

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Cr. App. No. 33 of 2009**

**BETWEEN**

**ANDY ADAMS A/C REDDO**

**Appellant**

**AND**

**THE STATE**

**Respondent**

**PANEL:**

P. Weekes, J A

Soo Hon, J A

R. Narine, J A

**APPEARANCES:**

Mr. E. Welch for the Appellant.

Ms. D. Seetahal S.C. for the Respondent.

**DATE OF DELIVERED:** 28<sup>th</sup> July, 2011.

## JUDGMENT

Delivered by: P. Weekes, J A

1. On 16<sup>th</sup> November 2009 the appellant was convicted of the murder of Kernel Jobe and sentenced to death. He has appealed his conviction.

### Prosecution Case

2. Vernese Vincent and her son, Nolan, lived at Calcutta Road, Mc. Bean Village. On the evening of 25<sup>th</sup> June 2004, Kernel Jobe came to her home, spoke with her son and left on foot.
3. A few minutes later, Kristy James was at her home at Paradise Street, which adjoins Calcutta Road, when she saw Jobe walk into her street. She had known him for approximately six months. She went out into the street, walking just ahead of him. She noticed a white Lancer motor vehicle, registration number PAL 9937 parked along the street and the appellant and another man near to the vehicle. The appellant was about six feet from her and she was able to recognize him as the street was well lit and she had known him all her life. He lived next door to her and at one time they had shared an intimate relationship.
4. Kristy heard the appellant say, "*Jobe, you is a bad man*". He then went towards Jobe, and repeated what he had said. At that time Jobe was about two feet from her. She saw the appellant pull something looking like a gun from his waist and aim it at the foot of Jobe. She heard a loud explosion and Jobe stumbled onto the vehicle. She heard a second explosion and saw blood on the back of the jersey that Jobe was wearing. He ran off and the appellant reversed the vehicle and drove after him. At this point both men went out of Kristy's sight. (Kristy James did not testify at trial. Her deposition was read to the jury after a *voir dire* was conducted).

5. About ten minutes after Jobe had left her home, Vernese Vincent saw him again. This time he was lying on his back at the side of Calcutta Road. She called her son and together they approached him. Vernese asked Jobe what had happened to him, and he replied, "*they shoot meh*". When asked who had shot him, Jobe said, "*Andy shoot meh*".
6. Vernese then saw a white Lancer motor vehicle turn from Paradise Street into Calcutta Road and stop opposite where Jobe lay. The appellant came out of the vehicle, carrying what appeared to be a gun. Vernese and Nolan both knew him as he was Nolan's cousin. He pointed the object towards Nolan, and Vernese heard three clicking noises. (Nolan was deemed a hostile witness during the trial but eventually adopted his evidence on deposition).
7. The following day, police took possession of PAL 9937 and a forensic examination of the vehicle revealed gunshot residue on the console, gear lever and dashboard of the car.
8. Jobe sustained gunshot injuries to the left forearm, left back and front of the left thigh. His death was caused by the injury to his back, which penetrated his left kidney, large intestine and liver.

### **Case for the Appellant**

9. The appellant gave no evidence at the trial. He called two witnesses – Jason Adams and Gyasi Gonzales.
10. Gonzales was a newspaper reporter who had interviewed Vernese the day after the incident. He testified that Vernese had spoken of the incident as having taken place between two of her close relatives and a suspect in Jobe's murder, to whom she was also related. She had said that she was fed up of the suspect, and wanted him arrested.

11. Jason Adams, who lived on Paradise Street, was the appellant's brother. He testified that Vernese was his aunt and was not on speaking terms with his family, including the appellant, because of an altercation between Vernese's children, the appellant and himself.
  
12. Jason claimed to have been at home at the time of the shooting. He heard two loud explosions and went to his gallery. He looked across to his neighbour Erica, who said, "*gunshots, gunshots, duck*" and he then saw Kristy coming out of her house. Kristy asked Erica what had happened. Jason further stated that he was the owner of PAL 9937 and that the appellant never drove it. He claimed to have lent the vehicle to a friend later that night.

### **Grounds of Appeal**

We will deal with Grounds 3 and 4 first for reasons which will become apparent.

#### **Ground 3**

*The deposition of the eye-witness Kristy James was wrongly admitted into evidence as the learned trial judge erred as a matter of law, evidence and fact in finding that the prosecution had proven that the witness was absent from the jurisdiction and that she had been kept out of the way by the appellant.*

13. The trial judge exercised his discretion to have the deposition of the witness Kristy James read as evidence after hearing evidence and submissions in the absence of the jury. He held that he was satisfied to the criminal standard that the witness was absent from Trinidad and Tobago, and was kept out of the way by the accused through fear. The issue for us is whether the trial judge erred in the exercise of his discretion.

14. An appellate court will interfere with a judge's exercise of his discretion only in certain circumstances. The test was stated by Archie, C.J. in **NH International (Caribbean) Limited v Urban Development Corporation of Trinidad and Tobago App. No. 17 of 2004**:

*“The test was succinctly set out by Nelson, J.A in **Fisherman and Friends of the Sea v The Environmental Management Authority and B.P. Trinidad & Tobago Ltd Civ. App. No. 106 of 2002** in which he quoted **Hadmour Productions v Hamilton [1982] 2 WLR 322 at 325**:*

*‘[An appellate court] must defer to the judge’s exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only.*

*It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible and is, in fact, plainly wrong, that an appellate body is entitled to interfere.’”*

15. A deposition may be read as evidence on trial pursuant to s. 39(1) of the Indictable Offences (Preliminary Enquiry) Act Ch. 12:01 (the Act), which reads:

*39.(1) Where any person has been committed for trial for any offence, the deposition of any person taken before a Magistrate **may**, if the conditions set out below are satisfied, without further proof be read as evidence on the trial of that person, whether for that offence or for any other offence arising out of the same transaction or set of circumstances as that offence.*

*The conditions referred to above are the following:*

*(a) The deposition must be the deposition either of a witness whose attendance at the trial is stated to be unnecessary in accordance with the provisions of section 21(5), or, of a witness who is proved at the trial by the oath of a credible witness to be dead, or so ill as not to be able to travel although there may be a prospect of his recovery, or incapable in consequence of his condition of mind of giving evidence, or **absent from Trinidad and Tobago, or kept out of the way** by the prosecutor of the State or by the accused person or by some other person on his behalf.*

*(b) It must be proved at the trial, either by a certificate purporting to be signed by the Magistrate before whom the deposition purports to have been taken or by the oath of a credible witness, that the deposition was taken in the*

*presence of the accused person or the prosecutor, as the case may be, and that he or his legal adviser had full opportunity of cross-examining the deponent;*

*(c) The deposition must purport to be signed by the Magistrate before whom it purports to have been taken.*

The trial judge found all of the conditions referred to in s. 39(1) (a), (b) and (c) to be satisfied and it is the matters highlighted above that fall to our consideration.

16. On the *voir dire* Inspector Lumy, the investigator, testified that he visited the last known address of Kristy James on several occasions and spoke with her close relatives who informed him that she was living in Grenada and gave him a telephone number, bearing the Grenada country code, at which she could be contacted. On 13<sup>th</sup> October, 2009, he called the number and spoke with someone with a female voice, who identified herself as Kristy James. He identified himself to her as the investigating officer and she acknowledged his introduction. She told him that she was not returning to this country because she was afraid that she could be killed after she gave evidence. On 22<sup>nd</sup> October 2009, he telephoned the number with the same result and on the 23<sup>rd</sup> October 2009, (the very morning he testified on the *voir dire*) he again called the number and the scenario repeated itself.

17. Giselle Landau, a paralegal, who was assisting the prosecutor, also testified on the *voir dire*. Her evidence was that having received a telephone number for Kristy James from Inspector Lumy she, on 14<sup>th</sup> October 2009, called the number and a person with a female voice answered and identified herself as Kristy James. Ms Landau identified herself to the woman, and informed her that she was required to return to Trinidad to testify. The woman refused saying that she was afraid, since she had been threatened by the accused that if she returned to the jurisdiction she would be jeopardizing her life and the lives of her family. Ms. Landau asked her to reconsider her position, since arrangements could be put in place for her protection

and she agreed to do so. Later that day Ms. Landau called the same number and a male voice answered, and when she asked to speak to Kristy James she was told, “*Leave Kristy alone she not giving any evidence in this matter, she frighten.*”

18. Another witness on the *voir dire* was Cheryl Ann Bruce-Metivier, Immigration Officer II. She testified that immigration records showed two dates of arrival in Trinidad for Kristy James – 27<sup>th</sup> June 2007 and 5<sup>th</sup> March 2008. There were no corresponding departure records. The officer concluded that Kristy James had left the jurisdiction clandestinely between her arrival dates. This was the evidence available to the trial judge in respect of the conditions at s 39(1) (a).

19. As long as there is evidence sufficient to satisfy the conditions outlined in s. 39(1) (a) (b) and (c), the court will normally exercise its discretion to admit the deposition: **Barnes, Scott and Walters v. R 37 W.I.R. 330.** Counsel for the appellant has submitted that the evidence of Lumy and Landau was all inadmissible hearsay which could not be relied upon for the truth of its contents.

20. In **Nankissoon Boodram et al v the State (1997) 53 WIR 35**, this Court discussed the considerations by reference to which this discretion should be exercised. Chief Justice de la Bastide noted as follows:

*“The statutory discretion to exclude is simply a re-statement of the common law and must clearly be exercised in the same way and in accordance with the same principles as the common-law discretion. The Privy Council in Scott and Walters laid down the following guidelines: (i) the only justification for excluding an otherwise admissible deposition is when that is essential in order to ensure a fair trial for the accused; (ii) the determining factor in the exercise of the discretion must be the quality of the evidence in the deposition; and (iii) provided that the judge is careful to (a) warn the jury of the danger of acting on evidence which has not been the subject of cross-examination before them, (b) point out any discrepancies and weaknesses in the evidence contained in the deposition, (c) give them any other necessary warning such as the Turnbull direction (cf R v Turnbull [1977] QB 224) with regard to*

*the danger of acting on identification evidence, and (d) exclude any evidence which is hearsay or inadmissible for any other reason, it is only very rarely that it will be appropriate or necessary to exclude the deposition. (iv) It is not a ground for exclusion that the deposition contains the principal, or even the only evidence, on which the accused could be convicted.*

21. In **La Vende v The State (1979) 30 WIR 460**, the admission of a deposition on the basis of absence from the jurisdiction was addressed. The State sought to prove that the witness (Edwards, a forensic pathologist employed at the general hospital) was absent from the country at the date of the trial (21 November 1977). Another doctor employed at the general hospital testified that he had seen Edwards board and leave on a BWIA plane on 4<sup>th</sup> July 1976; that some three months later, he received a letter from Edwards from abroad; and that he had never seen Edwards in Trinidad again. No evidence was tendered to show that Dr Edwards's employment as a pathologist at the general hospital had been terminated, nor was any other evidence placed before the court from which it could reasonably be inferred that Dr Edwards was absent from the country on 21 November 1977. This evidence was held to be insufficient to prove Edwards' absence. It was held that if a deposition taken before a magistrate is to be admitted in evidence on the trial of an indictable offence on the ground that the witness is absent from the country, his absence must be proved by evidence and it is not something of which judicial notice may be taken, nor may any deficiency in the evidence be supplied by outside knowledge. Indeed, it was said by Sir Issac Hyatali CJ (as he then was) that "*proper proof*" of absence was a condition precedent to admission. It is clear that the evidence of absence must be cogent.

22. The objection was taken by the appellants was taken in **Kenrick London and Or. v. The State Cr. App. Nos. 31 of 2002** at paragraphs 52 and 53. Hamel Smith J.A. who delivered the judgment of the court dealt with the objection in this way:

*"Counsel submitted that the application was based on hearsay and that the state did not prove that she could not return to the country to give evidence.*

*Applications of this kind will at times generate a certain amount of hearsay evidence, unlike applications where a witness has died and a death certificate is generally sufficient. In the former, someone, preferably a member of the family, may inform the court that the witness is in a particular country, having seen that person depart on board an aircraft, and is unable to return on short notice to attend court because of certain commitments. The trial judge, if satisfied that the witness is in a particular country, having seen that person depart on board an aircraft, and is unable to return on short notice, will then decide whether in the interests of justice he will admit the deposition. The absent witness may be the only one who can give direct evidence as to whether she can return on short notice and that would make nonsense of the provision in the law if the other side could insist on her attendance to give that evidence.*

*The proper approach, we think, is that the judge hears evidence as to why the witness cannot return on short notice (which will inevitably be hearsay). If there is any other evidence to show that the reason is untrue then, maybe, more is necessary, but if there is not, the Judge is entitled to come to the conclusion that the witness cannot return on short notice based on the hearsay evidence given. This the trial Judge did and it was a matter for his discretion. In light of the evidence led we cannot say that he erred in the exercise of that discretion.”*

23. There can be no doubt that in certain circumstances, depending on the condition to be satisfied under s. 39(1) (a) of the Act, a certain amount of hearsay evidence is inevitable. A witness who is being kept out of the way will hardly attend court in order to give evidence of that fact. That information will most likely be relayed by that witness to another person who may be called to give evidence that he was so informed. See **Neill v. North Antrim Magistrates Court (1993) 97, Cr. App. R. 121** and **R v Blastland (1986) AC 41**.

24. In respect of the judge considering hearsay evidence in deciding whether the conditions at s. 39(1)(a) of the Act were satisfied, we are of the opinion that he was entitled to do so. What is of concern, however, is whether on the totality of the evidence he could be properly satisfied beyond reasonable doubt that the witness was out of the jurisdiction or kept away by fear.

25. We are not convinced that the evidence supported such a finding. It is to be noted that neither Inspector Lumy nor Giselle Landau testified that they recognized the voice at the other end of the line to be Kristy James. One would have expected, as is the normal course, that some witness on the *voir dire* could identify the voice as being that of Kristy James. Usually a relative or close friend would testify as to having made the phone call and so recognize the voice. There would also be evidence that were the absent witness within the jurisdiction, some person would expect to see or otherwise be in contact with him. In the absence of such evidence, one expects that in this modern age it is not beyond the capability of the police to have some counterpart in the foreign jurisdiction visit and speak to the witness and then testify to the relevant facts. This requirement becomes even more imperative when the element of being kept away by fear is added to the matrix. Given the peculiar relationship between the witness and the appellant, it was incumbent on the judge to exercise a degree of caution in dealing with the evidence.

26. In respect of the evidence of the immigration officer, while it was possible to draw the inference that Kristy James, having left Trinidad and Tobago at least once without it being documented, could have done so a second time, there was the equally reasonable inference that the lack of documentation of a second departure could well indicate that she was still within the jurisdiction.

27. In his ruling, the trial judge enumerated the items of evidence which he found to be true and indicated that he found the witnesses to be credible. This was a matter entirely for him, but even taking the evidence at its highest, we are unable to find that it was evidence from which he could find the requisite condition satisfied. The question of the exercise of discretion only arises after, and if, the conditions at 39(1) (a) (b) and (c) of the Act are satisfied. In our opinion that hurdle could not be crossed on the evidence before the trial judge.

In the above premises we find there is merit in this ground.

#### **Ground 4**

*The learned trial judge's directions to the jury on the issue of mistaken identification in respect of the deceased's dying declaration identifying the appellant as his assailant, were potentially confusing as it had a tendency to suggest that if the accused were honest in his identification, that fact might mitigate the possibility of mistake.*

28. Specific concerns are raised with respect to that part of the judge's summation reproduced below:

*"Further, you must consider the possibility of the deceased being mistaken as to the person who shot him. In this regard,....if very shortly after you were shot you lay seriously wounded on the ground, do you not consider that this dramatic occurrence and your grave wounds would have been dominating your thoughts?"*

*In those circumstances, members of the jury, can you draw the inference that the possibility of concoction or distortion could be disregarded? In the situation then existing, members of the jury, would the deceased Kernel Jobe have had the time to think and reason things out, or would his utterance simply be an honest instinctive reaction? That is a matter for you. If his utterance would be an honest instinctive reaction, does that exclude the possibility that he was activated by malice or ill will? Again, that is a matter for you.*

*Finally, you must consider the possibility of the deceased being mistaken as to the person who shot him. As you are aware, a witness who is convinced in his own mind, may as a result be a convincing witness, but may nevertheless, be mistaken."*

29. The complaint of the appellant is that this direction was "potentially confusing" as it tended to suggest that once the deceased was being truthful that mitigated the possibility of having made a mistaken identification.

30. While the judge does direct the jury to consider the possibility of the deceased being mistaken as to the identity of the shooter and further, reminds them that a mistaken

witness might be convincing, he placed this direction in an unfortunate juxtaposition with directions normally given in cases of *res gestae* which was also a live issue in this case. The two issues were distinct and separate and admitted of different considerations. Having sandwiched the *res gestae* direction between the directions on identification, and linking them with the words “**in this regard**”, the trial judge courted the possibility that the jury might be confused into thinking that once the deceased in his extreme condition, was unlikely to have deliberately concocted or distorted his story, in particular, the identity of his assailant, and that his utterance was an honest instinctive reaction, not instructed by malice or ill will, his identification would have been correct and therefore reliable.

31. Even though the evidence against the appellant was cogent and compelling we are unable to find that without the *res gestae* evidence the jury would still have convicted the appellant. A classic dying declaration can be very powerful evidence once believed. When we consider that, together with the disadvantages inherent in the deposition evidence of Kristy James, we cannot be satisfied that no substantial miscarriage of justice would have occurred.

32. Additionally, during the hearing of oral submissions, this Court raised a concern. The trial judge had given a full **Turnbull** direction with respect to the identification evidence of Kristy James, but did not give such a direction with respect to the utterances of the deceased identifying in the appellant as the shooter.

33. Ms. Seetahal responded that a **Turnbull** direction was not required in this case, certainly not in respect of Kristy James who knew the appellant all her life. The challenge to her evidence, as to the evidence of Vernese, was that they had fabricated their story against the appellant, not that they were mistaken. The following principles guiding when a **Turnbull** direction is appropriate may be gathered from the

cases of **Shand v. the Queen (1996) 1 WLR. 67** and **Freemantle v. R (1994) 45 WIR 312**, both decisions of the Privy Council:

- (i) *Where the prosecution relies wholly or substantially on visual evidence of identification, including recognition, the judge should direct the jury, in accordance with established guidelines, as set out in **R v. Turnbull (1977) Q.B. 224**;*
- (ii) *A failure to follow these guidelines is likely to result in the conviction being quashed on the basis that it is unsafe or unsatisfactory, or will have resulted in a substantial miscarriage of justice;*
- (iii) *Where the principal or sole defence is a challenge to the credibility of the identifying witness, there might be exceptional cases where the direction is unnecessary or could be given more briefly;*
- (iv) *Even where an attack on the credibility of a witness is the only defence, the judge should in ordinary cases direct the jury to consider whether they were satisfied that the identifying witness is not mistaken, although no particular form of words is necessary.*
- (v) *Where the identification evidence is of exceptionally good quality, and a reasonable jury inevitably would have returned the same verdict, if the judge had given them the appropriate warning, the court will apply the proviso on the basis that no miscarriage of justice has occurred.*

34. While given the learning above, it might not have been fatal had the judge failed to give a **Turnbull** direction in respect of Kristy James' identification evidence, there is no evidence that the deceased was as familiar with the appellant as was Kristy. We are of the opinion that identification arose as an issue in respect of the reliability of the identification made by the deceased.

35. We find the case of **Neville Nembhard v The Queen [1981] 1 W.L.R. 1515**, a Privy Council appeal from Jamaica, to be instructive. In that case, the deceased identified the accused as his attacker and there were no eye-witnesses. The deceased's wife gave evidence at trial and stated that she had arrived on the scene shortly after her husband

was shot. The wife's evidence was that the deceased had told her he was dying and that it had been the defendant who had shot him.

36. Trial judge directed the jury as to the basis upon which a dying declaration was admitted into evidence. He then further directed them that they had to assess the probative value of the declaration itself. Owen Woodhouse, L. J. stated the following at pg 1518:

*“In this part of the summing up Smith C.J. began by putting in contrast the evidence given on oath by a witness who has appeared in person in the courtroom and the hearsay evidence of a dying declaration. **And he took pains to describe the basis upon which a dying declaration was regarded as admissible and the tests which must be satisfied in that regard.** He went on to direct the jury that before they could act on the dying declaration they themselves must be satisfied as to the reliability of the wife, both in terms of veracity and accuracy, and that **if so satisfied then they must still assess the probative value of the dying declaration itself.** Inter alia, he said:*

*‘Do you believe Mrs. Campbell? Do you believe her that she went out there? Do you believe her that her husband told her the things which she said she was told? That you have to decide first of all ... If you believe her that the deceased did tell her then, you have to examine the circumstances and say whether in the light of what he is supposed to have said, you are convinced by this, taking all the circumstances into account, so that you can feel sure that in fact it was this accused who shot the deceased.’*

And later:

*‘Now if you believe her that the deceased did tell her this, you will have to test the statement and say whether you can rely implicitly on it. **If you believe the statement was made, Mr. Campbell is saying how he got his injuries and who caused them, if you believe he made the statement and he has described accurately what he said took place, were the circumstances such that he could identify positively the person who attacked him in order to convince you that a mistake has not been made in the identification of the person who shot him? In other words, you have to examine it in the same way as you would examine the evidence if he had come here and said the same thing.**’*

37. The court held that the trial judge accurately directed the jury on the various difficulties arising in the area of identification. Owen Woodhouse, L.J. stated the following at pg 1519:

*“There follows a lengthy and entirely accurate warning concerning the various problems that can and do arise in the area of identification evidence and the circumstances that were relevant in assessing the deceased's identification of the defendant as his assailant. Then Smith C.J. summarised what he had been saying in the following way:*

*‘If you feel sure the statement was made to her you have to examine the circumstances which must have existed at the time when Mr. Campbell was shot; you have to take into account his state of mind when he made the statement; was he in a state of mind where you would tell that you could safely rely on what he was saying, as being the truth? **You have to take into account the caution that I have given about mistaken identity and whether the circumstances were such, having regard to distance, light and so forth, that you can feel that a mistake was not made in the identity of the [defendant]. And if you are not sure whether a mistake was made or not, or if you do not think that you can safely rely at all on what the deceased is alleged to have said, then you must acquit the [defendant].’***

38. We find the foregoing directions to be apposite in the instant matter. Having given an initial **Turnbull** direction, the judge was not required to repeat it, but he would have had to raise it specifically in respect of the *res gestae* utterance and make such adjustments as were appropriate in all of the circumstances. See **Arthur Mills and Others v The Queen [1995] 1 W.L.R. 511, 522**, another appeal to the Privy Council from Jamaica which dealt with directions on identification *vis a vis* a dying declaration. While it is true that the deceased would not have given any evidence of his opportunity for observation, the evidence of Kristy James who, on the State's case was present on the scene, was a source of such information once it was accepted by the jury as being credible and reliable. Of course, her evidence on the issue could not have been applied in its entirety to the deceased but certain factors for example lighting, distance and time could have been gleaned.

39. On the foregoing grounds we allow the appeal and will now deal briefly with the remaining grounds which we found to be without merit.

**Ground 1**

*The appellant's trial was rendered unfair and he possibly suffered prejudice and bias occasioned by the occurrence of a material irregularity during the course of his trial, comprising of the learned trial judge's decision to admit into evidence the deposition of the only eyewitness after having already allowed the Prosecutor at her insistence to open the case to the jury with the said evidence, despite the fact that it was known at the time of the said opening that the witness might not have been available to testify and after the trial judge at the said time had also registered serious concerns about the possibility of the trial having to be aborted if the case was opened with the said evidence and the prosecution's application to admit the deposition was later refused.*

40. Mr. Welch submitted that the trial judge, having allowed the prosecutor to open her case with reference to the evidence of Kristy James at a time when her availability was uncertain, may have been influenced "consciously or sub-consciously" to admit the deposition of the witness, presumably to avoid the possibility of having to abort the trial.

41. One only has to read the ground to dismiss it out of hand. Not surprisingly, counsel advances nothing in support of it. The ground is highly speculative and requires no further treatment but to dismiss it as unmeritorious.

**Ground 2**

*The appellant suffered an unfair trial and grave prejudice when the learned trial judge went beyond all proper bounds of judicial intervention and in the process demonstrated bias when he dove into the arena after the close of Inspector Lumy's evidence on the voir dire, by suggesting to the prosecution that it had put its case on the voir dire on too narrow and artificial a basis, and even in the face of initial expressed disagreement by the Prosecutor with the court's position, suggesting in very forceful terms to the prosecution that it should include the element of fear in its grounds and should lead evidence of same through the said Inspector, then*

*inviting the prosecution to make an application to recall the Inspector to the stand to give evidence to the said effect, and then consequently making a finding of fact adverse to the appellant based on the very evidence that the court had recommended be led, and then later using the said finding as a ground for the admission of the deposition into evidence on the basis that the witness had been kept out of the way by the appellant by means of threats which had instilled in her a fear of attending court and testifying.*

42. The basic complaint under this ground is that the trial judge exceeded the bounds of judicial intervention and showed bias when he allegedly insisted that the prosecutor should include in her application to admit the deposition of Kristy James, the ground that the witness was being kept away by fear.

43. The trial judge conducted a *voir dire* in the absence of the jury to determine whether or not he should exercise his discretion to admit the deposition of Kristy. During the *voir dire*, at the end of the evidence of Inspector Lumy, the judge inquired of the prosecutor whether she was proceeding, “on a basis that really reflects the factual situation”. She responded that when Inspector Lumy was giving evidence before the jury, objection had been taken by the defence, and the words, “because she was fearful for her life” were deleted from the notice of fresh evidence which had been filed.

44. There followed a discussion between the judge, prosecutor and defence counsel. The prosecutor indicated that she was under the impression that she was confined to the same evidence at the *voir dire*, as had been led before the jury. The judge pointed out that the evidence of fear was not allowed in the main issue in order to prevent prejudice against the accused in the jury’s mind. Defence counsel objected to the ground of fear being raised at the *voir dire* on the basis that the prosecutor had indicated earlier in the *voir dire* that she was not relying on it.

45. The judge eventually permitted the prosecutor to recall Inspector Lumy to lead further evidence on the issue of the witness being kept away by the accused through fear. He

was of the view that the prosecutor was operating under a genuine misapprehension that she would not have been permitted to lead the evidence of fear on the *voir dire*, having been prevented from doing so before the jury. On two occasions during the discussion of the issue with counsel, the trial judge made it clear that it was a matter for the prosecutor to decide how to conduct her case, and it was for her to determine on what basis she wished to ground her application.

46. Counsel for the appellant has referred us to the case of **Peter Michel v. The Queen [2009] UKPC 41**, a decision of the Privy Council sitting on an appeal from the Court of Appeal of Jersey, in which the Board reviewed the leading cases on the propriety of judicial intervention. The appellant was convicted of nine counts of money laundering before the Inferior Number of the Royal Court of Jersey comprising a Commissioner and two Jurats. His appeal to the Court of Appeal of Jersey was dismissed.

47. The Board set aside the convictions on the ground that the appellant did not receive a fair trial. In commenting on the conduct of the Commissioner, the Board noted that his interventions amounted to a hostile cross-examination of the appellant and his witnesses. Lord Brown further observed (at para. 12) that the questioning evidenced not merely skepticism, but sometimes downright incredulity as to the defence being advanced. On occasion the questioning was “variously sarcastic, mocking and patronising”.

48. Lord Brown (at para. 17) referred to the dictum of Lord Parker C.J. in **R v. Hamilton (unrep. 9<sup>th</sup> June 1969)**:

*“Of course it has been recognized always that it is wrong for a judge to descend into the arena and give the impression of acting as advocate....Whether his interventions in any case give ground for quashing a conviction is not only a matter of degree, but depends to what the interventions are directed and what their effect may be. Interventions to*

*clear up ambiguities, interventions to enable the judge to make certain that he is making an accurate note, are of course perfectly justified. But the interventions which give rise to a quashing of a conviction are really three-fold; those which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury....The second ground giving rise to a quashing of a conviction is where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence, and thirdly, cases where the interventions have had the effect of preventing the prisoner himself justice and telling the story in his own way.”*

49. While Lord Parker C.J. outlined three grounds on which an appellate court would be minded to quash a conviction, these grounds are not exhaustive. The Court of Appeal in **Peter Michel** had said:

*“The mere fact that a judge intervenes excessively or inappropriately does not necessarily lead to a conviction being quashed. The decision for the court is whether the nature and extent of the interventions have resulted in the applicant’s trial becoming unfair.”*

While the Board disagreed with the Court of Appeal’s final conclusion on the fairness of the trial, it found no fault with the statement of principle above.

50. The principle that not all deviations from good practice will render a trial unfair is illustrated by the decision of the European Court of Human rights in **C.G. v. United Kingdom** [2002] 34 E.H.R.R. 31 (referred to in para. 28 of **Peter Michel** *supra*.) where the court found the judicial interventions to be excessive, but rejected the submission that the proceedings as a whole were unfair.

51. In commenting on the decision, Lord Brown stated at paragraph 28:

*“Ultimately the question is one of degree. Rarely will the impropriety be so extreme as to require a conviction, however safe in other respects to be quashed for want of a fairly conducted trial process.”*

The cases cited above are clearly distinguishable from the instant case. In **Michel and C.G. v. United Kingdom** the judicial interventions were found to be excessive. The trial judge in this case merely expressed his concern whether the application to admit the deposition of Kristy James was grounded on an artificial basis. We are of the opinion that the trial judge did not go beyond the bounds of judicial propriety, he was merely seeking to clarify the grounds upon which the prosecutor was applying to have the deposition admitted.

52. It is not every departure from good practice which will render a trial unfair. It is a matter of degree, and requires an overall assessment of the fairness of the proceedings as a whole. On the facts of this case, we hold that the proceedings were not rendered unfair by this single instance of judicial intervention.

53. The appellant has further complained that the trial judge demonstrated bias when he went “*beyond the proper bounds of judicial intervention.*” We have already indicated that the judge’s intervention was not improper. Further, there is no evidential basis to support the allegation that the trial judge demonstrated bias. In our view, a fair-minded and informed observer would not have concluded that the trial judge was actuated by bias when he entered into discussions with both counsel with respect to the grounds of the application to admit the deposition.

Accordingly, we find no merit in this ground.

### **Ground 5**

*The appellant received an unfair trial occasioned by the occurrence of a material irregularity when during the course of the voir dire the prosecution chose to call its Legal Assistant/Trainee in the matter from the Bar table to give evidence on the voir dire on the contentious subject matter of proving the absence of the witness Kristy James from the jurisdiction and which said evidence was used by the learned trial judge to form the basis of his finding that the witness was not only out of the country but was there because of fear and was kept out of the way by the appellant.*

54. The essence of this ground is that Giselle Landau, the paralegal, who had not yet been admitted to the Bar, was permitted to sit at the bar table and then gave evidence on the *voir dire*. The appellant complained that it is improper for a person placed in that position to engage in, “forensic gymnastics catapulting from Minister of Justice at the bar table into the witness box as a witness for the prosecution”. The suggestion is that the trial judge might have been inclined to view her evidence favourably having regard to the fact that she was about to enter the profession and was part of the prosecution team.
55. There is no merit in the ground. The evidence of Ms. Landau was clearly admissible. It was not given in the presence of the jury which might have been more impressionable than an experienced trial judge. The judge was well aware of the weight to be attached to the evidence of a witness who was present in court and heard the evidence of other witnesses in the trial, as is evident from the direction he gave the jury with respect to the evidence of a defence witness. There is no reason to believe that the trial judge would not apply the same principle when assessing the evidence of Ms. Landau.
56. The appellant has failed to establish on the evidence or by reference to legal authority that the admission of Ms. Landau’s evidence was a material irregularity nor has he shown that the appellant suffered any prejudice, or unfairness as a result. Accordingly, there is no merit in this ground.

**ORDER**

The appeal is allowed and conviction and sentence quashed. Given the strength of the evidence against the appellant and the considerations laid down in the case of **Reid v R 27 W.I.R. pg 254**, a re-trial is ordered.

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P. Weekes  
Justice of Appeal.

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Soo Hon  
Justice of Appeal.

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R. Narine  
Justice of Appeal.