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

CRIMINAL APPEAL NO. 14 OF 2006

BETWEEN:

CYRIL WADE	**Appellant**
AND	
THE QUEEN	**Respondent**

—

BEFORE:

The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Mr. Hubert Elrington for the appellant.
Mr. Kirk Anderson, Director of Public Prosecutions, for the Crown.

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10, 13 July, 27 October 2006.

MORRISON, JA

1. On 11 May 2006 the appellant was convicted of causing dangerous harm, after a trial before Gonzalez J. and a jury. On 17 May 2006, he was sentenced to five years' imprisonment.

2. His appeal to this Court was heard on 10 and 13 July 2006, at the end of which it was dismissed and his conviction and sentence affirmed. At that time we promised to put our reasons in writing at a later date and this we now do.

3. The appellant, who was a police constable at the time the offence for which he was convicted was committed, was charged with intentionally and unlawfully causing dangerous harm to Mr. Emil Pinelo. The incident from which the charge arose commenced on the streets of San Ignacio a little after 12 midnight on 13 September 2004 and ended in the San Ignacio Police Station later that same morning.

4. The case for the prosecution, which the jury accepted, was that Mr. Pinelo was accosted by the appellant and another police officer while they were on patrol in San Ignacio. Something of an altercation developed during which the appellant punched Mr. Pinelo twice in his face causing him to fall to the ground and to begin bleeding from his mouth and nose. The appellant and his colleague then took Mr. Pinelo into custody, forcibly and against his will, and transported him in the police vehicle in which they had been patrolling, to the San Ignacio Police Station. Mr. Pinelo's stout resistance to going with the police officers subsided somewhat on the urgings of his father, who had come onto the scene, and who advised him to relax before they "hurt him anymore" and to go with them. While handcuffed in the police vehicle, the appellant continued to punch Mr. Pinelo in his face and at the police station launched an all out attack on him, which he described graphically in the following terms:

"I remember entering the police station right after you pass the counter to the front, that's when I remember something hit me from the back that's when I fell to the ground with my hands still cuffed to the back that's when P.C. Wade start stomping me, kicking me in my stomach.

THE COURT: You fell on your back?

WITNESS; Yes, I fell on my back, like on my back but to the side because my hands was cuff to the back.

THE COURT: You fell side ways?

WITNESS: Yes, because my hands was still cuffed to the back that's when P.C. Wade start stomping me and kicking and stomping me in my belly. Then he picked me up –

THE COURT: Who picked you up?

WITNESS: P.W. (sic) Wade. He picked me up and slammed me into the wall, the concrete wall in the police station. My hands was still cuffed to the back that's when I received a bruise to the back of my head then I fell on the ground again, P.C. Wade continued stomping and standing in my belly.

THE COURT: Continued what?

THE WITNESS: He continued to stomp and he actually stand on my belly, on my stomach. He had both his feets (sic) on top of me holding onto the side.

THE COURT: He was holding to the side of?

WITNESS: Like the counter and the wall. At the time, he was on top of me. He was on

top of my belly that is when I got unconscious. The next thing I remember after that is when a police officer throw a bucket of water on top of me.

THE COURT: You got unconscious then what happened?

WITNESS: The only thing I remember was - -

THE COURT: While unconscious?

WITNESS: No. The only thing I remember I was bathe with a bucket of water. At the time I was on knees and hands on the ground, I was in serious pain, I was holding onto my belly, I was asking the police officer to please take me to the hospital cause am in serious pain."

5. At the end of this attack, Mr. Pinelo testified, he was vomiting blood and bleeding from his face and head and he was, not without some delay, taken to the San Ignacio hospital and then to the Belmopan hospital, where he was admitted. In addition to a laceration to the scalp and multiple abrasions on the head, neck, chest and abdomen, Mr. Pinelo was found to have sustained an avulsion (a tear) of the mesentery (the structure through which the circulation of all of the small intestine passes). This last named injury required prompt surgery, without which the medical evidence was that Mr. Pinelo could have died. In the opinion of Dr. Jesus Ken, who gave evidence on behalf of the prosecution, an injury of this sort would have been caused by "a severe blunt force trauma to the abdomen". When asked if the action of "stomping on a person in the region of the stomach, that is stomping with shoes, like boots"

would be consistent with the injuries he had observed, Dr. Ken's response was that "That could be one of the causes."

6. Constable Clayton Marin, who had been the appellant's colleague on patrol on the night of the incident, also gave evidence for the prosecution and in support of Mr. Pinelo's account of what had taken place, as did Mr. Pinelo's brother, Jaime Pinelo.

7. The appellant gave sworn evidence in his defence (he was in fact the only witness called by the defence). His evidence was basically a denial of the case for the prosecution. His account of the encounter with Mr. Pinelo on the street depicted Mr. Pinelo as an unruly and aggressive person who had obstructed the police in the performance of their lawful duties and resisted arrest. The appellant's evidence was that, having with considerable effort subdued Mr. Pinelo sufficiently to place handcuffs on him, he placed him in the police vehicle (with assistance from Constable Marin), took him to the San Ignacio Police Station where Mr. Pinelo "continued behaving disorderly and cursing and … was handed over to the diarist, P.C. Chun." According to the appellant, some of the injuries which Mr. Pinelo complained of, notably those to his face and head, were in fact sustained by him in his struggle with the appellant, as the appellant tried to restrain him before he was able to place him in the police vehicle. When P.C. Chun attempted to search Mr. Pinelo at the police station, the appellant testified, "he threw himself on the station floor", whereupon the appellant handed over the handcuff keys to Constable Marin and left the station, to which he did not return before receiving instructions by radio to do so some time later in the morning. After giving the key to Constable Marin, he said, he had had nothing further to do with Mr. Pinelo. At that time, he said, he "also wrote a report in the station

diary as Emil Pinelo was supposed to be charged for assault of a police officer, resisting arrest and – I don't remember but there were several other charges that I was supposed to charge him for." There is no record of Mr. Pinelo having ever been charged with any of these, or any other, offences.

8. Close to the end of his evidence in chief, the appellant volunteered this explanation of why, contrary to what Mr. Pinelo had said, he had in fact taken extra care to avoid "really roughing him up":

> "The reason I try not to be aggressive with Mr. Pinelo was because I knew that my officer [Superintendent] Mr. Nicholas didn't like me and he would do anything to make bad for me.
>
> MR. ELRINGTON: How did you know this?
> APPELLANT: I know that because several times Mr. Nicholas had threatened to put me on charge and I go to higher ranking officer than him for help to assist me."

9. When the appellant was cross examined by Crown counsel, Superintendent Nicholas came in for further mention, almost in passing:

> "Q. Now you were saying now that all these people noh like yuh, Mr. Nicholas in particular because enough time he waahn put yuh pahn charge. Right?
> A. Yes.
> Q. On charge for what kind of things he waahn put yuh on?

A. One time he wanted to put me on charge because my right knee got dislocated, came out of place, and I reported sick and I was granted 15 days by the hospital, the doctor at San Ignacio hospital and he told me that there's a law in the police Standing Orders that says when you report sick from duty for things like that he could put you on charge. He mi the threaten fu put me on charge."

10. Then, almost at the end of his cross examination the following exchange took place between the appellant and crown counsel, as she put the details of the prosecution's case to him:

"Q. And am further putting it to you that you did not leave it there. You were very very angry and you proceeded to stomp on Emil Pinelo on his belly when he was on the ground.

A. No. I couldn't possibly stomp on anyone cause I told you I have a bad knee.

Q. You never tell me you have no bad knee, but of course, anything is possible with you, Cyril Wade, so am sure right now you have a bad knee.

A. I have a bad knee from ever since.

Q. And because you have a bad knee you can't stomp?

A. No.

Q. So how you walk come in here?

A. I walk because I could walk, but my knee kyaahn tek any - -

Q. But you kyaahn lift it up to stomp?

A. -- - any sudden movement, or - -

Q. No sudden movement, so it kyaahn climb steps?

A. I could climb steps, but am saying mi knee kyaahn put any sudden pressure on it."

11. The jury in due course retired to consider their verdict at the conclusion of the learned trial judge's summing up (and after they had returned to court briefly for further directions from the judge on an aspect of the matter, apparently at the request of counsel for the defence). Neither of these two exchanges between Crown counsel and the appellant referred to in paragraphs 9 and 10 above was mentioned to the jury by the learned trial judge. After nearly two and a half hours, the jury returned to court when the following exchange took place:

"THE COURT: Yes, Madam forelady, Members of the jury, it is my understanding that you have reached your verdict, and it is also my understanding that you want further directions with respect to the alternative verdict of wounding. Do you still want those directions with respect to wounding if you have reached your verdict?

FORELADY: No, sir.

THE COURT: Are you sure of that? Don't you want to consult? You have reached your verdict now?

FORELADY: Yes, sir.

THE COURT: Have a seat then. Yes, Mr. Humes?"

12. The jury's unanimous verdict of guilty of the crime of dangerous harm was then taken and in due course the appellant was sentenced to a term of imprisonment of five years.

13. The appellant appealed on the following grounds:

    1. The learned trial judge erred and was wrong in law when he gave the jury directions and communicated with the jury through the Marshall in the absence of Crown Counsel, Defence Counsel and the Defendant.

    2. The learned trial judge failed to put the defence case adequately or at all to the jury.

14. With regard to ground 1, the appellant was faced with the problem that the record of the proceedings in the court below did not provide any factual basis for the complaint that it was sought to advance in this Court. Mr. Elrington therefore applied for leave to adduce further evidence by way of an affidavit sworn to by him, an application which was after some argument granted by this Court. So far as it is relevant, the full text of Mr. Elrington's affidavit is set out below:

    "4. The learned Trial Judge completed his summing up and directions on the relevant law at about 12:30 p.m. on Thursday May 11th, 2006.

    5. The jury were given in charge to the Marshall, and retired at 12:40 p.m.

6. I then left the Court and proceeded to my law office at No. 90A New Road, Belize City, Belize.

7. At about 2:40 p.m. I received a telephone call from the Marshall, Mr. Charles Humes. I have known Mr. Charles Humes for over 20 years and I have had to interact with him with great frequency over the last ten (10) years. I am very familiar with his voice. He told me on the telephone that my presence was required immediately at the Supreme Court as the jury has sent a note to the Judge, asking him for further directions, I proceeded without delay to the Supreme Court.

8. On my arrival, I met and spoke with Ms. Kamar Henry. This was about 2:45 p.m. Not long afterwards the trial Judge invited Ms. Kamar Henry and myself into his chamber. He informed us that he had received a noted (sic) from the jury asking for further directions. He showed us the note and permitted us to read it.

9. The jury was requesting direction as to the procedure they should follow if they decided to acquit the Defendant on the charge of dangerous harm and decided to consider the alternative charge of wounding.

10. The learned Trial Judge also indicated that he had sent the Marshall back to the jury to ascertain from them if they had arrived at a verdict, and to inform them that if they had arrived at a verdict there would

be no need for further directions in respect to the alternative charge of wounding.

11. I am unable to say what exactly the Marshall told the jury as the conversation between the Marshall and the jury took place in the jury room or its environs and not in open Court.

12. The learned Trial Judge then reconvened the Court. The jury was brought in, and the Judge addressed the jury personally.

13. He told them that it was his understanding that they had reached a verdict and that they also wanted further direction on the charge of wounding.

14. He then asked them whether in view of the fact that they had arrived at a verdict whether or not they still wanted further direction on the charge of wounding.

15. The forelady, in the presence of and in the hearing of all the jurors, the Judge, the Prosecuting Counsel and the Defense Counsel and persons assembled in Court stated in reply to the Marshall's question Have you arrived at a verdict?) Replied Yes, in a clear unambiguous manner.

16. Is your verdict unanimous? Again she replied yes in a clear and unambiguous manner. The learned Trial Judge then thanked the jury for their service and

discharged the jury. He then remanded the Defendant to custody to await sentencing."

15. Mr. Elrington's affidavit drew an immediate response from the prosecution, in the form of an affidavit from Mr. Charles Humes, the Supreme Court Marshall who had been assigned to Gonzalez J's court during the appellant's trial and who was in fact the Marshall referred to in Mr. Elrington's affidavit. After identifying himself and referring to Mr. Elrington's affidavit, Mr. Humes deposed as follows:

"4. That paragraph 5 of the aforementioned Affidavit is incorrect, insofar as it has been stated therein, that the jury, "were given in charge to the Marshall, and retired at 12:40 p.m. In fact, immediately prior to the jury having retired for the purpose of their deliberations as to the verdict to be rendered, the jurors were placed in charge of the bailiff – being a police officer who had been duly sworn for that purpose.

5. That the jury had retired to the "jury room," for the purpose of deliberations as to their verdict at 12:40 p.m. on May 11th, 2006.

6. That a juror had initially, after the jury's retirement, knocked on the door of the room in which they were then being kept, herein referred to as the, "jury room," at which time, the bailiff went inside that room to find out what the jury wanted and came back with a note from them.

7. That the Court bailiff then handed that note to me and I, in turn, handed that note to the Trial Judge, while the trial

Judge was in his chambers, AND THAT, the trial Judge then read the note and began to peruse his notebook of the evidence given at trial.

8. That at that stage, whilst still in the trial Judge's chambers, I was told by the trial Judge to go to the jury and verify from them, which aspect of the case was not clear to them – whether it was the, "Dangerous Harm" or the, "Wounding" charge.

9. That such conversation as referred to at paragraph 8 herein, took place in the absence of counsel, since counsel were not then present at Court.

10. That the trial Judge had also, after having received and read the note, asked me to called (sic) counsel to Court, so that he (the trial Judge) could give further directions to the jury regarding the matter(s) concerning them.

11. That I have long been aware that as a Court Marshall, once a jury has been placed in the charge of a Court bailiff, only such bailiff can lawfully communicate with any member of the jury to any extent and accordingly, whenever I receive instructions from a presiding Judge with respect to an ongoing trial, such as I had received as specified at paragraph 8 thereof, I am fully aware that it would not be expected by the trial Judge for me to personally speak with the jury, but rather, it would be expected for me to communicate with the Court bailiff, in order that he (the bailiff) can then communicate with the jury, in the terms as made known to me by the trial Judge.

12. That in any event, after having received instructions from the trial Judge as specified at paragraph 8 hereof, but before I had left the Judge's chambers to carry out such instructions, the Court bailiff informed myself and the trial Judge, that the jury had reached a verdict. AND THAT accordingly, no such enquiry of the jury as the trial judge had instructed me to carry out, was ever, to the best of my knowledge, information and belief, ever carried out/made by anyone.

13. That I had called by telephone and requested both Attorney/Crown Counsel – Ms. Kamar Henry and Attorney – Mr. Hubert Elrington, respectively, to come to the Court to discuss with the trial Judge, the issue as raised in the note which had been passed by the jury, to the trial Judge and I had done this prior to my having been made aware that the jury had reach a verdict. AND THAT accordingly, since I knew that counsel had already been requested to return to Court, I then awaited their arrival thereat and in that regard, Ms. Kamar Henry – Crown Counsel, arrived some minutes before Mr. Elrington – Attorney-at-law, did.

14. That upon Mr. Elrington having arrived at Court, both himself and Ms. Henry were shown into the trial Judge's chambers; AND THAT, while in chambers, the trial Judge told counsel of what had transpired in terms of the transmission of the note by the jury. Each counsel was there and then shown the aforementioned note and permitted to read the same and the trial Judge also, at that stage, told counsel that he had asked me to speak with the jury so as to make the enquiry of them as specified in paragraph 8 hereof. AND THAT however, the trial Judge did not make it clear to counsel, that

I had not complied with that instruction of his, since by that time, the jury had already informed the bailiff, that it had arrived at a verdict.

15. That thereafter, the hearing of the case against the Appellant herein, resumed in open Court and before the Court proceeded to record the verdict of the jury, the Court enquired of the jury and received responses thereto from the jury, as have been duly recorded at pages 419 and 420 of the Transcript of proceedings with respect to the trial of the Appellant in the Court below – which portion of that Transcript I have seen/read and verified as being accurate."

16. Mr. Elrington's complaint was that the trial judge had "communicated with the jury in private" and given them directions in the absence of counsel. However, on the basis of the material placed before this Court, in particular the Marshall's unchallenged affidavit, it is clear that the factual basis for this complaint has not at all been established. Even the judge's enquiry as to which aspect of the case was not clear to them was not, as it turns out, communicated to the jury, as before this could have been done the jury had indicated through the court bailiff that they had in fact reached a verdict, thereby obviating the need for any further directions. Thereafter, the learned trial judge, quite properly it seems to us, made a formal enquiry in open court and for the record whether the jury required any further directions and was told that they did not, as they had reached their verdict, which was unanimous.

17. Mr. Elrington also complained that the learned judge "erred and was wrong in law in failing to read the note he had received from

the jury in open court and in particular in the presence of the defendant and his counsel and in failing to ensure that the said note was made part of the record of the trial." Mr. Elrington also complained that the judge ought, upon receiving the note, to have recalled the jury into open Court and given them "a clear direction on the law and facts, relating to the subject matter causing them uncertainty."

18. It is indeed the law, as Mr. Elrington submitted, that a trial judge who is sent a note from the jury raising a matter connected with the trial should almost invariably state in open Court the nature and content of the communication which he received from the jury and should, if he thinks it useful so to do, seek the assistance of counsel as to how best to deal with the situation before the jury is called back into Court (see Archbold, Criminal Pleading Evidence and Practice 2000, paragraph 4-427). However, the circumstances described by the Marshall's affidavit were unusual and it appears to this court that Gonzalez J. dealt with it as best he could, by advising both counsel in his chambers of what had taken place and by adverting to the matter in open court upon the jury's return. We are unable to see what possible prejudice could have been caused to the appellant by the manner in which the learned trial judge chose to handle a wholly unexpected situation. For all these reasons, this ground of appeal accordingly fails

19. We cannot, however, leave this aspect of the matter without a comment on the fact that Mr. Elrington swore an affidavit on behalf of the appellant in the appeal and nevertheless continued his representation of the appellant before this Court. Rule 37 of the Legal Profession (Code of Conduct) Rules, 1991 is in the following terms:

"(1) An attorney should not appear as a witness for his own client except as to merely formal matters.

(2) Where an attorney is a necessary witness for his client with respect to matters other than such as are merely formal, he should entrust the conduct of the case to another attorney of his client's choice."

In **Rupert Burke Najarro v The Queen** (Criminal Appeal No. 5 of 1996, judgment delivered 10 February 1997), this court characterized this as a "fundamental rule".

20. At the outset of Mr. Elrington's application to adduce further evidence by way of an affidavit sworn to by him, this court alerted him to the rule, in particular to the need that would arise for the appellant to make other arrangements for his representation on the appeal should the application succeed. However, on the facts as they emerged from the Marshall's affidavit, which were not challenged, it became clear that there were no facts alleged in Mr. Elrington's affidavit upon which the appellant could rely as a basis for the ground of appeal filed on his behalf and the matter thereafter proceeded entirely on the footing of the Marshall's account. It was in these circumstances that Mr. Elrington was allowed to continue to appear and to make further submissions in the appeal on the appellant's behalf. While the court considers that in all the circumstances of this case it was not objectionable to allow Mr. Elrington to continue in that manner, we wish to make it clear that in our view rule 37 of the Legal Profession (Code of Conduct) Rules, 1991 remains a "fundamental rule of professional conduct designed to ensure proper representation of an accused person" (see the

judgment of this court in the **Najarro** case, at page 4). It requires counsel in a case who is minded to give evidence on behalf of his client on anything other than purely formal matters to consider his position carefully and make it known to the court at the earliest possible time, so that appropriate arrangements can be made promptly to secure alternative representation for the client.

21. Before passing on to ground 2, we should record that the learned Director also referred us to the decision of this Court in **Lauriano v R** (Criminal Appeal No. 15 of 1994) in which it was held that a complaint would not be entertained on appeal on an irregularity in respect of which complaint ought to have been taken at trial, pursuant to the provisions of section 145(1) of the Indictable Procedure Act. However, we have not felt it necessary to deal with this aspect of the matter because of our decision on the primary point dealt with in paragraph 18 above. It may in any event be open to question whether Mr. Elrington's complaint in this case, had it been well founded, could have been said to relate merely to an "irregularity or informality in the proceedings", which are the actual words of section 145(1).

22. The appellant's other ground of appeal was that the learned trial judge failed to put the defence case "adequately or at all to the jury." Despite the very general way in which the ground was formulated, Mr. Elrington's real – and only - complaint on this ground related to the matter which emerged during the appellant's cross examination, as set out at paragraphs 9 and 10 above. Mr. Elrington submitted as follows:

> "In his defence defendant raised the defence of physical incapacity. He testified that he suffered from a condition in

which the right knee, kept slipping out of its joint, so he was saying by necessary implication, that he was not physically capable of kicking or stamping (sic) anyone with his right foot, as the prosecution alleged he did.

In his summing up the learned trial judge failed to mention this defence raised by the defendant. Immediately after completing his summing up, defense counsel brought this omission to the learned trial judge's attention and requested him to direct the jury on this aspect of the defence, he declined to do so."

23. We should say at once that there is no evidence on the record that the omission complained of was brought to the learned trial judge's attention, as Mr. Elrington contended, and we therefore decline to deal with the matter on that basis.

24. Given the way in which the somewhat exiguous evidence as to the condition of his knee emerged (in cross examination, without having attracted even a passing reference from him in examination in chief conducted by his very experienced counsel), it can, in our view, hardly fairly be asserted as Mr. Elrington has done, that the appellant "raised the defense of physical incapacity" in his defence, neither could it with any accuracy be described as "a cardinal line" of the appellant's defence at the trial (cf. **R v Badjan 50 Cr. App. R. 141**, in which it was held that the failure by a trial judge to mention in his summing up a cardinal line of defence placed before the jury would render a conviction unsafe). Perhaps more to the point is the following statement of Winn LJ in **R v Kachikwu, 52 Cr. App. R. 538, 543**:

> "It is asking much of judges and other tribunals of trial of criminal charges to require that they should always have in mind possible answers, possible excuses in law which have not been relied upon by defending counsel or even as has happened in some cases, have been expressly disclaimed by defending by defending counsel. Nevertheless, it is perfectly clear that this Court has always regarded it as the duty of the judge of trial to ensure that he himself looks for and sees any such possible answers and refers to them in summing up to the jury and takes care to ensure that the jury's verdict rests upon their having in fact excluded any of those excuses and circumstances."

25. On this basis, we accept that Gonzalez J. might have, if only for the sake of completeness, drawn the jury's attention to the appellant's evidence – as fortuitously as it emerged – of his supposed physical incapacity. However, we cannot say that in all the circumstances described his failure to do so was sufficiently grave as to vitiate the appellant's conviction on what was in general irresistible evidence. The appellant's defence was in all other respects put fully and fairly to the jury, who were told in clear terms that they were to give his evidence the same fair consideration that they would give to that of the witnesses for the prosecution. By their verdict, that evidence was rejected. We therefore considered this to be a proper case for the application of the proviso to section 30(1) of the Court of Appeal Act, on the basis that no substantial miscarriage of justice actually occurred as a result of the learned trial judge's omission.

26. In the result, the appeal was dismissed and the appellant's conviction and sentence to five years' imprisonment affirmed.

SOSA JA

CAREY JA

MORRISON JA