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

CRIMINAL APPEAL NO. 10 of 2008

BETWEEN:

CARMELA DOMINGA RAX FERNANDEZ **Appellant**

AND

THE QUEEN **Respondent**

BEFORE:

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

Leo Bradley for the appellant.
Ms. Cheryl-Lynn Branker-Taitt, Director of Public Prosecution (Ag.) for the respondent.

11, 19 June; 30 October 2009.

MOTTLEY P

[1] On 19 June 2009 we allowed the appellant's appeal and ordered a retrial on the offence of manslaughter. At that time, we promised to put our reasons for so doing into writing. These are those reasons. Because of the order which the Court made, we will refrain from commenting on the facts of the case except in so far as is necessary. This judgment will deal only with the ground upon which the appeal was allowed, viz – that the judge failed to adequately leave the defence of accident to the jury..

[2] The appellant had been indicted for the offence of murder. The indictment alleged that, on 4 July 2005, she murdered Yesenia Judith Salguero. After a trial before Lord J and jury, she was acquitted of murder but convicted of manslaughter and was sentenced to a term of imprisonment of 15 years. It was from that conviction that she appealed.

[3] Crown counsel sought the court's permission to admit the cautioned statement of the appellant. Following a voir dire, the statement was admitted into evidence. This statement disclosed that, after an incident in King's Lounge which involved name calling, the appellant came out of the Lounge, the deceased followed her outside. She said that the deceased:

> "..took hold of a pint of rum and threw the rum on me, after that she broke the bottle and the three of them advanced towards me, after that it was that I took our a dagger, there I then stabbed her, but it was not my intention and I only wanted to frightened (sic) her and after it occurred that I had stabbed her."

In addition to the cautioned statement of the appellant, the prosecution case showed that on 3 July 2005, an incident occurred at King's Lounge, Cayo. During this incident, words were exchanged between the appellant and one Norma, who appeared to be drunk. Jessica, the deceased, went outside and was pushing the appellant into a car. As the time, the appellant had a knife in her hand. When Jessica stepped back from the car Jessica had an injury from which she was bleeding. She subsequently died.

[4] The appellant made an unsworn statement from the dock. The relevant portions of that statement were:

> "….then I heard a bottle was broken Jessica grab my hair and pull me down I was so afraid I took out the knife only to frighten then, when Jessica grabbed my hair to pull me down it was when I started pushing her so she could let (sic) my hair go….."

> "After Jessica held me by my hair I took out the knife but I just wanted to frighten her then I tried pushing her so she could let go my hair….."

[5] Such was the state of the evidence emanating from the cautioned statement and the unsworn statement of the appellant. It is clear that, on one version of the evidence, it was open to the jury to conclude that the appellant only intended to frighten Jessica in order to cause her to release her hair and to prevent any further attack on her person and as a result of arming herself, Jessica accidentally received the injury as a result of which she died.

[6] At the end of his summation, the judge inquired of the Director of Public Prosecutions whether she wished to draw to his attention to any important point with which he had omitted to deal in his summation. Following this invitation, the judge directed the jury as follows:

> "The defence has also raised the defence of accident, she is saying I did not stab her it was an accident, it occurred as an accident and I begin by saying that it is for the Crown to negative the issue of accident and the Crown is saying I have done that. The Crown must disprove the issue to make you feel sure beyond a reasonable doubt that the death of Jessica in this case was not a killing by accident. Therefore if you accept the explanation the defendant has made the way the purported incident occurred, she is saying I did not intend to hurt the girl, I was pushing her, I did not stab it was an accident she was killed, therefore the defence explanation, if that explanation leave you in any doubt that it was an accident then you must acquit her.
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> However if you do not accept her defence of accident then she must be found guilty as charged but it is left to you to decide whether it was an accident or whether she intended to do what arose in this case. And the crown has said no we have negative

> that issue, we have proven the issue of accident beyond a reasonable doubt, then if you are satisfied that the crown has proven the issue of accident beyond a reasonable doubt by saying no it was not an accident you will convict the accused of murder, so long as you are sure that the Crown has proven that to you."

[7] It was the duty of the judge to identify the defence and to direct the jury on it and to place it properly before the jury. At no stage in the summation on accident did the judge explain to the jury what was meant by accident. In **R v Bailey (1991)** unreported Carey J.A. in delivering the judgment of the Court of Appeal of Jamaica said in relation to the issue of accident:

> "…..but having identified the defence as accident, he (the learned trial judge) was in our judgment bound to explain the meaning of accident. No directions in this regard were given to the jury. He would have had to tell the jury that the killing which occurred in the course of a lawful act and without negligence is accident which they had to have in mind. It plainly was not the jury's laymen view of accident which mattered."

In **Edward Reyes v The Queen**, Criminal Appeal No. 11 of 2006 this Court endorsed what was said by Carey J.A. in **R v Bailey**.

[8] The judge ought to have explained to the jury what was meant by the word accident when he spoke of the defence of accident. He should have reminded the jury of the evidence upon which it could be said that the defence of accident arose.

[9] In telling the jury that, if they did not accept the defence of accident, the appellant must be found guilty as charged, the judge misdirected the jury on how they were to approach their task if they rejected the defence of accident. Not satisfied with the content of the direction on what should happened if the jury rejected the defence of accident, the Director again pointed out to the judge what

the jury ought to be told if they rejected the defence version that the killing was as a result of an accident.

[10] The judge then told the jury that they must "only convict on the prosecution's case".

[11] Faced with these conflicting summations on how the jury should approach the evidence if they rejected the defence of accident, the jury must have been confused. Having earlier misdirected the jury, it was the duty of the judge to correct his earlier misdirection.

[12] In **Secundino Garcia v The Queen**, Criminal Appeal No. 16 of 2005, in a judgment dated 22 June 2007, this Court had occasion to state what was the correct procedure to be adopted when the judge was made aware that he had made a mistake in the course of his summation.

Carey JA in giving the judgment of the Court said at paragraph 8:

> "The essential question is whether the corrective action was effective. This point arose **in R v Moon** [1967] 1 WLR 1705 where at the end of the summing-up, counsel drew the judge's attention to a slip in his directions and an attempt was made to correct it. Salmon LJ (as he then was), said at p. 1707:
>
> > "… on the assumption that the fault can be put right, … it can only be put right in the plainest possible terms. It would be necessary for the judge to repeat the direction which he had given, to acknowledge that the direction was quite wrong, to tell the jury to put out of their minds all that they had heard from him, then in clear terms, which would be incapable of being misunderstood, tell them very plainly and simply what the law is …"

We think these words are applicable to the circumstances of this case, and, in our view, correctly represent the legal position. A judge who makes a misdirection of law or misstates the facts, in order to put right the error made, he must:

(a) repeat the wrong direction

(b) acknowledge that it was an error

(c) instruct the jury to put it out of their minds altogether

(d) direct the jury correctly.

These are the conditionalities to be satisfied."

[13] It was the duty of the judge to point out to the jury that he had made a mistake when he told them that if they did not accept her defence of accident the appellant "must be found guilty as charged". The judge ought then to go on and tell them what was the correct position in law. He should have told them that, even if they rejected the defence of accident, that, before convicting, they had to be sure on the prosecution's case that the appellant was guilty. What the judge did amounted to a serious misdirection which prevented the appellant from having a fair trial. We therefore allowed the appeal and ordered a new trial.

[14] We cannot leave this appeal without commenting on the manner in which the verdict of the jury was taken. It is necessary to set out in full what took place:

VERDICT

Q. Mr. Forman, members of the jury have you agreed upon a verdict to the charge of murder?

A. Yes.

Q. Is the verdict unanimous?

A. Yes.

Q. Is the verdict all twelve of you?

A. Yes.

Q. How say you, is the prisoner guilty or not guilty?

A. Not guilty.

Q. Mr. Foreman, members of the jury you said that the prisoner is not guilty, so say you all?

A. Yes.

On the alternative manslaughter

R. Mr. Forman, members of the jury have you agreed upon a verdict of manslaughter?

A. Yes.

Q. Is the verdict unanimous?

A. Yes.

Q. Is the verdict all twelve of you?

A. Yes.

Q. How say you, is the prisoner guilty or not guilty?

A. Not guilty.

Q. So say you all, not guilty?

A. Yes.

THE COURT: All 12 of you are saying not guilty of murder, not guilty of manslaughter?

A. Yes.

MS. BRANKER-TAITT: My Lord, they are saying no.

MR. FOREMAN: They are saying not guilty of murder, not guilty of manslaughter, but guilty of manslaughter by provocation.

THE COURT: You're saying not guilty of manslaughter, now you're saying guilty of manslaughter due to provocation.

MR. FOREMAN: They were saying the fourth option.

MS. BRANKER-TAITT: My Lord, when Your Lordship addressed at the end of the summation, Your Lordship told the jury manslaughter because of, manslaughter because of severe, they chosen manslaughter that they wish to convict of apparently.

THE COURT: I am aware of that.

So you're saying that you've found her not guilty of murder, and not guilty of manslaughter in the alternative, but you've found her guilty of manslaughter by provocation?

MR. FOREMAN: Yes.

THE COURT: Unanimously?

MR. FOREMAN: 9 to 3.

THE COURT: Then we cannot accept that verdict.

It has to be 10 to 2 or 11 to 1.

You may retire again if you so wish to decide over and to make a decision on the matter and we can give you time or if you wish me to go into some thing or some part of the law which you may not be familiar with which may not have been cognizant to you, you wish to retire and consider that verdict again.

Let me read it to you, then you'll understand what am saying, after 4 hours you may consider a verdict in a proportion to 11 to 1 or 10 to 2 and that verdict when so delivered shall have the same affect as the whole jury had concurred therein to if it is 11 to 1 that means one is dissenting the verdict is accepted, if it is 10 to 2 the verdict is accepted, but 9 to 3 the verdict would not be accepted, so if you wish the court can give you

more time to go back and to decide in the proportion that is needed, do you wish for that time?

MR. FOREMAN: Yes.

THE COURT: You wish to say something Madam DPP?

MS. BRANKER-TAITT: Mr. Lord, I would just ask that is clarified to the jury that there are only two possible verdict, murder or manslaughter, for whatever reason they want to arrive a verdict of manslaughter it is up to them.

THE COURT: And that is what I am about to clarify to them.

This morning what I gave you were the alternatives, but in reality there are two verdicts you can arrive at, you can arrive at murder or not guilty of murder, and in the alternative you can arrive at manslaughter, you can arrive at manslaughter because of provocation, self-defense does not bring it down, it totally allows her to walk free, but if you're saying

manslaughter by provocation you're saying that you finding her guilty of manslaughter and there is only two verdict, that means you found her not guilty of manslaughter in the alternative but you found her guilty of manslaughter whichever it is, it doesn't matter to us. But if you're telling us now that you're not unanimous in that then and you want to consider it over, then you can consider it because the jury was not risen completely not have I discharged the jury as yet, but it has to be 10 to 2 as I read to you from they jury's act or 11 to 1 but when you come back it would be guilty of manslaughter if you so find her, whether it is by provocation or not would not matter to us. What I did there were several different verdicts that were opened to you, murder, manslaughter, manslaughter when it is provocation, manslaughter when

otherwise, which I went on to or total freedom to which she walks in self defence.

But what I did I gave you the different options, so those were defenses which were presented which created the options, but in reality there are two verdicts, murder or manslaughter, just that there are other options which comes into the picture at that point in time. So if you find her guilty not of the manslaughter alternative you then have to go to manslaughter provocation or you go to self defence and then you decide on those, whether she walks free or not, but there are only two verdicts you will bring, do I make that clear to you all now.

So I will ask the jury to retire once more and take you time, it has to be 10 to 2 or 11 to 1, 9 to 3 would be a

hung jury and would not be accepted.

[15] In order to appreciate just why this confusion arose it is necessary to recall the possible verdicts which were left to the jury by the judge. The judge told the jury:

> "Now you will ask yourselves the questions, what are the possible verdicts that you may give cause there are so many things I've told you maybe a bit confused. Members of the jury the possible verdicts you can choose from is as follows:-
>
> (1) If all the elements are proven and you believe the prosecution has proven its case beyond a reasonable doubt, then you may find the defendant guilty of murder.
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> (2) If not, then you can proceed to the alternative verdict of manslaughter and there you must check to see if all the elements have been proven, also if you are satisfied beyond a reasonable doubt and you find no intention to kill but nevertheless the person died, then you may find the defendant guilty of manslaughter.
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> (3) If you look at the defence of self defence raised by the defence and you accept that this has been proven as explained to you, then you may find the defendant not guilty as self defence is a complete defence in itself, not guilty of everything and she walks free.
>
> (4) If you look at the defence of provocation and you accept that this has been proven as explained to you by me a few minutes ago and as I went through the law with you then you may find the defendant not guilty of murder but guilty of the lesser offence of manslaughter as provocation reduced the charge of murder to the lesser offence of manslaughter."

[16] Having returned the verdict of not guilty of murder, the foreman was then asked if the jury had agreed upon its verdict in respect of manslaughter. The foreman then announced that in respect of manslaughter the jury had found the appellant not guilty. Inquiry was then made of the foreman whether the verdict of manslaughter was unanimous to which he replied yes. Had it not been for the intervention of the Director that would have been the verdict which the Court was going to accept. After the Director intervened to draw to the Court's attention that all was not well with the other members of the jury, the foreman then stated that the jury was saying not guilty of murder but guilty of manslaughter by provocation. This prompted the judge to intervene, telling the jury that you are "saying not guilty of manslaughter, now you are saying guilty of manslaughter due to provocation." To this the foreman informed the judge that the jury was returning their verdict in accordance with the fourth option he had left to then, guilty of manslaughter by provocation.

[17] This is a clear indication that the jury was following the direction given by the judge. This was without any doubt calculated to confuse the jury which it did. In our view, only three verdicts were open to the jury – they could convict the appellant of murder; or they could acquit her of murder but convict her of manslaughter; or they could have found her not guilty of anything.

[18] The judge ought to have directed the jury that manslaughter could arise on the evidence in various ways. He could then point out the various ways in which it could arise. However, the judge should have made it abundantly clear that only three verdicts were possible on the evidence – guilty of murder, not guilty of murder but guilty of manslaughter, or not guilty. Nonetheless, in leaving the case to the jury, it is open to the judge to inform the jury that, if they came to the conclusion that the accused was guilty of manslaughter, they should indicate the basis on which they arrived at their verdict, e.g. manslaughter by reason of provocation or manslaughter due to lack of intent. A verdict given in this way will assist the judge in imposing sentence on the accused. But this is entirely

different from leaving the matter to the jury, telling them that they could return one of the verdicts as specified by the judge in his summing-up.

[19] If having returned a verdict of guilty of manslaughter and the jury not indicating the basis for the decision and if the judge considered that, for the purpose of imposing the appropriate sentence, it was necessary to ascertain the basis on which they reached their verdict, it was open to him to so inquire of the jury. See **Regina v Matheson [1958] 1 WLR 474** and **R v Byrne [2003] 1 Cr. App. R (5) 68**. However, it should be noted that the jury was not obliged to respond to such inquiry.

[20] The taking of the verdict is an essential part of the trial process. It is therefore incumbent on the judge to ensure that the verdict is clear, unambiguous and not misleading. This is part of the judge's responsibility to ensure that an accused person has a fair trial.

MOTTLEY P

SOSA JA

MORRISON JA