IN THE COURT OF APPEAL OF BELIZE AD 2020

CRIMINAL APPEAL NO 43 OF 2010

NORMAN PETERS Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Sir Manuel Sosa	President
The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal

B S Sampson SC, for the appellant.
C Ramírez, Senior Crown Counsel, and J Chan, Crown Counsel, for the respondent.

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4 March 2019 and 1October 2020

SIR MANUEL SOSA P

Introduction

[1] On 6 March 2007, Miss N, then 16 years old, suffered cardiac arrest whilst undergoing major emergency surgery in the operating theatre of the Karl Heusner Memorial Hospital in Belize City and was only resuscitated some thirty minutes later through the heroic work of a team headed by Mr Jose Moguel, General Surgeon. She had been the object of a savage attack by knife a few hours earlier on 5 March when three male persons had invaded her home in Placencia, Stann Creek District, whilst she was there alone. The surgery was required because of three life-threatening neck injuries sustained by her during the attack. Along with two others, viz Leonard Godoy and Brandon Lozano, Norman Peters ('the appellant') was subsequently arrested and charged with offences allegedly arising out of that home invasion, in his case robbery,

rape and attempted murder. He was convicted as charged at the end of a trial before Lucas J ('the Judge') and a jury in the court below; and he was sentenced concurrently to serve terms of imprisonment of ten, eight and 18 years respectively. At the hearing of his appeal to this Court, held on 4 March 2019, Mr B S Sampson SC challenged only the convictions in question. The question of an application for leave to appeal against the relevant sentences does not therefore arise.

The facts and course of the trial as relevant

[2] At trial, at which the appellant was unrepresented, the Crown case against him was based on a statement under caution allegedly given by him to the police on 21 April 2007 at the police station in Independence, Stann Creek District ('the statement'). Before the admission of the statement in evidence, however, (on the third day of the main trial, to be precise), the Judge properly directed the holding of a *voir dire* at the suggestion of Ms Purcell, prosecuting counsel. In the course of such trial within a trial, allegations of the use of police brutality against him prior to the recording of the statement were put by the appellant to two Crown witnesses, viz Sergeant Nicholas Palomo and Superintendent Ralph Moody (an inspector at the time). The allegations were that (a) pepper spray was used against the appellant; (b) he was beaten up; (c) he was handcuffed to a chair and struck on the head with a book; (d) he was threatened with death if he refused to give the police a statement; and (e) a garbage bag was placed over his head. These allegations were first put to Sgt Palomo, who testified before Supt Moody. Then they were put to the superintendent. They were all firmly repudiated by both police officers. The appellant called a witness to support his claim that he had been subjected to oppressive tactics by the police; but, unfortunately for him, that witness's testimony succeeded only in torpedoing his claim. At the conclusion of the *voir dire*, the Judge ruled that the statement was admissible.

[3] Sgt Palomo and Supt Moody were rightly called by the Crown to testify at different points during the remainder of the main trial. In cross-examination, the appellant again trotted out his allegations of the use of police brutality against him to

secure his giving of the statement. Each of the police officers, for his part, again firmly denied the allegations. The statement was admitted in evidence in due course.

[4] At the close of the prosecution case, the judge duly informed the appellant of his three options. He elected to remain silent.

[5] In consequence, the jury were left to consider the contents of the statement without any evidence from the appellant, or any other witness, that police brutality had been used against him shortly before he agreed to give, and gave, the statement on 21 April 2012. The jury served notice by their verdict, rendered after about only one hour's deliberation, that they accepted the statement as both freely and voluntarily given and true.

The summing-up as relevant

[6] In his summing-up, the Judge commenced his directions to the jury with respect to the statement as follows:

> 'With respect to the first accused – Norman Peters, remember he was not identified. What has happened, it is the evidence in his statement that he gave voluntarily in the presence of the Justice of the Peace. I agree he had asked the police some questions about being beaten up and the police denied it; and the JP came saying voluntary, he gave the statement. But I am telling you from the cross examinations both Sergeant Palomo denied it and Inspector Moody denied it. That they beat him up; that they put bag on his face for him to give the statement.'

Becoming overly kind towards the appellant, the Judge went on to say:

> 'Because he was asking that question, you are to consider whether he gave that statement and whether the statement is true. And to consider the truth of the

statement you are to consider all the circumstances in which the statement was given, his allegations. Remember it's just an allegation that he was beaten.' (underline added)

Having thus made plain to the jury that what they had before them was just an allegation, and not actual evidence, of the use of force by the police, the Judge, growing increasingly generous to the appellant, further said:

'But JP said there wasn't any signs of injury on him. He even asked him, remember the JP asked anybody beat him. And he said no. You eat? I'm straight. You want water? And the JP, if you recall, told the sergeant leave, I want to speak to this person. That means he wanted to speak to him in private. And he see to it, according to the JP. JP saw to it that the Sergeant was not in ear shot (*sic*). That he was not around to listen to the questions and answers. And he did not ask the JP ---, so you have to take that into consideration. <u>If he was beaten indeed</u>, then you may say that that beating had an effect on the statement as if though he did not say anything. That means there would not be any evidence against him. We're talking about the first accused. But remember all that had transpired. What the JP said, what he said.' (underline added)

In this last passage, the Judge was effectively (and mercifully) elevating the mere allegations made by the appellant during cross-examination to the level of evidence.

The submissions to this Court

[7] At the hearing, Mr Sampson SC deployed, with customary and commendable concision, oral submissions based on his previously filed skeleton argument. The thrust of these submissions was that the Judge had failed properly to direct the jury on how to treat the statement. The Judge, he complained, had not guided the jury in accordance with the decision of the House of Lords in Regina v Mushtaq [2005] UKHL 25. As the statement formed the whole basis of the Crown case against the appellant, had the jury

been given a *Mushtaq* direction, they might, he submitted, have disregarded the statement and thus been left with no option but to acquit him of all charges.

[8] In reply to Mr Sampson, Mr Ramírez, whilst confessing not to be in the best position to argue as to the true effect of the decision in *Mushtaq*, contended that, from a practical standpoint, the relevant directions of the Judge had sufficed to avoid a miscarriage of justice.

[9] In the course of the oral argument, the President expressed reservations about the applicability of *Mushtaq* save as an example of a case in which no *Mushtaq* direction will be required for want of evidence of, in a strictly English setting, 'oppression'. Accordingly, in the hope of maximizing the assistance of counsel on both sides, the Court directed the parties to file further submissions in writing on the question whether, given the absence of evidence to support the allegations of police brutality prior to the giving of the statement, a *Mushtaq* direction was required. Such further submissions were duly filed at a later date. The gist of Mr Sampson's further submissions, as minimally relevant, was that, whilst it was indeed the case that the House of Lords had dismissed the appeal of Mr Mushtaq on the ground that no evidence had been adduced at his trial to show oppression, the present case should, in effect, be distinguished on the basis that the appellant was unrepresented in the court below. A Mushtaq direction would have been fair in the circumstances, which justified the effective playing down of the fact that the appellant had made no more than unsubstantiated allegations of police impropriety.

[10] The Court does not consider it necessary, given the further submissions of counsel for the appellant, to enter into those filed by the Crown. Had there been further oral argument after the filing of the further written submissions, the Court would not have seen fit to trouble Mr Ramírez to reply again to Mr Sampson.

Discussion

[10] The Court must note by way of preface, that it was clear from the context of it's direction requiring the filing of further submissions that the touchstone was meant to be the decision in *Mushtaq* and that the purpose of the submissions was to clarify the effect of the absence of evidence of oppression in that case. Mr Sampson's further submissions nevertheless sought to go around the indisputable reason for decision in the case, which was unfavourable to the appellant's appeal, and raise a new argument based on fairness to an unrepresented accused. It is for that reason that the Court has chosen to describe those of his further submissions which are being taken into account in this judgment as minimally relevant. (Both counsel were required to file their further submissions by the same deadline date, with the result that the Crown had no opportunity to reply.)

[11] That said, the point to be highlighted at once is that there is no room whatever for any doubt that Mr Mushtaq's appeal was unreservedly dismissed by the House of Lords for the reason that there was no evidence at his trial of any oppressive conduct by the police officers in question. Lord Rodger of Earlsferry, writing the leading opinion in the case, stated at para 36:

> 'The point of principle raised by the certified question and argued before the House is indeed of general importance. But I cannot help noticing at the outset that, since the appellant did not give evidence and the police officers denied all the suggestions of oppressive behaviour in conducting the interview that were put to them in cross-examination, it appears that there was actually no evidence of oppression before the jury. If that was indeed the position, there was no need for the judge to give any direction on what the jury should do if they found that there was, or might have been, oppression.'

[12] The learned Law Lord went on to consider the question of law certified by the Court of Appeal saying that the House should deal with it since it had been fully argued.

But he returned to the matter of evidence of oppression at para 57, where he unambiguously said:

> 'As I mentioned at the outset, this was a case where the appellant chose not to give evidence … There was accordingly no evidence from the appellant or from any witness for the defence about the circumstances in which he had come to make the confession. The only evidence about the interview in which he made the confession was from the police officers … and from the records relating to the interview which gave the times when various stages began and ended. Many allegations of improper conduct were put to the officers in cross-examination … It would be fruitless to narrate all of the allegations since they were all denied, despite what the judge described as vigorous cross-examination.'

Lord Rodger then quoted a short passage from the summing-up of the trial judge in which the latter twice rhetorically asked about the whereabouts of the supposed evidence to support the allegations of oppressive police conduct. The learned Law Lord, speaking with the same clarity, then went on to say, at paras 58-59:

> '[Counsel for the appellant] did not challenge this passage in the summing up. What it shows is that in this case there was no evidence whatever of oppression, or of any other improper means, for the prosecution to disprove or for the jury to consider. The direction to the jury as to what they might do if they found that the confession had been obtained by oppression or any other improper means was, accordingly, unnecessary and unduly unfavourable to the appellant. In those circumstances, the fact that the judge did not go further in his direction cannot possibly affect the fairness of the appellant's trial or the safety of his conviction.
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> 59. For these reasons, I would … dismiss the appeal.'

[13] This Court regards the resulting legal position as extraordinarily clear. The absence of evidence of the use of improper methods by the police against a person in

their custody prior to his/her giving of a statement under caution justifies the trial judge in refraining from giving the jury a direction of the type which was held in *Mushtaq* to be required in the circumstances set out in the pertinent certified question, now generally known in legal circles as a *Mushtaq* direction. This Court is unaware of any legal principle under which it may down play the absence of legally required evidence on the ground that the relevant accused person was unrepresented at trial. A circumstance such as that cannot possibly serve effectively to elevate mere allegations made in the heat of cross-examination, especially cross-examination by an accused lacking the professional discipline of a trained attorney-at-law and not subject to rules of professional conduct, to the level of evidence. With great respect to Mr Sampson, the Court has been unable to find any merit in his submissions in support of this appeal, which must accordingly be dismissed.

Disposition

[14] The appeal is dismissed and the conviction and sentence affirmed.

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SIR MANUEL SOSA P

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AWICH JA

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HAFIZ-BERTRAM JA