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

CRIMINAL APPEAL NO. 6 OF 2019

NEVIS BETANCOURT **Appellant**

v

THE KING **Respondent**

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BEFORE

The Hon Madam Justice Hafiz-Bertram	-	President
The Hon Madam Justice Woodstock-Riley	-	Justice of Appeal
The Hon Mr. Justice Foster	-	Justice of Appeal

Mr. Anthony Sylvestre for the appellant.
Mrs. Cheryl-Lynn Vidal SC, Director of Public Prosecutions, for the respondent.

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Date of hearing: 11 March 2022
Date of Promulgation: 14 April 2023

REASONS FOR JUDGMENT

FOSTER, JA

[1] On 11th March 2022, the Court heard an appeal by the appellant, Nevis Betancourt, against his conviction for the murder of Jose Castellanos. At the conclusion of the hearing, the Court dismissed the appeal and promised to provide written reasons for the decision. I now do so and regret the time it has taken.

Background

[2] The factual background may be summarized as follows: On 27th July 2017, Jose Castellanos was shot inside a restaurant in Santa Elena Town and succumbed to his injuries later that night. The appellant was indicted for the murder of the deceased. He pleaded not guilty to the offence and was tried without a jury, pursuant to ***section 65A of the Indictable***

Procedure Act.[1]

[3] At the trial, the Crown's case was that the appellant intentionally and unlawfully killed Jose Castellanos. The Crown adduced evidence from seventeen (17) witnesses. Four of them were at the restaurant at the time of the incident, namely, Donovan Ramirez, Roxanna Gomez, Elvia Montufar and Consuelo Canales and gave direct evidence in relation to the incident. The Crown's case was based almost exclusively on the eyewitness testimony of Donovan Ramirez, Roxanna Gomez and Consuelo Canales.

[4] The first eyewitness, Donovan Ramirez, testified that on the 27th of July 2017, at about 8:00 p.m., he was at the restaurant conversing with the deceased when a young man arrived with a firearm. The man walked towards a lady in the restaurant and the lady pointed at the deceased. The man then walked towards the deceased who was sitting in a chair in the restaurant. The man then took out his firearm and he shot twice at the deceased. The deceased then responded to the shooting by brandishing a machete. When asked during cross examination whether he had seen where the deceased got the machete from, Mr. Ramirez stated that *"it was so fast I couldn't notice from where he got it [the machete*]". Later during his cross examination, Mr. Ramirez admitted that he had been playing with his telephone. However, he stated that *"As I saw the movement, I placed my phone and I saw what was happening"*.

[5] Roxanna Gomez gave evidence that she was with her child at the restaurant on the night of the incident and saw the appellant enter the restaurant. She testified that when the appellant entered the restaurant, *"he started doing signs to his mother, Ms. Stephanie,"* and that "*Ms. Stephanie pointed at where Jose Castellanos was sitting."* Ms. Gomez further testified that after, the appellant walked towards the deceased and the two men mumbled something which she did not hear. She said that she heard two gunshots and then turned and saw the deceased with a machete standing. She further stated that the deceased chopped the appellant with the machete. She testified that the deceased tried unsuccessfully to chop the appellant again and the machete fell. She said that the deceased fell and started crawling underneath the restaurant and that *"Nevis finished shooting on the ground ".*

[1] Chapter 96 of the Laws of Belize, as amended.

[6] Consuelo Canales was the owner of the restaurant in which the incident occurred. Her testimony was that on the night of the incident, she was at her restaurant with seven or eight customers including the appellant's mother, when the deceased was shot. She said that *"I heard first two gunshots. I heard them but I did not see. After I heard a machete, something like a machete. Then I saw Nevis holding a gun to his hand. Then I heard him telling him 'you with a machete and I with a gun, we will see who will do better.'* She testified that the appellant continued *"firing"* at the deceased. On cross examination, Ms. Canales stated that after the incident she placed the machete around where she kept the garbage inside the restaurant because she thought the fight would continue. She said that she did not see the deceased after he was shot because she closed her eyes as she did not want to see.

[7] At the trial, the appellant's case was that he acted in self defence. He gave sworn testimony that as he entered the restaurant, the deceased rushed at him with his hand held up in the air with a machete. He said that while trying to move out of the way, he was chopped on his left arm. He then took out his firearm and the deceased lifted his hand to chop him again. The appellant testified that he was in fear for his life, and it was at that moment that he discharged his firearm and shot the deceased.

[8] In a written judgment dated 1st April 2019, the learned judge found the appellant guilty of murder. She concluded that she felt sure on the prosecution's evidence that the five elements of murder had been made out – that Jose Castellanos was dead and died of harm; that the accused caused the fatal harm to the deceased intending to kill him; and that he did so without the lawful justification of self defence or any other lawful justification. She further noted that the defence and the appellant's good character had not given her reason to doubt the prosecution evidence.[2] On 10th January 2020, the learned judge sentenced the appellant to a term of 20 years imprisonment.

Grounds of appeal

[9] The appellant filed a notice of appeal on 17th April 2019 and subsequently filed grounds of appeal on 17th August 2021. He initially sought to challenge his conviction on five grounds. The appellant amended his grounds of appeal on 25th January 2022 and at the hearing of the

[2] Paragraph 62 of Judgment below.

appeal, learned counsel Mr. Anthony Sylvestre sought leave of the Court to proceed on the amended grounds of appeal. In the main, the grounds of appeal concern the learned judge's treatment of the evidence during the trial and the adequacy of the good character direction to herself. The amended grounds of appeal are as follows:

1. The learned judge erred in permitting a substantive prejudicial leading question of prosecution witness Donovan Ramirez in re-examination.

2. The learned judge erred in failing to take all relevant matters into account in determining whether the appellant had the specific intention to kill.

3. The learned judge failed to give herself an adequate good character direction.

4. The learned judge failed to properly review and evaluate the evidence of the prosecution witnesses Donovan Ramirez, Roxana Gomez and Consuelo Canales.

5. The verdict is against the weight of the evidence.

I propose to address grounds of appeal 1 to 4 in turn. A discussion of these specific grounds will invariably involve my consideration of the merits of ground 5.

Ground 1 – Permitting a prejudicial leading question in re-examination

[10] The gravamen of the appellant's first complaint is that, during re-examination of the prosecution witness, Donovan Ramirez, the prosecutor asked an improper leading question which was prejudicial to the appellant. Learned counsel for the appellant, Mr. Sylvestre, submitted that section 66(2) of the **Evidence Act** makes plain that re-examination must be directed to matters referred to in cross-examination and that no ambiguity emerged in the cross examination of Donovan Ramirez that necessitated the prosecutor asking that specific question. Mr. Sylvestre also referred the Court to section 67 of the **Evidence Act** and the relevant principles referenced at paragraph 8-72 of ***Archbold (2001)*** which state that questions which suggest the answer to the witness should not be asked during re-examination. He therefore

argued that the learned judge erred in permitting a question of that nature to be asked by the prosecutor.

[11] Mr. Sylvestre argued that rules of evidence must be adhered to strictly if a trial is to be regarded as a fair process. In this regard, he prayed in aid the decision of this court in ***Albino Garcia v The Queen***[3] which applied ***Randall v The Queen.***[4] In both cases, the court underscored that it is the essence of a fair trial that the rules must be followed and that the rules are designed to safeguard the fairness of proceedings.

[12] Learned counsel stated that the central issue in the trial was the sequence in which the appellant sustained injuries and the deceased was shot. The crux of the appellant's case was that the deceased attacked him first and that he acted in self-defence. The prosecution's case, however, was that the appellant initiated the confrontation by first shooting the deceased. Mr. Sylvestre therefore contended that as the response by the witness was to a question posed in re-examination, the response was the final evidence of this witness on the critical issue of the sequence of events. Consequently, the response would have been most prejudicial and would have amounted to a serious irregularity in the trial process.

[13] In response, the Director of Public Prosecutions, learned counsel Ms. Cheryl-Lynn Vidal SC, submitted that the question asked by the prosecutor in re-examination was permissible in order to clarify an ambiguity and was not prejudicial. She contended that what was said in cross-examination was capable of being interpreted as being inconsistent with what had been said in examination-in-chief and needed to be explained. She argued that the question was clearly meant to clarify any perceived inconsistency, which is precisely the purpose of re-examination. Further, she argued that there was no objection by the appellant to the question and it was clearly permitted by the judge who sat as arbiter of the facts and who is entitled to ask questions in any event.

[14] Mrs. Vidal SC further pointed out and reminded the court that the appellant's trial was not a jury trial, it was a trial by judge alone. She explained that the learned judge, in her judgment, carefully detailed the basis of her conclusion and acceptance of the evidence of the prosecution. She submitted that nothing in the judgment supports the view of the appellant that

[3] Criminal Appeal No. 18 of 2004.
[4] Privy Council Appeal No 22 of 2001

the judge was improperly influenced by the answer to the question in re-examination that, in any event, merely confirmed the evidence given by the witness in examination-in-chief. Accordingly, she submitted that there was no material, or any, irregularity, nor was the learned judge improperly influenced by the question and answer in re-examination and there was therefore no prejudice to the appellant.

Analysis

[15] It is useful to recite the material portion of the evidence of Donovan Ramirez so as to place the first ground of appeal and the arguments of counsel in proper context. The evidence in chief was that:

> "He walked towards Castellanos where he was sitting down in a chair, beige in color. He took out his firearm and he shot him … I don't know how he did it or from where he got the machete" (Judge's Notes) and he attacked him … After the two shots, he continued shooting at him in his chest area. While Castellanos tried to come out of the restaurant, as he was coming down the steps, he continued shooting at him… After that I don't know what happened because I took my bicycle and I left the place." [5]

In cross examination, Mr. Ramirez testified:

> "Q. So, he was standing up when he got shot?
>
> A. Yes, he was standing up.
>
> Q. And it was when he was going with the machete in his hand that is when he got shot?
>
> A. He was shot before that; he was shot before when he got two shots to his chest area.
>
> Q. Chele got two shots and then he raised the machete to chop the young man?
>
> A. It was when he raised the machete to attack the young man that he was shot two times and then he turned around he went down the stairs and he continued shooting him."[6]

The evidence in re-examination was that:

[5] Record of appeal, page 16.
[6] Record of Appeal filed 23rd September 2020, pages 18-21.

"Q. Was Chele shot before he attacked the young man?

A. They were two shots before but they didn't harm him. (Judge's Notes).

THE COURT: The question was: Was Chele shot before he attacked the young man?

THE WITNESS: Yes.

THE COURT: Thank you very much, Mr. Ramirez, you may leave. Mr. Ramirez?"[7]

[16] The provisions of law referred to by counsel are clear and unambiguous. Section 66(2) of the Evidence Act provides that:

> *"The re-examination must be directed to the explanation of matters referred to in the cross-examination and if new matter is by permission of the judge introduced in re-examination, the opposite party may further cross-examine upon that matter."*

Section 67 provides:

> *"Questions suggesting the answer which the person putting the question wishes or expects to receive, or suggesting disputed facts as to which the witness is to testify, must not, if objected to by the opposite party, be asked in an examination-in-chief or in a re-examination, except with the permission of the judge, but may be asked in cross-examination." (emphasis mine)*

[17] It is readily apparent from the arguments of counsel that the scope of re-examination is not in issue. Indeed, section 66(2) is clear. A witness, on behalf of the party for whom he has given evidence in chief, may be re-examined for the purpose of explaining or qualifying any part of his evidence given during cross-examination which is capable of being construed unfavourably to his own side.[8] It is the law that no questions may be asked in re-examination which introduce wholly new matters except with leave of the court and that leading questions are not permissible in re-examination.[9]

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[7] Record of Appeal filed 23rd September 2020, page 26.
[8] Halsbury's Laws of England 5th edn., Vol 12, para. 840; Blackstone's Criminal Practice 2023, F7.66.
[9] Ireland v Taylor [1949] 1 KB 300.

[18] From the above extracts of the transcript, the issue to be clarified was whether, as Mr. Ramirez had said in examination-in-chief, the appellant first fired shots while the deceased was still seated, or whether he was standing, with the machete raised, when the shots were first fired. It appears that in examination-in-chief, Mr. Ramirez had given a very clear account that the deceased was sitting in the chair, then he was approached by the appellant who had a firearm and who shot him, and, on cross-examination he seemed to have been suggesting that the deceased was standing with the machete raised when the shots were fired. I therefore accept the argument of the learned DPP that this was a discrepancy in the evidence which created some ambiguity that arose in cross-examination that needed to be clarified. The prosecutor's question sought to simply clarify the sequence of events which were raised in cross-examination. I am unable to discern any prejudice to the appellant where this evidence had already been given in examination-in-chief. It is clear that no new issue had been raised.

[19] Counsel for the appellant urged the court to apply ***Albino Garcia v R***,[10] which concerned an improper and prejudicial question put to a witness, and which must be distinguished from this case. ***Albino Garcia*** involved a jury trial, where the question posed by counsel sought to elicit inadmissible evidence and that the situation was aggravated by the trial judge soliciting the content of the inadmissible statement before the jury. In this present case, there was no jury, and the question asked sought to clarify admissible evidence.

[20] It is also worth noting that no objection was taken by counsel for the appellant during the trial. In any event, even if an objection was taken on the basis that it was a leading question, I see no reason for the prosecutor not to have rephrased the question to clarify the evidence which previously arose. In the circumstances, the first ground of appeal must fail.

Ground 2 - Failing to consider relevant matters in determining intention to kill.

[21] On the second ground, learned counsel, Mr. Sylvestre, submitted that, although the learned judge accurately stated the law on intention to kill in her judgment, she failed to consider all relevant matters when determining whether the appellant had the specific intention to kill the deceased. He argued that, in determining 'intention to kill', the learned judge considered the testimony of Consuelo Canales pertaining to the words of the appellant *"you*

[10] Criminal Appeal No. 24 of 2004.

with machete, I with gun, we will see who do better". Next, Mr. Sylvestre stated that the learned judge considered the evidence of the pathologist as to the cause of death and considered the number of injuries, the location of the injuries on the body, the continued shooting of the deceased after he was shot and as he attempted to escape further harm. Mr. Sylvestre submitted that it is significant that the learned judge did not consider, among these factors, the fact that the appellant had received severe injuries during the altercation with the deceased and what reasonably then may have prompted or caused the appellant to have, for instance, fired further shots.

[22] Counsel brought to the court's attention the evidence of Sergeant Dwayne McCulloch who testified that appellant sustained injuries classified on the Medico-Legal Form as "dangerous harm" and such harm is "harm endangering life". Further, there was evidence before the court that the appellant was hospitalized from 27th July 2017 to 8th August 2017 as a result of the injuries he sustained at the hands of the deceased. Mr. Sylvestre submitted that this is evidence from which the learned judge could have inferred as to the extent of injuries sustained and therefore analyze the appellant's reaction in this context. Accordingly, he argued that the learned judge failed to take all relevant matters into account in determining whether the appellant had the specific intention to kill.

[23] In response, the Director of Public Prosecutions' submission was that the learned trial judge took into account all the circumstances that were relevant to a determination of whether the appellant had the requisite intention to kill. Further, learned counsel, Mrs. Vidal SC, argued that counsel for the appellant has improperly conflated the issues of intention and justification. She stated that the analysis of the appellant proceeds from an inaccurate premise. She argued that in determining intention, the question that the learned judge had to answer was, what was the intention of the appellant when he inflicted the injuries on the victim and not what his motivation was when he inflicted the injuries.

[24] Mrs. Vidal, SC submitted to this court that an intention to kill is not inconsistent with the assertion of self defence. A person who legitimately thinks that his life is in danger may intend to kill his attacker, and do so, and still not commit an offence. She stated that the argument of the appellant that the judge should have taken into consideration that the appellant had sustained severe injuries and, that would have reasonably prompted him to have fired further shots, confuses the issue as to what he did with why he did it.

[25] Mrs. Vidal, SC asserted that the learned trial judge took into consideration all that she was legally required to take into consideration when determining intent. She submitted, that given the evidence accepted by the learned judge, a finding other than one that the appellant intended to kill the victim would have been a perverse finding.

Analysis

[26] Section 117 of the Criminal Code,[11] provides an essential ingredient of murder, is a specific intention to kill. At paragraph 33 of her judgment, the learned judge stated:

> *"I have taken into account in order to determine if I can reasonably infer from all the circumstances that the accused intended to kill the deceased: the number of injuries; the weapon used; the location of the injuries on the body; the continued shooting of the deceased after he was shot and as he attempted to escape further harm; as well as, the comment I believe the accused made."*

[27] As I understand the argument of Mr. Sylvestre, the learned judge ought not to have only considered the prosecution's evidence in determining whether there was an intention to kill. She ought also to have considered that the extra shots were as a result of the machete attack by the deceased. Further, she ought to have considered the severity of the injuries of the appellant.

[28] I have noted that while dealing with the issue of intention to kill the learned judge did not address this issue of motive. The learned judge simply had to consider whether, based on the totality of the evidence, the appellant had a specific intention to kill the deceased and not why he intended on killing him. Whether or not the appellant had sustained injuries and therefore fired further shots does not necessarily go towards his intention to kill the deceased. In these circumstances, I am unable to understand how the extent of the injuries sustained by the appellant is a relevant matter to be taken into account when determining whether the appellant had the specific intention to kill the deceased. I am unable to follow the submission of counsel for the appellant, particularly where it has long been established that an intention to kill is not inconsistent with the defence of self defence. The cases of ***Krishendath Sinanau et al v The State***[12] and ***Baptitse v The State***[13] support this proposition.

[11] Cap 101, Laws of Belize.
[12] 1992 44 WIR 383.
[13] 1983 34 WIR 253.

[29] The learned judge rightly considered the evidence relevant to intention. She considered the number of shots that were fired (six shots), the number of injuries, the weapon used, the continued shooting of the deceased as he attempted to escape further harm being shot twice at and the location of the injuries, all being concentrated on the upper torso, the shoulder, the chest, the abdominal region.[14] The evidence is also that the appellant fired two shots *before* the machete was produced. T hose are relevant factors which go towards intention.

[30] The judge found that the appellant initiated the attack on the deceased. He first fired two shots at the deceased and then the deceased stood and severely wounded the appellant with a machete. In my view, the initial attack was sufficient to establish the specific intent, the utility of a deadly weapon, the firing of the two shots to the torso of the deceased, the injuries the deceased sustained and the continued shooting by the appellant at the deceased whilst the deceased was crawling away even after the appellant was severely injured, In my view, the judge rightly disregarded the appellant's injuries at the time of dealing with the appellant's intention. The matters raised by counsel for the appellant are irrelevant to that issue and go towards justification as rightly pointed out by the learned Director. The fact that the appellant felt justified in killing the deceased is a matter separate and apart from him intending to kill the deceased. In the premises, this ground of appeal cannot succeed.

Ground 3 – Judge's failure to give herself an adequate good character direction

[31 On this ground, Mr. Sylvestre submitted that the appellant was entitled to a full good character direction (both the credibility limb and propensity limb) having given sworn evidence at the trial and having adduced evidence of his good character. He drew the attention of the Court to the decision of ***Gregory August v The Queen***[15] in which guidance was given on how the good character directions are to be applied.

[32] Having conceded that the learned trial judge did say that the good character evidence here is the nature of absolute character, Mr. Sylvestre argued that the learned judge did not properly apply the good character directions to the case. He argued that the learned trial judge addressed her mind to the appellant's good character and the two limbs of the good character direction at the tail end of her judgment and not when considering the evidence and determining

[14] Page 10 of Judgment below.
[15] [2018] CCJ 7 (AJ).

the issue of whether the appellant intended to kill the deceased and whether the appellant killed the deceased without lawful justification.

[33] In written submissions, Mr. Sylvestre stated that the question of "honest belief" was not properly considered. As a result of this, the appellant would have been denied the opportunity of a manslaughter verdict. He cited ***Keith Gaynair v The Queen***[16] where this Court highlighted the interplay and application of sections 117 and 119 of the **Criminal Code** of Belize where an accused "who intentionally causes the death of another person by unlawful harm" is deemed to be guilty only of manslaughter and not murder if he "was justified in causing some harm" and in causing that harm, "he acted from such terror or immediate death or grievous harm as in fact deprived him of the time being of the power of self-control.

[34] Counsel for the appellant argued that the severity of the appellant's injuries and the length of time that he was hospitalized would not be able to be considered by the trial judge in the context of the application of section 117 and 119 if the trial judge makes a determination that there was no honest belief. He asserted that once there is a wrong determination on the question of honest belief, the opportunity for consideration of a lesser verdict of manslaughter is removed. Thus, the appellant would have been denied a fair trial as a result of the failure of the learned trial judge to properly apply the good character directions.

[35] Mrs. Vidal SC argued that the learned trial judge gave proper consideration to the appellant's good character in the determination of his guilt and the argument of the appellant ignores both the manner in which a judge arrives at a verdict and the actual words of the judgment.

[36] Mrs. Vidal SC submitted that it is clear from the judgment that the appellant benefitted from the proper consideration of his good character. The learned trial judge considered the version of events given by the accused, and in assessing whether to believe that version, factored in that his good character supported his credibility and that it was less likely that he would have committed the crime. She went on to state that the learned judge rejected the version of the appellant notwithstanding his good character.

[16] Criminal Appeal No. 18 of 2018.

[37] The learned Director argued that there was therefore no room for the consideration of "honest belief" beyond what the judge had already indicated. The judge specifically found that the appellant was the attacker.

Analysis

[38] The learned judge directed herself on the appellant's good character in paragraphs 56 - 61. Having gone through authorities on the issue she stated that:

> *"[58] The good character evidence here is in the nature of absolute good character, the accused having no previous convictions or apparent criminal involvement of any sort and no reprehensible conduct in his background. Additionally, the accused gave sworn testimony. Consequently, I direct myself that the accused is entitled to the benefit of both limbs of the good character direction.*
>
> *[59] I direct myself that good character is not a defence to the charge. I also direct myself that evidence of the accused's good character is a positive feature of the accused which helps support his credibility and I should take this into account when assessing whether I believe the sworn testimony of the accused.*
>
> *I further direct myself that the good character evidence of the accused supports the lack of propensity for the accused to commit the crime, meaning it is less likely than otherwise, for him to have committed the crime with which he is charged. I am obliged to take this into account.*
>
> *[60] After looking at the good character evidence proferred by the defence and taking both limbs into account, it does not alter my acceptance of the prosecution evidence which is in direct contravention to the testimony of the accused with reference to who initiated the attack in the restaurant and who was acting in self-defence. I have reached this conclusion after carefully considering that the actions taken by the accused would have been out of character for him, a person who had never previously been accused of violating the law and that he has sworn under oath that he was acting in fear of his life. The evidence however does not support what the accused told the court so I can give his good character little to no weight."*

[39] The rationale for a good character direction has been expressed in several cases[17] including cases of this court such as ***Linsbert Bahadur v The Queen***.[18] The good character direction is relevant to the credibility of an accused person and to the issue of the likelihood or propensity that he would commit the offence in question. It is therefore interesting to note that the judge's good character direction followed from her finding that the appellant initiated the incident and the accused did not have any lawful justification when he fatally harmed the deceased. In oral arguments, Mrs. Vidal SC sought to address this point by directing the court to the decision in ***Dionicio Salazar v The Queen***[19] where the Caribbean Court of Justice noted:

> *"That the judge had not properly considered the defence case as she had already reached the conclusion that Salazar was guilty before she even looked at his alibi evidence, reveals a misconception of what a judge does when evaluating evidence in a bench trial. In R v Thain, Lord Lowery LCJ observed:*
>
> > *'Where the trial is conducted and the factual conclusions are reached by the same person, one need not expect every step in the reasoning to be spelled out expressly, nor is the reasoning carried out in sealed compartments with no intercommunication or overlapping, even as the need to arrange a judgment in a logical order may give that impression. It can safely be inferred that, when deliberating on a question of fact with many aspects, even more certainly than when tackling a series of connected legal points, a judge who is himself the tribunal of fact will (a) recognize the issues and (b) view in its entirety a case where one issue is interwoven with another'.*
>
> *As a rule, the judge will consider the prosecution's evidence first. If that evidence seems strong enough to carry a conviction, the judge will consider the evidence of the defence. The judge will then look at the totality of the evidence to reach a final decision. It is there where the intercommunication and overlapping take place. It is after this polymorphic process that the judge needs to arrange his or her judgment in a logical*

[17] Troy Simon v The Queen, Grenada Criminal Appeal No. 16 of 2003. See also Dwight Dookie v The Queen Saint Lucia Criminal Appeal No. 1 of 2007; Jay Marie Chin v the Queen ANUHCRAP2012/0005; Teeluck v State of Trinidad and Tobago, 42 [2005] 1 WLR 2421.
[18] Criminal Appeal No. 10 OF 2016.
[19] 2019 CCJ 15(AJ).

order which will not always be able to reflect the complicating thinking process as such."

[40] Counsel then submitted that the judge in paragraph 61 of the judgment did exactly that which was prescribed in ***Dionicio Salazar v The Queen***. In paragraph 61, the learned judge stated that:

> *"I cannot believe both the testimony of the Prosecution witnesses and also what the Accused has said. The stories are inconsistent with each other. I have already said that I accept the Prosecution's evidence. However, as I considered carefully, the testimony of the accused, I continue to direct myself that the Accused has nothing to prove. Taking everything I have heard and seen in the trial into consideration including the good character evidence about the Accused I do not believe the testimony of the Accused. I do not accept that he was chopped first and then drew his firearm, released the safety on the gun and then shot. I believe the deceased pulled the machete after seeing the firearm. I direct myself that because I do not believe the Accused that I may convict him on that basis".*
>
> *"Having concluded that he is not being truthful, I remind myself that persons Accused of criminal offence may lie for reasons other than guilt… Most importantly the Prosecution has the burden of proof and thus it is their evidence that must make me feel sure of the guilt of the accused. So even if I disbelieve the accused that does not necessarily translate to my acceptance of the Prosecution evidence. I could reject both the Prosecution and the Defence evidence. So, then I am duty bound to return and consider the Prosecution's evidence".*

[41] I am satisfied that the learned judge ultimately dealt with the issue of the appellant's good character and the appellant benefitted from both limbs of the good character direction. I therefore find no merit in the argument that the learned trial judge failed to give herself an adequate good character direction and the safety of the conviction cannot be undermined on this ground.

Ground 4 – Failure to properly review and evaluate the evidence of the prosecution witnesses Donovan Ramirez, Roxana Gomez and Consuelo Canales

[42] Counsel for the appellant conceded that, at paragraphs 15 to 24 of her judgment, the learned judge reviewed the evidence of the prosecution witnesses, Donovan Ramirez, Roxana Gomez, Consuelo Canales and Elvia Montufar and acknowledged the points raised in relation to discrepancies in the evidence. However, the learned trial judge did not properly review and evaluate the evidence of these witnesses. His submission was that the wholesale acceptance of the witness' evidence without the required scrutiny being undertaken by the learned judge was an error which operated to the detriment of the appellant. In relation to the evidence of Donovan Ramirez, he stated that the learned judge never reviewed the evidence and evaluated the witness' whole evidence in light of an egregious inconsistency; that the expert medical evidence did not disclose any entry wound in the back of the deceased, only exit wounds when during cross-examination, Donovan Ramirez testified that the shooter was shooting the deceased in the back as the deceased attempted to flee.

[43] Similarly in relation to the evidence of Roxana Gomez, learned counsel, Mr. Sylvestre argued that the judge failed to address her mind to the discrepancy in her evidence that there was no evidence of shots having been fired in the floor of the establishment and that would disprove the witnesses' evidence that after the deceased fell to the ground and started to crawl away, the appellant continued shooting to the ground.

[44] In relation to the evidence of Consuelo Canales, Mr. Sylvestre pointed the Court to the learned trial judge's statement that she believed her when she said that the appellant uttered the words "*you with a machete and I with gun, you will see who do better*". Mr. Sylvestre acknowledged that it is within the competence of a trier of fact to determine which witness the trier believes. He stated however, that the trier of fact must arrive at this determination after considering the complete evidence of witnesses, including the witness' response in cross examination regarding the machete that the deceased had in his possession and used to chop the appellant. He said that the learned trial judge did not consider the witness' response to the questions in particular her admission of moving the machete and concealing it. He relied on ***Dionicio Salazar v The Queen*** in support of his argument.

[45] Mr. Sylvestre contended that there is no indication in the judgment of the learned judge of whether she addressed the challenge to the credit of the aforementioned witnesses. It is for this reason that counsel for the appellant submitted that the judge failed to properly review and evaluate the evidence and that such failure resulted in the appellant being denied a fair hearing.

It was incumbent on the learned judge to properly evaluate these key witnesses whom she ultimately believed.

[46] Mrs. Vidal SC responded that the learned trial judge properly assessed the evidence of the prosecution witnesses. She said the submissions of the appellant on this ground, in essence, are a challenge to the finding of the judge and that the appellant is ultimately urging that the judge should not have accepted the evidence. She contended that the function of an appellate Court is not to review findings of fact by a lower Court and substitute those findings with its own, even if it were to disagree. She argued that the learned judge detailed the basis upon which she accepted the evidence of the witnesses. The judge was not obliged to list every single consideration that led her to that point, nor to detail how she reconciled every single challenge to the evidence by the defence. She submitted that unless the appellant can demonstrate that the conclusions were erroneous, this Court cannot properly interfere.

Analysis

[47] This is a short point. The general appellate approach in relation to the findings of a trier of fact is so well established as to merit only brief recitation. Where a lower court, whose function it is to make findings of fact has done so and there is evidence which shows that these findings may be justified, it is not the function of an appellate court to interfere by substituting its own view of the facts. The cases of ***Peters v Peters***[20] and ***Vere Bird and Others v The Commissioner of Police***[21] are instructive.

[48] As stated in ***Henderson v Foxworth Investments Ltd and Another***[22]:

> *"…. the duty of the appellate court was to ask itself whether it was in a position to come to a clear conclusion that the trial judge had been 'plainly wrong'… . The phrase 'plainly wrong' can be understood as signifying that the decision of the trial judge could not reasonably be explained or justified. An appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. It follows that, in the absence of some other identifiable error, such as a material error of law, the making of a critical finding of fact which has no basis in the evidence,*

[20] (1969) 14 WIR 457.
[21] ANUMCRAP2010/0015
[22] [2014] UKSC 41.

a demonstrable misunderstanding of relevant evidence or a demonstrable failure to consider relevant evidence, an appellate court would interfere with the findings of fact made by the trial judge only if it was satisfied that his decision cannot reasonably be explained or justified."

[49] Given the constraints attendant upon challenging factual findings, the appellant must satisfy this Court that the findings of fact made by the learned judge cannot reasonably be explained or justified and that the learned judge was plainly wrong. The appellant has failed to demonstrate this and has not provided any evidence that the judge was plainly wrong. The judge reviewed the evidence before her and arrived at a reasonably justified conclusion which cannot be properly criticized. While she did not give a detailed account of every consideration and challenge, it is clear from her well-reasoned judgment that she correctly addressed the essential issues of the case. There is therefore no basis for appellate interference with the findings of fact of the trial judge.

[50] The Caribbean Court of Justice in ***Dionicio Salazar v The Queen*** cited the Irish case of ***R v Thompson***[23] with respect to the duty of the judge giving judgment in a bench trial. The Irish Court of Appeal stated that:

"He has no jury to charge and therefore will not err if he does not state every relevant legal proposition and review every fact and argument on either side. His duty is not as in a jury trial to instruct laymen as to every relevant legal aspect of the law or to give (perhaps at the end of a long trial) a full and balanced picture of the facts for decision by others. His task is to reach conclusions and give reasons to support his view and, preferably, to notice any difficult or unusual points of law in order that if there is an appeal it can be seen how his view of the law informs his approach to the law."

[51] I do not find any proper basis for this Court to impeach the factual findings of the learned judge. On this basis, this ground of appeal fails.

[23] [1977] NI 74.

Conclusion

[52] We were satisfied that the learned judge did not err in arriving at the verdict, that the verdict is safe and was not against the weight of the evidence. Having found that grounds of appeal 1 - 4 have failed, ground 5, in the circumstances of this appeal therefore also fails. The appeal was accordingly dismissed, and the conviction upheld.

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HAFIZ-BERTRAM, P

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WOODSTOCK-RILEY, JA

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FOSTER, JA