IN THE COURT OF APPEAL OF BELIZE AD 2014
CRIMINAL APPEAL NO 30 OF 2011

EDWARD BULLER 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 Douglas Mendes Justice of Appeal

Anthony Sylvestre for the appellant.
Mrs Cheryl-Lynn Vidal SC, Director of Public Prosecutions, for the respondent.

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5 March and 27 June 2014.

MORRISON JA

[1] The appellant, who was indicted for the offence of murder, was tried before Lucas J and a jury at the Central Criminal Session of the Supreme Court between 5 – 28 September 2011. On 19 September 2011, the jury returned a verdict of not guilty in relation to the charge of murder, but found the appellant guilty of the offence of manslaughter. On 28 September 2011, the learned trial judge sentenced the appellant to 16 years' imprisonment.

[2] The appellant appealed against his conviction and sentence on the single ground that "[t]he learned trial judge erred in failing to give the jury a required *Mushtaq* direction". At the conclusion of the hearing of the appeal on 5 March 2014, the court announced that the appeal would be allowed, quashed the conviction and set aside the sentence. In the interests of justice, the court ordered a new trial, pending which the appellant was remanded in custody, unless and until any other order might be made by the court below. These are the reasons for this decision.

[3] In the light of the disposal of the appeal, it is unnecessary to give more than a brief outline of the facts, bearing in mind also the limited nature of the appellant's challenge to his conviction. The appellant was charged with murdering Ms Ella May Pinnace Bennett ('the deceased') on 20 June 2009. Just after midday on 22 June 2009, the deceased's lifeless body was found by Inspector Suzette Anderson and a team of police officers, acting on information they had received, on premises located at 32 Central American Boulevard in Belize City. The deceased's partially nude body, apparently in a state of decomposition, was observed lying face up on the veranda of a cream coloured cement house. There was a pool of blood near to the body and an 8 inch cement block a foot away from the body.

[4] Just over an hour later, a post mortem examination was conducted on the spot by Dr Mario Estrada Bran. It revealed that the deceased had sustained three injuries to her head, characterised by Dr Estrada Bran as "blunt instrument type". The doctor's opinion was that the direct cause of death was severe brain damage due to these injuries. Based on the state of decomposition of the body which he observed, Dr Estrada Bran estimated the approximate date and time of the death of the deceased to be 20 June 2009, between 9:00 pm and 12:00 midnight.

[5] The appellant was taken into custody early in the afternoon of 22 June 2009 and, in the late afternoon of the following day, he was arrested and charged with the murder of the deceased.

[6] There were no eyewitnesses to the killing. In addition to some evidence, partly circumstantial, from which the prosecution invited the jury to infer that the appellant was the person who killed the deceased, the case against the appellant was based to a

significant extent on a statement after caution ('the statement') allegedly given by the appellant on 23 June 2009. Upon an objection being taken by counsel for the defence at the outset of the trial to the admissibility of the statement, on the ground that it was not voluntary, the judge embarked upon a *voir dire* for the purpose of determining this issue. After hearing evidence on the *voir dire*, the learned trial judge ruled that the statement had been voluntarily given by the appellant, in circumstances which were not unfair to him. It was therefore admissible.

[7] The statement was tendered through Corporal Carmelito Cawich, who gave evidence of having been requested to record a statement under caution from the appellant on 23 June 2009. Corporal Cawich told the court that, upon receiving the request, he arranged for the presence of Ms Grace Flowers, a justice of the peace, to witness the recording of the appellant's statement. In due course, after being cautioned, the appellant dictated his statement, which was written down by Corporal Cawich, read over by the appellant and, after being signed by the appellant, witnessed by the justice of the peace. Corporal Cawich's evidence was that, during this process, no promise of any favour or advantage was held out by him or anyone else to the appellant, nor was any threat or pressure brought to bear upon him. Corporal Cawich said that the statement was given and taken down in an air-conditioned room, over a period of approximately 55 minutes, and that he (Corporal Cawich) was unarmed at that time.

[8] The appellant's statement, which was self-inculpatory in effect, was accordingly admitted in evidence and read to the jury. In cross-examination, it was suggested to Corporal Cawich that (i) the appellant had not at any time indicated a desire to give a statement; (ii) the statement produced by him in court was "already prepared" before the appellant got into the room; (iii) the appellant signed the statement on his (Corporal Cawich's) instruction; and (iv) the appellant did not read over the statement because he could not read. All of these suggestions were denied by Corporal Cawich.

[9] The justice of the peace, Ms Flowers, told the court that, upon being left alone with the appellant for five minutes before the interview commenced, the appellant had told her that he wished to give a statement, and that no-one had forced him to do so, threatened or beaten him. Ms Flowers' evidence generally supported Corporal Cawich's account of the circumstances in which the statement was taken, save that, as she

recalled it, the statement was read over to the appellant, rather than by him, after it had been recorded by Corporal Cawich. She denied the suggestions put to her in cross-examination that, when she came to the office of the Criminal Investigation Bureau ('CIB'), the statement was already prepared, and that all she did that day was add her signature and stamp to the document.

[10] The only other of the prosecution's witnesses that it is necessary to mention for present purposes is Sergeant Nicholas Palomo, who was at the material time stationed at the CIB, Eastern Division, Belize City. His evidence (so far as is now relevant) was that on 22 June 2009, he had seen the appellant in custody at the Belize City Police Station. At no time during the two hour period that the appellant had been in his presence had he or anyone else offered any promise, favour or advantage to the appellant in order to assist the police in obtaining any statement. Nor had he or anyone else in his presence threatened or pressured the appellant in any way in order to obtain a statement. Sergeant Palomo also denied the suggestions put to him in cross-examination that he used a club to beat the appellant and that the appellant had given a statement to him.

[11] The appellant, who gave evidence, was the sole witness for the defence. He gave an alibi with respect to the night of 20 June 2009. He said that he was taken into custody by the police during the afternoon of 22 June 2009 and taken to the CIB Office in Belize City. After he had been there for approximately half an hour, a police officer identified by him as Sergeant Palomo handcuffed him and took him to a room to the back of the office. There, Sergeant Palomo and another police officer started punching and choking him. Sergeant Palomo, who was beating him with a baton, then told him, the appellant said, that he "kill the woman". After about 25 minutes to half an hour, the appellant testified, he was taken somewhere by Sergeant Palomo and another officer and then to the Queen Street Police Station. The following morning he was again beaten by Sergeant Palomo and another police officer. They were "[p]unching me, beat me with a club, then they started choking me".

[12] It was at this point, the appellant testified, that he decided that he "might as well give them for what they were asking"; that is, a caution statement. He accordingly dictated a statement to Sergeant Palomo, who wrote it down in a notebook. The

appellant denied giving any statement to Corporal Cawich although, when shown the statement which had been admitted in evidence through Corporal Cawich, he acknowledged that the signature was his. Thereafter, in answer to the judge's questions, the appellant explained that Corporal Cawich "just come to me and tell me to sign my signature and so I did without reading it".

[13] In summing-up the case to the jury, the learned trial judge told them this:

> "Madam Forelady, ladies and gentlemen of the jury I am going to give a direction in terms of the statement under caution which Corporal Cawich said that he recorded from the accused. This is the direction; I'm telling you now about the statement according to Corporal Cawich that he recorded from the accused:
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> (i) Are you sure that the accused dictated the statement under caution to Corporal Cawich?
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> (ii) If you found that the accused dictated the statement, you are to consider whether the statement is true.
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> If for whatever reason you are not sure whether the confession, that means the statement, was made or was true you must disregard it. Once you are not sure that the accused gave that statement or you're not sure that it was true, don't consider the statement which Corporal Cawich recorded from him. If on the other hand you are sure both that it was made and is true you may rely on it."

[14] Mr Sylvestre submitted that, in these circumstances, the judge ought to have directed the jury in accordance with the decision of the House of Lords in **R v Mushtaq [2005] UKHL 25**. The learned Director, with her usual candour, readily agreed. So did we.

[15] In **R v Mushtaq**, the House had for consideration the appropriate direction to be given to the jury where, a statement having been admitted by the trial judge after a *voir dire* as voluntary, the circumstances in which the statement was given are revisited by the defence in front of the jury (as it has long been accepted that the defence is fully entitled to do so - **R v Murray [1951) 1 KB 391**). In **Chan Wei-Keung v R [1967] 2 AC 160,** the Privy Council had held that, in that event, although the jury should be told that the question of the weight and probative value of the confession was a matter for them,

there was no need for a further direction that they must be satisfied beyond reasonable doubt as to the voluntariness of the confession before giving it any consideration. As is now well known, **R v Mushtaq** changed all this by holding that the jury should be directed in such a case that, if they considered that the confession was, or might have been, obtained by oppression or in consequence of anything said or done which was likely to render it unreliable, they should disregard it. This is what is now known as a *Mushtaq* direction.

[16] In **Benjamin & Ganga v The State (2012) 82 WIR 445**, the Privy Council held that a *Mushtaq* direction is required when there is a possibility that the jury might conclude that (i) a statement was made by the defendant; (ii) the statement was true; but (iii) the statement was, or may have been, induced by oppression. Clarifying the scope of its own previous decision in **Wizzard v R (2007) 70 WIR 222**, the Board made it plain (at para [17]) that the direction was equally required where the defence was a denial that the statement was made:

> "…both issues (viz whether the appellants made the statements and whether they were induced by oppression) remained live before the jury. The claim that the statements had not been made does not extinguish as an issue which the jury had to decide, whether, if they had been made and were true, they had been procured by violence".

[17] **Benjamin & Ganga** was applied by this court in **Arturo Ek v R (Criminal Appeal No 7 of 2010**, judgment delivered 20 July 2012), a case in which, as Sosa P observed (at para [29])**,** "Manifestly, there was a possibility that the jury might find both that the statement was true and that it was or might have been induced by oppression". In these circumstances, this court was in no doubt that the trial judge ought to have given a *Mushtaq* direction.

[18] In the instant case, the position at the close of the appellant's case was as follows. The prosecution relied on a statement which it alleged was voluntarily given by the appellant to Corporal Cawich, but which the appellant denied having given. However, the appellant gave evidence that, earlier in the same day on which he was alleged to have given the statement to Corporal Cawich, he had been forced through

violence to give a statement to Sergeant Palomo, an allegation which Sergeant Palomo denied.

[19] In these circumstances, it appeared to us that there was a clear possibility that the jury could have found that, although the appellant did give the statement which he was alleged to have given to Corporal Cawich, he gave it because he had been beaten, as he alleged, by Sergeant Palomo or by some other police officer: in other words, that he was conflating the two incidents. It is this possibility which, in our view, called for a *Mushtaq* direction. Instead, the learned judge's direction to the jury left the matter to them entirely on the basis of (i) whether the appellant made the statement and (ii) whether it was true. In so doing, we considered that the judge plainly fell into error, by foreclosing any possibility of the jury taking the view – clearly open to them on the evidence - that the statement should have been disregarded entirely.

[20] These are the reasons for the decision of the court which was announced on 5 March 2014 (see para [2] above).

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SOSA P

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MORRISON JA

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MENDES JA