

IN THE COURT OF APPEAL OF BELIZE, A.D. 2008
CRIMINAL APPEAL NO. 5 OF 2007

BETWEEN:

BURTON CALIZ

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. Leo Bradley for the appellant.

Mr. Cecil Ramirez for the respondent.

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6, 7 March, 20 June 2008.

MOTTLEY, P.

[1] On 12 February 2004, Leroy Pilgrim, also known as Dan, a fisherman of San Pedro Town, San Pedro, received a gunshot wound as a result of which he died. Following his death, the appellant, Burton Caliz, a police officer, who, at the time of the incident, was on duty, was charged with the offence of manslaughter.

[2] He was convicted and was sentenced to a term of imprisonment of 10 years. It is against the conviction that he has appealed. We earlier allowed his appeal, quashed his conviction and set aside his sentence. The Court ordered a new trial and consequently we will not comment on the evidence except in so far as it is necessary. At the time of allowing the appeal we promised to put our reasons for so doing into writing. These are those reasons.

[3] The indictment presented by the Director of Public Prosecutions contained two counts both charging the appellant with manslaughter. In the first count, the Statement of Crime is manslaughter, contrary to section 116 (1) of the Criminal Code, Cap 101 (the Code). In the Particulars of Crime, it is alleged that the appellant on 12 February 2004 at San Pedro Town “by unlawful harm caused the death of Leroy Pilgrim”. In the second count, which is stated to be in the alternative, the Statement of Crime is stated as manslaughter by negligence contrary to section 116 (2) of the Code. In the Particulars of crime, it is alleged that on 12 February 2004 the appellant caused the death of Leroy Pilgrim by “the negligent use of a firearm”.

[4] Manslaughter is defined in section 116 of the Code. This Section states:
“116 (1) Every person who causes the death of another person by harm is guilty of manslaughter.
(2) If the harm was negligently caused, he is guilty only of manslaughter by negligence.”

[5] In addition to the difference in the elements which constitute the offences under subsections (1) and (2) the punishment on conviction is different. It is the consequence of the conviction that is important for the purposes of this appeal. Provision for the punishment of persons convicted of manslaughter and manslaughter by negligence is made under section 108 which states:-

- (1) Every person who commits manslaughter-
 - (a) by negligence shall be liable to imprisonment for five years;

(b) by any other cause shall be liable for imprisonment for life.

(2) Every person who caused death of another by any careless conduct not amounting to negligence, as defined by the Code shall be guilty of an offence and liable to imprisonment for two years.

[6] For the purposes of this appeal, the significant difference on conviction of manslaughter under Section 108(1) and manslaughter by negligence is the sentence which the Court may impose. On conviction of manslaughter on the first count of the indictment under the section 116 (1) of the Code, the Court is empowered to impose a sentence of life imprisonment (section 108(1)(b)). A conviction under section 116 (2) of the Code, the second count of the indictment, the maximum sentence which the Court may impose is a term of imprisonment not exceeding 5 years (section 108(1)(a)).

[7] After the jury returned to court having completed their deliberation and were about to render their verdict the following exchange took place:

MARSHALL: Mr. Foreman, Members of the Jury, have you agreed upon a verdict in relation to the charge of manslaughter?

FOREMAN: Yes.

MARSHALL: Is your verdict unanimous?

FOREMAN: No.

MARSHALL: In relation to the charge of manslaughter have you agreed in a proportion of 7 to 1?

FOREMAN: Yes.

MARSHALL: They agree in a proportion of 7 to 1.

THE COURT: Yes.

MARSHALL: How say you, is the prisoner guilty or not guilty?

FOREMAN: Guilty.

THE COURT: Yes?

MARSHALL: You say the prisoner is guilty of the crime of manslaughter. Is that the verdict of all of you and so say you all (sic)?

MS. HENRY: No. My Lord, I don't think that is how it would be said.

THE COURT: Yes.

MS. HENRY: It can't be that it will be all of you. It will be all 7 of you.

THE COURT: Yes.

MARSHALL: You say that the prisoner – all 7 of you have said that the prisoner is guilty of the crime of manslaughter?

FOREMAN: Yes, we do.

THE COURT: The 7 of you?

MARSHALL: The 7 of you?

FOREMAN: All 7.

THE COURT: That's a unanimous verdict then.

MS HENRY: No, My Lord, it's not unanimous because it's only 8.

MARSHALL: 7 to 1.

THE COURT: Oh, it is 8, yes.

MS. HENRY: So, 7 is majority.

THE COURT: And so say all of you?

MS. HENRY: Should be all 7 of you.

MARSHALL: So say all 7 of you.

FOREMAN: Yes.

THE COURT: I wouldn't want that later on, Members of the Jury, a complaint that that was not the verdict so we need to get that. It has happened before, you see? 7 for manslaughter?

FOREMAN: 7 for manslaughter.

THE COURT: Yes, that is true? You don't; look too happy and comfortable back there? That is so?

JUROR: Yes.

FOREMAN: Yes.

THE COURT: Okay, very well. Thank you very much, Mr. Foreman, and members of the jury. I think you need to do the allocutus.

MARSHALL: Burton Caliz, the jury have found you guilty for the crime of manslaughter. Have you any matter of law to urge sentence should not be passed upon you?

THE COURT: Yes?

MR. ARNOLD: May it please you, Mr. Lord. My Lord, the defence is asking that you adjourn sentencing to Friday, that is the 2nd, My Lord, the 2nd of February, My Lord.

THE COURT: At 9:00?

MR. ARNOLD: Yes, My Lord.

THE COURT: Okay. Yes, stand up, Burton Caliz. Burton Caliz, the jury of your peers, seven of them, have found you guilty of the crime of manslaughter. It is a verdict which I have to respect and your counsel has urged the court to adjourn the matter for sentence, this case for sentencing to the 2nd of next month at 9:00 in the morning, that is next Friday. May the prisoner be taken away.

[8] On 21 March 2007, when the trial resumed, the judge, after hearing counsel on the question of sentence, imposed a sentence of ten years on the appellant. In passing sentence the judge said:

“And, in this case, I have considered the mitigation factors put before me and other factors and I have come to the conclusion that a sentence of 10 years is appropriate in the circumstances. I therefore sentence Burton Caliz to 10 years imprisonment to take

effect from the day of his conviction, namely, the 29th January, 2007. Sentence accordingly.”

[9] The Record shows that the judge proceeded to sentence the appellant as if he had been convicted of manslaughter under s 108(1). In taking the verdict, it is clear that no attempt was made to put the counts of the indictment separately to the jury. Both counts charged manslaughter even though count 1 was manslaughter and count 2 charged manslaughter by negligence.

[10] In the context of this case where both counts charged manslaughter, it was the duty of the judge to ensure that a proper verdict was returned. The Marshall enquired of the jury whether they had agreed upon a verdict in relation to the charge of manslaughter. This was in effect meaningless as manslaughter was charged in both counts. It cannot be said that in taking the verdict of the jury in this form that the verdict was free from doubt as to which count of the indictment the jury had convicted the appellant. In this case, the correct question which ought to be put to the jury is:

“Mr. Foreman has the jury reached a verdict on which you have all agreed?”

If the answer to this question is yes, then the question to be put to the jury is:

“Mr. Foreman, what is your verdict on count 1 of the indictment?”

If the answer to the question is yes, then the jury is not required to return a verdict on the other count in the indictment which is an alternative count to count 1.

[11] If the answer by the foreman is that the jury cannot reach a verdict on count 1 or that the defendant is not guilty on count 1, then the jury must be asked what is your verdict on count 2.

[12] Generally, on the trial of an indictment which contains more than one count, the foreman of the jury should be asked whether the jury finds the

defendant guilty on any count. If the foreman says “yes” he should then be asked to indicate on which count they wish to convict. The verdict is then taken on that count. The judge should then discharge the jury from giving a verdict on any other count.

[13] The procedure adopted in taking the verdict in this case has led to uncertainty as to which count of the indictment the appellant was being convicted of, given that both counts were for manslaughter.

[14] The verdict of the jury must be taken in such a manner as not to cause any prejudice to the defendant. It is the responsibility of the judge to ensure therefore that the correct procedure is adopted when the verdict of the jury is being taken. This is an important part of the criminal process and no uncertainty should exist as to the true verdict of the jury. Having not adopted the correct procedure the judge assumed that the jury intended to convict the appellant on count 1 of the indictment. In so doing the judge was wrong. He ought to have ascertained on which count of indictment they were convicting the appellant.

[15] It is noted that the judge told the appellant that the jury having found him guilty of the crime of manslaughter and it was a verdict which he had to respect. In passing sentence the judge considered a number of mitigating factors.

[16] However, it is the view of the Court that before accepting the verdict the judge ought to have ensured that there was certainty in respect of the count on which the jury was convicting the appellant. By this failure the appellant was deprived of the benefit of a verdict under count 2 and of being sentenced under Section 108(1) which carried a maximum term of imprisonment of five years.

[17] It was for these reasons that we quashed the conviction and set aside the sentence and ordered a new trial.

MOTTLEY, P

CAREY, JA

MORRISON, JA