IN THE COURT OF APPEAL OF BELIZE, A.D. 2004

CRIMINAL APPEAL NO. 11 OF 2003

BETWEEN:

GEORGE MATHEWS	**APPELLANT**
AND	
THE QUEEN	**RESPONDENT**

—

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**

Mr. Hubert Elrington for appellant.
Mr. Kirk Anderson, Director of Public Prosecutions, for respondent.

—

2 March & 18 June 2004.

MOTTLEY P.

1. On the hearing of this appeal, the Court accepted that what had taken place between the brother of the deceased and a member of the jury could lead to the impression that the appellant did not receive a fair trial. We allowed the appeal and ordered a new trial. Our reasons for so doing are set out below. However, because a

new trial was ordered, the Court considered that it would be inappropriate to deal with the facts of the substantive trial.

2. The appellant was convicted of murdering Denver Hamilton on April 7, 2002 and was sentenced to life imprisonment.

3. On the morning of November 13, 2003, Mr. B. Q. Pitts S.C. counsel for the appellant, brought to the attention of the trial judge an incident relating to the conduct of two jurors and one of the prosecution witnesses.

4. The judge conducted an investigation into the complaint of counsel. The allegation was that a juror was seen “punching out” with Reginald Hamilton, the brother of the deceased, Denver Hamilton. Reginald had given evidence on behalf of the prosecution. He had identified the body of the deceased to Dr. Martinez Blanco who conducted the post mortem examination.

5. The “punch out” had in fact taken place on Wednesday, November 12, 2003 on the verandah of the Court. The judge stated that he had made inquiries as to the meaning of the “punch out” and he concluded that it was “the touching of the fist between a juror and a brother of the deceased”.

6. The judge in his ruling stated:

"….*I have had to carefully consider the explanation of the juror which he have to the court in chambers when he testified in this regard. The juror admitted that he had punch out with the brother of the deceased, but immediately said that he did not do so intentionally. The punch out just happened. The juror explained that he had known Fish, the person he had punch out with from way back. He went on to say in his testimony that he did not know Fish real name was Reginald Hamilton. He concluded his testimony by saying that he did not know whether or not there was a connection between Fish and the deceased. By the word connection, I understand that word to mean whether Fish and the deceased were related. Since I have had the benefit of observing the demeanor of the juror, it is my view that juror was truthful in his testimony relative to his act of punching out. My impression and view having heard the explanation of this juror and having seen him testify under oath in that the punch out, that act of punching out between himself and the brother of the deceased is a mere greeting in the circumstances and therefore cannot lead one to the conclusion that the juror was exhibiting any real danger of bias in this case."*

7. The juryman had stated that while he knew “Fish”, the nickname of Reginald Hamilton “from way back” he did not know his real name was Reginald Hamilton. His lordship went to hold:

> *“It is my view, as I have said, that the act of the juror was no more than mere greeting or in the nature of a mere greeting between two acquaintances, all be it that the punching out was with the brother of the deceased. In the circumstances this juror will not be discharged and neither will the panel of jurors.”*

8. This Court found it difficult to understand how the trial judge could have concluded that, since he had the benefit of observing the demeanor of the juror, the juror was truthful. Indeed, the evidence tends to show the contrary.

9. The trial commenced at 10 a.m. on November 11, 2003. Not much occurred on that day. On November 12, counsel for the prosecution made her opening address to the jury. Following the completion of her opening address, the first witness called by the prosecution was Reginald Hamilton. During the examination in chief this witness was asked the following questions:

Q. You went to the Kart Heusner Memorial Hospital morgue at that time (9 April, 2002 at 10 a.m.)?

A. Yes.

Q. You identified to the doctor, doctor Martinez Blanco?

A. Right

Later he was asked:

Q. Mr. Hamilton Denver he was your younger brother?

A. Yeah, he is the youngest of three boys.

Having stated that his brother was a taxi driver, Reginald was asked by the counsel for the prosecution:

Q. Now, you said that your brother was a taxi driver, do you know if he owned a car at that time?

A. Yes he did own a car.

Counsel for the prosecution again asked:

Q. What kind of hair style did your brother wear at that time?

A. He had it dred.

10. It is significant that after the cross-examination had been completed, the learned trial judge asked the following question of Reginald Hamilton:

THE COURT: When you were at the Karl Heusner Memorial Hospital, you said you went to identify the **body of your brother** (emphasis mine) to the police and to the doctor, was it at the Karl Heusner Memorial

Hospital that the body was or was it at the morgue, where was it?

WITNESS: The body was at the morgue which is located inside the Karl Heusner Memorial Hospital.

Having intervened to ask this question, the judge then directed certain comments to the jury when he invited the jurors to ask any questions if they wished to do so after the completion of the examination-in-chief, cross-examination and re-examination.

11. From the above evidence, it ought to have been clear to the judge that there was in fact evidence that Reginald Hamilton, who the juror said he knew as “Fish” from “way back” was the brother of the deceased Denver Hamilton. It is difficult to appreciate how the judge, faced with such overwhelming evidence given in the presence of the jury, could gave accepted the statement of the juror and reached the conclusion “that the juror was truthful in his testimony relative to his act of punching out”.

12. The question therefore arises why would the juror deny knowing who “Fish” or Reginald Hamilton was? Even if it could be said that the juror knew Reginald Hamilton as “Fish” from “way back” and did not know the connection with the deceased, Denver Hamilton, it is difficult to accept that having heard the evidence of the witness on

the morning of 12 November 2003, he must have known who Reginald Hamilton was when the punch out took place on the evening of November 12, 2003 after the Court had been adjourned.

13. In any event, it is highly unlikely that this inquiry could have been conducted without it being brought to the attention of the juror that "Fish" or Reginald Hamilton was the brother of the deceased, Denver Hamilton.

14. The "punching out" which is the touching of the fist by the juror and the brother of the deceased would tend to suggest more than mere passing acquaintance. It could possibly suggest some sort of relationship between the juror and the witness. In the mind of an independent observer it could have had the effect that the particular juror was in some way giving comfort to the family of the deceased. In our view, it is quite probable that such conduct, suggesting as it does, more than a mere passing acquaintance, could possible be interpreted as something more sinister than a mere greeting. Such conduct would have had the effect of creating in the mind of that independent observer that the jury may be bias against the accused. It is a constitutional requirement that an accused in a criminal trial is entitled to a fair trial. The process of a criminal trial requires that a jury should not be bias or appear to be bias against the accused. Fairness requires that the jury should be independent and free from any bias. If there is a possibility that a juror may be

tainted, it would be impossible to state the effect of this on the jury as a whole during its deliberations.

15. In his third Ground of Appeal, the appellant alleged that the judge "had wrongly exercised his discretion when he held that, not withstanding that there had been contact between a juror and a witness, that there was no real danger of bias".

16. The role of the Court of Appeal when reviewing the exercise of a discretion of a trial judge in a matter such as this has been set out in *Sangit Chaitlal v. The State [1991] 39 W.I.R. 295 where Barnard JA.* (as he then was) at page 302 stated:

> *".....we entertain the view that in matters of this kind it is a matter for the discretion of the trial judge, after due inquiry, to determine whether to discharge a juror or an entire jury, and, if he does either, his discretion ought not to be interfered with even in exceptional circumstances."*

17. This Court accept that it ought not to interfere with the exercise of the discretion of the trial judge and should only do so in exceptional circumstances. Such circumstances in our view existed in this case as we have demonstrated above. The trial judge having conducted his investigation concluded that the juror was truthful and exercised his discretion and refused to discharge the jury. We find it difficult

to appreciate how the judge, in the face of the evidence on the record, could have reached that conclusion. It was paramount that the appellant receive a fair trial. So that the issue is whether what had taken place was likely to prejudice the fair trial of the appellant. It was, in our view, impossible for a fair trial to take place. The judge, therefore, in the interest of ensuring that the appellant did receive a fair trial, ought to have discharged the jury and order a retrial. For the reasons stated above, the Court concluded that the discretion of the trial judge was not properly exercised.

_____

MOTTLEY, P.

_____

SOSA, J.A.

_____

CAREY, J.A.