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

**CRIMINAL APPEAL NO. 10 OF 2007**

**BETWEEN:**

**GARETH JASON JOSEPH** **Appellant**

**AND**

**THE QUEEN** **Respondent**

**BEFORE:**

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

**Mrs. Audrey Matura-Shepherd for the appellant.**
**Ms. Cheryl-Lynn Branker-Taitt and Mr. Cecil Ramirez for the respondent.**

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**3 March, 20 June 2008.**

**MORRISON, JA**

1. At the conclusion of the hearing of this matter on 3 March 2008, the appeal was dismissed and the appellant's conviction and sentence affirmed. These are the promised reasons for this decision.

2. The appellant was convicted on 14 May 2007 of the offence of Dangerous Harm after a trial in the Supreme Court at Belize City before Gonzalez J

and a jury. On 25 May 2007 he was sentenced to 5 years' imprisonment, and this is an appeal from his conviction and sentence.

3. The appellant was charged on an indictment charging him with Attempted Murder and, in the alternative, Dangerous Harm. The case for the prosecution was that at about 8:30 p.m. on 17 April 2006, Mr. Jamie Pook, who was 20 years old, was sitting in the bleachers at a basketball court in his home village of Rancho Dolores, after having played a game of basketball. While there, he saw the appellant, who had been known to him for about 10 years, enter the court, which was lit up by floodlights, and strike up a conversation with "some guys" who were also on the court. Shortly afterwards, Mr. Pook said, the appellant started "coming up the bleachers" towards him, heading straight in his direction and, before he knew it, "he was all up in [Mr. Pook's] face". The appellant then asked Mr. Pook if he remembered him, produced a knife from behind him and stabbed Mr. Pook in his throat, telling him that "he will watch me till I dead". A struggle ensued, during which the appellant "turned the knife around to the butt and start to hit [Mr. Pook] in the face with the butt of the knife repeatedly". The appellant lifted up Mr. Pook and "stomped [him] off the bleachers to the ground".

4. The appellant then drove off in his car and Mr. Pook was in due course taken to Karl Heusner Memorial Hospital, where he was admitted and remained in all for 4 – 5 days receiving treatment. He required emergency surgery for an injury which, according to the doctor who gave evidence for the prosecution, "penetrated deep within the structures of the neck', and which was by its nature life threatening. This injury was classified by the doctor as Dangerous Harm.

5. No real motive was established on the prosecution's case for this attack, though, for whatever it was worth, Mr. Pook did give some evidence of an

"incident … a day or night before this incident", in which the appellant, who, according to Mr. Pook, "was under the influence of alcohol", had asked him, again without apparent provocation, if he wanted him "to buss [his] face open". In response, Mr. Pook had told the appellant that he should "go ahead and satisfy his mind if that is what he desire", whereupon the appellant "just walked away".

6. After an unsuccessful no-case submission, the appellant gave sworn evidence, in which he stated that it was Mr. Pook who had first attacked him at the basketball court, armed with both a gun and a knife. It was during the ensuing struggle between them, he said, that he had wrested control of the knife from Mr. Pook, "turned it around and hit him with the handle three or four times in his head". After the struggle, Mr. Pook fell to the ground, after which, the appellant insisted, he inflicted no injury to Mr. Pook. That was his defence.

7. On this evidence, the jury returned a verdict of not guilty of attempted murder, but guilty on the alternative count of dangerous harm. The learned trial judge heard evidence from two witnesses as to character on behalf of the appellant, and submissions from his counsel in mitigation. Gonzalez J, having taken all the material placed before him on sentence into account, and having reminded himself of the maximum sentence provided for in the Criminal Code for the offence of which the appellant had been convicted (20 years), considered that in all the circumstances of the case "a custodial sentence of five years, or a quarter of the maximum sentence, is a just and proper sentence to impose … in the circumstances".

8. Mrs. Matura-Shepherd filed, and was given leave to argue, some six grounds on the appellant's behalf. These were the grounds of appeal:

"(1) The failure by the prosecution to disclose evidence of Dr. Jose Moguel was prejudicial to the case of the defendant and amounted to a miscarriage of justice;

(2) The Learned trial judge should have exercised his discretion and excluded the evidence for which there had been no disclosure on the common law principle of natural justice and his constitutional right to a fair trial, despite the fact that the defence attorney did not ask for an adjournment;

(3) The judge should not have admitted prejudicial evidence of no probative value at trial and after such evidence was before the jury he should have given a direction to the jury to remove that from their minds;

(4) The learned trial judge failed to give a Turnbull direction, which was required in light of the defence of the accused and the identification evidence of the prosecution; (this ground was abandoned)

(5) The learned trial judge should have pointed out key inconsistencies in the evidence of the witness for the prosecution;

(6) That the sentence of five years was unduly harsh and not in keeping with the past sentencing trends."

Grounds 1 & 2

9. These grounds were argued together by Mrs. Matura-Shepherd. It appears from the transcript of the proceedings at the trial that the defence had been served with a medico-legal report signed by one Dr. Ortega. However, when the prosecution came to adduce medical evidence at the trial, the person whom Crown counsel indicated that she wished to call was a Dr. Jose Moguel, Crown counsel pointing out that, although the medico-legal report was signed by Dr. Ortega, the person listed in the document as the surgeon who had performed surgery on Mr. Pook was in fact Dr. Moguel. In response to the trial judge's direct enquiry, Crown counsel confirmed that there was no separate deposition from Dr. Moguel.

10. Up to this point, no objection to Dr. Moguel giving evidence appears to have been taken by Mr. Hubert Elrington, who appeared for the appellant in the court below, but the following exchange then ensued:

> "THE COURT: Well, he must have a deposition once you record a statement from him and then give it to him and then provide the court with notice of additional evidence, he will be here, because he is not one of the witnesses to testify, and there is a medical report here for Jamie Pook Pook (sic) and that is the one signed by Dr. Ortega but that's as far as you can go. But if Mr. Elrington wants to forgo the niceties of the procedure, I have no problem. There should be notice of additional evidence given, yuh know? But as I said if he wants to –
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> MR. ELRINGTON: My Lord –
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> THE COURT: Cause you don't know what the doctor will say.
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> MR. ELRINGTON: Let them go ahead, My Lord. I will not be raising any objection."

11. There was no further discussion on the matter and Dr. Moguel proceeded to give evidence as an expert witness (again, without objection) and was cross-examined by Mr. Elrington briefly, albeit in some detail.

12. Against this background, Mrs. Matura-Shepherd submitted that the prosecution's duty of disclosure at common law was continuous, that Dr. Moguel's evidence was clearly material to the case in that it was he who classified the offence as dangerous harm and should have been disclosed to the defence before the trial in order to provide the defence with a basis to challenge the doctor's evidence. Mrs. Matura-Shepherd also complained that "evidence of the identity of Jamie Pook was elicited from Dr. Moguel through a leading question from the prosecution". Finally on this point, faced with the obvious comment that Mr. Elrington had made no objection to Dr. Moguel's evidence, Mrs. Matura-Shepherd submitted that this was an "error" on his part which "should not be used against the appellant who is not learned in the law".

13. Ms. Branker-Taitt pointed out in response to these grounds that the defence had been well aware of the doctor's name and that it was intended that he should give evidence for the prosecution, because of the fact that his name, which was mentioned in the medico-legal report, also appeared on the back of the indictment. It is no doubt for this reason, she said, that Mr. Elrington, who was experienced counsel, did not object, as he had not in fact been taken by surprise. Ms. Branker-Taitt also drew the court's attention to section 108 of the Indictable Procedure Act, which is in the following terms:

> "108. If the court is of opinion that the accused person is taken by surprise, in a manner likely to be prejudicial to his defence, by the production on behalf of the Crown of a witness who has not made any deposition, and of the intention to produce whom the accused has not had sufficient notice, or if the court is of opinion that the Crown is entitled to produce rebutting evidence, the court may, on the application of the accused person, or of the Director of

Public Prosecutions, as the case may be, adjourn the further trial of the cause, or discharge the jury from giving a verdict and postpone the trial."

14. Section 108 provides statutory confirmation, in our view, of what would in any event be the appropriate judicial response in the circumstances it describes. Even without reference to this provision, we have no doubt that if there had been any indication to Gonzalez J that the defense was embarrassed in any way by the "late" appearance of Dr. Moguel, the learned judge would have exercised his discretion in a manner that would have ensured that there was no unfairness to the accused. Indeed, this is what the judge was clearly intimating in the extract from the transcript set out at paragraph 10 above. However, in the face of Mr. Elrington's unequivocal and obviously considered statement that he did not propose to object to the evidence, we have been quite unable to discern what possible basis there could be in these circumstances for a challenge to that evidence at this stage on the basis of the prosecution's continuing duty of disclosure.

15. In any event, not even a hint of prejudice to the appellant has been demonstrated to this court by Mrs. Matura-Shepherd, despite her best efforts. The subsidiary complaint that "evidence of the identity of Jamie Pook was elicited from Dr. Moguel through a leading question" was plainly misconceived since it is difficult to see what possible relevance the "identity" of Mr. Pook, who was the complainant, might bear to the case as a whole. In our view, grounds 1 and 2 cannot therefore succeed.

Ground 3

16. This ground raises the question of what counsel described as "prejudicial evidence" which was admitted at the trial and in respect of which the trial

judge made no comment. The evidence complained of is Mr. Pook's evidence of his brief earlier encounter with the appellant described at paragraph 5 above. Mrs. Matura-Shepherd complained that the trial judge ought to have intervened "to ensure that nothing prejudicial was said", and that he ought in any event to have told the jury to disregard the statement that the appellant was under the influence of alcohol. She submitted that this evidence "must have weighed heavily against [the appellant] by painting him as an outright aggressor" who had a day or two before threatened Mr. Pook by offering to "buss his face". The prejudice was, she submitted further, "compounded" by the evidence of the appellant having been under the influence of alcohol, which "did not paint a positive picture of him". She referred us to the decisions of the Judicial Committee in **Arthurton v R** (Privy Council Appeal No. 67 of 2003, judgment delivered 22 May 2004) and of this court in **Albino Garcia Jr. v R** (Criminal Appeal No. 24 of 2004, judgment delivered 24 June 2005), and concluded that the appellant had been deprived of a fair trial as a result of the prejudicial evidence.

17. Ms. Branker-Taitt submitted, on the other hand, that this evidence was probative of the prosecution's case by "putting in context the frame of mind of the appellant at the relevant time". It is permissible, she said, for the prosecution to lead evidence to explain the conduct of the appellant and this evidence showed that there was enmity between the parties and showed a pattern of behaviour.

18. We should say at once that what is complained of in this ground of appeal bears not the slightest resemblance to what took place in **Albino Garcia v R**. In that case, Crown counsel, with encouragement from the trial judge, elicited by a direct question evidence from the complainant in a sexual case, under examination in chief, of an alleged admission by the accused of previous criminal conduct similar to that for which he was charged,

involving the complainant's sister. The conduct of both crown counsel and the judge was stigmatized in the strongest terms by Carey JA as "appalling and egregious" (at paragraph 7), amounting to "a material irregularity of such a nature as to affect the fairness of the trial" (paragraph 16).

19. In the instant case, while we accept that the trial judge might have warned the jury as to the very limited effect that the evidence complained of could have, that is, to contextualize the attack on Mr. Pook, as Ms. Branker-Taitt submitted, it remained essentially a matter for his discretion. Apart from attempting to suppress the witness's reference to the appellant having been under the influence of alcohol (much too late, as it turned out, as the statement had already been made), the judge obviously decided to let the matter rest there, as he was entitled to do, and we are unable to conclude in the circumstances of this case that there was any potential or actual unfairness to the appellant as a result. The only real issue in the case at the end of the day revolved around the contest of credibility between Mr. Pook's and the appellant's evidence, which the jury by its verdict resolved against the appellant, a conclusion which the medical evidence, as the only independent evidence in the case, clearly entitled them to reach.

20. As Rowe P observed of the evidence in **Charlesworth v R** (Criminal Appeal No. 9 of 2001, judgment delivered 8 March 2002), to which Mrs. Matura-Shepherd was referred by the court during the argument in this case, "the evidence in this case was so overwhelming, that a reasonable jury, properly directed … would inevitably have convicted the appellant" (paragraph 38). This ground of appeal accordingly fails.

Ground 5

21. Mrs. Matura-Shepherd submitted that the learned trial judge "totally failed to give a direction on inconsistencies to the jury thus not affording the accused a fair trial". However, the judge did give a full direction to the jury on the subject of such inconsistencies as there might have been in the following passage of his summing up:

> "Now before I review the evidence for the defence, let me tell you that in this case, Members of the Jury, if you were to find any discrepancies, or if you were to find any inconsistencies with the evidence of the witnesses, it is a matter that you will have to deal with. It may, Members of the Jury, having seen any inconsistencies or discrepancies in the evidence reject that particular portion of the evidence or the whole of it. Remember I told you from the beginning, it's for you to decide which evidence you will accept, what evidence you may reject, you may accept all, you may accept or reject all or some of it. So, in this particular case, if you were to find inconsistencies in the evidence, and it's of a nature that makes you want to doubt the credibility of the accused person, if it's on that point alone, you could disregard that evidence. But if you find that because of those discrepancies you don't want to accept the total evidence, the whole evidence of the witness, then, Members of the Jury, you are free to do that. That is a matter for you as judges of the facts. At the end of the day you have seen the witnesses testified (sic), you have heard the evidence, and it's for you to decide which witness told you the truth, despite any inconsistencies or discrepancies you may have seen."

22. In our view, this direction was entirely adequate in the circumstances of the case and this ground of appeal must also fail as well.

Ground 6

23. By this ground the appellant complained that the sentence of 5 years' imprisonment which he was given was "unduly harsh and is not in keeping with the past sentencing trends". On the evidence, which the jury accepted, this was a wholly unprovoked and particularly vicious attack, which resulted in a life threatening injury to Mr. Pook. The learned trial judge clearly took into consideration all the evidence and other material which was placed before him in mitigation, including the fact that the appellant had no previous convictions. After balancing all the factors, Gonzalez J concluded that "a custodial sentence of five years, or a quarter of the maximum sentence, is a just and proper sentence to impose upon you in the circumstances". We see no basis for disturbing the conclusion of the learned trial judge that 5 years' imprisonment was the appropriate sentence in this case.

24. It is for these reasons that this appeal was disposed of in the manner set out at paragraph 1 of this judgment.

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**MOTTLEY, P**

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**SOSA, JA**

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**MORRISON, JA**