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

**CRIMINAL APPEAL NO. 9 OF 2008**

**BETWEEN:**

| | |
|---|---|
| **JOSE MARIA ZETINA** | **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** |

**Simeon Sampson SC for the appellant.**
**Ms. Cheryl-Lynn Branker-Taitt, Acting Director of Public Prosecutions for the Crown.**

**3 & 19 June 2009.**

**CAREY JA:**

1. The appellant, a police officer, was tried and convicted before Lord J and a jury, of the murder of his common-law wife Rosa Mejia, and sentenced to imprisonment for life. He now appeals to this Court against his conviction.

2. We heard submissions on 3 June when we allowed the appeal, quashed the conviction for murder and substituted a verdict of manslaughter. After Mr. Sampson made a plea in mitigation, we imposed a sentence of twenty years' imprisonment. We promised reasons which we set out hereunder.

3. The short facts in support of the prosecution case, are these: on 29 November 2004 at about 6:15 a.m., the police at San Ignacio Police Station received a call regarding an incident at Hillview Area in Santa Elena Town. Three police officers, Constables Wayne Oliver, Alfredo Chavarria and special constable Myvette responded. They were directed to the appellant's house in the Hillview Area. There, the appellant invited Constable Chavarria alone to enter the house. He told the officer that he had just "beat up his girl and he could come in and see because she was in the middle room." The officer did as he was bidden to find a woman clad in a black bikini panty and red blouse, supine on the floor in a pool of blood. There was a shiny metal object stuck in her "left upper chest", as Constable Chavarria described his observations. After the officer left the house, the appellant asked him if his wife was dead. In response to a question from the officer as to the reason for the enquiry, the appellant said that he had stabbed her in the throat due to extreme provocation. The officer arrested and cautioned the appellant. While the appellant was en route to the police station, the appellant further informed Constable Chavarria that he had killed his wife because he caught her with another man, and he did not mind going to prison for twenty-five years so that he could relax his mind.

4. A brother of the victim, Juan Antonio Mejia, who was at the appellant's house on 29 November 2004, gave evidence for the prosecution. He testified that after he rose that morning, both he and his sister greeted each other. Then he overheard a quarrel between his sister and the appellant. The appellant was crying, and saying that if she left him, he would kill himself. Thereafter he heard noises which he described "as if someone pulled out something out of the dishes", the noise came from the appellant's room and there was the sound of a door being slammed. Then his sister called to him to come and talk to the appellant. He, in turn, called to them to stop fighting. He then went outside the house to wash

his face. His sister called him to help her. He ran back in the house but was stopped by the appellant who pushed him out and locked the door. He heard slamming in the house and told the appellant to stop hurting his sister. The appellant, however, cursed him and chased him away. As he was unable to help his sister, he sent for the police. Then, everything became quiet.

5. He saw the appellant open the front door but close it hurriedly, and the returned inside. Shortly thereafter, the police arrived and removed the appellant.

6. The post mortem examination report which appears to have been read into the record although the doctor gave viva voce evidence and is not altogether easy to follow, disclosed that the victim received multiple blunt injuries with slashing-like characteristics on her face,, a bird-nest shaped injury at the base centre area of the front part of the neck. It was explained that the instrument used had been twisted after entry, resulting in the shape described. There was a one inch long wound situated below the left side of the chin, two stab wounds were found on the right side of the right forearm: these were defensive injuries. Further, there were multiple blunt injuries on the left forearm and hand with almost total amputation of the area. These also qualified as defensive injuries. Internal examination of the body, revealed that the stab wound to the neck had penetrated horizontally backwards injuring the vessels in the area of the trachea or windpipe and puncturing one of the bones of the cervical spine. It was noted that the injuries inflicted to the left upper limb were inflicted after death. The cause of death was stated to be trauma asphyxia due to a stab wound to the neck. That injury was inflicted by a knife, the "shiny metal object" mentioned by Constable Chavarria while the other injuries were consistent with infliction by a machete.

7. The appellant gave evidence on oath. He told a strange tale. He was awakened by the high volume of the television set in his bed-room on the morning of 29 November. From about 4:15 a.m. he began experiencing severe abdominal pain. He left the room and on leaving the house, he noticed that the front door was not locked. He proceeded, he said, to the outside bathroom where he remained for about fifteen minutes. Whilst there, he heard an argument between his wife and another person. He could not say with whom his wife was engaged in this argument. At about 4:30 a.m. he returned to the house where he noticed that two doors were wide open. He observed what appeared to be blood on the floor. He noticed also that the door to the children's room was open. On entering the bedroom, he saw his common law wife lying partially across the wall. She had injuries to the left hand. He tried to lift the body but was unable to do so. He shouted for Antonio but there was no reply. When he went into the room that Antonio occupied with his brother, it was empty. He went through the house and found Antonio forcing himself into the house. As he could trust no one, he pushed Antonio out through the door which he locked.

8. There he remained until dawn when he heard the police patrol arriving in the area. He woke his 8 year old daughter to tell her he was going to the police station. Constable Chavarria told him he would be escorted to the police station at San Ignacio.

9. The jury by its verdict was plainly unimpressed by this tale.

10. Mr. Sampson SC put forward a number of grounds of appeal which were critical of the trial judge's directions especially with respect to the issue of provocation. Having regard to the conclusion at which we arrived with respect to this issue, it is not, in our opinion, necessary to rehearse nor to consider them. The ground with which we will deal was formulated thus:

1. The learned judge erred in law, in that he failed to put the defence of provocation fully with specific regard to sec. 120 “alleged adultery by wife’.

It is right to say that the (Acting) Director, candidly conceded that the directions on the issue were defective.

11. The trial judge in the course of his summation did leave for the jury’s consideration the issue of manslaughter on the basis of the absence of the specific intent to kill but he did not leave the issue of provocation. However, at the end of the summation, on enquiry of counsel if he had omitted some important point of law, counsel for the Crown suggested to him that out of an abundance of caution he might consider giving directions on this issue. The trial judge before complying, said this (p. 211):

> “Members of the jury, I did not go into provocation because the defence is not saying the defendant in anyway committed a crime or killed anyone in which they were provoked to do it. However, I have been asked by the prosecution and it is their right …”

As we are of opinion that there may be some misunderstanding on the part of the trial judge as to his duty in leaving issues to the jury, we would remind of the advice of the Judicial Committee in **Bullard v The Queen [1957] AC 635** where it was said:

> “It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for

> the defence, and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked"

and at p. 644:

> "Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached."

This duty of the judge was succinctly stated by Rix LJ in **R v O'Sullivan (2004)** EWCA Crim. Para. 17, as:

> "…the judge's obligation to leave every possible available defence of a defendant to the jury…"

12. We can now return to the directions which the trial judge gave the jury. It is regrettably lengthy, confused and confusing but needs to be set out:

> "Provocation is deemed where a person at the time or just prior to the moment of committing an act is so provoked that he or she looses self control and commits the particular act or acts I will read Section 119 to you it says: **"a person who intentionally causes the death of another person by unlawful harm shall be deemed to be guilty only of manslaughter and not of murder if there is such**

**evidence as rises** (sic) **a reasonable doubt as to whether (a) he was deprived of the power of self control by such extreme provocation given by the other person as in mention in Section 120"** I will go into that very shortly **"(b) he is justify in causing such harm of the other person and in causing harm in excess of the harm which he was justified in causing he acted from such terror of immediate death**" I went into that when I was talking about self defence **"or grievous harm as infact deprived him for the time being of the power of self control"** that means if somebody is coming at you, you are defending yourself of terror **"if he was deprived of self control of extreme provocation" and I will tell you what is in 120. "in causing the death he acted in the belief and in good faith and on reasonable grounds that he was under a legal duty to cause the death to do the act which he did"** he is a police office and so he is under a legal duty to cause the act because someone is killing someone else, one of his children and he is defending that person that is a legal duty, he is legally bound to take the life of himself, his children or any other person off the street if he is there and he is see (sic) somebody else is acting unlawfully.

Section 120, **"The following matters may amount to extreme provocation to one person to cause the death of another person namely – (a) an unlawful assault or battery committed upon the accused person by the other person**, same thing I was saying, someone is attacking you unlawfully you are defending yourself, **an unlawful fight or otherwise, which is of such a kind either in respect of its violence or by reason of words**,

so mere words can cause provocation, **gestures**, somebody gestures something to you, **or other circumstances of insult, or aggravation, as to be likely to deprive a person, being or** (sic) **ordinary character, and being in the circumstances in which the accused person was, of the power of self control."** Somebody make wah gesture to you, somebody tell you something by words, somebody does something to you that provokes you, we have the evidence in which it says extreme provocation purportedly to PC Chavarria, but be do not have exactly was the provocation.

There was no eye see witnesses therefore we so not know if there was any provocation but if he claimed there was and I remind you the defence is not claiming provocation, defence is saying not me, not my deed, non est factum, (emphasis supplied) not my deed I did not do it, so the defence is saying I didn't say anything to Chavarria, I didn't do anything, but I am going into it out of an abundance of caution so you understand what is happening. The assumption of the other person by the commencement of an unlawful fight, of an attitude manifesting an intention of instantly attacking an accused person with deadly or dangerous means in a deadly manner, then that is extreme provocation also, an act of adultery and this maybe hinted at an act of adultery committed with or by the wife or husband by the accused person or the crime of unnatural carnal knowledge committed upon an accused person wife or child, so the law if saying saying if you come in and witnessed an act of adultery that is extreme provocation and if you will in that manner it is reduced to manslaughter, not murder no matter

how he did it manslaughter, but here we have the defendant saying I didn't do anything but PC Chavarria is telling us the defendant said he was provoked extremely but he did not go on to explain what it was. A violent assault or battery of sexual offence committed upon the accused person's wife, husband etc., you are again excused and it comes down to manslaughter not murder even although you committed the offence and anything said to the accused person by the other person by a third person which were graved enough to make a reasonable man loose his self control, these are the things that exempt you and immediately reduces it from murder to manslaughter, so although you committed the offence it is not (sic) longer murder because of these I've gone into it comes down to manslaughter.

However, Section 121(1) says: **"Notwithstanding the existence of such evidence as is referred to in section 119(a), the crime of the accused shall not be deemed to be thereby reduced to manslaughter if it appears, either from the evidence given on his behalf, or from evidence given on the part of the prosecution.** And that is why the prosecution asks for us to deal with it out of an abundance of caution. **(a) that he was not in fact deprived of the power of self control by the provocation; or (b) that he acted wholly or partly from a previous purpose to cause death or harm, or to engaged in an unlawful fight whether or not he would have acted on that purpose at the time or in the manner in which he did act;** and (b) which is very specific because we will go into it in a few minutes but I come to another part which I have to explain to you (c) **that after the provocation was given, and before**

**he did the act which cause the harm, such a time elapsed or such circumstances occurred that a person or ordinary character might have recorded his self control**, that means if somebody tell you last night so and so and you get vex and you immediately act it reduces it to manslaughter, but if somebody tell you something last night and this morning you just remember it and you go back and act then and kill the person you have enough time weh deh call wah cooling off period, so it does not reduce it, it is still murder then; **and (d) that his act, in respect either of the instrument or means used, or of the cruel or other manner in which it was used**, so they're looking if it is extremely cruel or the other manner in which it was used **greatly in excess of the measure in which a person of character would have been likely under the circumstances to be deprived of his self-control by the provocation.** So you are provoked, but the means by which you act out the provocation is such that is gruesome or extremely cruel possible as in this case then it does not reduce it to manslaughter, it means murder this is what this is saying, and therefore ladies and gentlemen although I did not go into it at the beginning, I touched on it but I have now got into it to explain to you if you kill a person and you are provoked and you can proved that the provocation is one of the following which I have enumerated above then it reduces it to manslaughter, but if you kill a person after a time lapse and if you do you in such a cruel manner etc. then it does not reduce it because it saying that you had the intention and you were doing it so cruelly that it cannot reduce it and although provocation is not being pleaded by the defence it arose by way of the prosecution's case in the evidence of

> PC Chavarria where PC Chavarria purportedly said that it was said to him that he acted in this manner because he was extremely provoked and provocation has to be extreme provocation for you to lose your self control, therefore out of an abundance of caution I now agree with the prosecution that they have raised it, I have explained it to you, the defendant was provoked by extreme provocation I went into section 119, 120 and 121 to explained to you.

13. We are of opinion that the jury would not have been assisted nor in any way enlightened by this disjointed and incoherent exegesis which consisted of a reading of the provisions of the statute followed by ill-considered thoughts expressed in tortuous language. What was required of the trial judge was a reference to the applicable provisions and an application of the relevant facts in the case to the provisions of the law. We would suggest that the judge keeps a bench book with appropriate precedents to which he may refer when necessary. Off the cuff attempts at directions are often fraught with problems as we think these directions starkly illustrate. The jury were entitled to receive clear and accurate directions. These directions by any measure, fall far short of that standard.

14. We think it right before parting with this appeal to say that we noted that the structure of this summing up, in the main, comprised of a recitation of statutory provisions followed by a verbatim rehearsal of the *viva voce* evidence of the witnesses called at trial. We bring to attention the pithy observation of Lord Hailsham LC in **Reg v Lawrence [1982] AC 510** at p. 519 where he said:

> "It has been said before, but obviously requires to be said again. The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's note book. A direction to a jury should be custom built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions from the primary facts."

In David McKoy (CA 30/07) dated 26 October 2007 (Gazette 8 December 2007), this court said at para. 15:

> "A summing up, it has been said time out of mind, must be tailor-made for the particular circumstances which the jury is called upon to consider. It is not a circumnavigation of the criminal law to demonstrate the trial judge's familiarity with, and knowledge of the criminal law."

We offer these suggestions in the hope that some guidance is afforded to the trial judges in this jurisdiction and to emphasize the need for carefully

crafted directions appropriate to the particular facts of the case and helpful to the jury in determining guilt or innocence.

______________________
**MOTTLEY P**

______________________
**CAREY JA**

______________________
**MORRISON JA**