IN THE COURT OF APPEAL OF BELIZE AD 2013

CRIMINAL APPEAL NO 14 OF 2010

MARLON CONTRERAS Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Mr Justice Manuel Sosa	President
The Hon Mr Justice Douglas Mendes	Justice of Appeal
The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal

A Sylvestre for the appellant.
C Vidal, Director of Public Prosecutions, for the respondent.

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25 June and 1 November 2013.

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Introduction

[1] Sometime in the early part of the evening of Thursday 20 September 2007, in the Cayo District, José Alfredo Howe, a taxi-driver of the town of Benque Viejo del Carmen in that district, had a fateful encounter with two assailants, one of whom fatally stabbed him in the trachea. On 3 and 13 December 2007, respectively, Marlon Contreras ('the appellant'), aged 18, and Abraham Guerra, aged 17, were arrested and charged with

murder. The trial proper commenced on 10 August 2010, with the appellant being represented by Mr P Palacio and Guerra by Mr B S Sampson SC. On 16 August, González J ruled that Guerra had no case to answer and the trial continued with the appellant as sole accused. On 17 August, according to the Record, the jury, having deliberated for a little more than two hours, returned a verdict of Not Guilty of murder but Guilty of manslaughter. The sentence imposed on 8 September 2010, was one of 15 years' imprisonment, to commence on that same day. The appellant thereafter filed notice of his desire to appeal against his conviction and sentence. At the conclusion of the hearing on 25 June 2013, this Court allowed the appeal, quashed the conviction and set aside the sentence but, in the interests of justice, ordered a retrial on the charge of manslaughter. The Court further ordered that the appellant remain in custody pending his retrial, unless and until a judge of the court below should otherwise order. The Court now gives its reasons for judgment.

The Crown evidence connecting the appellant to the crime

[2] The only evidence which was said by the Crown to connect the appellant to the crime was to be found in (a) a statement allegedly made by him under caution and recorded by a Mark Augustine, at the time a Police Sergeant, on 2 December 2007, at the San Ignacio Town Police Station ('the station') and (b) two so-called oral admissions alleged to have been made by the appellant to the police on 3 December 2007 at the station and at a location to be described below, respectively. (The statement under caution shall in the remainder of this judgment, save where clarity otherwise requires, be referred to as 'the statement'.)

(a) The statement

[3] Summarised, the substance of the statement was that, on the evening of 20 September 2007, the appellant, armed with a knife, and a confederate, carrying a length of wire, took a taxi-cab near a workshop on 'Benque Viejo Road' ostensibly to go to Benque Viejo del Carmen. At some point after the taxi-driver had dropped off a third passenger on the 'Arenal Road', the appellant placed his hands around the taxi-driver's neck and squeezed 'around his chest', whereupon the taxi-driver stabbed him on the left

thumb. The appellant immediately let go the taxi-driver and the latter opened the driver's-side door and began making his way out of the car. He was, however, grabbed by the appellant and pulled back in. The typewritten copy of the statement provided in the Record goes on to say that 'the taxi' then stopped moving. As read out by the trial judge to the jury, however, the statement, in its handwritten form, said that it was 'the taxi man' who stopped moving: p 267, Record. The appellant then placed the taxi-driver on the rear seat and, with bloody hands, ran all the way to his home via Cahal Pech.

(b) The alleged so-called oral admissions

[4] Police Sergeant Enrique Aldana, the investigating officer, gave evidence that on the morning of 3 December 2007, at the station, he saw the statement, cautioned the appellant, in accordance with the Judges' Rules, as to his not being obliged to say anything, and informed him of his constitutional right to communicate with an attorney-at-law or other person. He further testified that he acceded, on the afternoon of that same day, to a request for an audience from the appellant, whereupon the latter volunteered to take him to 'where the stabbing had took (*sic*) place'. [Self-evidently, this ("the first 'admission") was not, in and of itself, an admission by the appellant that he had stabbed anyone.] Together with a crime scene technician and a justice of the peace, the sergeant and the appellant thereafter visited an area near a junction formed by what was then known as the Western Highway and another road. This area was visited, it seems, because, in the language (as recorded) of the sergeant in evidence-in-chief: 'On approaching a junction [the appellant] directed that that was the area where the initially (*sic*) stabbing took place'. [Self-evidently, again, this ("the second 'admission' ") was not, in and of itself, an admission by the appellant that he had stabbed anyone.] The sergeant further testified that, at the scene, a sketch plan was drawn by the crime scene technician and signed by the appellant, who was then, on the night of that same day, formally arrested and charged (as already noted above) with murder.

The appellant's evidence and contention at the voir dire

[5] A *voir dire* was conducted by the trial judge in order to determine the admissibility or otherwise of the statement and the second 'admission', as well as of another statement under caution and another alleged oral admission said to have been given by Guerra. Testifying at the *voir dire*, the appellant alleged in the clearest of terms that, sometime after seven o'clock on the night of 1 December 2007, he was taken into custody by the police whilst walking on Joseph Andrews Drive (no doubt an intended reference to Joseph Andrews Street in the town of San Ignacio) and transported in a police vehicle to the station. Whilst at the station and, specifically, in the office of Senior Superintendent David Henderson, he came to be alone with Sergeant Aldana and a 'PC Solomon Mas', the latter of whom began choking him, making him 'scared and frightened', after he denied that a knife with a blue and grey handle, a photograph of which he had been shown, belonged to him. Whilst being so choked, he was hit twice on the head. The appellant further alleged in his testimony at the *voir dire* that the Senior Superintendent, on his return to the office, put his options to him as follows: he could either (a) give a statement and thus avoid being charged for 'armed robbery, robbery, burglary, aggravated assault and wounding' or (b) give no statement and 'be charged'. The appellant, for his part, thereafter told the Senior Superintendent that he was not willing to give a statement. After having spent the night of 1 December 2007 in police custody, the appellant, according to his evidence at the *voir dire*, was told by another police officer, whom he named as a Dalton Sánchez, that he would not be charged if he gave a statement. Believing what Sánchez said to him, he agreed to give, and later gave, the statement, which does in fact purport to have been recorded by the police on 2 December 2007.

[6] Under cross-examination at the *voir dire*, the appellant maintained that 'Detective Constable Solomon Mas' (the name and rank used by prosecuting counsel) had used physical violence against him and said that this constable 'could have easily denied' the pertinent allegation if he had been cross-examined about it, the implication here being that that was the reason why he had not instructed his counsel to cross-examine him (the constable) concerning it.

[7] When counsel for the appellant came to make his submissions at the close of the evidence in the *voir dire*, he, quite oddly, (even if, as needs to be presumed, in accordance with the instructions of the appellant), abandoned the ground of the challenge to admissibility based on oppression, notwithstanding the pellucid evidence of the use of physical violence against the appellant which had already been given. This curious turns of events unfolded with the following exchange:

> 'MR PALACIO: … Therefore, my Lord, we submit that the statement was given by a promise or favour thus, my Lord, it should be ruled as inadmissible.
>
> THE COURT: It is a stage [strange?] conclusion because I think you indicated when the voir dire was to begin that your complaint was that the statement was given under oppression and now you have changed to inducement.'

It is far from clear to this Court that Mr Palacio was, at this early stage in his submissions (the top half of only the second of ten pages of typescript occupied by his submissions and related exchanges), already stating the bottom line, as it were, of his contention in the *voir dire*. But it is clear from the judge's somewhat exclamatory interruption that he, for his part, had already concluded that counsel was doing just that.

[8] Whatever may have been the true position, Mr Palacio's reply was definitive, if surprising:

> 'My Lord, we abandon the oppression.'

The cause for surprise was to increase in the later stages of the main trial, as shall appear in due course. In conclusion, as regards the *voir dire*, the judge ruled that the statement under caution as well as the oral admission allegedly made by Guerra were inadmissible in evidence; but, with respect to the appellant, he stated:

> '… his caution statement including that portion of his statement where he went to the scene and pointed out the scene as the place where the incident took place he [be?] introduced into evidence – ruling accordingly.'

The appellant's unsworn statement at the main trial

[9] As has been pointed out above, it was further ruled, following a submission of 'no case' made on behalf of Guerra at the close of the Crown evidence, that he had no case to answer. Electing to make an unsworn statement from the dock ('the dock statement'), the appellant said that, on 1 December 2007, at around 7 pm, he was arrested and taken to the station, where, in the office of Senior Superintendent Henderson (but in his absence), 'the CIB officer' began to choke him, causing him to become 'scared and frightened'. He was, at the same time, being hit in the face; but he could not, by reason of the effects of the choking, identify the person or persons hitting him. Sergeant Aldana then told him that he had to give a statement and the CIB officer released him from his grip.

[10] The appellant also repeated the claim he had made at the *voir dire* to the effect that he had made the statement in reliance on the assurance of Dalton Sánchez that he would not be charged if he made it.

[11] The dock statement further contained an assertion that, whilst he had in fact been taken to a 'scene' and signed a sketch plan, he had only done so in compliance with an order by Sergeant Aldana, an order made after he (the appellant) had clearly stated to the sergeant that he did not wish to sign anything.

[12] The dock statement ended with a denial that he had taken the life of anyone.

The relevant directions of the judge in his summing-up

[13] The trial judge told the jury in his summing-up that the only evidence connecting the appellant to the commission of the crime was that to be found in the statement and the second 'admission'. To quote his actual words:

> ‘Now, Members of the jury, there is no eye witness (*sic*) account of what took place. There is only a confession statement and an oral admission. But if you were to accept the confession statement and the oral admission as true and you come to the conclusion that [the appellant] is guilty you are entitled to return a verdict of guilty … But I enjoin you or I direct you to be careful when convicting on the contents of the oral statement and the confession statement because there is no other independence (*sic*) evidence to support the confession of [the appellant], to support the admission of [the appellant] and there is no confirmation either to assist in connecting [the appellant] into (*sic*) any material respect with the commission of the crime. So I will enjoin you to look at the confession statement and the oral evidence (*sic*) very careful (*sic*). Not that you cannot convict on it. You may convict on it but you have to exercise caution when doing so because that is the only evidence before you.’ [Emphasis added.]

[14] The judge, having so directed the jury, proceeded immediately to deal with the claim of the appellant at the main trial that he had been subjected to physical violence by the police, and also made an offer by way of inducement, before he decided to make, and made, the statement on 2 December 2007. He did not, however, attach equal importance to the two prongs of the claim, saying as to the first:

> ‘… it does not appear that the fact that the evidence disclosed that he was beaten. (*sic*) That operated in his mind …’

and as to the second:

> ‘… he was promised say something and we are not going to charge you for these offences. That is an inducement and the law is saying that if a person has been induced to give a statement and he gives the statement that is an indication that the statement was not given voluntarily and therefore you are entitled to find that the contents of these statements are not true.’

[15] Not long thereafter, the judge turned to the crucial issue as to whether the jury should disregard or act upon that which the appellant had allegedly said to the police (in writing as well as orally) on 2 and 3 December, respectively. Initially, his words were directed only to the second 'admission'; but he soon found himself speaking in one breath (at times confusingly) of that as well as of the statement. It is necessary to quote him at some length:

> 'Now with respect to the visit to the scene [the appellant] is saying that at the scene he said nothing and pointed nothing to the police and that he was told to sign the sketch plan. So he is denying everything that is in that admission statement said (*sic*) to you by Sergeant Aldana and by the other witnesses. So in respect to what [the appellant] allegedly said and showed to the police to (*sic*) the scene your approach should be, did [the appellant] in fact make that admission at the scene. The admissions which the police said he made at the scene. Did he made (*sic*) that admission? Did he point out that spot to the police? If you are not sure he made the admissions to the police and that it has been fabricated you should ignore it. If you are sure that [the appellant] made the oral statement and the caution statement and the confession statement the question you are to ask yourselves is whether or not the oral admission at the scene and the confession statement are true. When deciding this issue you should have regards (*sic*) to all the circumstances in which the confession and the oral admission came to be made and consider whether there were any other circumstances which might cause (*sic*) doubt upon the (*sic*) reliability and you should decide whether the confession was made voluntarily or was or may have been made as a result of some improper circumstances as in this case inducement. And I am restricting this only to the confession statement given to the police not the admission because in respect to the admission [the appellant] is saying I did not take the police to the area, point anything to them or said (*sic*) anything to them. Completely denying the alleged admission.

> You should also have regard, Mr. Foreman and members of the jury, to the contents of the confession itself and consider whether [the appellant] appears to have made admissions to matters which cannot be true. It is for you to assess and give what weight should be given to the confession statement. If you are not sure that the confession is true, you must disregard it. And the same thing will apply to the admission statement. If on the other hand you sure (*sic*) of it or sure of (*sic*) both confession statement and admission statement is (*sic*) true, you may act upon it (*sic*). Members of the jury, I will direct (*sic*) to be cautious in considering and acting in (*sic*) the oral admission and the caution statement of [the appellant] because the case against [the appellant] depends wholly on the confession statement. There is no other evidence to support that confession statement. So be careful when considering caution statement to determine whether or not [the appellant] is guilty. So that at the end of the day if you accept it as true you accept both of them as true then, Members of the jury, you may act on this statement.' [Emphasis added.]

The need for a Mushtaq direction

[16] As was properly conceded by the learned Director of Public Prosecutions at the hearing (at which this Court did not call upon Mr Sylvestre to argue the appellant's grounds of appeal, all unrelated to the point now to be discussed), the two underlined sentences of the lengthy passage just quoted from the summing-up each constituted a serious misdirection. It was gravely wrong to tell the jury that, once they accepted that the statement and the second 'admission' were both true, they were free to act on them. Instead, the jury should have been directed in keeping with the guidance given by Lord Rodger of Earlsferry in the leading speech in *R v Mushtaq* [2005] UKHL 25. The guidance contained in that speech, with which both Lord Phillips of Worth Matravers and Lord Steyn agreed, was to the effect that the jury should be directed to disregard a confession if they reach the conclusion that it 'was, or may have been, obtained by oppression or in consequence of anything said or done which was likely to render it unreliable': para 47 of the judgment. In the more recent case of *Barry Wizzard v The*

Queen [2007] UKPC 21, in which it was held that the decision in *Mushtaq* is applicable in Jamaica, Lord Phillips of Worth Matravers, rendering the advice of the Privy Council, said, at para 35:

> 'A *Mushtaq* direction is … 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.'

Lord Phillips had earlier quoted with approval the passage from the speech of Lord Rodger in *Mushtaq* (at para 47) in which the reference is to both oppression and 'anything said or done which was likely to render [a confession] unreliable'; and this Court is in no doubt that, in the passage just reproduced above from the judgment in *Wizzard*, mention is made only of oppression simply because that alone was alleged on behalf of Mr Wizzard.)

[17] In the view of this Court, there was, in the instant case, first, a clear possibility, at the close of the evidence, that the jury might conclude that the appellant had made the statement and the second 'admission'. It was at the very core of the Crown case that he had made both of them; and the verdict of the jury leaves it in no doubt that they found that the Crown case had been proved in the relevant respect. The Court considers that, secondly, there was at the material point of time an equally distinct possibility that the jury might conclude that the statement and the second 'admission' were true. Again, it was at the heart of the Crown case that both were true; and there can be no doubt that the jury, in reaching its verdict of Guilty of manslaughter, concluded that they indeed were. Thirdly, the Court is satisfied that there was at the close of the defence case a possibility, at least, that the jury might conclude that the statement and the second 'admission' were induced by oppression or a promise of favour. As to the promise of favour, the judge rightly recognised that this was, throughout, part and parcel of the defence case. But as regards the oppression, there was, as has been noted above, the express abandonment by Mr Palacio towards the end of the *voir dire* of oppression as a ground of the challenge to admissibility; and the judge, moreover, was at pains to keep it in the forefront of the jury's collective mind that

the appellant's evidence was to the effect that what had influenced him was Sánchez's repetition of the earlier promise of favour. But this Court is nonetheless convinced that the proper approach for the judge would have been to consider that it remained possible that the jury might conclude that there had been oppression, as the appellant himself resolutely maintained to the very end. The cases of *Wizzard*, cited above, and *Benjamin and Anor v The State* [2012] UKPC 8, particularly when read together, are highly instructive in this connexion. In *Wizzard*, the Privy Council held that, given that Mr Wizzard's contention at trial was that he had not made the relevant statement under caution but merely signed it as a result of oppression, 'there was no need for the judge to give the jury a direction that presupposed that the jury might conclude that [Mr Wizzard] had made the statement but had been induced to do so by violence': para 35 of the judgment. This conclusion came under scrutiny in the subsequent decision of the Board (differently constituted) in *Benjamin*. The view arrived at following such scrutiny was that it was an erroneous conclusion. The commonsensical approach adopted in *Benjamin* was that, whatever Mr Wizzard may have said in his unsworn statement from the dock, it remained open to the jury to find that he had, in truth, given the statement in question (not merely signed it under coercion). Lord Kerr, delivering the judgment of the Privy Council, said, at para 16:

> 'The Board in *Wizzard* considered that the fact that the appellant in that case had made an unsworn statement from the dock, denying that he had made the confession which the police claimed he did, meant that a *Mushtaq* direction was not required. It is, with respect, somewhat difficult to understand why this should be so. Simply because the appellant had denied making the statement, it does not follow that the jury could not find that he had done so.'

By the same token, in the present case, counsel's express abandonment of oppression as a ground of challenge in the *voir dire*, even when set alongside the appellant's emphasis in the dock statement on the persuasive effect of the promise of favour allegedly made to him by the police, could hardly, in the view of the Court, have eliminated every possibility that the jury, as a reasonable jury, might nevertheless find

that oppression was a contributory factor in the appellant's decision to make the statement under caution. Whatever counsel may have said or done at the *voir dire*, which had preceded the main trial, is properly to be presumed not to have come to the knowledge of the jury. And, moreover, as already noted, when the appellant made his dock statement in the final stages of the main trial, he made sure explicitly to reiterate his allegation of oppression by the police. The jury would have been entitled to conclude that there was here a serious suggestion, not to be dismissed as purposeless repetition, that oppression had played some part in breaking down the original resolve of the appellant not to make a statement under caution.

[18] In any event, even assuming (without accepting) that oppression was not a legitimate consideration by the time the judge commenced his summing-up, there was, unquestionably, the separate and distinct allegation of a promise of favour for him to consider in deciding whether the possibility existed that the jury might find that the statement was the result of '[something] said or done which was likely to render it unreliable', the expression which (as already pointed out above) was employed by Lord Rodger of Earlsferry in *Mushtaq*, at para 47. That circumstance alone was enough to warrant a *Mushtaq* direction.

[19] The Court has not failed to take into account that, whereas the statement is said to have been recorded on 2 December 2007, the second 'admission' is said to have been made until the following day. On the other hand, the reality here is that the second 'admission', which was the sole so-called oral admission to be accorded attention in the summing-up, involved no more than identification of the area where 'the initially stabbing took place', to quote again the less-than-limpid language of Sergeant Aldana. Therefore, even assuming (again without accepting) that there was, by reason of the lapse of an additional day, no basis for a finding that the alleged oppression and promise of favour might still be operative on 3 December, it is impossible to imagine a reasonable jury arriving at a verdict of Guilty of manslaughter after having completely disregarded the statement and taken into account only the illusory second 'admission'. (The Court does not go so far as to suggest that, taken in conjunction with the statement, neither of the alleged oral 'admissions' can lend support to it.).

[20] In summary, then, the giving by the judge of a *Mushtaq* direction in the instant case could well have resulted in the jury disregarding (a) both the statement and the second 'admission' or (b) only the statement. In either case, they could not, as a reasonable jury, have convicted the appellant of manslaughter, as they ended up doing in the absence of such a direction. The appellant was thus deprived by the misdirection of the chance of an acquittal.

Retrial

[21] The Court was guided, in ordering a retrial, by the illuminating decision and observations of the Privy Council in *Dennis Reid v The Queen* [1980] AC 343. It saw much relevance, for present purposes, in the guideline (at p 350) that the strength of the Crown case, as demonstrated at the previous trial, is (if near the middle, rather than at either end, of the scale) a factor whose weight will vary with each new case, given that that weight must depend on such considerations as the type of crime involved, the circumstances of its commission and the state of public opinion on relevant matters. This Court particularly remarked the comment of their Lordships' Board that an appellate court need not, before ordering a retrial, satisfy itself that such retrial will probably result in a conviction. The Court was thus led to the conclusion that the interests of justice demanded an order for a retrial. The bare number of years that have elapsed since the slaying of the deceased could not, in the view of this Court, be allowed to overshadow the stark reality here – that of a gory killing involving multiple stabs with a large knife which no one sought at the trial to portray as in any way justified or the result of provocation and which undoubtedly deeply shocked the relatively peace-loving and law-abiding community of Benque Viejo del Carmen. It cannot be imagined that the state of public opinion in that sleepy western community is such that it would wish to see this matter now quietly consigned to the archives without so much as an order for a retrial. It is, moreover, at this stage a matter of irresistible inference that the jury by whom the appellant was found guilty were in no doubt whatever that the statement was not only made by him but also true. Besides, the appellant called no witnesses at trial, in consequence of which no question of the possible unavailability of defence witnesses ever arose. There was, furthermore, no reason to believe that he

would otherwise be prejudiced in the event of a retrial, which, however, if it shall in fact follow, should follow without delay.

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SOSA P

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MENDES JA

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HAFIZ BERTRAM JA