IN THE COURT OF APPEAL OF BELIZE, A.D. 2006

CRIMINAL APPEAL NO. 11 OF 2006

BETWEEN:

EDWARD REYES **Appellant**

AND

THE QUEEN **Respondent**

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BEFORE:

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

Ms. Sondra Garoy for the appellant.
Mr. Kirk Anderson, Director of Public Prosecutions, for the respondent.

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11 July and 27 October 2006.

MOTTLEY P.

1. The appellant was convicted of the manslaughter of Norman Ferguson. In the indictment, which charged manslaughter, it was alleged that, on the 22 January 2005, he caused the death of Norman Ferguson by shooting him with a gun.

2. On 22 January 2005, Norman Ferguson, otherwise known as Butta, went to the Prime Cut Meat Shop on Central America Boulevard which is owned and operated by the appellant. P.C. Raymond Lord, was at the corner of Central America Boulevard and Mahogany Street. While there, he saw Butta who he "hailed" by name, with a machete tucked away on his bicycle. Butta entered the Prime Cut Meat Shop. When he did so, he was not carrying the machete. A person who P.C. Lord was unable to identify at that stage, and who was behind the counter, opened a small gate which was to the right side of the counter and approached Butta. As Butta and the unidentified person walked towards each other, P.C. Lord heard a loud noise which he described as being similar to a gunshot or the sound of dynamite exploding. After the explosion, Butta turned around and walked out of the shop. On reaching a gate, Butta stumbled and fell to the ground on his face. Blood was seen on the left side of his chest.

3. P.C. Alexis Banner went to the premises of the Prime Cut Meat Shop. On arrival, he saw Butta whom he described as gasping for breath. Inside the shop, he encountered a "Hispanic man" who was later identified as the appellant, mopping up a red substance which was on the floor. The appellant placed a black pistol along with a black magazine and an expended shell and placed them on a table. The appellant told P.C. Banner that he had shot a man in his shoulder because the man had harassed him. Later, after being cautioned by Corporal Mark August, the appellant said that Butta came to his shop with a machete on a bicycle and started to harass him and as a result he shot him in his hand. The appellant indicated that he never meant to shoot Butta in his chest.

4. Subsequently, after a further caution by the police, the appellant made a written statement. He said that, about 11:45 a.m., a man approached him in an aggressive manner in his meat shop. The man grabbed the middle of his shirt and pulled him toward him. At the same time, the man demanded money from the appellant who informed him that he did not have any. While holding the appellant, the man pushed his hands in the appellant's pants pocket. At that point, the appellant said that he pulled out his licensed firearm. A struggle ensued between the appellant and Butta, during which the gun discharged. The appellant insisted that he never intended to kill Butta but was only defending himself. The appellant formed the opinion that Butta was on some kind of drugs as he had a lot of froth on his mouth and could not pronounce his words properly. The appellant did not give sworn evidence at his trial but instead made an unsworn statement from the dock which was essentially consistent with his cautioned statement.

5. A post mortem examination conducted by Dr. Mario Estradabran revealed that Butta's cause of death was cardiac tamponade syndrome due to auricle injury by gunshot wounds. A toxicology examination of a blood sample from Butta carried out by the Barbados Forensic Science Centre indicated the presence of cocaine at the level of 2.98 mg/L. This concentration was within the lower range for the type of cocaine which was said to be in the range of 0.25 to 5mg per litre. The evidence showed that cocaine alters and affects the central nervous system of an individual which in turn may influence his physical behaviour.

6. He was convicted of manslaughter and subsequently sentenced by the Chief Justice to a term of imprisonment of seven years.

7. Four grounds of appeal were filed by the appellant. However, only two grounds were argued. Ground 2 alleged that the judge had failed to give the jury adequate directions in relation to the defence of accident. In ground four, it was alleged that the judge failed to give the jury any specific directions regarding the aspersions and improper remarks made in her closing speech by prosecuting counsel on the conduct of defence counsel. During the course of the argument, the issue of the need for a direction on lies by the appellant arose but it is not necessary for the disposal of the appeal to deal with this issue.

8. In relation to ground 4, the appellant complained that, on a number of occasions during her closing speech, prosecuting counsel cast aspersions on the conduct of counsel for the appellant. As a result of these aspersions, counsel alleged that the appellant did not have a fair trial. It is therefore necessary to examine aspects of this speech.

9. In dealing with the oral and written statement made by the appellant, Crown counsel told the jury:

> "Confession after confession it is set up little by little because his confession changed 360 degrees after he talked to the attorney. Now he grabbed it, pushed his hand in his pocket, there is a struggle and the gun go off. He no mek fi shoot ah again, you know. Remember that now change now. He no mel fi shoot ah. He noh mek fi shoot ah. I will show you why that is important why because he has two defences, he said the thing is an accident and you want to use both of them. Smart man good attorney instruction."

The suggestion being made by Crown counsel is that it was the appellant's attorney-at-law who had instructed him to make the

changes which he did in his written cautioned statement. There was absolute no evidence to support this contention by Crown counsel and it was therefore improper. It must be remembered that the client instructs counsel. Based upon instructions, counsel will advise his client. Counsel does not instruct his client.

10. This is not the only statement of which complaint was made. In dealing with what she termed a confession, Crown counsel said:

> "What about his fourth one now? After consultation with his learned counsel, what was the last one now? He say, this man that he consult, you know, get counsel, "he grabbed me by the middle of my shirt and pulled me towards him with his left hand. He also demanded money from me. That time I told him I did not have any so he hold me with his left, his right went into my pants pocket. I then told him that I did not have any money and I pulled out my licenced pistol. There was a struggle and the gun fired off." That is about all he had to say about the incident. This is up to this particular portion. We will deal with that part later."

Continuing in the same vein counsel said:

> "Now he says that he was only defending himself and he never intended to kill this guy. Now he says he pulls out his licenced pistol, there was a struggle and the gun fired off, a material difference. After he consult the counsel he noh mek fi shoot ah again. No, man I noh mek fi shoot ah again, the gun just go off. You just tell those two things to the police just now then after you consulted your counsel you have a new defence now."

11. Again crown counsel is here suggesting that it was defence counsel who suggested to the appellant what he should say. The appellant did change his earlier statement as to what took place. In those circumstances, it is certainly open to counsel for the prosecution to point out to the jury the fact that the appellant had changed his statement regarding the circumstances under which the deceased was shot. However, it is highly improper for Crown counsel, without any evidence to support it, to suggest or even give the impression that the appellant changed his earlier statement as a result of what was said to him by his attorney-at-law. Counsel is entitled to invite the jury to draw inferences from proven facts that statements are inconsistent. Counsel is not however entitled to make improper suggestions about the conduct of counsel in circumstances where there is absolutely no evidence to support such suggestion.

12. Crown counsel pointed out to the jury that the appellant had earlier said that he was only defending himself and he never intended to kill Butta. Later the appellant stated that he pulled out his pistol and a struggle ensued and the gun went off. Counsel pointed out, as she was entitled to do, that there was a material difference between what the appellant had earlier said, when he said that he had shot the man and what he was subsequently saying, that the gun went off by accident. Counsel again made reference that this change took place after he had consulted counsel. She went on to tell the jury:

> "You just tell those two things to the police just now then after you consulted your counsel you have a new defence. Your new defence is that you never mek fi shoot again, it was an accident. The two things are dramatically opposed, man."

Such comments fall within the ambit permitted for counsel in his closing speech.

13. Later in her speech, Crown counsel again crossed the line of what is permitted. Counsel told the jury :

> "Come on man, Mr. Reyes did have a better defence when he said he mek fi shoot ah in ah shoulder and in shot a ina ih chest. Sometime you get too much advice. Because what kind of advice is that? You noh pull no gun now, you noh want pull it and you have to cock it because that reflects intention."

Counsel was implying that the appellant changed his statement as a result of the advice which he received from his attorney-at-law. It would be proper for counsel to draw to the attention of the jury the fact that the appellant changed his defence after he spoke to his attorney-at-law. Here however, counsel went beyond that. She not only suggested that the appellant changed his defence as a result of advice given to him by counsel, but went on to say that counsel had given his client bad advice.

14. Returning to the same theme Crown counsel asserted:

> "But you know when he comes up within this new addition now about this drug thing he had met Mr. Chebat and he give a caution statement where he add in the drug part and how the person appeared to him."

The implication here is that it was counsel who suggested that deceased was under the influence of cocaine.

15. Crown Counsel persisted with the theme of attacking the conduct of defence counsel. She told the jury:

> "But you know what is very important? When was the first time this was brought out? The first time this was brought out was after his caution statement. Who wasn't here the day when those questions was asked? Mr. Chebat. He was the only attorney that wasn't here and that is so interesting because he say we never understand Mr. Arnold and Mr. Sooknandan, they no ask that question. I mean that is very interesting. I say but the man is the one who say I see the man going into the shop, this is your biggest thing to say but I see this man look froth up and so. The man no look right, he look irregular. You noh put that to the witness? The witness deh pan the stand. You see this man di ride come up. He noh ride strange to you. I man said hi, Mr. Lord. What happen to that? Since he erratic all alone he rising up and down and saying hi Mr. Lord he is quite right. When he walk up to the door he just start froth up. That do must what happen because all along they noh question this man about how he behaving but as soon as he step into the shop he start fuss up, man. That only add in man. The only time you ever hear about that is on the caution statement after Mr. Chebat and Mr. Arnold speak to him and it end up in the caution statement."

Again it would have been proper to counsel to point out to the jury that the appellant in his earlier statement did not make any reference to the appearance of froth on the mouth of the deceased. She could quite properly have invited the jury to draw inferences adverse to the appellant. It was however improper to suggest or imply that the change had anything to do with his counsel unless there was evidence upon which to base the suggestion.

16. In his closing address on behalf of the appellant Mr. Arnold Ellis S.C., sought to deal with the effect of the address by crown counsel in so far as it consisted of an attack on the conduct of counsel for the appellant. He pointed out to the jury that:

> "Under the Constitution of Belize, a person has the right to counsel and the counsel must advise the client. So when my friend is talking to you and trying to insinuate certain things that it was only after he spoke to counsel and so on, just dismiss that.
>
> THE COURT: It was an unfortunate remark.
>
> MR. ARNOLD: Precisely so, My Lord.
>
> And I must tell the Jury that. That is most unfortunate, it is most unbecoming for her to have said that, so just disregard it. He has the right to counsel."

17. In his summation to the jury the judge reminded the jury that:

> "Yesterday we heard the eloquent addresses, if I may say so by both Ms. Henry for the Prosecution and Mr. Arnold for the Defence. They made certain submission. They were passionate in their defence of their respective cases. What they said is not evidence."

The Chief Justice thought that the speech of the crown counsel contained unfortunate remarks. This was a mild characterization of the unwarranted and unfounded attack on counsel for the defence.

18. The Chief Justice failed to direct the jury how to deal with the comments of the prosecuting counsel. It was not sufficient in our view for the Chief Justice merely to say that the speech of Crown counsel was unfortunate. By stating in his summation that the jury had heard eloquent addresses by both Ms. Henry and Mr. Arnold, the jury may very well have come to the conclusion that, by not

rebuking Crown counsel and then referring to her speech as eloquent, the Chief Justice approved the unwarranted attack by Crown counsel on defence counsel and that it was permitted by law.

19. In **Johnson (Gregory) v. R (1996) 53 WIR 206**, the Court of Appeal of Jamaica had to deal with a complaint that Crown counsel had "made improper and unfounded allegations" against defence counsel on numerous occasions during the trial which were of such character and frequency as to prejudice the fair trial of the appellant". The Court of Appeal observed that:

> "The dignity of the Court must never be compromised. Counsel must not cast aspersions or make improper imputations as to the integrity of opposing counsel, unless in most extreme circumstances, and then only in the absence of jury. Such conduct emanating from prosecution counsel in the presence of the jury creates prejudice in the minds of the jury and inhibits a fair and impartial trial."

20. We are satisfied that throughout her closing speech, Crown counsel resorted to making improper and unnecessary implications against defence counsel. In our view, the speech went way beyond the bound of what was permitted. The speech may very well have distracted the jury from concentrating on the issue in the case and to direct their attention to the conduct of counsel for the defence. The Chief Justice ought, in the circumstances, to have given the jury a very strong warning not to be distracted by the attack by Crown counsel on the conduct of defence counsel. No direction was given to the jury as to how they should approach the aspersions made by Crown counsel against the character of defence counsel. This failure may have left the jury with the

impression that the attack by Crown counsel on the defence counsel was proper and justified. In the circumstances of this case, Crown counsel's speech may very well have prevented the appellant from having a fair trial. As was said by the Court of Appeal in **Johnson's case** at p. 215:

> "A judge has a further duty and that is to ensure and maintain the dignity and authority of the court, and to guard against conduct that may improperly influence jurors in the performance of their duties."

21. In ground 2 of the grounds of appeal, the complaint made was that the judge failed to give adequate directions to the jury in relation to the defence of accident. The Chief Justice told the jury that the appellant did not have to prove that he was innocent. He told them that the prosecution had to prove the guilt of the appellant. He reminded them that if they were not sure about the appellant's guilt they had to return a verdict of not guilty as it meant the prosecution had failed to discharge the burden of proving the appellant's guilt to their satisfaction.

22. In dealing with the issue of self-defence, the Chief Justice pointed out to the jury that a person who is attacked or believed that he was about to be attacked may use force as is reasonably necessary to defend himself. He indicated that if the jury thought that the appellant was acting in self-defence he was entitled to be found not guilty. Equally, if they were left in doubt whether he was acting in self-defence they had to resolve that doubt in favour of the appellant. There is no quarrel with that direction in so far as it relates to the general burden of proof and in relation to self defence.

23. However, in relation to the issue of accident the Chief Justice told the jury:

> "Could the gun have gone off accidentally? I repeat, could the gun have gone off accidentally? He said he aimed at his shoulder but ih catch a da ih chest. He said they struggle. It is reasonable inference that the gun could have gone off there accidentally? It is for you, Mr. Foreman, Members of the Jury, to decide. This is a matter for you to consider. But the accident in the circumstances of this case if there was one is for the prosecution to disprove of negative. The defendant I should tell you assumed no burden of proving the issue of accident. The prosecution must negative accident so as to make you sure of the defendant's guilt. Have they done so? This is a matter for you to decide.

24. Complaint is made that the Chief Justice did not tell the jury what was meant by the word "accident" in these circumstances. In addition the judge did not tell the jury that if they were left in doubt as to whether what occurred as a result of an accident then they would have to acquit the appellant. In R v. Bailey (1991) unreported Jamaica, Carey JA in delivering the judgment of the Court of Appeal 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's view of accident which mattered."

We endorse this statement by Carey JA. This failure, along with the failure to direct the jury that, if they were left in reasonable doubt as to whether what took place was an accident, they should acquit the appellant, were material non-directions which were sufficiently grave for this Court to allow the appeal.

25. We do not consider that it is necessary in these circumstances to make any comments on the failure of the Chief Justice to give a Lucas direction on the issue of lies.

26. It was for these reasons, which we promised, that the appeal was allowed and the conviction quashed and sentence set aside. In the interest of justice we ordered a new trial.

MOTTLEY P

CAREY JA

MORRISON JA