IN THE COURT OF APPEAL OF BELIZE, A.D. 2008

CRIMINAL APPEAL NO. 31 OF 2005

BETWEEN:

HARVEY LEE HENDERSON **Appellant**

AND

THE QUEEN **Respondent**

—

BEFORE:

The Hon. Mr. Justice Mottley - President
The Hon. Mr. Justice Carey - Justice of Appeal
The Hon. Mr. Justice Morrison - Justice of Appeal

Mr. Ernest Staine for appellant.
Ms. Cheryl-Lynn Branker-Taitt, Deputy Director of Public Prosecutions for respondent.

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25 October 2007 and 13 March 2008.

CAREY, JA

1. On the evening of 11 January 2004, two persons who gave evidence on behalf of the prosecution, saw the appellant chop Alfredo Santos on Corozo Street in the town of Corozal, inflicting injuries from which he died. At his trial between 3 and 11 November 2005 in the Northern District before Lucas J and a jury the

appellant was convicted on an indictment charging murder and sentenced to imprisonment for life. We heard his appeal against conviction and sentence on 25 October, which we dismissed promising our reasons which follow hereunder.

2. The case for the prosecution fell within a very narrow compass indeed and we are at a loss to understand why the trial extended over the period it did. We would observe by way of explanation that a number of witnesses were called whose contribution to the furtherance of the prosecution case was altogether minimal. On 11 January 2004, Enrique Martinez and Martin Armstrong said they saw the appellant whom they knew chop Alfonso Santos with a machete. The medical evidence disclosed that he had suffered the following injuries:

> 3 inch blunt wound on the right lateral area of the forehead:
>
> 8 inch blunt wound on the left occipital temporal area, discovering bones of the area:
>
> Two 5 inch lined abrasions on the left upper back
>
> The doctor explained "blunt wound" as an injury produced by a blunt and cutting instrument.
>
> A fracture on the left parietal temporal bone, lineal type. The fracture extended from the parietal, the temporal up to the frontal bone:
>
> Brain appears with subarachnoid haemorrhage.

The cause of death was traumatic shock as a consequence of blunt injuries to the head and the doctor suggested that the injuries were consistent with infliction by a machete. A witness for the prosecution, Jason Quan, gave evidence that he heard the appellant bragging that he had chopped a man at about 5:00 p.m. on 11 January 2004.

3. The appellant made an unsworn statement in which he said that he had consumed a great deal of strong liquor beginning in the morning and continuing into the afternoon and he had not eaten. He became quite drunk – "I was block

up". He had no recollection of what went on that afternoon. He called three witnesses, Roque Gonzalez, a friend, who confirmed that himself and the appellant consumed approximately five quarts of brandy between 9:00 am and 4:00 pm that evening, Desiree Hyde, a one time common-law wife of Roque and Ruben Riverol, an uncle of the appellant. He was called to speak to his nephew's good character. He said he was a "well-behaved boy".

4. The grounds of appeal filed on behalf of the appellant were these:-

"The learned trial judge erred –

(a) in omitting to advert to all possible defences to be considered by the jury;

(b) in failing to put the case of the accused adequately to the jury.

In his written submission, counsel for the appellant was critical of the fact that the trial judge had left neither temporary insanity nor automatism to the jury for its consideration in light of his duty to leave all possible defences for the jury's consideration. When pressed in the course of oral argument, he confined the judge's failure simply to automatism. Counsel did not deal with the defence of temporary insanity which he had optimistically advanced in his skeleton arguments.

5. In the opinion of this court, no issue of temporary insanity or automatism arose on the facts of this case. The entire defence was directed at demonstrating that the appellant had consumed a considerable quantity of alcohol over a period during which time he had not had a meal. In a word, he was drunk. There was no suggestion at the trial that the appellant was insane within section 26 of The Criminal Code, which provides as follows:-

"A person accused of crime shall be deemed to have been insane at the time he committed the act in respect of which he is accused

(a) if he was prevented by reason of idiocy, imbecility or any mental derangement or disease affecting the mind, from knowing the nature or consequences of the act in respect of which he is accused;
(b) if he did the act in respect of which he is accused under the influence of a delusion of such a nature as to render him, in the opinion of the jury, an unfit subject for punishment of any kind in respect of such act.

We do not doubt that the evidence of drunkenness adduced on his behalf was for the purpose of determining whether [the appellant] had formed the specific intention required in a case of murder (section 27(3) of The Criminal Code). We are not to be taken as minimizing, in any shape or form, the importance of the duty of a trial judge to place before a jury whatever defences fairly arise on the facts in a case before him. It is no excuse that the defence was not expressly raised because as is well known, counsel for the defence for strategic reasons may choose not to do so or through negligence fail to put it forward. However, a failure on the part of a trial judge to discharge this obligation constitutes a miscarriage of justice. See for example *Bullard v. R [1961] 3 ALL ER*. In such cases, an appellate court would quash the conviction and substitute a verdict of manslaughter.

6. The duty of which we speak, can only arise where there is a factual basis in the circumstance of the case. In the present case, the only factual basis to which the involuntary act (from the defence perspective) can be ascribed is the appellant's condition of drunkenness.

In our judgment, where that is the situation, then only drunkeness should be left to the jury. We think the law is correctly stated in *Bratty v. Attorney General for Northern Ireland [1961] U.K. HL 3* in the speech of Lord Denning who said:-

> "…When the only cause that is assigned for an involuntary act is drunkenness, then it is only necessary to leave drunkenness to the jury with the consequential directions, and not to leave automatism at all (Emphasis supplied). When the only cause that is assigned for it is a disease of the mind, then it is only necessary to leave insanity and not automatism…"

As long ago as 1958 in *Hill v. Baxter [1958] 1 QB 277* Devlin J (as he then was) stated that "automatism ought not to be considered at all until the defence has produced at least prima facie evidence". In the instant case, there was no basis, no foundation whatever for saying that automatism arose when no medical evidence was adduced by the appellant on whom the burden lay. The burden is not discharged by the appellant in his dock statement, asserting that he has no recollection of the events.

7. The defence explicitly put forward drunkenness as a defence. The trial judge was at pains to deal with that issue over many pages of the transcript. The complaint of the appellant is that he did not deal with the issue adequately, not that there was a misdirection in that regard. A curious feature of the summing up, was that the trial judge invited not only counsel for the prosecution and defence to advise whether he had omitted any matter of law in his directions, but also required the jury to discuss among themselves "what is not clear to you where the evidence is concerned and what is not clear to you where the law is concerned, [so that he could assist them]. The Foreman of the jury responded -

> "Just to clear up the law on intoxication, my Lord".

The judge gave the following directions at (p. 384):

> "Okay. Thank you. We begin with that the accused because at times the Crown will not know what is the defence until the

day of the trial or when they hear the accused. So the accused having brought up the issue or let's put it, the defence having brought up the issue of intoxication he has no burden to prove that he was intoxicated. He don't have to bring evidence the issue of intoxication he has no burden to prove that he was intoxicated. He don't have to bring evidence then to prove beyond a reasonable doubt that he was intoxicated that he could not form the intent. Our system is that he having brought up that issue, he having brought it to your notice about intoxication along with the witness that he brought the burden is on the Crown to prove beyond a reasonable doubt that he was not intoxicated, that he was capable of forming an intention to kill. Or even if he were intoxicated he had the capacity and indeed form the intention to kill that is the burden of the Crown. I'm going further now, if you found that he was intoxicated and as a result he could not form an intention to kill you find him not guilty of murder and guilty of manslaughter. If you have a reasonable doubt on that point that means you are not sure, that means the Crown has not negative, that means the Crown has not proven to you that even if he were intoxicated that he form an intent to kill you must resolve that in his favour. That is his benefit. Then you could find him not guilty of murder but guilty of manslaughter. I go further again. If you found that he was not intoxicated but you are not sure of you have a reasonable doubt about the intention to kill Alfonso Santos you are to find him not guilty of murder but guilty of manslaughter. The only way you are to find him guilty of murder that you are sure whether intoxicated or not that he formed the intent to kill and in forming the intention to kill he chopped or inflicted those injuries to Alfonso Santos.

So intention to kill is the key element the Crown must prove to you whether he was intoxicated or not. The defence just bring up to you about intoxication to tell you that because of intoxicating state he could not form that intention to kill. And they are saying, which is true, I am throwing it out to the Crown to prove otherwise. And they must prove that beyond a reasonable doubt. That otherwise mean that he was not intoxicated or if he was intoxicated he formed the intention to kill when he was chopping up or before he was chopping Alfonso Santos. If I am not clear on that I can stay right here and repeat because serious this is my duty for you and it is for you to ask the question. I can repeat it if you care to. Just ask the jurors if they are clear.

THE FOREMAN: It is clear."

The only criticism which we consider might justifiably be leveled at this exposition by the trial judge is the infelicity of language. However we do not think it can fairly be said that the jury would fail to understand that the appellant's intoxication was relevant to the issue of intent to kill, and it was for them to determine whether he was so drunk, as to be incapable of forming that intention. The trial judge said what was necessary to make that position clear to them. They went to the jury room with his exposition fresh and ringing in their ears.

8. In the result, we are not persuaded that any of the parts of the ground have merit, and we reject them.

MOTTLEY P

CAREY JA

MORRISON JA