COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCrApp No.14 of 2017

BETWEEN

ZINTWORN DUNCOMBE

Appellant

AND

REGINA

Respondent

****

SCCrApp No. 47 of 2017

CORDERO SAUNDERS

Appellant

AND

Regina

Respondent

BEFORE:	**The Honourable Mr. Justice Isaacs, JA** **The Honourable Madam Justice Crane-Scott, JA** **The Honourable Mr. Justice Evans, JA**
APPEARANCES:	**Mr. Wayne Munroe, QC, with Mr. Ryszard Humes, Counsel for Appellant Duncombe,** **Mr. Roberto Reckley, Counsel for Appellant Saunders** **Mr. Patrick Sweeting, Counsel for Respondent**
DATES:	**13 July 2020; 19 November 2020; 24 November 2020; 1 February 2021**

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Criminal Appeal – Murder – Material irregularity- Conviction unsafe and unsatisfactory - Retrial –Whether order for re-trial is in the interest of justice – Section 13(1) of Court of Appeal Act- Section 27 of the Correction Services Act, 2014

In March 2016 the appellants, Zintworn Duncombe and Cordero Saunders, were convicted in the Supreme Court. They were later sentenced to divers terms of imprisonment. They appealed their convictions and sentences. On 13 July 2020 the Court of Appeal ordered that the convictions of the appellants, Duncombe and Saunders, be quashed and the sentences be set aside. The Court determined that it would, at a later date, hear the parties on whether a retrial should be ordered. On 24 November 2020, the Court heard the submissions of Counsel on the retrial. The appellants contend that a retrial should not be ordered. Duncombe argued that the evidence of the prosecution against him was weak and it would not be in the interest of justice in such an instance. Saunders argued that a retrial would be unfair and would allow the respondent an opportunity to cure the deficiencies in its case and that he had already served a significant portion of his sentence. The respondent submitted a retrial would be appropriate.

Held: appeals allowed; convictions and sentences are quashed. The case of the appellants, Duncombe and Saunders, is remitted to the Supreme Court for re-trial.

An order for a re-trial ought to be made in this case inasmuch as the ground on which the appellant Duncombe's appeal had been allowed was due to a failure of the trial judge to conduct a proper investigation into the altercation between the forewoman and the alternate juror.

The strength of the Prosecution's case remains to be tested and it will be a matter for the jury whether the inconsistencies and interests identified by the appellant will be of any consequence. to their deliberations.

There is no automatic bar to a second or even third trial being allowed to proceed. Everything depends on the court's views of the circumstances in the particular case under consideration. There has been nothing shown to suggest that the Prosecution will produce any more evidence or that they are even capable of doing such a thing.

There is nothing to suggest that that the prosecution is being given another chance to cure evidential deficiencies in its case against the appellant Saunders; nor is there any suggestion that evidence which tended to support the defence at the first trial would not be available at the new trial.

No evidence had been placed before the Court speaks to the appellant's conduct while in custody There is no certainty that an inmate will be eligible to have his sentence reduced by a third. That will depend on his behaviour while in prison.

B (A Child) v The Queen PC No. 48 of 2000 considered

Bowe v The Queen **[** 2001] All ER (D) 163 (Apr) applied

Dennis Reid v The Queen [1980] AC 343 applied

Director of Public Prosecutions v Legesse [2020] All ER (D) 115 (Jun) considered

Donna Vasyli v Regina SCCrApp. No. 255 of 2015 mentioned

James Rodriguez Johnson v Regina SCCrApp No. 267 of 2018 distinguished

Jerome Bethel v Regina SCCrApp No. 19 of 2013 mentioned

Mario Delancy v The Attorney General SCCrApp No. 19 of 2012 mentioned

R v Bell [2010] EWCA Crim 3 considered

JUDGMENT

Judgment delivered by the Honourable Mr. Justice Isaacs, JA:

1. On 24 November 2020, we heard the submissions of Counsel on whether or not we should order a re-trial of the appellants in pursuance of our judgment rendered on 13 July 2020 when we allowed the appellants' appeals primarily on the ground that the judge had failed to properly investigate the altercation that had occurred between the forewoman and an alternate juror and that such failure constituted a material irregularity sufficient to make their convictions unsafe. We reserved our decision on the re-trial issue for delivery at a later date. We render our decision now.

2. Having now heard the submissions, we are satisfied that an order for the re-trial of both appellants is appropriate since the success of their appeals was predicated on an error made by the judge.

Background

3. On or about 24 November 2013, Tishka Braynen ("Tishka") and her boyfriend, Senior Immigration Officer Shane Gardiner ("Shane"), went missing from Shane's home in Love Hill, Andros. On 21 December 2013, their decomposed remains of were found on the grounds of Newbold Farms in Fresh Creek, Andros. The couple had each been shot to the head, execution style. The appellants and their co-accused were arrested and later charged with the murder of Tishka and Shane. On 29 March 2016, the appellants were convicted of murder, kidnapping, conspiracy to commit armed robbery and attempted armed robbery and were sentenced to imprisonment. They appealed their convictions and

sentences on several grounds including the failure of the judge to properly investigate the matter of the verbal altercation between the forewoman and an alternate juror; and the failure to advise the jury that the prosecution's witness had an interest to serve.

4. On 13 July 2020, we allowed the appellants' appeals; but we left open the issue of whether there ought to be a re-trial for arguments to be made on another occasion.

The Case Against the Appellants

5. I reproduce the primary evidence that was produced at the appellants' trial as disclosed in paragraphs 7 to 11 of my judgment of 13 July 2020:

> **"7. Suspicion fell on Duncombe and his co-accused: Daniel Coakley ("Daniel"), James Johnson ("James") and Cordero Saunders ("Saunders") because Ms. Quetell Rahming ("Quetell") reported to the Police she had seen the Immigration jeep usually driven by Shane, pass her early in the morning and with Terell Mackey ("Terrell") sitting in the back seat on the very day Tishka and Shane went missing. She also told of Saunders and Daniel driving in Tishka's sister's vehicle right behind the jeep. Saunders and Duncombe along with others were arrested by the Police. They and their co-accused were charged with multiple offences and taken before a magistrate; and in due course, a Voluntary Bill of Indictment was filed fast tracking the case to the Supreme Court.**
>
> **8. At the trial, the Crown called two key witnesses, one of whom was Terrell, a coconspirator in the matter, but who gave evidence for the Crown. He testified that while in Fresh Creek, Andros, Duncombe, James, and Shawn Hinsey had planned to rob Shane and Tishka. Significantly, Terrell does not name Saunders as one of his coconspirators. Quetell does, however, name Saunders.**
>
> **9. Terrell recounted in his evidence that on the morning of 24 November 2013, he was picked up by the men and realized that Shane and Tishka were in the jeep and that the men were armed with handguns. He recounted that they arrived at Newbold Farm, Fresh Creek. That they all exited the vehicle, and it was at that time that Duncombe began asking Shane for money. Terrell said that Shane replied that he had no money.**

At that point, Duncombe shot Shane. He then led Tishka a short distance away and shot her.

10. Quetell was the second key witness for the prosecution. She stated that on 23 November 2013, while preparing breakfast at her home she overheard a conversation between 5 Saunders and James that Paul Marshall said that Shane had won some money. She stated that shortly thereafter Saunders came into the house and told Daniel that he was going to call Duncombe and they left together. She recalled that half an hour later Saunders and Daniel returned with Duncombe. It must be noted that it does not appear that the appellant was a party to the conversation outside of Quetell's home.

11. Quetell recounted that around 4:00am on 24 November 2013 whilst standing near the Fresh Creek Graveyard awaiting a ride to work, she recognized the jeep of the Bahamas Immigration Department which was regularly driven by Shane driving past her with Terrell in the rear passenger seat. As the vehicle passed her, she could hear the screams of a male and female.

12. She recounted that following closely behind was a white vehicle belonging to the sister of Tishka being driven by Saunders with Daniel as a passenger and another whom she could not see."

Submissions in Duncombe's Case

6. The appellant contended that no re-trial should be ordered because the main prosecution witnesses Quetelle Rahming ("Quetelle") and Terell Mackey ("Terrell") were not reliable witnesses as Quetelle was at one time arrested and questioned as a suspect hence she had an interest to serve; and Terrell had admittedly played a role in the offences. Thus, the evidence against the appellant is weak.

7. Additionally, he argued that due to the backlog of cases in the Supreme Court which has been exacerbated by the Covid-19 pandemic it would not be in the interest of justice to remit the appellant's case for rehearing, particularly when regard is had to the prosecution's weak case against the appellant.

8. The respondent submitted that it would be appropriate for the Court to remit the case for a re-trial because the appellant's appeal was allowed due to a material irregularity - an

error on the part of the judge - and was not due to the specific evidence at the trial, namely, the evidence was not found to be weak.

9. Both parties relied on the Judicial Committee of Her Majesty's Privy Council's ("the Privy Council"/"the Board ") decision in the Jamaican case of **Dennis Reid v The Queen** [1980] AC 343 to support their respective positions. Hence, I propose to delve into the case in some depth; but with only a brief recitation of the facts by way of an introduction.

10. The appellant, Reid, was charged with murder. At his trial, the prosecution case against him depended upon an identification of him by a single eye-witness. He was convicted. He appealed; and the Court of Appeal quashed the conviction holding in effect that the jury's verdict was unreasonable and was not supported by the evidence. However, by a majority, the court ordered that Reid undergo a new trial. Reid appealed the re-trial order to the Privy Council; and the Board held that the order for a re-trial should be quashed. In the course of the Board's judgment principles that ought to guide a court when considering whether or not to order a re-trial were set out.

11. The appellant adverted our attention to that portion of the Board's judgment found at pages 349-51 where Lord Diplock, delivering the judgment of their Lordships, stated:

> **"The recognition of the factors relevant to the particular case and the assessment of their relative importance are matters which call for the exercise of the collective sense of justice and common sense of the members of the Court of Appeal of Jamaica who are familiar, as their Lordships are not, with local conditions. What their Lordships now say in an endeavour to provide the assistance sought by certified question (4) must be read with the foregoing warning in mind.**
>
> **Their Lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury. Save in circumstances so exceptional that their Lordships cannot readily envisage them it ought not to be exercised where, as in the instant case, a reason for setting aside the verdict is that the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed. It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be**

given another chance to cure evidential deficiencies in its case against the defendant. At the other extreme, where the evidence against the defendant at the trial was so strong that any reasonable jury if properly directed would have convicted the defendant, prima facie the more appropriate course is to apply the proviso to section 14 (1) and dismiss the appeal instead of incurring the expense and inconvenience to witnesses and jurors which would be involved in another trial.

In cases which fall between these two extremes there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant factor: so may its prevalence; and where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the defendant. Nevertheless, there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and , if this were so, it would be a powerful factor against ordering a new trial."

12. The proviso to section 14(1) of the Jamaican Judicature (Appellate Jurisdiction) Act is similar to the proviso to section 13(1) of our Court of Appeal Act.

13. The appellant also referred to the passage of the judgment found at pages 350-51:

" Their Lordships in answer to the Court of Appeal's request have mentioned some of the factors that are most likely to call for consideration in the common run of cases in Jamaica in which that court is called upon to determine whether or not to exercise its power to order a new trial. They repeat that the factors that they have referred to do not pretend to constitute an exhaustive list. Save as respects insufficiency of the evidence adduced by the prosecution at the previous trial, their

> **Lordships have deliberately refrained from giving any indication that might suggest that any one factor is necessarily more important than another. <u>The weight to be attached to each of them in any individual case will depend not only upon its own particular facts but also upon the social environment in which criminal justice in Jamaica falls to be administered today.</u> As their Lordships have already said, this makes the task of balancing the various factors one that is more fitly confided to appellate judges residing in the island."** [Emphasis added as per the appellant's submission]

14. The respondent relied on that portion of the judgment of Lord Diplock at page 348 where he stated, inter alia:

> **"The interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge in the conduct of the trial or his summing up to the jury. There are, of course, countervailing interests of justice which must also be taken into consideration. The nature and strength of these will vary from case to case. One of these is the observance of a basic principle that underlines the adversary system under which criminal cases are conducted in jurisdictions which follow the procedure of the common law: it is for the prosecution to prove the case against the defendant."**

15. The respondent also made reference to the passage taken from pages 348-50 of **Reid** while submitting that what was material to our determination whether to order a re-trial was not the inconsistencies that may exist in the witnesses for the Prosecution's evidence, given the reason the appeal was allowed, that is, a material irregularity arising from a failure of the judge. The respondent also urged that circumstances such as the offences being serious, the cogency of the evidence and the timeliness of the prosecution of the case, ought to cause us to make the order for a re-trial of the appellant.

16. In the digested case of **Director of Public Prosecutions v Legesse** [2020] All ER (D) 115 (Jun), where the appellants had faced charges arising out of the importation of a Mercedes Benz vehicle and an attempt to evade payment of excise duty and taxes on the vehicle, Privy Council said, inter alia:

> **"Abuse of the returning citizen import concession was a public interest matter. Public confidence in the due application of the law in a case of the present kind, where there was a serious irregularity in the original trial, would best be promoted by a retrial."**

17. An order for a re-trial by a majority of the Court, differently constituted, in **Donna Vasyli v Regina** SCCrApp. No. 255 of 2015 was not disturbed by the Privy Council on an appeal to that court. See also **Jerome Bethel v Regina** SCCrApp No. 19 of 2013 and **Mario Delancy v The Attorney General** SCCrApp No. 19 of 2012.

18. At paragraph 44 of **Bethel** (Supra), John, JA said:

> **"We are therefore satisfied that the appellant was effectively denied a fair trial as a result of the unnecessary questioning by the trial judge. Accordingly, we quash the conviction and sentence."**

19. After considering Lord Diplock's statement of principle in **Reid** (Supra), John, JA, with whom Conteh and Adderley, JA agreed, concluded that a re-trial was warranted. Of note is that there was no separate submissions on whether there should be a re-trial.

20. In **Delancy** (Supra), the Court, differently constituted, considered a case where the appellant was charged with murder but was found guilty by the jury of manslaughter. He appealed his conviction and sentence. At paragraph 27 Allen, P stated as follows:

> **"27. In the present case there was no evidence ....in our minds an injustice has been done."**

21. The President went on to consider whether a re-trial should be ordered and, having referred to Jerome **Bethel** (Supra) and the principles enunciated by Lord Diplock in **Reid** (Supra) concluded at paragraph 31 as follows:

> **"31. On a re-trial the medical evidence .... under s. 13(2) of the Court of Appeal Act."**

22. In my view, the different results in the appeals in **Bethel** (Supra) and **Delancy** (Supra) is explicable by the cogency of the evidence in **Bethel** and the dearth thereof in **Delancy**.

Conclusion

23. I am satisfied that an order for a re-trial ought to be made in this case inasmuch as the ground on which the appellant's appeal had been allowed was a failure of the trial judge to conduct a proper investigation into the altercation between the forewoman and the

alternate juror. The strength of the Prosecution's case remains to be tested and it will be a matter for the jury whether the inconsistencies and interests identified by the appellant will be of any consequence to their deliberations.

24. Accordingly, I order that a re-trial take place as soon as practicable in case of the appellant, Duncombe.

Submissions in Saunders' Case

25. Mr. Roberto Reckley submitted that the appellant ought not to face a re-trial for the following reasons:

> **"1. A retrial would allow the Respondents an opportunity to cure the many deficiencies in their case which would be unfair to the Appellant.**
>
> **2. The Appellant has already served a significant portion of his sentence on at least two of the offences and as such it would be unfair to put him on trial again."**

Ground 1

26. Mr. Reckley argued that the respondent having had a trial run or dress rehearsal, would be in a better position to fill those holes and close those gaps disclosed in the first trial; and to strengthen their case and fix the flaws should they be given a second chance. He pointed to the discrepancies in the evidence of Quetell; and the possibility that the Prosecution, now aware of Saunders' alibi, would be in a better position to address it.

27. He referred to **Reid** (Supra) where Lord Diplock said at page 350-51:

> **"It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the defendant"**

28. As a matter of principle, I take no issue with Lord Diplock's view. However he enunciated it in the context of the facts in **Reid**. In the present appeal, there was no determination made by this Court as to the strength or weakness of the Prosecution's case. That remains to be determined by a jury if a re-trial is ordered.

29. The respondent submitted that a retrial should be ordered; and relied in the main on the submissions made in Duncombe's appeal. As I have already mentioned them, I will not repeat them here; and would say only that they have been considered by me. The

respondent did refer to **Forrester Bowe v R**, (a second retrial for murder) and the judgment of the Privy Council delivered on 10 April 2001.

30. A passage from the judgment in **R v Bell** [2010] EWCA Crim 3 at paragraph 28 of the judgment of Lord Judge, CJ is as follows:

> **"[28] It is in the first instance for the prosecutor to judge whether, taking account of all relevant considerations, the public interest is better served by offering no evidence or by seeking a further re-trial. There is plainly no rule of law in this country which forbids a prosecutor from seeking a second re-trial . . . there may of course be cases in which, on their particular facts, a second re-trial may be oppressive and unjust . . . whether a second re-trial should be permitted depends on an informed and dispassionate assessment of how the interests of justice in the widest sense are best served. Full account must be taken of the Defendant's interests . . . account must also be taken of the public interest in convicting the guilty, deterring violent crime and maintaining confidence in the efficacy of the criminal justice system . . . ."**

31. In **B (A Child) v The Queen** PC No. 48 of 2000 Lord Bingham of Cornhill stated at paragraphs 38-9:

> **"38. There may of course be cases in which, on their particular facts, a second retrial may be oppressive and unjust. The Board judged Charles v The State [2000] 1 WLR 384 to be such a case. But it was there recognised (at page 390G) that the trial judge has a margin of discretion, and in Persad and Jairam v The State (unreported, 24 January 2001) the Board remitted the issue of retrial to the Court of Appeal of Trinidad and Tobago treating it as relevant but not conclusive that it was a second retrial.**
>
> **39. Whether a second retrial should be permitted depends on an informed and dispassionate assessment of how the interests of justice in the widest sense are best served. Full account must be taken of the defendant's interests particularly where there has been long delay, or he has spent long periods under sentence of death or if his defence may be prejudiced in any significant way by the lapse of time. Account must also be**

> **taken of the public interest in convicting the guilty, deterring violent crime and maintaining confidence in the efficacy of the criminal justice system. These are matters which a national court is well—placed to consider. The Board is for obvious reasons much less well—placed. Here it has no guidance from the Court of Appeal since that court was never invited to address the issue. The Board does not feel entitled to rule that there may never properly be a second retrial in a capital case, irrespective of the facts. It notes that the New Zealand High Court declined to stay a third trial for murder in R v. Barlow [1996] 2 NZLR 116 (although the charge was not capital). The consequences of conviction in a capital case are of course grave and irreversible, but that is because the crime found to have been committed is judged by the state in question to be particularly heinous. The appellant may exercise any right he has to seek the exercise of mercy, or any constitutional relief which may be available. But the Board cannot hold that this trial was unlawful on the grounds of oppression or abuse."**

32. It is evident that there is no automatic bar to a second or even third trial being allowed to proceed. Everything depends on the court's views of the circumstances in the particular case under consideration. There has been nothing shown to suggest that the Prosecution will produce any more evidence or that they are even capable of doing such a thing. The trial judge who acts to ensure the fairness of the trial will be better placed to determine what impact any particular evidence or course of action the Prosecution may propose to take inures to the fairness of the trial or not.

33. Insofar as the success of the appeal relies on this ground, it fails.

Ground 2

34. Mr. Reckley submitted that there should be no order for a re-trial because the appellant has been in custody since 30 December 2013, and, therefore, when remission of sentences usually accorded to those serving long sentences - a "Prison year" is equivalent to eight months - has already served a significant part of his sentences in respect of the attempted armed robbery (90%), kidnapping (100%), and conspiracy to commit armed robbery (50%). he posits that it would be unconscionable to have the appellant stand trial for those offences again.

35. The respondent submitted that since the Court ordered a re-trial in **James Rodriguez Johnson v Regina** SCCrApp No. 267 of 2018, the appellant's co-accused, on his appeal, the Court ought to follow that course and the thinking stated in paragraph 46 as follows:

" The evidence led at the trial could suffice to cause a properly constituted jury properly directed to find the Prosecution's evidence compelling. Thus, the appellant is to be re-tried as soon as practicable."

36. The immediate difference to be noted between **Johnson** (Supra) and the present appeal is that the appellant opposes a re-trial; whereas in **Johnson**, Counsel for the appellant agreed that an order for a re-trial would be the appropriate order for the Court to make.

37. I make reference again to the cases of **Bell** (Supra), **Legesse** (Supra), **B (A Child)** (Supra) and **Forrester Bowe** (Supra) and to the judgments cited above.

38. The respondent also sought to argue that the appellant was not caught by surprise by the possibility of a re-trial. The issue is not however, his preconceptions but whether in all the circumstances it would be fair for him to face a re-trial.

Discussion

39. Section 27 of the Correction Services Act, 2014 ("the CSA, 2014") allows for remission of up to one third of an inmate's sentence. Section 27 states, inter alia:

"27. Remission for good conduct.

(1) Every inmate shall, upon admission, on warrant, be credited with the full amount of remission he could earn being one third of his sentence.

(2) The Commissioner may forfeit such portion of an inmate's remission, as a punishment for bad conduct or any offence against discipline as the Commissioner may determine.

(3) With a view to encouraging good conduct and industry and to facilitating the reformative treatment of inmates, the Governor-General may, on the recommendation of the Commissioner -

(a) grant to an inmate (whether under one sentence or consecutive sentences) for a period exceeding one month, remission of such part of his sentence on the ground of good conduct;

(b) grant further remission to an inmate on special grounds such as exceptional merit or permanent ill health.

(4) No -

(a) inmate who has served more than two custodial sentences;

(b) civil inmate;

(c) inmate who has been convicted for an offence under the Dangerous Drugs Act (Ch. 228), Firearms Act (Ch. 213), Sexual Offences Act (Ch. 99) or any other law that rescinds the remission of a term of imprisonment by reason of good conduct and industry, shall be eligible for remission of sentence."

40. There is no certainty that an inmate will be eligible to have his sentence reduced by a third. That will depend on his behaviour while in Prison. No evidence had been placed before us that speaks to the appellant's conduct while in custody. All we have been provided with is a calculation of time based on section 27(1) of the CSA, 2014. I am, therefore, in no position to determine what time remains on the appellant's sentences except on the time that has elapsed since he was sentenced. In the premises, although I accept that the appellant has been in continuous custody since 2013 (there being no evidence to the contrary), I am unable to rely on Mr. Reckley's calculations as to the percentage of the sentences that have been spent.

41. Notwithstanding the time the appellant has spent on remand, and serving sentences that have since been quashed, I have had regard to the dicta of Lord Diplock in **Reid** (Supra), where he said that it is in:

".. the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury."

42. There is nothing to suggest that that the prosecution is being given another chance to cure evidential deficiencies in its case against the appellant; nor is there any suggestion that evidence which tended to support the defence at the first trial would not be available at the new trial. These are but two of the factors a court must have regard to when considering whether or not to order a re-trial.

43. I repeat the words of Lord Diplock where he discussed factors that may be relevant to our decision at page 351 of **Reid** (Supra):

"**The seriousness or otherwise of the offence must always be a relevant factor: so may its prevalence; and where the previous**

> **trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the defendant."**

44. We are called upon to perform a balancing exercise by placing onto one side the scale those matters that argue for an order for a re-trial and on the other side, those matters that argue for no order for a re-trial to be made. As Lord Diplock said in **Reid** (Supra):

> **"The weight to be attached to each of them in any individual case will depend not only upon its own particular facts but also upon the social environment in which criminal justice in Jamaica falls to be administered today."**

45. I am satisfied that when all of the factors are weighed the scale tips toward a re-trial.

Conclusion

46. The case of appellants, Duncombe and Saunders, is remitted to the Supreme Court for re-trial so soon as is reasonably practicable.

The Honourable Mr. Justice Isaacs, JA

The Honourable Madam Justice Crane-Scott, JA

The Honourable Mr. Justice Evans, JA