge who was supposed to guide them through the process. In this situation, an appellate court must work with suppositions as to how and to what extent the mistakes of the judge may

[118] At [53]-[71].
[119] *R v George*, 2017 SCC 38, where the Supreme Court of Canada dealt with an acquittal ordered by a judge alone; a similar test in *R v Graveline*, dealing with an acquittal resulting from a jury trial.

have led the jury astray. In Belize, in an appeal of a non-directed acquittal, the trier of facts is the trial judge who has given the court's reasoned decision in writing. Any mistakes made are the trial judge's, any miscarriage of justice is the trial judge's direct responsibility. These differences, however, do not result in a substantially different test[120]. They do make it easier, though, to apply the test as indicated by the Court of Appeal of Guernsey in *Law Officers v Guest* cited above.

[107] Despite the transparency of a written judgement, there will of course still be limitations for a complete and thorough assessment of the reasoning of the trial judge who has seen and heard the witnesses, which is an advantage the Court of Appeal does not have. The finding of primary facts, which partly turns on the credibility of witnesses, remains largely a matter for the trial judge. It is trite law, in my view, that such findings should generally not be overturned unless they are clearly wrong, or the trial court has clearly misdirected itself. Inferences or conclusions which the trial judge has drawn from those facts, however, are fully open to scrutiny from the Court of Appeal. Serious mistakes in the reasoning concerning the facts will, among other things, depending on the circumstances, certainly qualify as a miscarriage of justice. It is therefore incumbent upon the Court of Appeal to revisit the evidence of this case to determine the correctness of the trial judge in acquitting the accused.

Disposal

[108] It was for the foregoing reasons that the Court ordered that:

1. The appeal is allowed.

2. The Orders prayed for by the Director of Public Prosecutions are granted namely, that:

[120] The fact that the Guyanese legislation requires the Court of Appeal to be satisfied *that the acquittal is the result of the errors and flaws that have occurred in the trial court*, whereas the Belizean legislation does not contain such a requirement, does not change this conclusion in my view. I note that the Canadian legislation does not express such a requirement either. Moreover, from the Hansard report it is clear that the legislature's intention was to create a prosecution appeal against an acquittal in cases that were water tight and where the evidence was so compelling that nothing else but a conviction would have been expected.

a. Section 65C (3) of the Indictable Procedure Act gives the Crown a right of appeal against the verdict of acquittal of a judge in a trial conducted without a jury.
b. The decision by the Court of Appeal dismissing the application by the Crown for want of jurisdiction, is set aside.

/s/ A Saunders

The Hon Mr Justice A Saunders, President

/s/ J Wit

The Hon Mr Justice J Wit

/s/ W Anderson

The Hon Mr Justice W Anderson

/s/ D Barrow

The Hon Mr Justice D Barrow

/s/ A Burgess

The Hon Mr Justice A Burgess