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

CRIMINAL APPEAL NO. 20 OF 2005

BETWEEN:

JAVIER RAMIREZ	**Appellant**
AND	
THE QUEEN	**Respondent**

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BEFORE:

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

Mr. Michael Peyrefitte for the appellant.
Ms. Cheryl Lynn Branker-Taitt for the respondent.

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27 June and 27 October 2006.

MOTTLEY P.

1. The appellant was convicted of the offence of abetment to murder and was sentenced to three years in prison. He appealed against his conviction and sentence. He filed two grounds of appeal. In his first ground, the appellant alleged that the conviction was unreasonable and cannot be supported having regard to the

evidence. The gravamen of this submission is that the prosecution was under a duty to prove all the elements of the offence of abetment. It was submitted by Mr. Peyrefitte, who appeared for the appellant before this Court but not at trial, that one of the elements of the offence which the Crown had to prove was that Claudio Cardenas and, the person referred to in the evidence of Charles Bradley, the main witness for the prosecution as taxi man, were one and the same person. The second ground of appeal relates to the reception of evidence which the appellant alleged was prejudicial and therefore prevented him from having a fair trial.

2. The appellant had been jointly charged with Adrian Enrique Cruz and Juliana Theodora Ramirez on an indictment which contained three counts. The first count alleged that Cruz and Javier Ramirez on 19 September 2002 murdered Claudio Cardenas. The second count charged Javier Ramirez with abetment to murder in that on 20 August 2002 he solicited Charles Bradley to murder Claudio Cardenas. At the close of the case for the prosecution, the trial judge accepted a submission made on behalf of Cruz and Ramirez that they did not have any case to answer in respect of count 1. The jury duly returned a formal verdict of not guilty. However, the judge ruled that Ramirez had a case to answer on count 2, the count on which he was subsequently convicted.

3. Prior to the commencement of the trial, the Director of Public Prosecution entered a nolle prosequi discontinuing all proceeding against Theodora Ramirez who had been charged on count 3 with abetment to murder.

4. In the event, we allowed the appeal and ordered a new trial. We do not propose therefore to express any opinion on the evidence or to

consider it in any great detail. The Crown's case against the appellant was that he had solicited Charles Bradley to kill Claudio Cardenas.

5. In ground 1 as stated earlier the gravamen of the complaint by the appellant was that the prosecution failed to establish that the person who Charles Bradley was required to kill namely Claudio Cardenas was also known as "Taxi man". In other words the appellant submitted that the Crown had to prove that Cardenas and "Taxi man" were one and the same person. The appellant contended that by failing to do so, the Crown did not establish that the person who Charles Bradley said that appellant solicited him to murder had in fact been murdered. While the prosecution may have established that Cardenas had been murdered, counsel for the appellant stated there was no evidence to show that Cardenas was the same person that Bradley alleged that the appellant had pointed out as "Taxi man".

6. This submission is based on a misunderstanding of the offence of abetment as provided for by section 20(1) and (2) of the Criminal Code Cap. 101. An examination of section 20(1) and (2) of the Criminal Code will be sufficient to dispose of this ground. Section 20(1) and (2) of the Criminal Code provides as follows:

20(1) Every person who:

(a) directly or indirectly instigates, commands, counsels, procures, solicits or in any manner purposely aids, facilitates, encourages or promotes the commission of any crime, whether by his act, presence or otherwise; or

(b) does any act for the purpose of aiding, facilitation, encouraging or promoting the commission of a crime

by any other person, whether known or unknown, certain or uncertain,

shall be guilty of abetting that crime and of abetting the other person in respect of that crime.

(2) Every person who abets a crime shall, if the crime be actually committed in pursuance or during the continuance of the abetment, be deemed guilty of that crime.

7. In **Director of Public Prosecution v. Delita Chavez Criminal Appeal No. 34 of 2004**, this Court said:

> Under section 20(1)(a) the offence is committed where a person directly or indirectly, instigates, commands, counsels, procures, solicits or in any manner purposely aids, facilitates, encourage or promote the commission of any crime (emphasis ours). The wording of section 20(1)(a) does not require a person to instigate command etc. another person (emphasis ours) to commit a crime. The offence under this subsection is completed with the instigation commanding counseling procuring soliciting etc. the commission of any crime. The subsection does not require that the crime must have in fact been committed before a conviction may be obtained under its provisions.

8. As provided, the subsection does not require that the crime solicited must have been committed. The offence is completed when the solicitation takes place. Nothing else is required under section 20(1). Applied to the instant case, what the subsection requires, is that Ramirez would have solicited Charles Bradley to murder Claudio Cardenas. There is no requirement that the Crown should prove that Cardenas was in fact murdered. As stated earlier, we do not see any merit in this ground.

9. In relation to ground 2, we find that there is substance in this ground. On the first day, when the trial resumed after lunch, Charles Bradley, who was about to undergo cross-examination, informed the judge, in the presence of the jury, that he wanted to say something to them. The following exchange then took place in the presence of the jury:

WITNESS: I would like to say something to you, My Honour. When I was at the police station in the cell block – I would like you to speak to Mr. Javier cause I was threatened and he have two brothers in the prison and I don't know what am going getting into.

THE COURT: You are drawing the court's attention to the fact that you were threatened by who?

WITNESS: Mr. Javier when I was in the cell block at the police station. He told me that he have two brothers at the central police right now, so I don't know what am getting myself into. When I came out, I referred to Cpl. Cob. I made a report to Cpl. Cob.

THE COURT: What happened you said?

WITNESS: I made a report to Cpl. Cob.

THE COURT: You reported the matter to Cpl. Cob?

WITNESS: Yes, sir.

THE COURT: Okay. Well, the crown counsel is here, she had heard what you have to say and am sure they will probably take some statement from you with a view to bring charges against Javier for uttering threatening words to you.

WITNESS: Yes, sir.

THE COURT: Ms. Henry? You may wish to follow up on that that your witness has been threatened.

MS. HENRY: I will ensure that a statement is taken from him.

THE COURT: Yes. Go ahead, Mr. Bradley.

10. The direction that a statement would probably be taken from Bradley with a view of bringing charges against Ramirez for uttering threatening words could have been understood by the jury that the judge had accepted that Ramirez had in fact made threats to Bradley. At no stage during or after what had transpired, did the trial judge warn the jury not to draw any adverse inference against the appellant from what Bradley had alleged, nor did he tell the jury that they must not use the allegation to bolster the prosecution's case in order to convict Ramirez.

11. We would have expected that counsel for Ramirez would have taken objection to the allegation against his client being made in the presence of the jury. This was not done. The authorities show that Courts of Appeal are usually reluctant to allow an appeal when no objection is made at the trial. Regard must nonetheless be had to the nature of the allegation being made by the Crown against Ramirez. Their case was that Ramirez had solicited Bradley to murder Cardenas. In short, Ramirez was asking someone else to commit the murder for him. Ramirez was not threatening to do any harm to Bradley personally, but was suggesting that the witness could suffer harm at the hands of two brothers.

12. On the completion of the evidence of Bradley the trial judge revisited the issue of the allegations of threats to the witness made by Ramirez. Again in the presence of the jury the following transpired:

THE COURT: Thank you very much. Before I forget, Ms. Henry, since it appear (sic) to you as though the police are not concern (sic) about certain things that the witness have (sic) raised in this court, I have directed that this witness not be place (sic) near or close to the accused person as a result of what he has said. The police never should have put them together.

MS. HENRY: The cells are located side by side. They were not in the same cell so you can talk.

THE COURT: Keep them far from one another.

MS. HENRY: He will be sent back to Hattieville, so that would not be a consideration of the trial judge.

13. In saying that it appears as though the police are not concerned about the threats, the judge may have given the impression to the jury that he had concerns that Ramirez had in fact made the threats and would seek to carry them out. By directing that the witness and the appellant be kept separate "as a result of what he said", the judge may have given the jury the impression that he accepted that Bradley was speaking the truth and that Ramirez had in fact issued threats to him. The prejudicial effect of this is that the entire incident relating to the threats could have been used by the jury to bolster the case for the prosecution. Again, in as much as allegations were made in the presence of the jury, the judge ought immediately to warn the jury not to draw any adverse inference against Ramirez having regard to the nature of the charge of abetment against him.

14. What transpired in the presence of the jury after the resumption of the trial, and before the cross examination of Bradley, and again at

the end of his evidence was in the opinion of this Court sufficient having regard to the charge of abetment to prevent the appellant from having a fair trial. The judge in the circumstances ought to have discharged the jury and ordered a new trial. It was his responsibility to ensure that the trial of Ramirez was conducted in a fair manner so as to protect all his constitutional rights to a fair trial. The judge is required to ensure that only such evidence is admitted which will assist the jury in their determination of the innocence or guilt of the person being tried. He must therefore guard against the admissibility of any evidence which may unfairly prejudice that trial. In this case, once it became obvious to the judge that Bradley was making a complaint which of its very nature may be and which in fact was prejudicial to the fair trial of the appellant, he ought to have caused the jury to retire so that in the interest of justice Bradley's complaint could be properly aired. This the judge failed to do. But matters were made worse when the judge, on his own initiative, and again in the presence of the jury, revisited the subject matter of the complaint Bradley was making against the appellant.

15. In **Regina v. Sang [1980] 402, 437** Lord Diplock in explaining the concept of a fair trial said:

> "that there should be excluded from the jury information about the accused which is likely to have an influence on their minds prejudicial to the accused which is out of proportion to the true probative value of admissible evidence conveying that information".

16. Since no request was made by counsel for the defence to discharge the jury, it was, in our view, incumbent on the trial judge at the stage when the statement was made, to direct the jury that they should ignore the statement made by Bradley that the

statement should not in any way form part of their deliberations in deciding the guilt or innocence of the appellant.

17. Counsel for the appellant made no application to the judge to discharge the jury in view of the allegations made by Bradley. In **Hamilton v. R. (1963) 5 W.I.R. 361 at p. 363**. Moody JA (Ag) in delivering the judgment of the Court of Appeal of Jamaica in a case dealing with the accidental disclosure of inadmissible and prejudicial evidence to the jury, had this to say:

> "Where in the course of a trial there is the accidental disclosure by a witness for the prosecution of evidence of a prisoner's bad character and that statement is prejudicial to the prisoner if the prisoner is undefended, it is the duty of the learned trial judge to inform the prisoner of his right to apply either for the jury to be discharged and a new trial ordered or to proceed with the trial before the same jury that heard the prejudicial statement of the witness: **R. v. Fripp (1).** Where the prisoner or his counsel exercises his right and elects to have the trial proceed he cannot thereafter complain that the learned trial judge ought nevertheless to have discharged the jury: James v. R. (2). In our view it would be quite wrong in these circumstances for an appellant to sit back and take the chance of a favourable verdict and to come to this court if there was an unfavourable verdict and ask for a new trial: **R. v. Browne (3) (]1962] 2 All E.R., at p. 628)**. It would not be proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal: **Stirland v. Public Prosecution Director (4) ([1944] 2 All E.R., at p. 19)**."

18. It may very well be that counsel did not appreciate that he ought to have raised an objection to what was taking place. While it appears that counsel for the appellant sat back and took a chance of a favourable verdict, in the context of this case and having regard to the nature of the offence of soliciting the judge had in our view the responsibility to protect the interest of the appellant. He ought to have caused the jury to retire when he was directing an investigation into the allegations which Bradley was making against the appellant.

19. The Court also heard submissions on whether Bradley was an accomplice. We mean no disrespect to counsel but we do not consider it necessary for the purposes of determining the outcome of the appeal.

20. The judge did warn the jury that they had to be very careful with the evidence of Bradley because he had an axe to grind in that he had an interest to serve. This direction did not go far enough. What was required was the full direction explaining to the jury the reason for caution. It has been stated in Blackstone's Criminal Practice (2005 ed.) at p. 2206:

> "The justification for the full warning in the case of an accomplice giving evidence for the prosecution was that such a witness may have a purpose of his own to serve. Thus he may give false evidence out of spite and he may exaggerate or invent the accused's role in the crime in order to minimize the extent of his own culpability."

21. Bradley was the only witness who spoke of an agreement between himself and the appellant. He clearly had his own interest to serve. The full warning was required to be given to the jury by the judge.

He ought to have warned the jury that there was a special need for caution before they were entitled to act on the evidence of Bradley. In addition, the judge ought to have explained that an accomplice may give false evidence out of spite and may exaggerate or invent the role of the accused in the crime in order to lessen his own role. The judge's failure to give the full warning amounted, in our view, to a serious non direction which, on its own, was sufficient to vitiate the conviction.

22. It was for these reasons that we allowed the appeal in the interest of justice and ordered a new trial.

MOTTLEY P

SOSA JA

MORRISON JA