IN THE COURT OF APPEAL OF BELIZE AD 2017

CRIMINAL APPEAL No. 15 OF 2012

GILBERT HENRY Appellant

AND

THE QUEEN Respondent

BEFORE

The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

K L Arthurs for the appellant.
C L Vidal SC, Director of Public Prosecutions, for the respondent.

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14 and 23 March, 16 June 2017.

DUCILLE JA

[1] The Appellant was charged with Attempt to Murder, and was convicted of the alternative offence of Dangerous Harm on July 9, 2012. The Appellant filed this appeal on July 18, 2012, his sole ground of appeal at that time being that he felt that he was not properly represented in court as his lawyer had died and the trial judge ordered that the trial continue. Later, the following grounds were added:

(1) The Appellant has been denied the right to a fair trial in a reasonable time – by reason of delay in having his appeal heard – the appeal being part of the trial process.

(2) The absence of a complete transcript in a case where issues of self-defence were raised, particularly the summing up and the absence of proper procedure to rebuild the record have further denied the Appellant the right to a fair trial.

(3) Owing to the delay in the trial and the deprivation of his right to a fair trial within a reasonable time, the Appellant has not been afforded the right and application of the principles of remission.

Facts

[2] On September 14, 2008, Ellis Taibo walked into a bar where a domino game was in progress. The Appellant was in the bar at that time, but it is not clear whether he was involved in the game or not. What is clear is that words were exchanged between the two men and eventually blows. Taibo claims that the Appellant hit him in the chest first. He (Taibo) hit the Appellant back twice before leaving the bar. A witness, Earl Trapp, said the two men were wrestling and the Appellant was cursing. The Appellant followed Taibo out of the bar and stabbed him in the upper chest. Taibo was promptly taken to hospital, where it was discovered that he had a collapsed lung and was bleeding into the chest cavity. He was hospitalized for about six weeks. The Appellant himself reported the incident to the police and handed over a pocket knife, stating that he had just killed Taibo. On the same day, Appellant was charged, cautioned and made a statement in which he described the argument between himself and Taibo. He stated that he ran after Taibo and "jucke" him because Taibo threatened to kill him.

[3] Although the Appellant was first charged in September 2008, the trial proper did not actually begin until on or about June 28, 2012. There is a suggestion that this may have been due partly or even entirely to Appellant's efforts to obtain legal representation after the death of his original lawyer. However, the transcript is devoid of any mention of this. The trial itself was brief and the Appellant was patently unskilled in the way he conducted his defence. He was eventually convicted on July 5, 2012 and sentenced to five years' imprisonment on July 9, 2012.

[4] The jury retired initially for two hours and twenty-six minutes, then asked for further directions. There is no record of what was addressed in the further directions, as there is

indeed no transcript of the learned Trial Judge's summing up. The jury returned for the second time after deliberating for a further eight minutes with a verdict of Not Guilty of Attempted Murder and Guilty of Dangerous Harm. There is no mention in the transcript as to whether the verdict was unanimous or a majority. The Appellant gave Notice of Appeal on July 12, 2012. This appeal was eventually heard on March 14, 2017.

Issues

[5] There are two issues in this appeal. The first is whether the provisions of section 6(2) of the Belize Constitution require a conviction to be quashed in a case where there has been a delay of almost nine years from the date the Appellant was arrested to the present date, the delay has not been occasioned by the Appellant, and there have been significant administrative and judicial irregularities and disorganization. The second issue is whether a trial should be declared a nullity where the jury returns a majority verdict in less than the time specified in section 21(2) of the Juries Act, Cap. 128.

[6] Although we answer the second question in the affirmative and this is instantly dispositive of this appeal, we mention at this time that we are constrained to discuss the first issue in some depth in order to make our concerns known, and to state in the clearest terms that such a situation as occurred in this case is never acceptable. That an Appellant waiting for his appeal to be heard should be forced to serve his entire sentence while so waiting – particularly where the fault can be laid squarely on administrative insufficiencies – is unacceptable. It is incumbent on a Registrar to make provision as soon as Notice of Appeal is filed, to secure the transcript of the trial and obtain the judge's notes of his summing up (if this is not available with the transcript). Note also that section 38 of the Court of Appeal Act, Cap. 90 states

> The judge of any court before whom a person is convicted shall, in the case of an appeal under this Part against the conviction or against the sentence, or in the case of an application for leave to appeal under this Act, furnish to the Registrar, in accordance with rules of court, his notes of the trial, and he shall also furnish to the Registrar in accordance with rules of court a report giving his opinion upon the case or upon any point arising in the case.

Additionally, every effort should be taken to ensure that court clerks have adequate training, particularly with reference to note-taking during a trial. The earlier that an irregularity or omission is discovered, the earlier an attempt can be made for the Registrar and both parties to settle the record.

Constitutional considerations – fairness and delay

[7] Section 6(2) of the Belize Constitution[1] states that "[i]f any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law." Although "a fair hearing" and "a reasonable time" are separate concepts, there being several circumstances that might affect fairness, there can be no question but that delay is one of those circumstances. Here, we propose to discuss these concepts together. In **Joseph Stewart Celine v the State of Mauritius, [2012] UKPC 32**, Lord Kerr stated that "[i]f a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10(1) of the Constitution, whether or not the defendant has been prejudiced by the delay."[2]

[8] As to what constitutes "a reasonable time", there are several factors to be taken into account. In **Boolell v The State, [2006] UKPC 46**, Lord Carswell cited the earlier case of **Dyer v Watson [2004] 1 AC 379**, in which it was stated that

> The court has identified three areas as calling for particular inquiry. The first of these is the complexity of the case. It is recognised, realistically enough, that the more complex a case, the greater the number of witnesses, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial and for any appellate hearing. But with any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable. The second matter

[1] Cap. 4 of the Laws of Belize

[2] comparable to section 6(2) of the Belize Constitution

> to which the court has routinely paid regard is the conduct of the defendant. In almost any fair and developed legal system it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges, changing legal advisers, absenting himself, exploiting procedural technicalities, and so on. A defendant cannot properly complain of delay of which he is the author. But procedural time-wasting on his part does not entitle the prosecuting authorities themselves to waste time unnecessarily and excessively. The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It is plain that … states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on … states so to organise their legal systems as to ensure that the reasonable time requirement is honoured …"[3]

[9] Counsel for the Appellant argued, and we agree, that "reasonable time… relates not only to the time by which a trial should commence but also the time by which it should end and judgment be rendered … and that "all stages must take place without undue delay." As Lord Carnworth said in **Melanie Tapper v Director of Public Prosecutions {2012} UKPC 26**, "… there is no dispute that [the section] extends to post-conviction delay."[4] That understanding was also evident in his further remarks that '… even extreme delay between conviction and appeal, in itself, will not justify the quashing of a conviction that is otherwise sound." In effect, all periods until "the end of the saga …must be within a reasonable time."[5]

[10] The Respondent argued that the issue before this court should be whether the conviction is sound, and that delay should only be considered "if it caused prejudice to the appeal, for example if there would have been an application to call fresh evidence

[3] Dyer, at paragraphs 53-55

[4] Tapper, at paragraph 9

[5] per Adams J. in R v P.J & Sons Ltd. 1990 CanLII 7282 (NL SCTD) citing Lamer J. in R v Rahey [1987] 1 S.C.R. 588

which was affected by the delay." With respect, we disagree with this narrow framing of the issue, which although supported by authority speaks particularly to remedy; as in "should the conviction be quashed?"

[11] In this case, we examine delay within the Boolell and Dyer enquiries. First, was this a complex case? For this we must consider the number of witness involved, the burden of documentation and the time taken to prepare for both trial and appeal. There was a total of six witnesses, four for the prosecution and two for the defence, all of whose testimony lasted two days. The only documentation in this case was the statement of the Appellant. That statement had a total of thirteen lines of text, and appears to reiterate the report the Appellant made to the police, as well as to set out a possible defence. We note here that the Appellant apparently objected to both his oral and written statements (although in the transcript, those objections are attributable to the prosecution) and a voir dire was held. However, the Appellant did not cross-examine the police officer who took his written statement and posed only two questions to the officer who testified as to the oral statement. With regard to the Appellant's preparation before trial, it is fairly obvious from the transcript of the trial that very little time was spent on preparation. We contrast this with the preparation of the appeal where it is also obvious that some considerable effort was expended, the Skeleton Arguments being replete with reasoned submissions and authorities from around the Commonwealth.

[12] Second, we examine whether the Appellant contributed to the delay by any means. The Appellant avers in his first ground of appeal that his original lawyer died. However, there is nothing in the transcript to suggest that this is true or that any of the delay in this matter was attributed to that circumstance. In fact, the Appellant's other Grounds of Appeal allege that most of the delay in this matter was caused by the absence of a complete transcript and the absence of proper procedure to rebuild the record. This is not disputed by the Respondent.

[13] Finally, we address the "manner in which the case has been dealt with by the administrative and judicial authorities."[6] In particular, we examine the transcript of the trial and note that there is no record of the learned Trial Judge's summing up, nor are there any notes of said summing up. There are several anomalies in the transcript as well. For example, there is a list of twenty-two jurors, one of whom, although listed as "absent" appears to also be the "Forelady." One would have to suppose that the jury was selected from that list of twenty-two. As counsel for the Appellant has pointed out, there are obvious gaps in the record, missing pages and paragraphs. He argues that this Court is severely impeded from carrying out [its] function and the prospect of having a just hearing of [the] appeal is greatly diminished." Counsel cited certain Canadian authority in support of the proposition that "the court must look to see if there is other evidence available which can shed light on what transpired during the gap period[s] and whether anything significant occurred during the gap[s]."

[14] It appears that by "other evidence", counsel for the Appellant was referring to the Trial Judge's notes as in **R v Hayes [1989] CanLII 108** (SCC). The judge's notes were available in that case. On the issue of what is considered significant, counsel also cited **Chabedi v The State** (the Supreme Court of Appeal of South Africa) Case No: 497/04, where the court stated that "[t]he question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal." In that case, the defects in question were inaudible questions and comments by the magistrate due to a non-working microphone. But these were found not to be material since there were other working microphones in court.

[15] Counsel for the Respondent concentrated less on the gaps in the transcript and more on the absence of a transcript of the summing up. In **Roberts and Roberts v The State [2003] UKPC 1**, it was held that "the lack of a transcript of the judge's summing-up

[6] Dyer, at paragraph 55

is significant only if the appellants can point to something to suggest that it contained a misdirection." In that case, the shorthand notes of the trial judge's summing up were lost, with the result that it was impossible to tell what directions were given on identification. While accepting that the loss of a transcript of a summing up is not, without more, a ground for setting aside a conviction, their Lordships, referring to R v Elliott (1909) 2 Cr App R 171, 172, stated that "[w]here … there is reason to suspect that there is something wrong in connection with the hearing of a case, the absence or insufficiency of a proper shorthand note may be material." They then considered the words of certain Justices of Appeal from the jurisdiction in question, expressing concern about the "repeated failures of trial judges to instruct juries properly on the Turnbull principles when they deal with the issue of identification."[7] Their Lordships then concluded that they could not assume that the judge in that case gave proper directions on identification, especially having regard to the prevalence of such misdirections at the relevant time.

[16] The Appellant raised the issue of self-defence at the trial; a material issue, which, if accepted by the jury, would have been an absolute defence entitling him to an acquittal. It could be argued however, that since both the Appellant and his victim stated that the Appellant was running behind the victim at one point, it was open for the jury to reject that defence. This should have been the subject of a careful direction to the jury on the part of the Trial Judge. Like the court in Roberts and Roberts, we cannot assume that the Trial Judge gave proper directions on self-defence, especially with regard to the other irregularities during the trial.

[17] The Respondent cited **R v Le Caer (1972) 56 Cr App R 727** for the proposition that "… the simple fact that there is no shorthand note is not of itself a ground for saying that the conviction is unsafe or unsatisfactory. In order that the appellant may claim that conclusion, he must be able to show something to suggest that there was irregularity at the trial or a misdirection in the summing up. Unless there is something to suggest that an error of that kind took place, the absence of a shorthand note simpliciter cannot cause

[7] See Fuller v State (1995) 52WIR 424, 433

the court to say that the verdict of the jury was unsafe or unsatisfactory."[8] Here, there is no complaint by the Appellant about misdirection. This is not remarkable as there is no summing up, audio recording or notes of same for this court to consider, and the Appellant was unrepresented at trial. It is this very fact unsettles the Respondent's contention that the lack of a transcript is significant only if the Appellant can point to something to suggest that it contained a misdirection. Without representation, how would the Appellant have known whether there was a misdirection?

[18] Counsel for the Appellant contended that because "there can be no detailed review of the transcript … sufficient grounds exist to reasonably conclude a miscarriage of justice ***may have occurred*** [emphasis ours], particularly since the Appellant was unrepresented and handling a fairly complex case." With respect, we do not believe that inability to have a detailed review is of itself indicative of a miscarriage of justice. Also, when we apply the principles set out in **Dyer v Watson**[9] with regard to number of witnesses, documentation and time for preparation, we are not of the view that this is a fairly complex case.

[19] As far as irregularities at the trial however, there were quite a few. For example, we are left to assume that the correct number of jurors were empaneled. Then, the Trial Judge does not appear to have informed the Appellant of his rights at the end of the case for the prosecution on the voir dire. The jury returned for further directions, but there is nothing to indicate what those directions were, or indeed whether they were even given. There is also no indication of whether the verdict was unanimous or a majority. Further, there is definite indication that there was non-compliance with the Juries Act, Cap. 128, and this will be discussed separately below.

Section 21(2) of The Juries Act Cap. 128

[20] Section 21(2) of the Juries Act provides

[8] Le Caer at 730-731

[9] [2004] 1 AC 379

> For the trial of the issue in every criminal cause in which the accused person is arraigned for an offence not punishable with death, the jury shall consist of nine persons and that jury may, on or after the expiration of two hours from the time when it retired to consider its verdict, return a verdict whenever it is agreed in the proportion of eight to one or seven to two, and that verdict when so delivered shall have the same effect as if the whole jury had concurred therein.

This section has been discussed quite recently by this court in the case of **Christian Neal v The Queen, Criminal Case Appeal No. 14 of 2014**, where the jury deliberated for one hour and fifty-four minutes. This was six minutes less than the time specified in section 21(2). Awich JA delivering the judgment of the court, stated that "this court has consistently interpreted the provisions of section 21(1) and (2) as mandatory." He then proceeded to consider the following cases.

[21] In **Cecil Gill v The Queen, Criminal Case Appeal No. 1 of 2003**, the jury retired for nineteen minutes before returning with a majority verdict. The trial was declared a nullity on appeal. In **Stanley Coleman v The Queen, Criminal Case Appeal No. 6 of 2004**, the trial was also declared a nullity where the jury retired first for two hours and fifty-five minutes. The trial judge sent them back and they deliberated for a further forty minutes. However, they were still short of the statutory period by fifteen minutes. In **Kent Francis v The Queen, Criminal Case Appeal No. 25 of 2006**, the jury returned after exactly two hours. Carey JA, delivering the judgment of the court, stated that "the period of acceptance of the verdict as valid begins to run from the instant the jury retire to the instant it returns the verdict."

[22] Similarly, in **R v Raymond Failey (1975) 13 J.L.R.39**, a majority verdict was held to be invalid, the court stating that "the crucial question however is: "when was the case finally and definitely left to the jury?" … we are of the firm view that it was finally left to them on the occasion of the second retirement." The rationale

for the careful adherence by the courts to every minute of the time specified by the statute is that an appellant '[should not be] deprived of the protection given him by an essential step in criminal procedure …"[10]

Applying that rationale to this case, the jury retired for only eight minutes after the case was finally left to them on their second retirement. This falls far short of the statutory two-hour requirement and the trial is accordingly declared a nullity.

23. In any event and in light of all the above, we conclude that the provisions of section 6(2) of the Constitution have been violated in this case, the delay and other irregularities amounting to a denial of a fair hearing within a reasonable time. Had it not been for the fact that we have just declared the trial a nullity, we would be constrained to allow the appeal and set aside the conviction. There can be no question of retrial. The Appellant has unfortunately already served the sentence imposed by the lower court. In the circumstances, we decline to address the issue of remission in Ground (3) of the Grounds of Appeal.

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AWICH JA

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HAFIZ-BERTRAM JA

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DUCILLE JA

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[10] See R v Winston McDonald and Clover Haye (1969) 11 J.L.R. 201, 206