

IN THE COURT OF APPEAL OF BELIZE, A.D. 2008
CRIMINAL APPEAL NO. 1 OF 2008

BETWEEN:

SANTIAGO ESTRADA

Appellant

AND

THE QUEEN

Respondent

BEFORE:

The Hon. Mr. Justice Mottley	-	President
The Hon. Mr. Justice Carey	-	Justice of Appeal
The Hon. Mr. Justice Morrison	-	Justice of Appeal

Mr. Anthony Sylvestre for appellant.

Ms. Cheryl-Lynn Branker-Taitt, Deputy Director of Public Prosecutions for the Crown.

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11 June & 17 October 2008

CAREY, JA:

1. On 11 June 2008, this court acting pursuant to powers conferred by section 31(4) of the Court of Appeal Act, Cap. 90, instead of allowing or dismissing the appeal, substituted for the verdict returned by the jury of guilty of “maim” (section 82 Criminal Code Cap. 101), a judgment of guilty of “unlawful wounding” (section 80 Cap. 101). We promised to put our reasons in writing and hand these down at a later date. We now do so.

2. The appellant was convicted of the offence of causing “a maim to James Jackson” before Lord J and a jury and sentenced to a term of five years’ imprisonment.
3. The facts may be shortly stated and were as follows: the incident which culminated in the eventual charge, started in a bar called “The Purple Toucan”, when the appellant used racial slurs to Jackson who pushed him. A police officer who was present, intervened. Jackson left for his home followed by the appellant. There, a confrontation took place between both men. The appellant came at Jackson with a machete but the latter used his bicycle as a shield to ward off chops aimed at him. They eventually fell to the ground as Jackson attempted to disarm the appellant. In the course of this tussle, the appellant bit off a piece of Jackson’s right ear. Jackson managed to take the machete away and struck the appellant, who then ran off. The police arrived and the injured man was taken to the hospital where he was treated.
4. The defence did not deny that Jackson’s ear ‘got into the appellant’s mouth’. That suggestion was put to the victim in cross-examination. The appellant acknowledged under oath that there was a confrontation between both men involving a machete. There came a time when both men were on the ground and neither of them had the machete. Jackson was on top of him looking for something to chop or kill him. When Jackson turned his head, his ear came close to him, so he bit a piece of his ear. That was the only way, he thought that Jackson “would have left him”. In short he was defending himself.
5. We would remind that the charge was causing a maim to James Jackson. “Maim” is defined in the Criminal Code, (Cap. 101 section 96) as – “the destruction or permanent disabling of any external or internal organ, member or sense”

The admitted fact in this case was that the appellant amputated a piece of the victim's right ear with his teeth. It is as clear as can be, that the definition of maim had not been satisfied. The ear is, no one doubts, an organ: it is the organ of hearing. However, that organ, was neither destroyed nor permanently disabled. The doctor described the injury inflicted as a "cut wound". There was no evidence that the victim's auditory faculties were in any way impaired. It is a matter of no little surprise therefore, that this inescapable fact was appreciated neither by the prosecuting counsel, defence counsel, nor the trial judge himself. We suspect that the prosecutor may have been led astray by the doctor's classification of the injury as maim. We note that on two occasions prosecuting counsel asked the doctor in the course of examination-in-chief to state the classification he attributed to the injury. On the first, it was designated "grievous" and on the second, he stated – "maim". We have no hesitation in saying that these questions were improper. The answer to the question being asked is for the determination of the jury, after appropriate directions by the judge not the medical expert. There appears to be some extant practice where counsel for the Crown as a matter of course asks this question regarding classification without objection from the defence or any expostulation or discussion on the part of trial judges. We wish to state that this practice, as such it appears to be, is without any jurisprudential base, and should cease.

6. Two of the three grounds of appeal filed on behalf of the appellant which dealt with this question of maim, were framed thus:
 - (i) The verdict could not be supported having regard to the definition of the offence of maim in section 96 of the Criminal Code and the evidence adduced at trial.

(ii) The learned trial judge failed to fully and adequately direct the jury on the elements of the offence of maim and in the circumstances led to a miscarriage of justice.

The third ground of appeal was, we fear, devoid of merit and we do not propose to deal with it. It is right to note that Mr. Sylvestre who argued the appeal before us, on behalf of the appellant was not counsel below. He accepted that the appellant having admitted biting off a piece of the victim's ear, the only issue for the jury was whether he was defending himself. The jury by its verdict, plainly rejected that defence. He was then constrained to concede that section 31(2) of the Court of Appeal Act, Cap. 90, was applicable to the circumstances.

7. In our judgment, the jury could on the indictment have found the appellant guilty of unlawful wounding, contrary to section 80 of the Criminal Code, Cap. 101. There were facts of which the jury must have been satisfied, which proved the appellant guilty of that offence. We heard submissions in mitigation of sentence after we had substituted for the verdict returned, a judgment of guilty of unlawful wounding. We imposed a sentence of twelve months' imprisonment as being proportionate to the offence committed.
8. Before parting with this case, we are obliged, regrettably to, comment on an irregularity which took place in the course of the trial. One of the duties imposed on a trial judge, is to advise an accused person of the options open to him when he comes to make his defence. It should not, we would have thought, be necessary to have to state that it should be performed correctly and not perfunctorily.

The judge said this at p. 92:-

“I will, Mr. Estrada, I am required by law to tell you that you have three choice (sic), the first choice is you can remain silent, you need not say anything and it cannot be held against him. The second choice is, you can tell us your side of the story or give evidence as we call it, from two places. You can give evidence from where you are now in the witness box, or you can make it at the prisoner’s box and give evidence from there. If you choose to give evidence from there, it would be unsworn evidence, counsel cannot ask you any questions if you remain at the prisoner’s box. I can ask question for clarification. If you choose to be sworn in on the Bible, everything you say will be taken down in writing, and counsel can ask you questions if you choose to give evidences (sic) from the witness stand”.

It is enough to say that this statement was, sadly infelicitous in language, but more importantly, imprecise and inaccurate in point of law. Little care seemed to have been taken. It was all most unfortunate and unacceptable. We took the opportunity recently to enjoin trial judges to be alive to their responsibility in the case of *R. v David McKoy C.A. 30/07 (unreported) dated 26 October 2007*. We commend what we said there (para. 17) to the attention of trial judges, to be regarded as *de rigueur*.

MOTTLEY P

CAREY JA

MORRISON JA