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

**CRIMINAL APPEAL NO.8 OF 2020**

**BETWEEN:**

**MARIO AGUIRRE**

Appellant

**and**

**THE KING**

Respondent

_____

Before:

The Honorable Madam Justice Woodstock-Riley — Justice of Appeal
The Honorable Madam Justice Minott-Phillips — Justice of Appeal
The Honorable Mr. Justice Bulkan — Justice of Appeal

Appearances:

Mr. Leeroy Banner for the Appellant
Ms. Sheiniza Smith, Senior Crown Counsel, for the Respondent

---

2023: March16

October 10

---

**JUDGMENT**

**INTRODUCTION**

[1] **WOODSTOCK, J.A.:** By this appeal, the Appellant, Mario Aguirre, seeks to set aside his conviction for the offence of murder. The trial commenced on the 29th January 2020 before the Honorable Justice

Herbert Lord sitting without a jury. On the 17th June 2020, the Appellant was found guilty and was sentenced on 29th April 2021 to life imprisonment with eligibility for parole after 20 years 10 months.

[2] On the 25th February 2017, Marcelino Chan, (the deceased) and the Appellant had an encounter in San Roman Village, Orange Walk District. Witnesses indicated that there was contact between the deceased and the Appellant during which the deceased was stabbed. He was pronounced dead on arrival at the Northern Regional Hospital. The Crown's case was that the Appellant stabbed the deceased which resulted in his death and at that time, the Appellant inflicted said harm with the specific intention to cause death and without any lawful justification. The Appellant pleaded not guilty to the charge.

**THE TRIAL**

*Prosecution's case*

[3] The Prosecution advanced its case with fifteen witnesses who gave evidence at the trial. Dr. Mario Estrada Bran who conducted the postmortem examination at the Karl Heusner Memorial Hospital Morgue gave evidence as to the fact of death. The body was identified to be that of Marcelino Chan by his wife Ethelinda Marroquin who also testified to the fact at trial. Dr. Bran testified that the direct cause of death was cardiogenic shock due to cardiac tamponade syndrome caused by a stab wound to the heart. In addition, Dr. Bran testified as to his observation of six other stab wounds on the deceased's body. This evidence satisfied the Judge that the deceased died of harm.

[4] Crown witnesses Aldair Carrillo and Severo Vasquez Jr. testified that at the scene there was an argument in front of Severo Vasquez Sr's land which began when the accused arrived at the scene calling his wife to come out of the property. There was an altercation between the Appellant and the deceased and in which the deceased was fatally stabbed and subsequently died as a result. As the Trial Judge noted the evidence of the Prosecution's witnesses and the unsworn statement of the accused both confirm that it was the accused who caused the harm leading to Marcelino Chan's death.

[5] The Trial Judge observed that it was upon him as the trier of fact to look at the surrounding circumstances by reference to all the evidence to determine the accused's intention. In the instant case, the Judge considered the location of the fatal stab wound, the nature of the instrument used to inflict the wound and the infliction of the seven stab wounds. In particular he considered the testimony of Dr. Bran regarding

the heavy force required to injure the heart because of the depth of the stab wound to the heart ,6 inches, and the fracture of the 5th costal arch/rib. That in this case the stab wound went through the rib completely fracturing it. That injury alone was fatal, and the deceased had no chance of surviving. The Trial Judge outlined those factors as sufficient circumstances to satisfy him that the accused had the specific intention to kill the deceased when he caused the harm.

*Defence's case*

[6] The Trial Judge considered the defences of provocation and self-defense as he notes were raised by the Defence's unsworn statement from the dock. The Judge observed that it was upon the Prosecution to negative the justifications raised by the defence. The unsworn statement was as follows:

> *"On February 25, 2017 I was in the house of Sgt. Severo Vasquez at a birthday party at San Roman, Rio Hondo, I had a misunderstanding with my wife (Diana Vasquez). I punched her two times in her face, immediately Sgt. Severo Vasquez, Edgar Vasquez, Severo Vasquez Jr., Felipe Vasquez attacked me inside the house and punched me. I immediately came out running of the house through the front door, I went to my house. When I reached my house 15 minutes after I came out of my house in the direction to my mother's house. Reaching close in front of Mr. Tiburcio house I saw Edgar Vasquez, Severo Vasquez Jr., Felipe Vasquez, Marcelino Chan, Aldair Carrillo and other persons that I do not recognize came out from a dark area on the right side of the street with bottles, knives and bare hands. I pulled my knife defending myself stepping backwards, whilst I was defending myself. I saw Marcelino Chan, I continued defending myself stepping backwards, moments after I turned myself and ran with my knife on my right hand. I want to say that I was only defending my life when Marcelino Chan got stabbed."*

[7] In addition, the Defence called one witness, one Isabel Toledano, in support of its case. She testified that she saw the accused being attacked by three men with knives and bottles, namely Aldair Carrillo, Severo Vasquez Jr. and the deceased, causing the Appellant to have to defend himself. The Appellant maintains that it was within this context that the harm was occasioned, causing the death of the deceased and therefore he had lawful justification.

*Judge's Decision*

[8] The Learned Trial Judge gave little weight to the accused's unsworn statement and upon assessing the evidence from both sides, determined that the Prosecution satisfied the court beyond a reasonable doubt as to the accused's guilt in respect of the offence of murder. That self-defence or extreme provocation did not arise.

**GROUNDS OF APPEAL**

[9] The Appellant filed an appeal and asserted he did not receive a fair trial as guaranteed under the Constitution of Belize on the following five grounds:

i. The Learned Trial Judge failed to consider the discrepancies/inconsistencies in the prosecution's case which rendered his summation deficient and as such deprived the Appellant of a fair trial;
ii. The Learned Trial Judge failed to give the Appellant a good character direction;
iii. The Learned Trial Judge failed to apply the principles of self-defense to the facts presented by the Defence;
iv. The Learned Trial Judge failed to consider the defence of intoxication;
v. The Learned Trial Judge failed to give himself a Lucas direction.

Both parties filed written submissions but before us Counsel for the Appellant indicated he was not arguing grounds 2, 4, 5 leaving same to the Court for consideration.

**DISCUSSION**

**(i) Whether the learned trial judge failed to consider the discrepancies/inconsistencies in the prosecution's case thereby depriving the Appellant of a fair trial**

[10] The Appellant submitted that the Learned Trial Judge not only failed to identify the inconsistencies in the prosecution witness' evidence, but failed to show how he resolved the inconsistencies prior to accepting those witnesses as credible. The evidence in question concerned the manner in which the incident leading to the death of the deceased commenced and occurred. The Appellant proffered that in light of

the importance of that evidence to the outcome of the case, the judge had an onus to identify the inconsistencies, analyze the effect of the said inconsistencies on the case, and demonstrate within his reasoning how any such inconsistencies were resolved. The Appellant submitted that as the credibility of the witnesses were not properly assessed, he did not receive a fair trial.

[11] The Respondent submitted that the Learned Trial Judge did address the discrepancies and it was unnecessary for the Judge to highlight and resolve individually each area of inconsistency in his reasonings. The Respondent further submitted that all the witnesses substantially corroborated each other on the material facts of the case and that the Trial Judge observed this within his judgment at p. 304:

> "*I have also again carefully considered, and I noted that there were certain discrepancies in the Prosecution's witnesses' evidences, but I note that all agreed that it was the accused who advanced towards the deceased and subsequently stabbed him several times thus causing his death shortly thereafter as noted in the evidence of Dr. Mario Estrada Bran, Forensic doctor who performed the post-mortem examination."*

[12] There is no question that there were inconsistencies in the evidence of Crown witnesses Aldair Castillo and Severo Vasquez Jr apparent in the record. For instance, there were inconsistencies with the location of injury caused to the Prosecution witness Aldair Castillo in the altercation with the accused, and other discrepancies between cross-examination evidence and the witness statements. The Trial Judge observed this in his judgment, and it is observed too by this court from the excerpts within the Appellant's submissions.

[13] The Appellant raises that the Trial Judge failed to demonstrate the resolution. It seems evident that the Trial Judge found that there were no inconsistencies significant to the material issues, that is with respect to primary facts and the credibility and reliability of the witnesses which he had seen and heard.

[14] It is for this court to determine whether the discrepancies went to the heart of the prosecution's case and the issues influential on the trial's conclusion to determine if the Trial Judge made an error in law.

[15] The relevant issues at trial follow the requisites of the offence, that is, whether the accused at the time caused the harm to the deceased which caused the death, and whether there was intention to cause death, and without any lawful justification. Inconsistencies as to whether there were persons on the road or on the street, as cited by the Appellant in submissions, or any other contextual components that do not impact the aforementioned elements of the offence would not necessarily merit impugning the credibility of the evidence or necessitate a separate finding unless said inconsistencies as an aggregate were so copious and egregious so as to color the entire witness' account as dubious.

[16] The Trial Judge did set out in detail the discrepancies between the accused's unsworn statement and that of his witness. Also, between the accused's statement when he attended the Police Station with his attorney when he indicated he was not in a fight and which was admitted in evidence, and his unsworn statement which spoke of a fight. The same detail was not applied to the discrepancies of the prosecution witnesses. Whilst the Trial Judge could have been more detailed when he notes 'there were discrepancies in the Prosecutions witnesses' evidence, one cannot find fault in his acceptance of the evidence as seen and heard. Importantly, when he references the discrepancies in the Prosecution's witnesses' evidence, he does go on to note that they all agreed that it was the accused who first verbally started the events of 25th February 2017 and it was the accused who advanced towards the deceased and subsequently stabbed him several times causing his death. As noted in his judgment, the Crown's witnesses corroborated the material facts, and the Trial Judge was entitled to make the inferences and determinations he made relating to the requisite elements of the case, therefore, this ground of appeal must fail.

**(ii) Whether the Learned Trial Judge failed to give the Appellant a good character direction; and if so, what effect does this have on the conviction.**

[17] The Appellant, having no previous convictions, submitted that he was entitled to a good character direction in respect of the propensity limb and in the absence thereof, he was deprived of a fair trial. The CCJ decision of ***Gregory August v R*** [2018] CCJ 7 (AJ) was relied on wherein the court held that:

> "*It is understood that the aim of a good character direction is to ensure fairness of the trial process. It is the duty of the trial judge to ensure that the trial is fair and even-handed, and an appropriate good character direction plays an important part in ensuring that fairness and even-handedness. Where a defendant, of good character, has given sworn testimony and has*

*subjected himself to cross-examination, the trial judge maintains fairness and balance in the trial by directing the jury that, because of his good character, the defendant is a person who should be believed. Where however the defendant is not willing to place himself in a position where his credibility can be tested, we do not think that he should benefit from a good character direction as to credibility. Where a defendant does not give sworn testimony therefore, it is in our view, unnecessary to ensure the fairness of the trial process, for the trial judge to direct the jury on the defendant's credibility. The defendant is, however, still entitled to the propensity limb whether or not he has given sworn evidence.*"

[18] The Respondent contended that no issue arises on the Trial Judge's failure to direct himself on the Appellant's good character, as it was neither raised during the course of the trial nor was an application made by Appellant's counsel for a good character direction. They submitted that on the authority of **Thompson v The Queen** [1998] UKPC 6 at para 73, if an Appellant intends to rely on his good character, he must distinctly raise that issue during the course of the trial either by direct evidence from him or on his behalf or by putting questions on that issue to the witnesses for the prosecution during their cross examination. It is the Respondent's submission that the Trial Judge therefore was under no duty to give good character direction, supported by the Privy Council's guidance in **Edmund Gilbert v. The Queen** [2006] UKPC 15 at para 21:

*"It is still the general rule that it is up to defending counsel and the defendant to ensure that the judge is aware that the defendant is relying on his good character. If this rule is not adhered to, there is a danger that an unscrupulous defendant will be able to manufacture a ground of appeal based upon the failure of the judge to give the proper character direction….*"

[19] Ultimately, the Respondent pointed out in submissions that in such circumstances, where good character is raised for the first time on appeal the court must concern itself with the impact of the failure of a good character direction on the safety of a conviction. They rely on **Nyron Smith v. The Queen** [2008] UKPC 34 citing **Bhola v. The State** [2006] UKPC 9 wherein the court considered that, "*The critical factor is whether it would have made a difference to the result if the direction had been given*". This court must now consider then whether the absence of the good character direction by the Trial Judge in respect of the propensity limb was fatal to this conviction. It is understood that having given unsworn evidence, the credibility limb of the good character direction would not apply. However, as stated in **R v Vye** [1993] 97 Crim App R 134, once the defendant is of good character, i.e., has no convictions of any relevance or

significance, he is entitled to the benefit of such direction on his propensity to commit the offence with which he is charged.

[20] The Trial Judge was only apprised of the Appellant's good character during the plea in mitigation. The Appellant neither raised the matter by putting the line of questioning to Crown witnesses, nor did he raise such evidence within the trial distinct from the plea in mitigation. Said good character could then only be considered in sentencing where raised. More importantly, having read in full the judge's treatment of the evidence in respect to all elements of the offence, it is evident that with the cogency of the Prosecution's case, any failure of the Trial Judge (who was sitting without a jury) to issue a direction with respect to propensity would not have altered the outcome.

[21] Suffice it to say, this ground is not a sufficient basis for the conviction to be set aside.

**(iii) Whether the Learned Trial Judge failed to apply the principles of self-defense to the facts presented by the Defence**

[22] The Appellant argued that the Learned Trial Judge had a duty to apply the principles as enunciated in the Privy Council judgment of **Norman Shaw v The Queen** [2001] UKPC 26. Therein, the Board mandates that it is incumbent upon the Judge to consider two questions: (i) Did the appellant honestly believe or may he honestly have believed that it was necessary to defend himself? (ii) 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?

[23] The Appellant averred that he raised the issue of self-defense in his unsworn statement from the dock. He contended that although the Trial Judge had the principles of law in his mind, he failed to apply it to the facts as believed to be true by the Appellant. They refer to the summation wherein the Trial Judge stated:

> *"Accordingly, if the person honestly believed the circumstances (if true) would justify his use of force to defend himself, or that other person and that it was reasonable to resist the attack, he was entitled to be acquitted of murder."*

[24] The Respondent proffered first that the Trial Judge had the principles in mind when assessing the availability of the defense and on the authority of **Palmer v R** (1970) 55 CR. App. Rep 233 at 242, that "*there are no prescribed words which must be employed in or adopted in a summing up. All that is needed is a clear exposition in relation to the particular facts of the case, of the conception of necessary self-defense.*" They submitted that the Judge did essentially consider the first question in analyzing the witness evidence and answered in the negative by concluding:

> "*I also note and rule that the unsworn statement of the accused is to be given little weight as it cannot be accepted as the truth of what happened from the above evidence…"*

[25] Further referring to the Trial Judge's statement that:

> "*Therefore, having assessed all of the evidence and deductions, conclusions mentioned above I am satisfied beyond a reasonable doubt that the prosecution has proven that the accused (Mario Aguirre) had no lawful justification for his actions on the 25th February 2017 and I also rule that the accused was the aggressor, this I do as I accept on the facts of the case the evidence of the prosecution in preference to that of the version of the defence presented to the court.*"

[26] The Respondent refutes the suggestion that the Trial Judge was heedless of the principles of law applicable to the Appellant's case, submitting that once the Judge disbelieved the version as put forward by the defense and accepted the version as put forward by the Crown in finding that the Appellant was clearly the aggressor, the Judge could not thereafter find that the Appellant held or could have held an honest belief that it was necessary to defend himself in the circumstances. They proffer that even if the Judge had specifically directed himself to the first limb of the **Shaw** case, the Judge would have reached the same conclusion.

[27] The Privy Council in **Shaw** directed that the questions as aforementioned were necessary . That being said, a statement encompassing the essence of the considerations would suffice, that being a direction on the Appellant's honest belief in the necessity for force in the circumstances and the reasonableness of the degree of force.

[28] In reviewing the treatment of the defence by the Trial Judge as contained in the transcript, the Judge evidently found that on the basis of the evidence of both the Prosecution and Defence, he did not accept that the Appellant believed or must have believed that it was necessary to defend himself. The Trial Judge believed the prosecutions witnesses evidence that the accused was the aggressor, he noted the accused at the police station indicated in the presence of his attorney he was not in a fight. The Trial Judge detailed why he did not accept the evidence of the defence witness and its inconsistency with that of the accused and determined 'it was inconsistent on so many factual matters that it detracted rather than strengthened the unworn statement of the accused account of the attack and his self-defence as claimed.'' As the reasonableness of the force will logically become a consideration only if the court believes that the accused honestly held (or could have held) that belief there was no need for the Judge to go on to consider whether the force used was reasonable. The Trial Judge also reviewed actions of the deceased, concluding that ' Mr. Chan could not attack the accused nor did he say anything to the accused or even assaulted him in any way.' This court can find no issue with the Judge's determination and application of the principles of self-defence. This ground must thus fail.

**(iv) Whether the Learned Trial Judge failed to consider the defence of intoxication**

[29] The Appellant submitted that the Learned Trial Judge erred when he failed to consider intoxication as a defence that would avail the Appellant. It was argued that while the Appellant didn't raise the defence, it arose from the facts of the Prosecution's case in the evidence of witness Severo Vasquez Sr:

> *"From what I recall Mario Aguirre was socializing with me between 6 and 8pm having a few drinks, about 3 to 4 beers."*

[30] Also submitted for consideration was the principle in **Von Stark v The Queen** [2000] UKPC 5 on the effect of intoxication on a charge of murder, wherein the Court stated that, "*As a matter of law it is not disputed that the voluntary consumption of drugs, as well as the voluntary consumption of alcohol may operate so as to reduce the crime of murder to one of manslaughter on the ground that the intoxication was such that the accused would not have been able to form the specific intent to kill*…" The Appellant argued that whether it arises on the evidence of the defence or prosecution, the Trial Judge ought to

have addressed his mind to the impact that said intoxication would have had on the Appellant forming the mens rea for the offence charged.

[31] The Respondent contended that intoxication could only have been available as a defence to the Appellant if there was evidence that he was insane within the meaning of **s. 26 of the Criminal Code of Belize Cap 101 of the Substantive Laws of Belize Revised Edition, 2020.** They submitted that there was no evidence that the Appellant was prevented by reason of *idiocy*, *imbecility* or any *mental derangement or disease affecting the mind*, from knowing the nature or consequences of his act or that he acted under the influence of a delusion of such a nature that would render him unfit for punishment. They averred that while a Trial Judge has a duty to direct himself on every possible available defence, he is only required to so do when such defences fairly arise on the evidence: **John Williams v. The Queen** CA 11 of 2008 paras 10-11. The Respondent submits that the fact that there was evidence that the Appellant had 3-4 beers did not provide a sufficient evidential basis for it to become a live issue requiring direction. As the Court said in **Tiburcio Keme v. The Queen** CA No. 4 of 1978 material must be placed before the court to make intoxication a live issue fit and proper to be placed before a jury.

[32] The Respondent asks the court to consider the Privy Council's statement in **Broadhurst v. The Queen** (1964) AC 441 at 441 wherein Lord Devlin stated:

> *"It is not enough to show that before the event the accused had been drinking heavily (as the Chief Justice told the jury, the effect of alcohol varies greatly with different people) …. There is nothing in the evidence …of those witnesses who observed him before or after the event to suggest that at the time of the event his physical and mental faculties were affected at all, let alone to the extent of affecting his capacity to form an intent…. **There was no evidence of defect in speech or movement…"***

[33] The Respondent ultimately proffered that although the evidence reveals that the Appellant consumed 3-4 beers, the evidence submitted did not indicate that his intention was possibly impacted as a result of alcohol consumption.

[34] On the face of it, the statement of the Prosecution witness would be insufficient without more to impose upon the Trial Judge a duty to consider intoxication as a defense against the conviction. It seems evident that the Appellant (as one expected to avail himself of every possible defence) would have led such

evidence if it had been consequential to his case. The Trial Judge did not have sufficient evidence before him to make intoxication a live issue in the case and was not dutybound to consider it in his conclusions in this matter. Therefore; this ground also fails.

**(v) Whether the Learned Trial Judge failed to give himself a Lucas direction**

[35] The Appellant submitted that as the Trial Judge rejected the accused's version of events from the box, he should have given a Lucas direction. That on the authority of **R v Lucas** (1981) 2 All ER 1008, the judge was dutybound to direct himself that he cannot convict based on any lies told by the accused as persons may fabricate defences for other reasons other than guilt. Further relying on the case of **Burge and Pegg** (1996) 1 Cr App. R 163 wherein at 169, the court named the four circumstances which necessitate a Lucas direction, that being:

i. "*Where the defence relies on an alibi;*

ii. *Where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from the other evidence in the case, and amongst that other evidence draws attention to lies told, by the defendant;*

iii. *Where the prosecution seeks to show that something said either in or out of court, in relation to a separate and distinct issue was a lie and to rely on that lie as a evidence of guilt in relation to the charge which is sought to be proved; and*

iv. *Where although the prosecution has not adopted the approach to which we have just referred, the Judge reasonably envisages that there is a real danger that the jury may do so.*"

[36] The Appellant submitted that a Lucas direction was specifically necessary in the instant case as the Appellant's credibility would have been called into question since the Judge rejected his account of the facts.

[37] The Respondent argued that the circumstances of the instant case do not warrant a Lucas direction as it does not encompass any of the circumstances listed in **Burge and Pegg.** That a ***Lucas*** direction should be given wherever lies are relied upon by the Crown and might be used by the jury to support evidence of guilt as opposed to merely reflecting on the Appellant's credibility.
Citing **Burge and Pegg** at p. 169, wherein the Court of Appeal held that:

> "…*A Lucas direction is not required in every case in which a defendant gives evidence, even if he gives evidence on a number of matters, and the jury may conclude in relation to some of the matters at least that he has been telling lies. The warning is only required* <u>*if there is a danger*</u> *that they may regard that conclusion as probative of his guilt of the offence which they are considering….*

[38] The guidance in **Burge and Pegg** as cited by the Respondent notes:

> *"…the direction on lies approved in Goodway comes into play where the prosecution say, or the judge envisages that the jury may say, that the lie is evidence against the accused: in effect, using it as an implied admission of guilt. Normally prosecuting counsel will have identified and sought to prove a particular lie on a material issue which is alleged to be explicable only on the basis of a consciousness of guilt on the defendant's part. This is, as Professor Birch says, a very specific prosecution tactic, quite distinct from the run of the mill case in which the defence case is contradicted by the evidence of prosecution witnesses in such a way as to make it necessary for the prosecution to say that in so far as the two sides are in conflict, the defendant's account in untrue and indeed deliberately and knowingly false*."

[39] Counsel for the Respondent ultimately submitted that the prosecution did not rely on any lies told by the Appellant as evidence of his guilt; that if the Trial Judge did conclude that anything the Appellant said was a lie, he did not use that lie as any part of the evidence to find the Appellant guilty, and; that the Trial Judge found the Appellant guilty of murder not based on his rejection of the Appellant's defence but upon being satisfied on the Crown's evidence of his guilt.

[40] In the court's opinion, it is evident that the Trial Judge came to the conclusion of the Appellant's guilt by being satisfied beyond a reasonable doubt of the prosecution's case which is the only sufficient basis for such finding. The Trial Judge analyzed each element of the Prosecution's case and, on the evidence adduced in respect of each, concluded that the Prosecution had satisfied him of the Appellant's guilt. The court further finds that the present case does not fall into any of the categories of circumstances as articulated in **Burge and Pegg** and for those reasons, this ground also fails.

**DISPOSITION**

[41] For the reasons as set out above, this court is satisfied as to the Trial Judge's reasoning and affirms the conviction and sentence.

**Woodstock-Riley**
Justice of Appeal

**Sandra Minott-Phillips**
Justice of Appeal

**Arif Bulkan**
Justice of Appeal