

**IN THE SUPREME COURT OF BELIZE, A.D. 2021
CRIMINAL JURISDICTION**

CENTRAL DISTRICT

Indictment No. C94 of 2019

THE QUEEN

v.

MR. DEAN GALVEZ

- **Murder**

BEFORE Honourable Justice Mr. Francis Cumberbatch

APPEARANCES Ms. Natasha Mohamed – Counsel for the Crown
Mr. Arthur Saldivar – Counsel for the Accused

TRIAL DATES 21st, 22nd, 23rd, and 27th of July 2020; 26th of October 2020;
16th of February 2020; 22nd of March 2021; 21st of June
2021; 8th and 15th of July 2021.

DECISION

[1] The Accused was indicted by the Director of Public Prosecutions for the offense of murder for that he on the 6th day of May 2018, at St. Matthew's Village in the Cayo District, murdered Ronnie Omar Casasola Jr. ('the Deceased').

[2] At his arraignment, the Accused entered a plea of not guilty hence a trial was held by a judge alone pursuant to the provisions of section 65(a) of the *Indictable Procedure Act*.

Summary of Facts

- [3] I will summarize the facts of the case as presented by the Crown and Defence witnesses. 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] **Khadijah Thimbriel** the Crime Scene Technician in this matter testified. She stated that she visited the scene at around 1:00 a.m., on the 6th day of May 2018, on an unnamed street in St. Matthew's Village. She took several photographs as per the instructions of CPL Carrillo. She also found five expended shell casings and a red substance suspected to be blood.
- [5] On the 7th day of May 2018, this witness attended the post-mortem examination of the Deceased held at the Western Regional Hospital where she took photographs of the body of the Deceased lying face up and face down. The post-mortem examination was conducted by Dr. Loyden Ken. The photographs taken were tendered into evidence at the trial.
- [6] Under cross-examination, this witness stated that even though the lampposts had lights she considered the lighting conditions to be poor. She stated that the five expended shells recovered at the scene were strewn for a distance of about 100 yards along the street. She could not say whether there were one

or five shooters that night. She said the fact that she saw red substance at various parts of the scene suggests that the person who got shot was moving.

[7] Under re-examination, the witness stated that she said under cross-examination that the lighting was poor because, at 1:00 a.m., it was dark. However, because of the light from the three lampposts, she was able to see her surroundings.

[8] **Nidia Romero** testified that on the night of the 5th day of May 2018, she was present with her sister-in-law, Elizabeth Chiquillo, Harvey Casasola, and the Deceased outside the Pedrigal bar in St. Matthew's Village Cayo. She said she saw a fight going on inside the bar. Having seen what was going on inside the bar she and the Deceased were heading home. Whilst doing so she saw the Accused, one Josiah and Mario fighting with Harvey, Angelita, Elvira, and Elizabeth. She testified that she saw the Accused pull out a gun from his waist and she ran towards Elvira Casasola's house. She said when she got to the corner of the street, she saw the Accused point a gun toward all of them and started to shoot. She ran and hid. She later saw the Deceased on the ground face up between some flower trees.

[9] Under cross-examination, this witness admitted that she did not tell the police in her statement that she saw the Accused with a gun in his waist that night. She said whilst hiding she saw the Accused pointing with a weapon and heard

the gun going off. She said she does not remember if she told the police that she saw a gun in the shooter's hand.

[10] The witness stated that the area was not dark and that prior to the incident there was an argument with the Accused, Mario, Josiah, and her family. After the argument, the first of the gunshots occurred. When she was hiding she saw the shooter from the side, not face to face. She did not see in what part of his body the Deceased was shot. The only thing she saw was the Deceased holding the front of his chest and his back.

[11] **Angelita Janelle Cassasola** testified that at around 10:55 p.m., she left her home to go to the Pedrigal bar to buy a coke when she saw an argument going on inside the bar. She did not enter the bar but saw her brother Ronnie Omar Cassasola enter the bar to stop the fight because it was three persons against one person. She observed Mario, Chias, and the Accused. She told her brother Ronnie let's go and he came out of the bar and they started walking. Whilst doing so Chias, the Accused, and Mario started to follow them and at the same time were uttering bad words and pushing them. When they arrived at a lamppost Chias's father stopped him and sent him inside his house, however, the Accused and Mario continued insulting and pushing Omar. She said she told Omar to let us go because Dean only want problems. Dean replied telling her "*shut up you whore*" and Omar told him he should not be

insulting his sister. Mario pushed his head and continued to insult him so she hit Mario on his chest with her hands. They continued on their way to her mother's house and she saw Dean pick up something from the bushes. She continued on her way then she heard Claudia say something and on looking back she saw Dean pointing something at them and shooting. She was about 25 to 35 feet away from Dean who was about 15 feet from a lamppost and was able to see him from his waist up for about a minute. When they arrived home Dean continued shooting then the shooting stopped. She stated that she later saw Dean coming from another direction which is from the back towards her house and started shooting again. At this time, she stated that they started throwing stones at Dean to see if that would make him leave, and sometimes he would go back but he continued shooting. Omar and Harvey were next to her. She said some of the shots hit a lamppost in the yard and they continued throwing stones at Dean. She went on to say that all of a sudden, she heard Omar say he got hit. She observed something like blood on the left side of his chest and called her brother to help him.

- [12] This witness also testified about the lighting conditions that night and spoke of the position of the lampposts when the Accused was shooting at them, and they were throwing stones at him. She stated that she was about 25 feet away

from Dean who was beneath a street light, shining yellow and white light. She said she saw the Accused's whole body for about two to three minutes.

[13] Under cross-examination, this witness denied that they were in the house when gunshots were going off. She said they were running to the house when the gunshots stopped. After the gunshots stopped they went back outside looking to see if Dean would come back from behind. She denied that they were going after the shooter and denied that they were hunting after the person who shot at them. She stated that they were trying to defend themselves by picking up rocks. She also denied that it was Harvey who shot Omar in the back.

[14] **Elvira Cassasola** testified that on the 6th day of May 2018, at about 12:30 a.m., she was at home when she heard an argument. She was concerned about her children so she came outside of the house. She said she saw her children coming and decided to walk toward them. She also saw Dean, Chias, and Mario. After she told her children to come inside the house she said she heard two gunshots. She said she saw Dean again running towards them and shooting. At that time, she said Ronnie picked up stones to try to defend them and when he turned around to pick up stones he got shot. She said she saw him walk inside the yard and fall to the ground.

- [15] This witness testified about the distance of the street lights and the closest distance between her and the Accused which she estimated to be between 22 to 25 feet.
- [16] Under cross-examination, the witness stated that she saw the black object in Dean's hands when he came back shooting. She did not see it when the first two shots were fired. She denied that Harvey shot Ronnie in his back whilst the two of them were chasing Dean. She stated that only Dean had a gun that night.
- [17] **Elizabeth Chiquillo** testified that on the night of the 5th day of May 2018, she together with Nidia, Harvey, and Ronnie had an argument with Chias, Dean, and Mario. She stated that Dean and Chias started to threaten and insult them and pointed their fingers at Ronnie's face. Angelita arrived and slapped Mario. They left walking away and whilst doing so she said Dean followed them and they started to run. Whilst running she said she heard three gunshots. She turned and noticed that Dean had something in his hands. Then she saw it was a black firearm.
- [18] The witness stated that she later saw Dean come out from the other direction to the house. They were prevented from going to the house because Dean started firing shots toward the house, so they were afraid and started picking up stones to throw at him and he started to fire shots like crazy. She stated he

fired approximately seven to ten shots. She said when Dean was firing shots like crazy she saw Omar turn around to pick up more stones and she saw his chest jump. After that, she said he dropped the stones and started to walk towards her as she was behind him. Then she saw he was bleeding from his back and chest and saw him fall to the ground in his mother's garden.

[19] This witness testified about the lighting conditions and positions of lamp posts in the area. She said she was able to see Dean for about three minutes when he was shooting as he was positioned beneath a lamppost and facing her. She said the first time he came shooting she heard him say he will kill all of us and pay off the police because he is untouchable.

[20] Under cross-examination, she admitted that when she gave her statement to the police, she did not say she saw when Ronnie was shot. She said she told the police Ronnie told her he was shot in the chest. She said the incident is fresher in her mind now because she has thought about it more and more than on the day, she gave her statement which was on the 6th day of May 2018. She said she drank two beers that day and Ronnie's mother did not drink anything as she just came by to check up on her children.

[21] This witness denied that the black firearm she saw belonged to Harvey and also denied that all shots fired that night were done by Harvey when he and Ronnie were chasing Dean.

[22] **Harvey Cassasola** testified that on the night of the 5th day of May 2018, at around 10:00 p.m., he was at the Pedrigal bar with his brother Ronnie and his girlfriend, Elizabeth. He and his brother parted a fight in the bar after which they started walking home. Dean, Daniel, and Mario started bothering them by cursing them and following them on the way home. The witness went on to say that as they were walking home Dean fired two shots at them and they ran to their home. He said he saw Dean with something resembling a firearm in his hands and heard the sound of gunshots. He said at that time Dean was about 30 feet away from him and he was able to see him by the lights from the electricity posts and nothing stopped him from seeing Dean. He said he saw him for about ten minutes.

[23] The witness went on to say that after he fired the two shots Dean ran back to where he came from. He next saw him coming from the opposite direction and at that time he started firing more shots. He said all of them started picking up stones so that Dean could go back to where he came from. It was mainly him, Angelita, and Ronnie picking up stones and that's when he saw his brother turn back to pick up more stones and he saw his body shake. His brother told him he got shot and walked into the yard and fell. That was when Dean Galvez ran away. The witness said that Dean was about 25 feet away when he was picking up stones and he was able to see him with the aid of the

street lamps. He further stated that at that time the Accused was right under the lights.

[24] The witness testified that whilst following them the Accused told him “*if he had balls he would come out and fight him, he also said he would shoot all of them motherfuckers.*” He said he did not have a weapon that night.

[25] Under cross-examination, the witness denied that he and his brother chased the Accused and Mario up the street with firearms. He further said they had no firearms and denied that he had a firearm and shot his brother which caused his death. He said he only had two beers that night.

[26] **Dr. Loyden Ken** testified. He was deemed an expert as a general practitioner with a specialization in anatomical pathology. He stated that on the 7th day of May 2018, he performed a post-mortem examination on the body of the Deceased at the Western Regional Hospital. His findings revealed that the Deceased suffered from a gunshot entry wound located at the right posterior aspect and an exit wound at the left anterior aspect of the chest. The doctor found the cause of death to be a hypovolemic shock as a consequence of internal and external exsanguination due to the laceration of the heart and right lung as a consequence of a single perforating gunshot wound to the chest. This witness was not cross-examined.

- [27] **John Rudon testified.** He was deemed an expert in the field of ballistics. He stated that on the 2nd day of May 2019, he examined five expended cartridge cases retrieved from five sealed envelopes marked “**EXH. RC001- RC005**”. Each envelope contained one brass cartridge case with no bullet or powder charge and with a firing pin impression on the primer. His findings were that the said five cartridge cases were all of the Sellier & Bellot (S&B) brand 9x19 caliber expended cartridge cases and that all five were fired from the same unknown 9x19(9.mm) caliber firearm.
- [28] Under cross-examination, the witness stated that if the firearm had a faulty spring the distance of the expelled cartridge cases would vary. It also depends on the state of the firearm and the surface on which the cartridge cases fell. The witness could not say if all five cartridges were fired on the same day.
- [29] At the close of the Crown’s case, the Court informed the Accused of his three options and he elected to give sworn testimony. He said that on the night of the 5th day of May 2018, he was at Claudia Martinez’s house along with Mario, Chias, and Augustine. They went to buy some drinks at the Pedrigal bar. Whilst going in front of the Cassasola residence some of them got into an argument with him. He paid them no mind and continued on his way to the bar. At the bar, Claudia and her boyfriend got into an argument and were fighting. He did not interfere because it was a man and a woman thing. When

the fight stopped they came out of the bar and started walking to Claudia's house. As they arrived at the lamppost at the corner to the Cassasola residence he heard shots so he ducked for cover and ran to Manuel Soto's house. When he got there he heard some more shots and went to bed. He heard that the police wanted him so he along with his lawyer went to the police station and turned himself in.

[30] The Accused said he knew the Deceased. The last time he saw him was one night when along with Manuel Soto and the Deceased's cousin they went fishing. He stated that when he was on his way to the bar and passed the Cassasola house it was Ms. Cassasola, Elvira Cassasola and her husband, two of her daughters-in-law and some persons were there. He said when he ran after he heard shots he jumped over a fence and then ran down a road toward Manuel Soto's house. He did not go back to Claudia's house that night and he had no weapon and did not shoot anyone.

[31] Under cross-examination, the Accused denied shooting the Deceased. He stated that he jumped one side of the fence in a yard and jumped the other side of the fence to get to the street where Manuel Soto's house was. He said he had no clue where the shots were coming from. When he was coming from the bar no one was behind them only in front of them but he jumped the fence because his life was on the line.

[32] The Accused said he did not see the Deceased at the bar that night and denied being in an argument. He later said that he saw Angelita and the Deceased walking up the street to get to their house and that he did not follow them until after he reached the corner to their house. He never had any trouble with the family. He went on to say that he followed them on his way to Suzie's house. He later said he was not following them; he was going to Suzie's house.

[33] The Accused denied that he was shooting at the Cassasola's who were throwing stones at him. He was not re-examined.

[34] The Defence called the witness, **Mario Alberto Avelar**. This witness testified that on the night of the 5th day of May 2018, at about 7:30 p.m., he left his home to meet with the Accused at his home. On the way, he met with the Deceased who appeared to be under the influence of alcohol. They went to Suzie's house where they remained for about 45 minutes then went to take a drink. On the way, they passed in front of the Cassasola house. It was him, the Accused, and one Daniel Quevedo. Harvey started an altercation with them and the whole family joined in. They arrived at the bar and remained there for about 20 minutes when Suzie arrived and she and her boyfriend had an altercation.

[35] The witness said on their way home from the bar the Deceased attacked the Accused with a galvanized pipe. He said he too was attacked with the same

pipe by Yanelly and a little while after he heard the first gunshot. He stated that the Accused had no firearm or weapon that night. He said after he heard the shots fired both he and the Accused ran beside each other.

[36] Under cross-examination, the witness stated that after leaving Suzie's house it was him, the Accused, and Daniel together in front of the Cassasola's house. After leaving the bar he met the Cassasolas' at the junction where he heard the gunshot. He said he ran and hid behind a car parked on the roadside and stayed there for about 20 to 30 minutes. He saw the Accused running at the same time but he did not see him jump any fence.

[37] That was the case for the Defence.

Submissions

Defense Submission

[38] In his closing address Defence Counsel submitted thus:

- i. That no identification parade was conducted; and,
- ii. All of the Crown's witnesses who testified to seeing the Accused as the shooter did so by a dock identification.

[39] Counsel further submitted that the Crown must prove beyond reasonable doubt that the injuries sustained by the Deceased were unlawfully inflicted by the Accused; that in so doing the Accused had the intention to kill the Deceased and that the Deceased met his demise as a result of those injuries.

[40] Mr. Saldivar went on to contend that though the harm sustained by the Deceased was unlawful the Crown must prove that his client was not acting in self Defence when the injuries were inflicted to the Deceased. However, though his client denies being the shooter, if the court finds that he was the shooter there is evidence that the Crown's witnesses chased and stoned his client at the time the Deceased was injured.

[41] Defense Counsel submitted on the matter of intention that the evidence of the Crown's witnesses does not establish that the Accused had or developed the specific intent to kill the Deceased at any time on that fateful night. He also referred to the evidence of the pathologist, Dr. Ken, who testified that the bullet entered the lower back of the Deceased and traveled in a downward to an upward trajectory. Counsel contends that this piece of medical evidence provides an alternative view as to how the injuries sustained by the Deceased were caused. Counsel suggested that the injuries were not sustained by a direct shot aimed at the Deceased but by a ricochet. Counsel states that if the Accused is found to be the shooter in these circumstances then his actions would be reckless and would not reach the threshold of a specific intent to kill.

Crown's Submission

- [42] Crown Counsel submits that at least four of the witnesses for the Crown were well acquainted with the Accused before this incident. Thus, in the circumstances, the holding of an identification parade was unnecessary. Counsel relied on the *dictum* of Lord Bingham in ***R v Forbes*** and the Court of Appeal of Belize in ***Dean Hyde v The Queen***.
- [43] On the matter of the specific intention to kill Crown Counsel submits that the Accused verbalized his intentions a few minutes before he commenced shooting when he said he would kill all of them. He followed up his threats by arming himself with a gun and discharging multiple shots at those same persons.
- [44] In response to the submission by Mr. Saldivar that the bullet causing the death of the Deceased ricocheted from the ground into his body hence his death was not as a result of a specific intent to kill but by recklessness, Crown Counsel submits that the Deceased was bending over picking up stones when he was shot and is asking the Court to infer that the Deceased whilst in that position was hit in the lower back and the bullet traveled upward.
- [45] The Crown relied on the *dictum* of the Privy Council in the decisions of ***Norman Shaw v the Queen*** and ***Solomon Beckford v the Queen*** in response to the submission by Defense Counsel on self-defense. Crown Counsel went

on to submit that in the circumstances as described by its witnesses the Accused could not have honestly believed that it was necessary to defend himself because at no time was, he attacked, and at all material times, he was the aggressor.

[46] The Crown also contended that there was nothing said or done by the Cassasola family to amount to an extreme provocation that would cause a reasonable man to act as the Accused man did on that night.

[47] The Crown also addressed the Court on the discrepancies in the sworn testimony of the Accused and his witness Mario Avelar as to the events that took place on that fateful night.

The Law

[48] 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.*”

[49] 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.*”

[50] 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.

[51] It is common ground that the thrust of the Defence 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. Thus, the question of visual identification must be considered.

Identification

[52] 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 own mind that the person he 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, at what distance, in what light, and

whether anything interfered 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 extra careful in its consideration of the evidence of visual identification.

[53] The Crown's witnesses who purported to identify the Accused as the shooter testified about the lighting conditions on the scene at the time of the shooting and the distance that separated them from the alleged shooter. They all testified of their previous knowledge of the Accused and their previous interactions with him. Indeed, the Accused himself in his sworn testimony testified that he had known the mother of the Deceased and considered the Deceased to be his friend. He also spoke of knowing the sisters of the Deceased.

[54] There is evidence coming from the Accused that prior to the shooting incident that night he had seen the Deceased and other family members at the Pedrigal bar and when he left that area they were walking ahead of him.

[55] The court paid a visit to the locus in quo and was able to observe the closeness of the lamp posts on the street in front of the Cassasola's residence. There were 3 lamp posts in relatively close proximity to each other. The Crown's witnesses pointed out to the court the positions where they were and where

the Accused was at different times during the incident. Indeed, there is testimony from the Crown's witnesses that at one time the Accused was standing directly under a street light which is positioned over the road when he allegedly shot the Deceased. The Court was shown the street light which is positioned directly over the road. The Crime Scene Technician testified that the light from the three lamp posts on the unnamed street enabled her to see the surroundings that night.

[56] The Defence is contending, however, that when the shooting began the Accused ran away from the scene and went home to bed. Thus, he is by implication raising the defense of alibi.

Alibi

[57] The Accused testified that he ran away from the street corner where the Cassasola family resided when he first heard gunshots. He stated that he jumped fences in order to get to the home of Manuel Soto where he resided at the time. His witness testified, however, that when the shooting commenced he and the Accused ran together and he hid behind a car whilst the Accused ran home. He denied that the Accused jumped fences to get home as the Accused was with him when they both ran after the shooting started. He further stated that when he hid behind the car he saw the Accused running home.

[58] I have directed myself that as the Crown has the burden of proving the guilt of the Accused he does not have to prove that he was elsewhere at the time. On the contrary, the Crown must disprove the alibi.

[59] I find that there is a material discrepancy in the versions of the Accused's whereabouts from him and his witness. Accordingly, I have rejected that part of the evidence of the Accused that he ran away from the scene when the shooting started and in so doing jumped fences to get home. However, even though the alibi was or may have been concocted that does not mean that he was not somewhere else when the shooting took place. Thus, I must return to the evidence in the Crown's case on visual identification to determine whether the Crown's case has satisfied me to the extent that I feel sure that the Accused was the shooter on that night.

[60] The witness Angelita Cassasola testified that she had known the Accused for some eight months before this incident and saw him sometimes thrice weekly. On the night in question, she said she saw the Accused at the Pedrigal bar and on the road when he told her "*Shut up you whore*". She later saw him shooting at them and she was able to see him because he was standing under the streetlight for about two to three minutes, he was facing her, she saw him from head to toe and nothing prevented her from seeing him.

[61] Harvey Cassasola stated that he knew the Accused for about two years and would see him at their house about three to four times a week as he and his brother the Deceased were friends and they spoke often. He said when the first set of shots was fired he saw the Accused who was about 30 feet away from him by the electricity post light and his view was unobstructed. He went on to testify that he saw the Accused firing shots the second time and said “*when Dean was firing the shots he was right under the lamppost*”. He said he saw the Accused for about five minutes and was able to see his face and his whole body and nothing obstructed his view.

[62] The witnesses, Elizabeth Chiquillo and Elvira Cassasola, also testified to seeing the Accused standing under the street light when he fired shots the second time.

[63] As stated aforesaid, I have visited the scene of this incident and have seen the position of the lamp posts of which the Crown’s witnesses testified. The streetlight under which the Accused allegedly was during the second shooting hangs directly over the road. The evidence from the Crime Scene Technician is that the lights on the posts in that area were working when she visited the scene that night. I have also been shown where the witnesses were and the distances between them and the Accused during the second set of shootings.

I have also taken into consideration the inconsistencies, discrepancies, and *lacunae* in the evidence of the Crown's witnesses to *wit*:

- **Nadia Romero said she saw the gun pulled by the accused from his waist but admitted that she did not tell that to the police;**
- **Angelita Cassasola said she saw the accused pick up something from the bushes. When she looked back she saw him shooting.**

However, the witnesses Elizabeth Chiquillo and Harvey Cassasola gave what I consider to be very powerful evidence of seeing the accused with a black firearm in his hands firing shots at them in favorable lighting conditions. In so finding I have taken into consideration their demeanor and the manner in which they gave their testimony both in chief and under cross-examination.

[64] Defense Counsel submits that the evidence of visual identification should be rejected because of the absence of an identification parade. Crown Counsel submits that in the circumstances of this case an ID parade was unnecessary because the Accused was well known to and by at least four of the five eyewitnesses which were not disputed by the Defence. The Crown relies on the *dictum* of Lord Bingham in ***R v Forbes*** (2000) UKHL 66 to wit:

“Identification on parade or in some other similar way in which the witness takes the initiative in picking out the Accused should be made

a condition precedent to identification in court, the fulfillment of the condition to be dispensed with only when the holding of the parade would have been impracticable or unnecessary. An example of it being impracticable is when the Accused refuses to attend. An example of it being unnecessary is when the Accused is already well-known to the witness ...”

[65] I find in the circumstances after having carefully considered all of the relevant evidence that the Crown’s case has satisfied me to the extent that I feel sure that the Accused was the shooter that night and for the reasons in the *dictum* of Lord Bingham aforesaid I find that holding of an identification parade in the circumstances was otiose.

Self-defense

[66] Mr. Saldivar has submitted that his client was being chased and stoned by the Cassasola family and was forced to defend himself in the circumstances. Thus any harm inflicted by his client to the Deceased was not unlawful but was justified in the circumstances.

[67] In the decision of the Privy Council in *Norman Shaw v Regina* the Board in an examination of the application of the defense of self-defense stated thus in paragraphs 14 and 19 to wit:

“...14. It was common ground between the parties to this appeal that, as pithily expressed in Smith and Hogan, Criminal Law, 9th Edition (1999) at page 253:

“The law allows such force to be used as is reasonable in the circumstances as the Accused believed them to be, whether reasonably or not. For example, if D believed that he was being attacked with a deadly weapon and he used only such force as was reasonable to repel such an attack, he has a Defence to any charge of an offence arising out of his use of that force. It is immaterial that he was mistaken and unreasonably mistaken.”

‘...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?”

[68] I will consider and apply the directions approved by the Board in *Norman Shaw v Regina* aforesaid. In so doing, I will direct myself in the following manner:

[69] First of all, if the Court believes and accepts the submission made by Counsel for the Accused and finds it to be reliable and if I believe that he was or may have been acting in lawful self-defense I must acquit him. The Crown must prove his guilt and it is for the prosecution to prove that he was not acting in lawful self-defense, not for the Accused to prove that he was.

[70] The Court must consider the matter of self-defense in light of the situation that the Accused honestly believed he faced. The Court must also consider if the Accused honestly believed it was necessary to use force to defend himself against the attacks or perceived attacks from the Deceased which in law he is entitled to do. I must also bear in mind that the Accused is under no duty to retreat and await the attack before taking defensive action.

[71] If after having considered the evidence I find that the Accused did or might have honestly believed that it was necessary to use force to protect himself from the attacks or perceived by the Deceased and his family then I must go on to consider whether the type and amount of force was reasonable.

[72] I must also consider that a person who is under attack would react on the spur of the moment and cannot be expected to work out exactly how much force

he needs to use to defend himself. On the other hand, if he goes over the top and uses force out of all proportion to the attack or more force than is really necessary to defend himself then the force used would not be reasonable.

[73] If the prosecution's case satisfies me to the extent that I feel sure that the force used by the Accused was unreasonable then he cannot be said to be acting in lawful self-defense and I must reject the defense of self-defense. If however I find that the force used was or may have been reasonable then I must acquit him.

[74] Before I come to make a finding on this Defence I must also consider the provisions of section 36(6) of the ***Criminal Code*** which provides thus:

(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."

[75] Having considered this provision in ***Norman Shaw v Regina*** aforesaid the Board opined thus in paragraph 11:

"... The provision is clearly intended to deny a defendant the right to rely on self-defense 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 the 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 concludes that it was done in an unlawful fight."

[76] The evidence upon which this submission is premised comes from the Crown's witnesses who stated that when the Accused appeared on the scene on the second occasion and recommenced shooting at them they picked up

stones from the road to distract him and repel his attack on them. Thus, the first question therefore arises, did the Accused honestly believe that it was necessary to use force to protect himself from the attacks or perceived attacks by and from the Cassasola family?

[77] I have considered the evidence as a whole and find that the evidence revealed that prior to the commencement of the shooting the Accused challenged Harvey Cassasola to come out and fight if he has balls. Elizabeth Chiquillo testified that when the Accused was shooting for the first time he said: “he would kill us all and he can pay off the police and he is untouchable.”

[78] The evidence that I believe and accept to be true is that the Cassasola family members acted in fear for the safety of their children and themselves hence they resorted to throwing stones at the Accused to get him to leave the scene. Moreover, the evidence clearly discloses that the Accused was the aggressor that night and in the circumstances could not have honestly believed that it was necessary for him to defend himself from the attacks or perceived attacks of the Cassasola family members. Accordingly, I find that when the Accused was shooting at the Cassasola family and shot the Deceased he was not acting in lawful self-defense. I further find that the harm inflicted on the Deceased was unlawful.

Intention

[79] The Court must now determine whether when the Accused inflicted harm to the Deceased he intended to kill him when he did so. 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.”

[80] What is or is not a person's intention is not easily ascertainable unless, of course, they disclose their intentions to you. The Prosecution must prove that the Accused had the requisite intention, that is, to kill the Deceased at the time of the alleged offense. They intend to do so by asking the Court to believe and accept the evidence of its witness Elizabeth Chiquillo who testified that the

Accused threatened to kill them all. The Crown is also relying on the evidence of Harvey Cassasola who testified that the Accused challenged him to come out and fight and then threatened '*to shoot you motherfuckers.*' The Court is also being asked to draw certain inferences from the evidence in this case.

[81] 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 fired several shots at the Deceased and his family.

[82] So, when considering whether the Prosecution has proved to my satisfaction that the Accused 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.

[83] The evidence before the Court from the Crown's witnesses aforesaid which I believe and accept is that the Accused challenged Harvey Cassasola to come out and fight if he has balls and thereafter stated that he would '*shoot all you motherfuckers*'. I also believe and accept the evidence of Elizabeth Chiquillo aforesaid in a similar vein.

[84] The evidence which I believe and accept further discloses that the Accused proceeded to discharge a number of gunshots from a handgun at the Cassasola family and was not deterred in that unlawful exercise by stones being thrown at him. Indeed, after discharging the first two or three shots he returned to the

scene from another direction and discharged another salvo at his intended victims described by Elizabeth Chiquillo as firing shots like crazy.

[85] I find in the circumstances, that the aforesaid is powerful evidence adduced by the Crown to satisfy the court to the extent that it feels sure that when the Accused fired shots at the Deceased he intended to kill him.

[86] Defense Counsel raised a discrete point that the bullet which entered the body of the Deceased was a result of a ricochet. This argument is based on the opinion of the finding of Dr. Ken that the bullet entered the Deceased body from the right back and traveled in an upward direction exiting his body from the left chest. Hence, Counsel submits the shot was not aimed at the Deceased but could have hit the ground before entering the body of the Deceased. Counsel contends that in the circumstances there could be no intention to kill and the Crown's case at its highest amounted to recklessness on the part of the Accused.

[87] Crown Counsel submitted that this occurred because the evidence of the Crown's witnesses is that the Deceased was bending down with his back to the Accused whilst picking up stones to throw at him.

[88] The evidence does not disclose that the bullet was retrieved, which is not surprising, as the pathologist found that there was an exit wound through which the bullet exited the body of the Deceased. Thus, there is no forensic

evidence arising from an examination of the bullet as to whether it made contact with another surface before entering the body of the Deceased. Equally there is no opinion evidence from the pathologist as to what was the position of the body of the Deceased when he was shot.

[89] I find, however, that the Accused had formed the intention to kill the Deceased sometime prior to firing the fatal shots and that there is no evidence to cause the court to find that the Accused at some time after he had formed that intention resiled therefrom. Accordingly, I find that for the reasons hereinbefore stated that when the Accused shot the Deceased he intended to kill him.

Provocation

[90] Section 117 of the *Criminal Code* under which the Accused is indicted 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.”

[91] Section 119 so far as is relevant to the case at *bar* 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; ...”

[92] Section 120(a) (b) of the ***Criminal Code*** defines what may amount to extreme provocation as is relevant to this matter;

“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; ...”

[93] Defense Counsel did not in his closing submissions nor did he in cross-examination foreshadow the partial Defence of provocation. Crown Counsel, however, in their written submissions quite rightly in the Court’s opinion addressed the court on this issue.

[94] The Accused in his sworn testimony stated that earlier that night when he was passing in front of the Cassasola residence they got into an argument with him but he paid them no mind and continued on his way to the bar. Under cross-examination, he denied that after they left the bar he was engaged in an argument with Angelita and the Deceased. The thrust of the Accused’s testimony was that he was not involved in any argument or altercation with

members of the Cassasola family and when they tried to get into an argument with him he paid them no mind.

[95] His witness Mario Avelar testified, however, that after he and the Accused left the bar the Deceased attacked the Accused with a galvanized pipe. He stated that he himself was attacked with the same pipe by one Yanelly Cassasola. Most surprisingly, however, this incident was not raised by the Accused in his sworn testimony nor was it suggested to any of the Crown's witnesses in cross-examination. Thus, I reject that part of the evidence of this witness.

[96] I have carefully examined all of the evidence adduced by both the Crown and the Defence and I have not encountered any evidence of anything said or done to the Accused that did or might have amounted to extreme provocation to cause him to lose his power of self-control. Indeed, the evidence disclosed that the Accused and his friends were uttering bad and insulting words to the Cassasola's after they left the bar and were on their way home. This conduct continued as he followed them and thereafter commenced shooting at them.

[97] Accordingly in the circumstances, I find that the Crown has satisfied me that the Accused was the aggressor and seemed to be spoiling for a fight that night. Thus I find that the Crown has satisfied me to the extent that I feel sure that when the Accused shot and killed the Deceased that fateful night this was not

done because he was deprived of the power of self-control by such extreme provocation given by the other person or persons. I further find that the Crown has satisfied me to the extent that I feel sure that the Accused was not justified in causing some harm to the Deceased 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.

[98] Thus, in the circumstances aforesaid the partial Defence of provocation fails.

Verdict

[99] I have considered and analyzed the facts and circumstances in this case and in so doing I have applied the relevant principles of law thereto. I am satisfied to the extent that I feel sure that the Accused was the shooter that night. The Crown has also satisfied me that when he fired shots at the Deceased and members of his family he intended to cause their death and that he was not acting in lawful self-defense. I have also found that the Accused did not act as a result of extreme provocation from the Deceased and his family on that fateful night.

[100] Accordingly, I find that the Accused is guilty of the murder of the Deceased as indicted.

Dated this **15th day of July 2021.**

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