

IN THE COURT OF APPEAL OF BELIZE AD 2017

CRIMINAL APPEAL NO 4 OF 2015

DENNIS GABOUREL

Appellant

v

THE QUEEN

Respondent

BEFORE

The Hon Mr Justice Sir Manuel Sosa

President

The Hon Madam Justice Minnet Hafiz-Bertram

Justice of Appeal

The Hon Mr Justice Christopher Blackman

Justice of Appeal

S Sampson SC for the appellant.

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

1 and 17 March 2016 and 24 March 2017.

BLACKMAN JA

[1] At the close of the hearing of the appeal against conviction of grievous harm, the appeal was dismissed and the conviction and sentence affirmed. At that time, we promised to put our reasons for so doing into writing. However, before so doing we are obliged to record our concern at the unsatisfactory state of the Record of Appeal. There are several places in the transcript with notations such as **tape inaudible; recording gaps for significant periods of time in relation both to the evidence of witnesses and the trial judge's summation and the absence of the closing address of**

Defence Counsel, Mr. Simeon Sampson SC. In respect of the summation, a Supplementary Record of Appeal was provided which enabled counsel for the appellant and the respondent to address their respective concerns, thereby facilitating the appeal to proceed.

[2] The foregoing occurrence was not peculiar to this appeal. It has been noted previously. We would urge those responsible to take the appropriate measures to ensure that these incidents are minimised, if not totally avoided. We now turn to the reasons for our decision.

[3] On January 26, 2015 the appellant was arraigned before **Gonzalez J** and a jury on charges of rape and grievous harm. At the close of the trial on January 29, 2015 the appellant was acquitted of the charge of rape but by a majority verdict of 8 to 1, found guilty of grievous harm. He was sentenced to a fine of \$10,000.00 to be paid by March 31, 2015 or in default, to a term of 3 years imprisonment. In addition, the appellant was ordered to pay by June 30, 2015 compensation in the amount of \$3000.00 to the complainant.

[4] While there has been no appeal against sentence, the Court was informed that only \$2000.00 had been paid on account of the fine and that there had been no payment whatsoever in relation to the order for compensation. In the circumstance that there was no application for leave to appeal the sentence, the Court has determined that it is for the parties to take such steps as they consider appropriate in light of the determination of the appeal.

[5] The sole ground of appeal relied upon by the appellant was that the trial judge erred in law by not putting the defence to the jury adequately or fairly or any at all.

The Appeal

[6] Mr. Simeon Sampson SC Counsel for the appellant submitted that the trial judge did not give a proper direction on the issue of self- defence. Counsel stressed that the direction given by the trial judge, as recorded at page 14 of the Supplementary Record of Appeal that: *"...if there is no justification available to the accused in this regard. So members of the jury, how then will the issue of self -defence arise, you see? but*

members of the jury, at the end of the day it is for you to say, don't take my views, it is for you to say whether or not you think that the accused was acting in self-defence and the accused was not justified in hitting the virtual complainant" was inadequate and the appellant suffered a miscarriage of justice when he did not give a proper direction on the issue of self-defence.

[7] Mr. Sampson further submitted that a man who is attacked may defend himself, but may only do what is reasonably necessary to effect such a defence and that simple avoiding action may be enough if the circumstances permitted. In that regard, he submitted that the trial judge seemed not to understand the exact nature of this particular defence when the appellant in his unsworn statement said, as recorded at page 96 of the Record of Appeal that *"I slipped her and she fell on the couch on the verandah"* to understand that as a consequence of "slipping" a violent aggressor (who had flown at him), her own momentum had propelled her forward to the ground, and as a result the complainant had been injured.

[8] Mrs. Cheryl-Lynn Vidal SC, Director of Public Prosecutions, Counsel for the respondent however submitted that self-defence did not arise on the facts, as on the appellant's own version of the events, the injuries sustained by the complainant were sustained accidentally, when she fell, and not because of any positive action on his part.

[9] In those circumstances, the DPP submitted that it was not incumbent on the learned trial judge to direct the jury on the issue of self-defence. Further, the prosecution's case was that the injuries sustained were unlikely to have been caused by a fall as shown by the cross-examination by Mr. Sampson of the medical doctor, Dr. Jose Moguel at page 17 line 9 to page 18 line 16 of Record of Appeal.

"Q. One last thing, doctor, in your answer to my learned friend about blunt instrument, as approximate cause of injuries that you saw, could a heavy fall on a concrete pathway or step caused some of these superficial lacerations or injuries to her face hands?"

A It's unlikely.

15 Q. Could?

A. *It is unlikely.*

Q. *Why?*

A. *If you know a person's facial structure, the lips and the mouth are different things and both were injured. And, besides*

20 *the left side had more injuries than any other part of the face.*

So, falling forward, falling sideways would not affect the other side

Q. *Depends on how you fall. Suppose you fall front ways, I am saying some of the lips, for example?*

10. A. *Yes, you can say falling can cause some of the injuries,*

5 *yes.*

MR. SAMPSON: *Thank you, My Lord.*

THE COURT: *Doctor, can you recall whether the person's nose or lips was injured?*

WITNESS: *Well, less swelling on the nose and lips but the entire face was swollen.*

THE COURT: *But considering that the eye is sort protected by a socket, if a person falls in the way that Mr. Sampson demonstrated, would the eye be liable to suffer that type of injury?*

WITNESS: *No, sir, unlikely."*

[10] The learned Director submitted that on the facts, the issue resolved itself into a determination by the jury as to whose version of events they accepted, and, as evident from the verdict, they clearly accepted the version given by the complainant in relation to the offence of grievous harm, and rejected the version given by the appellant.

Discussion and Disposition.

[11] We have carefully reviewed the Record of Appeal and the Supplementary Record in relation to the evidence of the complainant, to the evidence of Dr. Jose Moguel the medical practitioner reproduced at paragraph 9 above, and the directions given by the trial judge. Taken as a whole, we were of the view at the close of the

submissions, that even if there was some error on the part of the judge, in the summation, a jury properly directed would have inevitably convicted and consequently, there was no miscarriage of justice. We therefore dismissed the appeal and affirmed the conviction and sentence.

SIR MANUEL SOSA P

HAFIZ-BERTRAM JA

BLACKMAN JA