

**IN THE SUPREME COURT OF BELIZE, A.D. 2018
CRIMINAL JURISDICTION**

CENTRAL DISTRICT

Indictment No. C51/2018

THE QUEEN

V

MR. STEVEN GOMEZ

BEFORE: Honourable Justice Mr. Francis M. Cumberbatch

APPEARANCES: Mrs. Portia Ferguson - Counsel for the Crown
Mr. Oswald Twist - Counsel for the Accused

TRIAL DATES: 21st, 22nd, 25th, 26th, 27th, 28th June 2018.

JUDGMENT

Introduction

[1] The Accused was indicted by the Director of Public Prosecutions for the offence of murder for that he on the 16th day of August 2014 at Unitedville Village in the Cayo District murdered Victor Vargas (“the Deceased”) contrary to *Sections 117 and 106 (1) of the Criminal Code CAP 101 of the Substantive Laws of Belize (Revised Edition) 2011*. At his arraignment, he entered a plea of not guilty and his

trial was conducted by a single Judge pursuant to the provisions of *Section 65 A of the Indictable Procedure Act, Chapter 96 of the Substantive Laws of Belize*.

Preliminary Point

[2] At the commencement of the trial, Defence Counsel raised the preliminary point that the Crown must call and present for cross-examination certain witnesses to wit, Jamil Mckoy, Matthew Caretela, and Inspector Octaviana Victorin, whose names were not included on the indictment but whose witness statements were contained in the disclosure bundle.

[3] Mr. Twist contends that these names appeared on a previous indictment on which the Accused was indicted together with one Joseph Vaccaro for the same offence for which his client stands indicted. He contends that, the Crown must in those circumstances call the witnesses required and present them for cross-examination. He relied on the Privy Council's decision of *Steven Grant v The Queen*.

[4] Crown Counsel opposed the application contending that the Crown is under no obligation to call those witnesses whose names are not on the indictment and who the Crown does not consider to be truthful witnesses. She relied on the English Court of Appeal decision of *Daniel Brown et al v The Queen*.

[5] At the hearing, I gave an oral decision to the effect that the Crown should not be compelled in the circumstances of this case to call the witnesses but must make them available to the Defence. I further ruled that, the witnesses must be summoned to appear in court to testify for the Accused at dates to be fixed by Defence Counsel. At the invitation of Defence Counsel, I reconsidered my

decision at the close of the Crown's case and found no reason to recall same. I also promised to put my reasons in writing which I will now do.

[6] The witnesses Jamil McKoy and Matthew Caretela in their statements to the police stated, *inter alia*, that they saw the former co-Accused Joseph Vaccaro stab the Deceased with a knife. The witness, Inspector Victorin, conducted an identification parade where Joseph Vaccaro was the suspect and was allegedly identified by Caretela as the person he saw stab the Deceased.

[7] When the new indictment against the Accused was filed, and the one charging the Accused and Joseph Vaccaro was withdrawn, Crown Counsel candidly told the Court that the Crown was not satisfied that they could prove the case against Vaccaro, hence, the withdrawal of the charges against him. The Crown, however, proceeded against the Accused herein.

[8] It is against that background that the Crown withdrew the indictment against Vaccaro. The new indictment against the Accused, herein, excludes the names of these witnesses who did not contribute to the Crown's case.

[9] The thrust of Mrs. Ferguson's submission is that the civilian witnesses were not considered to be witnesses of truth; hence, the Crown felt they could not be relied on in the prosecution of Vaccaro on the original indictment. The evidence of Inspector Victorin was not relevant to the case against this Accused.

[10] Kennedy L.J. in *The Queen v Russell-Jones [1995] 1Cr App R 538* helpfully set out seven principles for dealing with the Crown's obligations to call witnesses. These are:

- “(1) Generally speaking the prosecution must have at court all the witnesses named on the back of the indictment (nowadays those whose statements have been served as witnesses on whom the prosecution intend to rely), if the defence want those witnesses to attend. In deciding which statements to serve, the prosecution has an unfettered discretion, but must normally disclose material statements not served.*
- (2) The prosecution enjoy discretion whether to call, or tender, any witness it requires to attend, but the discretion is not unfettered.*
- (3) The first principle which limits this discretion is that it must be exercised in the interests of justice, so as to promote a fair trial. ...*
- ...*
- ...*
- ...*
- (4) The next principle is that the prosecution ought normally to call or offer to call all the witnesses who give direct evidence of the primary facts of the case, unless for good reason, in any instance, the prosecutor regards the witness’s evidence as unworthy of belief. In most cases the jury should have available all of that evidence as to what actually happened, which the prosecution, when serving statements, considered to be material, even if there are inconsistencies between one witness and another. The defence cannot always be expected to call for themselves witnesses of the primary facts whom the prosecution has discarded. For example, the evidence they may give, albeit at variance with other evidence called by the Crown, may well be detrimental to the defence case. If what a witness of the primary facts has to say is properly regarded by the prosecution as being incapable of belief, or as some of the authorities say “incredible”, then his evidence cannot help the jury assess the overall picture of the crucial events; hence, it is not unfair that he should not be called.*

...

- (5) *It is for the prosecution to decide which witnesses give direct evidence of the primary facts of the case. A prosecutor may reasonably take the view that what a particular witness has to say is at best marginal.*
- (6) *The prosecutor is also, as we have said, the primary judge of whether or not a witness to the material events is incredible, or unworthy of belief. It goes without saying that he could not properly condemn a witness as incredible merely because, for example, he gives an account at variance with that of a larger number of witnesses, and one which is less favourable to the prosecution case than that of the others.*
- (7) *A prosecutor properly exercising his discretion will not therefore be obliged to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the Crown relies. To hold otherwise would, in truth, be to assert that the prosecution are obliged to call a witness for no purpose other than to assist the defence in its endeavour to destroy the Crown's own case. No sensible rule of justice could require such a stance to be taken.*

He went on to say:

“Plainly, what we have said should not be regarded as a lexicon or rule book to cover all cases in which a prosecutor is called upon to exercise this discretion. There may be special situations to which we have not adverted; and in every case, it is important to emphasise, the judgment to be made is primarily that of the prosecutor, and, in general, the court will only interfere with it if he has gone wrong in principle.”

[11] In *Steven Grant v The Queen at paragraphs 25* the Board restated the applicable principles thus:

“25. *The extent of the duty on a prosecutor to call witnesses named on the back of an indictment was fully reviewed in R v Russell-Jones [1995] 3 All ER 239. The principles there summarised were not criticised in argument, and provide authoritative guidance. That summary need not be repeated. Plainly the prosecutor has a discretion. It is a discretion to be exercised by the prosecutor acting as a minister of justice, in the interests of fairness. Thus the prosecutor need not call witnesses who are incapable of belief, or whose evidence is pure repetition (R v Haringey Justices, Ex p Director of Public Prosecutions [1995] QB 351, 356), or whose evidence is not material (R v Harris [1927] 2 KB 587, 590, Ziems v The Prothonotary of the Supreme Court of New South Wales (1957) 97 CLR 279, 307-308). The general rule, however, was that stated in R v Russell-Jones, above, at p 245:*

‘The next principle is that the prosecution ought normally to all or offer to call all the witnesses who give direct evidence of the primary facts of the case, unless for good reason, in any instance, the prosecutor regards the witness’s evidence as unworthy of belief. In most cases the jury should have available all of that evidence as to what actually happened, which the prosecution, when serving statements, considered to be material, even if there are inconsistencies between one witness and another. The defence cannot always be expected to call for themselves witnesses of the primary facts whom the prosecution has discarded. For example, the evidence they may give, albeit at variance with other evidence called by the Crown, may well be detrimental to the defence case. If what a witness of the primary facts has to say is properly regarded by the prosecution as being incapable of belief, or as some of the authorities say ‘incredible’, then his evidence cannot help the jury assess the overall picture of the crucial events; hence, it is not unfair that he should not be called.’

In the present case, the names of Bryant and Kinglock did not appear on the back of the indictment, but their inclusion in notices to adduce made clear the Crown’s

intention to rely on their evidence; and, there has never been any suggestion that either was regarded as incapable of belief or immaterial.”

[12] I have considered and applied the principles on the exercise of the Crown’s discretion on the calling of witnesses not listed at the back of the indictment as enunciated by Kennedy LJ in *Russell-Jones* aforesaid and their application in The Privy Council decision of *Steven Grant* aforesaid.

[13] I am satisfied that the Crown’s refusal to accept that of the evidence of the witnesses Jamil McKoy and Matthew Caretela was worthy of belief is not unfounded in the circumstances of the case, more particularly the strength of the evidence against the Accused as the person who stabbed the Deceased.

[14] In *Steven Grant*, the Board found that the Crown had presented notices of additional evidence for witnesses whose names did not appear at the back of the indictment. However, having done so, they chose not to call those witnesses as part of their case. The Board found that in those circumstances there was never any suggestion that they were incapable of belief or immaterial, hence, the exercise of the discretion was unacceptable. In the case at Bar, the facts and circumstances are clearly dissimilar.

[15] I further find that the principle listed at number 7 in *Russell-Jones* to be applicable to wit:

“(7) A prosecutor properly excising his discretion will not therefore be obliged to proffer a witness merely in order to give the Defence material with which to attack the credit of other witnesses on whom the Crown relies. To hold otherwise would, in truth, be to assert that the prosecution are obliged to call a witness for no purpose other than to assist the Defence in its endeavour to

destroy the Crown's own case. No sensible rule of justice could require such a stance to be taken."

[16] Accordingly, I find that the discretion was properly exercised; hence, the Court ought not to intervene and order the Crown to call the witnesses or order the witnesses to be called as part of the Crown's case.

The Crown's Case

[17] The Crown called a number of witnesses to prove its case commencing with, **Quinton Middleton:**

This witness stated that on the 16th August, 2014 at about 2:45 a.m., he was awoken by his sister-in-law. A few minutes after he heard his name being called from outside followed by the sound of stones falling on his house roof. On peeping through the window he saw neighbours outside on the road so he got dressed and went downstairs where he saw the Deceased lying motionless. The Deceased was his neighbour for some seven years prior to that date.

[18] He called 911 and the police arrived. They processed the scene and hours later removed the body. He said he recognised Ada Chavez, Lynette McKoy, and Jamil McKoy. He identified the Deceased on a photograph shown to him by Crown Counsel. He also identified his home on another photograph. He was not cross-examined.

Filiberto Pott:

[19] This witness is a Crime Scene Technician. He testified that on the 16th August, 2014, he was requested by then Sergeant Zuniga to accompany him to a crime scene at Unitedville Village, Cayo. He noticed an unpaved and unnamed street in Unitedville which he searched in an east to west direction. He observed

what appeared to be a spot of blood in the middle portion of the street. He took a photograph of the spot and swabbed it. He observed a second spot about one foot from the edge of the road with what appeared to be blood. He took photographs of the spot and swabbed it. He saw a fenced yard which contained a two storey building. On entering the yard he saw spots of red substance which appeared to be blood which led to a body of a male person in a pool of red substance. He also observed a red substance on the floor in front of the entrance door of the house. He took photographs of the red substance near the body and near the entrance door to the house. He tendered 14 photographs of the scene he visited as exhibits.

[20] Under cross examination he said that photograph number two shows the first spots of suspected blood. The street has street lights which were about 30 feet away from the suspected blood. He could not recall the type of street lights. He was not re-examined.

Joseph Vaccaro was called next:

[21] He testified that on the 16th August, 2014, he recalls returning to Unitedville Village from a wake in Georgeville. He was in the company of the Accused and Jamil McKoy. They stopped at the residence of one Ms. Josephine, where he saw the Deceased and one Matthew Caretela, lying down behind a hibiscus tree. He and Jamil woke them up and he told them let's go home. As they were walking home, the Deceased started to quarrel with the Accused during which time the Deceased told the Accused that he had already killed 18 men. They told the Deceased to go home but he continued to follow them. There was an exchange of words between the Accused and Deceased about smoking crack/rock. The Accused took away a cup from the Deceased and urinated in it then handed it back to the Deceased. The Deceased punched the Accused in his mouth and the Accused stumbled on the side of the street. The Deceased was over him and he, the Accused, pulled out a knife

from his right side pants pocket and stabbed the Deceased once on the right side of his neck. The Deceased then got up and ran into the Accused and grabbed his shirt then the Accused stabbed him in the front part of his neck.

[22] The witness said he told Jamil McKoy to part the fight and while he was doing so the knife was coming out of the Deceased's neck. The Deceased then grabbed both sides of his neck and started to holler "Steven kill me" and ran down the street to Quinton Middleton house. The witness said he went home. He met with the Accused who asked him if Mr. Vargas was dead and he replied "Yes, you killed the man." The Accused then got angry and fired a stab at him with the knife so he held his hand with the knife and pushed him away.

[23] The Accused's mother, Ms. Aretha Gomez, came out and asked them what was going on and he told her the Accused just killed Miko ("the Deceased"). She asked the witness to borrow \$20.00 from his mother but he was only able to obtain \$10.00 from his mother. His mother also gave him a plate of food for the Accused which he gave to him. The Accused asked him to go with his mom to see if Mr. Vargas was really dead but his mother said he couldn't go. This caused the Accused to say "if you think you wahn snitch on me, your statement wahn come in the disclosure."

[24] The witness went on to say when he saw the Accused stab the Deceased the lighting conditions were good, it was not foggy and there was a street light not too far away...about 4 feet. He said the incident between the Accused and the Deceased lasted for about 10 minutes. He identified the area where the incident took place on photographs which were tendered.

[25] This witness was cross-examined. He admitted that he was once jointly charged with the Accused for the offence of the murder of the Deceased and that the charges against him were discontinued on the 18th June, 2018. He also admitted that on that said day he gave the police a statement in relation to the incident. He denied that he was offered anything from the Director of Public Prosecutions' office or anybody to give evidence against the Accused. He said his evidence was true and denied that he was the person who stabbed the Deceased and that he was the only person in possession of the knife. He stated that it was the Accused who was the person in possession of the knife. He denied that he gave evidence to save himself from being prosecuted for the crime of murder. He went on to say that he spent three years and 10 months in prison for murdering Victor Vargas and had nothing to do with it. He denied making a deal with the Director of Public Prosecution to get out of prison. He said even if he had gone through a trial he would tell the truth. He sat down and two persons got into an altercation and one died. He never had anything to do with it and the person who did the crime is not man enough to tell the people what happened. He said he did not go to the Director of Public Prosecution nor did they come to him and that he is not making up the story as that was the story he gave from the start. He said he did tell Aretha Gomez that the Accused had just killed Victor Vargas and the Accused admitted that was true and that he had given that evidence in his caution statement. He said during the incident when Miko jumped on the Accused the lower part of the Accused's body was down because he was trying to defend himself. He denied that at that time he assisted the Accused. He said, "That night the other guys were drinking but he only took one beer at the wake nor did he smoke weed that night." He said, "The Accused was drinking something in a cup but he didn't know what was mixed in the cup. They were at the wake from 12:30 p.m. and left around 2:30 a.m.

It was him, the Accused and Jamil McKoy. The Accused was drinking all the while because it was his father's wake.”

[26] Under re-examination the witness said he gave a statement to the police on the 18th June after the case that was against him was withdrawn. He said in his caution statement, he told the police that the Accused admitted in front of his mother that he killed Victor Vargas and that the caution statement was freely and voluntarily given.

Brendalee Vaccaro testified:

[27] This witness said in August 2014 she resided at Unitedville Village. On the 16th August, 2014, at around 3:20 a.m., she was awoken by the sound of barking dogs at her home. She saw her son, Joseph Vaccaro, run through the small gate. She spoke with her son and later handed the Accused a plate of food over her gate. She and her son were standing inside her gate whilst the Accused and his mother, Aretha Gomez, were standing outside of the gate.

[28] Her son replied to the Accused mother when she asked what happened that the Accused just killed Mico. The witness stated that Aretha Gomez then asked her son, the Accused, if that was true, she put her hands on her head and said “Boy what I gun do now.” The Accused said “We bin argue and me jook am”. The Accused then told her son to go see if the man dead but she said Joseph “Na going no where out deh” she said the Accused then told her “Ah so ah done tell you ah kill you old lady.” The Accused said “Me go see if the man dead”. The Accused went across the road to his mother's house and she and her son went inside. The conversation with her, her son, the Accused, and his mother lasted for about ten minutes. They were speaking at the gate and there was a street light in front of them. She saw the whole of the Accused during the conversation.

[29] Under cross-examination the witness said Joseph is her second son and she loves him like any mother would. She's aware that he was charged with the Accused for murder but she's a strict mother and wouldn't lie to save her son. She denied making up this story to save her son. She said she's telling the truth and nothing but the truth and she's not here to sink the Accused. She said it's not true that she did not go to the police until the 7th May, 2015. She said that's when the police came to get her. She did not go to the police right away because the Accused had threatened her. She did not have to take time to fabricate the story.

Dr. Mario Estrada Bran testified:

[30] This witness was deemed an expert as a forensic doctor. He testified that on the 19th August, 2018, at the Karl Heusner Memorial Hospital, he carried out a post mortem examination on the body of Victor Vargas.

[31] The external examination revealed that the Deceased suffered four stab wounds as follows:

1. to the midline of the right lateral neck area;
2. to the center anterior area of the neck;
3. to the base of the neck following the ventral line; and
4. to the lower aspect of the left parietal bone, that is, at the top of the head.

[32] The doctor also discovered abrasions on the right anterior region of the neck. He opined that the cause of death was exsanguinations due to external bleeding from injury to the external carotid artery due to stab wound to the neck.

[33] The doctor further opined that a sharp pointed instrument could have caused the stab wounds. He testified that the first and third stab wounds were caused by

mild force, whilst moderate force was used to inflict the second stab wound. The injury to the scalp was superficial.

[34] Under cross-examination the doctor opined that the injury causing death was the wound number one.

Marie Lou Ramcharran testified:

[35] This witness stated that she is a Crime Scene Investigator and is the Supervisor for the Scenes of Crime Offices at Belmopan, San Ignacio and Benque. As a result, she knows one Oscar Quiroz who is employed as a Crime Scene Officer at Benque Viejo. She further stated that she has been his supervisor for about eight years and is familiar with his signature.

[36] The Court is satisfied that Oscar Quiroz whose name is listed on the indictment as a witness for the Crown is currently out of the jurisdiction, hence, she was allowed to read his statement in to evidence and tender a number of photographs taken by him of the body of the Deceased at the post mortem examination conducted by Dr. Estrada Bran.

She was not cross-examined.

Joshua Moreno testified:

[37] This witness stated that on the night of the 15th August, 2014, he attended a wake at Georgeville where he saw the Accused and Joseph Vaccaro who he referred to by the nickname of Spooki. He had no contact with them.

[38] Under cross-examination, he stated that the Accused who had a cup in his hand and from his actions appeared to be under the influence of alcohol. He also

said that Spooki was drinking and also appeared to be under the influence of alcohol.

Ada Chavez testified:

[39] This witness was the common-law wife of the Deceased for some 12 years. She stated that on the 16th August, 2014, she went to the home of Quinton Middleton where she saw the Deceased lying on the floor with his white shirt full of blood. Quinton came down and called the police who arrived later. She identified the Deceased in photographs taken of his body at the post mortem examination tendered by the Crown.

She was not cross-examined.

[40] The Crown called **Elizabeth Petillo** to the witness stand. This witness from the inception stated that the police tortured her to make a statement. She said she remembers giving a statement to the police but was forced to sign it. She was shown her statement and she confirmed that was the statement she gave to the police but what is in the statement is not true. The Court decided to hold a *voir dire* and stood down this witness' testimony.

[41] The Court granted leave to the Crown to prove the statement. The first witness called in a *voir dire* was, Desol Neal.

Desol Neal:

[42] This witness stated that she is a Senior Justice of the Peace and that on the 20th August, 2014, she was requested by the police to assist them by witnessing a statement from Elizabeth Petillo at the San Ignacio Police Station. On arrival at the station, she met Elizabeth Petillo sitting in the office with two male policemen.

One of the officers introduced her to Petillo as a Senior Justice of the Peace. Police Constable Labriel then entered the office and introduced himself to Petillo and the witness. He told Petillo that he will be taking a statement from her. After that he stepped out of the office leaving the witness and Petillo alone by themselves. She asked, Petillo if she was okay and she replied, yes. She also asked if they were forcing her or promising her anything to make the statement and she said, no. Police Constable Labriel returned and sat in front of Petillo and she sat next to her. Police Constable Labriel took the statement and at the end told Petillo that she could make corrections if she wished. He read the statement to her and she said it was okay. Petillo signed the statement, the witness signed and Police Constable Labriel signed. The witness went on to say that no force was used on Petillo in her presence nor did anyone subject her to torture. She made no complaints nor did the witness see anything on her body.

[43] Under cross-examination the witness said after the statement was completed she and Police Constable Labriel took the witness' fingerprints on the statement. Those were made after she signed. She said she was left alone with the witness even though that is not in her statement. She doesn't recall what time the statement commenced but she reached the station around 1:00 p.m. to 1:30 p.m. that day. She did not ask Petillo if she had anything to eat or drink because it was cool in the office. She doesn't know how long the witness was in the Central Investigating Branch office prior to her arrival. She could not say if any police officer did anything to the witness in her absence nor could she say how long the witness was in police custody.

In re-examination she said Petillo did not ask for anything to eat or drink.

Police Constable Labriel testified next in the *voir dire*:

[44] This witness said that on the 20th August, 2014, he was present at the San Ignacio Police Station when he met Elizabeth Petillo and the Senior Justice of the Peace Ms. Neal. He recorded a two page statement from Petillo in connection with a stabbing incident that took place at Unitedville Village, Cayo. The statement was done on a computer whilst the witness dictated same to him. After recording the statement, he read it over to the witness and gave it to her to read it herself. She signed the statement followed by the Senior Justice of the Peace. He also made Petillo place her fingerprint on the statement. He also informed the witness she could add, alter, or correct anything on the statement. He said at no time did he make any offer or promise to the witness to give her statement. At no time did she complain of being tortured nor did he see anything on her body. He stated that before taking the statement he left the witness and Senior Justice of the Peace alone in the office.

[45] Under cross-examination the witness said he does not know why Petillo was brought to the San Ignacio Police Station. He met Mr. Gonzalez, Corporal Po, and Donald Requena at the Central Investigating Branch office but has no idea if they had dealings with her prior to his arrival. He was not able to say if others made any promises to the witness in his absence. The statement started at 2:11 p.m. but he could not say what time it ended. He did not ask her if she had eaten nor did he offer her any refreshment such as water. She gave her date of birth as the 20th August, 1996.

Under re-examination the witness said to his knowledge Petillo did not ask for anything to eat or drink.

Elizabeth Petillo was recalled:

[46] This witness testified that at that time she was living at Hattieville and when the police held her she was 17 years old. They torture her to make her say what she doesn't know about the murder. The Court at this stage granted leave to the Crown to cross-examine the witness as a hostile witness.

[47] Under cross-examination by Crown Counsel the witness denied saying to the police that on the 16th August, 2014, whilst she was at Hattieville her boyfriend, Steven Gomez, visited her and told her he got into a fight with a male person. She also denied saying that at that time the Accused appeared to be in a happy moment. Under cross-examination by Defence Counsel the witness said when the police held her on the 17th August, 2014, she was still 17 years old. She was held at the San Ignacio Police Station from the 17th to the 20th August, 2014, in custody. No parent or guardian was present with her. She said they put her in a room and asked her questions and she told them she doesn't know anything so they force her to give a statement. She said Police Constable Labriel was present.

[48] The witness said the statement was not true. She said the Senior Justice of the Peace told her she has to give a statement and has to attend court. She stated only police officers were present when she gave the statement and no Senior Justice of the Peace was there. She was not allowed to call a relative and she was not given any food whilst she was there. She said the only police officer she had dealings with was Police Constable Labriel.

[49] She was not re-examined and the statement was tendered as Exhibit F.L.-1. Lynette McKoy was called. This witness was called by the Crown to give *res gestae* evidence of what was allegedly said by the Deceased that night after the stabbing incident.

[50] After holding a *voir dire* and hearing full arguments from counsel for the Crown and Defence the Court allowed the evidence to be adduced.

Lynette McKoy:

[51] This witness said she recalls that on the 16th August, 2014, after midnight she was at home when she heard some voices outside of her home. She then heard Victor Vargas also known as Mico say, “Fuck, Steven stab me.” She waited a while to see if she would hear anything else and after not hearing anything she turned off her fan and after 15 to 20 minutes came outside. She saw what looked like a foot on Quinton’s verandah so she came out to take a look. When she did so, she saw Victor Vargas lying in a pool of blood. She screamed and ran to the house of Ada Chavez, Mico’s wife. After that she returned to Quinton’s place. About a half hour later Quinton came out and called the police.

[52] The witness stated that Victor Vargas lived in the block next to her and she has been at his house several times. They would talk and tease each other and the last time they spoke was on the 14th August, 2014, when he came to fix a light for her and stayed for about half of an hour. She said Vargas spoke for about 4 to 5 seconds when he said, “Fuck, Steven stab me” and his voice was medium pitch.

Inspector Francis Zuniga testified:

[53] This witness was attached to the San Ignacio Police Station and on the 16th August, 2014, he together with Crime Scene Technician **Filiberto Pott** visited a two storey building in Unitedville Village. On arrival he saw the motionless body of a person of Mestizo descent lying in a pool of blood whose name he learnt to be Victor Vargas. The scene was processed by Pott and around 5:00 a.m., the body was transported to the San Ignacio Town Hospital where he was pronounced dead

on arrival. As a result, he conducted an investigation into the matter. On the 23rd August, 2014, he learnt that the Accused was in custody and on the 24th August, he informed him of the reason for his detention. He informed him of his Constitutional rights and cautioned him.

[54] Under cross-examination the witness said that after he cautioned the Accused, the Accused said Joseph Vaccaro stabbed Mico. He was the investigating officer and Joseph Vaccaro was also arrested and charged jointly with Steven Gomez for murder. This was based on the evidence gathered.

[55] That was the case for the Crown.

[56] The Accused was informed of his choices and he chose to give sworn testimony.

Steven Gomez sworn:

[57] The Accused stated that he resides in Unitedville Village. On the 16th August, 2014, he together with Jamil McKoy, Dean McKoy, and Joseph Vacarro go by a wake socializing. It was his father's wake, so he went and got several drinks for himself and his friends. About 15 to 20 minutes after they caught a ride with one Alex who was in a red vehicle. He dropped them off at the junction in Unitedville. Then it was him, Joseph Vacarro, and Jamil McKoy, who was walking and met Victor Vargas and Martin Caretela. He saw them on the ground sleeping, so they woke them up and told them the bar already closed so they could go home now. He, Jamil McKoy and Joseph Vacarro walked and stopped at a junction by Albert Street. They were socializing and Victor Vargas and Matthew Caretela arrived. He and Vargas had an argument and he told Vargas that he doesn't smoke drugs so he won't give him money. Then Vargas hit him on his mouth. He fell

because he was intoxicated and Vargas got over him and he felt several blows to his face and body then Spooki (Joseph Vaccaro) stabs Victor Vargas several times in his throat and ran away. Spooki then told him, "I done kill the man, Steven," and they all went their several ways. That's all he could recall.

[58] Under cross-examination the Accused said he and Vargas got into an argument. He did not get angry when Vargas punched him on his mouth. His mouth was burst. He was not upset when arguing with Vargas and when Vargas punched him on his mouth he was emotionless. He said he didn't take a knife and stab Vargas. He does not recall seeing Vargas and Spooki in an argument. He said it's not true the argument started because he urinated in Vargas' cup and gave it to him to drink. He denied stabbing the Deceased and getting up. He said it was after Spooki stabbed the Deceased he got up. He said it's not true after he got up the Deceased ran into him and grabbed his shirt and top lip and it's not true that he inflicted stab wounds on the Deceased.

The Accused called the following witnesses.

Inspector Octaviano Victorin:

[59] This witness stated that on the 24th August, 2014, he was at the San Ignacio Police station when he was requested by Sergeant Zuniga to conduct an identification parade. He obtained the assistance of Elaine Berry, Justice of the Peace, and conducted an identification parade with Joseph Vaccaro as the suspect together with eight other persons of similar complexion, height, and build. He called the witness, Matthew Caretela, who having viewed the parade identified Joseph Vaccaro as the person who he identified and mentioned in his statement as being of Creole descent, low haircut, and two tear drops between his left eye. He also tendered the identification parade documents.

[60] Under cross-examination the witness said he cannot recall where he was on the early morning of the 16th August, 2014. He did not witness a stabbing incident in Unitedville Village that day. At number four position was one Orlando. Matthew Caretela did not choose number four on the parade.

Jamil McKoy testified:

[61] This witness stated that he resides at Unitedville Village. On the 16th August, 2014, he was in Unitedville. There was a fight between Steven Gomez and Mico at Albert Street. It started over an argument between Steven Gomez and Mico. Matthew Caretela and him were around. Nobody else was there. The argument continued for about 15 to 20 seconds. In the 15 to 20 seconds Steven Gomez just stabbed Mico.

[62] Mr. Twist on the instructions from his client declined to pursue an application to have this witness deemed hostile.

[63] That was the case for the Defence.

Closing Submissions

[64] Mr. Twist for the Accused addressed the Court on four issues, namely:

1. That the Accused is not the person who committed the crime;
2. If the Court finds he did the stabbing, he did so in self-Defence;
3. The Accused was intoxicated;
4. The Accused was provoked.

[65] Counsel also submitted that the Court should regard Joseph Vaccaro as an accomplice or alternatively that he had an interest to serve. He submits that the Court should reject his evidence as he was under the influence of alcohol and was

not a truthful witness. He further submitted that Brendalee Vaccaro should also be viewed as a witness with an interest to serve and as such her evidence should be rejected.

[66] Mr. Twist submitted that the witness, Lynette McKoy, should not be believed as she took a long time to mention the name of the person who she heard utter the words “F...Steven stab me.” The question remains whether or not she recognized the voice she heard.

[67] As for Elizabeth Petillo who was deemed a hostile witness Defence Counsel urged the Court to carefully examine the circumstances under which her statement was taken and to reject her statement as being one of the truth.

[68] Defence Counsel contends that his client from the time he was arrested and charged told the police that it was Spooki who stabbed the Deceased and not him and that the Court should accept the evidence of the Accused and reject that of Joseph Vaccaro and his mother. He also urged the Court to attach little or no weight to the evidence of the Defence witness, Jamil McKoy, who said it was the Accused who stabbed the Deceased.

[69] Defence Counsel went on to address the Court on the law as it applies to self-defence, intoxication, and provocation.

[70] Mrs. Ferguson for the Crown submitted that the Crown had proven beyond reasonable doubt all of the five elements outlined in her opening address. She urged the Court to accept the evidence of Joseph Vaccaro and Brendalee Vaccaro as credible witnesses. She also alluded to the oral confession made by the Accused to his mother in the presence of Joseph Vaccaro and Brendalee Vaccaro.

[71] Crown Counsel further submitted that the Court should accept the evidence given in the statement from Elizabeth Petillo. She contends that Petillo was not a suspect and relied on the testimony of Inspector Zuniga who stated that the only suspects were the Accused and Joseph Vaccaro.

[72] Mrs. Ferguson submitted that Joseph Vaccaro was not an accomplice in the stabbing of the Deceased. She contends that he was sitting on a stone during the fight. She further contended that neither he nor his mother had an interest to serve. She submitted that Lynette McKoy was very familiar with the voice of the Deceased and Joseph Vaccaro had testified that after the fight the Deceased ran towards Quinton Middleton's yard saying, "Steven kill me." She urged the court to accept the *res gestae* evidence of this witness.

[73] Crown Counsel also addressed the Court on intention, intoxication and self-defence. She submitted that the evidence proves that the Accused had the requisite intention to kill the Deceased and that when he did so he was not intoxicated. She contends that he was in full control of his faculties and was aware of what he was doing when he stabbed the Deceased.

[74] Crown Counsel in her address to the Court on self-defence contends that it does not arise because what took place was a fist fight and in any event the Accused used more force than was necessary. On the question of provocation, she submits that it was the Accused who provoked the Deceased when he urinated in his cup and gave him to drink. She asked the Court to reject the Defence and convict the Accused for the offence of murder.

[75] Both counsel relied on several authorities in support of their closing submissions.

Analysis and Verdict

[76] As stated aforesaid, the Accused is indicted for the offence 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.*”

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.*”

[77] 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.

[78] The Court is satisfied to the extent that it feels sure that Victor Vargas is dead. I believe and accept the evidence of Inspector Zuniga who saw his lifeless body on the 16th August, 2014, and that he was declared dead at about 5:00 a.m. that morning at the San Ignacio Hospital. His common-law wife, Ada Chavez, also testified seeing him lying in a pool of blood earlier and he appeared dead. This was supported by the evidence of Dr. Estrada Bran who performed a post mortem examination on the Deceased.

[79] I am also satisfied to the extent that I feel sure that the Deceased died from unlawful harm. I accept the evidence of Dr. Estrada Bran that there were four stab wounds to the body of the Deceased, two of which were serious, and that the cause of death, was exsanguinations due to external bleeding from injury to the external carotid artery due to the stab wound to the neck.

[80] The Crown's case must be of such strength that the Court is satisfied to the extent that it feels sure of the guilt of the Accused before it could convict. To satisfy that burden, the Crown relied on the testimony of the witnesses called particularly, Joseph Vaccaro. Crown Counsel in her address stated that, the Crown is also relying on other evidence which I will deal with in due course.

[81] Joseph Vaccaro was the only eye-witness presented by the Crown. Prior to his appearance as a witness for the Crown, this witness was jointly charged by the police with the Accused for this murder. On the 18th June, 2014, the Director of Public Prosecutions entered a *nolle prosequi* withdrawing the charges against him. On that same day, he gave a witness statement to the police implicating the Accused as the person who stabbed the Deceased.

[82] There is no evidence of any immunity given by the Crown to this witness. Moreover, under cross-examination, he denied being made an offer akin to immunity to testify. A perusal of this witness' statement to the police which he gave at the time of his arrest and to which he made reference under re-examination reveals, that from since that time he stated that it was the Accused who stabbed the Deceased. Thus, his story from the time of his arrest to his testimony before the Court is essentially the same.

[83] There is also corroborative evidence coming from Lynette McKoy who heard the Deceased say “F...Steven stab me” and the evidence of his mother, Brendalee Vaccaro, whose evidence I believe and accept that the Accused in the presence of his mother admitted to stabbing the Deceased. In considering Brendalee Vaccaro’s evidence, I did so bearing in mind the likelihood that she too may have an interest to serve. In her statement to the police, given in May of 2015, she made mention of the oral admission made by the Accused to his mother in her presence. She explained the reason for her not giving a statement to the police at an earlier date was that she was threatened by the Accused and that the police did not come to her for a statement until May of 2015. Having examined her testimony with due care and caution, I find that I accept it as true, correct, and reliable.

[84] I also accept the *res gestae* evidence of Lynette McKoy to be true. I am satisfied that she is sufficiently familiar with the voice of the Deceased and was not mistaken when she said she heard him utter the words ‘F...Steven stab me’. I also rely on the reasons given in my ruling made on the admissibility of the *res gestae* evidence during the course of this trial.

[85] Notwithstanding the foregoing, I directed myself to exercise due care and caution in considering the evidence of Joseph Vaccaro as he may be a person with an interest to serve. He was on the scene of the offence and was charged together with the Accused for the commission of this offence. I have also considered that he may be singing for his supper. I am satisfied that he was not an accomplice but was merely present at the scene of this killing.

[86] After having carefully and cautiously considered the evidence of Joseph Vaccaro, together with all the evidence in this matter, I believe and accept his version of the events on that fateful night.

[87] The Crown also called the witness Elizabeth Petillo who sought to resile from her statement to the police in this matter.

[88] This witness was deemed hostile for reasons hereinbefore stated and as such I allowed Crown Counsel to cross examine her on the contents of her statement. *Section 73A of the Evidence Act* provides thus:

“Where in a criminal proceeding, a person is called a witness for the prosecution and-

(a) He admits to making a previous inconsistent statement; or

(b) A previous inconsistent statement made by him is proved by virtue of Section 71 or 72,

The statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible and may be relied upon by the prosecution to prove its case.”

[89] The effect of this Section amounts to a reversal of the common law rule that a previous inconsistent statement is not evidence of the truth of its contents. It follows that the Court could, once the statement is proved accept it for the truth of its contents.

[90] I have perused the decision of the Court of Appeal in *Tillett v The Queen*, more particularly the *dictum* of Morrison JA, who considered authorities from this region and the Supreme Court of Canada.

[91] The Learned Justice of Appeal referred to the decision of *The Queen v B (K.G.)* where the use of previous inconsistent statements was being reconsidered. Morrison JA quoted the dictum of Lamer CJ at paragraph 33 to wit:

“The trial judge should hold a voir dire to... satisfy himself or herself that the indicia of reliability... are present and genuine. If they are, he or she must then examine the circumstances under which the statement was obtained, to satisfy himself or herself that the statement supported by the evidence of reliability was made voluntarily if to a person in authority, and that there are no other factors which would tend to bring the administration of justice into disrepute if the statement was admitted as substantive evidence.”

Morrison JA went on to state at paragraph 41 the following:

*“However, we consider that, as his court held in relation to Section 105 in **Micke Lee Williams**, the admissibility of such a statement will nevertheless remain subject to the rule of the common law that a judge in a criminal trial has an overriding discretion to exclude it if its prejudicial effect outweighs its probative value, or if it is considered by the judge to be unfair to the defendant in the sense of putting him at an unfair disadvantage or depriving him unfairly of the ability to defend himself.”* (Emphasis mine)

[92] In the UK Section 119 (1) of the Criminal Justice Act 2003 contains a similar provision in *pari materia* to Section 73A aforesaid. The authors of *Archbold 2015 at para 8-204 in their examination of Section 119(1)* opined thus:

“...the statement is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible. This of course says nothing about the relative weight to be attached to the previous statement and to the evidence given orally. This will be a matter for the tribunal of fact, but it would appear to be open to act on the statement and reject the oral evidence, provided it is satisfied to the requisite standard that it is a statement that represents the truthful account.”

The authors in Archbold go on to state at paragraph 8-205 thus:

“...more generally however...it is for the tribunal of fact to weigh the out of court statement of the witness and his evidence in court in light of all the circumstances (including the circumstances in which the original statement was made, his explanation for the inconsistency, and the evidence of any other witnesses on the matter)...”

[93] A distillation of the principles aforesaid reveals the approach of the Court in treating with the oral evidence and written statement of a hostile witness to be as follows:

- The Court has a discretion to exercise to determine whether or not to admit the written statement into evidence;
- In considering whether or not to admit the written statement the Court must consider all circumstances surrounding the taking of the statement;
- If the Court admits the statement into evidence it must determine what weight should be attached to it, before acting on it;
- The creditworthiness of the witness must be assessed in light of the fact that he has been deemed hostile;
- Care should be exercised in determining whether any credence should be given to the witness’s testimony and out of court statement.

[94] During the *voir dire*, the Crown relied on the evidence of Desol Neal, a Senior Justice of the Peace and Police Constable Francis Labriel. I believe and accept the evidence of the Justice of the Peace that she was present during the taking of the statement and that it was dictated to Police Constable Labriel by this witness. Concerns arise, however, with regards to the events prior to the recording of the statement. None of the witnesses called by the Crown could say how long

this witness was at the police station before the statement was recorded. The only unchallenged evidence before the Court on this important issue comes from cross-examination by Defence Counsel.

[95] The witness said under cross-examination by Mr. Twist that she was at the station for four days prior to the taking of the statement during which time she was not fed. She was still 17 years old at the time and the statement was taken on her eighteenth birthday. She was not allowed to contact her family.

[96] Thus, I find it astonishing that the Crown did not adduce any or any reliable evidence to rebut this assertion, but, nevertheless urges the Court to accept the contents of that statement as being true, and correct, and reliable. I find in the circumstances, that I am not satisfied to the extent that I feel sure that the contents of this witness' statements are true, and correct, and reliable and as such I reject it.

[97] I have considered the evidence of the Accused and his witnesses. I do not believe and accept the evidence of the Accused, nor does it leave me in reasonable doubt of the truthfulness of Joseph Vaccaro's testimony, or the evidence of his mother Brendalee Vaccaro and Lynette McKoy.

[98] The evidence of Inspector Victorin bereft as it was of the evidence of Matthew Caretela was of no assistance to the Defence. The evidence of Jamil McKoy whom the Crown did not find to be a witness of truth ended up being unfavorable to the Defence. I do not attach any weight to his testimony. Thus, I reject the Defence and return to the Crown's case.

[99] I now turn to the question of intent. Did the Accused intend to kill Victor Vargas when he stabbed him on the 16th August, 2014?

[100] *Section 9 of the Criminal Code* provides the applicable law for the determination of a person's intent.

“9. A court or jury, in determining whether a person has committed an offence,

(a) shall not be bound in law to infer that any question specified in the first column of the Table below is to be answered in the affirmative by reason only of the existence of the factor specified in the second column as appropriate to that question; but

(b) shall treat that factor as relevant to that question, and decide the question by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.”

[101] What is or is not a person's intention is not easily ascertainable unless, of course, they disclose their intentions to you.

[102] The Prosecution must prove that the Accused had the requisite intention, that is, to kill the Deceased at the time of the alleged offence. They intend to do so by asking the Court to draw certain inferences from the evidence in this case.

I must direct myself, that I am not bound to infer that the Accused had the requisite intention to kill just from the fact that he inflicted fatal stab wounds to the Deceased.

[103] So, when considering whether the Prosecution have proved to my satisfaction that the Defence had the necessary intention, I should draw such

conclusions as I think right and inferences as appear to be proper in the circumstances having considered all the evidence in this case.

[104] I have considered the Crown's case in its entirety, especially the evidence of Joseph Vaccaro, who testified that there was an argument between the Accused and the Deceased; after which the Accused proceeded to take the Deceased's cup, urinate in same and then return it to him to drink. This was such an egregious act, which, by itself might have caused serious injury to anyone who had consumed the contents of that cup. Not surprisingly, the Deceased cuffed him and they fought. The Deceased was unarmed during the physical altercation but the Accused introduced his knife into the fracas and used it four times to critical areas of the Deceased's body, the head, and neck. Any reasonable person would know that stab wounds to those critical parts of the body would cause death.

[105] I must also apply and consider the provisions of *Section 27(4) of the Criminal Code* to wit:

“(4) Voluntary intoxication shall be taken into account for the purpose of determining whether the person charged had formed any specific intention in cases where a specific intention is an essential element in the offence charged.”

[106] The evidence discloses that the Accused was consuming alcohol at a wake that night. I find, however, that his conduct that night was not that of a person who was unaware of what was occurring and unable to form the specific intent to kill the Deceased. Indeed, shortly after the commission of the offence, he asked Vaccaro if “the man dead” and after that he was able to admit stabbing the Deceased to his mother, and thereafter, threatened harm to Vaccaro if he snitched on him saying his statement would come out in the disclosure if he did. This in my

opinion is not the conduct of a person who was intoxicated to the extent that he was unable to form the intent to kill. I find that, he had control of his faculties and was well aware of what he had done and the consequences thereof.

[107] Accordingly, I find that the Accused intended to cause the death of the Deceased when he stabbed him that night.

Self-Defence

[108] The Accused in his sworn testimony did not raise the issue of self-defence. In fact, his defence is that of complete denial of stabbing the Deceased and an assertion that it was Joseph Vaccaro who stabbed him. The Court will nevertheless direct itself on, and consider whether the Accused acted in lawful self-defence when he stabbed the Deceased as this issue arises from the evidence as a whole.

The question to be determined is: Was the accused justified in killing the Deceased when he stabbed him that night? The applicable law on this subject is provided in ***Sections 36 of the Criminal Code:***

“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.

(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:*

- (a) Treason*
- (b) Piracy*
- (c) Murder*
- (d) Manslaughter, except manslaughter by negligence*
- (e) Robbery*
- (f) Burglary*
- (g) Aggravated burglary*
- (h) Arson of a dwelling-house or vessel*
- (i) Rape*
- (j) Forcible unnatural crime*
- (k) Dangerous or grievous harm.*

(5) *For the suppression or dispersion of a riotous or unlawful assembly, force may be justified in the cases and subject to the conditions specified in this Code with respect to such assemblies.*

(6) *No force used in an unlawful fight can be justified under any provision of this Code and every fight is an unlawful fight in which a person engages, or which he maintains, otherwise than solely in pursuance of some of the matters of justification specified in this Title.”*

[109] In *Norman Shaw v The Queen Privy Council Decision No. 58 of 2000 at paragraph 19*, Lord Bingham stated the approach to be taken by the Court on the question of self-defence:

“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?”

Before I do so however, I must consider whether or not the Accused and Deceased were engaged in an unlawful fight. Section 36 (6) provides thus:

“36(6) No force used in an unlawful fight can be justified under any provision of this Code, and every fight is an unlawful fight in which a person engages, or which he maintains, otherwise than solely in pursuance of some of the matters of justification specified in this Title.”

[110] In *Shaw v The Queen* aforesaid Lord Bingham opined thus at paragraph 11:

“11. It appears that no reference was made to Section 35 (6) (now 36(6)) at any stage of this case. The Board finds this surprising. The provision is clearly intended to deny a defendant the right to rely on self-defence if the force used by the defendant was used in the course of an unlawful fight. Thus if criminal individuals or gangs inflict violence on each other in the course of unlawful conflict between them, or an innocent victim inflicts or threatens violence against a criminal aggressor, it is not open to either party in the first example or the criminal aggressor in the second to justify his conduct as self-defence. If the prosecutor seeks to rely on Subsection (6) it is first necessary for the trial judge to consider whether there is any evidence fit for the jury’s consideration that the act

charged against the defendant occurred in the course of an unlawful fight. If the judge finds that there is no such evidence, the matter will not be left to the jury. If the judge finds that there is some evidence fit for the jury's consideration, he should in the course of his summing-up (a) identify such evidence and invite the jury to consider it; (b) tell the jury what is meant by an unlawful fight; (c) invite the jury to decide whether, on what they find to be the facts, the act charged against the defendant occurred in the course of an unlawful fight as defined by the judge; and (d) direct the jury that the defendant may not justify the act charged against him as self-defence if the jury conclude that it was done in an unlawful fight."

[111] I will consider and apply the *dictum* of Lord Bingham aforesaid to the facts and circumstances herein.

[112] The evidence reveals that the Accused and Deceased were arguing. It was just an oral altercation. The Accused then took away a cup from the Deceased, urinated in it then returned it to the Deceased to drink. The Deceased cuffed him on his mouth and he stumbled and fell. The Deceased was over him and the Accused took a knife from his pocket and stabbed him. When they got up the Deceased held onto the Accused's shirt and the fight continued at which time the Accused again stabbed the Deceased. The witness, Joseph Vaccaro, said he then told Jamil McKoy to go and part the fight. During this fight, the Accused inflicted four stab wounds to the Deceased with a knife.

[113] I find that, from the time the Accused and the Deceased met that night, they were involved in an atmosphere of animosity and hostility. The Deceased had told the Accused that he had killed 18 men and they argued over money ostensibly to

purchase drugs. Matters reached a head when the Accused took away the Deceased's cup and urinated in it. Events, thereafter, became physical with the Deceased cuffing the Accused and the Accused stabbing the Deceased until the Deceased held his neck and left the scene.

[114] I find in the circumstances, this is a case of two individuals, the Accused and Deceased, inflicting violence on each other in the course of an unlawful conflict. The Accused in my view instigated the physical altercation when he urinated in the cup and gave it to the Deceased. Not surprisingly, the Deceased responded by cuffing him on his mouth. He maintained the fight and introduced a knife to what was a fist fight and at no time sought to withdraw or remove himself from the altercation until after the Deceased left.

[115] In the circumstances, the Crown's evidence has satisfied me to the extent that I feel sure that the altercation between the Accused and the Deceased was an unlawful fight. Thus, the Accused is not entitled to rely on self-defence to justify stabbing the Deceased.

PROVOCATION

[116] As stated aforesaid, *Section 117 of the Criminal Code* provides thus:

“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.”

[117] I will now consider whether the Accused's crime is reduced to manslaughter by virtue of extreme provocation, or some other partial excuse.

[118] **Section 119 of the Criminal Code** provides:

“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; or*
- (c) in causing the death he acted in the belief, in good faith and on reasonable grounds that he was under a legal duty to cause the death or to do the act which he did; or*
- (d) in the case of a woman who causes the death of her child recently born, she (while not insane,) was deprived of the power of self – control by a disease or disorder of mind produced by child-bearing.”*

[119] I find from the evidence in this matter that the provisions of Section 120(a) are applicable. I have considered the provisions of Section 119(b) but there is no evidence to cause me to believe or infer that the accused acted from terror of immediate death or grievous harm.

[120] **Section 120 of the Criminal Code** provides:

“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;*
- (b) *the assumption by the other person, at the commencement of an unlawful fight, of an attitude manifesting an intention of instantly attacking the accused person with deadly or dangerous means or in a deadly manner;*
- (c) *an act of adultery committed with or by the wife or husband of the accused person, or the crime of unnatural carnal knowledge committed upon the accused person's wife or child;*
- (d) *a violent assault or battery, or any sexual offence, committed upon the accused person's wife, husband, child or parent, or upon any other person in the care or charge of the accused person;*
- (e) *anything said to the accused person by the other person or by a third person which were grave enough to make a reasonable man to lose his self-control."*

[121] On the evidence which I believe and accept to be true, I find that provocation should be considered. There is evidence of the Deceased cuffing the Accused on his mouth and grabbing him by his shirt. Whilst there is no verbatim report of the exchanges during the quarrel with the Accused and Deceased, I can infer from the general atmosphere of hostility that insulting words were spoken to

the Accused by the Deceased. These matters must be considered against the background of the Accused having recently experienced the death of his father, his youthful age, and the fact, that he was drinking alcohol that night.

[122] The Crown must satisfy the Court beyond reasonable doubt, that the Accused was not provoked by the cuff to his mouth, the grabbing of his shirt and the words spoken during the quarrel to cause him to lose his self-control. I find in the circumstances, that the Crown's case does not satisfy me to the extent that I feel sure that when the Accused stabbed the Deceased and caused his death he was not deprived of the power of self-control.

[123] Accordingly, the Crown's evidence that I believe and accept to be true has satisfied me to the extent that I feel sure that the Accused intentionally caused the death of the Deceased during an unlawful fight. However, the Crown's case has not satisfied me to the extent that I feel sure that when the Accused did so he was not deprived of the power of self-control. Hence, I find him guilty of manslaughter by virtue of provocation.

Dated this **Monday 16th day of July 2018.**

Honourable Justice Mr. Francis M. Cumberbatch
Justice of the Supreme Court