IN THE COURT OF APPEAL OF BELIZE AD 2013

CRIMINAL APPEAL NO 6 OF 2010

CLARENCE HEMMANS Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Mr Justice Manuel Sosa	President
The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal

B Neal for the appellant.
C Vidal, Director of Public Prosecutions, for the respondent.

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2013: 21 March and 28 June

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Introduction

[1] At about 7.38 pm on Sunday 27 May 2007, Kevin Arnold was walking along Armadillo Street in Belize City when a young man rode up to him on a bicycle, pointed a shiny object (which turned out to be a firearm) at him and proceeded to shoot him six times. As so often happens in cases of this kind, he was rushed to hospital only to be

pronounced dead at some stage after his arrival there. During the course of the police investigation which ensued, Clarence Hemmans, ('the appellant'), then aged 18, was arrested and charged with the murder of the deceased. His trial before González J and a jury commenced on 17 May 2010 and ended on 21 May with his conviction of murder, following which, on 1 June 2010, he was sentenced to life imprisonment. By a document purporting to be a notice of appeal but not drawn in conformity with the relevant form prescribed in the Court of Appeal Rules, the appellant expressed his desire to appeal against both his conviction and sentence. At the hearing before this Court on 21 March 2013, the appellant challenged his conviction, but not his sentence, and the Court, finding no merit in any of the grounds of appeal argued, dismissed the appeal (affirming the conviction and sentence) for reasons which it promised to give in writing at a later date and shall now proceed to give.

The facts as relevant

[2] Having regard to the nature of the grounds of appeal relied upon by the appellant, a lengthy rehearsal of facts is not required. It suffices to focus upon the evidence relating to identification of the body upon which a *post-mortem* examination was indisputably conducted by Dr Estrada Bran at the morgue of the Karl Heusner Memorial Hospital ('the KHMH') in Belize City at about 1.25 pm on 30 May 2007. On the first day of the trial, Audrey Cleland, a crime scene technician called by the Crown as its first witness, testified, that at about 1.20 pm on 30 May 2007, she attended at the KHMH, where Dr Estrada Bran conducted a *post-mortem* examination on the body of a male 'Creole descent person'. She proceeded to add, without objection from defence counsel, Mr Palacio: 'This body was identified to be one Kevin Arnold.' Mr Palacio was apparently not the only one caught napping, so to speak, by this introduction of hearsay evidence, for the record discloses that there then followed this exchange:

'THE COURT: Who identified it, you know?

THE WITNESS: His brother Anthony Arnold.

THE COURT: Okay.'

(Anthony Arnold was not a witness at trial.) Ms Cleland went on to testify that she took photographs of the body in question and that, thereafter, at the Scenes of Crime offices, the photographs were downloaded and printed. These photographs were duly tendered in evidence through her and admitted as such by the judge. Defence counsel, after having refrained from objecting to the introduction of inadmissible hearsay, as already noted above, chose not to cross-examine Ms Cleland at all.

[3] The second witness called by the Crown was one Tyron Bradley, a former police corporal, who had been involved in the pertinent investigation in its earliest stages. It was his testimony, unchallenged in cross-examination, that, on the night of 27 May 2007, he visited the trauma room of the KHMH, where he observed the body of 'Kevin Arnold' with certain injuries on it which he described.

[4] Samuel Bonilla, another police corporal, was the witness next called by the Crown. As pertinent in the instant appeal, his evidence was that, on 30 May 2007, he visited the morgue at the KHMH where he saw the lifeless body of 'Kevin Arnold' with what he called '10 gunshot wounds' and witnessed a *post-mortem* examination conducted on it by Dr Estrada Bran. It was also part of his testimony, unchallenged by the defence, that a certain Anthony Arnold, a brother of the deceased, identified the body prior to the commencement of the autopsy.

[5] Next to give evidence for the Crown was Shana White, who testified that the deceased had been her boyfriend for a year and a half and expressed confidence in her ability to recognise him in a photograph. The record indicates that she went on to testify:

> 'This is the photo of Kevin Arnold …'

but does not contain the usual statement in parenthesis by the stenographer to the effect that the witness was shown a photograph. (It is, however, obvious that this part of the record, at least, is, in fact, derived from the judge's note.) Ms White went on to testify that she was an eyewitness to the shooting of the deceased by the appellant on the night in question. And it was her further evidence that she, her father and a sister of hers were in the taxi-cab which took the deceased to hospital following the shooting.

[6] Dr Estrada Bran himself was allowed to state in the course of his evidence that the autopsy which he performed on the day in question was performed on the body of Kevin Arnold.

The submission of no case to answer

[7] Surprisingly, given the circumstances described above, it was submitted by defence counsel at the close of the Crown case that there was no case to answer for the reason that there was no admissible evidence that Kevin Arnold was dead. Defence counsel contended that the Crown was relying entirely on inadmissible hearsay, singling out in this connection the reference by Ms Cleland to a supposed identification of the body at the morgue by a certain Anthony Arnold. To prove the death of Kevin Arnold, insisted defence counsel, the Crown would have had to call as a witness a relative or other person who had known Kevin Arnold and who could also testify that he/she had attended at the morgue and identified the body prior to its subjection to a *post-mortem* examination. In the instant case, that person was, and could only be, Anthony Arnold.

[8] Replying to this submission, prosecuting counsel argued that the usual way of proving death in a criminal trial in Belize was not the only way. The Crown could just as effectually prove death by doing what it had done in this case, which was (a) to call Ms Cleland to testify as to her attendance at the morgue on the day in question and to tender in evidence photographs of the body which was later subjected to an autopsy and (b) to then call Ms White to state in evidence that the body shown in one of those pictures was that of Kevin Arnold and none other. There was, therefore, admissible evidence that Kevin Arnold was dead. The ruling of the trial judge, in favour of the Crown, was that there was indeed such evidence and that the appellant therefore had a case to answer. (It is to be noted that there was no dispute in the course of argument before the judge that Ms White had in fact been shown a photograph of Kevin Arnold's body.)

The first ground of appeal: the ruling on the submission of no case

[9] On appeal to this Court, the first ground of appeal was that the trial judge erred in law in ruling that there was a case for the appellant to answer. Mr Neal, for the

appellant, essentially adopted the argument presented by Mr Palacio at trial. That argument was rightly rejected by the trial judge and must, therefore, be rejected by this Court as well. It is, with respect, a serious error, nay an absurdity, to think that the Crown is under a binding obligation always to establish the death of the victim of crime in a criminal trial in one set way, never having the freedom to depart from the beaten track. Prosecuting counsel may have been blowing his own trumpet when he described as 'creative and ingenious' the Crown's approach to the proof of death at trial in the instant case, but this Court entertains no doubt whatever as to the legitimacy of such approach. And the Court would refer in this regard to supportive dicta to be found in its judgment delivered on 8 March 2002 in *Mark Vega v The Queen*, Criminal Appeal No 4 of 2001, at para 12.

[10] Mr Neal made it a recurring theme of his submissions in purported support of this ground that inadmissible hearsay had been allowed to creep into the Crown case, the reference here being primarily to Ms Cleland's statement to the effect that one Anthony Arnold had identified the body in the morgue on the day in question. This was, however, to seek to make a mountain out of an ant-hill, an exercise doomed to failure. The making of that statement by Ms Cleland did not have the effect of somehow erecting a sound-proof barrier which prevented, from that point on, any admissible evidence as to proof of the death of Kevin Arnold from reaching the ears of the jury. When Ms White, almost immediately after her entry into the witness-box, proceeded to identify the person shown in the relevant photograph as Kevin Arnold who, on her testimony, was slain before her very eyes, the Crown case, insofar as proof of death was concerned, instantly and irreversibly crystallised.

[11] In a further effort, which the Court can only regard as one made *in extremis*, to sustain this ground, Mr Neal insisted, somewhat astonishingly, that the hearsay evidence in question would have already hit home, so to speak, with the jury by the time Ms White was called to testify; and that the extent to which such hearsay had influenced the collective mind of the jury was therefore a matter for the consideration of the Court in dealing with ground 1. However, as was pointed out from the bench to counsel during the oral argument, it is impossible to see what connection anything supposedly

happening in the collective mind of the jury could possibly have had to the outcome of the no-case submission, a matter, axiomatically, entirely for the trial judge. Counsel graciously acknowledged, albeit in a tone of some resignation, the confining effect of the ground, but this Court regards as an absolute prerequisite for the orderly presentation of appeals the filing of grounds of appeal, which unless amended, as permitted by the rules, are then adhered to or abandoned at the subsequent hearing.

[12] In his two conclusions on ground 1 set out in his Skeleton Argument, Mr Neal stated that (i) it was an inadmissible inference that the body shown in the relevant photograph was that of Kevin Arnold and (ii) the judge failed in his duty to give certain careful directions to the jury. As to the first of these conclusions, however, it follows from what has already been stated above that the relevant portions of the testimonies of Ms Cleland and Ms White combined to form admissible evidence of the death of Kevin Arnold. This was straightforward and direct evidence involving no element of inference whatever. As to the second conclusion, the Court can only see it as a further reflection of counsel's state of serious confusion as to the parameters of ground 1. The judge's directions to the jury were matters wholly irrelevant to the correctness or otherwise of his ruling on the no-case submission.

The second ground of appeal: empanelment of the jury

[13] This ground complained that the judge erred in law when he empanelled the jury from a pool of jurors which was incomplete as a necessary result of another jury trial being in progress at the material time. The judge, pointing out that he was not breaking any new ground by so doing, proceeded with the empanelment notwithstanding the expression by prosecuting counsel of reservations of his own as to the legality of the proposed course.

[14] Provision for the striking by the Registrar of a panel of jurors is contained in section 15(1) of the Juries Act ('the Act'). The Act, which requires the Registrar to keep a book to be called a Jurors' Book, further requires that, in respect of every sitting of the court below in its criminal jurisdiction the Registrar shall 'strike and make out from the

Jurors' Book for the time being in force a panel of common jurors to serve at [such sitting].'

[15] Mr Neal referred the Court to subsections (1), (4) and (5) of section 25 of the Act, which subsections respectively read as follows:

> '(1) When any issue between the Crown and an accused person is to be tried, the Registrar shall ballot for the jury by placing in a box as many ballot papers or balls as there are jurors on the panel from which the jury is to be chosen, marked with the jurors' numbers appearing on the panel and, after shaking the box in open court, drawing them out of the box one after another to the number required to constitute a jury and calling out the number thereon and the name of the juror ascertained from the panel as and when each ballot paper or ball is drawn.'
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> '(4) The ballot papers or balls containing the numbers of the jurors so drawn and sworn shall be kept apart until the jury has delivered its verdict, and the verdict has been recorded, or until the jury has otherwise been discharged, and shall then be returned to the box and mixed with the other ballot papers or balls then remaining undrawn, and so as often and as long as any issue remains to be tried.'
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> '(5) If any issue comes on to be tried before the jury in any other issue has brought in its verdict or has been discharged, the Registrar shall ballot for the new jury, in manner aforesaid, from the residue of ballot papers or balls then in the box for the trial of the issue so coming on to be tried.'

It is plain from the record that, in the trial that was ongoing at the time the judge decided to proceed to empanelment of the jury in the instant case, the stage had been reached at which the jury were 'locked up', ie deliberating their verdict. And it is also clear that, whilst prosecuting counsel expressed, in his words, 'doubts as to the legality of the

approach of starting a matter when another one is still been (*sic*) done', he did not at any stage cite any provision of the Act as the basis for his doubts.

[16] Before this Court, Mr Neal argued that the judge erred in empanelling the jury in the instant case whilst the jury in the ongoing case was still locked up in that, in his (Mr Neal's) submission, whilst such a course of action could be adopted consistently with the provisions of subsection (5), that subsection, properly construed, was applicable only in a case of emergency, which, as he further contended, the instant case was not. It was, so ran Mr Neal's argument, subsection (1) which applied in the absence of the emergency situation for which subsection (5) was meant. But, according to Mr Neal, the procedure laid down in subsection (1) for balloting for the jury could not be followed by the Registrar (in discharge of his duty so to do) in circumstances where, as a result of a jury still being empanelled in another trial, 'as many ballot papers or balls as there are jurors on the panel' were not available to be placed in the relevant box.

[17] The Court is unable to accept Mr Neal's argument. There is nothing in the language of subsection (5) to suggest that it was intended to apply only in a case of emergency. There is therefore no reason to interpret it as restricted to matters not listed for trial during the sitting of the court below which is current at the time when the decision to empanel a jury is taken, notwithstanding the fact that another is still 'locked up'. Expressing this a little differently, subsection (5) poses no impediment, in the view of this Court, to the adoption of such a practical and convenient course as was in fact adopted by the trial judge in the instant case. The Court would underscore in this regard the fact that the judge, having empanelled the jury on the day in question, a Wednesday, very correctly refrained from commencing the trial proper on that same day, adjourning instead to the following Friday.

[18] In view of its conclusion that the empanelment of the jury in the instant case did not run counter to the requirements of section 25 of the Act as contended by Mr Neal, the Court is not required to consider whether the alleged irregularity resulted in a miscarriage of justice such as would prevent application of the proviso. But the Court would repeat the point expressly made or hinted at by at least two members of the court in oral argument, viz that the complaint that an accused has been prejudiced by the

supposed narrowing of the pool of jurors caused by a trial judge's adoption of a course such as the one adopted in the present case does not sit well with the fact that such an accused did not in fact exhaust his right to challenge jurors during the empanelment.

The third ground of appeal: directions on the intention to kill

[19] Mr Neal, in oral argument, dealt considerably more briefly with this ground than with the others, and rightly so. The judge's treatment of the topic of intention to kill was attacked for all the wrong reasons. What is more, self-contradiction was at the forefront of the written submissions. Thus, at para 25 of the skeleton, the opening paragraph in regard to this ground, Mr Neal animadverted that the judge 'did not make it pellucid to the jury that intention must be inferred'. Two sentences later, however, at para 26, he quoted the judge as having said at page 224 that intention should be 'ascertained and determined by considering and drawing inferences from what a person did or did not do and the effect of his actions and in actions (*sic*) and/or by what the person said or did not say and indeed from all the surrounding circumstances -- from all the circumstances surrounding this alleged incident'. [Emphasis added.] But, apart from flatly contradicting Mr Neal's earlier critical remark, the sentence in question taken from para 26 shows, in the opinion of this Court, a direction on the need to infer intention which has all the clarity that one could reasonably hope for.

[20] Mr Neal, choosing not to advert to the fact that the quote in question effectively exonerated the judge from the sin of omission earlier imputed to him, labeled the content of such quote a misdirection. He submitted that the jury ought to have been directed that the intent to cause really serious harm must be inferred from the circumstances of the attack on the victim and not from all the surrounding circumstances. 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. As far back as 1980, this Court, in its judgment in *Cowo v The Queen*, Criminal Appeal No. 13 of 1979, delivered on 28 February 1980, stated the corollary, viz that:

> 'An intention to cause bodily harm alone is insufficient to establish a charge of murder.'

Secondly, the judge, in seeking to have the jury take into account all surrounding circumstances, was merely doing that which he is required to do having regard to the provisions of section 9(b) of the Criminal Code, as interpreted in *Winswell Williams v The Queen*, Criminal Appeal No 2 of 1992 (judgment delivered on 15 September 1992), an authority which has stood the test of time. Counsel for the appellant contended that what the judge was required to do was to direct the jury that they needed to reach a conclusion as to 'what was [the appellant's] intention during the moments he was using the unlawful force toward the victim'. Looking however, at the entirety of the judge's directions on intention, this Court does not consider that he at any stage said anything which could have led a reasonable jury to think that they needed to do otherwise. And, indeed, the Court is in agreement with the submission of the Director, at p 5 of her Skeleton Argument, that the trial judge did, in fact, make it clear to the jury that they were required to reach a conclusion as to the intention of the appellant at the time of the shooting (this direction being based, of course, on the assumption that they found that he, the appellant, did the shooting.)

[21] Mr Neal's further and final submission in his Skeleton Argument was that the trial judge failed in what counsel called his 'duty' to sum up the case for the defence on intention. The long and short of the matter is, however, that the case for defence on intention was a thing conspicuous in its absence. The defence of the appellant was alibi, and alibi alone. Lack of intention was not an issue arising fairly on the evidence and, accordingly, the trial judge had (as he evidently recognised) no business entering into the topic of lack of intention at the risk of confusing the jury to the detriment of the appellant.

The fourth ground of appeal: The *Pop*-type directions

[22] Following the close of his arguments in support of those grounds of appeal which had up to then been filed, Mr Neal applied for, and was granted, over the powerful objections of the Director, leave to argue a fourth ground of appeal, which he formulated thus:

> 'The learned trial judge failed to warn the jury of the dangers of identification without a parade. He did not explain to the jury the potential advantage of an inconclusive parade. He did not state that dock identification was undesirable in principle. He failed to direct the jury that they were required to approach dock identification without a prior parade with great care.'

This ground faithfully reflected the terms of one of the grounds in *Dean Hyde v The Queen*, Criminal Appeal No 18 of 2007 (judgment delivered on 27 March 2007), a case which, as Mr Neal disclosed, he had only come to know about on reading the skeleton argument of the Director the night before. In his efforts to get off the ground with this ground, Mr Neal experienced no end of difficulty staying away from contentions that the guidelines in *R v Turnbull* [1977] QB 224 had not been followed. After several reminders that he had neither sought nor obtained leave to argue that the judge had not adhered to the *Turnbull* guidelines and after, as well, conceding, albeit grudgingly, that, in the circumstances of the case, an identification parade would have served no useful purpose, Mr Neal sought additional time in which to prepare proper submissions in support of ground 4. The Court did not consider that counsel had explained (at all, let alone adequately) his failure to learn of *Hyde*'s case until the eleventh hour. Despite prodding from the bench, he had seemed unable to deploy the leading decisions of the Privy Council in *Aurelio Pop v The Queen* [2003] UKPC 40 and *Pipersburgh v The Queen* [2008] UKPC 11, or, indeed, any other decided case. But weighing even more heavily in the mind of the Court was the fact of the concession that an identification parade would have served no useful purpose. Counsel's application for further time was therefore refused and he was told that, in view of the concession in question, the

Court did not see how it could be assisted by further argument. Mr Neal thereupon indicated that he had nothing further to add.

[23] It was for the reasons given above that the Court, on 21 March 2013, without hearing oral argument by the Director, handed down judgment in the terms already set out at para [1], above.

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SOSA P

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MORRISON JA

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HAFIZ JA