IN THE COURT OF APPEAL OF BELIZE, A. D. 2023

CRIMINAL APPEAL NO 13 OF 2019

STEVEN WILLIAMS **APPELLANT**

V

THE KING **RESPONDENT**

BEFORE:

The Hon Madam Justice Hafiz-Bertram	President
The Hon Madam Justice Minott-Phillips	Justice of Appeal
The Hon Mr. Justice Bulkan	Justice of Appeal

A Sylvestre for the appellant.
C Vidal SC, Director of Public Prosecutions, for the respondent.

9 June 2022 and 27 January 2023

JUDGMENT

BULKAN, JA

[1] The key protagonists in this matter are all well-known to each other. They lived in the Corozal district and their lives were entwined as neighbours and friends. More precisely, the appellant was the boyfriend of Yasmin, first cousin of the deceased (Sammir Richards), and for more than a year he was a regular visitor at the home where Yasmin lived with her grandmother and, it appears, the deceased. On August 4, 2015, however, relations took a darker turn, as an apparently trivial misunderstanding between the appellant and the deceased escalated dramatically, resulting in Sammir's death from a single stab wound to the abdomen. In due course the appellant was indicted for murder, contrary to s. 117 read together with s. 106(1) of the Criminal Code, Chapter 101 of the Substantive Laws of Belize, 2011. Following a judge-alone trial in 2019 he was convicted of manslaughter and sentenced to 15 years' imprisonment, though after deducting the period spent on remand the remainder to be served amounted to 10 years, 8 months and 30 days. It is from this conviction that the appellant now appeals.

[2] The evidence led at trial was sparse, and aside from the physical elements and one final utterance of the deceased, admitted as part of the res gestae, the material details – such as they were – came from the appellant himself. This was in the form of a statement given under caution to the police the day after the incident, on August 5th, 2015. Its voluntariness was contested at trial, but after conducting a *voir dire* the judge rejected allegations that the appellant was pressured or induced by a person in authority in order to speak and that he was not informed of his constitutional rights. Finding that the statement was freely and voluntarily given, the judge admitted it into evidence, and when the time came for the appellant to lead his defence, he adopted the very statement in its entirety.

[3] In that statement, the appellant spoke of an altercation between himself and the deceased, who was drunk at the time. In his telling, the deceased was at all times the aggressor, first accosting him, then slapping him, and then "rushing" at him. The deceased was trying to fight him whereas he was trying to run, and in the course thereof the deceased dropped in front of him, moaned, and he escaped. Given its centrality to the case, this statement is worth reproducing in full, as follows:

> "Between 8:00 to 8:30 I gone care a key to my gial. At the moment I was waiting, Sammir Vivas came behind me and he said, 'You bitch why you di say I thief your bike'. He also tell me he will box me. I just watched him and I smiled. Then the moment I smiled, Sammir slapped me and then he was drunk, he was under liquor. I was on my friend's bike when he slapped me. I get off the bike to go and then he rush at me, then I hauled the bike front of me so I could run and go. When I put the bike in front of me he pulled me from my shirt. He was trying to fight me and I was trying to run. He dropped in front of me and I escaped, but when he dropped he moaned then I escape. I jump on my bike and gone. It is just that."

[4] The Crown called no eye witnesses at the trial, so the appellant's version of *how* the incident unfolded stands uncontradicted. This version is as important for what it reveals as for what it conceals, given that at no time does the appellant admit to inflicting any injury on the deceased. Despite this apparent gap, however, the prosecution sought to prove this missing element by other means. First, there was the fact of death, which occurred shortly after this exchange. Several witnesses, including Gloria Hall, the deceased's grandmother, testified that the deceased came home clutching his right side. One of his aunts there at the time observed a

small puncture wound on his right side, between his breast and rib cage. An ambulance was called but by the time it arrived he was already dead. A postmortem conducted subsequently revealed the cause of death to be exsanguination due to internal bleeding, caused by a stab wound to the abdomen which severed the deceased's porta vein. The pathologist, Dr Estrado Bran, explained in his testimony that the porta vein is one of the biggest veins passing through the liver and once cut, it resulted in a massive loss of blood, which in short order led to Sammir's death.

[5] Second, the deceased's grandmother and the said aunt, who were at home when he staggered in mortally wounded, both testified that on entering he said: "Gran dem just stab me". The grandmother asked who, to which he replied "Steven". She probed further, asking which Steven, whether it was Pele's man (meaning the boyfriend of her granddaughter Yasmin, who was apparently known as Pele), to which the deceased replied in the affirmative. This account was largely echoed by the aunt, who confirmed that the deceased answered that it was Steven, "Pele's man", who had stabbed him.

[6] The trial judge conducted a thorough assessment of this statement's admissibility. He recalled the seminal authorities on the issue of res gestae such as ***R v Andrews [1987] AC 281*** and ***Ratten v R [1971] 3 All ER 801***, as well as more recent, local cases such as ***Trevor Gill v R (Cr App 15/2006)*** and ***Michael Faux v R (Cr App 3/2007)***, which identified the need to ascertain the possibility of concoction. In so doing, the longstanding approach has been to consider the circumstances in which the relevant statement was made to determine the extent to which it could be said to be unusual or dramatic, dominating the mind of the speaker and foreclosing any possibility for reflection (or concoction). In applying this test, the judge noted that the deceased's statement was spontaneously made, very close in time to the incident. Crucially, the judge also considered the possibility of error and of malice, reasoning that in spite of the deceased's level of intoxication, the former was unlikely given that the parties were known to each other, there was ample opportunity in favourable conditions to make the identification, and there was no evidence of anyone else being on the scene. As for malice, since this was not raised in evidence, there was no need for him *motu proprio* to speculate as to its existence. Accordingly, the judge concluded that the legal conditions were satisfied and admitted the statement as part of the res gestae and proof its contents. This, together with the fact that there was no one else at the scene and that the appellant confirmed that he was right there when the deceased fell and moaned, with death following very shortly thereafter, led the

trial judge to conclude, entirely reasonably one could add, that it was the appellant who inflicted the fatal stab wound on the deceased.

[7] The remaining evidence was that of context, of some significance given the nature of the defences raised. The pathologist described the deceased as "well built", 64 inches in height and 160 pounds in weight. It appeared that he had been drinking heavily on the day in question – that was obvious to the appellant who noted it when describing the events to the police in his statement the following day – but it was definitively established by tests conducted post-mortem. Ms. Diana Bol-Noble, a forensic analyst, testified on behalf of the prosecution that she analysed a specimen of the deceased's blood and found it to contain 265 ml of ethanol in 100 ml, a quantity that would produce a state of intoxication known as confusion. She explained that this category of intoxication, which was only 35 ml below the level that would render someone comatose, produces slurred speech, impaired memory, staggering when walking and vomiting, though she added the important qualifier that such effects would vary in relation to a person's tolerance for alcohol. While no evidence was led of the deceased's tolerance, there was no reason to doubt that the deceased was intoxicated.

[8] Up to this point, therefore, what the Crown had established conclusively was that Sammir Richards was dead, that he died as a result of a stab wound which severed a major blood vessel, and that the injury in question was inflicted by the appellant. What remained contested, based upon the appellant's statement, was the intention of the appellant when he inflicted the injury and, more controversially, whether in so doing he was acting unlawfully. Plainly put, was the appellant defending himself when he stabbed the deceased?

[9] On the issue of intention, the trial judge reviewed the circumstances, identifying as important the location of the injury, the degree of force that was presumably involved, and the severity of the outcome, concluding from these tangible factors that the only inference to be drawn was that the appellant intended to kill the deceased when he stabbed him. As regards self-defence, the trial judge referenced the applicable legal framework, focusing on the landmark Privy Council judgments in ***Palmer v R (1971) 16 WIR 499*** and more pertinently in ***Shaw v R (2001) 59 WIR 115***, which laid down the test governing self-defence in this jurisdiction. Applying the criteria specified in those cases to the facts, he highlighted the two essential questions identified in *Shaw*, answering the first in the affirmative but the second in the negative. This meant that in the first place, he accepted that the appellant honestly felt it

was necessary to defend himself in the circumstances. However, noting that the deceased was unarmed and that the appellant inflicted a major injury on him which almost immediately resulted in death, he concluded the use of a knife in such circumstances was unreasonable, rendering the appellant's response disproportionate to the perceived attack. For that reason, the learned judge rejected the defence of self defence.

[10] Having rejected self-defence, the judge then examined the conduct of the deceased, noting all the threats, assaults and aggression he committed against the appellant, even as the appellant was trying to leave the scene. Such conduct, he opined, amounted to extreme provocation, which was not disproven by the prosecution. As such, he found the appellant guilty of manslaughter in accordance with s. 119(a) of the Criminal Code.

[11] From this conviction the appellant initially filed eight grounds of appeal, but by the time of the hearing he relied on only five, namely that the trial judge erred as follows:

(1) in rejecting the defence of accident;
(2) in rejecting the alternative verdict of manslaughter by negligence;
(3) in failing to take all relevant matters into account in determining whether the appellant had the specific intention to kill;
(4) in directing himself on the law of self-defence and
(5) in carrying over to the main trial, his adverse conclusion of the credibility of the appellant in the *voir dire*.

This judgment focuses on ground #4, that of self-defence, but since the first two grounds can be easily disposed of, it is convenient to begin with them.

[12] The appellant's complaint as regards the judge's rejection of the defence of accident rests upon the evidence of the pathologist, Dr. Bran. In cross-examination, counsel for the appellant suggested to this witness that "You cannot say the injury was accidentally caused", to which he replied tersely, "No, I cannot". According to Mr. Sylvestre, since Dr. Estrada Bran – a medical expert – could not rule out the possibility that the injury was accidentally caused, this was evidence of accident. That argument, however, contains a logical fallacy. The doctor's testimony merely amounted to an unexplained observation that he could not say that the injury was accidentally caused, but at best that was a theoretical supposition and by itself insufficient

to raise as a viable evidential possibility that the injury was in fact or could have been accidentally caused. Had the question been framed more precisely, or had counsel probed the doctor further, allowing him to explain whether one could tell from a wound whether it was deliberate or accidental and then to elaborate what about the deceased's wound left open such a possibility (assuming that it did), then this would have been evidence upon which a tribunal of fact could act. But in its clipped, unadorned form, the suggestion and the doctor's mechanical acceptance of it was far too cryptic to be of any value. Further, aside from this meagre basis, nothing else in the facts suggested that the deceased could have sustained the injury accidentally. There was no evidence, for example, that there was any sharp protrusion anywhere in the vicinity – whether on the ground, on the bicycle, in the hands of one or both of the parties present – on which the deceased could have injured himself upon falling. In its absence, no court can supply the gap by speculation.

[13] Out of an abundance of caution it is worth repeating that while the burden of proof (and disproof as applicable) remains upon the prosecution at all times in a criminal trial, there must first be material giving rise to most defences, including accident, before they need be considered and acted upon. In ***Xavier v the State (1998) 57 WIR 342*** the Privy Council pointed out that this evidential threshold is low but must nonetheless be reached, so if the evidence on which the defence is based is slim or manifestly unbelievable, there is no obligation to leave it for the jury to consider. In ***Xavier***, they described the evidence relied upon as "fanciful and unrealistic" and so there was no obligation to consider the defence of accident. Similarly, in this case, the bare answer of the pathologist to an ambiguous suggestion, without more, provided no evidential basis for accident, and thus the trial judge cannot be faulted for rejecting this defence.

[14] For essentially the same reason the appellant's second ground holds no merit. Here the argument raised was that the judge erred by rejecting the alternative verdict of manslaughter by negligence, since it was a possibility arising from the appellant's caution statement – which, according to counsel, comprised the sole evidence in the case. However, as Mrs. Vidal S.C. pointed out, this was patently inaccurate as the caution statement was not the only evidence. There was other, positive evidence that the appellant stabbed the deceased (as discussed above, particularly at paragraphs [5]-[6]), and the trial judge explained at length why he admitted the deceased's statement as part of the *res gestae*. On the other hand, there was no other evidence from the appellant or elsewhere indicating some negligent act by the appellant leading to this

outcome – in fact, at no time did the appellant even admit to inflicting any injury on the deceased. This being the state of the evidence, the trial judge was entitled to conclude that there was no room for manslaughter by negligence.

[15] By comparison, even though the appellant did not admit to inflicting any injury on the deceased, his account of what transpired described a scenario of an attack on him by the deceased, which was evidentially and legally enough to raise the defence of self-defence. Juxtaposed against the evidence that he did stab the deceased, then his account of the events must be considered carefully to determine whether the prosecution discharged its burden of disproving self-defence. We therefore turn to the appellant's complaint in this regard.

[16] The essence of the appellant's fourth ground of appeal is that the learned trial judge misdirected himself by focusing on the deceased's injury to the exclusion of all else. Mr. Sylvestre submitted that the judge failed to consider the age and size differences between the parties, the deceased's intoxication, and the fact that the appellant was trying to escape. By focusing only on the type of injury the deceased sustained, the trial judge erred in his assessment of this defence. Mrs. Vidal S.C. disagreed with this submission, noting that the judge "repeated" counsel's submissions at the outset then referenced the law on the subject and in particular the test laid down in ***Shaw***, which she submitted meant that he "clearly considered" all the circumstances when deciding the issue. Mrs. Vidal S.C. also argued that the appellant's submission on this ground faced a conceptual hurdle in that he never admitted to injuring the victim; the judge having rejected the appellant's version of events as contained in the caution statement, the learned Director submitted, it was on the version he accepted that he considered self-defence. Both the law and the evidence in this case must therefore be examined to determine whether the judge erred in his assessment of the appellant's claim of self-defence.

[17] It is true that the learned trial judge accurately set out the applicable legal standards. One of the most authoritative sources in this regard is the Privy Council's decision in ***Palmer v R***, from which the judge quoted at length, identifying the main principles of the defence in the course of so doing. Although this is a well-known and oft-quoted decision, Lord Morris's classic exposition bears repeating in part, since he sought to highlight the simplicity of this defence which requires "no abstruse legal thought" to understand it:

> *"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. … If there has been an attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonably defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence."*[1]

From the totality of the decision in ***Palmer***, one can distil the essential elements of this defence as (1) the existence of an attack; (2) the necessity of a response as judged on the facts as the defendant honestly believes them to be, whether reasonably so or not; (3) proportional force in response to the attack; and (4) reasonableness of response as judged in all the circumstances.

[18] The judge also referenced the more recent Privy Council decision in ***Shaw v R***, of particular relevance as it originated from this very jurisdiction. ***Shaw*** can easily be described as the *locus classicus* of self-defence in Belize, and its key contribution has been to affirm that the necessity of a response, which is based on the existence of an attack, rests upon a subjective determination. In other words, what matters more in determining the need for defensive action is not the actual situation, but rather the facts as the defendant (honestly) believes them to be. In his discussion, the trial judge reproduced the two main questions to be asked as identified by Lord Bingham, namely: did the accused honestly believe or may have believed that it was necessary to defend himself, and if so, taking all the circumstances and dangers as the accused honestly believed them to be, was the amount of force which he used reasonable?[2]

[19] In light of this discussion undertaken by the trial judge, it cannot be said that he misdirected himself on the law. Quite the contrary, he demonstrated keen awareness of the governing authorities on self-defence and the applicable principles to guide his assessment of

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[1] *Palmer v R* (1971) 16 WIR 499 (PC Jam), per Lord Morris of Borth-y-Gest at 510.

[2] *Shaw v R* (2001) 59 WIR 115 (PC Bel), per Lord Bingham at 124.

the evidence. When he came to apply this test, the judge considered the first question identified in ***Shaw*** and answered it in the affirmative. His reason for so doing was based on the appellant's caution statement, which the appellant adopted at trial, and while the judge provided very little reasoning, he accepted that the appellant honestly believed defensive action was necessary, based on the situation as described. It is apposite to note here that given the explicit reasoning of the judge on this point, the learned Director was mistaken when she submitted that the judge rejected the appellant's version of events as contained in the caution statement. On the contrary, the facts as recounted in the caution statement provided the only basis for any apprehension on the appellant's part, and the judge explicitly referenced and relied upon this statement when answering the first question in the affirmative.

[20] It is difficult for this Court to disagree with the trial judge's conclusion on this first question. The issue related to the appellant's state of mind, involving a purely *subjective* test, and as the primary trier of the facts the judge was able to observe all the parties as they gave evidence. Since it was a possible inference from the facts as recounted by the appellant that he honestly thought defensive action was necessary, the judge's acceptance of this claim was reasonable in all the circumstances and there is no reason to reject it. The second question does not attract the same deference. It calls for an *objective* assessment of the force used, invoking a familiar benchmark in law and evidence – that of reasonableness and proportionality. This Court is thus as well-placed as any to scrutinize the evidence to determine whether the judge's conclusion on this question can be supported, and it is to this we now turn.

[21] In addressing the second question, the judge noted that the appellant did not complain of being injured by the deceased, juxtaposing this against a detailed description of the wound sustained by the deceased. He then noted that the deceased was unarmed and trying to fight the appellant and concluded that the appellant's use of a knife against an unarmed person was unreasonable. In concluding his assessment of this issue, the judge returned to the nature of the injury, describing it as not "minor" and leading almost immediately to death, which reinforced his conclusion that the appellant used excessive force in self-defence.

[22] A useful starting point in reviewing the judge's analysis would be to identify the applicable principles that could guide the determination. As mentioned above, the Privy Council judgment in ***Palmer*** explicitly affirmed that a crucial element of this defence is that

the force used in response to an attack must be proportionate. Lord Morris explained this is simple terms:

> *"If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression."*

Aside from making the obvious point of proportionality, what is useful about this explanation is that it contrasts two situations: one where the attack is in progress and the other where it has ended. Any response in the latter situation smacks more of revenge, whereas while the attack is ongoing not only would an immediate response (sometimes an instinctive one) be forthcoming and merited, but in so doing the person under attack "cannot weigh to a nicety the exact measure of his necessary defensive action".

[23] Subsequent cases illustrate this distinction with helpful clarity. In ***R v Clegg [1995] 1 All ER 334***, for example, the appellant was a soldier on patrol with others in the course of his duties in Northern Ireland in 1990, when he killed the occupant of a stolen car which was accelerating towards him and other members of the patrol. It was later established that the passenger had been hit *in the back* by a bullet fired from the appellant's rifle. Forensic evidence showed, and the trial judge found as a fact, that the appellant's shot was fired after the car had passed, and was already over 50 feet down the road – that is, when he and others were no longer in any danger. In those circumstances, self-defence was rejected on the basis that the force employed by the appellant was excessive and unreasonable, and thus his conviction for murder was upheld on appeal.

[24] Closer to home is the case of ***R v Gordon (2010) 77 WIR 148***, where unreasonable retaliation also precluded self-defence from succeeding. The appellant had been convicted of murder for brutally and repeatedly striking the deceased with a piece of wood, but his appeal was allowed because the trial judge had incorrectly applied an objective test to determine

whether the appellant had lost self-control in the context of s. 119(b) of the Criminal Code. Accepting the need for defensive action, the court nonetheless substituted a manslaughter verdict because on the facts the force used by the appellant was clearly unreasonable. The reason that the appeal was not dismissed outright, as it would on the application of common law principles, was because of the unique provisions of the Belizean Criminal Code by virtue of which excessive force in self-defence results in manslaughter and not a failure of the defence altogether. The facts there revealed that whatever attack the appellant had been exposed to had ended, yet he continued to strike the deceased with a piece of wood that had nails protruding from it. Police officers arriving on the scene at the same time witnessed the deceased on the ground, unarmed and motionless, but with the appellant holding the piece of wood with both hands and hitting him on the face and head as he lay on his back on the ground. At some point, it appeared that the deceased may have been armed with a knife (one was found discarded on the ground nearby), but even while disarmed and lying on the ground the appellant continued attacking. As in ***Clegg***, the response continued even after the attack was over and the threat passed, hence it clearly constituted excessive force.

[25] These being the legal principles and examples of how they have been applied, how did the judge below approach and analysed the evidence in this case on the subject of reasonable force? In discussing this specific element, the judge highlighted the following facts: that the appellant did not complain of sustaining any injury, the doctor's evidence as to the nature of the deceased's injury, and the fact that the deceased was unarmed though trying to fight. For him, these appeared to be the salient features of the evidence that led him to the conclusion that the use of a knife against an unarmed person was unreasonable, and reinforcing it the judge ended by noting again the seriousness of the injury inflicted by the appellant.

[26] The first observation to be made of this analysis is, indeed, how truncated it was. Dominating the judge's reasoning was the nature of the injury, rightly described as serious as it led to death in short order. Combined with the inference drawn that the deceased was unarmed (no evidence was led on this point one way or another), this was the entire basis substantiating his view of the use of excessive force. But it was incomplete insofar as it did not weigh in the balance the multitude of other facts that were germane to the issue of proportionality. Earlier we referred to the Director's submission, namely that at the outset of the discussion the judge "repeated the submissions of counsel in relation to the matters that may have been operating on the mind of the appellant when the injury was caused". However,

it is not enough merely to *repeat* submissions, and then only at the outset. Rather, by the time the judge was engaged in assessing the specific point of reasonableness, he ought to have identified all the relevant factors and then *evaluated* them, including by attempting some balancing exercise of factors bearing upon both sides of the issue. Only by such a critical analysis could an informed assessment be made of the reasonableness (or not) of the appellant's response. This the trial judge did not do.

[27] Can it be said that even though the judge did not explicitly carry out such a detailed assessment, his conclusion of excessive force can be justified on the facts? Aside from the nature of the wound, an aspect that dominated the discussion, there was other relevant evidence such as the facts that the deceased was the aggressor, older and bigger than the appellant, and was at the time highly intoxicated. As described by the appellant, which remained uncontradicted, not only did he not initiate any fight, but he attempted to leave the scene. Each of these facts constitutes elements of considerable significance in law and in reality. As it was put in ***R v McInnes [1971] 3 All ER 295***, for example, failure on the part of an accused to retreat – while not strictly required – is a material factor to be considered when judging the reasonableness of the accused's conduct. Here, the appellant's attempts to escape received scant notice. Next, the deceased was older and apparently much bigger than the appellant (aside from his build as noted by the doctor, one witness described him lifting a 5-gallon bottle of water on his shoulder, indicating his easy strength). How would this mis-match have affected the appellant's decision to use a knife and the manner of his retaliation? Then there was the fact of the deceased's intoxication, a state that is known to produce and enhance aggression. Again, what fear would this have inspired in the appellant (on whose consciousness it was seared so that he was able to recall and mention it the next day without the assistance of any expert)? In weighing all of these factors – the size difference, the intoxication of the deceased and its effects, and the appellant's attempts to escape – would the appellant's age not matter? Not only was he about a decade younger than the deceased, but his youth in itself may well have influenced his reaction.

[28] Of crucial significance here is the injury itself. This was described in detail by the trial judge, who noted that the result was the rupture of the porta vein in the liver. Because this is a main vein, it resulted in profuse blood loss and rapidly led to death. But what of the other dimensions to this injury in terms of context? It was, for instance, only a single stab wound – not like the repeated blows inflicted by the appellant in ***Gordon***. It was inflicted during the

height of the attack, as the appellant was trying to escape – not after the fact like the soldier's retaliation in ***Clegg***. Assessing reasonableness in the context of an unfolding attack calls for great care and sensitivity to danger, which could be harder to appreciate in the calm, safe aftermath. And apparently overlooked is the location of the injury and the force required. While the judge seemed to think that it required great force, the pathologist expressly refrained from expressing an opinion on this, while common sense would suggest otherwise given that flesh and not bone or muscle was involved. Moreover, the stomach is not generally known to be as vulnerable as the throat or the heart, so that an attack directed there is not inevitably indicative of an intention to kill as one against the latter parts of the anatomy would be. Thus, while the judge focused on the *outcome* of the stab – which could have been as much bad luck as it could have been design – he appears not to have weighed against that the situation surrounding the stab wound, namely that the appellant inflicted only a single stab, in the heat of the moment, and directed at a less vulnerable part of the anatomy. Considered in totality, a conclusion of excessive force is difficult to sustain.

[29] Regarding this defence, the learned Director identified as a "conceptual difficulty" the fact that the appellant did not admit that he caused any injury to the deceased. We disagree. As pointed out above, there was evidence that the appellant stabbed the deceased, which came from what the deceased told his grandmother shortly after. The trial judge admitted that statement as part of the res gestae and was perfectly entitled to rely on it for the truth of its contents. However, that statement could only prove the *fact* of stabbing, not its *manner*, as it shed no light on the surrounding circumstances. Regarding the context, the only evidence as to how the incident unfolded came from the appellant's caution statement, which set up a scenario of an attack by the deceased against the appellant. The learned Director further submitted that the judge "rejected that version [in the caution statement] and so it was on the version that the judge accepted that he would have considered the defence of self-defence". However, no other evidence was tendered as to *how* the incident unfolded, so it is entirely unclear what other version the Director is referring to. This being the state of the evidence, the Crown faces a not inconsiderable evidential challenge in disproving the appellant's version as contained in the caution statement, bearing in mind that disproof must be by way of evidence, not speculation or conjecture, and must dispel all reasonable doubt.

[30] Regarding the Crown's dilemma, for dilemma it is, it is always possible for circumstantial evidence to fill the gaps where there is no direct evidence. The difficulty,

however, is that what contextual evidence there is strengthens the appellant's case rather than rebuts it. As discussed above, as against the sole fact of the injury and the inference that the deceased was unarmed, there is the evidence that the incident was ongoing not over, that the parties were wholly mis-matched both in age and in their physical make-up, that the deceased was intoxicated and aggressive, and that in all these circumstances the appellant inflicted only one stab – and that to a fleshy part of the body and not the throat or the heart. A fair (or even logical) assessment of these facts simply cannot lead to a conclusion of excessive force.

[31] The upshot of all this is that even though the trial judge cannot be faulted for his discussion of the law, his analysis of the evidence was skewed insofar as he did not properly assess the factors surrounding the injury, as distinct from the consequences of that injury. Ultimately, we do not agree with his finding that the infliction of one, single stab wound to the stomach in the context of an ongoing attack by a drunk, older and bigger man and from whom the appellant had been trying to escape, was excessive. In our estimation, based on a thorough evaluation of the evidence, the defence of self-defence ought to have succeeded, which entitles the appellant to a complete acquittal.

[32] While this is sufficient to dispose of the appeal, Mr. Sylvestre's final ground should be addressed, even if only briefly, as it seems to be a recurring one. This was that the learned trial judge erred in carrying over to the main trial, his adverse conclusion of the credibility of the Appellant in the *voir dire*. The argument was that in the context of this case, where the only evidence as to how the incident unfolded came from the appellant, "an informed, fair-minded, and reasonable public observer" (to use the test suggested by Jamadar JCCJ[3]) would have no hesitation in entertaining a reasonable apprehension that the trial judge would not have been able to decide the case impartially, having regard to his earlier finding on the *voir dire* that the appellant was an unreliable and untruthful witness.

[33] As pointed out by the learned Director, this submission has been made – and rejected – in a previous appeal. In ***Manzanero v the Queen [2020] CCJ 17 (AJ) BZ***, the CCJ observed that if accepted, it would render judge alone trials unworkable and impractical. As such the court noted that the "mere fact that a trial judge has made an adverse finding on the credibility of the accused on the *voir dire*, or has heard evidence which is prejudicial to or indicative of

[3] *Manzanero v the Queen* [2020] CCJ 17 (AJ) BZ.

the guilt of the accused, does not lead to the inescapable conclusion that the accused has been denied a fair trial".[4] Any such rule would require trials to be truncated, with one judge for the *voir dire* and another for the substantive trial. Not only has this never been the approach, but if adopted it would constitute a shameful indictment on the ability of judges to perform their functions impartially. Nonetheless, the CCJ did suggest that in the context of judge-alone trials it could be left up to the judge who has heard inculpatory evidence in the *voir dire* and feels personally too compromised to adjudicate the substantive issues impartially, to stop the main trial so that it could begin anew before a different judge. However, it is unclear how this would work as any determination on admissibility would not be binding on a subsequent judge, which only serves to reinforce the importance of relying on the traditional approach which assumes the integrity and competence of the judges.

[34] In any event, there is absolutely no room for Mr. Sylvestre's criticism, and in fact a careful read of the record reveals the opposite of what he suggests. On the issue of self-defence, the trial judge posed two questions in accordance with ***Shaw*** – one concerning the appellant's subjective belief as to the danger he faced, the other requiring an objective assessment of the reasonableness of the appellant's response. On the former, the trial judge unhesitatingly accepted the appellant's claim that he honestly believed it was necessary to defend himself. In so finding, the judge necessarily accepted the appellant's statement that he was under attack as described in the caution statement. It was only on the second question that the judge came to a finding adverse to the appellant, but that required an objective assessment of the evidence and did not involve issues of credibility. The appellant's defence failed on the objective assessment of reasonableness, not because the judge disbelieved him. Whereas on the issue involving credibility, the trial judge demonstrated no bias against the appellant but instead accepted his version of events. This, above all, demonstrates that he did not carry over any bias or adverse conclusion as to the appellant's credibility from the voir dire to the main trial.

Conclusion

[35] Ultimately, in the majority's view, a more rigorous assessment of all the facts would have led to a different outcome. Given our conclusion that self-defence was not disproved, the appellant's conviction cannot be sustained, as self-defence is a complete defence, and in the

[4] *Manzanero v the Queen* [2020] CCJ 17 (AJ) BZ at para [30].

absence of evidence apart from the caution statement as to how the incident unfolded, a retrial would be pointless. Accordingly, the appeal is allowed and the appellant's conviction for manslaughter quashed.

MINORITY JUDGMENT OF HAFIZ-BERTRAM, P

HAFIZ BERTRAM, P

Introduction

[36] I have read the majority judgment of my learned brother, Bulkan JA and learned sister Minott-Phillips JA, allowing the appeal of the Appellant and quashing the conviction of manslaughter which was reached by the trial judge on the basis of extreme provocation. I agree with the majority that the grounds of appeal on accident, alternative verdict of manslaughter by negligence, and on the adverse conclusion of the credibility of the appellant in the *voir dire,* have no merit. My disagreement with the majority is on the ground of self-defence and their evaluation of the facts that self-defence ought to have succeeded as there was no excessive force and as such entitles the Appellant to a complete acquittal. My own view is that the force used by the Appellant was unreasonable taking into consideration all the surrounding circumstances and the danger faced by him. Further, it is my view that the Appellant had an intention to kill the deceased when he inflicted the stab wound on him.

[37] The trial judge, who was the trier of both facts and law in considering the element of the crime of murder as to whether the infliction of the harm on the deceased was without lawful justification, considered the defences of accident, extreme provocation, the verdict of manslaughter and manslaughter by negligence and self-defence, all of which were raised in the closing arguments of the defence and/or in the Appellant's caution statement/unsworn statement. He directed himself that it was the Prosecution who must prove to him so that he is sure that when the harm was inflicted, it was done without lawful justification. The Prosecution therefore had the burden to negative the justification of extreme provocation, accident, and self-defence. The defence of extreme provocation was not negatived by the Prosecution.

[38] I will address the grounds of self-defence and intention to kill. The majority disposed of the appeal on the ground of self-defence.

Whether the judge erred in directing himself on self-defence

[39] The Appellant adopted his caution statement as his dock statement. Since he did not give sworn testimony, the statement could not be tested by cross-examination. The trial judge applied the guidance in ***Marcotulio Ibanez v The Queen, CA No. 17 of 2012*** and gave the unsworn statement such weight as he thought it deserved. In the dock, the Appellant gave his name and address and said, *"I wish to state the evidence I gave to the Police is all I wish to say. That is it."* The Appellant was referring to his caution statement. That caution statement was admitted into evidence through the Prosecution. (Exhibit ZN 1). It is worth repeating (although in the majority judgment) what is stated therein –

> *"Between 8:00 to 8:30 I gone care a key to my gial. At the moment I was waiting, Sammir Vivas came behind me and he said, 'You bitch why you di say I thief your bike'. He also tell me he will box me. I just watched him and I smiled. Then the moment I smiled, Sammir slapped me and then he was drunk, he was under liquor. I was on my friend's bike when he slapped me. I get off the bike to go and then he rush at me, then I hauled the bike front of me so I could run and go. When I put the bike in front of me he pulled me from my shirt. He was trying to fight me and I was trying to run. He dropped in front of me and I escaped, but when he dropped he* moaned then I escape. I jump on my bike and gone. It is just that."

[40] The Appellant, as seen by his statement did not say he stabbed the deceased. It was inferred from the surrounding circumstances by the trial judge who did not find that part of the statement credible where he stated that, "*He dropped in front of me and I escaped. When he dropped he moaned then I escape…"*

[41] Since the Appellant did not say he stabbed the deceased, he did not run a defence of self-defence to justify the stabbing. Counsel for the defence raised self- defence in closing address and the trial judge accepted the caution statement/dock statement raised that defence. In ***DPP (Jamaica) v Bailey [1995] 1 Cr.App.R. 257***. PC, it is stated that before the issue of self-defence is left to the jury, there must be evidence whether from the Prosecution or the

defence, which, if accepted, could raise a *prima facie* case of self-defence. If there is such evidence, the issue must be left to the jury, whether it is relied on by the defence or not.

[42] The trial judge, the trier of the facts, accepted that part of the statement from the Appellant in this case in which he stated that he was slapped, his shirt pulled by the deceased when he was trying to run away and the deceased was trying to fight him. From that statement, he was obliged to consider self-defence.

[43] It is to be noted from the unsworn statement that when the Appellant was threatened to be assaulted, that is, to be slapped, he had no fear of being harmed as he just smiled. Further, when he was slapped he did not think of defending himself as he stated that "*I was on my friend's bike when he slapped me. I get off the bike to go and then he rush at me, then I hauled the bike front of me so I could run and go."* He was therefore retreating after being slapped.

[44] He then stated – "*When I put the bike in front of me he pulled me from my shirt. He was trying to fight me and I was trying to run*." That is the extent of the statement from the Appellant. At this point, he must have honestly believed the deceased was a threat to him and defended himself by stabbing him. Since he did not state he stabbed the deceased there is no evidence from him as to why this was necessary.

[45] The crux of the challenge under the self-defence ground by the Appellant was that the trial judge failed to consider some factors in addressing the two prong questions *in* ***Norman Shaw*** and that he focused only on the injury received by the deceased. Mr. Sylvestre argued that the trial judge failed to consider the age and size differences between the deceased and the Appellant, the deceased's intoxication, and the fact that the Appellant was trying to escape. That by focusing only on the type of injury the deceased sustained, the trial judge erred in his assessment of self-defence.

The law on self-defence

[46] There is no challenge to the law stated by the trial judge in this appeal. Nevertheless, before addressing the two prong questions in ***Norman Shaw***, I find it useful to state the law on self-defence as it addresses the justification of necessary force or harm in self-defence. This will depend on the particular facts and circumstances of the case.

[47] ***Section 36 of the Criminal Code***, so far as is 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."*

[48] The justification of necessary force or harm is explained in common law. The trial judge reminded himself of the principles in ***R v Palmer [1971] 1 All ER 1077***, where the Privy Council gave the classic pronouncement on the law relating to self-defence. I find it useful to state the full quote. Lord Morris delivering the judgment of the Board, said:

> "It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend on the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing-up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected

anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence. But their Lordships consider in agreement with the approach in *De Freitas v R* that if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case. If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this then they will acquit. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then that matter would be left to the jury."

[49] ***Palmer*** was applied in ***R v Clegg [1995] 1 All ER 334***, (the facts set out by the majority judgment and need not be repeated) in which it was held that where a person kills another with the requisite intent for murder in circumstances in which he would have been entitled to an acquittal on the ground of self-defence, but for the use of excessive force, the defence fails altogether and he is guilty of murder.

Evaluation of reasonableness of force used – the test

[50] The common law test for assessing the amount of force used by an accused is that, "A person may use such force as is (objectively) reasonable in the circumstances as he (subjectively) believes them to be. See ***Owino [1996] 2 Cr App R 128***, ***[1995] Crim LR 743***; ***DPP v Armstrong-Braun [1999] Crim LR 416***. The circumstances being the facts as accepted by the tribunal of fact (judge or jury). The subjective element is how the Appellant views those facts as it is the Appellant's belief as to the existence of a threat.

[51] The subjective element was discussed in the Belize case of ***Norman Shaw***. The Board applied the common law of England and Belize and framed two essential questions for the jury/judge when considering self-defence:

(1) *"Did the appellant honestly believe or may have believed that it was necessary to defend himself?"*

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

The approach of the trial judge in considering the case

[52] The trial judge was not directing a jury as he was the trier of both facts and law. Therefore, he was not expected to direct himself in great detail as he would with a jury. Further, he was not expected to organize his judgment in any particular format providing his reasoning is clear as to how he arrived at his findings.

[53] Early on in the judgment, he directed himself to the law, (statute and common law), facts of the case of the Prosecution and the Defence, and the particular circumstances and the danger faced by the Appellant. He accepted part of the dock statement of the Appellant and rejected part of it as shown above.

Other circumstances and danger faced by the Appellant

[54] The trial judge in his judgment, considered other circumstances and danger faced by the Appellant brought to his attention by counsel for the defendant in closing submissions, apart from what is stated in the dock statement. These are - (a) The deceased was an older person – age 23 years, bigger in structure - 6' 4" and weight 160 pounds (See post mortem report); (b) He took judicial notice of the Appellant's age – 15 years old at the time of the incident; (c) There was a marked difference in size and structure of the deceased as against the Appellant; (d) The deceased was drunk as Alcohol level was 256/10; (e) Defence raised in the caution statement was that it was the Appellant who stabbed the deceased; (f) Defence counsel in closing address submitted Appellant was acting in self-defence.

Law and evidence considered by the trial judge to find that the Appellant was defending himself

[55] Before addressing the two prong questions in ***Norman Shaw*** case, the trial judge had already begun his assessment of the evidence and directed himself on the law. He relied on

Palmer and directed himself that "*a man who is attacked may defend himself. He may only do what is reasonably necessary. The law is that a man who believes he is under attack cannot be expected to weigh up the niceties of how he will respond."* Having done that, the trial judge looked at the nature of the danger to the Appellant. That is, what the Appellant said was done to him – "*What we have here however is the accused saying he was slapped and his shirt pulled and then the deceased rushed at him the fight (e.g.) "he was trying to fight me and I was trying to run…."*

[56] The trial judge also addressed the subjective aspect as to how the Appellant viewed the danger and not what the attacker intended. He directed his mind to what the Appellant said (as shown above) and found that "*he (the Appellant) is indeed saying* ***yes he was defending himself*** *and trying to run away from the danger. He went on to say he was slapped and his shirt pulled by the deceased and he was trying to run away as the deceased was trying to fight him."* The Appellant did not say that he stabbed the deceased and did not say he was defending himself. The trial judge therefore had to direct his mind to all the circumstances of the case and not only on the facts stated by the Appellant in his dock statement. The court had no other evidence except the relevant factors complained about and addressed in the judgment. In my view, in addressing the subjective element, the trial judge must have directed his mind to those additional circumstances (factors as argued by the Appellant) to come to the conclusion that the Appellant who was a minor,15 years old, (which he took judicial notice of) thought it was necessary to defend himself from the older intoxicated deceased.

Further consideration of self defence by the trial judge

[57] In Belize, ***Norman Shaw's*** case is often cited and applied and the Appellant's counsel brought to his attention the two prong questions in closing submissions. The trial judge was obliged to address the two prong questions without directing himself in the way he would have directed a jury. He directed himself to the opinion of the Board where it is stated that "*it is essential for the trial judge to pose two (2) essential questions, however expressed for the jury's consideration.."* I will address both questions. The trial judge addressed the subjective view of the Appellant in the first question which is also relevant in answering the second question. The subjective test as stated by Lord Bingham of Cornhill said at paragraph 21 that – "…. it was not the actual existence of a threat but the appellant's belief as to the existence of a threat which mattered".

The first question in Norman Shaw

> "*Did the accused honestly believe or may have believed that it was necessary to defend himself?"*

[58] The trial judge addressed his mind to the factual circumstances and answered this question in the affirmative on the facts accepted by him (trial judge) and the subjective view of those facts by the Appellant. The judge stated that from what the Appellant said in his caution statement adopted in his unsworn statement and the closing submissions of his counsel, the Appellant honestly believed it was necessary to defend himself in the situation and that even if the Appellant was mistaken, he cannot be faulted for it. At this point, the trial judge had earlier directed himself on the law by considering the principles in ***Palmer*** and considered all the circumstances of the case. The submissions by Counsel for the defendant to the trial judge included (a) the factors complained of and (b) honest belief can be gleaned from the sole evidence of the Appellant.

The second question in Norman Shaw

[59] The second question in **Shaw**, "*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?* The trial judge answered this question in the negative.

[60] The reasonableness of the force must be considered in light of the subjective view of the Appellant "*taking all the circumstances and dangers as the appellant honestly believed them."* The circumstances and danger the appellant honestly believed them to be is a subjective test as the Appellant viewed them, on the facts accepted by the trial judge. The submissions of counsel below to the trial judge in referring to the second question brought to his attention the age difference, physical characteristics and deceased was intoxicated. Further, in relation to whether the amount of force used was reasonable, counsel submitted that those factors would be operating in the mind of the 15 year old when he was assaulted by the deceased and he was trying to run away.

[61] The second question, after taking into consideration all the circumstances and danger as the Appellant honestly believed them, is about proportionality and a material consideration is the extent of harm/injury suffered by the Appellant as a consequence of the attack on him. The trial judge had already directed himself previously (in his own way of writing his judgment), to all the circumstances and danger faced by the Appellant. He also directed himself on the subjective view of the Appellant and not what the deceased intended. In answering the second question, he focused on the reasonableness of the force used by the Appellant.

[62] In considering the reasonableness of force used, the trial judge addressed his mind to injury to the Appellant (extent of harm) as a result of the attack on him as against the stabbing of the deceased with a sharp object to defend himself. There was no evidence that the Appellant suffered harm as a result of the slap and the pulling of his shirt. The trial judge could not speculate on the extent of harm suffered by the Appellant as a result of the attack. As such, he rightly found that the Appellant was not injured. Further, there was no evidence that the Appellant was in fear of his life, or grievous bodily harm or any imminent danger from the deceased.

[63] How did the trial judge approach reasonableness of force used by the Appellant as a result of the attack, absent the evidence of degree of harm suffered by the Appellant? He considered the evidence from Dr. Estrada Bran which showed the extent of the harm to the deceased which caused his death, the sharp instrument used to cause that injury, for example, a knife. Further, that the deceased was unarmed when he was trying to fight the Appellant. The threat made by the deceased was that he wanted to slap the Appellant and this he did. I note that there was no appeal to the finding of the trial judge that the deceased was unarmed.

[64] The trial judge found that in his view, the Appellant caused the death of the deceased, "*by the use of a knife (e.g.) the wound being accepted as described by Dr. Estrada Bran as the type produced only by (eg.) a knife when the deceased was unarmed, this was unreasonable in the circumstances perceived by him (accused). Therefore, the force used was not proportional to the attack or perceived attack on himself... "*

[65] The trial judge also rightly noted in my view that the stab wound was not a minor stab wound which caused massive injury to the deceased organs resulting in almost immediate

death. After a careful analysis of the evidence, he ruled that in the circumstances the Appellant used excessive force in self-defence and this force was unreasonable.

[66] I agree with the trial judge that the force used was excessive force in self- defence and the force was unreasonable in the circumstances of this case. For this reason, self defence failed. I part ways with the majority on this finding of the reasonableness of the force used by the Appellant.

[67] The Appellant argued that the judge did not take into consideration some of the factors that should have impacted on whether the Appellant used excessive force. The majority of the Court stated that the basis for substantiating the view by the trial judge of excessive force was the nature of the injury and the inference drawn that the deceased was unarmed and that was incomplete insofar as it did not weigh in the balance the multitude of other facts that were germane to the issue of proportionality.

[68] I agree with the majority that the trial judge in considering the second question in ***Shaw*** addressed the nature of the injury and the inference that the deceased was unarmed. However, I am of the view that he had already considered the subjective aspect of the question earlier in the judgment by looking at all the circumstances of the case, including the danger faced by the Appellant and the relevant factors complained of by the Appellant. That is, that the deceased was older and bigger in size than the appellant who was 15 years old at the time, the level of sobriety, and when the Appellant attempted to leave the deceased pulled his shirt and tried to fight him. At page 381 of the Record the trial judge stated the facts as they existed and directed himself "*The court will take judicial notice of the defendant's age 15 years in 2015."* Thereafter, he referred to the two prong test in the ***Norman Shaw's*** case which he answered later in the judgment. It does not seem, in my view, that the judge was merely repeating facts.

[69] Alternatively, even if I am wrong, and the trial judge simply repeated facts in his judgment without directing his mind to all the circumstances and danger as the Appellant honestly believed them to be, it is my view, that had the trial judge specifically addressed the factors complained about under the heading of the second question, the outcome would have been the same, absent any injuries or the degree of harm suffered by the Appellant as a result of the attack on him. It is clear that the deceased was the aggressor, however, there was no evidence that the Appellant was in danger of death or serious bodily harm or imminent danger

after his shirt was pulled by the deceased and tried to fight him. The judge therefore could not draw an inference on the evidence that when the Appellant stabbed the deceased, he did so on the honest belief that he was in serious danger and he acted reasonably in resisting that danger. As such, the trial judge, rightly in my view, from an analysis of the evidence, found from all the circumstances of the case, the nature of the danger and the way the Appellant must have viewed that danger, the stabbing of the deceased was unreasonable.

[70] The majority has rightfully recognized the crucial significance of the injury itself which caused death but seem to have negatived excessive force, not only because of the factors complained about, but because the Appellant inflicted only a single stab wound compared to the repeated blows inflicted by the appellant in ***Gordon***. Each case must be determined on its own particular facts and circumstances. The trial judge did just that. ***Gordon*** was determined on its own facts. The deceased in that case went after Gordon with a knife. Unlike the case at hand, the deceased was unarmed and threatened to slap the deceased which he did and then pulled his shirt and tried to fight him. The single stab wound was not minor. It was massive and damaged many organs causing pain and death in less than an hour.

Ground 3: Whether the trial judge erred in finding the Appellant had an intention to kill

[71] Learned counsel, Mr. Sylvestre submitted that the trial judge erred in failing to take all relevant matters into account in determining whether the Appellant had the specific intent to kill. He argued that there is nothing in the judgment of the trial judge which showed what aspects of the witness statements or the *res gestae* statement assisted him in coming to his determination that the Appellant had the specific intent to kill. That the sole evidence he considered was Dr. Estrada Bran's evidence which was conclusive of the fact that the injury received would have resulted in the death of the deceased. Counsel relied on section 9 of the Criminal Code, which provides that a court should not automatically infer an intention to kill merely because the natural and probable result of their action is death.

[72] The learned Director in response also referred to section 9 of the Criminal Code which obliged the trial judge to "*decide the question by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances."* She submitted that the judge did just that. I am in agreement with the Director that the trial judge firstly directed

himself to the law and then addressed the available circumstances he could have considered. Thereafter, he recounted and analysed the evidence.

[73] The trial judge found that the Appellant intended to kill the deceased when he inflicted harm to the deceased noting that one cannot see an individual's mind to know his intention. He specifically directed himself to section (9) of the Criminal Code which states that to determine if an accused person intended to produce a particular result by his conduct, it must be decided by reference to all the evidence as appear proper in the circumstances. He also specifically directed himself that he is not bound to infer an intention to kill from the mere fact that death was in his opinion a natural and probable result of the action of the Appellant, but noted it is a fact relevant to the question of intent.

[74] Further, he noted that the inference disclosed one act on the part of the Appellant, which is an act of injury caused by sharp instrument. He did not accept that part of the caution statement which was adopted in the dock statement of the Appellant that he put the bicycle in front of him and the deceased moaned and fell. Therefore, the trial judge was not required to consider that part of the caution statement as a relevant matter.

[75] Further, he considered the relevant evidence of Dr. Estrada Bran who conducted the post mortem examination on the deceased and gave a description of what he observed in relation to the nature, placement and dimensions of the injury. The trial judge also considered the *res gestae* statement[5] and the statement of the Appellant[6].

[76] Dr. Estrada Bran's evidence showed a 15 mm stab wound to the lower chest which took a direction right to left, upwards to downwards, forward to backwards, wounding the No. 8 costal cartilage, diaphragm muscle, liver and porta vein, up to the minor curvature of the stomach where the trajectory ended. He found 2700 cubic centimeters of blood in the abdominal cavity which was caused by the trajectory of the wound, but mainly from the porta vein of the liver. In the opinion of Dr. Estrada Bran the cause of death was state was "*due to exsanguination due to internal bleeding due to the porta vein injury due to stab wound to the*

[5] Page 369 lines 7 to 10 of the Record
[6] Page 369 lines 11 to 12 of t Record

abdomen." The injury was classified as fatal that would lead to death because of bleeding and injury to the porta vein.

[77] The evidence also showed that the wound to the diaphragm, a main muscle that controls breathing, and elevation and relaxation of the lungs, would have caused pain to the deceased. The wound to the liver, one of the biggest glands in the human body would have caused pain. Further, the injury to the porta vein was massive and caused severe bleeding.

[78] Furthermore, Dr. Estrada Bran testified that it was a sharp instrument which caused the injury to the deceased and in his opinion, was a knife. The characteristic of the injury had a piercing effect, small in length on the outside but deep on the inside. It would have caused death less than an hour. It was difficult for the doctor to determine the force used by the Appellant in the process of inflicting the injury itself because the impact was to soft tissues in the body of the deceased.

[79] The trial judge inferred an intention to kill by considering - : (a) the location of the major injury to the right chest area which penetrated the liver and the number 8 costal cartilage ending up at the minor curvature of the stomach (b) the instrument used to cause the injury such as a knife which had to pass through all the organs mentioned before reaching the minor curvature of the stomach; (c) the judge concluded that some great amount of force was used by the Appellant which he inferred from the severe injury causing damage to the organs of the body, (though the doctor could not say the amount of force used in the process of inflicting the injury to the deceased because of the soft tissues); (d) Injury to the chest was so severe that the deceased bled 2700cc of blood in the abdominal cavity; (e) The deceased was in pain and survived for less than an hour after the stabbing. Before dying he was unconscious and fell into shock. The evidence was that he was on the ground "*having like fitts and kicking up*." He was pronounced dead shortly after at the hospital.

[80] The majority stated that "the stomach is not generally known to be as vulnerable as the throat or the heart, so that an attack directed there is not inevitably indicative of an intention to kill as one against the latter parts of the anatomy would be." In my view, while the stomach might seem less vulnerable than the heart or the throat, it is vulnerable depending on the severity of the injury and the damage done to the organs. All the abdominal organs are located in the abdominal cavity as noted by Dr. Estrada Bran. The injury to the deceased located on

the lower right side of the chest caused by a sharp object was small on the outside but deep on the inside. The evidence of the doctor was that the trajectory/channel of the wound was through the No. 8 costal cartilage, diaphragm muscle, liver and porta vein, up to the minor curvature of the stomach where the trajectory ended. Most of the bleeding was from the porta vein which passes through the liver. The doctor described this particular wound as massive.

[81] Further, the trial judge did not infer an intention to kill because the stab was to the stomach. A careful analysis was done of the evidence. It was not a superficial stabbing to the stomach. The judge found the Appellant had an intention to kill after considering he stabbed the victim with a knife, the injury was to the abdomen, the depth of the injury, and the force needed to cause injury to several organs causing death less than an hour. In my view, the trial judge properly analysed the evidence and found that the Appellant intended to kill the deceased. I have no reason to interfere with that finding.

Conclusion

[82] The trial judge did not err in finding that the Appellant used excessive force in self-defence and that the force was unreasonable. Further the trial judge did not err in finding that the Appellant had an intention to kill the deceased. For reasons mentioned above, I would have dismissed the Appeal and affirmed the conviction.

Order

[83] This Court, by a majority decision, allows the appeal of the Appellant and quashes his conviction and sentence.

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HAFIZ-BERTRAM, P

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MINOTT-PHILLIPS, JA

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BULKAN, JA