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

CRIMINAL APPEAL NO. 5 OF 2005

BETWEEN:

PHILLIP TILLETT **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 Carey	**-**	**Justice of Appeal**

Mr. Leo Bradley Jr. for appellant.
Mr. Kirk Anderson, Director of Public Prosecutions, for Crown.

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5 July & 27 October 2006

CAREY, JA

1. This was an appeal against a conviction for the murder of Kirk Lee Gentle, an inmate at the Belize Central Prison on 17 June 2003 before Gonzalez J and a jury. He was sentenced to imprisonment for life. Having heard submissions from Mr. Leo Bradley Jr., we

dismissed the appeal and promised reasons. They are set out below;

2. The allegation was that the appellant stabbed Kirk Lee Gentle in his chest. Cause of death was given as exsanguinations as a consequence of external and internal bleeding due to stab wound to the chest. The motive for the killing was that the victim had slighted his mother. The prosecution case depended upon inferences to be drawn from the following circumstances:

A prison officer Jacinto Pop who was on duty at about 2:50 p.m. on 17 June 2003 on the roof of the maximum and medium section of the prison, observed one inmate elbow another against a cell. That shove was followed by a punch to the same inmate's chest. He radioed the control tower about the incident. In the meantime, the inmate who had been punched in the chest, slowly subsided to the floor. The assailant walked off to where another prison officer Ernesto DeLeon had come. That officer held this man who had halted at gun point. The man placed his hand behind his back which allowed DeLeon to notice a knife in his hand. Officer Gladden arrived on the scene and assisted to escort the same man to the control tower. The inmate who had fallen to the floor was taken to the medical centre. There was blood on the left side of his shirt.

3. Officer Ernesto DeLeon who was identified by officer Pop as the person who held the assailant gave evidence. On the day in question at the material time he was in the medium section. While he was on the way up the stairs, an inmate ran by him up the stairs. He called to him but got no response. He turned back down the stairs and saw another inmate coming behind the one who had

passed him. He ordered this inmate to stop and when he refused, he took out his pistol. That induced the inmate to come to a halt, but he then continued along a corridor into the prison yard where he threw away a knife, and then surrendered. Another inmate retrieved the knife and handed it to the officer. The witness said he noticed bloodstains on the knife. The judge, very concerned with the niceties, attempted to correct the witness by insisting that he "cannot know blood". Under the pressure of the court, the witness accepted that the substance was red and smelt like blood. The witness' parting words on the subject were "I saw what appeared to be blood on the blade". This digression is, we think, much ado about nothing. The jury must have been bemused by all this preciosity in a case where the victim was stabbed in the chest by that knife and evidence had been led that after the injury the victim was wearing a "bloodstained shirt". It would be startling indeed if the red substance which smelt like blood, was not blood. This witness identified the appellant as the person who attempted to discard the knife.

4. Officer Gladden's contribution to the prosecution case was, in brief, as follows:

He heard the word "fight" on the radio and when he ran out of the tower, he saw officer DeLeon pointing a weapon at the appellant who had a knife in his hand. When he got down to their level, the appellant placed the knife on the floor. He escorted him to the "tower". While doing so, he asked him "what he went through that for?" The appellant responded that the "young boy" disrespected his mother. The prosecution also called an inmate Anthony Mortis. He spoke of a prisoner who ran past him. When he went downstairs he saw an inmate holding his chest and falling to the

ground. He appeared to be in pain. This inmate was removed in a wheel barrow to the medical centre. He had also noticed an officer, DeLeon, pointing a gun at another inmate whom he identified as the appellant, who had a knife in his hand. The appellant was escorted to the control tower. Mortis picked up the knife eventually and handed it over to the officer.

5. The appellant gave evidence on oath. On 17 June 2003, while he was entering the medium yard of the prison, he saw two inmates struggling with each other. He saw when one pushed the other and ran off. Then he noticed a knife on the ground in front of a cell (No. 12) and hands reaching out for the knife. He made haste to retrieve it and was on his way to an officer by cell No. 1 but the officer pulled a gun and pointed it at him. He dropped the knife and was escorted to the tower.

6. The jury preferred the version given by the witnesses for the prosecution and returned a verdict of guilty of murder.

7. Some four (4) grounds of appeal were filed on behalf of the appellant which we propose to deal with seriatim:

> "(1) The learned trial judge erred in law when he failed to accept the no case submission put forward by defence counsel at the close of the prosecution's evidence as to the identity of the person who stabbed Kirk Lee Gentle."

Mr. Bradley submitted that the evidence of Jacinto Pop did not identify the person who did the punching nor the, argument continued, did the evidence of Ernesto DeLeon, because he had

not witnessed the punching motion. In those circumstances, the trial judge should have withdrawn the case from the jury.

We mean no disrespect to the arguments of counsel for the appellant but he took, we fear, a singularly jejune approach to the evidence adduced by the prosecution in proof of its case.

In our review of the prosecution case, we noted that it consisted of a chain of circumstances which a jury could find, led inexorably to the appellant as implicated in the stabbing. Mr. Bradley submitted however that the evidence was weak because two prosecution witnesses placed another person at the scene coming from the same direction where the incident had occurred. One of the witnesses, Jacinto Pop, who was asked about a person running by officer DeLeon, said that "activity" was not close to the "incident" where it happened. The matter was not pressed and left in that state. We do not see how that evidence in any way lessens the effect of the other evidence so as to make the case weak. At all events a weak case is not the same thing as there being no case. If Mr. Bradley wished to suggest that the prosecution case was tenuous for which see *R. v. Galbraith*, he never put that forward. We are satisfied that there was a case to go to the jury.

"(2) The learned trial judge erred in allowing witnesses to identify the accused from the stand (dock identification) without ensuring that the proper guidelines were followed before they called his name or pointed him out."

The proper guidelines which counsel had in mind as providing sufficient groundwork was evidence, for example, "how long they had known" the person being identified. When it was pointed out to

counsel that the man who did the stabbing was seen held at gun point and marched off to the control tower and that man was taken to court and the man in court is that man; he did not press the point. Any argument regarding the holding of identification parades would be absurd in these circumstances.

8. The two remaining grounds can be dealt with quite shortly. As to the first of these, it was submitted that there was no warning about inconsistencies in the evidence, but counsel had to concede that discrepancies were left to the jury. Mr. Bradley did not seek to say that the judge had omitted to direct the jury on how they should approach discrepancies in the evidence. As there is no requirement on the part of a trial judge to list every discrepancy in a case, the ground lacked substance and must be rejected.

9. The final ground complained that the trial judge did not give a *Turnbull* warning despite the urgings of counsel for the Crown. Mr. Bradley accepted that the case was not based on "identification evidence" but identification played some role: there were those witnesses DeLeon, Mortis and Gladden whom, he said, came before the court identifying someone as having done something.

10. It is necessary to reiterate what Mr. Bradley conceded namely, that the case did not depend on visual identification evidence: it depended on circumstantial evidence identifying the appellant as the person who stabbed the victim. Logic would dictate that directions on circumstantial evidence would be apt. The judge gave such directions and no criticism has been made in respect of them. A summing up if it is to serve any useful purpose must be structured or crafted in the light of the particular circumstances. It is not a circumnavigation of the criminal law to impress but to assist

the jury to understand the case on which they have embarked. Properly understood, the facts in the case showed that any identification of the person who inflicted the injury would be as to a body and not the physiognomy of the person. That body was seen to move from the victim towards a guard who held him at gun-point and from there he ended in court. A *Turnbull* warning would not, we think, improve the summing up. The circumstances had to lead to one conclusion only. The standard of proof cannot be any higher.

11. We have examined the case in its totality and we are satisfied that the defence was fairly and accurately put to the jury, who could be in no doubt what the issues were.

MOTTLEY P

SOSA JA

CAREY JA