IN THE COURT OF APPEAL OF BELIZE, A.D. 2003

CRIMINAL APPEAL NO. 3 OF 2003

BETWEEN:

CALBERT SMITH	**Appellant**
AND	
THE QUEEN	**Respondent**

—

BEFORE:

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

Mr. Simeon Sampson S.C. for the Appellant.
Ms. Marjorie Moyston, Crown Counsel for the Crown.

—

October 21, 2003 & March 12, 2004.

ROWE, P.

1. At the conclusion of the hearing of the appeal, we allowed the appeal, quashed the conviction for murder, set aside the sentence of life imprisonment and in the interest of justice ordered a new trial before another judge for the following reasons.

2. The appellant and his brother Kenrick Smith occupied rooms in the upper floor of premises of No. 9 Cadle's Alley, Belize City. It appears that the brothers owned the building which was a two-flat wooden and concrete structure. On the evidence of the prosecution, tenants of the building heard noise of breaking of furniture and of a quarrel coming from the room of the brothers shortly after midnight on October 4, 2001. The witness Ernest Brown who occupied a room on the upper floor of the building, and who had seen the appellant arrive home before he retired o bed, testified that the noise awoke him and he entered the appellant's room to make inquiries. He saw the appellant sitting at his dining table "railing and cursing" and he heard the appellant say, "I done with the bitch". The appellant, he said, appeared to be drunk. Another tenant, Kenyon Peters, saw the appellant at the back door of the upstairs apartment just after he had heard the commotion upstairs. Mr. Peters observed that the appellant was covered in blood and so he asked the appellant what had happened. The appellant said he had killed his brother and he asked Mr. Peters to assist him to obtain a shovel to bury his brother. Mr. Peters went to the upstairs flat and saw the dead body of Kenrick Smith. The police were summoned and as a consequence of their investigations, the appellant was arrested for the murder of Kenrick Smith. Corporal Myers, the first police officer to arrive on the scene when asked about the condition of the appellant said that he appeared to be drunk.

3. There was a postmortem examination on the body of Kenrick Smith. He was a well built male about 6 feet and weighing about 160 pounds. There was a 2 ½ inch stab wound to the left lateral chest area which penetrated inside the chest cavity through the seventh intercostal space into the left lung and the heart to a depth of 7 inches. Death was due to internal and external bleeding.

4. The appellant made an unsworn statement from the dock. He denied killing his brother. He said he had gone to the Chinese shop at Victoria Street and New Road on the night of October 3, 2001 and when he returned he discovered that his house had been burglarized. Both the back and front doors of the house were open. He said that he saw that his brother was sick and he tried to assist him. It was when he lifted up his brother, said the appellant, that blood got on his clothes. The appellant said that he spoke to persons that night but he could not explain himself properly. His defence was therefore that an unknown person or persons had entered his home in his absence of had fatally injured his brother.

5. The first ground of appeal was that the learned trial judge failed to direct the jury on the requisite intention to kill that is necessary to establish the crime of murder. In **Hillaire Sears v The Queen**, Criminal Appeal No. 7 of 2003, we drew attention to the fact that in this jurisdiction the intent required to be proved in a case of murder is not the common law intent to kill or cause grievous bodily harm, but the intention to kill as defined in terms of the Criminal Code, Cap. 101, section 9. In delivering judgment, Carey J.A. said:

> "In a case of murder the jury need to be told that they should not infer the intention to kill, which is an essential element to be proved by the prosecution solely from the presumption that a man is responsible for the natural and probable result of his conduct (if they found he did anything) but that they should take it into account with all other evidence in the case, which bears on that issue. See **R. v. Bardalez** (unreported) CA 4/00, 19th October 2000".

6. In the case before us, the jury were directed as follows:

> "Murder is the unlawful causing of death of another by the infliction of unlawful harm. And therefore the ingredients with which the accused is charged are as follows: Somebody died. And the death of that person resulted from the infliction of some unlawful harm by

> the deceased. Harm, members of the jury, means any bodily hurt, disease or disorder. And unlawful harm is intentional infliction of harm or negligent causing of harm without justification. Self defence and the ingredients require that it must be proved that the accused Calbert Smith intentionally inflicted the unlawful harm on Kenrick Smith that resulted in the death of Kenrick Smith".

We find this direction to be seriously flawed in that the concepts of intention and negligence were not separated and the statutory requirement that there must be an intention to kill before the act can amount to murder was not expressly explained to the jury.

7. In dealing with the defence, the learned trial judge told the jury that the appellant had made an unsworn statement from the dock. The judge did not remind them of the contents of that statement. He did not tell them what would be the effect of that statement if they believed it to be true or if they were in doubt whether or not it was true. He did not tell them that it was a matter entirely for them to determine what weight, if any, they should attribute to that unsworn statement. The judge did not tell the jury that the appellant, in the unsworn statement, had denied killing his brother. The direction that the learned trial judge gave to the jury at page 68 of the record, was:

> "It is for the prosecution to prove that he is guilty. On the other hand, because the accused did not give evidence, it means that there is no evidence from him to undermine, contradict or explain the evidence put forward before you by the prosecution".

And just before the jury retired, they were directed:

> "You must base your verdict on complete evidence that has been led in this court before you. Don't speculate or guess. You must return your verdict only in light of the evidence put before you by the prosecution in this case".

Mr. Sampson submitted that in the passages quoted above the learned trial judge failed to place the defence raised before the jury and failed to provide a proper direction as to the treatment of an unsworn statement.

8. In **Marcutulio Ibanez v The Queen** (Privy Council Appeal No. 76 of 1996), Lord Hutton gave express guidance on the approach a trial judge should take to an unsworn statement by an accused person in this jurisdiction. He said:

> "In directing the jury in respect of the appellant's statement from the dock the trial judge should have directed them in accordance with the guidance given by this Board in its judgment in **Director of Public Prosecution v. Walker**, [1974] 1 W.L.R. 1090, 1096E, where Lord Salmon said:
>
> > 'The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight shown be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should give the accused's unsworn statement only such weight as they may think it deserves.'

9. The directions given by the learned trial judge amounted to a complete negation of what the appellant stated in his unsworn statement and in the end the jury were invited to consider only the evidence presented by the prosecution. We therefore found that the appellant had been deprived of the substance of a fair trial. However, having regard to the overall strength of the prosecution's case, in the interest of justice we ordered a new trial.

10. There was evidence from two prosecution witnesses that the appellant appeared to be drunk on the night of the killing. No reference was made during the summing up to the provisions of the Criminal Code that deal

with intoxication. Counsel who appeared at trial could have provided greater assistance to the Court by calling attention to the decision in **Pasqual Bull v The** Queen (Criminal Appeal No. 10 of 1994) and to section 27 of the Criminal Code.