

IN THE COURT OF APPEAL OF BELIZE AD 2020
CRIMINAL APPLICATION FOR LEAVE TO APPEAL NO 2 OF 2017

THE QUEEN

Applicant/Intended Appellant

v

CALANEY FLOWERS

Respondent/Intended Respondent

BEFORE:

The Hon Mr. Justice Sir Manuel Sosa
The Hon Mr. Justice Samuel Awich
The Hon Madam Justice Minnet Hafiz-Bertram

President
Justice of Appeal
Justice of Appeal

S Smith, Senior Crown Counsel along with R Cattouse, Crown Counsel for the
applicant/intended appellant
A Sylvestre for the respondent

21 October 2019 and 13 March 2020

MAJORITY REASONS FOR JUDGMENT

HAFIZ BERTRAM JA

Introduction

[1] This was an application for leave to appeal by the Director of Public Prosecutions (the Director) against the acquittal of Calaney Flowers (“the

respondent”) after the conclusion of a trial before Gonzalez J. The notice of motion for leave to appeal, dated 13 April 2017, was made pursuant to **section 65 C (3) of the Indictable Procedure Act**, Chapter 96 of the Laws of Belize (Revised Edition) 2011, as amended by Act No. 5 of 2011. The application was supported by the affidavit of Rene Montero, Crown Counsel.

[2] The respondent was tried before Gonzalez J, without a jury, between the 10 May and 30 May 2016, and was acquitted on 24 March 2017. She was tried on indictment for the offences of murder and attempted murder, contrary to section 117, read along with sections 106 and 107 respectively, of the Criminal Code, Chapter 101 of the laws of Belize (Revised Edition) 2003.

[3] On 21 October 2019, this Court heard the application by the Director for leave to appeal the acquittal of the respondent and dismissed it without adjudication, for want of jurisdiction on the part of the Court to hear the application. This was a unanimous decision by the Court and it promised to give reasons for its decision and does so, albeit only by majority, now.

Brief factual background

[4] The respondent was tried for the murder of Lyndon Morrison and attempted murder of Sochyl Sosa. At the close of the prosecution’s case, a no case submission was made on behalf of the respondent. On 30 May 2016, the trial judge ruled that the respondent had a case to answer and the trial continued.

Judgment of the trial judge

[5] On 24 March 2017, the trial judge acquitted the respondent on both counts. In his written judgment, he concluded at paragraphs 99 and 103, the following:

“[99] From the evidence in this case, as I have already stated I do not find that the accused had the intention to kill either of the two persons.

.....

[103] As a consequence of my finding that the accused did not have the specific intention to kill Lyndon and Sochyl at the time when she collided with the cycle, I find myself compelled to find her not guilty on both charge, murder and attempted murder.”

Grounds of application for leave to appeal acquittal

[6] The Director made an application for leave to appeal the acquittal on the following grounds:

- (a) the acquittal of the respondent was unreasonable and cannot be supported having regard to the evidence; and
- (b) the trial judge erred in law in not considering the statutory alternative offence of manslaughter as set out in section 126(1) of the Indictable Procedure Act.

Jurisdiction issue

[7] At the hearing of the application, the grounds of the application for leave were not argued. As mentioned above, the application was dismissed for want of jurisdiction by the Court. The jurisdiction issue was raised by Mr. Sylvestre on behalf of the respondent. He contended that the right of appeal of an accused or the prosecution created by **section 65C(3)** of the **Indictable Procedure Act** is circumscribed by the provisions of the **Court of Appeal Act**, namely **section 49(1)** of the Act.

The relevant statutory provisions

Section 49(1) of the Court of Appeal Act

[8] *Section 49* of the *Court of Appeal Act* provides for appeals by the Director. It provides as follows:

“49. (1) Without prejudice to any right of appeal granted to the prosecution by any other provision of this Act, an appeal shall lie to the Court at the instance of the Director of Public Prosecutions in the following cases,

- (a) Where a person tried on indictment has been acquitted by the direction of the Judge at the close of the case for the prosecution whether in respect of the whole or part of the indictment; or
- (b) Where the Judge quashes the indictment; or
- (c) Against the sentence passed on conviction on a trial on indictment.

(2) An appeal under subsection (1) of this section may be made on the following grounds,

- (a) against the acquittal, on any ground of appeal which involves a question of law alone;
- (b) with the leave of the Court or upon the certificate of the Judge who tried the accused that it is a fit case for appeal against the acquittal, on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the Court or Judge to be a sufficient ground of appeal.
- (c) with the leave of the Court, against the sentence passed on conviction on the ground that it is unduly lenient, unless the sentence is one fixed by law.”

.....

(5) Subject to this section, the foregoing provisions of this Part respecting the time for appealing, filing of notice of grounds of appeal, costs of appeal and the powers of the court shall *mutatis mutandis* apply to appeals under this

section, and the Court may make all such orders and issue all such directions as it considers necessary to give effect to its decision.”

Section 65 (C) of the Indictable Procedure Act - judge alone trial

[9] Section 65 (C) of the *Indictable Procedure Act*, Chapter 96, is a provision for a judge to give reasons for conviction or acquittal and for the right of appeal by the accused or prosecution in cases conducted in a judge alone trial. It provides:

“65C.- (1) Where a trial is conducted without a jury, the judge shall, at the conclusion of the trial, give a written judgment stating the reasons for the conviction or acquittal of the accused person (as the case may be) at, or as soon as reasonably practicable after, the time of conviction or acquittal.

(2) The date of the judgment referred to in subsection (1) of this Act shall be deemed to be the date of conviction or acquittal of the accused person.

(3) An appeal shall lie to the Court of Appeal, at the instance of the accused person or the prosecution, from the decision of the judge given under subsection (1) of this section, convicting or acquitting the accused person.”

Argument for the respondent

[10] Learned counsel, Mr. Sylvestre submitted that this Court did not have the jurisdiction to hear the application brought by the Director for leave to appeal the acquittal of the respondent, as the circumstances of the case did not fall within the ambit of section 49(1) (a) of the *Court of Appeal Act*. As such, he argued that the application should be dismissed by the Court.

[11] Mr. Sylvestre argued that in the Notice of Motion dated 13 April 2017, the application for leave was made pursuant to section 65C (3) of the *Indictable Procedure*

Act. However, in the written submissions filed by the Director, dated 22 July 2019, it was stated that the legal basis for the application was provided by *section 49(2)* of the *Court of Appeal Act*. Counsel argued that the right of appeal of an accused or prosecution is circumscribed by the provisions of the *Court of Appeal Act*. Further, that all rights of appeal to the Court of Appeal are so circumscribed.

[12] Counsel further submitted that though *section 49(1)* gives the prosecution a right of appeal, it is restricted to three instances. (See para 8). Therefore, the right of appeal of an accused or the prosecution under *section 65 (C)* of the *Indictable Procedure Act* is read subject to the provisions of the *Court of Appeal Act* and the *Court of Appeal Rules*. Further, that although the Crown in their written submissions stated that the “Legal/Statutory Basis for the Application” is *section 49(2)* of the *Court of Appeal Act*, the right of the Director to appeal resides in *section 49(1)*. He argued that neither *section 49(1) (b)* nor *(c)* is applicable.

[13] As for *section 49(1) (a)*, Mr. Sylvestre submitted that it is the only source of the prosecution’s right of an appeal of an acquittal on an indictment. Counsel relied on the case of *Director of Public Prosecutions v Fabian Bain*, Criminal Appeal No. 6 of 2005, where Mottley P, at paragraph 16 of the judgment explained the circumstances that must exist for the provision to be invoked by the Director. His Lordship stated:

“16. S 49(1)(a) requires a number of things to have occurred before the Director may avail himself of the right of appeal. The accused must:

- (i) Have been tried on indictment;
- (ii) He must have been acquitted;
- (iii) The acquittal must have been as a result of a directed verdict by the judge; and
- (iv) The directed verdict and acquittal must have taken place after the close of the prosecution case.

But the right of appeal which has been granted empowered the Director to take steps in the interest of justice, to correct errors of law during the course of a trial which led to an accused person being wrongly discharged or acquitted.”

[14] Mr. Sylvestre contended that in the instant appeal, the Director cannot satisfy the third requirement since there was a verdict of acquittal by the trial judge and not an acquittal by direction of the trial judge.

[15] Counsel further argued that this Court cannot assume jurisdiction to hear the case for the prosecution, on the basis that the constitutional right to a fair trial includes fairness to the prosecution, since statutorily, there is no expressed statutory power to assume jurisdiction to hear an appeal that was not as a result of a directed acquittal by the judge. Mr. Sylvestre relied on the case of **Smith v The Queen** [2000] UKPC 6 at paragraph 26, where Lord Steyn stated that, “... *it is settled principle of English law that an acquittal recorded by a court of competent jurisdiction, although erroneous in point of fact cannot generally be questioned before any other court. An acquittal in final. The legislature may abolish or qualify this principle. In order to be effective such a legislative inroad on the principle requires clear and specific language.*”

Response by the Crown on the issue of jurisdiction

[16] Ms. Smith, learned counsel representing the Director, submitted that section 65 (C) (3) of the *Indictable Procedure Act*, gives the prosecution an additional right of appeal in the circumstances covered by the subsection. Counsel contended that this section, literally, though not directly, amended the Court of Appeal Act, thus giving the prosecution that right of appeal.

[17] Learned counsel admitted that Act No 5 of 2011 (the amending act), which brought section 65 (C) (3) into existence did not go so far as to outline the procedure and grounds upon which the Director is to exercise the right of appeal. Nevertheless, counsel argued that the intent of the legislature in passing section 65 (C) (3) was to

add a new right of appeal to the Director without effecting any change to the extant procedure and grounds upon which the Director may exercise that right.

[18] Ms. Smith further argued that the Court must look to external aids of construction to determine the proper procedure for the exercise of this right. Counsel argued that the Court of Appeal Act is an Act that is *in pari materia* with section 65(C) of the Indictable Procedure Act and therefore, the two can be read together to make legislative sense. As such, she urged the Court to read section 49(2) of the *Court of Appeal Act* into section 65 (C) of the *Indictable Procedure Act*, to prevent an absurdity that Parliament would give a right but no means of exercising that right. Further, that section 65(C) adds a new right under section 49(1) although it does not expressly stipulate so.

Discussion

[19] The issue that was considered at the hearing of the application for leave to appeal by the Director was whether this Court had jurisdiction to hear the application. The Court dismissed the application on the basis that there was no provision in the Court of Appeal Act which gives it the power to hear it. The Court considered section 65 (C) of the Indictable Procedure Act and sections 49(1), 49(2) and 49(5) of the Court of Appeal Act, in making its determination.

[20] It is without a doubt that section 65 (C) of the *Indictable Procedure Act*, gives both the accused and the prosecution a right of appeal to the Court of Appeal from the decision of a trial judge sitting without a jury and who has convicted or acquitted the accused person.

[21] In the instant matter, the trial was conducted without a jury and the respondent was acquitted after the trial by Gonzalez J. The trial judge gave a written judgment in compliance with section 65 C (1) stating the reasons for acquitting the respondent. The judge found that the respondent had no intention to kill. The grounds of the application by the Director for leave to appeal the acquittal are not frivolous. There is

indeed a statutory alternative offence of manslaughter as set out in section 126(1) of the *Indictable Procedure Act*.

[22] However, in light of the jurisdiction issue raised, the question considered by the Court, was whether as contended by Ms. Smith, the Court should read section 49(2) of the *Court of Appeal Act* into section 65 (C) of the *Indictable Procedure Act*, in order to prevent an absurdity that the legislature would give a right but, no means of exercising that right. It was the view of the Court, that section 49(2) which provides for grounds of appeal cannot be read in isolation. The section which states “(2) *An appeal under subsection (1) of this section may be made on the following grounds, ...*” has to be read with section 49(1) which provides for three cases as to when the Director can appeal. The two subsections are inextricably linked and there is no dispute about this fact.

[23] It is clear, and this is not in dispute either, that section 49(1) does not include the additional right of appeal by the Director provided under section 65 (C) (1), which is an appeal from a decision of a trial judge at the conclusion of a trial and sitting without a jury. However, Ms. Smith argued that since the *Indictable Procedure Act* is later in time to the *Court of Appeal Act*, it impliedly amended section 49 (1) in terms of the circumstances in which the Director can appeal. As such, the two Acts must be read together. Mr. Sylvestre, on the other hand, argued that section 65 (C) is circumscribed by the provisions of the *Court of Appeal Act* and he analyzed the Act. But, for present purposes, (with no disrespect to Mr. Sylvestre) the Court focused on section 49(1) & (2) and the powers given to the Court under sections 3(1) and 49(5) of the *Court of Appeal Act*.

[24] The Court had carefully considered the three cases under section 49(1) and has come to the conclusion that it cannot import the right under section 65 (C) into section 49(1) because of material differences. (For present purposes, there is no need to discuss section 49 (1) (b) and (c) and the Court will concentrate only on acquittal since the respondent was acquitted and the right of appeal of the Director was in

issue). Section 49(1) (a) provides for an appeal of an acquittal as well as section 65(C). But, the circumstances of acquittal in both sections are materially different. Section 49(1) (a) provides for an appeal by the Director of an acquittal by the direction of the judge at the close of the case of the prosecution, where a person is tried on an indictment. Section 65(C) provides for an appeal by the Director of the judgment of the trial judge sitting alone, and stating reasons for the acquittal at the conclusion of the trial. Section 65(C) is not a directed acquittal as in 49(1) (a) at the close of the case for the prosecution. (See the case of *Fabian Bain* which explains section 49(1) (a)/ directed verdict of acquittal). It was the view of this Court, that it had no power to hear an appeal created under section 65(C). In our opinion, the powers under section 49(5) to hear appeals is limited to appeals under section 49(1) (a).

[25] The Court had also considered whether it can properly add that additional right of appeal by the Director provided for under section 65 (C), by applying the principle of fairness. Mr. Sylvestre assisted the Court with authorities including that of *Dionicio Salazar* [2019] CCJ 15 at para 25, where that Court pointed out the constitutional requirement “*that any criminal trial needs to be fair*”. It was the opinion of the Court, that it cannot assume jurisdiction to hear the appeal on the basis of fairness even if an error of law had been made by the trial judge. There must be expressed statutory provisions in the Court of Appeal Act, giving it the power to hear an appeal which resulted from an acquittal by a judge alone trial. Unfortunately, this Court cannot step in the shoes of the legislature to add the right of appeal provided under section 65(C) which addresses judge alone trial, to section 49(1) (a) which addresses jury trial. Further, section 49(2) relied upon by Ms. Smith cannot be read in isolation as it is inextricably linked to section 49(1). Also, the Court had a difficulty (for reasons already discussed) in accepting the argument of Ms. Smith that section 65 (C) is not to be read subject to the restrictions contained in section 49(1) (a), and her further submission that section 49(2) is to be read together with section 65 (C) (3) of the *Indictable Procedure Act*.

[26] It is for these reasons that this Court dismissed without adjudication, the application of the Director for leave to appeal the judgment of the trial judge.

SIR MANUEL SOSA P

HAFIZ BERTRAM JA