IN THE COURT OF APPEAL OF BELIZE, A.D. 2022

CRIMINAL APPEAL NO. 5 OF 2018

WILSER ECHEVERRIA **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**

P G Bradley for the appellant.
C Vidal SC, Director of Public Prosecutions for the respondent.

MAJORITY JUDGMENT ON CONVICTION

10 June 2022

Promulgated on 27 December 2022

HAFIZ BERTRAM P

Introduction

[1] On 3 October 2016, Wilser Echeverria ('the Appellant') was indicted for the murder of Jose Rodrigo de La Rosa ('the deceased') contrary to section 106(1) of the Criminal Code.[1] It was alleged that on 23 November 2014, at Belmopan City, the Appellant slashed the throat of the deceased and caused his death. He was tried before the Honourable Justice Moore ('the trial judge'), sitting alone, for murder between 11 April and 22 November 2018. He was

[1] Chapter 101 of the Substantive Laws of Belize (Revised Edition) 2003

convicted on 7 June 2018 of manslaughter and sentenced on 22 November 2018, to a term of imprisonment of 16 years.

[2] The Appellant appealed against his conviction and sentence by notices of appeal dated 7 June 2018 and 23 November 2018. On 10 June 2022, this Court heard the appeal on conviction and reserved its decision. There were no submissions on sentence by the Appellant.

[3] The majority of the Court, for reasons to follow, dismisses the appeal of the Appellant and affirm his conviction and sentence.

Factual Background

[4] On 23 November 2014, the bloodied body of the deceased, 64 years old, was discovered on an infrequently travelled path in Belmopan. The body had numerous injuries including a fatal cut across the neck. The Appellant was indicted for the murder of the deceased and he pleaded not guilty on 11 April 2018, when he was arraigned.

[5] The Prosecution proved its case by several witnesses including two Scenes of Crime Technicians, Wenceslado Teul and Antonio Manzanero; Dr. Estrada-Bran who performed the post-mortem on the deceased; Corporal Brian Miller; and Detective Daniel Requena who put into evidence the Caution Statement of the Appellant. Six statements of witnesses from the Prosecution were agreed upon by the parties to be read into the record by the Marshall. These statements were from Leonel Ramirez who discovered the body of the deceased; Osiris Vanega who identified the body of the deceased; Mr. Teul, the scenes of crime technician who examined and took photos of the vehicle and a sweater that was found at the scene; Mr. Oscar Castellanos, a friend of the Appellant who saw him shortly after the incident; Sergeant Aldo Castillo, the Investigating Officer; and the Justice of the Peace who witnessed the Caution Statement from the Appellant.

[6] The Appellant did not call any witness. He gave a Dock Statement after being informed of his three rights.

The case for the Prosecution

Dr. Mario Estrada Bran – Cause of death

[7] Dr. Estrada Bran, Expert medical witness, testified that on 24 November 2014, at the Karl Heusner Memorial Hospital (KHMH) autopsy room, he performed a post mortem examination on the body of the deceased. He determined that the cause of death was "*exsanguination due to external bleeding, due to vascular injuries of external jugular plexus of the left side of the neck with a sharp instrument type."*

Evidence of Corporal Brian Miller

[8] Cpl. Brian Miller testified that he interviewed the Appellant in the presence of an inspector of police. Thereafter, the Appellant agreed to give a statement under caution. Cpl. Miller said he did not promise, force, threaten or do anything to coerce the statement given by the Appellant.

Evidence of Detective Daniel Requena - Caution Statement

[9] Detective Requena testified that on 24 November 2014, he was requested by Inspector Reyes to record a Caution Statement from the Appellant. This was done before Mr Vivas, Justice of Peace and Ms. Greysi Meza, the girlfriend of the Appellant. The Caution Statement was tendered and marked Exhibit "D.R. 1." It was read into evidence by Detective Requena. It states:

> "…. Yesterday, Sunday I was shopping in the Belmopan Market about 10:00 a.m. When I was walking on the terminal street, I was approached by a white vehicle with an individual that I currently was called by him and he asked me if I recognised him and I did from my previous job at Marina Towers in Belize. He offered me to take a drink and get in his vehicle then we drove away. When entering the Hummingbird Highway he told me that he knew a good place where we could go and take a drink. He then drove into a dirt road then he stopped and I took a beer when he started to touch me on my private part. He sexually assaulting me and offering me money for sexual intercourse. I never wanted but he threatened me that he had a gun with him. Then he tried to physically attack me and took my pants down. When I saw a blade in his vehicle he threatened to kill me if I don't comply with him. I then reacted in a desperate attempt

to push him away and he got more violent by trying to choke me. I then took the blade and injured him with the blade and I don't know where I injured him. Then he got out of the vehicle and he tried to attack me. I then pushed him away causing him to fall. I then was really confused I didn't know what I did I just wanted to disappear and I drove his vehicle and I wanted to come to the station, but I was frightened. So I head to a different direction and got rid of the vehicle. Everything that happened wasn't my choice he caused me to do it. I couldn't take it at one point."

Evidence of Mr. Leonel Ramirez who discovered the body of the deceased

[10] Mr Ramirez testified that he discovered the lifeless body of the deceased on 23 November 2014, about 4:00 p.m. on a path he uses to go home. He called the police and directed them to the body on the road. Mr. Ramirez said that he used that path the day before and he had not seen a body there. Further, it is a path that is used primarily by five families that lived in the area and not otherwise traversed.

Evidence of Oscar Castellanos - friend of the Appellant

[11] Mr. Castellanos, in his statement dated 24 November 2014, which was read into evidence, stated that he accepted a ride from the Appellant who was driving a white vehicle on the 23 November 2014 around 1:00 p.m. in the San Martin area of Belmopan. He stated that the Appellant told him that he just stole the car and that he should go with him. He then continued driving in the San Martin area, crossed the Maya Mopan bridge and then to the Maya Mopan cemetery and hid the vehicle in the bush. The two of them then walked back into the San Martin area.

[12] He further stated that when they were on their way to Guyana Street, the Appellant asked him, "*Bwai Oscar you want a chip*?" He replied "yes" because he had a phone that does not have a chip. The Appellant then gave him a Digicell phone chip and told him, "*Bwai I want you to hold this phone*." The Appellant then gave him a black Samsung cell phone which he accepted.

[13] Mr. Castellanos gave a second statement dated 2 December 2014, nine days later, which was read into evidence. He stated that the Appellant had made an oral admission to him:

"*Bwai I made to chill with this man eena this area to drink a stout and the man touch me eena my private and I just cut him and I jump eena the vehicle and take off with it and that is why I come to hide this vehicle because I fraid."*

Evidence of Investigating Officer – Sgt Aldo Castillo

[14] The evidence of Sgt. Aldo Castillo which was read into evidence stated that on the 23 November 2014, based on information received, he went to a location in Belmopan where he saw the lifeless body of a male Hispanic descent person lying on his right side on the ground. The body had a large cut wound to the neck and a cut on the top of his head along with other injuries. The body was transported to the Western Regional Hospital and was pronounced dead. An investigation was immediately launched and the body was identified as the deceased. The vehicle belonging to the deceased was located by the police the following day. Further investigation led to the detention and arrest of the Appellant. He was interviewed by PC Brian Miller and a statement under caution was recorded from him by Detective Requena. The caution statement was witnessed by Mr Vivas, Justice of the Peace and Ms. Greysi Meza, the girlfriend of the Appellant.

Evidence of Mr. Antonio Manzanero – Scenes of Crime Technician

[15] Mr. Manzanero, Scenes of Crime Technician took 28 photographs of the scene where the body of the deceased was found and of the injuries on the body as visible at the morgue at the post mortem examination. He testified about his observation at the scene where the body was found. The body of the deceased was clothed in a t-shirt and three quarter pants. He had on a tennis shoe on the left foot. He observed that the t-shirt was heavily saturated with a dark substance as well as the three quarter pants. The body had a large cut wound on the throat area and the forehead had wounds.

[16] Mr. Manzanero testified that he saw a Belikin pint near the foot area of the body and three stones. One stone had sharp edges and was stained with dark substance, near the body. Two stones were facing south of the body and a smaller stone which was partially under the body. He further testified that there was a Gillette Razor which was stained with dark red substance, in the immediate area. He further stated that there was a path in the thicker bushes due south of the body and that path appeared as if someone had forced themselves into the

thick bushes. He observed stains of dark red substance on several leaves and bushes along the path. Where the path ended in the immediate area there were other stones also stained with dark red substance. Mr. Manzanero testified that upon close observation of one of the stones he observed that it had attached, suspected hairs, which had similar characteristics of the hairs on the deceased head.

[17] In cross-examination, Mr. Manzanero testified that it was the deceased who went into the path by the thick bushes and then came back out because he observed that the pathway had a dark red substance. The substance resembling blood on the leaves in the bushes was drip blood.

Evidence of Mr. Wenceslado Teul – Scenes of Crime Technician

[18] Mr. Teul is a Scenes of Crime Technician and the statement from him was read into evidence by the Marshall. He stated that he processed, for blood trace, the white colour vehicle, Nissan Xterra, bearing diplomatic license plate D6-CD01, which was recovered from the Maya Mopan area in Belmopan. He did a search with white light and then processed it for blood trace using luminol but none was found. Mr. Teul also took 5 photographs which he processed.

The case for the Defence at trial

[19] The Appellant called no witnesses. He gave a dock statement in which he stated:

> "I have never been in the hands of the law; I have never committed any crime before .. this is the first time I have ever been in the hands of the law and before a court. I would like to give my God and ask him for forgiveness of what happened that day. I didn't have many options because of the fact that I truly believe that my life was in danger.
>
> What unfolded that day I was picked up by an individual in a white SUV offering me a drink to hang out. We went to a feeder road where he offered for us to hang out, whereby we were taking drinks when he began touching me in manners that did not seem appropriate and made me really uncomfortable, private areas. That is when I realised something was wrong. I explained to the individual that I am not such person

and that I am not that type of person. So then I asked him if we could please leave and that if he can drop me off back at the same location the Market Square.

In my request he refused so I tried to get out but then he locked the vehicle doors. He approached me in a different manner now. He offered me money in exchange for sexual intercourse. I refused and I explained to him again that I am not that type of person. That is when he reached at me and began taking off my pants with force and aggression. I then ask him to please stop and to take me back for us to leave. So he refused and I pushed him. When I pushed him he got more aggressive and very violent, at this moment I am scared as he was a very strong man with the force that he aggressed me with. That was when he reached for my neck with both arms and began choking me. That is when he started threatening me in Spanish also. At that moment I was running low on breath, I couldn't breathe. When I looked to the side of the passenger door I saw a blade. When I saw the blade I took the blade that was when I had to do something about it because I felt like I was being strangled, I was semi-conscious. I felt like I was going to die.

In that brief moment I swung the blade injuring the individual and he quickly released me whilst I gasped for air. He exited the vehicle, also opening mines allowing me to exit the vehicle. I want to clarify that it was that given moment where I felt that I was going to die that I had to do something to stay alive, to survive. What happened that day is very unfortunate for me and for the victim and I would like to ask for forgiveness. I believe I had no other choice. I would like to close my statement."

Decision of the trial judge

[20] The judge found on the evidence, including the caution statement of the Appellant, and the statement of Oscar Castellanos, that there was no doubt that the Appellant inflicted the deadly harm on the deceased.

[21] In relation to whether the Appellant had intention to kill the deceased, the trial judge considered the medical evidence of Dr. Estrada Bran who testified that the fatal injury was a slash to the neck of the deceased. That the deceased also had four (4) blunt sharp injuries on his head and bruises to his face. The trial judge accepted the medical evidence of Dr. Estrada

Bran that the sharp blunt injuries and bruising to the face occurred before the slash to the neck of the deceased. She found on the evidence that the Appellant had an intention to kill the deceased. The judge said:

> "Looking at all of the circumstances, including the razor that was used, the location of the injury and the fact that there were other injuries most importantly the one to the top of the head of the deceased, I am sure that the accused intended to kill the deceased when he slashed his throat, after causing several other injuries on and about his head and then left him on the road to die."

[22] The trial judge then considered whether lawful justification of either self defence or extreme provocation existed when the Appellant intentionally caused the deadly harm to the deceased. The judge said:

> "I direct myself that a person may intend to kill another if he reasonably believes he must do so to defend himself. And, of course, section 36, subsection four of the Criminal Code of our law sets out guidance here. That for the prevention for the defence of himself, a person may justify the use of necessary force to repel either murder, manslaughter, dangerous or grievous harm. Based on the evidence in this matter however, I do not believe that the accused was defending himself against an attack from the deceased in the vehicle as he describes. With respect to self defence the accused claimed that the deceased choked him and put him in fear of his life. Threatening that he had a gun because the accused rejected the advances of the deceased. In response according to the accused he cut the deceased with a razor he saw in the vehicle saying he did not know on what part of the body he had cut him.
>
> There is no evidence of blood in the vehicle, in fact, the evidence from the scenes of crime technician is quite clear that there was no blood in the vehicle, even traced elements. So I do not accept this version of events from the accused. It is through his caution statement which is prosecution evidence. The prosecution evidence that I have accepted in this trial does not support the lawful justification of self defence. But I also

must look at whether the lawful justification of extreme provocation exists in this matter."[2]

Analysis of the dock statement by the trial judge

[23] The trial judge also considered the defence of the Appellant who gave a dock statement.

The judge in analysing the dock statement stated:

> "In the dock statement the accused is essentially saying the same things that he said in his caution statement except he does not mention anything about a gun most notably and there are few other significant differences. What the accused is saying in his dock statement that he attacked the deceased only after being sexually assaulted and he says physically assaulted by the deceased.
>
> The accused is consistent in saying that the deceased touch his private and made sexual advances upon him. This was what he said to his friend Oscar Castellanos as well as to the police and then to this court in his unsworn statement. And as I had said to the reasons noted above with respect to the physical evidence I do not accept that the accused slashed the neck of the deceased inside the vehicle or that the deceased was able to unlock the vehicle doors as was said in the statement of the accused with a fatal cut having been done to his neck.
>
> There is no mention of a gun as I said given in the unsworn statement by the accused in court as there had been in the caution statement. I do not accept the totality of the unsworn statement, but I do give it considerable weight. I am reminded that, of course, even if I do not accept what the accused had said, this being the Defence portion of the case I cannot convict him on that basis. I may only convict if I believe the Prosecution's evidence, as I have said I did."[3]

[2] Page 157 line 10 to page 158 line 3 of the Record
[3] Page 158 - 159

No lawful justification of self-defence

[24] The trial judge, having accepted the case for the Prosecution found that there was no lawful justification of self-defence.

Lawful justification of extreme provocation

[25] The trial judge found that based on the evidence of Oscar Castellanos, witness for the Prosecution, she concluded that the Appellant was:

> "… **provoked in the extreme by the sexual advances of the deceased**. The accused in response to this lost his power of self-control and consequently attacked the deceased, striking him, causing four (4) blunt sharp wounds. One, on the top of his head, punching him in his face and ultimately slashing his neck with a razor."

[26] The judge explained the lawful justification for extreme provocation and why the Appellant was extremely provoked, in her oral judgment as follows:

> "Extreme Provocation in this jurisdiction constitutes lawful justification and will result in an accused charged with murder being found guilty of manslaughter rather than murder. Except in this matter that there was extreme provocation in this case. As I said earlier the evidence from Oscar Castellanos who said that the accused said to him that he was with this individual who touched his private parts, confirms to me that indeed that happened."

[27] The judge found that there was lawful justification of provocation based on the evidence from Oscar Castellanos, the Police, and what the Appellant said in his unsworn statement to the court, that the deceased touched his private parts and made sexual advances upon him. Under the heading of "VERDICT', the judge said that 'based on careful consideration of the Prosecution's evidence and taking into account all the evidence adduced at trial, I am sure that the accused inflicted the harm on the deceased with a partial lawful justification of extreme provocation, therefore I find the accused not guilty of murder but guilty of a lesser offence of manslaughter …"

[28] She also found that the physical attack by the Appellant would have happened outside of the vehicle and not inside of it, and even if sexual advances began inside of the vehicle. This finding was made by the trial judge based on the physical evidence from the scenes of crime technicians, Mr Manzanero and Mr. Teul. The luminol testing by Mr. Teul showed that there was no blood in the vehicle and Mr. Manzanero observed and photographed apparent blood and hair on the stones near the body of the deceased.

The Ground of Appeal

[29] The Appellant filed three grounds of appeal but abandoned two grounds on the day of the hearing of the appeal. He pursued only the first ground of appeal:

> "(1) *The learned trial judge failed to direct herself correctly in relation to the law of self-defence."*

Whether the trial judge failed to direct herself correctly in relation to the law of self-defence

[30] At the trial, counsel for the Appellant argued that this was a case of self-defence. The basis for the self-defence was his account as stated in his Caution Statement and his Dock Statement of an attack inside of the deceased's vehicle. The trial judge rejected self-defence as there was no factual basis to support that defence. However, there was evidence of extreme provocation which caused the Appellant to lose his self-control when the deceased touched his private parts.

[31] Learned Counsel, Mrs. Bradley for the Appellant submitted that the trial judge failed to direct herself on the requirements of the law of self-defence. She argued that the judge failed to pose to herself the two questions as set out by the Board in ***Norman Shaw v The Queen***[4], a case from Belize which discussed self-defence.

[32] In that case, at paragraph 19, the Lord Bingham of Cornhill stated the role of the trial judge when summing up in a case of self-defence:

[4] PC Appeal No. 58 of 2000

"19. In the opinion of the Board it was necessary for the trial judge to pose two essential questions (however expressed) for the jury's consideration:

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

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

[33] Learned counsel, Mrs. Bradley submitted that the Board's advice had been followed in ***May Bush v The Queen***[5]; ***Alpheus Parham v The Queen***[6], and ***Tiffara Smith v The Queen.***[7] However, in the instant case the trial judge failed to direct her mind to the advice of the Board before coming to the conclusion that the Appellant was not acting in self-defence.

[34] The learned Director submitted that in order for the judge to have posed the question as to the honest belief of the Appellant, the trial judge, as the trier of fact, had to have first accepted the version of the underlying events put forward by the Appellant. That version being that both the deceased and the Appellant were in the vehicle; there were unwanted sexual advances that escalated into threats and physical violence while the Appellant was locked in the vehicle; and in those circumstances he believed that he had to, and did, defend himself. However, the trial judge did not accept the version as told by the Appellant.

The law on Self-Defence – Section 36 of the Criminal Code

[35] Section 36 of the Criminal Code[8] provides:

36 (1) For the prevention of or for the defence of himself or of any other person against crime, a person may justify the use of necessary force not extending to a blow, wound or grievous harm.

[5] Criminal Appeal No. 5 of 2014
[6] Criminal Appeal No. 3 of 2015
[7] Criminal Appeal No. 11 of 2009
[8] Cap 101 of the Laws of Belize, Revised Edition 2011

(2) For the prevention of or for the defence of himself or of any other person against any criminal force or harm, a person may justify the use of necessary force not extending to a wound or grievous harm.

(3) For the prevention of or for the defence of himself or of any other person against any felony, a person may justify the use of necessary force not extending to dangerous harm.

(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
(d) Manslaughter, except manslaughter by negligence
(k) Dangerous or grievous harm."

[36] The trial judge addressed section 36 of the Criminal Code in her judgment and the justification for killing. She did not believe that the Appellant was defending himself. She said:

> "I direct myself that a person may intend to kill another if he reasonably believes he must do so to defend himself. And, of course, section 36, subsection four of the Criminal Code of our law sets out guidance here. That for the prevention for the defence of himself, a person may justifiable use of necessary force to repel either murder, manslaughter, dangerous or grievous harm. Based on the evidence in this matter however, I do not believe that the accused was defending himself against an attack from the deceased in the vehicle as he describes …"

Analysis of the facts by the trial judge

[37] The trial judge carefully analysed the facts relied upon by the Appellant and rejected that he was defending himself in the vehicle. She did not accept what the Appellant said in the Dock statement which showed that he was attacked inside of the locked vehicle so as to cause him to kill the deceased to defend himself. She also analysed the Caution Statement of the Appellant put into evidence by the Prosecution. She did not find the Appellant's version credible that he was choked by the deceased with both arms causing him to become semi-conscious and as such to defend himself by taking a razor blade he saw at the passenger side of the vehicle and cut the deceased on his neck. She explained the reason for not accepting

that there was an attack in the vehicle. The forensic evidence showed no blood in the vehicle although the deceased was cut to the neck.

Did self-defence arise on the evidence of what transpired outside of the vehicle?

[38] Having rejected the Appellant's version of events, the trial judge analysed the totality of the evidence to determine if the Prosecution had proven beyond a reasonable doubt that the deceased was killed and that there was no lawful justification for self-defence. The Prosecution proved that the deceased was killed outside of the vehicle and the evidence from the Crime Scene Technicians supports that finding by the trial judge. That evidence showed that the body of the deceased was found outside and he was killed outside. The dark substance on the stones, Gillete razor blade with dark substance, drip blood on the leaves in the thick bushes and on the path in the area, supported the view that the deceased was killed outside of the vehicle.

[39] The extent of the injuries to the deceased ranged from bruises to his face, injuries to his head and a cut to his throat. Stones near the body had dark substance with hair. The evidence from Dr. Estrada Bran showed that the deceased throat was cut after he was injured with the stones. The Appellant on the other hand, had only scratches on the arm and leg and so it could not have been that he dripped the dark substance resembling blood on leaves in the bushes and on the path leading to where the body was found. According to the medical evidence, death would not have been immediate and the deceased was the only one bleeding and hence the bushes and path leading to where the body was located had the dark red substance. In the view of the majority of the Court, this evidence as to what occurred outside of the vehicle does not support self-defence.

[40] The judge accepted the Prosecution's evidence, including that of Castellanos that the Appellant was touched on his private parts and he cut the deceased. This caused the Appellant to be provoked and lose self-control and kill the deceased. The fatal wound to the throat of the deceased was done after the attack with stones according to the medical evidence. In the view of the majority, the trial judge properly analysed the totality of the evidence and it was reasonable for her to find that self-defence did not arise.

Whether the judge failed to pose the two prong test in Shaw?

[41] Mrs. Bradley argued that the judge failed to pose to herself the two questions as set out by the Board in ***Norman Shaw*** case. In the view of the majority, the trial judge made no error, for reasons to follow.

[42] On an analysis of the facts and finding by the trial judge in the instant case, self-defence did not arise and the majority agrees with that finding. In ***Norman Shaw*** case, self-defence arose on the facts and hence the trial judge was obliged to direct the jury on the two prong test and if answered in the affirmative, the possible application of section 116(b) (now 119(b)). The first question as to whether the Shaw honestly believed or may have honestly believed that it was necessary to defend himself involves a subjective test. The trial judge in that case accepted that it was a case of self-defence but in his directions to the jury used an objective approach. The judge failed to inform the jury that it was the appellant's contemporaneous perception of the facts which mattered and not the facts as proven. That is, it was the Appellant's belief of a threat which existed and the jury were obliged to assess the situation as it appeared to the Appellant. Since the judge used an objective approach the Board found that this was a misdirection.

[43] The Board also considered section 116(b) as it was argued by the Appellant that the facts of the case brought it within that section. The trial judge was therefore obliged to direct on that subsection (116(b) provided that there was evidence of possible lawful justification. In considering the possible application of section 116(b) to the killings in **S*haw's*** case, the Board said at paragraph 29, that it was necessary to pose 4 questions:

(1) Was there evidence that the appellant was justified in causing harm to the deceased;

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

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

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

[44] The Board answered all the questions in the affirmative and concluded that there was enough evidence to require a judicial direction to the jury of the effect of section 116(b), the evidence relevant to application of its provisions and the burden on the prosecution to negative justification under that subsection. As the judge failed to direct the jury on the subsection, it was a misdirection, although not raised by the defence.

[45] In considering whether to apply the proviso, (section 31(1) of the Court of Appeal Act), the Board concluded that since there was no adequate direction given on the central issue in the case, the appellant's contention that he acted in self-defence, it could not be sure that no miscarriage of justice occurred. That a proper "direction could, even if improbably, have led to a different outcome." Accordingly, the Board concluded at paragraph 33:

> "Had the appellant's complaint, only related to the lack of a direction under section 116(b) convictions of manslaughter could have been substituted, since the appellant could have achieved no better results. But a proper direction on self-defence could have led to acquittals, and to substitute manslaughter convictions would represent a possible injustice."

[46] As such, the Board allowed the appeal, quashed the convictions and remitted the case to the Court of Appeal to decide whether to order a retrial.

[47] In the instant appeal, the facts are distinguishable from ***Norman Shaw*** case. As discussed above, the trial judge rejected the defence of self defence. The judge was the trier of facts and did not find the Appellant's version credible based on the physical evidence which conclusively proved that the deceased was not injured in the vehicle. Once the appellant's version as given in the caution statement and the dock statement was rejected, there was no evidential basis which raised self defence. As such the trial judge was not required to pose the two prong questions stated in ***Norman Shaw*** case.

The application of section 119(a) by the trial judge – Extreme Provocation

[48] The finding by the trial judge was that the Appellant intentionally killed the deceased but acquitted him of murder. She said: *"I am sure that the accused inflicted the harm on the deceased with a partial lawful justification of extreme provocation, therefore I find the accused not guilty of murder but guilty of a lesser offence of manslaughter…"*

[49] The trial judge found that the Appellant killed the deceased because of extreme provocation and this was not disproved by the Prosecution. As such, he was acquitted of murder and convicted of manslaughter by reason of the application of section 119(a) of the Criminal Code. The judge who was sitting alone did not get into any details in relation to the application of that subsection. The majority of this Court finds it necessary to do so because of the complaint of the Appellant that the judge did not apply the two prong test in ***Norman Shaw***, in relation to self-defence. As stated above, the majority is of the view, that the test in that case was not applicable because there was no evidential basis to support self-defence. The evidence does not support self defence and an outright acquittal nor the application of section 119(b) of the Criminal Code. We are of the view that the trial judge correctly applied section 119(a) of the Criminal Code.

<u>The legal defences under Belize Criminal Code</u>

<u>Definition of murder</u>

[50] Section 117 provides for the definition of murder which is an intentional killing. It states:

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

[51] By way of explanation there are two types of manslaughter. One where an accused is acquitted of murder on the basis that there is no intention to kill but convicted of manslaughter on the basis that he was acting unlawfully. By contrast there is the second type of manslaughter

where there is extreme provocation **or** other matter of partial excuse as shown by section 119 of the Criminal Code which provides for circumstances when intentional homicide is reduced to manslaughter.

When Intentional homicide is reduced to manslaughter – section 119 (a) and (b)

[52] Section 119 states:

> "119. A person who intentionally causes the death of another person by unlawful harm shall be deemed to be guilty only of manslaughter and not of murder, if there is such evidence as raises a reasonable doubt as to whether -
>
> (a) he was **deprived of the power of self-control by such extreme provocation** given by the other person as is mentioned in section 120 of this Act; **or**
>
> (b) he was justified in causing some harm to the other person, and that in causing harm in excess of the harm which he was justified in causing **he acted from such terror of immediate death or grievous harm as in fact deprived him, for the time being, of the power of self-control;**

[53] As stated above, the trial judge rejected self defence in the instant case and therefore the issue of self defence and a potential application of section 119(b) if there is excessive harm, did not arise. The trial judge found on the evidence that this was a case of extreme provocation and applied section 119(a), that is, the Appellant was deprived of the power of self control by such extreme provocation by the other person (the deceased).

What amounts to extreme provocation? – section 120

[54] Section 120 of the Criminal Code defines provocation. It states:

> "120. The following matters may amount to extreme provocation to one person to cause the death of another person, namely –
>
> (a) an unlawful assault or battery committed upon the accused person by the other person, either in an unlawful fight or otherwise, which is of such a kind either in respect of its violence or by reason of

> words, gestures or other circumstances of insult or aggravation, as to be likely to **deprive a person**, **being of ordinary character, and being in the circumstances in which the accused person was, of the power of self-control;** ….

The evidence which disclosed extreme provocation

[55] The trial judge found the evidence of Castellanos credible that the deceased touched the private parts of the Appellant and this led to killing of the deceased. Although the Appellant did not raise provocation, it was incumbent on the trial judge to do so if the evidence disclosed that he was deprived of his self-control based on the actions of the deceased. The trial judge believed that the deceased touched the Appellant on his private parts causing him to be deprived of the power of self-control. The touching of the Appellant's private parts falls under section 120 as it was a sexual assault committed by the deceased and that act of touching deprived the Appellant of the power of self-control.

Test for deprivation of the power of self control under the subsections

[56] Both subsection 119 (a) and subsection 119(b) refer to the deprivation of the power of "self-control." In the case of ***Norman Shaw***, it is stated that the expression "self-control" plainly bears the meaning familiar in the context of provocation. The Board said:

> "But whereas, for purposes of the defence of provocation, the defendant must be provoked to lose his self-control by things done or things said or both together, for purposes of section 116(b) the deprivation of the power of self-control must be caused by terror of immediate death or grievous harm. In each case the defendant's loss of self-control must cause him to act in the manner charged against him, **but the triggering event in the two cases is different."**[9]

[57] In the instant case, the trial judge was satisfied that the triggering event was the touching of the private parts by the deceased of the Appellant causing him to be extremely provoked. This evidence disclosed a lawful justification under section 119(a) and was applied by the trial judge. In doing so, the judge applied an objective approach. The Prosecution had the burden

[9] Para 25

to disprove provocation, if the evidence discloses possible grounds of justification. The trial judge stated that the Prosecution failed to negative provocation. The judge found that the Appellant was deprived of the power of self-control thus satisfying section 121 of the Criminal Code which states:

> "121 (1) Notwithstanding the existence of such evidence as is referred to in section 119(a), the crime of the accused shall not be deemed to be thereby reduced to manslaughter if it appears, either from the evidence given on his behalf, or from evidence given on the part of the prosecution
>
> (a) that he was not in fact deprived of the power of self-control by the provocation; …

[58] The Privy Council case of ***Kirk Gordon v R***,[10] explained the different test to be applied in relation to section 119(a) (extreme provocation) and 119(b) (excessive harm caused by terror of immediate death or grievous harm) at paragraphs 21 -23:

> *"The test*
>
> 21. Section 119(b) is quoted above. It provides that an accused is guilty of manslaughter and not murder where he intentionally causes death by unlawful harm and there is such evidence as raises a reasonable doubt as to whether he was justified in causing some harm to the other person, and that in causing harm in excess of the harm which he was justified in causing he acted from such terror of immediate death or grievous harm as in fact deprived him, for the time being, of the power of self-control. **Section 119(b) is to be contrasted with section 119(a), which also reduces murder to manslaughter but does so where there is such evidence as to raise a reasonable doubt as to whether the accused <u>was deprived of the power of self-control by such extreme provocation given by the other person as is mentioned in section 120</u>.** Section 120 provides a list of matters which may amount to extreme provocation for the purposes of section 119(a). They include, in section 120(a), an unlawful assault or battery committed upon the accused by another person, either in an unlawful fight or otherwise, which is of such a kind either in respect of its violence or by reason of

[10] <u>[2010] UKPC 18</u>

words, gestures or other circumstances of insult or aggravation, as to be likely to deprive a person, being of ordinary character, and being in the circumstances in which the accused person was, of the power of self-control. Section 121(1)(a) makes it clear that the accused must in fact be deprived of the power of self-control by the provocation.

22. It can immediately be seen that there is a distinction between section 119(a) and section 119(b). By reason of section 120(a), the unlawful assault or battery must be of such a kind as to be 'likely to deprive a person, being of ordinary character, and being in the circumstances in which the accused person was, of the power of self-control'. **The test is thus to that extent objective**. There is no similar provision in section 119(b), where it is sufficient for there to be a reasonable doubt as to whether the accused 'acted from such terror of immediate death or harm as *in fact* deprived him, for the time being, of the power of self control'. The Board emphasises the words 'in fact' because they demonstrate that, for the purposes of this part of section 119(b) the test is entirely subjective and has no objective element."

[59] In the view of the majority of the Court, the trial judge in the instant case was obliged to apply section 119(a) - extreme provocation, on the evidence proven. The finding of extreme provocation by the trial judge was the acceptance of the evidence of the Prosecution that the deceased touched the Appellant on his private parts causing him to lose self-control. Further, the nature of the injuries on the deceased showed the frenzied attack as compared to the two scratches on the arm and leg of the deceased.

Authorities relied upon the Appellant - distinguished

[60] The authorities of ***May Bush***, **Parham** and ***Tiffara Smith*** relied upon by the Appellant are distinguishable as self-defence arose under the facts of these cases. Self-defence did not arise in the instant case of the Appellant.

[61] In ***May Bush***, the trial judge, Justice Moore, (the same trial judge in the instant matter) found the Appellant not guilty of murder but guilty of manslaughter by reason of provocation. The Appellant had stabbed David Guerra, the deceased, as proven by the Prosecution. The Appellant, in her unsworn statement denied she stabbed the deceased. The deceased was

involved in an altercation with the Appellant, her common law husband, and her daughter, in a restaurant. A witness for the Prosecution saw the actual stabbing. One of the grounds of appeal was that the trial judge erred in directing herself on the law of self defence. Mrs. Bradley referred to paragraph 4 of ***May Bush*** where the Court of Appeal in addressing self-defence (section 36(4) of the Criminal Code) said the following:

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

[62] The appellant in ***Norman Shaw*** put self-defence at the forefront of his case. The subsection referred to in paragraph 4 above of ***May Bush*** is section 116(b) which provides for reasonably possible justification, excessive force in self defence and the justification of the appellant acting from terror of immediate death and so was deprived of the power of self-control. The learned trial judge in ***May Bush*** addressed self-defence because it arose from the defence closing submissions, that is self-defence or defence of another (since the appellant's common law husband and daughter were also involved in the altercation with the deceased). The trial judge was therefore required to do so if there was a reasonably possible justification of self-defence or defence of another on the facts although not raised by the Appellant who denied that she stabbed the deceased.

[63] The judge therefore addressed the two prong test and having considered the evidence did not find that the Appellant "*believed or may have believed she was in imminent danger since the deceased was at no point attacking her*." At the time the stabbing occurred the deceased daughter was no longer in danger and the common-law husband was defending himself. The judge found that the deceased injured the common- law husband of the Appellant. Also, the deceased had molested and assaulted the Appellant's daughter. The trial judge found provocation on the evidence which was not disproved by the Prosecution.

[64] In the cases of ***Tiffara Smith*** and ***Parham,*** relied upon by the Appellant, self-defence was clearly the defence which arose on the evidence. The Court need not discuss these cases.

[65] In the instant appeal, self defence was rejected by the trial judge on the basis that it did not arise on the facts. Therefore, in our view, it was not incumbent on the trial judge to apply the two prong test in ***Norman Shaw***.

Conclusion

[66] The trial judge had not failed in directing herself in relation to the law of self-defence. She rejected self-defence based on a proper analysis of the evidence. As the trier of fact, the trial judge was entitled to reject the account advanced by the Appellant for his assertion of self-defence. Further, the Prosecution's evidence negative self-defence. As such, there was no basis for the judge to consider the two prong questions posed in ***Norman Shaw's*** case. For these reasons, the majority of the Court is of the view that the appeal should be dismissed, and the conviction and sentence affirmed.

DISSENTING JUDGMENT OF MINOTT-PHILLIPS, JA

MINOTT-PHILLIPS JA

[67] This separate judgment is pronounced pursuant to ***Rule 21 (2) of Order III of the Court of Appeal Rules*** enacted pursuant to ***section 196(4) and Schedule II of the Senior Courts Act, 2022***.

[68] I would allow this appeal against conviction, quash the conviction and, in the interests of justice, order a new trial.

[69] I find myself unable to agree with the majority view that, on the facts of this case, there was no basis for the judge below to consider the questions posed in the case of ***Norman Shaw v The Queen***[11]**.**

[70] I accept the submission of counsel for the Appellant that the trial judge failed to properly direct herself as a trier of fact on the legal requirements of the law of self-defence in

[11] PCA 58 of 2000. Judgment delivered 24 May 2001 – Sitting in jurisdiction of Belize

that, in assessing whether there was a basis to support the Appellant's claim of self defence, she applied an objective test of reasonable belief (as set out in paragraph 22 above) and not the required subjective test. I agree with counsel for the Appellant that the accused was to be judged on the subjective basis of how he honestly believed the facts to be.

[71] The Appellant maintained both in his caution statement and unsworn statement that he was acting in self defence. His caution statement was admitted into evidence as part of the prosecution's case. He spoke of what he perceived to be a sexual assault by the deceased and of an attempt to choke him. He also spoke of the deceased locking the vehicle doors, taking off his (the Appellant's) pants with force and aggression, and described gasping for air and feeling like he was going to die. The facts show the Appellant to be much younger and smaller than the deceased. According to him, the deceased paid no heed to his pleas for him to stop. The prosecution was burdened with negativing/disproving self-defence. In my view it did not do so, but this appeal does not turn on whether or not it did so.

[72] The facts of this case, in my view, make it possible for section 36 (4) of the Belize Criminal Code to have been relevant; in particular subsections (j) and (k). The sexual assault described by the Appellant, if not forestalled by him, would have been more than capable of constituting either a forcible unnatural crime[12], or dangerous or grievous harm, or both. But for the exclusionary (in this jurisdiction) fact that the Appellant was male, the facts of this case may even have been capable of giving rise to a fear by him of rape[13].

[73] I do not agree that the absence of blood in the vehicle establishes, beyond a reasonable doubt, that the accused's account of what transpired is not credible. The Appellant details the unlocking by the deceased of his door as allowing him, the Appellant, to also exit the vehicle because that unlocking of the driver's door triggered the unlocking of his own door. Could this not be the kind of innocuous (at first blush) but seemingly accurately represented detail that, in fact, strengthens his credibility?

[74] Considering the circumstances from the Appellant's subjective point of view, does the prosecution's proof of an absence of blood inside the vehicle negate self defence arising as an

[12] As defined in section 53 of the Criminal Code it includes *"carnal intercourse against the order of nature with any other person"*.
[13] Rape, as defined in the Belize Criminal Code, is a crime that can only be perpetrated upon a female.

issue for the judge's consideration? I'm of the view that it does not. Even if the cutting occurred outside the vehicle that does not establish that the cutting did not occur in self defence. The determination of the issue, however, is something that, properly, ought to occur after a prior determination of whether it arose for consideration (i.e. by the trial judge asking herself the first of the 2 questions set out in ***Norman Shaw***).

[75] On the facts of this case the evidence required the trier of fact to direct her mind not only to the possible existence of justification such as would reduce murder to manslaughter (under section 119 of the Criminal Code), but also to direct her mind to the possible existence of justification by way of self defence (under section 36 of the Criminal Code) which, if established, would result in an acquittal. In my view it was not discernible from her judgment that she adequately directed her mind to the latter issue.

[76] As regards that issue, there being evidence adduced in the case by both the Appellant and the prosecution of the use by the Appellant of force causing harm to the deceased for the possible reason of preventing a crime being visited upon his person, the trial judge was under a duty to make it clear that she had directed herself on the issue of self defence,

> *"…whether the defence raised the issue at trial or not and* ***whatever the trial judge's opinion of the weight of the evidence****. This is clearly established to be the law in relation to provocation* ***and self-defence****."*[14] *[my emphasis]*.

[77] I agree with counsel for the Appellant that the trial judge erred by failing to ask herself the questions she was required to consider in looking at self defence (as set out in ***Norman Shaw v The Queen***) and in focussing her consideration on the partial defence of extreme provocation (which, ultimately, she found was established on the evidence).

[78] I am of the view that it was incumbent on the trial judge to have made it clear in her judgment that she considered, firstly, ***"whether, subjectively, the Appellant honestly believed, or may honestly have believed, that it was necessary to defend himself?"*** It is also my view that there's little, if any, scope for a *'no'* answer to that question given her conclusion that he

[14] Norman Shaw v The Queen. Per Lord Bingham of Cornhill at numbered paragraph 28

was extremely provoked by the deceased. That being so, the second question the learned Trial Judge was obliged to demonstrate that she had considered, was, ***"taking the circumstances and the danger as the Appellant honestly believed them to be, was the amount of force which he used reasonable?"*** That question was, on the evidence, open to either a 'yes' or a 'no' answer. Had the learned trial judge demonstrated that she asked herself both those questions, and answered the second one in the negative, her decision may have been unimpeachable. However, she did not do that and, consequently, in my view she erred for not having done so. In short, the 2-pronged test in **Shaw** should have been applied **to see whether self-defence arose for consideration** (by the answer to question 1) and, if so, whether it was established (by the answer to question 2).

[79] The facts of this case (in which the trial judge concluded that the Appellant was extremely provoked by the sexual assault of the deceased), to my mind, are stronger than those in the case of ***Norman Shaw***. In ***Norman Shaw***, the trial judge did not give a direction posing either of the two essential questions arising from facts that could call for a consideration of self-defence. Their Lordships' Board declared that failure to be a misdirection and went on to point out that the issue of whether the judge's misdirection was potentially prejudicial to the Appellant was one that caused them *"very great difficulty and anxiety"*[15]. That was because, on the facts of that case the Appellant shot one of the deceased with the deceased's own gun which had been taken from him leaving him unarmed. As Lord Bingham said[16],

> *"Despite real misgivings, and recognizing that a jury would probably have rejected the appellant's plea of self-defence even if properly directed, the Board concludes that the misdirection was potentially prejudicial to him."*

In my view it was more difficult for the Appellant in that case to establish his contention that self defence should be considered when he'd shot an unarmed man because he was upset that he's been sold flour instead of cocaine (the facts in ***Norman Shaw***), than it was for the Appellant in this case to establish his contention that self defence should be considered because he was seeking to resist a sexual assault in circumstances where he was being choked by the aggressor (the facts of the instant case).

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[15] At numbered paragraph 21 of ***Norman Shaw***
[16] At numbered paragraph 21 ***Norman Shaw***

[80] In the instant case, there is nothing in the trial judge's reasons to indicate that she considered either of the two questions considered by their Lordships' Board in ***Norman Shaw*** to be necessary in the circumstances before her. The judgment of the majority of this court affirming her decision is premised on there being no need for her to have done so because they agree with her finding that self defence did not arise. In saying so the majority reference the comments of the Board in ***Norman Shaw*** regarding section 116 of the Criminal Code (now section 119). Those comments relate to whether, on the evidence, an issue of provocation arose in that case. However, the correctness of the finding of provocation (established at the conclusion of the case below) is not the issue in this appeal. The issue in this appeal is the quite separate one of whether, on the evidence, an issue of self-defence arose for consideration.

[81] In my view a separate analysis of the issue of the trial judge's treatment of self defence from that of provocation, is required. Once facts emerge from the evidence that call for a consideration of whether self defence could be a relevant factor (whether raised by the Defence at trial or not, and whatever the judge's opinion of the weight of the evidence), the trial judge is under a duty to direct herself appropriately on the issue. It is, in my view, not open to her to fail to direct herself on the issue because she rejected the Appellant's factual account giving rise to self defence. It follows that I do not agree with the submission of the learned Director in that regard set out in paragraph 34 above.

[82] On the facts of this case I find myself unable to agree with the reasoning of the majority set out in paragraph 47 of this judgment.

[83] In my view this conviction is unsafe as it deprived the Appellant of having the trial judge consider whether he was entitled to be acquitted. I maintain (very respectfully to the contrary view of the majority) that I would have, accordingly, allowed this appeal against conviction, quashed the conviction and, in the interests of justice, ordered a new trial.

Order

[84] This Court, by a majority decision, dismisses the appeal of the Appellant and affirms his conviction and sentence.

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HAFIZ BERTRAM P

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MINOTT-PHILLIPS JA

_____
BULKAN JA