

**IN THE COURT OF APPEAL OF BELIZE, A.D. 2007**

**CRIMINAL APPEAL NO. 8 OF 2007**

**BETWEEN:**

**RENE LOPEZ MORENTES**

**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**

Oswald Twist for Appellant

Cheryl-Lyn Branker-Taitt, Deputy Director of Public Prosecutions for Respondent

9, 19 June & 17 October 2008.

**MOTTLEY, P.**

[1] On 19 June 2008 we allowed this appeal and ordered a new trial. At that time, we promised to put our reasons for so doing into writing. These are those reasons.

[2] The appellant along with another person was indicted for murdering Mary Jane Blondell on 25 July 2004, contrary to section 117 of the Criminal Code Cap 101 (“the Code”). On the second count of the indictment, the

appellant was also charged with the offence of aggravated burglary contrary to section 149(1) (b) of the Code. The particulars of crime alleged that, on 25 July 2004, being armed with a knife, he entered the dwelling house of Mary Jane Blondell as a trespasser and stole a chain. The other person with whom he was charged on count 1 of the indictment, was separately charged in the third count of the indictment with entering the dwelling house as a trespasser and stealing a gold chain.

[3] At the trial, the jury was unable to reach a verdict on the first count of murder but returned a majority verdict of guilty in respect of the second count. The appellant was sentenced to a term of imprisonment for 10 years. It was from this conviction that the appellant appealed.

[4] In view of the order for a new trial, we refrain from commenting on the evidence as this is not necessary for the disposition of the appeal. Counsel for the appellant filed and argued four grounds of appeal. In view of the approach adopted by this Court, we do not consider that it is necessary to deal with those grounds. In so doing, we mean no disrespect to counsel.

[5] During the course of the argument, the court sua sponte requested that it be addressed on the issue whether an indictment which contains a count for murder may also contain counts charging offences other than murder. Our decision relates to this issue. In other words, since the appellant had been convicted by a jury consisting of twelve persons could the conviction on the second count of the indictment, be maintained.

[6] Section 21 of the Juries Act Cap 128 (the Act) provides for the number of jurors to be empanelled for the trial of criminal cases. Section 21(1) of the

Act deals with the trial of cases for offences punishable by death. The subsection states:

S.21(1) “For the trial of the issue in every criminal cause in which the accused person is arraigned for an offence punishable with death, the jury shall consist of twelve persons and the verdict of that jury shall be unanimous.....”

[7] Section 21(2) of the Act deals with the trial of person charged with offences other than punishable with death. The subsection states:

S.21(2) “For the trial of the issue in every criminal cause in which the accused person is arraigned for an offence not punishable by death, the jury shall consist of nine persons and that jury may, on or after the expiration of two hours from the time when it retired to consider its verdict return a verdict whenever it is agreed in the proportions of eight to one or seven to two and that verdict when so delivered shall have the same effect as if the whole jury had concurred therein.”

[8] In subsection (1). it is stated that in cases punishable by death i.e. murder cases “the jury shall consist of twelve persons”. Subsection 2 which deals with all other cases and provides that “the jury shall consist of nine persons”. The use of the word “shall” clearly indicates that these provisions are mandatory. Section 58 of the Interpretation Act Cap 1 states that the word “shall”, when used in an enactment, shall be construed as imperative. No discretion therefore exists under section 21(1) and (2) for a court to depart from these provisions. They must be observed and followed.

[9] This issue engaged the attention of the Judicial Committee of the Privy Council in **Cottle and another v The Queen [1977] AC**, **Seeraj Ajodha & Others v The State (1981) 32 WIR 360** and the Court of Appeal in **Jamaica in R v McLeish (1980) 31(2) WIR 315**.

[10] In **Cottle v The Queen** (supra), the Judicial Committee of the Privy Council considered the provisions of the Jury Ordinance of St. Vincent and the Grenadines which made provisions for different modes of trial for capital and non-capital offences. In a capital trial, the Ordinance provided for trial by a jury of twelve persons whereas in a non-capital case, the Ordinance provided that the jury shall consist of nine persons. The appellants had been charged in one indictment which contained three counts. Lord Diplock, in giving the opinion of the Board said at p. 327:

“It is thus unlawful in St. Vincent for capital and non-capital offense to be tried together by the same jury. This is now conceded by the Crown.”

Later the Law Lord said, also at p. 327:

“The notices of appeal did not include any submissions that the trial was irregular upon the ground that a capital and non-capital offence had been tried together by a jury of twelve persons. It was the Court of Appeal itself which took this point in the course of the hearing. They held, correctly in their Lordships’ view, that the trial of the appellants by a jury of twelve on the non-capital counts was contrary to the provisions of the Jury Ordinance.”

[11] In **Seeraj Ajodha & Others v The State (1981) 32 WIR 360**, the appellant had been indicted with counts charging him with robbery and rape

along with murder. Section 16 of the Juries Act of Trinidad and Tobago stated that trial of murder all be by a jury of twelve persons, while trials for all other offences to be by a jury of nine persons. Lord Bridge of Harwich said at p. 373:

“It is settled that a trial before a jury of twelve of an indictment in which counts for lesser offences are misjoined with a count for murder invalidates any conviction of the lesser offences; but not the conviction for murder. **Gransaul and Ferreira v R (1979)** an unreported decision of this Board.”

[12] In **R v McLeish**, the Court of Appeal in Jamaica considered the provision of the Jury Act which provided that trials on indictment for murder and treason were to be heard before a jury consisting of twelve persons. In all other trials, the jury shall consist of seven persons. Henry JA in delivering the judgment of the court, said at p. 315:

“It is clear from these sections that different modes of trial by jury are provided for capital and non-capital offences and that non-capital offences cannot be tried by a twelve-man jury.”

[13] In the Privy Council case **Richard Dale Maye v The Queen**, Privy Council Appeal No 104 of 2006 (delivered on 1 July 2008) Lord Brown of Eaton – under – Heywood reaffirmed the position in the Caribbean in respect of trial of capital and non- capital cases. In paragraph 11 of the judgment, Lord Brown observed:

“11.... Nor, however, could she be tried for manslaughter at the same hearing as the appellant was to be retried for murder. Section 31 of the Jury Act provides that in Jamaica (in common with most other Caribbean countries) trials for murderous treason

are by twelve jurors, trial of other criminal charges are by seven. It is settled law that these provisions are mandatory and their constitutionality is not challenged on this appeal.”

[14] Having regard to these authorities, and from the mandatory nature of the provisions of section 21(1) and (2) of the Juries Act, it is clear that the offence of murder which is still punishable by death and non-capital offences cannot be tried together. Consequently, the Court holds that the trial of the appellant by a jury of twelve persons on a charge of aggravated burglary is not permitted by the Jury act. In the circumstances we held that the trial was a nullity and ordered a new trial.

[15] The Deputy Director of Public Prosecutions referred to section 21(3) of the Juries Act Cap. 128. The subsections provides:

“S21(3) Notwithstanding anything contained in this section, it shall be lawful for the judge presiding over the trial of any criminal cause in which the accused person is arraigned for an offence not punishable with death, to direct whenever in his opinion such a course would serve the end of justice, that the cause be tried by a jury consisting of twelve persons, and that jury may, on or after the expiration of two hours from the time when it retired to consider its verdict, return a verdict whenever it is agreed in the proportion of eleven to one or ten to two, and that verdict when so delivered shall have the same effect as if the whole jury had concurred therein.”

[16] This subsection gives the judge a discretion to direct that a person who is charged with an offence not punishable by death to be tried by a jury of

twelve persons notwithstanding the provision of subsection (2). In exercising this discretion, the judge must take into account the ends of justice. In any event, before exercising his discretion, the judge must inform counsel for the prosecution and defence that he is considering empanelling a jury of twelve persons to try the accused and invite their submissions on the proposed course of actions. The record does not indicate that such a procedure was adopted in this case. The Deputy Director however, in her written submissions, submitted that the record did not reflect that the judge specifically addressed his mind to the provision of subsection (3), (as the judge presided over the trial, it could only have been by his direction that the jury of twelve persons was empanelled to try the cause in relation to both counts of the indictment). The Deputy Director however conceded that the issue of trial of a non-capital offence by a jury consisting of twelve persons ought to have been specifically addressed by the judge and in so doing ought to have heard submissions from the prosecution and the defendant. Absent these submissions, the provisions of this subsection are not therefore applicable in the circumstances of this case.

The trial on the second count is in these circumstances a nullity and consequently the conviction cannot be maintained. In the result the Court order a new trial.

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**MOTTLEY P**

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**CAREY JA**

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**MORRISON JA**