IN THE COURT OF APPEAL OF BELIZE AD 2022
CRIMINAL APPEAL NO. 26 OF 2018

BETWEEN:

PHIL STAINE **APPELLANT**

V

THE QUEEN **RESPONDENT**

BEFORE THE HONOURABLE:

Madam Justice Minnet Hafiz Bertram **President P (Ag)**
Madam Justice Marguerite Woodstock-Riley **Justice of Appeal**
Madam Justice Sandra Minott-Phillips **Justice of Appeal**

Appearances:

Hubert E. Elrington SC and Norman C. Rodriguez for the Appellant
Cheryl-Lynn Vidal SC for the Respondent

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5 October 2021
Promulgated on 5 May 2022

JUDGMENT

HAFIZ BERTRAM P (Ag)

Introduction

[1] This is an appeal against the judgment of Lucas J, as he was then ('the trial judge'), sitting without a jury, on an indictment which charged Phil Staine ('the appellant') and two of his brothers for the offence of murder of Denver Villanfranco ('the deceased'). The Appellant was convicted of the alternative statutory offence of manslaughter and sentenced to 20 years imprisonment, less

time spent on remand. He appealed his conviction and sentence. The four grounds of appeal filed related only to the conviction. The first ground of appeal is that the verdict of the trial judge is unreasonable and cannot be supported by the evidence. The remaining three grounds of appeal relate to issues of fact.

Factual Background

[2] On 17 January 2015, there was a fight at the corner of Sunflower Street and Complex Avenue, involving four persons which resulted in the stabbing death of the deceased. The appellant and his two brothers, Orlando Staine ('first accused') and Kareem Staine (third accused') were charged for murder, contrary to section 117 read along with *section 106(1) of the Criminal Code, Chapter 101* of the Substantive Laws of Belize (Revised Edition) 2011 ('the Criminal Code'). It was alleged that the first accused and the appellant and the third accused, murdered the deceased on 17 January 2015, in Belize City.

[3] The trial in the Supreme Court of Belize was between the 3 September 2018 and 13 December 2018. On 5 November 2018, the learned trial judge returned a verdict of guilty of manslaughter against the appellant and acquitted the other two accused. On 13 December 2018, the learned trial judge imposed a sentence of imprisonment on the appellant for a term of 20 years, less three years and seven months which he had spent on remand.

[4] This Court heard the appeal on 5 October 2021 and reserved its decision. The majority has decided to dismiss the appeal for reasons to follow.

The case for the Prosecution at trial

[5] The prosecution relied on the testimonies of Rolando Ayala ('Ayala'), Selvin Castillo ('Selvin') and the deposition of Anthonette Hemsley ('Ms. Hemsley'), who was living abroad at the time of the trial, to prove the identities of the persons who were involved in the beating of the deceased. The cause of death was determined by Dr. Hugh Sanchez who performed the post mortem on the deceased. He testified as to the cause of death, the injuries he saw on the

body of the deceased and the type of weapon, in his opinion, that could have caused the injuries. Also, that only one of those injuries caused the death of the deceased.

[6] Ayala testified that on 17 January 2015, about 7.15 pm, he was sitting under a mango tree on Complex Avenue. He had a small pint of rum from which he had taken two drinks. At the time, he was along with Roberto Velasquez. The deceased went there and asked him to open a bottle of stout for him. He did so and the deceased walked away on Complex Avenue in the direction of Mahogany Street. He testified that five minutes later the deceased returned to the spot under the mango tree. He said that the "Estrada Brothers", (the three accused) were in front of their yard on Complex Avenue. Ayala knew one of the brothers as Kareem Estrada, the other by his alias Spoon (the appellant). He did not know the name of the third brother, which the trial judge referred to as the "unknown name". Ayala testified that one of the Estrada brothers walked to where they were sitting under the mango tree and when he saw the deceased he returned to his yard. Thereafter, the deceased left and upon reaching the corner of Complex Avenue Street and Sunflower Street, which is about 70 feet away from the mango tree, the three Estrada brothers surrounded him.

[7] Ayala further testified that Kareem had a machete three (3) feet in length and he used it to hit the deceased but, he could not see which part of his body he was hit. The appellant, whom he identified in court as Spoon, "*had a shine blade when he stabbed Denver*" (the deceased). He testified that he did not know which part of the body the deceased was stabbed. Further, that the unknown named person (Orlando Staine) lashed the deceased with a crowbar which caused him to drop in a drain. Ayala did not see on which part of the deceased body was hit. He said that when the deceased fell, the three of them beat him and the deceased could not do anything because he was already in the drain. The three Estrada brothers then ran away and entered a black pickup motor vehicle and drove off.

[8] Selvin testified that the three accused men were well known to him and he was in their company up to the time of the incident. Kareem Staine had informed

the appellant and Orlando that he was beaten up the night before and the appellant was visibly upset. He said that he saw Kareem slam a machete and a foot long knife on the hood of the truck on which he was sitting. He testified that thereafter a young man passed and a fight started with the three accused men. During the fight, Kareem went back to the hood of the truck and he retrieved the knife and the machete and handed the knife to Phil and he kept the machete. Thereafter Phil stabbed the young man to the abdomen.

[9] Miss Hemsley gave a statement to Police Inspector Westby on the 18 January 2015 and Mr. Anthony Hemsley, her father, was present when the statement was recorded. During the trial, Mr Hemsley deposed that his daughter, Miss Hemsley departed Belize by aircraft on 24 June 2015, to the United States of America and has not returned to Belize and has no intention to return to Belize. The trial judge admitted the statement of Miss Hemsley. There was no objection by defense counsel to the admission of the statement and to the reading of the statement by the Marshall of the court, into evidence as Inspector Westby was ill.

[10] Miss Hemsley's statement stated that one of the Estrada brothers with a swollen face had stabbed the deceased with a shiny object whilst he was in the drain. Further, another Estrada brother had a machete but did not use it. She saw the appellant run towards the deceased who was at the corner of Complex Avenue and Sunflower Street and they began to fight and shortly after the deceased fell to the ground. When he fell, two other Estrada brothers attacked him and he fell in the drain. She stated that while the deceased was on the ground the Estrada brother with the swollen face went towards him with a shiny object, about 3 inches in blade length and struck him to the right side of his body.

[11] Miss Hemsley, at the identification parade held on 19 January 2015, did not identify the swollen face person (who is not the appellant). She identified the second accused as Punce who was fighting with the deceased and the first accused as one of the brothers who was also beating the deceased.

The medical evidence

[12] Dr. Hugh Sanchez testified that on 20 January 2015, he conducted a postmortem examination on the body of Denver Villafranco, the deceased. He found:

> "[a] gaping wound to the right side of the abdomen 4 1/2 x 2 centimeters which was located to the right mid side of the abdomen in line with his navel through which the mesentery (the apron of the abdomen, a flat sheet of fat that keeps things in the abdomen) extrude.
>
> On turning the body over a cut wound was found under the left shoulder measuring 3 x 0.7 centimeters and finally, a laceration injury to the back of the head.
>
> Significant internal examination findings revealed that **stab wound to the right side of the abdomen went upwards and backwards damaging the large intestine …. and finally through the abdominal aorta resulting in 800 mLs of blood in the abdominal cavity.**
>
> Based on those findings I conclude that Mr. Denver Villafranco died from exsanguination due to stab wound to the aorta.
>
> In my opinion the gaping wound is a penetratory wound and based on the size of it, could be **caused by a knife, a pointed machete**. The depth of the wound would be about 7 inches. The instrument used could be 7 inches in length but could be more."
> (Emphasis added)

[13] Dr. Sanchez further testified that he used knife and machete as synonymous. (The trial judge used the word 'knife' in relation to the appellant who had the shiny blade and made the penetrating wound). Dr. Sanchez said that the force used to cause the injury to the deceased was moderate to severe. The injury to the shoulder could have been a knife or machete wound but not a penetrating wound. Further, he testified that the injury to the back of the head is difficult to access because it had bruising with two parallel lacerations separated from each other. It could be that he was hit on his head with a bat or a stout bottle.

The case for the appellant at trial

[14] The appellant gave a dock statement. He stated that on 17 January 2015, he was about to visit his brother Kareem at his house located on Complex Avenue and as he was approaching from the direction of Sunflower Street, he noticed a dark male person outside Kareem's fence. The person was trying to throw a stout bottle at Kareem and he quickly rushed over so as the prevent him from doing so. He further stated that by the time he reached, the person had thrown the bottle and then he rushed and grabbed him. Thereafter, he stated that they started to throw punches at each other and "*struggle up the street a little*." He further stated that:

> "Then later ending up on the other side of the street, Complex Avenue in the drain. After we fell in the drain, I was still punching the male person when I feel someone pulled my shirt . I noticed that it was Kareem. He said, "alright", "alright". I then get up and walk back to the yard. Kareem went in the yard and walked pass the truck and went into the back of the truck and tell Selvin, "Let's go from here."

[15] The appellant further stated that Selvin drove the truck to an apartment building that is located behind Lakers Night Club. Selvin and Orlando got off the truck and went to the back and whilst they were talking, Selvin pulled out a knife from a scabbard around his waist and said, "*wah good juck ah give the man."* He said that Selvin held the knife and showed it to them. He further stated that he "saw *about 3 inches to four inches of blood on the point of the knife. I then get frightened. I asked him, "where you juck the man?" He said in his belly. I then said to him, "boy this serious, police wah come look for we, best we goh home."* He stated that they then boarded the truck and went home. That was the last time he saw Selvin until the day in the courtroom for the trial.

The findings of the trial judge

[16] The trial judge was satisfied that the Prosecution had proved its case beyond a reasonable doubt. At page 292, line 17, of his judgment, the trial judge said: "*I believe the evidence of Mr. Rolando Ayala. He saw the second accused (Phil Staine) stab Denver"* (the deceased).

[17] In relation to the type of weapon used by the appellant and the other two accused the trial judge relied on the evidence of Ayala. He said that Ayala's evidence indicated that the first accused, hit the deceased with a machete, the appellant had a knife with which he stabbed the deceased, and the third accused hit the deceased with a crow bar.

[18] The trial judge also accepted the evidence of Dr. Hugh Sanchez as to the cause of death and the type of instrument that could have been used to cause the injuries. As to the nature of the injuries and the degree of force used to inflict the stab wound, the trial judge relied on the opinion of Dr. Sanchez who said that the force deployed to cause the fatal injury to the deceased was moderate to severe. The inference drawn by the trial judge from these two set of circumstances was the one more favourable to the accused. That is, moderate force was used by the appellant when he stabbed the deceased.

[19] At page 294 of the judgment, the trial judge found that he was sure from the evidence that the appellant inflicted the fatal injury to the deceased. However, taking into consideration the opinion of Dr. Sanchez as to the uncertainty of the degree of force used, he was not sure he had an intention to cause death. He therefore found the accused not guilty of murder but, guilty of manslaughter. He found the appellant caused harm which was unjustifiable as the deceased was unarmed.

[20] The evidence of Selvin was rejected by the trial judge. He found that his evidence which was given under oath was inconsistent with his statement which he gave to Detective Navarro on 11 April 2015. The trial judge also rejected Ms. Hemsley's statement which had been admitted in her absence, because he did not find her evidence believable.

[21] Further, the trial judge did not believe the dock statement of the appellant that Selvin stabbed the deceased and caused his death. No weight was placed on that statement by the judge.

The grounds of appeal against conviction only

[22] There were four grounds of appeal filed on the 6 May 2021, only in relation to the conviction of the appellant. The first ground of appeal was that the verdict was against the weight of the evidence. An application was made by Mr. Elrington for this ground to be amended at the hearing of the appeal to read that "*the verdict was unreasonable and cannot be supported by the evidence."* This will be discussed further below. The second, third and fourth grounds in summary are: (1) The trial judge relied on conflicting evidence in relation to the identification of the appellant; (2) The trial judge inferred that a blade of three inches caused the injury to the deceased; and (3) The prosecution had to prove that the knife possessed by the appellant could have made a seven inch long wound.

[23] The Director opposed the appeal on the grounds that:

(1) The trial judge was sitting in a trial without a jury and was the judge of both the law and the fact. Therefore, it was within the discretion of the trial judge to accept or reject any of the evidence led in the case.

(2) The Court is empowered to allow an appeal if it thinks that the verdict is unreasonable or cannot be supported by the evidence or for any other reason as provided by section 30(1) of the COA Act. The appellant has not demonstrated any such reason. Further, the function of an appellate court in an appeal from the verdict of a judge who sat alone, is not to substitute its own view of the evidence; and

(3) the verdict of the trial judge was justified on the evidence which he accepted and relied upon.

Function and powers of a judge sitting alone

[24] The trial judge in the instant matter sat without a jury. Section 65A of the **Indictable Procedure Act**, Chapter 96 of the Substantive Laws of Belize

(Revised Edition) 2011 (IP Act) makes provision for trial without a jury. Section 65D states the power of the judge as follows:

> "65D. Where a trial is conducted without a jury, the judge shall have all power, authority and jurisdiction which he would have had if the trial had been conducted with a jury, including the power to determine any question and to make any finding which would have been required to be determined or made by a jury."

[25] In the case of **Hernan Manzanero v The Queen** [2020] CCJ 17 (AJ) BZ, the Caribbean Court of Justice (CCJ) stated that the judge decides everything when sitting without a jury. The CCJ said:

> "[21] One of the principal differences between a judge alone trial and a jury trial is that in the former the judge decides everything. The issues arising at any *voir dire,* as well as all the issues of fact and of law in the main trial, are all naturally for the judge when the latter sits without a jury."

[26] A trial judge sitting without a jury, having seen and heard the witnesses is entitled to accept evidence which is credible and reliable and reject evidence which is unreliable. Where there is conflicting evidence, the judge sitting alone has "to *decide how reliable, honest and accurate each witness is*". See *Crown Court Compendium Part I December 2020 Judicial College 4.1 to 4-3.* (The directions given to a jury is applicable to judges sitting alone).

The verdict was against the evidence – Inaccurate wording

[27] As indicated above, the first ground was that "*the verdict was against the evidence*". This is not a sufficient ground of appeal as there must be strict compliance with *section 30(1) of the Court of Appeal Act, Chapter 90* of the Laws of Belize (Revised Edition) 2011 ('the COA Act'). At the hearing of the appeal, the Director indicated very early that this ground does not fall anywhere under the COA Act. In the case of **Samuel Aladesuru and others v The Queen**, Privy Council Appeal, No. 45 of 1954, relied upon by the Director, it was held that in order for an appellant to succeed, it must be shown that the verdict is

"*unreasonable or cannot be supported having regard to the evidence"*, as shown in the words of the statute. The words "*the verdict is against the weight of the evidence*," are inaccurate and cannot properly be substituted for the words of the statute.

[28] Learned counsel, Mr. Elrington agreed with the Director and sought leave of the Court to amend his ground to read that his submissions fell under *section 30(1) of the COA Act*. This Court allowed the amendment thereby bringing the ground in line with the wording of section 30(1) of the COA Act (set out below).

Power of the appellate Court to allow an appeal - section 30(1) of COA Act

[29] Section 30(1) gives the Court of Appeal the power to allow an appeal if it thinks the verdict of a jury or judge should be set aside on certain grounds. In this case, the trial judge sat without a jury. (In accordance with section *65E of the IP Act,* "*the verdict of the jury"* is to be read as "*the verdict of the judge*.") Section 30(1) of the COA Act provides:

> "30. (1) The court on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury (judge) should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal." (emphasis added)

Ground 1: Whether the verdict of the trial judge is unreasonable or cannot be supported by the evidence

[30] On an appeal against conviction, the Court is empowered to allow it if it is shown by the appellant that the verdict of the trial judge is unreasonable or cannot be supported by the evidence, or on any other ground in section 30(1) of the COA Act. The trial judge sat without a jury and had the power to decide

issues of fact and law as shown by *section 65D of the IP Act.* See also **Manzanero's case** where the CCJ opined those issues of fact and law are for the judge when sitting without a jury.

[31] In the present case, the trial judge found the appellant not guilty of murder but, guilty of the statutory alternative offence of manslaughter; a finding he based on his conclusions of the evidence. The judge accepted and rejected evidence for the Prosecution, in finding the appellant guilty of manslaughter. The appellant has not advanced any argument to impugn the decision of the trial judge in relation to the evidence he accepted as reliable and that he rejected as unreliable. As for the defence, the trial judge did not believe the dock statement of the appellant.

[32] The experienced trial judge relied on Ayala's evidence which he found to be credible and reliable that it was the appellant who stabbed the deceased. One of the roles of a trial judge, sitting without a jury, is to determine which evidence is reliable and which is not. This Court did not have the same advantages as the trial judge who, having seen and heard the witnesses, made his determination. He also relied on the evidence of Dr. Sanchez as to the cause of death of the deceased. There were no inconsistencies in the evidence of Ayala and Dr. Sanchez. Ayala's evidence established that the appellant unlawfully stabbed the deceased. The evidence of Dr. Sanchez established that the deceased died from *exsanguination due to* ***stab wound*** *to the aorta.* The view of the Court is that there was sufficient evidence to support the determination of the trial judge which he arrived at following a correct application of the relevant legal principles.

[33] In **Aladesuru's** case, the role of the Court of Appeal was also considered when hearing appeals. This is an appeal from the West African Court of Appeal and the Board considered the same section, as section 30(1) of the Belize COA Act, in the West African Court of Appeal Ordinance of the Laws of Nigeria. At page 2 of the judgment, after setting out the section, the Board said:

> "It will be observed that the language of the Ordinance follows that of the English Criminal Appeal Act 1907 under which it has long been established that the appeal is not by way of rehearing as in civil cases on appeals from a Judge sitting alone but is a limited appeal which precludes the court from reviewing the evidence and making its own valuation thereof. The position is correctly stated at page 346 of the 33rd edition of Archbold's Criminal Pleading Evidence and Practice as follows:
>
> > "In order to succeed an appellant must show, in the words of the statute, that the verdict is unreasonable or cannot be supported having regard to the evidence. It is not a sufficient ground of appeal to allege that the verdict is against the weight of the evidence."

[34] In the case of **Attorney General for Jersey v O'Brien** [2006] UKPC 14, the Privy Council considered the ground that the verdict could not "*be supported having regard to the evidence."* In that case the Jurats found evidence against the appellant in respect of laundering proceeds of drug trafficking. Subsequently, the Court of Appeal set aside the conviction and sentence for want of evidence. The Privy Council in considering whether the approach of the Court of Appeal was correct said that court was not entitled to disturb the verdict. At paragraph 25 it is stated:

> **"[25]** In the present case, if the Court of Appeal was saying that there was no case to answer after the prosecution evidence, not only was that not the ground of appeal, it was without any basis; the prosecution's evidence raised a compelling *prima facie* case, which could be dispelled, if at all, only by oral evidence from Mrs O'Brien. If the Court of Appeal was (as its references to Mrs O'Brien's evidence suggests) looking at the matter after all the evidence, their Lordships consider that the Court of Appeal simply usurped the function of the Jurats. They tried the case on the written record and allowed the appeal because, on their own somewhat imperfect understanding of the prosecution's case, they would not have convicted. Although they said that they had reviewed the evidence "separately and together", there is little indication that they had regard to the cumulative weight of the various items of evidence, to each of which they had, sometimes not altogether plausibly, assigned a possible innocent explanation. It is in the nature of circumstantial evidence that single items of evidence may each be capable of an innocent explanation but, taken together, establish guilt beyond reasonable doubt. The Jurats also had the opportunity to see Mr and Mrs O'Brien and the police witnesses give evidence. They disbelieved Mr and Mrs O'Brien. The Court of Appeal did not have the same advantages and their Lordships consider that they were not entitled to disturb the verdict ….":
> (emphasis added).

[35] The trial judge in the instant matter advised himself that the evidence adduced by the Prosecution must be beyond a reasonable doubt as to the guilt of each of the accused. He said, "***I believe the evidence of Mr Rolando Ayala. He saw the second accused (Phil Staine) stab Denver."*** This Court sees no basis for interfering with the verdict of the trial judge which was based on the credibility of Ayala's evidence and the medical opinion of Dr. Sanchez.

[36] The evidence for the Prosecution was carefully assessed by the trial judge. He did not rely solely on Ayala's evidence to find the appellant guilty of manslaughter. He also considered the evidence of Dr. Sanchez whose opinion was that the cause of death was as a result of stab wound which was a penetrating wound. Although Ayala did not see which part of the deceased's body was stabbed as shown by his evidence, it is the view of this Court, that this is not fatal to the case for the Prosecution. The appellant was the one who made the stabbing motion with the shiny blade. Further, there was supporting evidence from Dr. Sanchez on the nature of the three injuries and only one of those was a stab wound – the fatal injury.

[37] Senior counsel, Mr. Elrington in oral submissions contended that the verdict of the trial judge cannot be supported by the evidence. However, there was no challenge by the appellant of the acceptance by the trial judge of the witnesses, Ayala and Dr. Sanchez.

[38] Further, the trial judge explained the reason why the evidence of the Prosecution witnesses, Selvin and the statement of Ms. Hemsley were rejected by him. He found that Selvin's evidence which was given under oath was inconsistent with his statement which he gave to Detective Navarro on 11 April 2015. At page 289- 290 of the record, the judge referred to the evidence of Selvin and the inconsistencies with his statement. The judge pointed out the following discrepancies:

> "1. In his (Selvin) evidence he said that he saw Kareem Staine (the third accused) hand a knife to Phil Staine (second accused); his written

statement was drawn to his attention there was no mention of third accused handing a knife to the second accused.

2. In his testimony he said that he saw Phil Staine stab the young man to the left side of the body. When his statement was shown to him he agreed that it contained that Phil Staine was punching the young man and not stabbing him."

[39] The trial judge then said:

> "The incompatibleness between Castillo's (Selvin) testimony and his statement given to the police are serious inconsistencies and his testimony as it relates to seeing the second accused (the appellant) injuring the person on his left side is a grave discrepancy with the testimonies of Mr Ayala and of Dr. Hugh Sanchez, the pathologists who described the fatal injury to the right side of Villafranco's body. The inconsistencies and the discrepancy were not satisfactorily explained by Selvin Castillo. **Therefore, his testimony with regard to the person who injured Villafranco and the third accused handing of the knife to the second accused adversely affect Castillo's (Selvin) credibility on those issues and consequently, I will not utilize Castillo's (Selvin) testimony in regard to them."**

[40] As for Ms. Hemsley's statement, the judge did not find her evidence believable. He said:

> "Miss Hemsley's written statement has the shortcomings which were highlighted in **Emerson Eagan v The Queen,** Criminal Appeal No. 10 of 2012. Her statement was not given under oath; neither accused nor his legal representative was present to cross-examine her. Additionally, I found a major discrepancy between the content of her statement and with that of Rolando Ayala's testimony. Miss Hemsley identified one of the three persons who was fighting with Dean and who stabbed Dean had a swollen face. This is inconsistent with the evidence of Ayala. He did not describe any of the Estrada brothers with a swollen face. I find Miss Anthonette Hemsley's statement unreliable and therefore it is not in the interest of justice to factor her statement in my deliberation."

[41] This Court is of the view that there is no reason to fault the trial judge for rejecting the evidence of Selvin and Ms. Hemsley's statement. Where there is

conflicting evidence it is for the trial judge to "*decide how reliable, honest and accurate each witness is*". (See para. 26).

[42] As for the Defence, the trial judge explained why he rejected the defence of the appellant. He analysed the dock statement of the appellant and the two other accused. He gave each statement the weight he thought it deserved. The judge did not believe accused number one and the appellant, that Selvin Castillo told them he stabbed the deceased with a knife and caused his death. He believed the evidence of Ayala which showed that it was the appellant and the two other accused that were involved in the fight with the deceased.

[43] The trial judge also analysed the evidence and explained why accused number one and number three were acquitted and the appellant was found guilty of manslaughter. The trial judge said that there was no evidence to prove that they had knowledge that the appellant was armed with a knife. Further, even if they knew, there is no evidence that they knew or had the foresight that the appellant would use the knife to kill the deceased. The trial judge considered that each of the three accused were armed with different weapons. The first accused hit the deceased with a crow bar and the third accused hit the deceased with a machete. The appellant had the knife which he used to stab the deceased.

[44] In ***Phillips & Lutchman v The Queen*** (1969) 14 WIR 460, relied upon by the Director to support her arguments, the Court of Appeal of Trinidad and Tobago, discussed when the Court will set aside a verdict on a question of fact alone. In order to succeed the appellant must show in the words of the statute that the verdict is unreasonable or cannot be supported by the evidence. It was held in that case that the Court of Appeal in Trinidad and Tobago will set aside a verdict on a question of fact alone only where the verdict was obviously and palpably wrong. In the instant matter, this Court has no reason to fault the trial judge on his conclusions on the evidence which he accepted as credible and reliable.

[45] This Court can only interfere with the verdict of the trial judge which was based on his conclusions of the evidence if the verdict itself is unreasonable or

cannot be supported by the evidence which he found to be credible and reliable. In our opinion, the appellant has not demonstrated that the verdict of the trial judge was unreasonable or cannot be supported by the evidence as shown in the wording of section 30(1) of the COA Act. The unchallenged evidence of Ayala and Dr. Sanchez entitled the trial judge to properly convict the appellant of the offence of manslaughter.

Ground 2: Whether the trial judge relied on conflicting evidence in relation to identification of the appellant

[46] The appellant's second ground of appeal is that the evidence of identification of the person who inflicted the fatal wound was not consistent. Mr. Elrington in oral submissions contended that the verdict of the trial judge cannot be supported having regard to the evidence. That the prosecution brought two witnesses to prove who inflicted the fatal wound and these witnesses gave conflicting testimony as to who inflicted that wound. Further, this conflicting evidence raised a reasonable doubt which the trial judge should have resolved in favor of the accused and he failed to do so.

[47] Mr. Elrington in oral submissions referred to the evidence of Dr. Sanchez in relation to the weapon that could have caused the injury to the abdomen of the deceased, and contended that there was no evidence that the appellant throughout the confrontation had in his possession such a weapon. Further, he submitted that the evidence shows that another accused who was acquitted had such a weapon in his hands during the fight. He submitted that it was the accused, Kareem Estrada, the person with the machete, who inflicted the fatal injury.

[48] In his written and oral submissions, Mr. Elrington did not address the inconsistencies of the evidence which he argued the trial judge relied upon in relation to identification of the appellant. The judgment of the trial judge shows that he rejected the evidence of Selvin Castillo and Ms. Hemsley. The appellant has not advanced any argument to impugn the decision of the trial judge to reject these witnesses. The judge relied only on the evidence of Ayala who identified

the appellant as the person who stabbed the deceased and the supporting medical evidence from Dr. Sanchez. In the view of this Court, there were no inconsistencies in the evidence of these witnesses which the trial judge accepted and relied upon to convict the appellant. Ayala has not given evidence as to the dimensions of the knife which the appellant used to stab the deceased and he clearly testified that he not see which area of the body was stabbed. Further, he did not testify which hand the deceased held the knife when the stabbing occurred. Dr. Sanchez gave an opinion as to length of the knife based on the depth of the injury to the abdomen. The evidence of Ayala and Dr. Sanchez remain unchallenged. In the opinion of the Court, the complaint about inconsistencies in the evidence relied upon by the trial judge to convict the appellant has not been established.

Ground 3: Whether the trial judge inferred that a blade of 3 inches caused the injury to the deceased?

[49] The ground as framed by the appellant is that the learned trial judge "*erred and was wrong in law in inferring that the knife with a blade of three (3) inches could have made the cut wound described by the doctor which the doctor said was made by a blade of at least seven inches in length. The only instrument present when the wound was inflicted that could have made the injury which the doctor described was the machete."*

[50] The Court has reviewed the judgment of the trial judge and it is our opinion that he did not make an inference that a blade of three (3) inches could have caused the injury which resulted in the death of the deceased. In fact, the trial judge made no inference about the dimensions of the blade that caused the fatal injury to the abdomen of the deceased.

[51] The trial judge rejected the statement of Ms. Hemsley who stated that whilst the deceased was on the ground, the Estrada brother with the swollen face went towards him with a shiny object about three (3) inches in blade length and struck him with the knife to the right side of his body. The judge found her

statement unreliable and therefore, he stated that it was not in the interest of justice to factor her statement in his deliberation.

[52] Mr. Elrington argued that the only instrument present when the wound was inflicted, that could have made the injury which the doctor described, was the machete. We do not agree. The evidence relied upon by the trial judge shows that there were three different weapons and the machete was used to hit the deceased. Ayala testified about stabbing with a shiny blade, hitting with a machete three (3) feet in length and lashing with a crowbar. The judge accepted and relied on Ayala's evidence. At page 65 of the record line 15 , Ayala testified:

> " [O]ne of the three brothers I know one of them as Kareem Estrada, the other I know as Spoon, but the other one I don't know his name. Kareem had a machete about three (3) feet in length. Kareem hit him (Denver) with the machete. I do not know what part of Denver's body get hit with the machete. Spoon had a shine blade when he stabbed Denver. I do not know what part of Denver's body was stabbed. I saw Denver drop to the drain. The one who I do not know his name lashed the man (Denver) with the crow bar just after Denver fell. When he fell the three of them started to beat him up. Denver could not do anything because he was already in the drain. I do not know what part of Denver's body was hit with the crowbar… "

[53] The trial judge in his judgment considered the evidence from Ayala and said in his judgment, at page 292 of the transcript:

> "Mr. Rolando Ayala's evidence indicated that the third accused hit Denver with a machete. He said Spoon (the second accused) had a knife with which he stabbed Denver. The other one, the first accused, hit Denver with a crowbar. There is insufficient evidence that accused Nos 1 and 3 knew that the accused had a knife; even if they knew, there is no evidence that each knew or had the foresight that the second accused would use the knife to kill Denver. Accused Nos 1 and 3 were engaged in otherwise beating Denver. The usage of the

knife, and not the beating with the machete and crowbar, that caused the death of Denver. Having considered all the evidence, I find accused Nos 1 and 3 not guilty of murder or of manslaughter."

[54] It can been seen from the assessment by the trial judge of Ayala's evidence, that the machete, three feet in length, was not the weapon that caused the injury which killed the deceased. The machete was used by Kareem to hit the deceased and not stab him. For this reason, Kareem was acquitted along with the accused who lashed the deceased with the crow bar. There was no evidence from Ayala as to the dimensions of the blade that was used to stab the deceased and the trial judge made no inference as to the dimensions of the blade.

Ground 4: Whether the prosecution had to prove that the knife possessed by the appellant could have made a seven inch long wound

[55] The ground of appeal as styled by counsel was that the "*prosecution failed to show that the knife possessed by the appellant could have made a seven-inch-long wound that entered at the right side of the deceased and ended upward at the aorta near to the large intestine."*

[56] Mr. Elrington submitted that the direct evidence of Dr. Sanchez was that the knife or machete which caused the wound to the aorta of the deceased had to be at least seven (7) inches in length. In fact, the opinion of Dr. Sanchez states that the instrument used "**could be 7 inches in length but could be more.**" Dr. Sanchez addressed the type of wound, depth of wound, type of instrument that could have caused such a wound, and length of instrument, as follows:

> "[t]he gaping wound is a penetratory wound and based on the size of it, could be caused by a knife, a pointed machete. The depth of the wound would be about 7 inches. **The instrument used could be 7 inches in length but could be more"**

[57] The issue to be considered under this ground is whether the Prosecution *had to prove that the knife possessed by the appellant could have made a seven inch long wound.* The Director in her submissions argued that the Prosecution had to prove beyond a reasonable doubt that the blade was in the possession of the appellant and that he used it with the requisite intent to inflict the injury sustained by the deceased. This Court agrees with the submission of the Director. In our view, the Prosecution was not required to prove as an element of the offence the actual length of the blade the appellant used to stab the deceased or that the knife possessed by the appellant could have made a wound seven inches long. It was sufficient to prove, in light of the evidence that the deceased died of a stab wound sustained in the attack on him by the three brothers and that it was the appellant who stabbed the deceased.

Disposition

[58] The appeal of the appellant is dismissed and his conviction and sentence affirmed.

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HAFIZ BERTRAM P (Ag)

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MINOTT-PHILLIPS JA