IN THE COURT OF APPEAL OF BELIZE A.D. 2023

CRIMINAL APPEAL NO. 4 OF 2019

ORLANDO SMITH JR **APPELLANT**

AND

THE KING **RESPONDENT**

CRIMINAL APPEAL NO. 5 OF 2019

JOSEPH CADLE **APPELLANT**

AND

THE KING **RESPONDENT**

BEFORE

The Hon Madam Justice Hafiz Bertram	-	President
The Hon Madam Justice Minott-Phillips	-	Justice of Appeal
The Hon Madam Justice Arana	-	Justice of Appeal

Mr. Leeroy Banner for the appellant in Criminal Appeal No. 4 of 2019
Mrs. Peta-Gay Bradley for the appellant in Criminal Appeal No. 5 of 2019
Mrs. Cheryl-Lynn Vidal SC, Director of Public Prosecutions, for the respondent

Date of hearing: 27 March 2023
Date of Promulgation: 31 May 2023

REASONS FOR JUDGMENT

HAFIZ BERTRAM, P

Introduction

[1] The Appellants, Orlando Smith Jr. (Smith) and Joseph Cadle (Cadle) were jointly charged with the crime of attempting to murder Jonathan Zetina (Zetina) on 20 January 2016, in Belmopan City. They were tried before Moore J sitting in the Central District, in the City of Belmopan, on the 15 March 2019 and convicted of the offence of attempted murder. On the 24 of May 2019, they were each sentenced to a term of imprisonment of 12 years. Both

Appellants appealed their convictions on the basis that the trial judge failed to give a direction to herself in her judgment on the issue of intoxication. In their unsworn statements from the dock, the Appellants' defences were that they did not participate in the attack on Zetina and that it was Oswald Arnold.

[2] The learned Mrs. Vidal SC, Director of Public Prosecutions, conceded that the trial judge did not, in the course of her judgment, indicate that she considered the defence of intoxication but at the mitigation stage she stated that she had taken the consumption of alcohol into consideration in reaching the verdict.

[3] On 27 March 2023, this Court heard both Appeals. The issue that engaged the Court was whether the evidence of alcohol consumption and the smoking of weed by the Appellants met the threshold to trigger the direction on intoxication. Further, even if the trial judge had so directed herself, whether that could have resulted in a finding that the Appellants were so intoxicated that they could not form the intention to kill.

[4] At the conclusion of the hearing we were satisfied, on the evidence accepted by the trial judge, that she was not obliged to give herself a direction on intoxication. We have also considered that even if the trial judge had stated in her judgment that she had considered intoxication, it would have been inevitable that she would have come to the same conclusion that both Appellants were guilty of attempted murder. The evidence she accepted from Zetina was sufficient to prove beyond a reasonable doubt that the Appellants had an intention to kill him. Further, we noted that at the mitigation hearing the trial judge had in fact stated that the alcohol did not impair the Appellants to such a degree that they had not formed the intention to kill. Accordingly, there was no miscarriage of justice, and we dismissed the appeals and affirmed the convictions. We promised to give reasons in writing and do so now.

The case for the Prosecution

[5] The Prosecution called eight witnesses to prove its case of attempted murder. They relied mainly on the evidence of the virtual complainant, Zetina. He testified that on 20 January 2016, he was taken from his stepfather's vehicle which he had been driving in the company of the Appellants and his friend Oswald Arnold (Arnold). He testified that the three men took him into the bushes against his will and Arnold chopped him on the back of his neck, the side of his

head and on his left hand as he held it up to protect himself and another chop directed at his head.

[6] Zetina further testified that after the injuries were inflicted, Cadle told Oswald twice to "*Bos ih throat, bos ih throat."* (cut his throat). Smith and Cadle each held him by the arms whilst Arnold prepared to cut his throat. Zetina said he managed to escape and ran for hours until he got a ride to the Roaring Creek Police Station where his mother was present and he was then taken to the hospital. In cross-examination, he was unshaken that it was not only Arnold but the Appellants who were involved in the attack.

[7] Dr. Fernando Cuellar, the Medical Doctor who treated Zetina testified that he had lacerations to his head, neck, and left hand and classified the injuries as maim. He testified that he was "extremely concerned" with the neck wound because of the location and depth of the chop as he could physically feel the bone material through the wound. Further, the chop to the scalp was the second priority and both injuries were considered "life threatening" which he described as "*an injury that put life in danger and could result in death."*

[8] There was no evidence of the consumption of alcohol or drugs on the case for the prosecution. The issue arose in the statements made by each of the accused from the dock.

The defence of Smith

[9] Smith in his unsworn statement denied leaving the vehicle and accompanying Arnold and Zetina into the bushes in the isolated area. He denied any participation in the attempt on Zetina's life. In relation to intoxication he said:

> "On the 20th day of January 2016, we were all coming from San Pedro. We were at a party drinking, having fun…..
>
> The moment we all came in the house, we went in the house…he told us that drinks eena di rifrij, we can go and take a couple drinks. So we went straight into the rifrij, get a couple drinks but at the time we were in the kitchen…. .
>
> So I then went back into the kitchen and walk out through the back door to roll a joint or a weed…..

From there we left the bungalow house in Ladyville and went into Boom. We drove to Boom where we order more drink at a Chaini store…
I began to get drowsy, so I fell into a small [doze]….

While waiting in the vehicle, I then decide to open another drink. (sic)" (see Pages 208, 209, 210,211 of the record).

The defence of Cadle

[10] Cadle in his unsworn statement denied that he saw the chopping incident and that he said any words of encouragement or that he held the complainant for the chopping to continue. In relation to intoxication he said:

"When we enter the house, Mr Zetina was in the chair lying down and he told me, Orlando and Oswald, drinks are in the rifrij. So me and Orlando went in the kitchen, went in the refrij, got some drinks and went through the back door. Whilst behind the house, me and Orlando Smith, we smoke a couple joints….

So we left and went to Burrell Boom to a Chaini where we bought a half case of Mackeson and Belikin Stout ….

While reaching by St Matthews Village, I told Mr Arnold that I felt drunk from the liquor and I fell asleep …

When we reach by the old oil site, Mr Arnold said that he and his friend was going to do something and come back. I told them fine, [just] go ahead and I'll wait here and finish drink. After that I fell asleep again…(sic)" (Pages 214-215 of the record).

The decision of the trial judge relevant to the Appeal

[11] The trial judge found that both Appellants had in fact participated in the attack in the manner testified to by the victim, Zetina and the evidence showed that their intention was to kill him. At paragraphs [10] - [15] the trial judge discussed the actus reus (the attempt to kill) and the mens rea (intention to kill) of the crime. She accepted as true that Smith and Cadle each directly participated in the crime by holding Zetina. She also accepted as true that the Appellants held Zetina so that he could be chopped once again with a machete after he had been seriously injured and was bleeding.

[12] The trial judge gave the unsworn statement of the Appellants little weight. She found both of them to be untruthful. She properly directed herself that she cannot convict them on that basis alone but must revert to the case of the Prosecution. Having reverted to the case for the Prosecution, she was satisfied to the extent that she felt sure that Smith and Cadle participated in the effort to cause unlawful harm to Zetina on 20 January 2016, intending to kill him at the time that they participated in the effort. The trial judge was sure that Smith took hold of Zetina who had been chopped three times and he made no effort to withdraw from the offence. Further, she believed that Cadle instructed Arnold to kill Zetina by cutting his throat after he was chopped three times and he made no effort to withdraw from the crime. The trial judge stated that the evidence against the Appellants was strong and credible. She found that the Prosecution had proved the case against the Appellants beyond a reasonable doubt and found both of them guilty of the offence of attempt to murder. Both appellants were sentenced to 12 years imprisonment for the crime of attempted murder effective from the date of conviction, 15 March 2019.

Sole ground of Appeal by Smith

[13] Smith's ground of appeal is, "The learned trial judge failed to address her mind to the issue of intoxication."

Sole ground of Appeal by Cadle

[14] Cadle's ground of appeal is, "The learned trial judge failed to give herself directions on intoxication."

The Appeal of Orlando Smith Jr

[15] Learned Counsel, Mr. Banner submitted that the evidence showed that Smith had consumed alcohol and smoked marijuana at the time the incident took place. As such, there was a duty on the trial judge to take into account the voluntary intoxication for the purpose of determining whether he had formed the specific intention to murder Zetina. See: ***May Bush v The Queen, Criminal Appeal No 5 of 2014***.

[16] Counsel argued that the trial judge did not address her mind to the issue of intoxication until at the mitigation hearing when Mr. Saldivar, counsel at the trial below, for the Appellant,

invited the trial judge to consider the issue of alcohol consumption as a mitigating factor. It was then that the judge indicated that she took intoxication into consideration and accepted it as part of the evidence in the trial. This consideration, he contended came long after the trial judge had found the Appellant guilty of an attempt to commit murder, and only mentioned it after counsel had asked to do so when sentencing the Applicant. Further, no reference was made in the written judgment to section 27(4) of the *Criminal Code, Cap 101* that covers intoxication. See: **Calbert Smith v The Queen**, Criminal Appeal No. 3 of 2003. As such, Mr. Banner submitted that the Appellant was deprived of a fair hearing.

The Appeal of Cadle

[17] Learned counsel, Mrs. Bradley submitted that the trial judge failed to apply and consider the provisions of section 27(4) of the Criminal Code with respect to intoxication. Counsel relied on the case of ***May Bush*** where this Court considered the section and said the following:

> "[15] Be that as it may, the learned Trial Judge did however, go on to cite the cases of Calbert Smith v The Queen, Criminal Appeal No. 3 of 2003, and Zelaya v R, Criminal Appeal No. 2 of 1977. In Zelaya, the Court of Appeal stated that "[t]he burden is always on the prosecution to prove that the Accused actually had the intent to constitute the crime", and that "if there is material suggesting intoxication the jury should be directed to take it into account and to determine whether it is weighty enough to leave them with a reasonable doubt about the accused's guilty intent." (citing Broadhurst v. The Queen (1964) A.C. 441, at 463). The Court of Appeal went on to state that "there must be material suggesting intoxication before that issue need be left to the jury."

[18] Mrs. Bradley submitted that ***May Bush*** can be distinguished from the case on appeal as the trial judge did not consider intoxication at all in her summation. That since the issue of intoxication arose from the unsworn statement of the Appellant, the trial judge ought to have addressed her mind as to whether the consumption of alcohol was of such a degree to have affected the Appellant's ability to form the *mens rea* for the offence of attempted murder.

[19] Counsel argued that the Appellant was prejudiced by the failure of the trial judge to address her mind to his intoxication and therefore he was denied the opportunity of being considered guilty of the lesser offence of grievous bodily harm.

Response by the Director

[20] The learned Director conceded that the trial judge did not, in the course of her judgment, indicate that she considered the defence of intoxication, although she did indicate, at the mitigation stage, that she had taken the consumption of alcohol into consideration in reaching the verdict. Nevertheless, the Director argued that the evidence of alcohol consumption did not meet the threshold to trigger the direction on intoxication and even if it had been given, it could not have resulted in a finding that the Appellants were so intoxicated that they did not form the intention to kill. As such, she argued that the trial judge was correct in concluding, on the facts accepted by her, that the Appellants intended to kill the victim, Zetina.

[21] The Director relied on ***Sooklal and Francis Mansingh v The State [1999] UKPC 37***, which discussed the test to trigger the direction on intoxication. Also, ***Zelaya v The Queen, Criminal Appeal No. 2 of 1977*** and ***Agripo Ical v the Queen, Criminal Appeal No 6 of 2007***, cases from this Court which addressed intoxication.

Determination of the Appeal for both Appellants

[22] In the instant case, the defence of the Appellants were that they did not participate in the attack on Zetina. This Defence was not accepted by the trial judge as she did not find their statements to be credible. She found that Zetina was a credible witness and accepted his version of events and relied on it. The trial judge at paragraphs [4] and [5] of her judgment said:

> "[4] A summary of his testimony is that on the afternoon of the 20th of January 2016, he was taken from his stepfather's vehicle which he had been driving in the company of the two accused and a friend, Oswald Arnold. The three men took him into the bush, against his will. Zetina said that Arnold chopped him on the back of his neck, the side of his head and on his left hand as he held it up in an effort to protect himself from another chop directed at his head. Zetina testified that after these injuries were inflicted, the second accused (Joseph Cadle) told Oswald Arnold to cut his throat. At the moment

when Arnold prepared to cut his throat with the machete, the first and second accused each held Zetina by his arms. Zetina managed to escape from the aggress, he said. After his escape, he ran for hours until he got a ride to the Roaring Creek Police Station where his mother was present and transported him to the hospital."

....

[23] At paragraph 5 of the judgment, under the heading of "Burden and Standard of Proof", the trial judge stated that she found him to be a credible witness:

> "[5] As trier of fact, sitting alone in this matter, I found Jonathan Zetina to be a credible witness that is believable. He stood up to rigorous cross- examination, he did not waver in his story, he was consistent in his testimony and his demeanour was that of someone who was telling the truth."

Section 27(4) of the Criminal Code, Cap 101

[24] The charge against the Appellants was attempted murder and specific intent is an essential element in that offence. The trial judge addressed specific intent in her judgment. In doing so, she made no mention of section 27(4) of the Criminal Code which provides:

> "(4) Voluntary intoxication shall be taken into account for the purpose of determining whether the person charged had formed any specific intention in cases where a specific intent is an essential element in the offence charged."

The test to trigger the direction on intoxication

[25] In the statements of the Appellants they spoke of drinking alcohol and smoking weed. There was no evidence as to the state of drunkenness. As shown in ***Broadhurst v The Queen [1964] A.C. 441***, not any kind of evidence of intoxication qualifies as material suggesting intoxication. There must be evidence of drunkenness which rendered the Appellants incapable of forming the specific intention to kill. If there is such evidence then the trial judge would have a duty to consider it in order to determine if they had in fact formed the intention. There was no such evidence in this case <u>that the Appellants were so intoxicated that they lacked the specific intent to murder although they stated they were drinking and smoking weed.</u> The evidence the trial judge accepted showed that Cadle told Arnold to cut Zetina's throat. Both

Appellants held his arms for this to be done but he managed to escape after received chop wounds to the back of the neck, head and hands.

[26] In ***Sooklal and Francis Mansingh***, the Board considered the evidential basis for the direction on intoxication. Lord Hope noted at paragraphs 15 and 16:

> "This test is not satisfied by evidence that the accused had consumed so much alcohol that he was intoxicated. Nor is it satisfied by evidence that he could not remember what he was doing because he was drunk. The essence of the defence is that the accused did not have the guilty intent because his mind was so affected by drink that he did not know what he was doing at the time when he did the act with which he has been charged. The intoxication must have been of such a degree that it prevented him from foreseeing or knowing what he would have foreseen or known had he been sober. This was made clear by Lord Denning in *Bratty v Attorney-General for Northern Ireland* [1963] AC 386, 410, in a passage which was quoted by Widgery L.J. in *Reg. v. Lipman* [1970] 1 Q.B. 152 at 156:-
>
> > "If the drunken man is so drunk that he does not know what he is doing, he has a defence to any charge, such as murder or wounding with intent, in which specific intent is essential, but he is still liable to be convicted of manslaughter or unlawful wounding for which no specific intent is necessary, see *Beard's* case."

In ***Attorney-General for Northern Ireland v Gallagher*** **[1963] AC 349, 381** Lord Denning gave some helpful examples of the application of this principle:

> "**If a man is charged with an offence in which a specific intention is essential (as in murder, though not in manslaughter), then evidence of drunkenness, which renders him incapable of forming that intention, is an answer:** see **Beard's case**. **This degree of drunkenness is reached when the man is rendered so stupid by drink that he does not know what he is doing** (See **Reg. v. Moore** (1852) 3 Car. & Kir. 319), as where, at a christening, a drunken nurse put the baby behind a large fire, taking it for a log of wood (Gentleman's Magazine,

> 1748, p. 570; and where a drunken man thought his friend (lying in his bed) was a theatrical dummy placed there and stabbed him to death ("The Times" January 13, 1951). In each of those cases it would not be murder. But it would be manslaughter."

[27] In the case of ***Zelaya***, this Court also considered the evidential basis for the defence of intoxication. The Court cited the dicta from ***Broadhurst*** and said:

> "Implicit in this proposition is the requirement that there must be material suggesting intoxication before that issue need be left to the jury on the question of the Accused's intent, and *Broadhurst*, at pp 462 & 463, shows that it is not any kind of evidence of intoxication which qualifies as material suggesting intoxication."

[28] The Court in ***Zelaya*** found that while there was evidence in the case that showed that the appellant had been drinking and was under the influence of alcohol, there was other evidence that suggested that the appellant's mind was working rationally. Ultimately the Court found that there was insufficient material to justify leaving the question of the intoxication to the jury for its consideration.

[29] In ***Agripo Ical*** a judgment of this Court, the issue of intoxication was also considered. The Appellant had stated that he and the victim drank corn wine and they were drunk. The appellant raised as one of his grounds of appeal, that the verdict of guilty of murder was unreasonable or could not have been supported by the evidence. The basis of the argument was that the jury could not have reasonably found that the appellant intended to kill the deceased. Counsel sought to rely, partly, on the evidence of consumption of alcohol by the appellant. Sosa P (as he was then) writing for the Court said at paragraph 8:

> "[8] …it suffices to examine the statement under caution, in which the appellant spoke of his having engaged in drinking on four separate occasions and at two different places in the course of the day of the murder. There [is] in this statement a clear description of his alleged movements, before as well as after dark, and several references to approximate times at which he allegedly did different things. While the statement does say that, when the drinking ended at about 10pm, '*we were already all drunk'*, there follows a fairly detailed description of what immediately ensued….. Implicit in all this

is the formation by the appellant, prior to this struggle, of a firm and fixed intention to engage in sexual relations with the deceased. In our view, therefore, the jury had no reason to entertain doubts as to the ability of the appellant, whether intoxicated or not, to form an intention to kill the deceased."

[30] In the instant case, the Appellants denied participating in the crime. As such, they did not put up a defence that they had consumed so much alcohol that they were incapable of forming the intention to kill Zetina. Nevertheless, it is incumbent on the trial judge to have regard to any defence available on the evidence that she accepts. We agreed with the Director that on the evidence that the trial judge accepted, the defence of intoxication could not have availed the Appellants. She found Zetina's evidence to be credible and relied on it to find that the Appellants had the specific intent to kill him.

Evidence of Specific Intention to kill

[31] The trial judge considered the unsworn statements but gave them little weight. At paragraph 19, she stated that Cadle "*essentially say that he does not know about what happened outside in the bushes because he remained in the vehicle sleeping after heavily drinking alcohol…"* She did not mention in her judgment that she took Cadle's or Smith's alcohol drinking into consideration when looking at intention to kill Zetina. However, in the view of the Court she adequately addressed intention to kill. At [11] and [12] of her judgment, she addressed the mental element of the Appellants at the time when they each participated in the effort to chop Zetina:

"[11] … Again, I have no doubt that each accused intended that Zetina be killed when they both held him, so that he could be chopped once more. After already being injured but still alive, I infer the only intention to holding the complainant was so that he could not escape while being chopped and this was so that he would be killed and not merely further seriously injured. Moreover, the words from the second accused "*Bos ih throat*, *bos ih throat*", leaves no room for doubt that the intention of the second accused was that Zetina's throat be cut and that he be killed. The first accused having heard these words from the second accused, continued to participate in the attack by holding Zetina, thereby displaying his individual intention that Zetina be killed. I am satisfied as

discussed above that each of the *Augustine* (*Peter Augustine v The Queen Criminal Appeal No. 8 of 2001)* criteria were met by the First accused.

[12] I am also satisfied that the case against the second accused meets the *Augustine* criteria. I have no doubt whatsoever that each Accused foresaw the criminal actions of Oswald Arnold and then each accused possessing the intention to kill the complainant, took direct steps towards helping Arnold in the commission of the attempt to kill Zetina. These steps taken by the First Accused and also taken by the Second Accused cannot be reasonably regarded as having any other purpose other than the unlawful killing of Jonathan Zetina. There is no evidence whatsoever in this trial that self-defence or extreme provocation existed or played any role in the incident."

Was the trial judge obliged to consider intoxication in order to determine intent?

[32] In the view of the Court, the evidence accepted by the trial judge did not rise to that of the required standard of drunkenness needed to establish that the Appellants did not know what they were doing. The trial judge properly analysed the evidence and found that both Appellants had an intention to kill Zetina. The judge believed that they held him so that injuries could have been inflicted on him and that Cadle told Arnold to cut the victim's throat. Further, all three pursued him when he ran away from them into the bushes. We agreed with the Director, that the evidence accepted by the trial judge was evidentially inconsistent with persons who were, as put by Lord Denning in Gallagher, "*rendered so stupid by drink that [they] did not know what [they] were doing*".

[33] In our view, the trial judge who was sitting alone was not obliged to give herself a direction on intoxication. We have also considered that even if the trial judge had stated in her judgment that she had considered intoxication, on the evidence accepted by her, it would have been inevitable that she would have come to the same conclusion that both Appellants were guilty of attempted murder. The evidence she accepted from Zetina was sufficient to prove beyond a reasonable doubt that the Appellants had an intention to kill him.

Trial judge considered intoxication

[34] The Court noted that during the mitigation hearing the trial judge said that she had in fact considered at trial the consumption of alcohol. The trial judge said:

> "... And certainly what Mr. Saldivar said about the issue about alcohol can be taken into consideration. Although I do say that in reaching the verdict, I took into consideration the consumption of alcohol which I do accept as part of the evidence in the trial. But even with the consumption of alcohol, I found that both of you had (sic) what in law we call the *mens rea*.
> **Again, the intention. The mental element to commit the crime. The alcohol did not impair you to such a degree that you had not form (sic) the intention to kill."** (page 285 of the Record).

[35] The above quote confirmed the trial judge's finding that the Appellants formed the intention to kill Zetina although the Appellants stated they drank alcohol. In the words of the trial judge, worth repeating, "*The alcohol did not impair you to such a degree that you had not form the intention to kill."*

[36] In the case of ***Calbert* Smith**, a judge and jury trial relied upon by Mr. Banner, there were two witnesses who stated that the Appellant appeared drunk on the night of the killing of his brother. However, no reference was made by the trial judge in the summing up to the jury to the provisions of the *Criminal Code* that dealt with intoxication. In the view of the Court, the circumstance of that case is distinguishable from the instant appeal on the basis that Zetina testified about the attack on him and his evidence was found to be credible by the trial judge. The evidence clearly showed the intention of the Appellants was to kill Zetina. As such, no prejudice was caused to either of the Appellants because the trial judge did not refer to section 27 (4) of the Criminal Code and give herself a direction on intoxication. Zetina survived to tell of the horrific attack on him.

[37] In the case of ***May Bush***, a judge alone trial, the trial judge considered intoxication although there was contradictory evidence as to whether the Appellant was drunk or not. The trial judge in that case found that the Appellant's actions "*do not seem that of an intoxicated person who could not form the mens rea but rather a person who had their wits about them*

and made an effort to conceal her wrongdoing." In the instant appeal, the trial judge was not obliged, on the evidence accepted by her, to give herself a direction on intoxication. Nevertheless, she stated at the mitigation stage that she did consider the issue, and this Court took note of that statement. In our view, the Appellants received a fair trial.

Conclusion

[38] For those reasons, we dismissed the appeals of both Appellants, Orlando Smith Jr. and Joseph Cadle and affirmed their convictions.

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HAFIZ BERTRAM, P

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MINOTT-PHILLIPS, JA

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ARANA, JA