

**IN THE SUPREME COURT OF BELIZE, A.D. 2022
CRIMINAL JURISDICTION**

CENTRAL DISTRICT

Indictment No. C47/2019

THE QUEEN

v.

JOSEPH CADLE
TYLER HERRERA

(1st ACCUSED)
(2nd ACCUSED)

- Murder

BEFORE

Honourable Justice Mr. Francis Cumberbatch

APPEARANCES

Ms. Natasha Mohamed – Counsel for the Crown
Ms. Emmerita Anderson – Counsel for the Accused
Mr. Ronell Gonzalez – Counsel for Second Accused

TRIAL DATES

9th, 11th, 15th, 16th, 17th, 18th, 19th, 22nd, 23rd, 24th, and 25th
of February, 2021; 2nd, 4th, 9th, 11th, and 24th of March,
2021; 15th, 21st, 22nd, 26th, 27th, and 29th of April, 2021;
13th and 18th of May, 2021; 14th of July, 2021.

DECISION

[1] The Accused were indicted for the offense of murder by the Director of Public Prosecutions for that they on the 23rd day of January 2018, at Roaring Creek Village, in the Cayo District, murdered Thomas Michael Henry ('the Deceased'). To that indictment, the Accused entered pleas of not guilty and

as a result, a fully contested trial was held before a judge alone pursuant to the provisions of section 65A of the *Indictable Procedure Act*.

- [2] At the close of the case for the Crown, Counsel for both Accused signaled their intention to make submissions of no case to answer by their clients. On hearing the submissions the Court ruled that a case was not made out against the Second Accused, hence, his submission was upheld. Thus, the case against him was dismissed and he was discharged. No more will be said about him in this judgment.

Summary of the Facts

- [3] I will summarize the facts of the case as presented by the Crown and the Accused in his unsworn statement. I must state, however, that in arriving at my verdict I have taken into consideration all the evidence adduced by the Crown and the Defence in their respective cases.
- [4] **Kimberley Smith** testified that on the 23rd day of January 2018, she lived at Roaring Creek in a small wooden structure. There is also a concrete structure in the yard which is a family home. She kept the keys to both structures because she was responsible for both of them.
- [5] She was at home that day baking Journey cakes. Whilst there the First Accused visited her home. She said she knew him because he is the uncle of her eldest son and he came looking for her brother Orlando. She told him

Orlando was not around and that she was baking journey cakes for sale and asked if he wanted to purchase any. He said he wanted \$2.00 worth of journey cakes and paid her with a \$1.00 USD. She told him to return at around 6:00 p.m. to pick them up. He returned a little after 6:00 p.m. to collect his journey cakes. The witness said she told the Accused “where are you going I see you’ve changed” he in turn replied that he was feeling a bit chilly. She said she cleaned and locked up the concrete house and later on she went home to the wooden house with her common-law husband and children. They had dinner and went to bed.

- [6] The witness states that when going to bed she remembered that her brother had not come home as yet. She heard her name called thrice and she got up on the third time because she recognized her brother’s voice. She got up and opened a window that faced the right side of the concrete house and gave him the keys to that house and asked him to return them to her. She said she remained at the window and watched him opening the lock and whilst doing so she saw 2 persons coming from the right side in a stooping position. One of the persons was dressed in a black sweater, grey pants, and rubber boots whilst the other person was dressed in a camouflage jacket. She didn’t see the pants of the other person. The persons were heading towards the concrete house where her brother was stooping whilst opening the lock. She

said she saw the one in the black sweater had something in his hand which looked like a weapon, so she shouted to her brother “run gunman”. Her brother ran and jumped the rail and the fence. At that time she said she heard the first shot after which the two persons swung towards her house then she heard a second shot and felt a burning sensation on her arm. She said she flung herself from the window and said “gun man I get shot.”

[7] At that time Thomas, the Deceased, jumped up and tried to pull the window but she said it was not from the window it was from the wall. She heard him speak and he fell on top of her. That is when she realized that he was shot. He was bigger and his weight was hurting her because she was shot. She pushed him off and placed him in a sitting position on the ground. She saw him bleeding and began screaming. She saw a small hole at the side of his abdomen and one in his chest area. Next, she saw feet running out towards the open gate, so she got up off the ground and peeped through the other window that was closed and saw the persons run through the Deceased’s brother’s yard.

[8] This witness stated that with the assistance of neighbors the Deceased was taken to the hospital, and she was later taken to the hospital by the police. She said her mother’s house is always lighted up at the front and back. At that time there was a solar light at the front of the house. She said that there

is a street light in front of her yard that is on automatically from 6:00 p.m. so the yard was almost like daylight. She said the two men were about 12 feet from her. She saw the one in black she saw his eyes, nose, mouth, height, shoulders, and feet, and that made her recognize him as Joseph. His eyes were like cat eyes. As regards the other person she only saw the jacket because he was still stooping so she could not recognize him. The said clothes Joseph had on that evening the person had on that night. She said she knew Joseph from primary school when he was about ten years old. She got to know him better in 2007 when she and his older brother began dating and in 2009, she became more acquainted with him when he began visiting his nephew. When the Accused first came to her yard that day it was about 2:30 – 3:00 p.m. and he returned a bit after 6:00 p.m. for his journey cakes.

[9] Under cross-examination, the witness said that her home is on an unpaved street in Roaring Creek. The yard was fenced with barbed wire. If someone walks from the street into the yard they would first have to pass the wooden structure. The concrete house is not to the back. She said the sky was not dark that night it was a clear night with a full moon. The lamppost was across the street and it is beside Franz's house. It is closer to her structure and the concrete structure is a bit past the wooden structure.

[10] She said when the incident occurred she was between sleep and wake waiting for her brother to arrive. After she gave the key to her brother and he walked off towards the cement house and attempted to open the door. Whilst doing so she saw the two persons enter the yard heading to the cement structure where her brother was. The two persons came into the yard stooping down and moving inward in the yard. There is a solar light on the cement structure. It was on a beam outside the verandah. Not true that the only light on that night was the light on the cement structure, the solar light. The witness said she was able to see one of the two men clearly. That was the one in the black sweater.

[11] The witness stated that she did not observe any markings on the black sweater. One person had on a ski mask and one had something over the face. The ski mask was over the head with just the eyes and mouth open. That mask was worn by the person in the black sweater. That person had on long pants and black and yellow rubber boots.

[12] The witness stated that on the day of the incident the Accused visited her twice during the daytime before the incident. He wore two different types of clothing when he visited her earlier in the day. The Deceased was outside under a tree when the Accused visited her. He was together with the Deceased having drinks under a tree. One Kelson Theus was also present

with the Accused and the Deceased, her sons, and other persons. One Benjamin a neighbor passed by but didn't stay. One Mike Neal and Benjamin stopped and talked. She admitted that she told the police in her statement that these persons were socializing with the Deceased. She also admitted knowing one Oswald Twist called "Gunman". She knows him well and sees him often and earlier that night she and the Deceased were talking about him. She cannot recall what Mike Neal and Kelson Theus were wearing that day.

- [13] The witness stated that she heard three shots that night. They were continuous, one after the other. When she heard the first shot she stooped down below the window behind a wooden wall. Whilst she was stooping down the Deceased got up to the window. She said she could have seen who shot in the direction where the Deceased was from behind the wooden wall. When she saw the first shot fired the persons were halfway between her and her brother and at that time the person's backs were facing her, and their faces were pointed towards her brother. She said she did not get down behind the wall in her house a split second after she heard the first shot. She believed she got the gunshot wound from through the wooden wall in her home. She said she told her husband that shots were coming through the wall and he should not go to the window.

- [14] This witness was not re-examined.
- [15] **Barrington Montero** testified. He stated that he was a crime scene technician and on the night of the 23rd day of January 2018, at about 11:15 he visited a scene at Roaring Creek Village.
- [16] On arrival he did a walk through the alleged crime scene and at that time there was limited lighting in the area. He went to a small wooden structure 12x12, one foot off the ground with a zinc roof. The eastern side had three holes which he suspected to be bullet holes. About 10 feet away from the small wooden structure were two 9mm cartridge cases on the ground. He photographed and took possession of them. He also collected two swabs with suspected blood from the inside of the building. He also photographed an apparent bullet hole on the cement structure inside of the same yard.
- [17] On the following day the 24th of January 2018, he re-visited the scene and took daylight photos of the area. He also took photographs of some items of clothing at his office that same day, however, these articles of clothing were not tendered into evidence nor was any evidence adduced as to their origin.
- [18] On the 25th day of January 2018, the witness attended the post-mortem examination of the body of the Deceased at the Karl Heusner Memorial Hospital morgue which was conducted by Dr. Loyden Ken. He took photographs of the body of the Deceased and collected from Dr. Ken one

single expended bullet retrieved from the body of the Deceased. This bullet was packaged and sealed and handed over to the National Forensic Science Service. The photographs taken were all tendered into evidence.

[19] Under cross-examination, the witness stated that to the best of his knowledge he arrived at the scene about 45 minutes after the alleged shooting. When he got to the scene the lighting was limited and the sky was dark. The small wooden structure was to the western edge of the land and the concrete one was to the southern section of the property. The two buildings are approximately 30' to 35' away from each other.

[20] Under re-examination, the witness stated that the lighting was limited only to streetlamps, so he used his flashlight.

[21] **Khadijah Thimbriel** testified that she is a crime scene technician. On the 24th of January 2018, she accompanied DC Martinez to an unpaved street in the Another World area of Roaring Creek Village. At the back of the house one, Israel Cadle pointed to a black plastic bag under a rusty bicycle frame. She took a photograph of that bag. From that scene, DC Martinez retrieved one black firearm. She was also requested to photograph some clothing and a pair of black rubber boots. She photographed a long-sleeved camouflage jacket, a long-sleeved navy-blue jacket, long sleeved checkers button-down shirt with markings on the back, a navy blue T-shirt, long blue jeans, and

long camouflage pants. She also took photographs of the black firearm, black magazine, and six live rounds of ammunition. She printed 12 photographs which were tendered into evidence.

[22] **Under cross-examination**, this witness stated that she was informed that some items were discovered in the area she visited and she took photographs of these items. When she took photographs of the black plastic bag Israel Cadle was present. She did not dust the firearm or the ammunition for prints. The first time she saw the clothing was at the home on the floor. She was shown some of the photographs of clothing tendered by Barrington Montero and agreed they were the same photos taken by her. She was unable to say how it is that Montero took those photographs. She did not prepare or sign a chain of custody form for the items of clothing photographed by her.

[23] **Dr. Loyden Ken** testified. He was deemed an expert in the field of anatomical pathology by the Court. He testified that on the 25th day of January 2018, he performed a post-mortem examination on the body of the Deceased at the Western Regional Hospital morgue. He found the cause of death to be hypovolemic shock due to internal and external exsanguination as a consequence of the perforation of the liver, aorta, heart, and right lung due to a single penetrating gunshot wound to the chest.

- [24] The doctor further opined that there was no soot or stippling present and that these are characteristics of a distant range wound where the muzzle is more than 24 inches away from the target. He further opined that death in this case occurred rapidly.
- [25] **Franz Henry** testified that shortly after 10:30 p.m. on the night of the 23rd of January 2018, he went into his bedroom. Shortly after he heard five shots ring out and heard Kimberley Smith screaming. He got up and ran downstairs because his brother, the Deceased, was living with Kimberley Smith.
- [26] The witness said he went over to the house and saw the Deceased hunched over between the bed and a dresser and with the help of a neighbor he took him to the Western Regional Hospital. On the 25th day of January 2018, he identified the body of his deceased brother at the Western Regional Hospital Morgue to the police officers present and the doctor who did the post-mortem examination.
- [27] Under cross-examination, he stated that he heard six gunshots clearly and that his brother lives directly in front of him approximately 35 to 40 feet away. The shots were one after the other.
- [28] **DC Miguel Martinez** testified that in January 2018, he was attached to the Roaring Creek police station. On the 23rd of January, 2018, at around 11:15

p.m. he together with other police officers and Barrington Montero visited the scene of a shooting incident at Another World. On the 24th of January, 2018, around 3:45 a.m. he along with other police officers visited the home of one Brenda Hyde in the Another World area where the Accused was detained. He was told of his rights and escorted to the Belmopan police station where he was detained in custody.

[29] The witness said that around 3:00 p.m. that day he went to the residence of one Janet Cadle in the Another World area. The residence was searched and some clothing including a green camouflage jacket, black and cream boots, and a pair of black jungle boots were retrieved from inside a room. Shortly after one Israel Cadle showed up and pointed out to him and Crime Scene Technician Thimbriel a corner in the south side of the lot where he was shown a motorcycle rim and saw a black rusty 9 mm pistol on the ground. The magazine contained six live 9 mm rounds. Israel Cadle was detained and the scene was photographed by Crime Scene Technician Thimbriel. On the 25th of January 2018, he formally charged the Accused with the offense of murder. He also charged Israel Cadle with the offense of kept firearm and ammunition without a license.

[30] Under cross-examination, the witness said he visited the home of Israel Cadle on the day after the shooting where he found some clothing that was

collected by the police. He said he did not complete a chain of custody form for the clothing found. Israel Cadle was not at home when he arrived there but arrived a little after. Janet Cadle was not at the home when he arrived. He did not request that the firearm be tested for fingerprints. He said he prepared a chain of custody form for the firearm and on the 31st of January, 2018, he handed it over to the exhibit keeper.

[31] That was the case for the Crown.

[32] At the close of the Crown's case Defence Counsel for the Accused, Mr. Gonzalez, submitted that the Crown had not made out a case against his client and as such he should not be called upon to make a defense.

[33] This Court in a written decision overruled that submission and called upon the Accused to lead a defense. The Accused made an unsworn statement from the dock.

[34] **The Accused** stated that on the 23rd of January, 2018, he did visit Kimberley Smith's residence to buy journey cakes. When he reached the residence he saw some persons socializing with the Deceased, Thomas Henry. They were drinking and smoking. He remembers the date because the same night the police came and arrested him. He got his journey cakes and went to his aunt, Brenda Hyde, where he ate the journey cakes and fell asleep a while after.

[35] He said he is being honest with the Court, and he did not kill Thomas Henry. He was nowhere around Thomas Henry's residence that night and he would never do something like that because his nephew Ramon Cadle Jr. and his mother Kimberley Smith live at the residence and they are like family.

[36] The Accused called no witnesses and that was his case.

Closing Addresses

[37] Mr. Ramirez for the Crown submitted thus:

1. The elements to determine murder are present from the evidence.

They are:

- i. Thomas Henry is dead as a result of harm – this evidence was adduced by Kimberley Smith, Franz Henry, and Dr. Loyden Ken.
- ii. The shooting of Thomas Henry was unlawful – the Accused cannot successfully claim self – defense diminished responsibility or provocation.
- iii. The killing was intentional- firing multiple gunshots in the direction of the Deceased creates foreseeability that bullets may hit someone and therefore the killing was intentional.

2. In this case the Court ought to consider and determine the case on the basis of the direct testimony of the prosecution's eyewitness, Kimberley Smith.
3. The prosecution has made a strong and persuasive case that the Accused was the person who shot Thomas Henry.

[38] Crown Counsel further submitted the testimony of Kimberley Smith as follows:

The proof that the prosecution has adduced for this purpose is from Kimberley Smith who testified that:

- i. She knew the Accused from he was in Standard IV, then got to know him more in 2007 and more in 2009 when she was dating, Roman Cadle, his brother, and got to know him more when she had a child for Roman Cadle as the Accused used to go and look for his nephew, her son.
- ii. She saw the Accused twice on the 23rd of January, 2018, before she saw him the night. She saw him at about 3:30 p.m. when he went to look for Orlando Smith and again when he went to pick up the journey cakes from her.

- iii. She saw the Accused fire shots after Orlando Smith, saw when he fired shots at her, and saw when he fired the fatal shots that killed the Deceased, Thomas Henry.

[39] Thus at the end of the day, the Crown relies exclusively on the evidence of Kimberley Smith to justify its request for a conviction for the offense of murder.

The Law

[40] As stated, aforesaid the Accused is indicted for the offense of murder contrary to section 106 (1) of the *Criminal Code*. That section provides thus:

“106 (1) - Every person who commits murder shall suffer death.”

[41] Section 117 of the *Criminal Code* provides:

“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 extreme provocation, or other matter of partial excuse as in the next following sections mentioned.”

[42] The Crown must prove the following beyond reasonable doubt:

1. That the Deceased is dead;
2. That he died from unlawful harm;
3. That the unlawful harm was inflicted by the Accused;

4. That the Accused intended to kill the Deceased when he unlawfully caused harm to him.

[43] It is common ground that the thrust of the defense case is that the Accused was not the shooter on that fateful night. Thus, the issue to be determined from the outset is whether it was the Accused who allegedly discharged at least five rounds of ammunition that night. Therefore the applicable law on visual identification must be considered.

Identification

[44] To avoid the risk of injustice, I have warned myself of the special need for caution before convicting the Accused on the visual identification in this case. A witness who is convinced in his/her own mind that the person he/she saw is the Accused may as a result be a convincing witness but may nevertheless be mistaken. Mistakes can also be made in recognition of someone well-known to the witness such as a close friend or relative. So, I must carefully examine the circumstances in which the identification was made, for how long was the Accused under observation by the witness, and at what distance, in what light, did anything interfere with his observation. The fact that the Accused is also relying on the defense of an alibi is another factor to be taken into consideration in determining whether or not the Accused was the shooter that

night. The court must be that much more cautious in its consideration of the evidence of visual identification.

[45] It is common ground that the Crown's case rests on the testimony of the sole identifying witness Kimberley Smith. The evidence of this witness in her examination-in-chief is that she was able to identify the First Accused by his eyes, nose, and mouth. However, under cross-examination, she said the man wore a ski mask that covered his head, so she was only able to see his eyes and mouth and the clothing he wore. She also testified that the surroundings were bright like daylight at the time of the shooting. She had seen and spoken with him earlier that day.

[46] The Crime Scene Technician, Barrington Montero, stated however that the lighting was limited to the street light. That street light was over the other side of the street where she lived. He went on to say that the sky was dark, hence he had to use a flashlight whilst processing the scene. This significantly contradicts the evidence of Kimberley Smith aforesaid who describes the lighting conditions as bright like day.

[47] Kimberley Smith also sought to identify the Accused by the type of clothing he wore. The Court takes judicial notice of the notorious fact that that type of clothing is commonly worn throughout the country. Moreover, there is no significance either in design or by written words thereon to unequivocally

connect the clothing to the Accused. Indeed, he was not arrested dressed in a similar fashion nor was the clothing of that description capable of fitting him found at his residence and tendered into evidence. As mentioned, aforesaid, certain items of clothing were photographed by two Crime Scene Technicians, but none was tendered into evidence nor was there any evidence connecting same to the Accused.

[48] The sole eye witness said when she first saw the two persons she only saw their backs and they were stooping but after they fired the first shot they swung towards where she was and another shot was discharged at which time she felt a burning sensation and threw herself to the ground and another shot was fired. It was at this time that she identified the Accused.

[49] I find from the evidence of the witness, Barrington Montero, whom I consider to be a neutral and reliable witness herein that the lighting that night was inadequate. In a photograph tendered by Montero, the light in front of the concrete building only shone on a small part of the wall in front of that building. Thus the circumstances under which the identification/recognition of the Accused was made were poor. I now proceed to identify the following weaknesses therein:

1. It was night-time, the sky was dark, and the lighting conditions were inadequate.

2. Shots were being fired at the building in which the witness Smith and the Deceased resided and after the first shot, she took cover.
3. Prior to the first shot being fired all that Smith could see was the backs of the persons who entered her yard;
4. The alleged shooter wore a ski mask that covered his face and head, and the only visible parts of his face were his eyes and mouth.
5. She identified the alleged shooter as “gunman” to her brother and the Deceased and not by his name which she knew quite well;
6. There is someone whom she knows quite well who is called “gunman”.
7. The Crown did not during Smith’s testimony clarify to whom she was referring to when she used the word “Gunman”.

[50] I find after analyzing the weaknesses in evidence of identification that this evidence is inherently unreliable. It is limited to the identifying witness seeing no more than the mouth and eyes which she described as ‘cat eyes’ of a person in a ski mask under circumstances in which gunshots were being fired in her direction in limited or inadequate lighting. In the circumstances, I find that her vision of the shooter at that time and in those circumstances to be no more than a fleeting glance of the eyes and mouth of a person made under difficult conditions.

[51] Moreover, the Court has seen the Accused during normal daylight hours whilst in the witness box some six feet away and has not observed any such distinguishing feature in his eyes.

[52] What further exacerbates the weakness of the evidence is the use of the word gunman in circumstances where she could have been referring to someone whom she knows by that name. That issue has been left unclarified and has raised more reasonable doubt on the issue of the identification of the Accused as the shooter.

[52] The accumulative effect of the weaknesses of the Crown's evidence in the identification has resulted in the court not being satisfied to the extent that it feels sure that it was the Accused who was the shooter on that fateful night.

[53] Accordingly, the Accused is found not guilty of the offense of murder as indicted.

Dated this **14th day of July 2021.**

Honourable Justice Mr. F M Cumberbatch
Justice of the Supreme Court
Central District