IN THE COURT OF APPEAL OF BELIZE, A.D. 2008

CRIMINAL APPEAL NO 26 OF 2008

BETWEEN:

LOUIE GENTLE	**Appellant**
AND	
THE QUEEN	**Respondent**

BEFORE:

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

Mr. Darrel Bradley for the appellant.
Ms. Cheryl-Lyn Branker-Taitt, Director of Prosecutions (Acting) for the Crown.

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7, 17 October 2008 & 27 March 2009.

CAREY, JA:

1. In the Supreme Court before Gonzalez J and a jury, after a trial which began on 21 November 2007 and concluded on 17 December 2007, the appellant was convicted of the murder of Takiesha Sutherland with whom he had a common law relationship. She had come to her death as a result of receiving multiple stab wounds to the neck, chest and back. The

appellant was sentenced to imprisonment for life. He now appeals to this court.

2. We heard submissions on 7 October last and on 17 October announced that the appeal would be dismissed and the conviction affirmed. We intimated that we would give our reasons later, which we now provide.

3. There was no eye-witness to this crime. The prosecution rested its case on circumstantial evidence. The accused and Takiesha Sutherland lived together with their two infant children at 21 Racoon Street in Belize City. They shared the upper floor of a two storey house with Takiesha's grandmother, Gilda Johnson. She gave evidence on behalf of the prosecution as did Rupert McKenzie, a former police officer who occupied the ground floor of these premises.

4. Both witnesses spoke to the fact that the couple were home on the night of 3 January. Gilda Johnson spoke with Takiesha. Later that night, she heard her emitting a sound which she endeavoured to imitate for the jury's benefit. Rupert McKenzie said he heard their voices as if in an argument but was not able to hear what was being said. The noise of their argument had awakened him at about 4:00 a.m. He described odd sounds which he heard thereafter, the sound of shuffling, then footsteps running. All these sounds came from the room above his, which was occupied by the appellant and his common law wife. He also heard the sound of a bolt being drawn on the back door, then footsteps coming down the stairs and saw the appellant at the bottom of the stairs. The appellant had his bicycle and a couple of black plastic bags with him. He placed these bags on the handlebar of the bicycle which he mounted and rode away through the gate. At the time when he saw the appellant at the bottom of the stairs, it was at a distance of some fifteen feet. He had an unobstructed view of him and light came from a lamp post on Racoon

Street, some sixty feet away. So far as his acquaintance with the appellant went, he knew him over a period of five years since he had begun to live on the premises and saw him on a regular basis over that time.

5. Both, he and Gilda Johnson eventually saw Takiesha lying lifeless on the floor in a pool of blood from where she was taken to the hospital. The postmortem examination revealed that she had suffered multiple stab wounds to the front of the neck, the chest and the right side of her back. There were stab wounds in the upper chest penetrating through the cartilages and intercostal spaces, multiple punctures of both lungs and the most serious injury, a puncture wound to the heart. These injuries were consistent with infliction by a knife wielded with moderate force.

6. This represented the essentials of the prosecution case. No motive for the crime was established.

7. So far as the defence went, the appellant, a man of Rastafarian persuasion, who gave sworn evidence, denied the charge on the basis of alibi. He swore before the jury that on the night of 2 January 2007 he was at a “brethren’s” house at about 10:00p.m. whence he had gone to record music and collect fifty dollars which he was owed. He remained there until 2:00 a.m. when he left on foot for a house on Vernon Street but on the way, he realized he had left a DVD at his “brethren’s” house. He left there eventually at about 4:00 a.m. He did not return home to Racoon Street. The police picked him up on 17 January 2007. He kept out of the way of the police in the interim because he learnt the police wanted him dead or alive. He denied owning a bicycle or being on friendly terms with McKenzie whom he described as “Babylon”, a Rastafarian term for a policeman.

8. He called the "brethren", Roy Zelaya to support his story that he had been with him on 2 January 2007. In the course of cross examination, he said that he had not spoken to any police officer after the morning of 3 January. The prosecution was allowed without objection to call a rebuttal witness to show that he, in fact, had such a conversation. By their verdict, the jury after three hours of deliberations, rejected the defence of alibi, and returned, satisfied so they felt sure that the circumstantial evidence pointed in one direction and one direction only and that, the guilt of the appellant. They had been given appropriate directions on the burden and the standard of proof.

9. The grounds of appeal complained of material irregularities in the trial, criticized the summing up as unbalanced, charged that the defence was not fairly put to the jury and that the judge had not left provocation as an issue to be determined by the jury. Save for the last alleged deficiency complained of, we do not think a great deal can be said of the other grounds of appeal filed on behalf of the appellant.

10. The first ground was in these terms:-

> "(a) There was a material irregularity owing to the fact that the learned trial judge made prejudicial statements [p. 235 line 1-3; page 235 line 17; p. 236 line 3; page 237 line 10 to p. 238 line 2 at a critical point in the trial during cross-examination of the defence's alibi witness. The statements suggested that the alibi witness was being dishonest and not worthy of belief, going beyond fair judicial comment, and the effect of the comment was not cured by a direction in the summation (p. 402 line 15). The statements fundamentally prejudiced the accused (sic) right to a fair trial, making the conviction unsafe and led to a miscarriage of justice".

We would note in passing that this court has no power to allow an appeal on the footing that the conviction was "unsafe". Section 30(1) of the Court of Appeal, Cap. 90 provides that the court shall allow the appeal where it thinks the "verdict is unreasonable or cannot be supported having regard to the evidence" or that the "judgment should be set aside on a wrong decision of any question of law or that on any ground, there was a miscarriage of justice…" We now set out the impugned passages highlighted from the evidence of the appellant's witness, Roy Zelaya. At p. 235 line 1-3 "of course, you know what you are saying logically makes no sense, but I am writing down what you say, yes?"

And at line 17:-

> "you can't get out that one",

And at p. 236 line 3:-

> "No, no, you are missing the boat, man".

And at p. 237 line 19:

> "The witness is either not understanding the question or simply dodging the question".

11. It was submitted on behalf of the appellant in the skeleton argument that "these statements seriously undermined the defence case for the following reasons:

    (i) the statements came from the judge and the statements suggested to the jurors that the witness was not worthy of belief;

    (ii) the statements came into quick succession and the cumulative

effect of the statements added to its prejudicial effect;

(iii) the statements came at a pivotal point in the trial [probably the most pivotal point in the trial] during the cross-examination of the alibi witness;

(iv) the issue of the credibility of the alibi witness was a central issue in the trial and the statements, coming from the judge, may have tipped the scales against the Appellant and in favour of the prosecution".

Mr. Bradley was prepared to concede that a judge was permitted to comment on a case but said such comments must be balanced and fair and not usurp the functions of the jury. The comments in the instant case he urged, went beyond fair judicial comment and constituted a material irregularity resulting in a miscarriage of justice. Finally, he submitted, this material irregularity was not cured by the following direction in the summing-up (p.402):

> "And in the case of Roy Zelaya you might want to conclude that he's not too much of a bright man and therefore he testified in the manner in which he testified. And you will recall, Members of the Jury, that the way he was testifying at one spell I unwittingly may have made a jokey remark saying, I look like you get caught he smile (sic). But though I said that to him, Members of the Jury, <u>you cannot hold that against him. You cannot take that to conclude that he is telling a lie. It is for you to decide having seen and heard him testify, to say whether or not he was telling the truth or not telling the truth. So you can remove that remark. Disabuse your minds of that remark. Move it from your minds"</u> [Emphasis supplied]

12. Lord Bacon, the great English essayist, in his essay "On the Judiciary", observed that "a much talking judge is no well-tuned cymbal". The trial

judge in this case characterized one of his comments as “a jokey remark”. We have little hesitation in pointing out that a murder trial, more so where the prisoner is in peril of the death sentence, is not an appropriate place for “jokey remarks”. The trial should be conducted with due decorum and seriousness. There is no role for the judge to provide a running commentary for the jury’s or the public’s delectation. In a jury trial, the judge and the jury, it is trite knowledge, have separate and distinct roles. One of the functions of the jury, is to evaluate the testimony of the witness to determine whether he is speaking truth or falsehood. We cannot conceive how a jury is in any way, helped by “jokey remarks” or the opinion of the judge as to the witness’ bankruptcy of intelligence or that he was not worthy of belief. We think it right to make these observations in the hope that they will not ever recur. Having said that, we must consider whether these undoubtedly, incautious and injudicious comments amounted to a material irregularity as to lead to a miscarriage of justice. We think not. The witness Zelaya, supported the appellant’s alibi. Accordingly the effect of this fact was that the jury were confronted with two stark stories. On the Crown’s case, the appellant was at the scene of the crime at the material time, while the defence case was that he was at Zelaya’s house. Both stories could not be true. The jury were obliged to resolve that conflict, one way or the other. The jury accepted the evidence of Gilda Johnson and Rupert McKenzie in preference to that of the appellant and his witness. There was evidence on which the jury could have come to that view. We would note that by the time, the trial judge came to summing up to the jury, he had thought better of his inappropriate remarks. He recanted. His remarks appear at para 10 of this judgment. We think that the jury could not have had any doubt that his remarks were to be removed from their thinking. There is no reason to suppose that these directions fell on deaf ears. His remarks were clear and definitive. We would have suggested that he should also have apologized to the jury for his *faux pas*, out of courtesy to them. However, we cannot agree with

Mr. Bradley that there was a material irregularity leading to a miscarriage of justice..

13. Another ground advanced before us, was:

> (c) The summation was unbalanced and the defence case was not fairly put to the jury.

With all respect to Mr. Bradley's valiant endeavours, he was quite unable to show in what way the summation was unbalanced or that the defence was not fairly put. He suggested, as an example of this imbalance in the summation, the statement by the judge:- "As men and women of this world, you know how relationships between husband and wife whether common-law or not operates in this country, tempers flair up and things happen. But it is not because things happen, and because you are angry that you have a right to kill or that you have the intention to kill." It is far from clear how the observation, innocuous as it was, could weigh in the scales in a manner adverse to the appellant. It was based on evidence from Rupert McKenzie of an argument between the parties in the early morning. Mr. Bradley never categorized the observation as unwarranted or unfair. He did not venture that far. So far as the defence not being put fairly, was concerned, that assertion was not demonstrated in any way, much less cogently. Support was entirely lacking.

14. We set out this ground in respect of which, we invited submissions from the Director of Public Prosecutions.

> "(e) Owing to the fact that the prosecution's case was that the Appellant killed the deceased following an argument between the Appellant and the deceased, the learned trial judge ought to have directed the jury on the issue of provocation. The learned trial

judge should have drawn the juror's attention to any evidence capable of amounting to provocation and should have directed the jurors on the appropriate law as it relates to provocation"

Despite the positive terms in which this ground was settled, and an assertion that there was "evidence of provocation sufficient enough for the issue to have been left to the jury" we were never apprised of that evidence even if it were slight or tenuous, as he argued, it could be.

15. The Director referred us to section 120(a) of the Criminal Code which enacts as follows:

> "The following matter may amount to extreme provocation to one person to cause the death of another person, namely:-
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) …
>
> (e) any thing said to the accused by the other person or by a third person which was grave enough to make a reasonable man to lose his self-control. [Emphasis supplied]

She submitted that this provision required that the thing said to the accused by the other person, must be grave enough to make a reasonable man lose his self-control. There was no evidence of what was said in the instant case by Takiesha Sutherland. Such evidence as existed, comprised what the appellant had said at the time of the argument which was –

> "Dehn wahn know when she dat ah want mi pickney".

No one would challenge the comment of Mr. Bradley that a reasonable inference was that this was a dispute about the couple's children. But, plainly, this provides no basis for inferring what Takiesha must have said.

16. Our attention was called *to R v. Acott [1997] 2 Cr. App. R 95* which provides a helpful source of guidance regarding the issue of provocation. There is no difference between the law in England and in Belize with respect to this aspect of provocation. In this decision of the House of Lords. Lord Steyn delivered the speech with which the other Law Lords agreed. At p. 102 he said this:-

> "Moreover, although there is no longer a rule of proportionality as between provocation and retaliation, the concept of proportionality is nevertheless still an important factual element in the objective enquiry. It necessarily requires of the jury an assessment of the seriousness of the provocation ("the grave enough" – section 120 (a) Criminal Code). It follows that there can only be an issue of provocation to be considered by the jury, if the considers that there is some evidence of a specific act or words of provocation resulting in a loss of self-control… If there is no such evidence, but merely the speculative possibility that there had been an act of provocation, it is wrong for the judge to direct the jury to consider provocation. In such a case, there is simply no triable issue of provocation".

In the event, there was simply no evidence on which the jury could assess the gravity of what was said by the deceased to the appellant. A speculative possibility that there was the utterance of provocative words is wholly incapable of providing the deficiency. It would have been wrong for the judge to have left the issue to the jury in the absence of any evidence of words of provocation. This ground must also be rejected.

17. We come then to deal with the final ground, viz, (e) The verdict was unreasonable and cannot be supported having regard to the evidence".

Counsel for the appellant said this was supported by the following:-

(a) The evidence of Gilda Johnson was shaken significantly, because she failed to adequately account for the gap in time between 4:00 am to 5:00 a.m. which is when she informed the downstairs neighbour, who then went to the police. This leads to an inference that she never saw the appellant that night and her evidence was fabricated to assist the police because she could not account properly for the gap in time.

We do not think that time played any significance in the events of that night or morning. The significance of her evidence was to place the appellant at home with his family that night. Despite the submission about fabricating evidence to assist the police, no such suggestion was ever made to the witness. The view that her evidence was shaken must be put down to fanciful optimism or hyperbole.

(b) The evidence of Rupert McKenzie was shaken in that it was put to him that he did not have a good relationship with the appellant and that he did not see the appellant that night.

This basis is, we think, devoid of any merit or substance.

(c) There was evidence from the alibi witness [which was in part corroborated by Sergeant Polomo] and Sergeant Polomo in his testimony never revealed the

time when the alibi witness said he was visited by the appellant.

It is enough to say of these illustrations that the jury saw and heard the witnesses for the prosecution and the defence. They did not believe the witnesses for the defence but believed the two main prosecution witnesses. We see no reasons to differ.

18. Before parting with this case, we note that although the appellant retained counsel Mr. Richard Bradley, he nevertheless was assigned legal-aid. This seems to us highly anomalous. Legal-aid is required to be assigned to "poor" prisoners, those who cannot afford counsel. We think this is a matter which should be looked into by the proper authorities to determine how this situation came about and whether this procedure is correct.

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MOTTLEY P

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SOSA JA

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CAREY JA