IN THE COURT OF APPEAL OF BELIZE AD 2016

CRIMINAL CASE APPEAL No. 7 of 2014

THE QUEEN Appellant

v

GABRIEL SALAZAR Respondent

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BEFORE

The Hon. Justice Awich	-	Justice of Appeal
The Hon. Justice Blackman	-	Justice of Appeal
The Hon. Justice Ducille	-	Justice of Appeal

Cecil Ramirez Acting DPP for the appellant.
Hubert Elrington SC for the respondent.

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7 October 18 March 2016

AWICH JA

[1] On the 7th October, 2015 we dismissed the appeal by the DPP for the Queen, the appellant, against the decision of the learned trial judge, Hanomansingh J, dismissing a charge of murder contrary to s. 106 (1) read with s. 117 of the Criminal Code, Chapter 101, Laws of Belize, against Gabriel Salazar, the accused-respondent. The trial judge based the dismissal on his ruling that, at the close of the prosecution case a *prima facie case* (a case for the accused to answer on the charge) had not been established. The charge was that: on 12 September, 2009 Gabriel Salazar and others at Big Falls, Toledo District, murdered Francis Johnston.

Below are our reasons for dismissing the appeal, and affirming the acquittal of the respondent.

[2] At the trial before Hanomansingh J, without a jury on 9 July, 2013 the prosecution, after making an opening address, called the first witness, Amelia Johnston, the wife of the deceased, Francis Johnston. She described the incident on the evening of 12 September, 2009 at their trading store at Big Falls, Toledo District, at which her husband was shot and killed. Learned counsel Mr. Simeon Sampson SC, for the accused- respondent, did not cross-examine the witness. He simply renewed his earlier request for a *voir dire* to be conducted at that stage, in order for the judge to rule on whether certain notes made in a police note book by an intended prosecution witness, Cpl. Mario Salam, the officer in charge of the investigation, was admissible as evidence. The notes would be crucial evidence because they were the only evidence that would identify and connect the appellant to the murder in the course of a robbery.

[3] The *voir dire* was conducted at that stage, and the judge ruled that, the notes were not admissible. On page 156 of the record of proceedings he stated:

> "I hold that the prosecution has failed to prove beyond reasonable doubt that the statement was not as the result of the beatings and as such that it was voluntarily (sic) given. The circumstances and conditions under which it was extracted, to my mind, make me rule that it would be unfair to admit in the evidence and I so rule."

[4] Following the above passage, the judge called on learned counsel Mr. Cecil Ramirez, Acting DPP, for the prosecution. The record states this:

"THE COURT:	Yes, Mr. Ramirez?
MR. RAMIREZ:	My Lord in the circumstances, the prosecution has no further evidence to offer.
THE COURT:	MR. Sampson, the prosecution has closed its case.
MR. SAMPSON:	My Lord, I will simply ask in the circumstances that on the well-known principle of Galbraith, there being no evidence linking the accused to the commission of the crime, the court is automatically legally obliged to give a directed verdict of not guilty, My Lord, there being no case to answer.
THE COURT:	Directed to who?
MR. SAMPSON:	Yourself. Thank you very much, My Lord.
THE COURT:	Ok, Salazar, go on. You are dismissed."

[5] The DPP appealed under s. 49 (1) of the Court of Appeal Act, Cap. 90, on the grounds that:

> "1. [t]he learned trial Judge erred in law when he ruled that the statement recorded under caution from the Respondent was inadmissible.
>
> 2. [t]he learned trial judge erred in law when he ruled that the Respondent did not have a case to answer."

[6] The first reason for dismissing the appeal is an obvious one. Following the ruling on the *voir dire*, and upon the judge inviting Mr. Ramirez to proceed with

presenting evidence for the prosecution, Mr. Ramirez simply answered: “My Lord, in the circumstances the prosecution has no further evidence to offer.” That technical answer is often used by prosecuting counsel to mean that they have closed the case for the prosecution. In that event the defence may make a submission for a ruling by the judge of no case for the accused to answer on the charge. In this case the learned Acting DPP expressed his intention to offer, “*no further* evidence”, in the peculiar circumstance where the crucial evidence of admission by the appellant of his participation in the offence had been ruled inadmissible. The statement by the Acting DPP that he offered, “*no further* evidence”, meant he offered no evidence, not merely “no *further* evidence”. He simply discontinued the case.

[7] When the prosecutor, “offers no evidence” he exercises the common law power of the DPP to discontinue a criminal case – see ***Cooke v DPP (1992) 95 Cr. App R 233,*** and ***Raymond v AG [1982] QB 839***. The statutory power of the DPP in ***s. 174 (1) of the Indictable Procedure Act,*** to enter a *nolle prosequi* is additional to this common law power to discontinue a case by offering no evidence.

[8] It is our view that since Mr. Sampson had made an application inviting the judge to rule, based on ***Galbraith v R [1981] 1 WLR 1039***, that no case to answer had been made, and to dismiss the prosecution case, the judge correctly considered the evidence which was just the testimony of Mrs. Johnston, and ruled correctly that, there was no case for the accused-respondent to answer on the charge, and correctly dismissed the case and discharged the accused. We note that the judge should have mentioned that, the accused was acquitted and discharged, instead of the casual statement: “Ok Salazar, go on. You are dismissed.”

[9] The appellant contended that the judge erred in the ruling. So, let us examine the evidence on which the appellant contended that the judge erred in ruling that, a *prima facie case* had not been made.

[10] The evidence was wholly from the testimony of Mrs. Johnston, the only witness that had been called. The content of the notes made by Cpl. Salam cannot be included in our consideration because we have upheld the ruling of the trial judge on a *voire dire* that, the notes were not admissible into evidence. We acknowledge that, an erroneous exclusion of evidence by a trial judge would be a ground of appeal against a ruling of no case to answer – see ***Y. [2008] 1 WLR 1683***. Had we decided that the notes *were* admissible, we would have considered the proposed evidence in the notes in our determination of whether a *prima facie case* would have been established – see ***R v Jacinto Roches and Others, Criminal Case Appeal No. 23 of 2012***.

[11] Mrs. Johnston testified as follows. On 12 September, 2009 about 7.00pm Mrs. Johnston, her husband Francis Johnston and son Andy Johnston sat on a wooden bench just outside the door of their trading store at Big Falls, Toledo District. They drank coconut water. The husband and son had just finished off-loading goods from a trailer attached to a pick-up. The husband suggested that they go in and have dinner. He stood up and entered the store, followed by Andy, and then Mrs. Johnston followed behind.

[12] As Mrs. Johnston reached for the burglar bar part of the door of the store to shut the door, she heard foot-steps behind her. She looked back and saw three, “masked men.” Two rushed into the store, one had a gun. The third man grabbed her arms and held them behind her. She struggled with him and freed herself, and ran into a neighbour’s house. In the neighbour’s house she called the police on the

telephone. While speaking to the police she heard a gunshot. She went out to a tree and watched. The men got out and into the pick-up. They drove away in the pick-up. The trailer was still hooked to it.

[13] Mrs. Johnston returned to the store. She found the son on telephone. The husband laid on the floor bleeding from the stomach, and breathing heavily. She called Mr. Bardalez who quickly transported Mr. Johnston to Punta Gorda Hospital. He was taken to the Emergency Room. Two doctors attended to him. Mr. Johnston died the same evening. Mrs. Johnston discovered that the robbers had stolen some money and goods. Mr. Sampson declined to cross-examine the witness.

[14] When Mr. Ramirez closed the prosecution case (or offered no further evidence), the judge was obliged to rule on whether the evidence adduced in the testimony of Mrs. Johnston established a *prima facie case*. It was the only evidence. If it did not, the judge was required to stop the case and acquit the respondent. He ruled that, a case had not been established. He discharged the respondent.

[15] *A prima facie case* at the close of the prosecution case is a strong enough prosecution case to require the defendant to answer, although he cannot be compelled to answer. It is a case that has been supported by sufficient evidence for it to be taken as proved, should there be no evidence to the contrary. Such evidence taken at face value, that is, “taken at its highest”, would be proof regarding all the elements of the offence, and proof that it was the accused who committed the offence. The question as to whether a witness may be lying is usually left to the jury, or for appraisal by the judge later in a trial by a judge without a jury. The development in the law is tending towards the view that, if on one view of the evidence as a whole a jury may convict, the case should be proceeded with.

[16] The approach of the courts in Belize to determining whether or not a *prima facie case* has been established has been set out in several cases. Notable is the case of ***Ellis Taibo, Privy Council Appeal No. 26 of 1995 (from Belize)*** – see also: ***Director of Public Prosecutions v Selena Varlack, Privy Council Appeal No. 23 of 2007 (an appeal from Virgin Islands)***; ***DPP v Jeffrey Budd, Criminal Case Appeal No. 12 of 2001 (Belize);*** and ***DPP v Marlon Blease, Criminal Case Appeal No. 10 of 2002.*** The approach was adopted from the English case, ***Galbraith*** which Mr. Sampson cited to the trial judge.

[17] The widely acclaimed statement of the approach, that is, the law, made in ***Galbraith*** by Lord Lane CJ is this:

> ***"How then should the judge approach a submission of no case? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty the judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence: (a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) where however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury…***

There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[18] The statement will, of course, be modified accordingly when it is to be applied to a trial without a jury, where the trial judge is also the trier of facts.

[19] The prosecution evidence in the testimony of Mrs. Johnston does not meet the very first stage (the so called first limb) in ***Galbraith***. The evidence did not identify the respondent as the robber who shot Mr. Johnston, or as one of the three robbers at all. There was simply no evidence of identification of the robbers; it is not a question of available evidence of identification requiring caution. All that was in the evidence was that the men were, "masked men." Later in the record of proceedings on page 9 Mrs. Johnston testified as follows:

"THE WITNESS: I can say that the masked man that had me held was 5 feet 2 inches in height, dark brown skin fellow.

THE COURT: What you call brown skin?

THE WINTESS: My colour.

Q: She is describing the masked man who held her.

A: He was a dark brown skin fellow. He had on a peaked cap and his face tied with a white cloth around; only the eyes were visible. They were about 5 feet 6 inches in height, slim built."

[20] There has been *prima facie evidence* that Mr. Johnston was murdered. He was unlawfully shot and killed in the course of a robbery. He died from the injury

caused by the gunshot, in circumstances that showed an intention to kill. But the evidence did not meet the first limb in ***Galbraith*** that, there must be evidence that, the crime was committed by the accused, otherwise the judge should stop the case. The evidence did not show that the respondent was the one, or one of the three men who committed the crime. The decision of the trial judge to stop the case at the close of the evidence for the prosecution was correct.

[21] One can only surmise that, there was good reason for the prosecution not to have proceeded and called Andy Johnston, and also the person said to have been found with some of the goods stolen in the robbery, as witnesses. That came out in the discussion between counsel and the judge before the trial when Mr. Sampson intimated that he would object to an intended evidence of group identification. Whatever those intended witnesses knew never became evidence.

The police note book.

[22] We rejected the ground of appeal that, the judge erred in ruling that the notes made by Cpl. Salam was not admissible. We saw no merit at all in the ground. The complaint in the ground was not that the judge applied a wrong principle of law to, or adopted a wrong procedure in the *voir dire*, or that the judge misunderstood any of the items of evidence. The complaint was that, the judge should have exercised his discretion in favour of accepting that the notes made by Clp. Salam were of statements uttered voluntarily by the respondent, instead of in favour of accepting the contention by counsel for the accused (now the respondent) that, the notes were of statements not made voluntarily.

[23] Several reasons were given by Mr. Ramirez for a conclusion that the statements were voluntarily made. He said that the respondent said he wanted to change his life, he had already been to church in Honduras. The respondent also

told Cpl. Salam, “I will tell you everything big man…Only God knows why He never killed me.” The other two men had been shot and killed in Honduras, the respondent sustained only an injury to the forearm. Our response is that, all that was stated in the notes which was objected to and challenged by the respondent, the judge could not rely on the notes.

[24] Our view is that, the decision was within the discretion of the judge. The accepted wisdom is that, usually a trial judge is better placed to assess evidence at trial than this Court, an appellate court can.

[25] Moreover, the stark common fact was that, the respondent refused to sign in the note-book acknowledging the notes. He in effect disclaimed the contents. How could the trial judge conclude that the contents of the notes were what the respondent said, or said voluntarily? The notes were useful for something else, leads for investigators to follow.

[26] The appeal of the Crown is dismissed. The acquittal of Gabriel Salazar on the indictment for the murder of Francis Johnston on 12 September 2009 at Big Falls, is affirmed.

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AWICH JA

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BLACKMAN JA

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DUCILLE JA