IN THE COURT OF APPEAL OF BELIZE AD 2023

CRIMINAL APPEAL NO 2 OF 2019

RYON LORMAN WAGNER **APPELLANT**

v

THE KING **RESPONDENT**

BEFORE

Hon Madam Justice Woodstock Riley	-	Justice of Appeal
Hon Madam Justice Minott-Phillips	-	Justice of Appeal
Hon Mr. Justice Peter Foster	-	Justice of Appeal

Mr. Anthony Sylvestre for the Appellant
Mrs. Cheryl-Lynn Vidal, SC, Director of Public Prosecutions, for the Respondent

Date of Hearing: 28 October 2022
Date of Promulgation: 5 June 2023

REASONS FOR JUDGMENT

WOODSTOCK RILEY JA,

INTRODUCTION

[1] This was an appeal against the conviction by Her Honour Madam Justice Moore, in the Supreme Court, on the 10th January 2019, of the Appellant for the offence of Murder, and his subsequent sentencing. The appeal and application to admit fresh evidence were allowed,

conviction quashed, and in the interest of justice a new trial was ordered. Madam DPP undertook to prepare the order to be perfected so that she could proceed immediately to re-indict. As the matter is being retried it is appropriate to limit our reasons to those relating directly to our order.

[2] The Appellant filed two grounds of appeal:

(1) the late disclosure of the Report of Firearms Examiner Shyrlee Lino denied the Appellant the opportunity to properly put forward his defence and thereby impaired his right to a fair trial and his protection of law guarantee and

(2) the Learned Trial Judge failed to give herself a Mushtaq direction.

Based on our decision it is not necessary to address the second ground.

[3] In addition to filing Grounds of Appeal, the Appellant filed a Notice of Motion for leave to adduce fresh evidence pursuant to sections 20 and 33 of the Court of Appeal Act. The Appellant's Notice of Motion was filed in support of his ground one and was supported by an Affidavit of the Appellant.

[4] The fresh evidence was the Report of Analysis and Comparison of Shyrlee Lino, MSC. Forensic Analyst (Firearm Examiner). This Report dated 21st August 2018 was disclosed to the Appellant's attorney-at-law at the trial in Court on 4th December, 2018, the very date of the start of trial. The Appellant was indicted for the murder of Eduardo Sanchez alleged to have been murdered by gunshot between the 28th and 29th August 2015. The Appellant had been required to hand over his police issued firearm on the 29th August, 2015. The Report concluded that his firearm '*the GLOCK brand, model 19,9x19mm caliber pistol with serial number CHF975 was excluded as having fired the submitted cartridge case.'*

[5] The trial started on 4th December, 2018, with agreed evidence being read into the Record. Thereafter, three prosecution witnesses gave evidence that same day. On the following day, 5th December, 2018, a *voir dire* was conducted relating to the admission into evidence of oral

admissions purportedly made by the appellant to PC 833 Mark Arzu and PC 1880 Devin Garcia at the guard hut at the Police Training School on 29 August, 2015.

[6] Following the holding of the *voir dire*, on 6th December, 2018, the Appellant's attorney and counsel for the Prosecution made submissions relating to whether the oral admissions should be admitted into evidence. The Court gave its ruling admitting the oral statements into evidence and on the following day Friday 7th December, 2018, the prosecution led the remainder of the evidence in its case, being evidence from: PC Dion Guzman, Bertram Bermudez, Inspector 687 Sanitago Patt, Inspector Octaviano Victorin, Dr. Mario Estrada Bran, PC 833 Mark Arzu, PC 188 Devin Garcia, and Corporal Benedict Castillo.

[7] The case was adjourned to Monday 10th December, 2018 for the Appellant to present his defence. After the Appellant gave an unsworn statement, the case was then adjourned to the following day at which time his attorney and the attorney for the Prosecution made closing submissions for their respective cases. The Learned Trial Judge then adjourned the case to consider the verdict.

[8] In her Judgment the Court noted the crown's case against the accused was based on circumstantial evidence and alleged oral admissions from the accused. The circumstantial evidence came from the written statements of two witnesses (Guzman and Bermudez) who were treated as hostile at the trial and whose statements were admitted into evidence. The alleged oral admissions from the accused (to Arzu and Garcia) were the subject of the *voir dire* conducted by the court and which the trial judge admitted in evidence as given freely and voluntarily and not induced in any way by a person in authority.

[9] The Prosecution's case disclosed that the Appellant was issued a police service firearm on 7th June, 2010, being a 9 mm 19 series Glock with S/N CHF975. This evidence was provided by Hermes Morales, whose statement dated 4th September, 2015, was agreed evidence. Additionally, the agreed evidence of Aaron Camboa was that on 29th August, 2019, he retrieved the appellant's police issued service firearm, a 9 mm with S/N CHF975, along with a magazine, four Aguila brand 9 mm rounds and three S & B 9 x 19 rounds which were all handed over to Scene of Crime

Personnel Barrington Montero. Relevant as well, for purposes of the Appellant's application is the evidence of Barrington Montero that he found a 9 mm empty cartridge casing and a live 9 mm round at the scene where the body of a male person dressed in blue long jeans pants, blue T-shirt, brown boot and a black T-shirt wrapped around the head was found.

[10] The written statement of Guzman admitted in evidence was that the appellant had *'a firearm in his pants waist*', that he knew the firearm to be *'a 9mm pistol'*, that the Appellant left the car with the deceased and he shortly heard what appeared to be a gunshot, that seconds after the appellant returned to the vehicle *'and he had his firearm on his hand'*. The written statement of Bermudez admitted in evidence was that the Appellant left the car with the deceased, returned, *'came back took a gun off the back seat and walk towards the male, point the gun at the male person ..then I heard a loud bang'*. The evidence of Arzu and Garcia was that the Appellant arrived at the guard hut of the Police Training Academy *'with a firearm in hand'*.

[11] The parties agreed on the principles relating to leave to adduce fresh evidence, set out in ***Lavern Longsworth v The Queen***, ***R v Pendleton*** and ***Robert Smalling v The Queen***. These are:

(i) whether the evidence is capable of belief,
(ii) whether the evidence would have been admissible at the trial;
(iii) whether there was a reasonable explanation for the failure to adduce the fresh evidence at trial;
(iv) whether it appeared to the Court that the fresh evidence may afford a good ground for allowing the appeal.

[12] The Respondent in submissions conceded that two limbs of the test were satisfied: the evidence of Shyrlee Lino was capable of being believed and could have been admitted at trial, although noting that the Crown would have challenged its probative value.

[13] With regard to a reasonable explanation for the failure to adduce the evidence at trial the Appellant deposes at paras 19 and 21 of his Affidavit, the report was disclosed on the first day of the trial that he did not have the opportunity to consult with his attorney at trial and discuss and

give instructions with regard to the fresh evidence as his trial was not adjourned and proceeded to its end within the next five days. The Appellant further asserted that no reasonable opportunity or facility was afforded or existed to enable him to consult with his attorney with regard to any change in defence strategies or approaches once his trial started. The Appellant submitted that the third limb of the test was also satisfied.

[14] As to whether the evidence was fresh, in its judgement in ***Jason Bruce Lawrence v The Queen***, which followed its previous decision in ***Longsworth***, this Court defined '*fresh*':

> *"[38] The second arm of the* ***Lundy*** *test requires that the evidence must be fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. Counsel for the Respondent, by way of written submissions, made much of the difference between 'fresh evidence' and 'new evidence'. With respect, we find that the distinction may have more relevance for civil appeals but is immaterial for the purpose of criminal appeals. In Longsworth, for example, Hafiz-Bertram JA, clearly not acknowledging the distinction, spoke of 'section 20 of the Court of Appeal Act giving the court a discretionary power to receive new evidence or 'fresh evidence' on appeal, if it thinks it necessary or expedient in the interest of justice".*

[15] The Respondent submitted the evidence being sought to be adduced was not *fresh* in that sense. The report of Firearm Examiner Shyrlee Lino was disclosed to the Defence on the first day of the trial, the 4th December 2018. No evidence had yet been led in the case, and the Defence's case was not opened until the 10th of December 2018, that the Appellant had 'ample time' to deal with it. Further, that the Appellant's attorney could have requested an adjournment to consult with his client and determine how he wished to proceed. The Appellant acknowledges the point that an adjournment could have been requested but submits in his Affidavit in support of his application for leave to adduce fresh evidence that he 'should (not) be penalized for (that)'

[16] The Respondent accepted it was mindful of the dicta in ***Lundy v R [2013] UKPC 28,*** and cited at paragraph 14 of ***Lawrence***, that,

"If the evidence is credible but not fresh the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted notwithstanding that the evidence is not fresh."

[17] The Respondent 'readily conceded' that the prosecution had a duty to make full disclosure, which includes the duty to disclose material in its possession that it does not intend to use, and failed in that duty. The affidavit submitted in opposition to the Appellant's application did not assist. The report was dated 21st August 2018, the affidavit only asserts *'despite repeated attempts'*, that it was not until *'shortly'* before the trial that a copy was received. The affidavit also asserted the *'custom of the trial judge to allow counsel to meet with their clients in the jury room next to the court room when trials by judge alone are in progress'* and that it was in the hands of the Defendant a week before the defence opened its case.

[18] There was nothing definitive about 'shortly', no factual evidence of whether the 'custom' asserted was extended to the Appellant and utilized, and the affidavit ignored the reality that the defence would have been engaged in the trial immediately after receiving the report as the prosecution's case was proceeding.

[19] The Appellant was charged with shooting the deceased. Reference by the witnesses to his possession of a gun were integral to the trial judge's determination that he shot the deceased. The report from the ballistics examiner concluded that the shell found at the crime scene was not fired from the Appellant's police issued gun. The Respondent before us noted there was no evidence that the expended shell retrieved from the scene had any connection with the shooting.

[20] Without further comment it was considered that these were important issues which the Appellant should have had the full opportunity to review, raise and address within a reasonable time. His failure to have had this opportunity would have affected the Appellant's right to a fair trial. It was important evidence in the context of the remainder of the evidence. As noted in the authorities referenced above, the evidence should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction and

that there is 'no risk of a miscarriage of justice if the evidence is excluded.' In the circumstances we ordered that:

(a) The motion to adduce fresh evidence is granted;

(b) The appeal is allowed;

(c) The conviction is quashed and, in the interest of justice, a new trial is ordered.

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WOODSTOCK RILEY, J.A.

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MINOTT-PHILLIPS, J.A.

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FOSTER, J.A.