IN THE COURT OF APPEAL OF BELIZE AD 2013

CRIMINAL APPEAL NO 19 OF 2011

GLENFORD BERMUDEZ Appellant

v

THE QUEEN Respondent

_____

BEFORE

The Hon Mr Justice Manuel Sosa	President
The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Mr Justice Samuel Awich	Justice of Appeal

Appellant unrepresented.
C Vidal, Director of Public Prosecutions, for the respondent.

_____

13 June and 1 November 2013.

SOSA P

Introduction

[1] Mrs Raquel Violet Bermúdez, née Requena ('the deceased') was a taxi-driver who operated out of the village of Hattieville in the Belize District and was known often to carry passengers from that village to the Belize Central Prison ('the prison') and vice versa. The prison is located some four miles away from Hattieville on the road linking that village to Burrell Boom and commonly-known as the Hattieville-Boom Road ('the

road'). Sometime during the lunch-hour on 22 November 2007, a sunny and intensely hot day, the deceased, then aged 40, was forced by the driver of another taxi-cab to stop hers at a point on the road somewhere between the prison and Hattieville and was immediately thereafter fatally shot in the head whilst still at her steering wheel. The deceased's 36-year-old estranged husband, Glenford Bermúdez, also known as 'Bucket' ('the appellant'), was taken into custody by the police later that same afternoon and formally arrested and charged with the murder of the deceased by the following afternoon. His trial, at which he was represented by Mr Carlo Mason, started before Lord J and a jury on 11 April 2011. It included a *voir dire* (which extended from 13 to 15 April) and ended on 27 April 2011 with the appellant's conviction of murder. The record discloses that the jury retired to consider their verdict at 12.19 pm but omits to state the time at which they returned to the courtroom. It is, however, to be gathered from the fact that the court adjourned very shortly after such return, and that the time was then 4.50 pm, that the length of their deliberations easily exceeded four hours. A sentence of life imprisonment was imposed on the appellant on 12 May 2011 and he thereafter filed a notice of appeal in which he expressed a desire to appeal against his conviction and such sentence. On the appeal being called up for hearing on 13 June 2013, the Court drew the attention of the learned Director of Public Prosecutions to its own concerns over some aspects of the trial and invited her assistance in dealing with them. After hearing the Director in respect of such concerns, the Court announced that it would allow the appeal, quash the conviction, set aside the sentence and, in the interests of justice, order a retrial. In the circumstances, the Court further ordered that the appellant remain in custody pending retrial, unless and until otherwise ordered by a judge of the court below. The written reasons for judgment then promised by the Court are now given.

The statement under caution

[2] As has already been pointed out above, the appellant was taken into custody by the police on the very afternoon of the slaying. There was evidence from a Sergeant Aban that he recorded a statement made under caution by the appellant between 3.40 and 5.10 that same afternoon (such statement to be referred to in the remainder of this

judgment, save where clarity otherwise requires, as 'the statement'). It was for the purpose of determining the admissibility or otherwise of the statement that the *voir dire* mentioned above was held. The statement contains an allegation of acts of supposed provocation carried out by the deceased in a passage which, in its entirety, reads:

> 'When I returned [to the deceased's house] Monday, 19/11/07 at around 1:00 p.m. – 2:00 p.m. when I reached home and saw her neck ~~vamped~~ GB (*sic*) vamp up. I told her that I will be going out of the house but she told me that she want me to come out of the house because she has another man. Everytime she pass in front of me she kiss this person from prison. Everytime she does this and she is always provoking me.'

However, all expectations of an outright confession created in the mind of the reader of the statement by this mention of provocation are left unfulfilled. The statement, becoming increasingly confusing and lacking in coherence, goes on to deal with the alleged firing of two shots at the deceased. A large part of the confusion stems from the introduction of a kind of villain of the piece in the form of an individual variously referred to as 'the white boy' and 'Hyde'. It is claimed in the statement that this individual was picked up at the prison by the appellant and that the deceased thereupon somehow materialised and confronted the appellant, telling him that he should not be in that area in view of a restraining order which had been made against him at her instance. At some later stage, the appellant is said to be back on the 'Boom Road', with Hyde, for some unknown reason, still in his taxi-cab. According to the statement, the appellant then tells Hyde to come out of the taxi-cab and Hyde does so. At this point however, the deceased somehow reappears. Hyde thereupon produces a .38 revolver and refers to the deceased, as she approaches him and the appellant, as 'the informant'. The statement continues as follows:

> 'Hyde told me "You gwen go shot her or I will shoot you" at this time he had a .38 pistol pointing at my head. He then put a shot gun to my hand then he squeeze my hand and I heard the shot gun gone off, I saw the car which [the deceased] was driving ran off the road into a drain.'

The remainder of the statement contains details which are, in large part, inconsistent with the account already summarised by the Court above and which need not be reproduced for present purposes. Also contained in the remainder of the statement, however, are other details not so inconsistent, including:

> 'I do not know where [Hyde] ketch her…'

and

> '… [Hyde] told me that I shoot the informant because every time he bring for Puga she inform the officers.'

The ruling on admissibility

[3] The ruling of the judge at the conclusion of the *voir dire* was that the statement was admissible. In so ruling, the judge plainly rejected the appellant's evidence that he had been subjected to threats of physical violence and verbal abuse by a Sergeant Palomo and an unnamed officer of 'Indian descent' before appending his signature to the statement whose contents had not been dictated by him to Sergeant Aban and were, moreover, unknown to him. In the actual words of the judge: '… I do not accept the testimony of [the appellant] and of him being threatened and coerced'. The statement was accordingly read to the jury in the later course of the main trial.

The directions as to the possible use of the statement

[4] In summing up to the jury thereafter, the judge, referring throughout to the statement as 'the confession', said:

> 'In deciding whether you can safely rely upon the confession you must decide two issues -

1. Did [the appellant] in fact make the confession?
If you are not sure that he did, you should ignore it.

If you are sure that he did make the confession then:-

2. Are you sure the confession is true?

When deciding this you should have regard to all the circumstances in which it came to be made, and consider whether there were any circumstances which might cast doubt upon its reliability.

You should decide whether it was made voluntarily, or was, or may have been made as a result of oppression or other circumstances.

You should also have regard to the contents of the confession itself and consider whether [the appellant] appears to have made admissions to matters which cannot be true or could not be true according to the evidence presented to you.

Then it is for you to assess what weight should be given to the confession.

If you are not sure, for whatever reason, that the confession is true you must disregard it.

If on the other hand, you are sure that it is true you may rely on it.

This decision I leave to you as judges of the facts.' [Emphasis added.]

[5] In the passages which have been underscored above by the Court, the judge rightly raised the possibility of the use of oppressive methods by the police though, regrettably, he spoke there only of the making of the statement, as opposed to the signing of it. But having so raised the possibility of the use of oppressive methods by

the police, he wrongly went on to tell the jury that, so long as they were sure it was true, they could properly rely on it.

The necessity or otherwise for a Mushtaq direction

[6] That direction completely disregarded the guidance given by the House of Lords in its famous decision in *R v Mushtaq* [2005] UKHL 25, in which Lord Rodger of Earlsferry, giving the leading speech (with which both Lord Steyn and Lord Phillips of Worth Matravers agreed), said, at para 47, that:

> '… the jury should be directed that, if they consider that the confession was, or may have been, obtained by oppression or in consequence of anything said or done which was likely to render it unreliable, they should disregard it.'

The questions which require to be asked and answered in ascertaining whether such a direction is appropriate in a particular case were adumbrated with unsurprisingly perfect clarity by Lord Phillips of Worth Matravers, speaking for the Privy Council in *Barry Wizzard v The Queen* [2007] UKPC 21, when he said, at para 35:

> 'A *Mushtaq* direction is only required where there is a possibility that the jury may conclude (i) that a statement was made by the defendant, (ii) the statement was true but (iii) the statement was, or may have been, induced by oppression.'

As this Court had occasion to point out in *Arturo Ek v The Queen*, Criminal Appeal No 7 of 2010, in which judgment was delivered on 20 July 2012, the Board in its later decision in *Benjamin v The State* [2012] UKPC 8

> 'did not alter what it had said in *Wizzard* concerning the principles which should guide a judge in deciding whether to give the jury a *Mushtaq* direction. What it did not agree with was the decision in *Wizzard* that the

judge had been right not to give a direction along the lines of what is now the *Mushtaq* direction …' [See para 26 of the judgment in *Ek*.]

[7] Was there, then, in the present case, first, a possibility that the jury might conclude that the statement was made by the appellant? The Court hardly needs to point out that it was a central part of the Crown case that the appellant had, indeed, made the statement. In those circumstances, the possibility of such a conclusion on the part of the jury was, as the Court considers, a real one and ought properly to have been alive in the mind of the judge as he summed up the case to them. Secondly, was it possible that the jury might conclude that the statement was true? With respect to the allegation that the deceased had committed provocative acts towards the appellant, the Court has no doubt that there was such a possibility, indeed, a strong one. With regard to the claim of the presence and involvement of a man called Hyde at the scene, the Court would regard it as improbable that such a claim would be believed by a reasonable jury. But the Court is unable to say that the possibility could properly have been entirely ruled out by the judge. And the Court would respond similarly to the question whether there was a possibility that the jury might conclude that the statement was, or may have been, obtained by oppression. The judge had, moreover, formed the opinion, rightly or wrongly, that the defence purportedly raised in the statement was duress and, hence, unavailable; and, being of that opinion, he could hardly view the statement as anything but a confession. In the result, the Court is of the view that a *Mushtaq* direction ought properly to have been given by the judge to the jury in the instant case. The Director's corresponding concession in this regard was, in the judgment of the Court, eminently sound and justifiable. (The Court shall return to the question of the soundness or otherwise of the judge's opinion later in this judgment: see paras 21 – 22, below.)

[8] The Court is unable to leave this topic without first expressing its unqualified disapproval of the use by the judge in his summing-up of the noun 'confession' to refer to the appellant's statement under caution. It is basic judicial knowledge that the finding as to whether a statement under caution amounts to a confession is one for the jury and not for the judge. Repeatedly to tell a jury that such a statement is in fact a confession

is unnecessarily to imperil the fairness of a trial. In *Orceneo Flores v The Queen*, Criminal Appeal No 16 of 1980, this Court dealt with a submission by Flores' counsel, Mr Manuel Sosa, that Barrington-Jones J had erred in effectively telling the jury that Flores' statement under caution constituted an admission. Writing for this Court, Georges JA agreed (16th para) that: 'An admission of having stabbed a person is not an admission of a crime.' He further wrote (18th para):

> 'It would have been preferable to direct the jury that <u>if they thought the statement amounted to a confession</u> they should not act on it unless it was confirmed.' [Emphasis added.]

Having regard, however, to the remainder of the summing-up, the Court in *Flores* did not consider the pertinent ground of appeal sufficiently meritorious.

The directions as to the mens rea of murder

[9] The Court further drew the attention of the Director to the directions of the trial judge with respect to the *mens rea* for the crime of murder. There were, as the Director frankly acknowledged, three main areas of serious concern in this regard.

[10] First, there was an astonishing direction to the effect that an intention to cause serious bodily harm is a sufficient *mens rea* for the crime of murder. The judge is recorded as having said to the Jury:

> 'If you accept that he did anything then ask whether as an ordinary responsible person, he must have known that death <u>or really serious bodily harm</u> would result from his actions. If you find that he must have known then you may infer that he intended the result.'

The clear implication of that direction was that an intention to cause serious bodily harm alone is a sufficient *mens rea* for the crime of murder. The Court considers this a most egregious lapse at this stage in the development of the law in this jurisdiction.

Categorically rejecting a submission made along similar lines by counsel for Hemmans in *Clarence Hemmans v The Queen*, Criminal Appeal No. 6 of 2010, this Court said, at para [20]:

> 'This is a submission as misguided as it is bold. First, no trial judge worth his salt, so to speak, will be heard directing a jury in a murder trial in this jurisdiction today that 'intent to cause really serious harm' is the mens rea necessary to prove murder. As the learned Director of Public Prosecutions pointed out in her Skeleton Argument, at p 5:
>
> > "The required intention for the offence of murder is the intention to kill."
>
> This is a principle almost as old as the hills in this jurisdiction.'

[11] The trial judge was plainly very wrong so to direct the jury and he only compounded matters when, a little later, he told them, referring to that same direction:

> 'And this would be satisfactory proof of the intention required to establish the charge of murder.'

[12] It is true that the judge later correctly told the jury that the required intention was the intention to kill. But this Court does not consider that the judge employed the proper corrective, given the extremely serious nature of the misdirection concerned. In the view of this Court, the correct approach, in the circumstances of the present case, was undoubtedly that which was adopted by the English Court of Appeal in *Regina v Moon* [1969] 1 WLR and by this Court in *Secundino García v The Queen*, Criminal Appeal No 16 of 2005. In *García*, Carey JA , writing the judgment of the Court delivered on 22 June 2007, said, at para 8, that, to correct her error in that case, the trial judge was required to:

‘(a) repeat the wrong direction,

(b) acknowledge that it was an error,

(c) instruct the jury to put it out of their minds altogether, [and]

(d) direct the jury correctly.’

These are the corrective measures which ought to have been, but (with the exception of the fourth) were never, taken by the judge in the instant case. The Court fears that the result of this may have been that the jury were left in a state of some confusion on a point of considerable importance

[13] The second area of deep concern to the Court as regards direction on the *mens rea* of murder related to the giving of contradictory, and hence confusing, directions on a second aspect of intention, viz the appropriate, nay mandatory, evidential range to be covered by the jury. Putting it in the form of a question: Just how much of the evidence is the jury to examine in its effort to ascertain the intention of the accused person? What the judge said after quoting from section 9 of the Criminal Code, which deals with the subject of criminal intention, was as follows:

> ‘This is relevant to the question of intent and you will have to take it into account when considering all the evidence and the proper inferences to be drawn from all the evidence before you.’

It was, of course, correct to tell the jury that they had to consider all the evidence and such inferences as could be drawn from it. But the judge, having so directed the jury, enigmatically went on, later in the summing-up, to say:

> ‘Now, as I said, you may gather the intention of [the appellant] to kill [the deceased] if you so accept he did have that intention from a number of circumstances in this case. For instance, you may wish to draw

> inferences from the whole of the evidence before you and/or only certain of the evidence of the Prosecution.'

[14] The Court knows of no legal principle which would support the astounding proposition that such a novel option exists. The view that there is such an option constitutes a gross and heretical departure from the long-settled interpretation of section 9(b) of the Code, which goes back more than 21 years to the judgment of this Court in the leading case of *Winswell Williams v The Queen*, Criminal Appeal No 2 of 1992. It was quite wrong to direct the jury that they had such an option.

[15] The judge then proceeded, against that unfortunate background of misdirections, to tell the jury:

> 'And so you may come to your decision whether the required intention has been proven or not. That I leave to you to decide as you see fit.'

[16] The Court must again point out, in fairness to the judge, that he twice correctly directed the jury on this point later in his summing-up. But, as in the earlier instance noted above, he limited himself to giving the proper direction, taking none of the other three steps in the corrective process already described, a process which, in the view of the Court, was entirely necessary having regard to the gravity of the misdirection concerned.

[17] The third and final area of concern drawn to the attention of the Director in the context of the directions on the *mens rea* of murder had to do with what the judge said to the jury as to the role and status in this jurisdiction of the doctrine that a man is presumed to intend the natural and probable consequences of his acts. The judge, it is true, told the jury that, by section 9 of the Criminal Code, they were not bound to infer an intention to kill from the mere fact that the killing might, in their collective opinion, be the natural and probable result of the appellant's alleged act. But the Court regarded the direction given thereafter as potentially misleading and hence likely to confuse a

reasonable jury. That direction is to be found in the following passage (p 502, Record), where the jury is told

> 'The prosecution is asking you to infer at this instance [the appellant] intended the result of his act and that the intention was to kill [the deceased].'

This bordered on telling the jury, in layman's language, that they were entitled to presume that a man intends the natural and probable consequences of his act. The Court does not agree that that was what the Crown was doing. But, if the judge believed that that was what the Crown was doing, he should have emphasised to the jury, immediately thereafter, that section 9 of the Code does not permit the jury to resolve the issue of intention exclusively on the basis that a man intends the natural and probable consequences of his acts. In *Williams*, cited above, there was complaint in this Court with respect to a passage in the summing-up which read as follows:

> 'You have the evidence that [the person murdered] received this stab wound from the back and if you accept the evidence of Dr Estrada then he says it is with a moderate degree of force and without any other evidence you may presume that the accused Williams intended to kill when he delivered the blow.'

[18] Finding merit in the pertinent ground of appeal, Henry P, writing for this Court, stated (7th para):

> 'There was, however, in our opinion a real danger that the jury may have been led to believe, particularly by [the passage quoted above] from … [the summing up] and the words "without any other evidence" that, without considering any other evidence they could presume an intention to kill from the act itself and its probable consequences. This in our view is contrary to the provisions of section 9 [of the Criminal Code]. Certainly,

> unlike other jurisdictions, there is no provision to this effect in the Criminal Code of Belize.'

A little later in the same paragraph, the learned President wrote:

> '… it was in our view preferable for him, consonant with section 9, to have told the jury that they were not bound to infer an intention to kill from the mere fact that death was in their opinion a natural and probable result of the appellant's act, but that that fact was relevant to the question of intent and they would have to take it into account when considering all the evidence and the proper inferences to be drawn from that evidence.'

[19] It was, in the present case, patently not in keeping with the requirement of a fair trial groundlessly to impute to the Crown exclusive reliance on the doctrine in question while at the same time failing to point out to the jury the utter untenability of such a course. The grave risk thus created was that the jury could end up confused as to whether it was open to them to conclude that, if the appellant had indeed shot the deceased entirely on his own, he could simply be presumed to have intended the natural and probable consequences of his act.

The directions on the defence raised in the statement

[20] The Court also invited the assistance of the Director on the matter of the judge's treatment of the subject of duress in his summing-up. The concern of the Court at the hearing was as to the legal basis for the judge's repeated, confident assertion to the jury that they need not trouble themselves to consider the question of duress since duress was not, as a matter of law, a defence to a charge of murder. The Court was, of course, aware at the time of the hearing that, in England, as it is put by the learned authors of Smith and Hogan, *Criminal Law*, 12th Edition (2008), at p 325, para 12.2.1:

> '… [E]ither form of duress (ie duress by threats and duress of circumstances] is a general defence, except that neither applies to some

forms of treason, or to murder or attempted murder, whether as a principal or a secondary party.'

The question exercising the Court was whether the position was, as the trial judge was obviously content to assume without the benefit of submissions by counsel, the same in Belize, notwithstanding the scant mention of duress in the provisions of the Criminal Code. Replying without the benefit of adequate time in which to conduct full legal research, the Director indicated that she was not herself aware of any specific provisions of the Code dealing with the applicability or otherwise of the defence of duress in a case of murder.

[21] The reality, however, is that duress was not an issue in the instant case. The statement under caution does refer to the alleged levelling at the appellant of a threat to the effect that if he did not shoot the deceased he himself would be killed. But nowhere in the statement is there even a suggestion that the appellant actually gave in to such alleged threat. Quite to the contrary, the statement is clear that, when the shotgun in question was fired, it was as a result of that firearm having allegedly been placed in the hands of the appellant and one of his hands squeezed. The judge was thus altogether wrong to enter into the subject of duress, that being a non-issue in the trial, and ought instead to have focused the attention of the jury on the fact that what was being claimed in the statement was that it was, in reality, the act of Hyde, and not of the appellant, which had fired the gun. (The statement was thus exculpatory rather than confessional.)

[22] The Court agrees with, and adopts, the following statement of the position made in Smith and Hogan's already cited textbook under the rubric 'Duress and voluntariness', at page 325, para 12.2.1.1:

'It has often been said that duress must be such that D's act is not 'voluntary'. We are not, however, concerned here with the case where a person is compelled by physical force to go through the motions of an *actus reus* without any choice on his part. In such cases he will almost

> invariably be guilty of no offence on the fundamental ground that he did no act.
>
> If there be an actual forcing of a man, as if A by force takes the arm of B and the weapon in his hand and therewith stabs C whereof he dies, this is murder in A but B is not guilty.'

(This quotation by the learned authors is from Hale, II PC, 534.) The judge, far from appropriately directing the jury with this not–so–subtle distinction in mind, manifestly bundled both defences together under the label of duress and made, as already pointed out above, short shrift of them both – and, what is more, only in the course of summing up the case for the prosecution. When he came to sum up the case for the defence, he began by dealing with the appellant's unsworn statement from the dock, noting for the benefit of the jury the defence raised in it, viz that of denial. Thereafter, he turned to the statement under caution; but, in dealing with it, he confined his attention to the 'issue' of provocation, although, as noted earlier in this judgment, the reliance on provocation turned out to be decidedly more apparent than real since the bottom line, as it were, of the statement was that Hyde had placed the shotgun in the appellant's hands and Hyde had then squeezed the appellant's hand, causing the shot to be fired. Thus, the judge, in directing the jury on the defence case, had nothing at all to say about the appellant's sole defence arising under the statement under caution. And, while he had dealt with it in the course of directing the jury on the Crown case (on two separate occasions in considering the element of the crime concerned with whether the appellant was the person who had inflicted the relevant harm and once again in considering the element relating to the mens rea of the crime), he had on each occasion erroneously treated it as the defence of duress and summarily dismissed it as simply unavailable as a matter of law. To quote the actual words of the judge on the first of these occasions, after he had referred to the relevant part of the statement (pp 469 – 470, Record):

> '[The appellant] is saying he acted under duress because of the threat of death or grievous bodily harm to himself. This then would normally be a defence for [the appellant] …

> However where the charge is a charge of murder as in this case then the defence of duress is not available to him …
>
> So you the jury are instructed to disregard that defence of duress which was raised by him.'

It was akin to first declaring the baby to be part and parcel of the bath water and then, on the strength of such declaration, throwing both baby and bath water away. And it was another unquestionably monumental lapse on the part of the judge. The Court sees no reason not to regard it as a misdirection as material as the failure of the judge, considered in *Pasquall Bull v The Queen*, Privy Council Appeal No 77 of 1996, to leave to the jury a defence of provocation based on Bull's statement under caution.

The overall effect of the misdirection

[23] The Court reminds itself that the defence not put to the jury by the judge could have been stronger. And there is no denying that the strength of the Crown case was considerable. On the other hand, it is clear that the jury found reason to deliberate for more than four hours, despite the significant omission from the defence case as put to them by the judge. But weak or strong, the case for the defence needed adequately to be put before the jury in the summing-up in order for the trial to be worthy of that name. As Lord Steyn, rendering the advice of the Board in *Crosdale (Rupert) v R* (1995) 46 WIR 278, 289, g-h, having described Crosdale's explanation as 'transparently weak', said:

> 'On the other hand, even a defendant against whom the cards are stacked is entitled to have his case fairly presented to the jury.'

In the final analysis, the Court was of the opinion that, even allowing for the circumstance that what was made the subject of a *voir dire*, and branded a confession by the judge, was not in reality a confession (with the possible – but not probable - consequence that the technical failure to give the jury a *Mushtaq* direction was of little, if

any, prejudice to the appellant), the cumulative effect of the other judicial errors in the trial below was sufficiently serious to justify the firm conclusion that the appellant was denied a fair trial, the subject of a constitutional right whose breach must inevitably result in the quashing of a relevant conviction: *Mohammed v The State* [1998] UKPC 49, para 29, per Lord Steyn, delivering the judgment of the Privy Council.

_____

SOSA P

_____

MORRISON JA

_____

AWICH JA