IN THE COURT OF APPEAL OF BELIZE, A.D. 2009

CRIMINAL APPEAL NO. 11 of 2009

BETWEEN:

TIFFARA SMITH	**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. Simeon Sampson SC for the appellant.
Ms. Cheryl-Lynn Branker-Taitt, Director of Public Prosecution (Acting) for the respondent.

16, 30 October 2009 and 19 March 2010.

MOTTLEY P

[1] On 9 July 2009, after a trial before Lord J and a jury the appellant was convicted of the offence of murder. The indictment alleged that on 5 April 2007 at Corozal Town she murdered Dale Lino. On 29 July she was sentenced to a term of life imprisonment.

[2] At the conclusion of the appeal, we allowed the appeal, quashed the conviction and sentence and, in the interest of justice, ordered a new trial. At that time, we promised to put into writing our reasons for so doing. These are

those reasons. In these circumstances, we refrain from commenting on the evidence except insofar as is necessary for the purposes of the judgment.

[3] In her ground of appeal the appellant set out five grounds. In ground 4 the appellant alleged that the judge had misdirected the jury when he was dealing with self-defence. The judge told the jury that "it is good law and good sense that a person who is attacked or believe that he is about to be attacked may use such force as is reasonably necessary to defend himself". The judge went on to point out that "a person only acts in lawful self defence if in all the circumstances she believes it necessary for her to defend herself".

[4] The judge then went on to tell the jury about the amount of force an accused could use in defending himself. He said:

> "And the amount of force which she uses in doing so must be reasonable. Please note however in this case she is using a knife when the deceased was unarmed this is excessive force and may take away the defence from the accused."

[5] By characterizing the use of a knife by the appellant in circumstances where the deceased was unarmed as excessive force the judge had determined the very issue which the jury had to determine.

[6] The issue which the jury had to determine was whether the force used by the appellant was "reasonable in the circumstances as the accused believed them to be whether reasonable or not" (see Smith & Hogan Criminal Law 9th Edition (1999) at page 253).

[7] The issue of whether the force used was reasonable was an issue of fact for the jury to determine having regard to all the circumstances. Even if the judge intended to express his opinion on the use of the knife by the appellant against

an unarmed man , he ought nonetheless to have left the jury in no doubt that it was for their determination and not his.

[8] In **Mears (Byfield) v R, 97 Cr. App. R. 239 PC** the appellant had been charged with the murder of a youth called Adrian Brown. The prosecution case depended entirely on the evidence of one Sonia with whom he had previously lived as his wife. She stated that he had confessed to her that he had killed Adrian. The defendant gave evidence on oath in which he denied making the confession. The issue for the jury to determine was whether they could be sure that Sonia was speaking the truth when she said the appellant had made a confession to her. In the summing up the judge told the jury:

> "He says she is not to be believed, because she had fabricated the whole thing, and this is a comment I make again. I recoil to think that any human being could be so degenerate, so wicked that they would concoct a story like this, especially a woman who has borne from her womb a child for a man. I am not saying, but to me it is inconceivable that a human being could do this, just to settle a score."

The judge then went on to remind the jury that they "are the judges of the fact, it is a comment I am making".

[9] Lord Lane giving the judgment of the Board said:

> "The Court of Appeal took the view that the trial judge was not putting forward an unfair or unbalanced picture of the facts as he saw them. In rejecting the appellant's submission that the comments of the judge were unfairly weighted against him, the court asked themselves whether the comments amounted to a usurpation of the jury's function. In the view of their lordships it is difficult to see how a judge can usurp the jury's function short of

withdrawing in terms an issue from the jury's consideration. In other words, this was to use a test which by present-day standards is too favourable to the prosecution. Comments which fall short of such a usurpation may nevertheless be so weighted against the defendant at trial as to leave the jury little choice other than to comply with what are obviously the judge's views or wishes. As Lloyd L J observed in R v Gilbey (1990) (unreported):

> 'A judge….is not entitled to comment in such a way as to make the summing-up as a whole unbalanced….it cannot be said too often or too strongly that a summing-up which is fundamentally unbalanced is not saved by the continued repetition of the phrase that it is a matter for the jury.'

[10] Lord Lane went on to point out that:

> "….if the system is trial by jury then the decision must be of the jury and not of the judge using the jury as something akin to a vehicle for his own use."

[11] The defendant relied on the defence of self-defence. As indicated earlier, one of the essential matters which the jury had to determine was whether the force used by the defendant in defence of herself in the face of the conduct by the deceased was reasonable having regard to all the circumstances.

[12] In telling the jury that the use of the knife by the appellant against the unarmed deceased was excessive force, the judge made the summing up fundamentally unbalanced. Taking the summing up as a whole, it is difficult to conceive how in the light the statement from the judge, the defence of self defence could properly have been considered by the jury. A fair trial required that, the issue of self defence be determined by the jury without being told by the

judge that the force used by the defendant was excessive as the deceased was unarmed and the defendant was armed with a knife.

[13] Later, the judge told the jury:

> "If the prosecution has not made you sure that the accused did not stab Dale Lino in the belief that it was necessary to defend herself then self defence does not arise here and the defendant is to be found guilty."

To state that the sentence is unclear is to state the obvious. The jury could not have derived much assistance, if any ,from such a direction. It is useful to remind judges of what was said by Lord Bingham of Cornhill in Norman Shaw v The Queen Privy Council decision 24 May 2001 about the role of the trial judge when summing up in a case of self-defence. The learned Law Lord said:

> "19. In the opinion of the Board it was necessary for the trial judge to pose two essential questions (however expressed the jury's consideration):
>
> (1) Did the appellant honestly believe or may honestly have believed that it was necessary to defend himself?
>
> (2) If so, and taking all the circumstances and danger as the appellant honestly believed them to be, was the amount of force which he used reasonable?
>
> 20…Self defence was the crux of the appellant's defence to these very grave charges. The rudiment of that defence should have been stated in clear and simple terms which left no room for doubt."

[14] It cannot be said that, in directing the jury as is set out above, the judge stated the rudiments of self defence "in clear and simple term which left no room for doubt".

[15] Later, the judge reminded the jury that there was no burden on the appellant to prove that she was acting in self-defence. The judge continued:

> "She has given an explanation as she is entitled to do, if you find you cannot accept the prosecution's case or you have any doubt about it, then you should give her explanation which is self defence the benefit of the doubt and find her not guilty."

[16] This is a serious misdirection. It is in effect reversing the burden of proof. Clearly, if the jury could not accept the prosecution's case, or had any doubt, that the appellant was not acting in self-defence then that was the end of the case and the jury ought to have been told that in these circumstances they would have to return a verdict of not guilty. There would be no need to go on to consider any explanation given by the appellant.

[17] These matters are sufficient to dispose of this appeal. Nonetheless, the Court considers that it is necessary to comment on two other issues arising out of the summing up. At the commencement of the summing up the judge told the jury:

> "If after you consider all the evidence in this case, you feel sure that the defendant is guilty then your verdict must be guilty. If you are not sure, then your verdict must be not guilty. You must bear in mind that you must consider the case against, and for the defendant separately in arriving at your verdict. The evidence may be different and therefore your verdict need not be the same" .

[18] This direction may be appropriate where two or more persons are charged together with criminal offences. It has no place where a single defendant is on trial. Such a direction could unnecessarily confuse the jury and certainly could not help then in determining the guilt of the defendant. In any event it is a misdirection to tell the jury that they must consider "the case against and for the

defendant separately ". That certainly is not the duty of the jury . It is their duty to consider all the evidence before coming to their verdict.

[19] The final issue upon which the court will comment is the directions given by the judge in relation to the possible verdict. The judge told the jury:

> "The possible verdicts you may come to are-
>
> (1) A verdict of guilty of murder;
>
> i. Or a verdict of guilty of manslaughter by reason of lack of intention to kill;
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> (2) Or guilty of manslaughter by reason of extreme provocation;
>
> (3) Or guilty of manslaughter by reason of immediate terror of death or grievous bodily harm;
>
> (4) You may return a verdict of not guilty in respect to the charge, or any of the other verdict I have earlier allude to;
>
> (5) Not guilty by reason of self defence."

[20] This Court recently had occasion to comment on leaving verdicts to the jury in this fashion. The Court reiterates what is said at paragraphs 18, 19 and 20 in the judgment in **Carmela Dominga Rax Fernandez aka Yanira Escobar** Criminal Appeal No. 16 of 2008.

MOTTLEY P

SOSA JA

CAREY JA