IN THE COURT OF APPEAL OF BELIZE, A. D. 2020

CRIMINAL APPLICATION NO. 04 0F 2014

THE QUEEN Applicant /Intended Appellant

v

EDILBERTO MARTINEZ Respondent/Intended Respondent

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BEFORE

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

C Vidal SC, DPP, for the applicant/appellant
A. Saldivar for the respondent

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5 April 2016 and 31 December 2020.

AWICH JA

[1] This is yet another case transferred to me for judgment writing long after the hearing. This Court heard the case on 5 April 2016, and announced its decision and order the same day. Two years and three months after, on 11 July 2018, the writing of the judgment was assigned to me.

[2] The case was an application by the DPP under *s.49 (1) (a)of the Court of Appeal Act Cap.90, Laws of Belize* for leave to appeal from an order acquitting Mr. Edilberto Martinez, the accused-respondent, at the close of the case for the prosecution in the criminal case trial of the accused-respondent in the Supreme Court. In this Court at the end of the hearing, the Court granted leave to appeal and straightaway heard the appeal, allowed it, set aside the order acquitting the respondent and ordered a retrial.

[3] The case was tried by the learned trial court judge, Hanomansingh J. and a jury in the Supreme Court from 10 to 18 February 2014. It was a short case. The respondent was indicted for the offence of manslaughter under *s.116 read with s.108 (1) (b) of the Criminal Code, Cap 101, Laws of Belize*. The particulars of the charge were that:

> "*EDILBERTO MARTINEZ on 25 day of November 2010, in Dangriga Town, in the Stann Creek District in the Southern District of the Supreme Court, caused the death of Henry Enrique Petillo by unlawful harm, to wit punching him*."

[4] In the trial, the prosecution led evidence to be appraised, as follows. Two eye-witnesses testified that on 25 November 2010, at Ms. Martha's house on Saint Vincent Street, Dangriga Town, each saw Beto (the respondent) punch Henry Enrique Petillo, also known as Don Petillo or Hendon on the chest and he fell. They were at the entrance of the house. A report was made and police officers went to Ms. Martha's. They found Mr. Petillo, now deceased, lying on his back, apparently lifeless. When the

police inquired about what happened, the two witnesses pointed at the respondent as the person who had punched Hendon and he fell. The respondent was present.

[5] On his own the respondent went to the police station and spoke to the station commander, Julio Valdez, Assistant Superintendent of Police. The respondent and the O.C. knew each other personally. The respondent informed the O.C. about the incident at Martha's house. The O.C. cautioned him, invited a justice of the peace, and upon confirming that the respondent still wanted to make a statement, cautioned him and recorded a cautioned statement from the respondent. The O.C. read back the statement to the respondent. He agreed to the contents and signed the statement. The justice of the peace and the O.C. also signed the statement. In the statement, the respondent said that, he punched or pushed the deceased, who fell. The statement was admitted as evidence in the trial. All the above material items of evidence seemed uncontroverted up to that stage, but would, of course, be subject to assessment by the jury.

[6] The evidence that was controverted and was at issue was in the testimony of Dr. Estrada Bran, a postmortem expert. He testified that, he had carried out a postmortem examination on Mr. Petillo, the deceased, and prepared a report. It was admitted by the court as evidence. The crucial items in the testimony of Dr. Estrada Bran were two explanations that he gave about the cause of the death of Mr. Petillo.

[7] The first explanation he gave was during the examination-in-chief. It was recorded at page 111 to page 114 as follows:

"A: There is externally a neoformation situated on the occipital area. The internal exam- -

THE COURT: That's all the external exam shows?

THE WITNESS: Yes, My Lord.

THE COURT: Just for the jury, could you tell them what is the occipital area?

THE WITNESS: Sure.

THE COURT: Just show them.

THE WITNESS: The occipital area is the back of the head.

THE COURT: Go on.

THE WITNESS: The internal examination reveals an epicranial two inches hematoma situated on the occipital area. There is no skull fracture. The brain shows normal. The right lung shows fibrosis, congestion and edema. There are multiple areas of necrosis. The heart- -

THE COURT: Before you move on, we are dealing with the lungs first. Just explain to them what is fibrosis, please.

THE WITNESS: Fibrosis is abundant, lot of scars.

THE COURT: Is a lot of?

THE WITNESS: Scars which are attached to the chest walls.

THE COURT: To the walls?

THE WITNESS: To the walls of the chest.

THE COURT: It's the lungs we are dealing with.

THE WITNESS: The lungs were sticking to the inner walls of the chest.

THE COURT: Yes? You said it's also- -

THE WITNESS: Congestion meaning coloration changes of the lungs and inflammation.

THE COURT: And inflammation?

THE WITNESS: Of the lungs.

THE COURT: What else?

THE WITNESS: Edema means fluid collection in the lungs.

Necrosis- -

THE COURT: Well, that's the one I have never heard about. Necrosis is what?

THE WITNESS: Means dead tissues on different areas of the lungs which mean a pre-existing medical condition of the lungs. The heart shows normal. The liver shows cirrhosis which means a pre-existing medical condition of the liver. I arrived to an opinion that the cause of death was acute lung failure due to pulmonary edema due to chronic lung disease, fibrosis.

Q. Doctor, you said you had found a hematoma situated at the occipital area of the head.

A. Yes.

Q. What could have caused that hematoma?

A. First of all hematoma is a blood collection of two inches underneath the soft tissue of the skin and this hematoma is as a result by a blow or by a fall.

Q. Now, go back to the death as a result of the lung disease. Let me put it this way, how could a punch to the chest of a person with that pre-existing condition that you described, how that punch affected the person with that pre-existing condition that you described as the deceased had?

A. Affects the person indirectly but does not cause death.

Q. You said that in itself does not cause death but it affects him indirectly. Could you explain that some more?

A. The hematoma produces- -

THE COURT: Which hematoma? Just a minute.

Q. My question was a punch to the chest.

A. Yes.

THE COURT: You didn't find any hematoma in the chest?

THE WITNESS: No, My Lord.

Q. What about a punch or a fall to the chest how would that affect the deceased with that precondition that, you explained?

A. The punch to the chest contributes to cause the hematoma as a consequence of a fall and the pre-existing medical condition of the

subject affects the perfusion or the breathing of the lungs and indirectly produce the acute lungs failure.

THE COURT: That's it?

THE PROSECUTION: Yes, My Lord.

THE COURT: Cross-examination?

…"

[8] The second explanation by Dr. Estrada Bran of his finding and cause of the death of Mr. Petillo was made during cross-examination. It is recorded at page 114 to 119. It is as follows:

"**CROSS-EXAMINATION OF DR. MARIO ESTRADA BRAN BY MR. BRADLEY**

Q. Doctor, when you looked at the skull of the deceased, was there any bleeding or was there any blood from the bleeding of the brain?

A. No bleeding on the brain.

Q. What does that mean?

A. That the hematoma or the blood collection on the back of the head did not affect the function of the brain.

Q. In other words, it wasn't a severe blow?

A. That's correct.

Q. There was also no fracture of the skull, am I correct?

A. That's correct.

Q. And to make it more understandable to us, this hematoma in our words, in our language, isn't it like a ching chong?

A. That's correct.

THE COURT: It is like a what?

MR. BRADLEY: Ching chong, My Lord. The jury would understand what it means.

THE COURT: For one, I don't understand and for two, I don't know how to spell it. So between you and the doctor- -

Q. Help me out there, doctor.

A. In local terms also, people call it "guava".

THE COURT: So, you are saying the hematoma was a guava? I know they say guava when they say it's a swelling.

THE WITNESS: It was two inches- -

THE COURT: It's a little swelling?

THE WITNESS: Bruised blood, a two inches bruise blood. That's the next local term for hematoma, bruise blood.

THE COURT: We used to call it black and blue.

THE WITNESS: Black and blue or bruise blood, My Lord.

THE COURT: M. Bradley, anything else?

MR. BRADLEY: Yes.

Q. Doctor, the necrosis you said is dead cells. That's what you called necrosis?

A. Okay. Specifically, the necrosis of the lungs were dead cells maybe caused by several medical conditions.

THE COURT: One being smoking?

THE WITNESS: One of them will be smoking. The second one will be the use and abuse of controlled substance such as cannabis, alcohol or crack, etc.

THE COURT: It could be inhalation like asbestos and that sort of thing?

THE WITNESS: In relation to what, My Lord?

THE COURT: It could also be inhalation of asbestos, dust and those sorts of things?

THE WITNESS: That's correct, My Lord.

THE COURT: And especially in an area like Dangriga, the dust that you have here.

THE WITNESS: Yes, My Lord, also other chemicals such as insecticides, herbicides, etc.

THE COURT: And weedicides and so on?

THE WITNESS: Yes, My Lord.

THE COURT: And in an agriculture area like here, you got plenty of that around. Go on

Q. Doctor, you also spoke of cirrhosis of the liver. What could have caused cirrhosis of the liver?

A. I'm just going to mention two reasons of having cirrhosis because there are many. I am just going to mention the more common ones. Number one is alcohol.

THE COURT: Excessive alcohol, not just alcohol.

THE WITNESS: Yes, excessive alcohol.

THE COURT: Yes?

THE WITNESS: The second one also the same one relating to the lungs condition such as marijuana, cigarette smoking, other controlled drugs. And I would like to mention the third one which will be malnutrition.

Q. One final question, doctor. The hematoma or guava or bruise blood could have been caused by the moving of the body as well by being dropped somewhere? Are there other causes that could have caused that hematoma?

A. The direct cause of the hematoma was trauma, was fall because he has the characteristics of a pre-mortem hematoma.

Q. So, it was caused by a fall?

A. Yes.

THE COURT: Was caused by a pre-mortem fall?

THE WITNESS: That's correct, My Lord.

THE COURT: Yes?

MR. BRADLEY: No further questions, My Lord.

THE COURT: Any re-examination?

THE PROSECUTION: No, My Lord.

THE COURT: Any questions by the jury?

THE JURY: No, Your Honor.

THE COURT: I just want to get one thing clear for the benefit of the jurors here, from what you found there with the hematoma, that was the only injury you found, right?

THE WITNESS: That's correct.

THE COURT: In your opinion there is absolutely no connection whatsoever between that hematoma and, for want of a better word, the malfunctioning or the non-functioning of the lungs that caused death?

THE WITNESS: There is no connection, My Lord.

THE COURT: There is absolutely no connection. Mr. Bradley, any questions as a result of what I asked?

MR. BRADLEY: No, My Lord.

THE PROSECUTION: No, My Lord.

THE COURT: Thank you very much, doctor.

THE PROSECUTION: My Lord, the next witness will be Karen Valentine."

[9] At the close of the evidence for the prosecution's case, Hanomansingh J. came to the view that, the prosecution did not prove the cause of the death of Mr. Petillo; it did not prove that, the accused-respondent caused the death of Mr. Petillo by punching or pushing Mr. Petillo, thereby causing him to fall and sustain the hematoma in the back of his head, and that the hematoma caused the death of Mr. Petillo. The learned judge did not invite learned Senior Crown Counsel Mr. Willis or Mr. Bradley for Mr. Martinez, the accused, now the respondent, to address the judge on the question before him before he made up his mind. The judge simply directed the jury to enter a verdict of not guilty. The Jury accordingly returned a verdict of not guilty, and the judge acquitted Mr. Edilberto Martinez of the charge of manslaughter, contrary to s.*116 read with s.108 (1) (b) of the Penal Code Cap 101, Laws of Belize*.

The application for leave and the ground of appeal.

[10] The DPP was aggrieved. She applied under *s.49 (1) (a) of the Court of Appeal Act*, for leave to appeal the acquittal of the accused-respondent. The sole ground on which the DPP proposed to appeal was this:

"**Ground of Appeal**.

5. The ground of appeal which the applicant seeks leave to argue is that the learned trial judge erred in law in so far as he concluded

that, the evidence led by the Crown was insufficient to prove that the act of the Respondent caused the death of the victim."

The submissions.

[11] The learned DPP made extensive sound submissions supported by well established authorities, particularly about the cause of death and expert's evidence (opinion of an expert). It is not necessary to set out the submissions here for discussion because the question raised by the ruling of Hamomansingh J. is limited to whether the prosecution had led any evidence regarding the cause of death of Mr. Petillo, so that the case could be regarded as a good enough ***prima facie*** case to proceed with by the judge putting it to the accused-respondent.

[12] The submissions by Mr. Saldivar for the respondent, were expected to be largely responses to the submissions by the DPP for the applicant-appellant. Mr. Saldivar commenced his submissions in that way, but soon after strayed too far afield. Whereas his submission that invited the Court to consider the definition of manslaughter under *s.116 read with s.108 (1) (b) of the Criminal Code*, and the submission that, the principle in *R v Galbraith [1981] 1WLR 1039* be applied were to the point at issue, and helpful, Mr. Saldivar proceeded to muddy the waters. For the purposes of establishing a ***prima facie*** case, he submitted too extensively about the credibility of the eyewitnesses that this Court should consider. Further, his submission that, the accused-respondent punched the deceased in "self defence" of Ms. Martha, his mother, was also premature. The extent of the submissions about credibility, self defence, ***mens rea*** and

constitutional rights was suited for the end of the entire trial, and would have to be decided by the jury.

Determination.

(i) The application for leave to appeal.

[13] Regarding the application for leave to appeal, I agreed to granting leave to the DPP to appeal the acquittal of the respondent at the stage where the prosecution was required to establish a ***prima facie*** case. I based my decision on the principle that, there was a likelihood that, the intended appeal would succeed. The case put forward had prospect of success - see *DPP v Hernandez Orellano, Crim Appeal No. 8 of 2005*. Some judges have stated the principle in the negative that: “leave will not be given unless the case is seriously arguable”- see *R v A [2008] EWCA Crim 2186*.

[14] My view was that, the intended appeal would succeed on two grounds. The first was a point of practice and procedure ground. Of his own the judge came up with the idea that, the prosecution had not established a *prima facie* case. Without inviting the defence to make any submission, and the prosecution to answer if a case to answer had been established, the judge ruled that, there was no *prima facie* case to begin with, and directed the jury to return a verdict of not guilty. There was no exceptional circumstance to cause the judge to go it alone, and the judge did not point to anything that caused him to decide that he would proceed the way he did, in the interest of justice.

[15] The second ground for granting leave was that, the ruling of the trial judge was based on errors of fact and of law. The intended appeal would succeed because of the error of law. The error was that, Hanomansingh J. decided that, the prosecution had not led any evidence at all about the cause of the death of Mr. Petillo. The record presented to this Court showed that, the prosecution led evidence that, Mr. Martinez punched Mr. Petillo who fell and was taken apparently lifeless. Further, the prosecution led evidence in the testimony of Dr. Estrada Bran about the cause of death. The judge ought to have considered the principle in *R v Galbraith*. If he did, he would have decided that a *prima facie* case had been established. He would have allowed the case to go to the defence, and at the end directed the jury to consider whether the evidence proved that, the act of Mr. Martinez caused the death of Mr. Petillo, as a matter of fact.

(ii) The appeal.

[16] In the end, I accepted that, the appeal of the DPP be allowed for the reason that, Hanomansingh J. erred in law when he decided that, the prosecution did not establish a *prima facie* case of manslaughter against the accused-respondent. The evidence in the testimonies of the two eye-witnesses and in the cautioned statement of the respondent provided the causal link. In addition, the expert's evidence in the testimony of Dr. Estrada Bran provided the direct scientific cause of death. It would be for the jury to decide in the end, whether it would accept the evidence as sufficient proof of the cause of death of Mr. Petillo. The judge erred in asserting that, there was no evidence led to prove the cause of death of Mr. Petillo. That was an error of law under the first limb in *R v Galbraith*. If the judge thought that, the evidence was tenuous, unsatisfactory, that

would be a matter for the jury upon a proper direction by the judge at the end of the case for the defence. In *R v Galbraith*, the application by Mr. Galbraith for leave to appeal a ruling that a prima facie case to answer had been established against him was dismissed because evidence had been led, and only the strength of it depended on the reliability of the witnesses and other matters which were within the province of the jury.

[17] The two limbed principle in *R v Galbraith* is summarised by Lord Lane CJ. at page 1042 as follows:

> **"***How then should the judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty,*

then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

See also *Reg v Barker (note) (1975) 65 CA App R287*.

[18] Finally, I accepted the submission by the DPP that, Hanomansingh J. erred in law by disregarding the law that, the decision about the cause of death was a decision of fact to be made by the jury on the evidence led - see *s.11 and 124 of the Criminal Code, Cap. 101*. The prosecution led evidence regarding the cause of death. Dr. Estrada Bran provided two explanations about the cause of death. One explanation linked the fall of Mr. Petillo together with the health precondition that he had to the cause of his death. The other explanation pointed out that, hematoma in the occipital area of the head alone would not have caused the death of Mr. Petillo. It was for the jury to decide the cause of death upon proper direction by the judge.

[19] For these reasons I too allowed the appeal of the DPP and ordered that, the case be sent back for a retrial before a different judge.

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AWICH JA