IN THE COURT OF APPEAL OF BELIZE AD 2022

CRIMINAL APPEAL NO. 18 OF 2018

BETWEEN:

KEITH GAYNAIR **APPELLANT**

V.

THE QUEEN **RESPONDENT**

BEFORE THE HONOURABLE:

Madam Justice Minnet Hafiz Bertram	**President P (Ag)**
Madam Justice Marguerite Woodstock-Riley	**Justice of Appeal**
Mr. Justice Peter Foster	**Justice of Appeal**

Appearances:

Mr. Anthony Sylvester for the appellant

Ms. Sheiniza S. Smith for the respondent

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4 October 2021 and 18 January 2022

REASONS FOR JUDGMENT

HAFIZ BERTRAM P (Ag)

Introduction

[1] This is an appeal against the judgment of Lord J, sitting without a jury, on an indictment charging Keith Gaynair ('the appellant') for the murder of Darrel Wade Jr. ('Wade'). The appellant was acquitted of murder and found guilty of manslaughter for stabbing Wade which resulted in his death. He was sentenced

to 15 years imprisonment. The sole ground of appeal was whether the trial judge erred in directing himself on the law of self-defence. The appellant had relied entirely on self-defence as provided under *section 36(4) of the Criminal Code Chapter 101* of the Laws of Belize ('*the Criminal Code*'). The trial judge rejected the defence of self-defence under section *36(4).* On the evidence, the judge found that the case was one of partial excuse commonly referred to as excessive harm in self-defence and applied *section 119(b) of the Criminal Code.* The effect of that subsection was to reduce murder to manslaughter in intentional killing where the appellant in causing harm in excess of the harm which he was justified in causing, acted from terror of immediate death or grievous harm which deprived him of the power of self-control.

[2] The Court had concluded, after hearing the appeal on 4 October 2021, that the trial judge had not erred when he directed himself on the law of selfdefence. In the opinion of the Court, it was reasonable for the trial judge to find on the evidence that the appellant had used excessive harm in self-defence and as such he was not entitled to the defence of self-defence and a full acquittal. The Court concluded that Lord J correctly applied *section 119(b) of the Criminal Code* and reduced intentional homicide to manslaughter. The appeal was therefore dismissed and the Court promised, and now gives, its reasons for judgment.

The facts

[3] The appellant was indicted for murder, contrary to section 117 read along with section *106(1) of the Criminal Code.* It was alleged that on 24 September 2013, at Orange Walk Town, the appellant murdered Wade, by stabbing him in the chest with a knife. The cause of death was exsanguination due to a stab wound to the heart.

[4] The trial judge, sitting without a jury, commenced trial on 27 June 2018 for the offence of murder. The case was closed on the 11 July 2018 and the

judge reserved his decision. On 3 October 2018, he found that the appellant was not guilty for the offence of murder but guilty for the offence of manslaughter. Lord J found that the appellant had the specific intention to kill but pursuant to *section 119(b) of the Criminal Code* (partial defence) reduced the intentional homicide to manslaughter. On 22 January 2019, the appellant was sentenced to 15 years imprisonment, less the time spent in custody. The appellant had been on remand for a period of 5 years and 4 months. The judge took this time into consideration and deducted the time spent in custody from the 15 years. The appellant was therefore sentenced to serve, with effect from 22 January 2019, the balance of 9 years and 8 months' imprisonment.

[5] The appellant appealed his conviction and on 14 February 2020, filed six grounds of appeal, but later abandoned all, except one. The sole ground remaining was that "*The learned trial judge erred in directing himself on the law of self- defence."*

The case for the Prosecution at trial

[6] The Prosecution relied on several witnesses to prove that it was the appellant who caused the harm to Wade which resulted in his death. The prosecution's case was that there was no lawful justification for the intentional killing. The evidence in relation to how the stabbing occurred is relevant for present purposes. The witnesses were Gabriel Perez, Gregorio Lino, Priscilla Mejia, and Alberto August.

[7] Mr. Perez testified that he saw three young students standing at the corner of Santa Cecilia Street, when he heard the appellant say "da you" and he pulled a knife from his pants waist and ran towards the male students. The Appellant pushed a dark-skinned student (Wade) who fell to the ground with his bicycle.

Wade then pulled a chain which he believed was used for locking the bicycle and ran behind the appellant with the chain in hand. At that time, the appellant was chasing a fair skinned student who fell to the ground. The appellant made a stabbing motion towards the fair skinned student but was interrupted when Wade hit him from behind with the chain. The appellant turned around and made a stabbing motion which caught Wade to the right side of the chest. The appellant then pulled back the knife and cleaned it with his shirt. Mr. Perez then assisted Wade who had been bleeding profusely.

[8] Mr. Lino testified that he, Wade and Albert Vargas walked out of school and Wade was holding his bicycle. They were walking down the street when two male individuals approached them and one of them stopped and said, "*weh di go on with you.*" Then he repeated, "*weh di f… di go on with you".* He saw the appellant pulled a knife from his pants waist. He also saw Wade whopped the appellant one time on the back as he was chasing Albert. The appellant thereafter stabbed Wade.

[9] Ms. Mejia testified that she was selling corn at the back gate of the People's Stadium located on Stadium Street, Orange Walk Town. Wade and another student ordered corn and cream from her and thereafter she heard a male person shouting "*it is you I want".* When she turned she saw that it was the appellant and he pulled out a knife from his left pants waist and went after the male student. The three male students ran in different directions. The appellant then went after Wade and did a stabbing motion with the knife and he (Wade) dropped near a bicycle. She stated that Wade hit the appellant with the bicycle chain behind his neck and the appellant stabbed the student again.

[10] Mr. August testified that the appellant said to the students "*weh unu di watch pan*". He pulled out a knife from his pants, about 10 to 12 inches in length, and ran towards the students. When he turned around he heard Wade said

"*Ah"* and his uniform shirt turned red. He assisted Wade until he was taken to the hospital by the lady who sold corn.

The case for the appellant at trial

[11] The case for the appellant as shown by his caution statement and unsworn statement was self-defence. The caution statement was admitted into evidence without objection from the defence. In that caution statement, he stated that he was by the gate at the Stadium and was talking to his brother. As he was about to leave, he heard some students cursing. He heard one of them say to his brother: "*watch pan this one yah weh the f… di go on with you, weh you the watch pan."* The appellant then responded, "*weh th go on with unu*." The appellant stated that there were three young men and one of the young men took out a knife from inside his bag and began to approach his brother in a threatening manner. The appellant said he took out a knife for protection and approached the students. He heard his brother yelled, "*bwai Keith lookout*." The appellant stated that he turned around quickly to defend himself with his knife in hand and the young man had a chain in his hand and **touched him when he turned.**

[12] The appellant stated that as he turned quickly, Wade was already swinging the chain so he lifted up his left hand and with the same quick turn, Wade was so close to him and "*with the speed he was coming with,"* Wade ran into him. The appellant stated that he felt the knife penetrate Wade and he pulled it out quickly.

[13] The appellant gave an **unsworn statement from the dock** where he said:

"I am just here today to state the facts of what happened on 24 September 2013.

I went to pick up my common law at Technical High School because she is a teacher. At that time we were walking towards Stadium Street to go home. I saw my brother bring my son from school because he went to pick up my son.

I met up with him and I engaged in a conversation with him.

I then went to my son and asked him about school and then I heard some students utter some words and I then heard my brother utter some words as well. That caught my attention. I turned around to see what was happening and then I saw three adult male students walking in the direction towards me and my brother, and then I saw one of the male students reached into his bag and pulled out what appeared to be a knife and one of the next students that was along with him had a chain with a lock in his hand.

So I told my brother what was happening. I saw them still advancing. That is when I took out my knife from the side of my pants and then I told my brother to please get my son away from here, to please take home my son.

I had my attention on my son and my brother and then I heard my brother told me to look out. I turned around quickly and that is when one of the male students ran into me and then whop me in my face with the lock and chain, and then advanced again into me rapidly with his hand up. It appears to me that he wanted to hit me again with the lock. That is how he got stab, and then I saw the male person ran away.

I also wanted to say that I was in fear for my life and my loved ones; and I was just trying to protect my brother and myself; and I had no intention to kill that person; none whatsoever. I was just protecting myself."

The appeal

Whether the trial judge erred in directing himself on the law of self-defence

[14] The sole ground of appeal relied upon by the appellant was that Lord J erred in directing himself on the law of self-defence. Further, the contention for the appellant was that the judge erred in his finding of facts when he stated that the appellant was not injured. It will be shown below that the trial judge was not equating the word 'injured' with the word 'whopping'. Lord J was quite aware that the appellant was whopped with a bicycle chain that had a lock and thereafter he defended himself by stabbing Wade. The judge applied the commonsense

approach and thoroughly perused the statements made by the appellant but, there was no mention by him that he received injuries from the whopping.

Section 36 of the Criminal Code – self-defence

[15] *Section 36 of the Criminal Code,* so far as relevant to this case, sets out the limits in which force or harm is justifiable and constitutes a defence to a criminal charge. The judge directed himself to section **36(4) (c)** and **(k)** which provides:

> "(4) For the prevention of or for the defence of himself or of any other person against any of the following crimes, a person may justify the use of necessary force or harm, extending in case of extreme necessity even to killing, namely,
>
> ……
>
> (c) Murder
>
> ……
>
> (k) Dangerous or grievous harm."

[16] Learned counsel, Mr Sylvester for the appellant submitted that from the appellant's unsworn statement at trial and his caution statement, he raised the defence of self-defence. As such, there was evidence on which the defence of selfdefence ought to have been considered by the judge. Counsel relied on the case of **May Bush v The Queen**, Criminal Appeal No. 5 of 2014, at paragraph 4, where it was stated by this Court that:

> "In **Shaw v The Queen** [2001] UKPC 26, their Lordships held that in a case of murder, where from the evidence before the jury there was any reasonably possible justification under the Criminal Code, the trial judge was under a duty to give the jury a **specific direction on the effect of the subsection,** the evidence relevant to the application of its provisions and the burden on the prosecution to negative justification under the subsection, regardless of whether the defence was raised as an issue at trial or not."

[17] Mr. Sylvester further submitted at paragraph 15 of his written submissions that the vexed questions were whether the trial judge, consonant with his duty shown at paragraph 4 of the **May Bush** case, directed himself on the effect of the provisions of section 36 of the Criminal Code, considered the evidence relevant to the application of this provision and directed himself on the duty of the prosecution to negative the issue of self-defence.

The trial judge's direction to himself on self-defence

[18] Lord J noted that in closing submissions by the defense counsel, he specifically raised the defence of self-defence. The judge directed himself to look at the situation not based on the objective view of the facts but the subjective view of the appellant. The judge then considered the appellant's unsworn statement from the dock. He noted that defense counsel in his closing submission at trial contended that the appellant was defending himself and his brother. The trial judge accepted that the appellant could have believed, even if mistakenly, that he was defending himself and another. He therefore, directed himself to section 36(4)
(c) and (k) of the Criminal Code which provides that "for the prevention or for the defence of himself or any other person against any of the following crimes, a person may justify the use of *necessary force* or harm extended to killing, namely, 'murder' (section 36(4)(c), 'dangerous or grievous harm' (section 36(4)(k)." The judge considered the evidence which justified the use of necessary force.

[19] Lord J also considered the principles in the cases relied upon by defence counsel, that is, **Beckford v R** , 1988 AC 130 and **Palmer v R**, 16 WIR 499, in relation to self-defence. The judge directed himself that a man who is attacked may defend himself. Further, a man who believes he is under attack cannot be expected to weigh the niceties of how he will respond. Lord J said:

> "What we have here, there is no contention the person (Wade) came at Keith Gaynair (appellant) with a weapon 1 ½ foot long (bicycle chain with lock). He was **whopped** and then the stabbing happened."

[20] The judge then reminded himself that it was for the **prosecution to negative self-defence** and must do so beyond a reasonable doubt. He relied on the case of **Gonzalo Rivas v R**, Crim App 2 of 1983, where it is stated:

> "That the jury should be told that the burden of proof remains on the prosecution, but the defence does not have to prove that the accused was acting in selfdefence, that the prosecution must negative that possibility and must do so beyond a reasonable doubt."

[21] Lord J further reminded himself that it must be explained that if the jury has any reasonable doubt that the appellant was acting in self-defence then they must resolve that doubt in favor of the appellant and acquit. In this case, he directed himself, sitting alone. The judge did not accept the case for the prosecution that there was no lawful justification for the appellant to stab Wade.

[22] The trial judge also informed himself on the principles in the case of **Palmer** where the Privy Council stated:

> "In self-defence you have to consider that there was an attack upon the accused and that as a result the accused must have believed on reasonable grounds that he was in imminent danger of death or serious bodily harm. The force used by the accused must have been to protect himself from death or serious bodily injury or from reasonable apprehension of it induced by the words and conduct of his attacker even though the latter may not have in fact intended death or serious bodily injury. So it is not a question of what the attacker intended <u>but did the accused have a reasonable apprehension that he was in danger of death or serious bodily harm; imminent danger was impending."</u>

[23] Lord J thereafter noted to himself, that from the unsworn statement of the appellant, he stated that he was defending himself, his brother and son, and he believed that he was in imminent danger. He further noted that the appellant stated in his unsworn statement that he was in fear of his life and his loved ones and so he was just trying to protect himself and his brother. The judge further noted that the appellant stated that he was **whopped in the face by Wade,** "*who advanced again into himself with his hand up. It appears to me that he wanted to hit me again with the lock. That is how he got stab."*

[24] Lord J having informed himself of the relevant principles in self-defence, considered the evidence and followed the approach in the oft cited case of **Norman Shaw v The Queen,** Privy Council Appeal No. 58 of 2000. (1) *Did the accused honestly believe or may have believed that it was necessary to defend himself?* and

(2) *If so, and taking all the circumstances and dangers as the appellant honestly believed them to be, was the amount of force which he used reasonable*?

Did the appellant honestly believe or may have believed that it was necessary to defend himself?

[25] Lord J applied the subjective test as stated in **Norman Shaw.** That test highlighted by Lord Bingham of Cornhill at paragraph 21 as:

> "21 …it was not the actual existence of a threat but the appellant's belief as to the existence of a threat which mattered".

[26] Lord J considered the evidence and found that the appellant *honestly* believed or may have believed that it was necessary to defend himself. The judge accepted the evidence that the appellant advanced towards the students and thereafter, he was hit with the chain by Wade. He considered the appellant's

unsworn statement which showed that he acted from what he perceived at the beginning of the altercation and during the altercation. The judge stated that even if the appellant had a mistaken belief he cannot be faulted for it because he was defending himself and another.

Taking all the circumstances and dangers as the appellant honestly believed them to be, was the amount of force which he used reasonable?

[27] The answer to the second question was answered in the negative by the trial judge. The reasonableness of the force used ought to be viewed objectively and the judge found that the appellant used excessive force in self-defence and the force was not reasonable. The judge considered the circumstances surrounding the incident and the danger the appellant perceived. Further, he considered the appellant's caution statement and his unsworn statement when he considered the reasonableness of the force used. He also considered if the appellant was injured because of the whopping with the chain. He stated:

> "It is noted that **nowhere in his caution statement or in his unsworn statement from the dock, did the accused claim to have been injured by the deceased during this encounter/altercation**."

[28] Lord J considered the evidence of Mr. Eugenio Gomez of the National Forensic Science Service by whom the exhibits were tested. That evidence showed that the knife used by the appellant to stab Wade was approximately 13 ½ inches in length, the blade was 8 ½ inches and the handle approximately 5 inches in length.

[29] The trial judge also considered the evidence of Dr. Hugh Sanchez who performed the postmortem on the body of Wade. Dr. Sanchez's evidence showed the amount of force used to cut the 5th rib was severe to massive for the cartilage to be completely severed and the rib to be deeply grooved. This evidence was unchallenged. The evidence also showed that the wound severed the "*sixth costal*

cartilage and grooving the lower border of the fifth rib damaging the right lower lobe of the right lung and traversing the pericardium (the cover of the heart)."

[30] The trial judge analyzed the evidence by looking at the instrument used which was a knife, the kind of knife and the length of the knife, the force used by the appellant, even though he could not calculate in the moment of the incident the kind of force to use in defence of himself. The judge considered the evidence which showed that Wade had a chain with a lock as stated by the appellant in his unsworn statement and the evidence of the prosecution. The judge stated that the stabbing of Wade, by the appellant in defending himself, when taken as a whole, was excessive in the circumstances of the case. The stab wound was not a minor one and because of the instrument used, it was an extremely major penetrating wound resulting in almost immediate death to the deceased, Wade.

[31] Lord J further stated that, "it is again noted that **nowhere in this (accused) unsworn statement or caution statement did (he) the defendant ever claim or stated to have been injured by the deceased."** He noted that the stab wound was not minor and because of the instrument used, it was an extremely major penetrating wound resulting in Wade's almost immediate death. He found that in the circumstances there was **excessive force in self-defence and this force was not reasonable.**

Did the trial judge err in his application of the principles in **Norman Shaw** in answering the second question?

[32] Learned counsel, Mr. Sylvester contended that the trial judge correctly stated the principles in Norman **Shaw** case, however, he erred in the application of those principles which resulted in a grave miscarriage of justice. As such, the appellant was **denied of the opportunity of a full acquittal** and therefore, the appeal should be allowed.

[33] Mr. Sylvester submitted that in answering the second question in **Shaw's** case, ("*taking all the circumstances and dangers as the appellant honestly believed them to be the amount of force which he used reasonable*?), the trial judge made two erroneous factual findings. He referred to page 224 and 225 of the record where the judge stated:

"It is noted that **nowhere in his caution statement or in his unsworn statement from the dock, did the accused claim to have been injured by the deceased during this encounter/altercation**."

"Further, it is again noted that **nowhere in this (accused) unsworn statement or caution statement did (he) the defendant ever claim or stated to have been injured by the deceased."**

[34] Counsel argued that the above factual findings are grossly erroneous as the appellant in his unsworn statement said he was injured by Wade. Counsel referred the Court to that part of the statement which shows that the appellant was whopped in his face with the lock and chain.

[35] The Court was of the view that the trial judge had not erred in his finding of facts as he accepted the statement of the appellant that he was whopped. There was no mention of injuries by the appellant. As submitted by Ms. Smith, the trial judge indeed fully appreciated that the appellant was hit by Wade with the bicycle chain that had a lock. It was for this reason that there was an examination and proper consideration of the defence of self-defence by the trial judge and his finding that the appellant used excessive force or force that was not necessary in the circumstances of the case. The judge did not accept that this was a case of accident or provocation.

[36] The Court was not in agreement with the submissions by learned counsel, Mr. Sylvester that there were two erroneous factual findings by the trial judge and

that the appellant was denied of the opportunity of a full acquittal. The Court agreed with Ms. Smith that the words used by the trial judge was an observation that in the caution statement and the unsworn statement, though there is mention of being whopped and being hit from behind by Wade, there is no specific mention that he was injured. Further, as Ms. Smith submitted, the judge did not lose sight of the fact or failed to appreciate that the appellant was hit by the deceased prior to the stabbing. The Court agreed with Ms. Smith that the judge was merely observing that though the appellant said he was hit with the chain and lock, he never stated whether he received any injuries.

[37] The Court noted that the judge thoroughly examined the statements of the appellant to see if there was specific mention of injuries sustained as a result of the whopping. The Court also observed that there was no mention of injuries in the caution statement nor in the unsworn statement of the appellant.

[38] Further, the Court noted that in the caution statement and the dock statement of the appellant, he gave two different versions in relation to the use of the chain by Wade. In the statement under caution he stated: "*He touched me with the chain."* In the dock statement he said he was hit. There was no mention of specific injuries or rather, no mention of the extent of the force used by Wade or no mention of the force the appellant apprehended that he had to defend against. The judge could only have considered what was before him and not make speculations as to injuries sustained by the appellant.

[39] In the opinion of the Court, Lord J properly directed himself on the effect of the provisions of section 36 of the Criminal Code and considered the evidence relevant to the application of that provision. The trial judge having found that there was excessive harm in self-defence, rightly rejected the defence of selfdefence. This Court has no reason to interfere with the findings of the judge on the use of excessive force.

[40] Mr. Sylvester submitted that the 4-prong test in **Norman Shaw** should only be undertaken if it is found that the force used was unreasonable. Learned counsel made no further submissions on the test. The Court will briefly address the 4 questions and answers and the application of section 119(b) of the Criminal Code which led to a conviction of the appellant of manslaughter.

Section 117 of the Criminal Code - partial excuse

[41] Section 117 of the Criminal Code provides for murder to be reduced to manslaughter, by reason of extreme provocation or other **partial excuse** as follows:

> *"117. Every person who intentionally causes the death of another by any unlawful harm is **guilty of murder, unless his crime is reduced to manslaughter** by reason of such extreme provocation, or other matter of **partial excuse** as in the next following sections mentioned."*

Section 119 of the Criminal Code - excessive harm in self-defence

[42] The partial excuse in section 117 is provided for in section 119 of the Criminal Code. Excessive harm in self-defence is one of those set out therein. It provides, so far as relevant:

> "119. A person who **intentionally causes the death** of another person by unlawful harm shall be deemed to be guilty only of **manslaughter and not of murder**, if there is such evidence as raises a reasonable doubt as to whether –
>
> (a) …
>
> (b) He was **justified in causing some harm** to the other person, and that **in causing harm in excess of the harm which he was justified in causing he acted from such terror of immediate**

death or grievous harm as in fact deprived him, for the time being of the power of self-control; or ….

[43] The appellant did not rely on *section 119(b)*, but it was incumbent on the trial judge to consider that subsection based on his finding of excessive harm caused by the appellant in self-defence. The onus of disproving justification under *section 119(b),* if such justification arises on the evidence, is on the prosecution and not the appellant as shown in the case of **Norman Shaw.** The prosecution in its closing arguments had argued against lawful justification which was rejected by the trial judge. Lord J found that there was evidence that justification under *section 119(b)* exists and directed himself on considering same.

Application of section 119(b) to the intentional killing of Wade

[44] The judge found that the force used by the appellant was unreasonable for reasons shown above. He properly directed himself on the principles to be applied in circumstances of excessive force in self-defence. He relied on the principles in **Norman Shaw; Cleon Smith v The Queen** [2001] UKPC 27, Privy Council; and **Shane Juarez v The Queen,** Belize Criminal Appeal No. 5 of 2010.

[45] In **Juarez**, the Court said at paragraph 9 that:

"9. …..This was clearly a case of the type of which Lord Bingham of Cornhill was speaking when, giving the judgment of the Board in *Norman Shaw v The Queen*, Privy Council Appeal No. 58 of 2000, on 24 May 2001, he said, at para 28:

> 'Cases may arise in which, for reasons good or bad, a defendant may choose to present the jury with a stark choice between convicting of murder and acquitting.'"

[46] Lord J further advised himself as to what the trial judge and the Prosecution must keep in mind in this type of case, as shown at paragraph 10 of the **Juarez case**, where Lord Bingham stated in **Norman Shaw's** case:

'….[T]he state has an interest in ensuring that defendants are convicted of the crimes which they have in truth committed, which may (depending on the jury's assessment of the facts of a particular case) be manslaughter.'

The four questions the judge posed to himself

[47] The four questions which Lord J asked himself, as stated in **Norman Shaw**, were:

(1) Was there evidence of a situation in which the appellant was justified in causing some harm to Wade?

(2) Was there evidence that the appellant had caused harm in excess of the harm he was justified in causing?

(3) Was there evidence that the appellant was acting from terror of immediate death or grievous harm when acting as he did? and

(4) Was there evidence that such terror (if found possibly to have existed) deprived the appellant for the time being of his power of selfcontrol?

[48] The trial judge having considered the evidence answered all the questions in the affirmative and applied *section 119(b),* thereby reducing the charge of murder to manslaughter.

First question: *Was there evidence of a situation in which the appellant was justified in causing some harm to the deceased?*

[49] Lord J considered the evidence of the prosecution witnesses and the case for the appellant. The caution statement and the unsworn statement of the appellant gave two versions as to how the stabbing occurred as already

discussed. In the caution statement the appellant stated that Wade hit him with a chain in his face and then advanced into him rapidly with his hand up and it appeared to the appellant that he (Wade) wanted to hit him again and then Wade "got stabbed". The trial judge accepted that the appellant perceived his life was threatened or the appellant (even if mistakenly or unreasonably), believed it to be threatened, as shown in his unsworn statement. The Court had no reason to interfere with the trial judge's affirmative answer that the appellant was justified in causing some harm.

Second question*: Was there evidence that the appellant had caused harm more than the harm he was justified in causing?*

[50] The trial judge accepted that there was justification but the harm was excessive. This Court has no reason to interfere with the finding of the trial judge. The appellant was hit in his face with a chain and lock wielded by Wade and the appellant reacted and stabbed him, as shown in the unsworn statement.

The judge informed himself of the injuries to Wade as:

> "*This turned out to be massive force using an excessively long knife, its blade size 8 1/2 inches which was wielded with such force it completely severed the cartilage, the rib was deeply grooved, the right lung being damaged and the heart also being injured with that one stab wound which the force is described as severe to massive force."*

Third question: *Was there evidence that the appellant was acting from terror of immediate death or grievous harm when acting as he did?*

[51] Lord J correctly reminded himself of the **subjective nature** of this test as was stated by Lord Clarke in the case of **Kirk Gordon v The Queen** [2010] UKPC

18. The trial judge reminded himself that the ordinary or reasonable man has no role to play in the partial defense introduced by *section 119(b)* of the Criminal Code. The judge noted that the appellant in his unsworn statement stated that he was in fear of his life and the life of his loved ones, and he was just trying to protect his brother and himself. The judge considered the statement made by the appellant that he was hailed by his brother and on turning around, one of the male persons ran into him, whopped him in the face with a lock and chain and then advanced against him with his hand up. It appeared to the appellant that the person (Wade) wanted to hit him again with the lock. In the view of the Court, the judge rightly inferred from the statement that the appellant was in fear of his life and another and the further inference being that is how Wade was stabbed. Hence the affirmative answer by the trial judge that the appellant was acting from terror of immediate death or grievous harm.

Fourth question: *Was there evidence that such terror (if found possibly to have existed) deprived the accused for the time being of his power of self-control?*

[52] The trial judge in considering this question applied the principles in **Norman Shaw**. That is, the appellant's response to the incident may have been also a wild and panic response to a perceived threat (real or misconceived) causing him to stab Wade "*so severely or massively …in the right area of the chest during the incident on 24 September 2013."* The trial judge correctly concluded on the evidence that the question should be answered affirmatively.

Murder reduced to manslaughter

[53] In the view of the Court, the trial judge correctly stated that the effect of *section 119(b) of the Criminal Code* is to reduce the charge of murder to manslaughter when the above questions are answered affirmatively.

[54] Lord J then considered the unsworn statement and the caution statement of the appellant and the submissions from defence and prosecution counsel. The prosecution did not negative justification under *section 119(b).* Having considered the

evidence and the application of the law to such evidence, he held that the partial defense under *section 119(b)* prevailed and was accepted by him. As such, the trial judge found that the defense of self-defence under *section 36(4) of the Criminal Code* failed and was not accepted. Further, that *section 119(b)* reduced intentional homicide to manslaughter. The Court had no reason to fault the trial judge.

Disposition

[55] It was for the above reasons that the appeal was dismissed, and the judgment of the trial judge affirmed.

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HAFIZ BERTRAM P (Ag)

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WOODSTOCK-RILEY JA

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FOSTER JA