

IN THE COURT OF APPEAL OF BELIZE, A.D. 2003

CRIMINAL APPEAL NO. 7 OF 2003

BETWEEN:

HILLAIRE SEARS

Appellant

and

THE QUEEN

Respondent

BEFORE:

The Hon. Mr. Justice Rowe

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President

The Hon. Mr. Justice Sosa

-

Justice of Appeal

The Hon. Mr. Justice Carey

-

Justice of Appeal

APPEARANCES:

Mr. Simeon Sampson S.C. for appellant.

Mr. Kirk Anderson, Director of Public Prosecutions, for Crown.

2003: June 12 and 26.

CAREY, J.A.:

1. On 12 June, having heard the submissions of counsel, we quashed the conviction of murder recorded in the Supreme Court against the appellant, set aside the sentence of imprisonment for life but substituted a conviction of manslaughter, and imposed a sentence of 25 years' imprisonment. We promised then, to put our reasons in writing. These now follow.
2. The appellant was charged with the murder of Rodwell Michael Neal Hill on 18 March 2001 in Belize City. The facts and circumstances on which the prosecution relied to support the conviction may be shortly stated.
3. The victim lived at premises at 7254 Kraal Road in Belize City. At about 8:00 a.m. on 18 March, Michelle Milligan, the principal witness for the prosecution, who also resides at an apartment on the same premises, saw when the appellant and his girlfriend Cherrymae Howard entered the premises on bicycles. Both dismounted. The appellant then left his bicycle in the care of his companion and ran to the door of the victim's

room where, having removed a small hand gun from his waist, he discharged three rounds. She saw him enter and close the door behind him. There followed the sound of two more shots being discharged in the room.

4. The appellant emerged from the room, retrieved his bicycle and departed in the company of Cherrymae Howard. When the witness Michelle Milligan entered the room, it was to see Rodwell Hill lying on the floor, mortally injured.
5. Beverly Neal, a sister of the victim, was another prosecution witness and like Michelle Milligan, did not witness the shooting but confirmed the fact of the arrival of the appellant and Cherrymae Howard at the premises on bicycles and the sound of five gun shots. Both the appellant and Cherrymae Howard passed her on their way out and she saw the appellant pushing a gun into his waist. She also saw the seriously wounded Rodwell Hill lying on the floor in his room. Both women knew the appellant for about three months. Beverly Neal was related to Cherrymae Howard and saw the appellant about twice a week in that time.
6. The medical evidence showed that the five shots found their mark on the slain man. The cause of death was given as asphyxia by trauma, essentially gun shot wounds to the chest. Indeed, one of the bullets had penetrated the lung after fracturing a rib. The unfortunate man had been hit in the cheek, neck, upper back, lower back, thorax and thigh.
7. The defence was a denial of the charge. The appellant swore that he spent most of the morning of 18 March since lunch time in bed and the evening with a friend with whom he watched a football match. There was a small celebration after the match. It is plain the jury must have rejected his alibi defence.
8. Mr. Sampson S.C. argued two grounds of appeal. The first related to the issue of intention on a charge of murder. The complaint was that there were no directions given to the jury with respect to intention, in terms of section 9 of the Penal Code. In so far as the second ground went, learned counsel for the appellant was critical of the fact that the trial judge had omitted to give a "*Lucas direction*" – a reference to **R v Lucas** 73 Cr. App. R. 159.

9. We will deal with these complaints in the reverse order. It is necessary to point out that the requirement for a *Lucas direction* arises more particularly in circumstances where the prosecution is relying on lies or where lies might be used by the jury to support evidence of guilt as opposed to merely reflecting on the credibility of the accused. In this regard, we call attention to Archbold, Criminal Pleading, Evidence and Practice, 2001 Edition, para. 4-402.
10. In the instant case, the prosecution was not relying on lies told by the appellant as probative of his guilt. This was a case where prosecution witnesses identified the appellant as the shooter and the appellant denied he was. There was thus a conflict of evidence which the jury were required to resolve. Where a jury rejects the accused's evidence in those circumstances, that is not the sort of lie which is contemplated as obliging a trial judge to give the *Lucas direction*. The lie is not being used as corroboration of evidence of guilt.
11. Perhaps, it is as well to remind of what a jury is told where the full *Lucas direction*, is apt. The jury would be told that people sometimes lie in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. To be capable of amounting to corroboration, the lie told out of court must first of all be deliberate. Secondly, it must relate to a material issue. Thirdly, the motive for the lie must be a realization of guilt and a fear of the truth. Fourthly, the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say, by evidence from an independent witness. See per Lord Lane CJ in **R v Lucas** [1981] 3 All E.R. 1008 at p. 1011.
12. The learned trial judge, in respect of the alibi evidence given by the appellant, gave the following direction at p. 128:

*"The defense that has been offered is one of alibi. The defendant says he was not at the scene of the crime when it was committed. As the prosecution has to prove his guilt so that you are sure of it, he does not have to prove he was elsewhere at the time. In (sic) the contrary, the prosecution must disprove the alibi. The Burden of (Burger) (sic) proof does not shift in a criminal trial, it always remain upon the Crown to prove it beyond a reasonable doubt. Even if you conclude that the alibi was false that does not by itself entitle you to convict the defendant. It is a matter which you may take into account but you*

*should bear in mind that an alibi is sometimes invented to bolster what may be really a genuine defence but shift from the prosecution does not change, the prosecution must prove its case beyond a reasonable doubt."*

In this case, we have no hesitation in saying that these directions were, in our judgment, appropriate and eminently correct. This ground, we conclude, must be rejected

13. We can now return to deal with the first ground. Mr. Sampson S.C. submitted that he was not able to discover where, in his summation, the learned trial judge had given any assistance to the jury in determining the requisite intent on the indictment which charged murder. At pp. 132 – 133 of the Record, the trial judge, in directing the jury on the essential ingredients of the charge, stated as follows:

*"A person is guilty of murder if he intentionally causes the death of another person by any unlawful harm, unless he did so through extreme provocation or other partial excuse. In this case provocation doesn't arise or excuse doesn't arise. So in order no (sic) establishment (sic) the charge of murder against the accused Hillaire Sears the prosecution must prove first of all that Rodwell Michael Neal Hill is dead. Further, he died as a result of receiving bodily harm, that the bodily harm was inflicted by the accused and that it was inflicted without justification and at the time when he inflicted the harm without justification he had the intention to kill."*

Learned counsel was entirely correct that the trial judge never gave any assistance to the jury in their determination on this issue.

14. Mr. Anderson, Director of Public Prosecutions, quite candidly conceded that the summing up was deficient in this regard, but he invited the court to apply the proviso to section 30(1) of the Court of Appeal Act, Cap. 90 and dismiss the appeal. He argued that the facts were such that the jury, whatever they were told, would inevitably have returned a verdict of guilty.
15. It is axiomatic that an accused is entitled to a fair trial: it is guaranteed by the Constitution. In our opinion, a fair trial involves, among other things, that the rules be followed. In a criminal trial, with a jury, one of the rules is that the summing up must be correct in point of law, balanced and fair. Even where a defence arises on the facts, but is not taken by the defence, the judge is obliged to leave it to the jury for its consideration. No matter

the seriousness or heinous nature of the crime, an accused person is entitled to a fair trial.

16. In this jurisdiction, the intent required to be proved in a case of murder, is not the common law intent to kill or cause grievous bodily harm, but the intention to kill as defined in terms of the Criminal Code Cap. 101 section 9 of which prescribes how intention is to be proved. It is provided as follows:

'Proof of Intention, etc.

9. A court or jury, in determining whether a person has committed an offence –
- (a) shall not be bound in law to infer that any question specified in the first column of the Table below is to be answered in the affirmative by reason only of the existence of the factor specified in the second column as appropriate to that question, but
  - (b) shall treat that factor as relevant to that question, and decide the question by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

TABLE

<u>Questions</u>	<u>Appropriate factors</u>
1. Whether the person charged with the offence –	1. The fact that the result was a natural and probable result of such conduct.
(a) intended to produce a particular result by his conduct;	
(b) was reckless as to whether his conduct would produce a particular result;	
(c) foresaw that his conduct might produce a particular result.	
2. Whether he knew a particular fact.	2. The presence of circumstances leading to the inference that a reasonable man in his situation would have known the fact.

3. *Whether he was reckless as to whether particular circumstances existed.*

3. *The presence of circumstances leading to the inference that a reasonable man in his situation would have realised that the circumstances might exist.”*

17. In a case of murder, the jury need to be told that they should not infer the intention to kill, which is an essential element to be proved by the prosecution, solely from the presumption that a man is responsible for the natural and probable result of his conduct (if they found he did anything) but that they should take it into account with all other evidence in the case, which bears on that issue. See **R v Bardalez** (unreported) CA 4/00 –19 October 2000 to the like effect. In the present case, the jury, unaided by any guidance from the trial judge, might well have believed that they were obliged to conclude, inevitably, that the intention to kill, was proved by acceptance of the fact that the appellant first shot at the house, entered and fired other shots. It is to be borne in mind that there were no eye-witnesses to the actual shooting of the victim so it was not known whether the appellant fired at any time at the slain man as opposed to shooting into the house. These we think, were also relevant facts on this issue. This non-direction, in our opinion, deprived the appellant of a chance of acquittal on the charge of murder. For these reasons, we were constrained to substitute a verdict of manslaughter.
18. We heard a plea in mitigation of sentence from counsel for the appellant but concluded that justice would be served by the imposition of a sentence of imprisonment for 25 years which is in keeping with the range of sentence for a crime of such a grave character.

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ROWE, J.A.

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SOSA, J.A.

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CAREY, J.A.