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

**CRIMINAL APPEALS NOS. 27, 28 AND 29 OF 2006**

**BETWEEN:**

**JESUS OLIVAREZ**
**ELISEO OLIVAREZ**
**MARGARITO OLIVAREZ** **Appellants**

**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 Carey** | **-** | **Justice of Appeal** |

**Mrs. Audrey Matura-Shepherd for Jesus and Eliseo Olivarez.**
**Mr. Anthony Sylvester for Margarito Olivarez.**
**Ms. Merlene Moody for the respondent.**

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**4, 5, 6 March & 20 June 2008.**

**CAREY, JA:**

1. These appellants who are brothers, were tried on an indictment which charged them with the murder of Elvis Vasquez on 31 January 2003 in Corozal Town. At their trial before Arana J and a jury, Jesus Olivarez was convicted as charged, while the other brothers were convicted of manslaughter. A sentence of life imprisonment was imposed on Jesus, his brothers each received 15 years' imprisonment. At the conclusion of submissions in their appeals on 5 March, we dismissed those of Eliseo and Margarito and affirmed their convictions and sentences. In the case

of Jesus, we allowed his appeal, quashed the conviction of murder and substituted a verdict of manslaughter. On 6 March after hearing Mrs. Matura-Shepherd on sentence, we imposed a sentence of eighteen years' imprisonment. We promised to give our reasons at a later date. These now follow.

2. The facts and circumstances on which the indictment was framed can be shortly stated in view of the fact that the Crown called one witness, Calbert Daniels, who spoke to the events, and the defence challenge to his evidence, in the main, related not so much to what had occurred but rather, to where it had taken place. Daniels, related that on the night of 31 January 2003, accompanied by Elvis Vasquez, the slain man, and Doro Yang, he was on his way to the hospital and took a short-cut which led by the Olivarez house. As soon as they reached in front of the house, he saw all three appellants leap over their zinc fence, armed with machetes. Jesus and Eliseo attacked Elvis. At this point he ran off. From a distance of fifty feet, he saw when Eliseo chased Doro and also watched while Jesus and Margarito were chopping Elvis who was lying on the ground, helpless and seriously injured. Thereafter, the police arrived on the scene and took the injured man to the hospital.

3. The appellants were represented by counsel who no longer acts for them. He put their "defence" in the following questions – (p. 36 of the record), to the witness:

"Q: The last question will be this way, Elvis, your friend, got chopped that night almost at the front door of these people's house –

A: No.

Q: … because he Elvis trespassed on that property armed with a machete and chopped them. Then they retaliated in their home in front of their house.

A: Everything happened on the road. When they rush out and chop he and right there he dropped on the road and right thee they just finish chop him up more."

4. It is right to point out that the witness acknowledged that Elvis had a machete that night and that Eliseo received a chop. He also saw Doro Yang with a machete. The prosecution, as part of its case, without objection, put in evidence a statement taken under caution from Jesus in which he said that both himself and Elvis were "flinging machetes" and both received injuries.

5. The post mortem report revealed that Elvis Vasquez had received multiple wounds all over his body, to his head, face, neck, both arms and legs. There were fractures of the leg, skull and cervical column, and ribs. The cause of death was stated to be "hypovolemic shock due to external haemorrhage by multiple wounds".

6. All the appellants gave evidence on oath. Notwithstanding the suggestion put to Daniels by their counsel that "they retaliated …", Margarito swore that when he saw Elvis, Calbert and Doro in his yard with machetes and saw Eliseo lying on the ground, he jumped the fence and ran. He never returned. Eliseo's version of events was that the three men stoned their house and entered the yard with machetes. Elvis chopped his brother (Jesus). He went to assist. Elvis aimed a chop to his face. He raised his right arm to fend off the blow but got chopped. He received other chops from Doro Yang and Calbert Daniels which caused him to fall unconscious. He recovered to find himself in hospital. For his part, the

appellant Jesus, did not depart from his cautioned statement. He and Elvis were "flinging machete". He was defending himself to make Elvis leave his yard.

7. In the interest of completeness, it is necessary to note that there was unchallenged evidence from the prosecution that the police investigating officer found blood stains outside the appellants' premises in the street. The significance of this fact was to show that the incident took place in the street and thus the appellants must have left their premises to confront Elvis, Daniels and Doro in the street. A comment which we feel justified in making is that for purposes of her summation, the trial judge had to consider appropriate directions in the circumstances of an unlawful fight. We will return to this aspect of the case later in this judgment.

8. A number of grounds of appeal were filed on behalf of these appellants, and we trust we will not be thought discourteous if we deal only with those which we think merit some answer.

9. Mrs. Matura-Shepherd put forward the following ground on behalf of Jesus Olivarez:-

> "The appellant Jesus Olivarez was prejudiced and suffered a miscarriage of justice at his trial when evidence of bad character and direction of bad character was presented to the jury contrary to Evidence Act, section 51(1)(a) Laws of Belize Re 2000 …" (sic)

Section 51(2)(a) of the Evidence Act enacts as follows:

> "Where evidence of his good character is given by any person who –

(a) being on his trial for any felony not punishable with death, has been previously convicted of felony; or

(b) …

(c) …

the complainant or prosecutor or the Crown, may, in answer to the evidence of good character, give evidence of any of those previous convictions before the magistrate gives his decision, or before the jury return its verdict, in respect of the offence for which the offender is being tried.

We call attention also to the following subsections:

"(3) In this section, the word "character" means reputation as distinguished from disposition, and evidence may be given only of general reputation".

10. In this regard, what occurred at the trial, was regrettably highly improper. The defence elicited from a police officer that the appellant was a man of "very good character" (p. 98). That seemed to have induced counsel for the Crown to lead rebuttal evidence showing that he had three previous convictions with respect to offences involving violence. Defence counsel did not object and the judge tacitly allowed the evidence to be adduced. Error was compounded on error when this appellant was being cross-examined, it was put to him, obviously based on his convictions, that he was a violent man.

11. There can be no doubt that section 51(2)(a) was wholly inapplicable in this situation. The appellant was on his trial for a felony punishable with death. Thus the previous convictions were inadmissible in evidence and demonstrably prejudicial to this appellant. The circumstances in which the

injuries were caused to the victim were the same in respect to all the appellants, but he alone was convicted of murder.

12. We would wish to point out that although section 51(1) permits evidence of bad character to be adduced where evidence has been given that the defendant has a good character, section 51(3) only allows evidence of reputation and not particular acts. Previous convictions would qualify as facts showing that his disposition was bad, and would accordingly be inadmissible.

13. We can now turn to consider the directions which the judge addressed to the jury. She stated as follows (p. 242):-

> "Now you have heard that Jesus Olivarez has three previous conviction two for wounding and one for aggravated assault and this has been given in evidence because he claimed to be of good character. Now, what is the important of the defendant's convictions in this case? The only reason why you have heard about his previous convictions is that knowledge of the character of the defendant may assist you to judge the truthfulness of his evidence when you come to consider this matter. You must not assume that the defendant is guilty or that he is not telling you the truth just because he has previous convictions. His convictions are not relevant at all to the likelihood of his having committed. This particular offence nor are these convictions evidence that the defendant committed the offence for which he presently stands trial now. The convictions are relevant only as to whether you can believe him. You do not have to allow the convictions to affect your judgment at all. It is for you to decide the extent to which, if at all, Jesus' previous convictions helps you about that".

The fact of the matter is that evidence of the previous convictions was wholly inadmissible as contrary to section 51(2)(a) of the Evidence Act. It was therefore a misdirection to tell the jury that the convictions were relevant in assessing the appellant's creditworthiness.

14. Mrs. Matura-Shepherd, in relation to Jesus and Eliseo Olivarez, complained that "the trial judge failed to give proper direction of self-defence to the jury to assist them in their deliberation of the verdict." The gravamen of her submission was that the trial judge never, at any time, mentioned in her directions that the appellant Jesus Olivarez and Eliseo Olivarez were justified in acting in defence of another, but confined herself to the right of a person to defend himself or herself if and when attacked. She did not suggest in any form or manner that those directions were incorrect save that she identified as a deficiency the fact that the judge did not tell the jury that they had to consider the facts in light of what was the appellant's Jesus Olivarez' "honest belief" and not just "belief" even if it was a mistaken belief.

15. We have no hesitation in saying that neither of these criticisms have substance. It should be unnecessary to state that a summing up is not meant to be a gratuitous circumnavigation of the criminal law which the judge considers has some bearing on the case. The jury need to be told only so much of the law as will assist them to understand the case so as to render a true verdict. See the observations of Lord Hailsham L.C., in *R. v Lawrence [1982] A.C. 510 at 519.* The law the jury is entitled to be told must touch and concern the facts which have been adduced before them. At p. 229 the trial judge dealt with self defence in this way:-

> "…I must state that it is for the prosecution to prove that the accused persons were not acting in self-defence. It is not for Eliseo, Jesus and Margarito to prove that there were acting in self

> defence. I will repeat that the burden of proving his case is always on the prosecution not on the defence. Now, what does acting in lawful self-defence mean? The law provides that a person only acts in lawful self-defence if in all the circumstances he believes it is necessary for him to defend himself and the amount of force which he uses in doing so is reasonable. So members of the jury, you have to answer two questions: - (1) Did Jesus, Eliseo and Margarito honestly believe that it was necessary to use force to defend themselves? If the prosecution have made you sure that these defendants did not chop Elvis in the belief that it was necessary to defend themselves, then self-defence simply will not arise and these three persons would therefore be guilty of murder. But, if you decide that these three accused were or may have been acting in that belief, then, you must go on to consider the second question. The second question taking the circumstances as Jesus, Eliseo and Margarito believed them to be, was the amount of force they used reasonable? The law is that force used in self-defence is unreasonable and unlawful if it is out of proportion to the nature of the attack or if it is in excess of what is really required of the defendant to defend himself…
>
> So you must take into account both the nature of the attack on these accused persons and what each of them did."

In our opinion these directions were adequate in the circumstances of this case. The judge was well aware that from the prosecution evidence, the incident amounted to an unlawful fight and that the provisions of section 36(6) of the Criminal Code, cap 101, applied. That provision so far as is material, is in these terms"-

> "No force used in an unlawful fight can be justified under any provision of this Code…"

Then, so far as Jesus Olivarez was concerned, he did not say at any time that he was defending himself. In the course of giving evidence, he said (at p. 144)-

> "…Me and Elvis start to fight.
>
> "…In my yard, I went out with a machete. The two of us was flinging machete and Elvis chop me in ah my head".
>
> "…Elvis Vasquez was flinging his machete chop me and I was flinging my machete…".

It would seem to us in that sequence of events, that far from this appellant defending himself, he was engaging in a duel, both men were like gladiators in the Roman Coliseum. It follows that a more comprehensive direction than that provided by the judge was not required.

16. Eliseo gave sworn evidence that he received a chop when he raised his right hand to ward off a chop aimed at his face. He denied he was armed. We do not think it was seriously being argued that this appellant was putting forward self-defence as his answer to the charge. The ground must fail.

17. Counsel next raised the issue of the directions with respect to provocation as it related to the appellant Jesus. She accepted that the directions could not concern Eliseo because he was convicted of manslaughter. Mrs. Matura-Shepherd submitted that the judge did not properly leave that issue to the jury, but she was not able to assist in determining wherein lay the impropriety or to be more precise, the deficiency. Notwithstanding her inability, we felt compelled by the ground to examine section 119 of the

Criminal Code, cap 101 against the directions which the trial judge gave the jury. Section 119 (so far as is relevant) provides as follows:

> "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 raises 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 is mentioned in sectioned 120; or
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> (b) he was justified in causing some harm to the other person, and that in causing harm in excess of the harm which he was justified in causing, he acted from such terror of immediate death or grievous harm as in fact deprived him, for the time being, of the power of self-control; or
>
> (c) …
>
> (d) …

Section 120 must also be set out.

> "The following matters may amount to extreme provocation to one person to case the death of another person, namely:
>
> (a) an unlawful assault or battery committed upon the accused person by the other person, either in an unlawful fight or otherwise, which is of such a kind, either in respect of its violence or by reason of words, gestures or other circumstances of insult or aggravation, as to be likely to deprive a person, being of ordinary character, and being in

the circumstances in which the accused person was, of the power of self-control.

(b) the assumption by the other person, at the commencement of an unlawful fight, of an attitude manifesting an intention of instantly attacking the accused person with deadly or dangerous means or in a deadly manner;

(c) …

(d) …

(e) anything said to the accused person by the other person or by a third person which were (sic) grave enough to make a reasonable man to lose his self-control".

There could be no question, given the facts and circumstances of the case that the issue of an unlawful fight arose. It is fair to say that the trial judge although she was alert to its significance as regards self-defence, did not appreciate its relevance with respect to provocation, and indeed until counsel for the Crown as was her positive duty, drew albeit diffidently the judge's attention to her omission to direct the jury on this issue, make no mention of it. This is what she said (p. 249):-

> "…You may also wish to consider the question of provocation As I said before, the burden of proving everything in this case is always on the prosecution and it is for the prosecution to disprove provocation, not for the accused to prove that they were provoked. The evidence from the accused is that Doro, Elvis and Calbert came into their yard and started to threaten them curse them out and stoned their house. If you are sure that these accused persons killed Elvis Vasquez intending to kill him, then, all three are guilty of murder unless you conclude that this was or may have been a case of provocation. Provocation is not a complete defence leading to

an acquittal, to a verdict of not guilty. What provocation does, it reduces what would ordinarily be murder to the lesser offence of manslaughter. Because the prosecution must prove the accused's guilt, it is for the prosecution to make you feel sure that this was not a case of provocation, not for the accused to prove that they were provoked. When considering the question of provocation, you must first ask yourselves whether these accused persons were provoked at all. A person is provoked if he is caused suddenly and temporarily to lose his self control by things that have been said or done, rather than just his own bad temper. In this case, the provocation could be that these three men came into the Olibvarez's yard without invitation, without permission. They were each armed machetes on the prosecution's case, they threatened these people in their own home, and stoned their house. So these are the elements of provocation…"

18. In this jurisdiction murder is reduced to manslaughter in certain prescribed situations, one of which is "extreme provocation". In paragraph 17 of this judgment we detailed three of these situations which we think were peculiarly applicable in the context of this case. The trial judge brought one of these to the jury's attention. But her directions in that regard were not in our opinion, in accordance with the terms of section 119 of the Criminal Code, cap 101. The law provides that the entitlement to the lesser verdict arises where there is "such evidence as raises a reasonable doubt as to whether he was deprived of the power of self-control by such extreme provocation." In this case we are satisfied that there were matters which potentially amounted to extreme provocation. We advert in this regard to the clash of arms between the combatants in respect of whom there was evidence, either inferentially or direct, that they were armed with machetes. The evidence of Elvis "flinging machete" should have been left to the jury to determine whether the fight was, in the terms

of the provision (section 120 (a)) – "of such a kind either in respect of its violence or by reason of words, gestures or other circumstances of insult or aggravation, as to be likely to deprive a person being of ordinary character, and being in the circumstances in which the accused person was, of the power of self- control".

It was the duty of the judge to say to the jury something along these lines which we suggest - if you are satisfied that the accused intentionally caused the death of the (victim), he is entitled nevertheless to a verdict of manslaughter if you have a reasonable doubt whether the accused was deprived of his self control by the "extreme provocation", the circumstances of which should be identified. The jury should be told that the test of loss of self control is their judgment of the likely effect of the circumstances of extreme provocation on a person of "ordinary character", (the equivalent of the common law's reasonable man) – being in the same circumstances as the accused. The jury will have to consider in regard to the effect on the "ordinary character, whether he would be provoked and react in the same way as the accused did. If he would, the accused is entitled to the benefit of the lesser verdict.

19. The judge did not make it clear to the jury that a verdict of manslaughter is achieved if there is evidence that leaves them in reasonable doubt whether the appellant was deprived of the power of self control. Nor did she make it clear that the test, of whether the accused had lost his self control, given her choice of "things said or done" as amounting to extreme provocation, was its effect on the reasonable man. Section 120(e) of the Criminal Code, so prescribes. We need to point out that this provision does not include "things done", as the judge seemed to have thought. In her directions, the judge stated as follows in relation to this test (p. 248)

> "…it is for you to decide whether or not those accused persons loss of self control was sufficiently excusable to reduce the gravity of this offence from murder to manslaughter when deciding this, you must bear in mind that the law expects people to exercise control over their emotions. If a person has an unusually volatile, excitable or violent nature, he cannot rely upon that as an excuse for his behaviour. Otherwise, however, it is entirely up to you as representatives of this community to decide what are the appropriate standards of behaviour, what degree of control society would reasonably expect from Jesus, Eliseo and Margarito, and what is the just outcome of this case…"

We are clear that this statement is not in accord with the test set out in the provision cited. We conclude that there was on the part of the trial judge a non direction (the unlawful fight amounting to extreme provocation) and a misdirection, (the test as being appropriate standards of behaviour as determined by the jury), the effect of which was to deprive the appellant, Jesus Olivarez, of a chance of acquittal on the charge of murder to which he was entitled. This inevitably led, in our judgment to a miscarriage of justice.

20. Mrs. Matura-Sheppard submitted on behalf of Eliseo that the judge failed to properly and satisfactorily direct the jury on the issue of joint enterprise. Mr. Sylvestre, on behalf of Margarito associated himself with her submissions. She was however, quite unable to sustain this point in any worthwhile argument. This was a case in which the three appellants were armed with machetes and as the evidence showed they all used their weapons. Thus, as is shown in *DPP v. Merriman [1972] 3 ALLER 42*, where two or more defendants are charged jointly with an offence, it is not necessary for the prosecution in order to secure the conviction of each defendant, to prove that each was acting in concert with the other,

accordingly it was open to the jury to convict each of committing independently, the offence which was the subject matter of the joint charge. A joint charge against two or more defendants allege against each defendant, a separate offence committed on the same occasion and as part of the same transaction, the connection between the separate offences being no more than that, against each defendant, not only his own physical acts, but also those of the other defendants might be relied on by the prosecution as an '*actus reus'* of the offence with which he was charged. A direction addressing joint enterprise or acting in concert is obligatory where the participants in the crime play different roles. In a bank robbery, the look-out man, the driver of the getaway car, readily come to mind. Oddly however, the judge did give directions on joint enterprise (p.228). These were entirely otiose. We would respectfully suggest that in cases such as this, directions along the lines indicated above from *DPP v. Merriman (supra)* would be apposite. The jury might be told that whenever two or more defendants are charged in the same count of an indictment with any offence which men can help one another to commit, it is sufficient to support a conviction against any and each of them, to prove, either that he himself did a physical act which is an essential ingredient of the offence charged or that he helped another to do such an act and that in doing the act or in helping the other defendant to do it, he himself had the necessary criminal intent. We need only say that this ground was misconceived. We would ordinarily have not addressed it, but we have dealt with it perhaps at some length as we observed that the trial judge was in error, and some guidance could be helpful.

21. In the final ground on which we heard Mrs. Matura-Sheppard on behalf of Jesus and Eliseo (and adopted by Mr. Sylvester for Margarito), improper conduct of counsel for the Crown was highlighted. The ground was in remarkable terms:-

> "the trial judge should not have allowed into evidence material which was more prejudicial than probative and which had no relevance to the case".

What had occurred was that counsel for the Crown in the course of cross-examination of both Margarito and Eliseo suggested to them that earlier that night they were armed with machete, broke bottles and chopped up somebody and were drunk, which suggestions they had denied. Section 42 of the Evidence Act, Cap. 95 allows evidence of former acts to be admitted to prove for example good faith or claim of right but is impermissible to use such acts to prove disposition to commit the crime charged. It was unfortunately, quite improper. What is, we think difficult to grasp, is that counsel appearing below for the appellants did not object. And it is even more remarkable that the trial judge did not intervene on either occasion. Indeed, in one instance, she was insistent that the question be answered. We note however, that at the request of defence counsel who presumably had thought the matter over, she gave a corrective to the jury (p. 251):

> "There was a suggestion put to the accused person, I believe Margarito, Eliseo and Jesus under cross-examination that they were involved in an earlier altercation at a hotel "El Chital" earlier that same night but each accused person derived this, so I must tell you, members of the jury, that suggestions put to a witness in Cross-examination does not become evidence against that person unless that person accepts the suggestion as being true. So because each accused person denied being present at Eliseo (sic) Chital Restaurant or being involved in any altercation earlier that night, that is not evidence for you to consider because they said no, they were not there that is the end of the matter. And no further

evidence was brought to you to prove this point, so disregard that completely".

This impermissible cross-examination amounted to a serious irregularity and the question for this court is whether it resulted in a miscarriage of justice in regard to the appellants Margarito and Eliseo Olivarez. This ground does not effect Jesus to whom these questions were not directed. We conclude however that the warning given by the judge, albeit at the death, so to speak, was adequate to point the jury in the right direction. In so far as it may be thought necessary, we would apply the proviso to section 30(1) of the Court of Appeal Act.

We propose now to deal with the ground argued by Mr. Sylvestre on behalf of Margarito Olivarez. They regrettably are without substance or merit. We set them out for the record:-

"(1) The learned trial judge misdirected the jury as to the substance and effect of key features of the evidence of the prosecution as against the Accused

(2) The learned trial judge failed to direct the jury how to treat the inconsistencies in the testimony of witness Calbert Daniels."

22. The prosecution case depended entirely on the eye-witness account of Calbert Daniels. In substance he testified to the three appellants attacking Elvis Vasquez in the street and fatally inflicting multiple chops all over his body. Defence counsel did not challenge this in cross-examination. He put to the witness that the appellants "retaliated". The divergence related to the location of what we have previously described as a gladiatorial duel – the Crown's case was that it took place in the street, that of the defence, that the arena was in the appellant's yard. No misdirection of fact has been identified and none took place. It was submitted that because the

witness had said at first in his evidence that all three appellants had leapt the fence and later on, said, it was two who had done so, this was a substantial inconsistency. To found any argument on such an insubstantial base is, we fear, wildly absurd. Ground two was run along the same line and from the same base. The divergence or inconsistency identified by Mr. Sylvestre was insubstantial and did not affect the pith and substance of the prosecution case, viz., that all the appellants participated, and it paled into insignificance in the light of the defence posture.

23. In the final result, for these reasons, we dismissed the appeals of Eliseo and Margarito Olivarez, and allowed the appeal of Jesus Olivarez. We quashed the conviction of murder and substituted a verdict of manslaughter and imposed the sentence mentioned in paragraph 1 of this judgment.

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**MOTTLEY, P**

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**SOSA, JA**

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**CAREY, JA**