IN THE COURT OF APPEAL OF BELIZE, A.D. 2007

CRIMINAL APPEAL NO. 8 OF 2005

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS **Appellant**

AND

ISRAEL HERNANDEZ ORELLANO **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. Kirk Anderson, Director of Public Prosecutions, for the appellant.
Respondent unrepresented.

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20 October 2006, 8 March 2007.

MORRISON JA

1. On 20 October 2006, this court dismissed the appeal of the Director of Public Prosecutions from the acquittal by a jury of the respondent of the offence of murder in the Supreme Court of Belize (Central

Criminal Sessions) on 14 March 2005. These are the reasons for this decision.

2. The respondent was tried on indictment for the murder of Saul Montejo Portillo before Gonzalez J and a jury. The prosecution called some eleven witnesses in support of its case, which was that the respondent had used a machete to inflict several severe wounds to the head and body of the deceased, from which he died. The case for the prosecution having been closed, the respondent made an unsworn statement in his defence, the main trust of which was that he had acted in self-defence. Thereafter, addresses to the jury were made by counsel for the prosecution and the defence, at the end of which all that remained was for the trial judge to sum up the case to the jury. Before doing so however, the learned judge raised with counsel for the prosecution the question of "the element of the unlawfulness of the offence", which elicited further submissions from both counsel on the issues of unlawfulness, the use of excessive force in self-defence and the role of the jury.

3. The learned judge then delivered a ruling in the following terms:

> *"Ms. Branker-Taitt, and Mr. Turton, a while ago I took an adjournment to consider a ruling on certain questions I put to learned crown counsel. And the questions I had put to the learned crown Counsel is [sic]) whether the prosecution have proved that the act of the accused at the time of the Alleged incident was unlawful in view of the evidence as it stands, or as it came from the prosecutions [sic] witness, Amanda Portillo. And in the view of her admission that the killing of Saul Montejo took place in circumstances of self defence although she added, in her view, the amount of*

injuries caused was excessive and it should be left to the jury.

*Crown counsel further argued that the case of **Sydney Neal v. The Queen** was different in terms of its facts as in that case there was only one stab injury inflicted to the body of the deceased and so that case is not on par with this instance [sic] case because in this case there were multiple injuries, therefore, I should allow this case to go to the jury. It appears to me that that distinction made by crown counsel is artificial in nature considering their own evidence coming from Amanda Portillo who testified as to the conduct of the deceased before the accused had picked up the courage to defend himself. And at this stage, I will not go over her evidence.*

In the circumstances, I am of the strong view that I cannot allow the case to go to the jury as it stands. In my view, the prosecution has not negative [sic] the justification of self defence. Indeed, the evidence of the prosecution, or the evidence adduced by the prosecution and coming from the witness, Amanda Portillo, is consistent with the justification of self defence as raised by the accused. I therefore rule, as I have said that this case ought not to go to the jury and I will direct the jury to return a verdict of not guilty of murder. If I am wrong, the Court of Appeal put me right. I will in the course of time give a fuller ruling in this matter, if the need arises. Ruling accordingly."

4. In the result, the jury returned a formal verdict of not guilty, as they were directed to do, and the respondent was acquitted. The

appellant appealed to this court pursuant to sections 49(1)(a) and 49(2)(a) of the Court of Appeal Act on the single ground that the learned trial judge had erred in law in directing the jury in the terms set out in paragraph 3 above. The respondent was served with the Notice of Appeal on 12 April 2005, but did not appear either personally or by counsel when the appeal came on for hearing. This court was told by the Director that an attempt had been made to serve the respondent with the prosecution's Skeleton Arguments, but that it appeared that he was no longer resident within the jurisdiction.

5. The Director submitted that the learned trial judge ought not to have withdrawn the case from the jury, as questions relating to whether the respondent had acted in self defence (including the issue of whether in so acting he had used excessive force) turned on the assessment of evidence and therefore fell entirely within the province of the jury.

6. We are in full agreement with this submission. The issue of the use by an accused person of excessive force in self-defence is specifically dealt with in section 119(b) of the Criminal Code. Where that issue arises on the evidence, it raises a question of fact to be determined by the jury after appropriate directions from the trial judge. It is no part of the function of a trial judge, having determined that the evidence for the prosecution has crossed the threshold of a prima facie case to answer by the defence, to thereafter take on to himself functions that are reserved in the trial process for the jury. In this regard, the following observation by Mottley P, delivering the judgment of the court in **Director of Public Prosecution v Fabian Bain (Criminal Appeal No. 6 of 2005)** is equally apposite in the instant case:

"Judges should always be mindful that the interests of justice require that those persons who commit serious crimes should be brought to justice and, if there is evidence to support the charge, should be convicted. Equally, if there is insufficient evidence to support a conviction, the accused should be acquitted. To this end, judges must ensure that trials are conducted in accordance with the recognized and accepted procedures ensuring at all times a fair trial to the defendant and at the same time mindful of the interest of justice." (paragraph 31).

7. It is for these reasons that we formed the view that Gonzalez J fell into error in directing the jury to return a verdict of not guilty. This was an error of law within section 49(2)(a) of the Court of Appeal Act, in which case this court is empowered by section 49(3), if it thinks that a miscarriage of justice has occurred, to allow the appeal and order a retrial. However, in the instant case, the learned Director was, quite properly in our view, content that his point be taken, without seeking a retrial, given that the respondent is no longer within the jurisdiction of the courts of Belize.

8. In **Director of Public Prosecutions v Fabian Bain**, this court referred to and adopted the following statement of Lord Hoffman, who delivered the judgment of the Judicial Committee in **State of Trinidad & Tobago v Brad Boyce [2006] 2 WLR** 284, 293:

"Their Lordships do not think that Parliament could have intended that in every case in which the accused had been acquitted as a result of an error of law by the judge, the Court of Appeal would be bound to allow the appeal and order a new trial. There would be cases in which such a

course would be most unjust; for example, where an important defence witness had died. On the other hand, it would be unsatisfactory to allow the appeal and set aside the acquittal, leaving the guilt or innocence of the accused hanging in the air, without ordering a new trial. The position is different when an appeal against a conviction is allowed and no new trial ordered. There the conviction is simply quashed. In their Lordships' view, if the Court of Appeal considers that there was an error of law but that there should not be a new trial, it should correct the error but then simply dismiss the appeal and leave the acquittal standing."

9. We considered that the same approach was warranted by the circumstances of the instant appeal, bearing in mind in particular, as Mottley P pointed out in **DPP v Fabian Bain**, that section 49(3) of the Court of Appeal Act requires the court to exercise its discretion in determining whether the acquittal of the appellant has led to a miscarriage of justice (paragraph 28). It is for this reason that, in the light of all the circumstances of this case, the order of this court was that, notwithstanding the error of the learned trial judge, the appeal should be dismissed.

MOTTLEY P

SOSA JA

MORRISON JA