

IN THE COURT OF APPEAL OF BELIZE AD 2012
CRIMINAL APPEAL NO 1 OF 2011

ORLANDO WADE

Appellant

v

THE QUEEN

Respondent

BEFORE

The Hon Mr Justice Dennis Morrison
The Hon Mr Justice Douglas Mendes
The Hon Mr Justice Samuel Awich

Justice of Appeal
Justice of Appeal
Justice of Appeal

B S Sampson SC for the appellant.

C Vidal, Director of Public Prosecutions, for the respondent.

17 October 2012 and 28 March 2013.

MORRISON JA

[1] On 17 January 2011, after a trial before Lucas J and a jury, the appellant was convicted of the offence of murder and on 26 January 2011 he was sentenced to a term of imprisonment for life. His appeal against conviction and sentence was heard by us on 17 October 2012, when it was dismissed. These are the court's reasons for dismissing the appeal.

[2] The appellant was indicted for the murder of Dorla Louise Slusher (who was also known as Dorla Pitterson). The murder was allegedly committed sometime between 23 and 24 June 2008, at Sandhill Village in the Belize District. To this indictment, the appellant entered a plea of not guilty and his trial in the Supreme Court (Central – Criminal Session) accordingly commenced on 10 January 2011.

[3] The prosecution's main witness was Mr Barry Rosales. Mr Rosales was, by his own ready admission during cross-examination, a former crack cocaine user, a frequent drinker ("every day I do that") and an ex-convict, with a long list of past convictions. Despite being severely taxed with these matters in cross-examination, he categorically denied the suggestion put to him that his drinking and drug usage had affected the evidence which he gave in any way.

[4] At the material time, Mr Rosales was a resident of Sandhill. He lived in a board house on Salt Creek Road, directly opposite to which was a bar and restaurant known as 'Sylvia's Cool Spot', on premises on which there were two board buildings, in addition to a toilet and a container.

[5] On 23 June 2008, Mr Rosales did not own a watch or a clock, but his estimate was that he went to bed at about 9 pm on that evening. At "approximately around midnight", he was disturbed by the sound of screams coming from Sylvia's Cool Spot. He went back to bed, but, approximately 10 to 15 minutes afterwards, he heard the screams again. This time, he got up and went across the road to Sylvia's Cool Spot. There, between the two board buildings, about 10 feet from where he was, he saw "a lady on the ground, and Landy Wade on top of her". He would subsequently identify the person he referred to as "Landy Wade" in court as the appellant.

[6] There was a light by the bathroom about 15 – 20 feet away from the two persons on the ground and another underneath a mango tree, about 10 – 12 feet away. Mr Rosales was able, he said, to see the appellant's face and to recognise him as someone whom he had known from Sandhill for about 10 – 15 years before. In fact, Mr Rosales' brother, Arthur used to live with the appellant's sister and Mr Rosales was accustomed to seeing the appellant often, mainly on weekends, when they "would hang out sometime [sic] for a couple hours". The last time Mr Rosales had seen him was that very night of 23 June 2008.

[7] Upon seeing the appellant on top of the lady at Sylvia's Cool Spot, Mr Rosales testified, he called out to him, saying "bwoy da weh yu di do dat lady?", to

which the appellant's response was to the effect that "if I know weh good fi myself goh from deh".

[8] The 'lady' was someone known to Mr Rosales for about three to four years previously as 'Ms Dorla', whom he was accustomed to seeing and talking with daily. He was able to recognise her on the night of 23 June by her face also by her voice. Asked what the appellant was doing while he was on top of Ms Dorla, Mr Rosales' response was that "[h]e wasn't doing nothing only beating the lady". The appellant, who was shirtless, was sitting down on Ms Dorla, who was on her back. After observing them in this position for about a minute, Mr Rosales went back to his house and back to bed. But, he said, "I didn't drop asleep and ten to fifteen after, I heard no more crying".

[9] The following morning, 24 June 2008, Mr Rosales went to his mother's house, also on Salt Creek Road, where he saw his brother, Arthur. Arthur asked him to do an errand for him, which was to deliver \$10.00 to his girlfriend, Mashie, the appellant's sister, who lived at the appellant's mother's house. This was Mr Rosales' account in examination-in-chief of what next ensued:

"A: I went to the house to give the \$10.00 that my brother gave me to give to his girlfriend.

Q: And what happened when you went there?

A: When I went there to deliver the \$10.00, I saw Landy Wade push his head through the window.

Q: The person you are referring to as Landy Wade, is that the same person you identified?

A: Yes.

Q: Could you say what happen when you saw him push his head through the window?

A: A said, "Bwoy da weh yu mi di do last night with da lady?"

Q: Do you recall what was his response if any?

A: He told me, "a kill di bitch".

Q: What was your reaction or response?

A: I told him "bwoy", like this, "you di f**k round", and he tell mi if I noh believe, fi goh look ena di well.

Q: What if anything did you say to him?

A: Well I didn't say anything else. I just ride off."

[10] Mr Rosales' next move was to go back to Sylvia's Cool Spot, where he went directly to the well on the premises to which the appellant had directed him. The well was located behind the bar, about 40 feet from where he had seen that appellant on top of Ms Dorla the night before. There, he saw a cardboard box, an umbrella and "three toes pushing out above the umbrella". He immediately went to the telephone by the bus shed on Salt Creek Road, where he dialed 911 for the police.

[11] Cross-examined by the appellant's counsel on his long list of convictions and his personal habits, Mr Rosales did not deny most of what was suggested to him, though in some instances he was unable to recall the details. He accepted that he had been to jail "for several things", but denied that on the night of 23 June 2008 he had been "drinking, smoking marijuana and crack cocaine heavily".

[12] When his statement to the police dated 25 June 2008 was put to him, Mr Rosales accepted that he had then said that he was able to recognise Ms Dorla by her voice, but that he had not mentioned seeing her face. However, he maintained that he did see and recognise her by her face as well. He also insisted that the place he went to behind the bar at Sylvia's Cool Spot was a well, and not a latrine. Mr

Rosales denied that there was any “bad blood” between his family and the appellant’s, arising out of the appellant having “taken” his brother’s wife.

[13] As regards his visit to the appellant’s mother’s house on the morning of 24 June 2008, Mr Rosales said that he had not seen the appellant’s mother, Ms Filomena Tejeda, there at that time. He denied the suggestions put to him by counsel that the appellant did not say “ah kill the bitch” and that there had in fact been no exchange of words along the lines he had described between himself and the appellant at all. He denied that he had asked the appellant for a cigarette, though he accepted that the appellant had thrown a cigarette to him through the window and that he had taken the cigarette and left. However, an attempt to challenge him by way of a further statement allegedly made by him faltered, when Mr Rosales denied having made it and the appellant’s counsel was unable to satisfy the requirements necessary to prove it against him.

[14] On 24 June 2008, in response to information received concerning a dead body found in the village of Sandhill, Corporal Luis Cawich, who was then stationed at the Ladyville Police Station, led a team of police officers to Sylvia’s Cool Spot. There, in “an old septic hole” behind the bar, Corporal Cawich saw a female body, covered by a gray and black umbrella. The body was in a crouched, “fold up” position.

[15] At the request of Corporal Cawich, Mr Amelio Matura, who was at the time attached to the Police Department as a Crime Scene Technician, also went to Sylvia’s Cool Spot that afternoon. There, he observed the body of a dark-complexioned female, nude from the waist down, in a circular hole in a small concrete structure at the rear of the premises. There was trash and a gray umbrella in the hole on top of the body. About 50 feet away from this structure, Mr Matura saw a pair of black shoes under a tree.

[16] The body was removed from the hole and was identified by Ms Esmeralda Alvarado as that of Ms Dorla Pitterson, a close friend, a member of her church and someone whom she had known for the past 10 years. Ms Pitterson’s body was

subsequently taken to the Karl Heusner Memorial Hospital ('KHHM'), where she was formally pronounced dead.

[17] Later that day, at around 5.00 pm, Corporal Cawich obtained a search warrant sanctioning a search of the home of Ms Tejada, the appellant's mother, in Sandhill. The objective of the search was to locate the appellant, who was in due course found hiding in the attic of his mother's home. The appellant was taken into custody and taken to the Ladyville Police Station. At the station, Corporal Cawich removed the appellant's shirt and observed that he had scratches on the left side of his chest, the left side of his shoulder and the left side of his back. The appellant was then escorted to the KHHM, where he was examined by a doctor and later placed in custody at the Queen Street Police Station.

[18] On 25 June 2008, Ms Sonia Williams, the sister of Dorla Pitterson, went to the KHHM morgue for the purpose of identifying her sister's body. In the presence of Corporal Cawich and Dr Mario Estrada Bran, Ms Williams identified the body which had been found behind the bar at Sylvia's Cool Spot as that of Dorla Louise Pitterson, also known as Dorla Slusher

[19] Dr Estrada Bran then proceeded to perform a post mortem examination on the body of the deceased. He found post mortem lividities situated on different areas of the body, suggesting that deceased was in an "irregular" position at the time of death, such as, for example, "kneeling down but with one of the hand [sic] up". On the deceased's body was a "multi-plaid" skirt, rolled up to the abdomen and no underwear was seen. There was an irregular ligature mark around the neck, caused by "a rope or a wire or something that was placed around her neck to produce pressure on that area immediately above the thyroid cartilage...what is normally known as adams [sic] apple". There were also bruises on the surfaces of the muscles running laterally up to the sternum and collarbone. All of this indicated that "strong or heavy force" had been applied directly to ligature and consequently to the neck. The direct cause of death was manual strangulation.

[20] In addition to the injuries to the neck region, Dr Estrada Bran observed multiple bruises on the inner areas of the left thigh close to the vagina, as well as on

the inner area of the left knee. The bruises to the upper thigh were, the doctor said, “characterized by pressure being applied on the area to attempt...carnal penetration or molestation”. There were also bruises to the face, which could have been caused, Dr Estrada Bran considered, by force been applied by a blunt object, such as a fist or direct contact with some other surface.

[21] Finally, the doctor took oral, vaginal and rectal swabs, as well as samples of hair (including pubic hair) and blood, from the body. Those were handed over to Mr Matura, who was also present at the post mortem, and who took charge of them for delivery to the forensic laboratory for analysis.

[22] Dr Estrada Bran was cross-examined about, among other things, the time of death. His conclusion from his findings was that the approximate time of death was “before midnight” on 23 June 2008. However, the apparent time of death was, he said, “a different barrier”:

“It’s on the 23rd of June 2008 around the evening time. When I say around the evening time, evening falls immediately after 4 o’clock.

Q: But you were saying earlier that the apparent time of death was 4:00 p.m. to; you gave a time frame just now and I missed it.

A: Immediately after, around the evening time meaning immediately after the evening time, before the night falls.

Q: So the time of death would have been some time when the sun was going down up until midnight?

A: No, midnight isn’t correct. Midnight is already midnight. I am saying in the evening time.

Q: So the time of death was in the evening time?

A: Yes, around evening.

Q: And you can make that opinion based on all the findings and examinations that you did on the body?

A: That's correct.

Q: This is a scientific calculation, it is unlikely that your calculation would be wrong; is that so?

A: Should not be wrong because I am not giving a specific time. I am not saying 4 o'clock, I am not saying 4 o'clock; I am giving the date and approximate time which is around the evening time."

[23] Re-examined on the point, the doctor said (albeit in answer to a hopelessly leading question, asked without objection) that, in estimating the time of death, he was not able to say precisely when death occurred, but was only able to give "a general approximation".

[24] In answer to a question from the learned trial judge, the doctor said that the bruises which he observed to the inner area of the deceased's left knee were not consistent with a fall, as this would have been more likely to cause bruises to the front or outer areas of the knee.

[25] Mr Eugenio Gomez, a Forensic Analyst at the National Forensic Science Service in Ladyville, was accepted by the court as an expert in serology. On 26 June 2008, he received several sealed envelopes containing vaginal, oral and rectal swabs and smears, pubic and head hairs, blood samples, fingernail scrapings and a piece of glass, all relating to the deceased, Dorla Louise Slusher.

[26] On analysis, semen was detected on the vaginal and rectal swabs and smears and human blood, type 'A', (which was the deceased's blood type) was detected on the vagina, oral and rectal swabs.

[27] That was the case for the prosecution. In his defence, the appellant opted to make an unsworn statement from the dock. After stating his name, his age (32), his occupation (mason) and his address (Sandhill Village), the appellant said this:

“ACCUSED: I’d just like to say to the court and the attendance [sic] of the court I was a resident of Sandhill Village and everybody in the village know me very well. I would like to say that we all mature humans, male and females and I precisely think and I am sure of everybody in the surroundings is in a properly mental situation.

I would just like to refer to way the crime scene is at, is quite a wide distance away from my house and around the crime scene a lot of neighbours are around, for instance, if Mr. Barry Rosales saw Orlando Wade beating a woman, in front of his residence more or less I would say he have a right to make a quick alarm to the neighbours around the crime scene.

He knows my mom. He knows the family of the deceased very well. So he could make a quick response about the attacker Orlando Wade beating on a mental patient.

THE COURT: I could ask you now who is that?

THE ACCUSED: The same deceased sir. Everybody around the crime scene, neighbours know all three of us very well, so if Mr. Barry Rosales wanted something to be done, in a proper way, he would have went straight to one of the neighbours or to the family of the deceased or my family saying Orlando Wade is beating somebody that everybody know, before he think to go back to his bed just by words, leaving a female begging for help.

All I would like to say to the court, I never been convicted. I never went to prison before. I also, have a mom and my sister to clarify that I was at home at the time of the incident.

I am quite sure everyone in Sandhill Village knew I wasn't around for quite a period of time in Sandhill Village. I was in San Ignacio, Cayo, two years and three months, living with the sister-in-law of Barry Rosales.

I am sure that everybody in Sandhill Village knew that I am a hardworking individual sir, trying to take care of my own responsibility sir.

I say thanks to the court and the attendance [sic] that attending this case today sir."

[28] The appellant's mother, Ms Tejada, was called as a witness on his behalf. She testified that on the morning of 24 June 2008 she was at her home in Sandhill Village. With her were his sister, Zoila Cano, who was visiting from abroad, and her brother, Mario Tejada, who lived in Ladyville, but had come to visit their sister. The appellant was also there.

[29] While they were all there together talking, Ms Tejada heard some other voices downstairs and realised that it was Mr Rosales, who she knew as 'Jacksy', who was speaking to her daughter, Mashie. Mashie lived right behind Ms Tejada's house. Mr Rosales then came around to the front of the house and called out to the appellant, "Landy Wade, yu noh have wa cigarette?" After replying, "yeah", the appellant threw a cigarette to him through the window, whereupon Mr Rosales went away. The windows in the house were what she described as "the Mennonite windows", that is louvre-type windows, through which it was not possible to shove one's hand.

[30] The appellant, who had recently come back from Cayo where he had been living with one Onelda Rosales, who was Mr Rosales' sister-in-law, had been at home the previous night, 23 June 2008, "hanging out" with her brother Mario between 9.00 pm and 2.00 a.m. However, Ms Tejada said, she had herself retired to bed at some point between 10.30 pm and 11.00 p.m.

[31] According to Ms Tejeda, the deceased, whom she knew, was “like a person who walks everyday”, Mr Rosales she knew to be someone who “like to drink everyday...when he drink like that he go on very funny, like he beat up his head and things like that”.

[32] Asked in cross-examination if she was aware of anything that would motivate Mr Rosales, whose visit to her house that morning was not unusual, to accuse the appellant of murder, Ms Tejeda accepted the suggestion that “there was bad blood between them”. However, she had never turned Mr Rosales away from her house.

[33] That was the case for the defence. Lucas J then summed up the case to the jury in largely conventional terms. As regards Dr Estrada Bran’s evidence as to the time of the deceased’s death, the learned judge directed the jury as follows:

“[The doctor] said that the apparent date and time of death is 23rd June 2008, before midnight, that’s what the doctor is saying. He said he made his opinions on all the findings. So I added this, ‘I am not giving a specific time. I am giving a date. I say around the evening time from the death.’ So the doctor is saying, listen, I can’t tell you the person died one o’clock the morning, five or eleven. I am just giving you an approximate time.”

[34] In due course, after retiring for two and a half hours, the jury returned a unanimous verdict of guilty of murder, from which the appellant now appeals on a single ground:

“There was a miscarriage of justice when the trial judge deliberately misled the jury on Dr Estradabran’s [sic] opinion As to ‘TIME OF DEATH’.” (Emphasis in the original)

[35] In support of this ground, Mr Sampson SC submitted that the judge’s direction as to the time of death (which is quoted in full at paragraph 33 above) was “prejudicial and most unfair to the appellant”. Given Mr Rosales’ evidence that he had seen the appellant on top of the deceased at around midnight on 23 June 2008,

the doctor's evidence was of great importance to assist the jury in assessing his credibility, "which had already been devastated by his own testimony admitting several past criminal behaviors". Instead of alerting the jury to this aspect of the matter, Mr Sampson submitted, the judge sought to rehabilitate the witness by telling the jury, wrongfully, that the doctor had placed the time of death at "before midnight".

[36] In the alternative, it was submitted further, given the state of the evidence after Mr Rosales' evidence and the doctor's evidence as to the time of death, the judge should have stopped the case, as there was no other evidence to link him to the crime. In the circumstances, bearing in mind the conduct of Mr Rosales in the witness box, his admitted criminal past, the absence of any other evidence and the good character of the appellant, the conviction was unsafe and unsatisfactory and the court should resolve the "lurking doubt" in the appellant's favour.

[37] In response to these submissions, the learned Director referred us to Dr Estrada Bran's evidence and submitted that the learned trial judge had not misled the jury. The upshot of the doctor's evidence was that he was not able to fix the precise time of death, but gave an estimate of some time during the evening of 23 June 2008. While the Director accepted that the judge was to some extent paraphrasing by telling the jury that he had estimated the time of death to be sometime before midnight, she submitted that that was entirely in keeping with Dr Estrada Bran's evidence and the judge did not misrepresent his evidence. In any event, the Director pointed out, Mr Rosales had himself given only approximate times in his evidence, having said that he possessed neither a watch nor a clock. The case for the prosecution turned on Mr Rosales' credibility, it was submitted, and the judge had given adequate directions to the jury as to how to approach whatever inconsistencies there were in his evidence and his supposed bad character.

[38] As regards Mr Sampson's suggestion that the judge should have withdrawn the case from the jury, the Director submitted that, at the close of the prosecution's case, there was sufficient evidence upon which the jury, properly directed, could have convicted. The issue in the case was whether Mr Rosales was a truthful witness and this was a matter for the jury to determine.

[39] The first issue that arises for consideration is whether Lucas J's directions to the jury on Dr Estrada Bran's evidence can be said to have been prejudicial and unfair to the appellant, as Mr Sampson submitted that they were. It will be recalled that, based on his findings, the doctor put the apparent time of death at "around the evening time", (which he considered to be "immediately after 4 o'clock") or "immediately after the evening time, before the night falls" (para [22] above). In answer to the suggestion from defence counsel that "the time of death would have been some time when the sun was going down up until midnight", the doctor maintained that "midnight isn't correct...I am saying evening time". However, the doctor was careful to say, "I am not giving a specific time...I am not saying 4 o'clock, I am giving the date and approximate time which is around evening time". Further, he stated, he could not say precisely when death occurred and was only giving "a general approximation" ([para 23] above).

[40] In our view, this evidence clearly suggests that, while Dr Estrada Bran's opinion based on his findings was that death would have occurred sometime between evening time (defined by him as immediately after 4 o'clock) and nightfall, he nevertheless qualified this opinion by his statement that he could not state a precise time of death and his opinion was no more than a general approximation.

[41] It seems to us that, in the passage in the summing up about which complaint is made, Lucas J's summary of this evidence was, save perhaps in a single respect, faithful to what the doctor said. So the jury were told, correctly, that Dr Estrada Bran had said that, while he was not giving a specific time, his opinion was that the time of death was "around the evening time", or after 4.00 pm. They were also told, again correctly, that the doctor's evidence was that he was "just giving an approximate time". However, the judge's statement that what the doctor was saying was the time of death was "after 4.00 pm to before midnight" was, in our view, a somewhat loose paraphrase of Dr Estrada Bran's evidence, given his insistence that "midnight isn't correct...I am saying evening time". But, that having been said, it appears to us that, although he did venture an opinion as to the time of death, Dr Estrada Bran was saying plainly to the jury that his opinion was an approximation only, which is the identical note on which the learned judge left the matter to the jury in his directions (see para [33] above). In these circumstances we are unable to agree with Mr

Sampson's submission that, taken as a whole, the judge's directions on the point were either unfair or apt to mislead.

[42] As regards the potential impact of the doctor's evidence on Mr Rosales' credibility, it is true, as the Director accepted, that the judge did not bring this to the attention of the jury specifically. However, it must be borne in mind, as the Director also reminded us, that the times given by Mr Rosales in his evidence were all stated by him to be approximate (for example, "approximately around midnight" and "middle of the night more or less...I had no time on me").

[43] The second, or, as the Director described it, subsidiary issue is whether, at the close of the case for the prosecution, the case ought to have been withdrawn from the jury. In our view, there is no question that, at that stage, there was evidence upon which it was open to the jury to convict the appellant for the murder of the deceased, particularly in the light of the clear admission attributed to him by Mr Rosales. The case for the prosecution thus turned entirely on the credibility of Mr Rosales, taking into account the internal coherence and consistency of his evidence, as well as the other factors affecting credibility. Whether or not he was to be believed was therefore a matter for the jury to consider, in the light of the judge's directions to them on the law.

[44] In leaving the case to the jury, the learned trial judge gave them full and accurate directions on how they should approach that evidence. Thus, in relation to inconsistencies, the jury were told that, where there were inconsistencies in the testimony of a witness, "it is your task to determine whether or not the witness is lying or just confused or simply does not remember"; and that it was for them to make up their minds "whether or not to accept the testimony of that witness as being testimony of truth". As regards Mr Rosales' personal habits, the jury were reminded that, as far as the defence was concerned, "Barry Rosalez [sic] is a liad man, don't believe him, crack head...not to be believed. You might say yes, that is how I see it too...a matter for you". And, at the very end of the summing up, there was a final word on Mr Rosales:

“I just want to repeat about reaching the verdict, to find the accused guilty, you must be sure of his guilt and I’ve told you the five elements that you must be sure that the Crown through Mr. Cave have proven each element to you beyond a reasonable doubt.

If you are not sure, or to put it another way, if you have a reasonable doubt of any of the elements you must find the accused as I said not guilty.

I went further and say that if you don’t believe the evidence of Mr. Barry Rosales, you find the accused not guilty. If you have a reasonable doubt about his evidence, that means you are not too sure about it or you have some doubts about his evidence, find him not guilty. To find him guilty relying on Barry Rosales’ evidence, you are to believe it. You must be sure that he is telling the truth.

You will recall too that Mr. Barry Rosales was giving evidence here confessed to you through the cross-examination of the defence counsel that he have [sic] previous convictions. He even said that he had gone to jail. The issue then, with respect of Barry Rosales who has previous conviction [sic] is one of credibility. It is within your domain or purview to determine whether his previous conviction affects, adversely affects his credibility. So you give it serious consideration. You might say, I can’t believe that man or I have a reasonable doubt of what he say, it is affecting the credibility. So you won’t be able to rely on his evidence. And of course, as I said, if you cannot rely on his evidence you are to find the accused not guilty.

Of course, a person with a criminal history may not affect his credibility and as such you may rely on it, on his evidence. We are talking about Barry Rosales, but that again is a matter for you the jury. It is for you to say whether Mr. Barry Rosales criminal record, pass criminal, he being a convict, whether or not it affects his credibility. That is a matter for you and I have told you how to treat it because if it affects his

credibility, you may say you cannot believe his evidence and as such you find the accused not guilty. Because his evidence is really, what you would say trump card, that is essential to the prosecution case, if you accept it. But you may say, even though he has previous conviction, I still believe his evidence. That's a matter for you. Then you can act on it.”

[45] In our view, this was an impeccable direction, striking the entirely appropriate note at the end of a case in which everything turned on the evidence of a single – potentially suspect - witness.

[46] These are our reasons for the decision to dismiss the appeal, as stated at para [1] above.

MORRISON JA

MENDES JA

AWICH JA