

- [1] **CUMBERBATCH, HON. FRANCIS M., J:** The Appellant was convicted for the offence of Damage to Property contrary to section 132 (1) of the *Criminal Code*¹ Chapter 101 of the Substantive laws of Belize Revised Edition 2011 by then Chief Magistrate Sharon Fraser. He was sentenced to a fine of four hundred dollars (\$400.00) to be paid by the 30 April 2023, in default whereof he shall serve a period of imprisonment of six (6) months. He was also ordered to pay compensation to the Government of Belize in the sum of four hundred eighty-eight dollars (\$488.00) by the 31 March 2023, in default whereof he shall be liable to distress.
- [2] On 7 February 2023, the Appellant filed a notice of appeal against the conviction and sentence aforesaid citing the following grounds:

Grounds of Appeal

1. The decision was erroneous in point of law.
2. The decision was unreasonable or could not be supported having regard to the evidence.
3. The decision was based on a wrong principle or was such that the Inferior Court viewing the circumstances reasonably could not properly have so decided.
4. Some specific illegality, substantially affecting the merits of the case was committed in the course of the proceedings.
5. The sentence was unduly severe.

¹CAP 101 of the Substantive Laws of Belize Revised Edition 2020 section 132.- (1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of a crime.

- [3] At the hearing of this appeal it was conceded by Crown Counsel that the Appellant was not granted a sufficient opportunity to retain counsel to conduct his defence. Moreover, the record does not disclose that at the close of the Crown's case the Appellant was advised about his electives before he proceeded to testify in his defence.
- [4] After having been found guilty there is nothing on the record to indicate that the Appellant was advised that he had the right to call witnesses to testify on his behalf before he is sentenced.
- [5] Accordingly, it was not surprising that Crown Counsel conceded that the appeal should be allowed on the grounds aforesaid, however, the Crown submitted that a retrial should be ordered.

Retrial

- [6] The *dictum* of Lord Diplock in the Privy Council in the decision of ***Dennis Reid v The Queen***² PC Appeal No. 37 of 1977 is most instructive on the applicable principles in the court's consideration of whether a retrial should be ordered. Lord Diplock opined thus:

"The interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge in the conduct of the trial or his summing-up to the jury. There are, of course, countervailing interests of justice which must also be taken into

² Privy Council in the decision of ***Dennis Reid v The Queen*** PC Appeal No. 37 of 1977 pages 4 – 5 paras. 3 and 4

consideration. The nature and strength of these will vary from case to case. One of these is the observance of a basic principle that underlines the adversary system under which criminal cases are conducted in jurisdictions which follow the procedure of the common law: it is for the prosecution to prove the case against the accused. It is the prosecution's function, and not part of the functions of the court, to decide what evidence to adduce and what-facts to elicit from the witnesses it decides to call. In contrast the judge's function is to control the trial, to see that the proper procedure is followed, and to hold the balance evenly between prosecution and defence during the course of the hearing and in his summing-up to the jury. He is entitled, if he considers it appropriate, himself to put questions to the witnesses to clarify answers that they have given to counsel for the parties; but he is not under any duty to do so, and where, as in the instant case, the parties are represented by competent and experienced counsel it is generally prudent to leave them to conduct their respective cases in their own way.

It would conflict with the basic principle that in every criminal trial it is for the prosecution to prove its case against the accused, if a new trial were ordered in cases where at the original trial the evidence which the prosecution had chosen to adduce was insufficient to justify a conviction by any reasonable jury which had been properly directed. In such a case whether or not the jury's verdict of guilty was induced by some misdirection of the judge at the trial is immaterial; the governing reason

why the verdict must be set aside is because the prosecution having chosen to bring the accused to trial has failed to adduce sufficient evidence to justify convicting him of the offence with which he has been charged. To order a new trial would be to give the prosecution a second chance to make good the evidential deficiencies in its case—and, if a second chance, why not a third? To do so would, in their Lordships' view, amount to an error of principle in the exercise of the power under s. 14(2) of the Judicature (Appellate Jurisdiction) Act, 1962”.

- [7] This *dictum* was applied by the C/A of the ECSC in the decision of **Sherfield Bowen v The Queen**³ Criminal Appeal No. 4 of 2005. Rawlings JA (as he then was) opined thus at para 46:

“The question which arises is whether this case should be remitted to the High Court for a retrial. In Andre Bennett and Another v The Queen,²⁷ the Privy Council reiterated that the issue of a retrial order depends upon whether the interest of justice and the public interest would be served by such an order. The main consideration is whether in the interest of the community and the family of the victim, a person who is convicted of a serious crime should be brought to justice and not escape merely because of some technical shortcoming in the conduct of the trial or in directions to the jury. Their Lordships said that a critical factor is the seriousness of the crime. A countervailing consideration is fairness to the Accused”.

³Court of Appeal of the ECSC in the decision of **Sherfield Bowen v The Queen** Criminal Appeal No. 4 of 2005 at page 18 para 46.

[8] The question to be determined by this court is whether the interests of justice and the maintenance of law and order in places to which the public have access would be served by a retrial. The court must also consider whether an order for a retrial would be unfair to the Appellant.

[9] This is a serious incident of a police officer allegedly destroying the door of a Governmental department by the use of force and violence in public. I have reviewed the evidence adduced at the trial of the appellant and find same bereft of complicated issues. The alleged incident occurred during daylight hours within the view of a witness who had been dealing with the appellant shortly prior to its occurrence.

[10] In the circumstances, I do not find that holding a retrial would be unfair to the Appellant. I find that the interests of justice would be served by a retrial.

Accordingly, the court orders:

1. That the appeal is allowed, and the conviction and sentence are set aside.
2. The court orders that the Crown is at liberty to proceed with a retrial which shall be heard expeditiously.

Hon. Mr. F M Cumberbatch

Justice of the High Courts