IN THE COURT OF APPEAL OF BELIZE AD 2016

CRIMINAL CASE APPEAL No. 27 of 2011

BETWEEN:

LEONARD GODOY Appellant

v

THE QUEEN Respondent

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BEFORE:

The Hon. Justice Awich	-	Justice of Appeal
The Hon. Justice Hafiz-Bertram	-	Justice of Appeal
The Hon. Justice Ducille	-	Justice of Appeal

Michael Young SC for the appellant.
Cecil Ramirez Acting DPP for the respondent.

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8 October and 18 March 2016.

AWICH JA

[1] This is judgment in the appeal of the sole appellant, Leonard Godoy, against convictions and sentences for robbery, and attempted murder, charged in the first and third counts respectively, of the indictment dated 26 January, 2010. At the hearing of the appeal on 8 October 2015, learned counsel Mr. Michael Young SC for the appellant, quite properly withdrew the appeal against the

conviction for robbery. He pursued the appeal against the sentence for that conviction, and the appeal against the conviction for attempted murder and the sentence for it.

[2] At the trial in the Supreme Court the appellant did not have an attorney representing him. At the hearing of the appeal Mr. Young represented the appellant *pro bono pu blica*. Recently the Hon. Sir Dennis Byron, President of the CCJ, the final appeal court, called on attorneys in Belize to assist impecunious appellants charged with serious offences. There has been positive result. Since that call less and less criminal appeals have been adjourned several times. We record our gratitude to Sir Dennis Byron and the attorneys who have responded.

[3] The appellant, Leonard Godoy, and two others, Norman Peters and Brandon Lozano, were indicted jointly. The indictment was comprised of three counts. In the first count, all three accused were charged with the offence of robbery, contrary to s. 147 of the Criminal Code Cap. 101, Laws of Belize. It was alleged that on 5 day of March, 2007 at Placencia, they robbed HN of $350.00 and three cell phones. In the second count, only Norman Peters was charged with rape of HN, contrary to s.46 of the Criminal Code. The rape was committed in the course of the robbery. In the third count, Norman Peters, and may be the appellant Leonard Godoy, were charged with the offence of attempted murder of HN, contrary to s.117 of the Criminal Code. We say, “may be”, because a question arose, whether the third count was ever amended and Godoy was added to Peters, the original sole accused in the count, and charged jointly with Peters. No answer was provided. The attempted murder was alleged to have occurred at the time of the robbery. All the offences took place at the family home of HN at Placencia on the Main Street, about 8.00 pm on 5 March, 2007 when HN was home alone doing school homework.

[4] The three accused were tried jointly from 4 May, 2010 to 25 May, 2010 in the Supreme Court before the learned trial judge, Lucas J and a jury. On 17 May,

2010 the jury returned a unanimous verdict of guilty on each count in respect to each respective accused.

[5] After hearing witnesses in mitigation, and HN's victim impact statement, the judge passed sentences on the three accused on 25 May, 2010. It is commendable that the prosecution presented a testimony of the impact of the offence on the victim (the so called impact statement) and the judge received it. It is desirable that a judge is informed of the impact of a heinous offence on a victim of a crime of violence. Impact testimony is no less important information than the personal circumstances of a convicted person in reaching a just sentence.

[6] For the offence of robbery in the first count, the judge sentenced each of the three accused to 10 (ten) years imprisonment. For the offence of rape in the second count, the judge sentenced the accused Peters to 8 (eight) years imprisonment. For the offence of attempted murder in the third count, the judge sentenced the accused Peters and the accused Godoy, the appellant, to 18 (eighteen) years imprisonment each. He ordered that, the three sentences of imprisonment of Peters were to run concurrently, and the two sentences of imprisonment on the appellant were to run concurrently.

[7] Peters was already serving a term of imprisonment for an earlier conviction for burglary; the judge ordered that, the three sentences he passed on Peters were to commence at the end of the existing sentence of imprisonment. That meant that the three sentences imposed in this case on Peters were to run concurrently, but consecutively with the existing sentence of imprisonment he was already serving.

[8] Only the appellant Godoy appealed. We have allowed his appeal against the conviction for attempted murder on the third count, and have quashed the sentence of 18 years imprisonment for that conviction. But we have dismissed his appeal against the sentence of 10 years imprisonment for the conviction for

robbery on the first count. The appeal against the conviction for the robbery was withdrawn.

The Facts.

[9] The following is the prosecution evidence on which the jury convicted the appellant and the other two accused. Much of the evidence came from the testimony of HN. The cautioned statement of the appellant which the judge admitted, confirmed much of what HN stated in her testimony. When the judge enquired of the appellant in the absence of the jury, whether the appellant had made the statement, and if so, whether voluntarily, the appellant said that he had made the statement voluntarily. It was read as evidence in court. There has been no appeal against the ruling by the judge that, the cautioned statement was made voluntarily and was admissible as evidence. There was also abundant evidence *aliunde* proving the commission of the offence of robbery by the appellant and the accomplices.

[10] On 5 March, 2007 about 8:00 pm, HN aged 16, was at home alone. Her father was at his restaurant business on the same street. Her younger sisters had gone to have dinner at the restaurant. HN was on the upper floor. She sat at a table between the kitchen area and a sliding glass door that opened to the verandah. The glass door was the back door. She was doing her school work. Bright electricity lights were on. A young man (the third accused) Lozano, knocked at the door and asked for water. HN opened the sliding glass door, and Lozano entered the house through it. Immediately another and older man (the first accused Peters), who had wrapped his face with a blue t-shirt, ran up the stair-case and entered through the same sliding glass door. He grabbed HN, held her with her back on him and held a knife to her neck. He told her, “shut up bitch otherwise I will kill you.” At this point a third man, “a light skin man” (the appellant Godoy) who was at the foot of the stair-case, also went up and entered through the same sliding glass door.

[11] Peters asked whether HN knew him, where her parents had gone, when they would return, and whether anyone was on the ground floor. HN answered that, she did not know him, she did not know when the parents would return, and there was no one downstairs. All the three men stood around HN, and then proceeded to search for money. HN looked on. All this took about ten minutes.

[12] Then Peters grabbed HN again and walked her towards the bedrooms, ending in the parents' bedroom. There were bright electricity lights in the passage and in the bedrooms. The other two men continued searching around in the bedrooms for money. In the hope that the men would take money and leave, HN told them that there was money in a purse that they had seen, but had not paid much attention to. One of the two men opened the purse and took $350.00. They also took 3 cell phones. The men did not leave rightaway though.

[13] When all that was going on HN heard her sisters knocking at the door. They pleaded that HN open the door for them. It was locked at that moment. After a while the sisters left and made a report to their father at the restaurant.

[14] Meanwhile Peters who was still holding HN dropped her on her parents' bed and held her by the neck "chocking" her. The appellant went over and took over chocking her. He removed her from the bed and laid her on the floor. Peters took over again. He removed her panties and had sexual intercourse with her for about 5 minutes. When he finished he stabbed her 3 times in the neck. The three men left.

[15] After about two minutes, and when it was quiet, HN got up and ran out of the house. She ran in the direction of the restaurant. Her father who was hurrying home met her on the street. He took her to a doctor on the same street. The doctor carried out some procedure to stop bleeding. He called a helicopter, and HN was taken to KHMH. There she was operated on by several doctors. During the operation her heart stopped. The doctors restarted it by electrical means. HN

was discharged from hospital after 8 days. She continued to have treatment for some time.

[16] During the police investigation the police invited HN on 21 April, 2007 to the police station at Independence Village to identify a suspect, if any, on an identification parade. She identified the person bearing No. 9 (the appellant). The police then took HN to the police station at Sein Bight and asked her to identify a suspect, if any, on an identification parade. She identified the person bearing No. 5 (the accused Lozano). HN was never invited a third time to identify a suspect.

The grounds of appeal.

[17] By leave of the Court, Mr. Young amended the grounds of appeal by restating the details as follows:

> "1. The Learned Judge failed to direct or properly and adequately direct the Jury on the law relating to joint enterprise and what the Jury needed to determine to be satisfied that, on the evidence in the case joint enterprise had been established separately and distinctly for the second accused on the charges of robbery and attempted murder respectively.
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> 2. The learned trial judge erred in failing to direct the jury's attention to whether the particular act and the use of a weapon which resulted in the life threatening injury were within the contemplation of the Second Accused as a part of the group and consequently within the scope of their joint enterprise.

3. The conviction is unsafe as the Appellant was prejudiced and suffered a miscarriage of justice.

4. The verdicts were unreasonable having regard to the evidence."

Determination.

The third count and the indictment.

[18] We allowed the appeal against the conviction for attempted murder on the third count for the following reasons. The first reason was that, the appellant seemed to have been added to the third count at the trial, yet the record of the proceedings did not show that, the prosecution ever made an application for an order amending the indictment as originally formulated, and thereby joining the appellant as a joint accused to Peters who had been charged alone in the third count of attempted murder. The indictment was filed on 27 January, 2010. The trial commenced on 4 May, 2010. The words, "and Leonard Godoy", were simply inserted in handwriting immediately after the name "Norman Peters", in the thrid count of the indictment. Another handwritten noting which read, "amended on 3/5/2010 [or 5/3/2010]" was made on the margin. There was no signature to it or the word judge or any other designation to it.

[19] The record of proceedings about arraignment simply stated:

"Tuesday 4 May 2010, Court commenced at 9.30 am. Indictment read to the accused persons. Each accused pleaded not guilty."

[20] There is no record that a formal application for an order amending the indictment was filed by the prosecution and made in court, and granted by the judge. An order amending an indictment must be indorsed on the indictment; there was no endorsement on the present indictment.

[21] Upon perusing the record of proceedings we noticed the defect and irregularity. We asked both counsel to provide us with any information that would assure us that an application for amendment was made by the prosecution and was granted; and further, whether the amended indictment, if there was any, was put to the appellant to plead to.

[22] Unfortunately both counsel could not provide the information that we needed. Both had not participated in the trial at the Supreme Court. The prosecuting Crown Counsel had left the country. Learned counsel Mr. Ramirez, Acting DPP, informed the court that, the record on the prosecution file did not reveal any application for an amendment or any copy of a court order that might have been made and filed. He informed us that, the usual practice at the DPP's Office was to file a formal application for an order amending an indictment, a draft amended indictment would be attached to the application. If the application was granted, the Office would draw, sign and file an amended indictment at court. He advised that, because there was no record of all that, he was unable to give his assurance to the Court about the handwritten and unsigned notes that appeared on the court copy of the indictment.

[23] The judge in his summing-up to the jury did not refer to any application for an order to amend the indictment or any amendment order that he had made. He simply proceeded on the footing that, Norman Peters and Leonard Godoy were jointly charged with attempted murder in the third count.

[24] On the persuasion of ***Leeks [2010] 1 Cr App R 87***, (***Court of Appeal England and Wales), Soneji [2006] 1 ACC 340*** and ***R v Clarke and McDavid [2008] 1 W LR 338 (House of Lords***), we decided that, the failure by the prosecution to make a formal application for an amendment of the indictment by adding the appellant as a joint accused in the third count, and the absence of record that showed that, the appellant was asked to plead to any amended count, was fatal to the trial of the appellant on the third count of attempted murder. There was no valid third count and indictment in respect to the appellant. We hold

that the proceedings regarding the third count, to the extent that they applied to the appellant, were a nullity. We note however that, failure to indorse an amendment, had it been duly applied for and granted, would have been a mere irregularity not necessarily rendering the proceedings a nullity. – see ***Moss [1995] Crm. LR 828***.

[25] ***Leeks*** cited above, was a judgment granting leave to appeal and allowing the appeal. The case was commenced by filing a signed and valid indictment for the offence of causing death by careless driving *and refusing to provide a specimen of breath*. When the case was called up for mention, the prosecutor, because he perceived difficulty in the evidence regarding the request for breath, intended to apply for an amendment by introducing an alternative count of causing death by careless driving *when unfit through drink*. He informed the judge of his proposal to apply for the amendment, and he circulated the proposed amendment. The application was not made, and no order to amend the indictment was made. At the trial the prosecutor and the judge were different. The Clerk of Court simply read the draft amended indictment, and the applicant pleaded guilty to the proposed amended count. The applicant was convicted and sentenced to two years imprisonment. He applied for leave to appeal. The Court of Appeal (England and Wales) held that, the proceedings on the intended count which had not been applied for in an application for amendment, and not introduced by an amendment, were a nullity. In ***Clake and McDavid***, the indictment had not been signed. The House of Lords held that, the proceedings were a nullity.

Joint enterprise and the scope of it.

[26] The other reasons for allowing the appeal against the conviction for attempted murder were based on the principle of joint enterprise (common purpose) and the principle regarding a principal offender and a secondary offender. The first of those reasons is that, the direction by the judge to the jury about the principle of joint enterprise was inadequate in the circumstances of this

case. The judge did not state unequivocally that if the jury found that the three accused set out on a joint enterprise, that is, with a common purpose, the jury had to identify what that joint enterprise was, and the scope of it. Secondly, the judge did not direct the jury that, if they concluded that, the joint enterprise was to rob, they had to decide further whether the stabbing of HN or anyone resisting, with intention to kill, was part of the robbery that all the accused intended. Furthermore, the judge did not direct the jury that, if they decided that, the stabbing was not part of the intention in the robbery, then only the perpetrator of the stabbing would be liable for the stabbing which was the subject matter of the offence of attempted murder, if the stabbing was carried out with intent to kill.

[27] One of the requirements of the offence of attempted murder is that the harm (the stabbing) done to the victim must be shown to have been carried out with the specific intent to kill. The judge correctly stated this to the jury. However, he erred when he directed that, if Peters was the perpetrator who intended to kill HN, then the appellant (the secondary offender) would be taken to have had the intention that HN be killed, if the appellant foresaw that Peters would kill in the course of the robbery when Peters produced a knife and threatened to kill HN with it, and the appellant continued participating in the joint enterprise.

[28] We do not blame the judge at all for that direction which instructed the jury to act on what would be a presumption of law that foresight that death could be caused was sufficient intent that death be caused. That was in line with the restatement of the law made by the Privy Council in ***Chan Wing Siu [1985] AC 168***. The Privy Council has recently overruled that restatement of the law in a joint judgement ***in R v Jogee (England and Wales); and Ruddock v The Queen (from Jamaica) [2016] UKSC 8, [2016] UKPC 7.*** The restatement in ***Chan Wing Siu*** had been adopted in several judgments of this Court. In ***Jogee and Ruddock***, the Privy Council held that, contemplation (foresight) that the principal offender may use lethal force was no more than evidence, and sometimes very important evidence, in proving that the secondary offender

assisted or encouraged the crime of violence with the intent that death be caused.

[29] Furthermore still, we noted that, the judge did not mention to the jury that the evidence to consider included that, Peters stabbed HN after the appellant and Lozano had left the scene and the house. Although the judge had no obligation to mention all the evidence, and had earlier in a general way told the jury to take into consideration evidence that he might omit to mention, we consider that, this item of evidence was very important in the decision by the jury as to whether either of the other two accused intended killing in the course of the common purpose to rob. This made the conviction of the appellant for attempted murder unsafe.

Sentence on the first count of robbery.

[30] We start by noting that, deciding an appropriate punishment following a conviction is a matter for the discretion of the trial judge. An appellate court cannot interfere where it has not been shown that the judge did not follow a statutory provision or an established principle of sentencing law, or misunderstood a material fact. The responsibility for showing all that is on the appellant.

[31] Mr. Young's written submissions against the sentences were largely suited for impugning the sentence of 18 years imprisonment for the conviction for attempted murder, which we have quashed. The submissions are now somewhat weaker in merit as far as they are to be considered as complaints against the sentence of 10 years imprisonment for the conviction for robbery.

[32] The submissions against the sentences were the following: (1) the same sentences of 10 years imprisonment for robbery, and 18 years imprisonment for attempted murder were imposed on the appellant who had previous convictions

for only the minor offences of disorderly conduct and use of threatening words, and imposed on Peters who had a pervious conviction for burglary, a serious offence; (2) the appellant was a young person, 23 years old, had a common law wife and 3 children; and (3) the appellant was, “not the primary participant” in the offences.

[33] The record shows that, the judge noted that, the appellant had convictions for two minor offences, he was young and had 3 children. The judge further noted that, the first accused Peters had a convicition for a more serious offence of burglary. He further noted the health condition of the appellant that often he bled from the nose, and noted the dependency on the appellant of his mother, his common law wife and his three children. The Judge having noted these facts must have taken them into consideration in favour of a more lenient sentence, otherwise why note them.

[34] On the other hand, the judge considered that, the offence of robbery under ***s. 147 of the Criminal Code*** was punishable with a mandatory minimum sentence of 10 (ten) years imprisonment which may extend to life imprisonment. He must have concluded that, taking into account all the circumstances of the robbery it was appropriate to punish for it with no more than the mandatory minimum punishment of 10 years imprisonment. The DPP has not appealed against the sentence. If the judge thought that the appropriate sentence for the facts of the offence was less than the mandatory minimum punishment, he must have regarded himself as bound to pass the mandatory minimum sentence anyway.

[35] Another way of looking at it is this. If the judge considered that, the appropriate punishment of Peters, given his record of previous conviction for burglary, a serious offence, was 10 years impriosnment, the mandatory minimum sentence, the judge must have realised then that, it would follow that the punishment of the appellant and of Lozano who were younger and had not as bad records of previous convictions would be shorter than 10 years

imprisonment, but for the mandatory minimum punishment of ten years imprisonment required under ***s. 147 of the Criminal Code***. The appellant has not shown to this Court that, the two probable approaches by the judge were wrong in law, so that this Court may interfere with the sentence passed on the appellant for the robbery.

[36] We must also point out that, it was not argued before the judge that, any or all the mitigatory facts for the appellant were "special extenuating circumstances", under ***s. 147 of the Criminal Code***, or that the appellant, because of his minor previous convictions, could be regarded as, "a first time offender," under the section, so that he could be spared a mandatory minimum sentence.

[37] The provisions of ***s.147 (2) of the Criminal Code*** and the ***proviso*** thereto are the following:

> **(2) A person guilty of robbery, or of attempted robbery, or of assault with intent to rob, shall be punished as follows:-**
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> **(a) on conviction on indictment, to a term of imprisonment which shall not be less than ten years but which may extend to life imprisonment;**
>
> **(b) on summary convictions, to a term of imprisonment which shall not be less than five years but which may extend to ten years;**
>
> **Provided that (whether the case is tried summarily or on indictment) the court may, in the case of a first time offender who has no previous convictions for any offence involving dishonesty or violence, refrain from imposing the minimum mandatory sentence prescribed above if there be special extenuating circumstances which the court shall record in**

writing, and in lieu thereof, pass such other sentence (whether custodial or non-custodial) as the court shall deem just having regard to the prevalence of the crime and other relevant factors.

[38] We posed to both counsel the question: whether the mitigatory facts in this case could be regarded as constituting, “special extenuating circumstances” for the purpose of imposing less than the mandatory minimum sentence on the appellant under the proviso to subsection (2) of s. 147. Mr. Young was unable to refer us to any judgement in which mitigatory facts such as in this case were accepted as special extenuating circumstances for the purpose of imposing a sentence lower than the mandatory minimum under s. 147 of the Criminal Code. Not surprising, we were also unable.

[39] Mr. Ramirez submitted that, the mitigatory facts for the appellant were the usual ones, and could not constitute special circumstances for the purpose of s. 147 of the Criminal Code.

[40] We accept the submission by Mr. Ramirez. The mitigatory facts that, other people including his children depended on the appellant, his youth, and his health condition that the appellant sometimes bled from his nose, were not special extenuating circumstances such that permitted the judge to impose a sentence less than the mandatory minimum sentence under s.147 of the Criminal Code. We could not simply ignore the express words of the proviso that only, “a first time offender who had no previous conviction for any offence involving dishonesty or violence,” may be punished with less than a mandatory minimum punishment, “if there be special extenuating circumstances...” There was no basis on which we could interfere with the mandatory minimum sentence of 10 years imprisonment imposed on the appellant.

[41] The orders that we make are: (1) that the appeal against the convicition of the appellant Leonard Godoy, for attempted murder contrary to s. 117 of the

Criminal Code is allowed, the Court enters an acquittal of the appellant on the third count, and quashes the sentence of 18 years imprisonment imposed on the appellant on the count; (2) the appeal against the sentence of 10 years imprisonment imposed on the appellant on the first count for robbery under s. 147 of the Criminal Code is dismissed, the sentence is affirmed.

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AWICH JA

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HAFIZ-BERTRAM JA

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DUCILLE JA