Privy Council Appeal No. 58 of 2000

Norman Shaw *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF BELIZE

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 24th May 2001

Present at the hearing:-

Lord Bingham of Cornhill
Lord Hoffmann
Lord Cooke of Thorndon
Lord Scott of Foscote
Sir Patrick Russell

*[Delivered by **Lord Bingham of Cornhill**]*

---

1. On 4 July 1996 at Dangriga in southern Belize the appellant shot and killed two men, Fitzgerald Mantock and Rudolph Bermudez (who was also known as "Kilo Boy"). He was tried on two charges of murder, one in respect of each victim, and convicted by the jury on each. He appealed against both convictions to the Court of Appeal, but his appeals were dismissed. His defence at the trial was self-defence, and this appeal turns on the correctness and adequacy of the trial judge's direction to the jury on that issue and a closely related issue under the Criminal Code of Belize. The appellant also contended at trial that the shooting of Mantock was accidental, but the jury by their verdict rejected that contention which gives rise to no continuing issue.

2. The evidence at trial was that Bermudez sold fake cocaine on behalf of Mantock. On 3 July 1996 at the house of Francis Noralez (also known as "Dread") in Dangriga, when both Mantock and Bermudez were present, the appellant and two associates called to buy a quantity of cocaine. Tests satisfied them that the product

offered was genuine cocaine. They paid $3,000 in cash to Bermudez and left with what they thought was cocaine. On returning to Belize City where they lived, the appellant and his associates found that what they had bought was flour.

3. On 4 July 1996 the appellant with three associates (among them Broaster and Flowers) returned to Dangriga with the object, it would seem, of obtaining genuine cocaine or a return of their money. The appellant and his associates were driving a Cherokee vehicle when they saw Mantock's van. In the van were Mantock, Bermudez, Noralez and a man named Gregorio. Flowers stopped the Cherokee which he was driving so as to block movement by the van. There followed a confrontation between the two groups which culminated in the shooting by the appellant of Mantock and Bermudez.

4. The main prosecution witness at the trial, and the only eye witness of the incident to give sworn evidence on either side, was Noralez. According to him, the four occupants of the Cherokee got out of it and Mantock got out of the van to talk to them. There was "hard talking" when the four men said they wanted their money back and Mantock said he had no money. Then they asked for Bermudez but Mantock said he was not there. The appellant and his associates surrounded the van, seeing Bermudez, Gregorio and Noralez himself inside it. Mantock was still outside. Broaster was overtly carrying a gun. Then, according to Noralez, "Mantock came to the van for his gun and he went back outside with his gun after he cocked it up". The gun was given to Mantock by Bermudez. Mantock was then outside the van with the gun (according to Noralez, he was holding it pointing downwards) and the argument about return of the money continued. A squabble then broke out. One of the appellant's associates choked Mantock and the appellant took his gun out of his hand and hit him with it. Noralez became aware that the appellant had shot Mantock with the gun from about 5 feet away, and Mantock ran away down the street. When shot, Mantock had nothing in his hand. Noralez and Bermudez were still in the van. Gregorio was outside the vehicle: it seems the appellant and his associates told him to "get out of the ride because they don't want anything to do with him". Then, according to Noralez, the appellant came to the driver's side of the van, opened the door and shot Bermudez, who was sitting on the floor of the van, having first said "Kilo Boy, I have to shoot you, man". Bermudez was unarmed at the time. Turning to Noralez, the appellant said "Dready, I have to shoot you too". He fired again, but Noralez raised his hand and the bullet entered his hand or arm without causing fatal injury. The appellant and his associates then ran away. In cross-examination

Noralez agreed that Mantock was known to be a "jacker", namely an armed enforcer of drug debts.

5. The appellant did not elect to give sworn evidence at the trial. The evidence on which he relied came from three sources. The first was a prosecution witness, Terrylee Miguel who overheard a conversation between the appellant and another man on, it seems, 4 July 1996. According to her the other man asked the appellant "why he shoot the guys before they get the money" to which the appellant replied that "if he didn't shoot the guys they would have shot him" or words to similar effect.

6. The second source was a statement made by the appellant to the police under caution on 6 July 1996, led in evidence by the prosecution and admitted without objection. In this statement the appellant said:

> "On Wednesday 3rd July 1996 myself and three friends by the name of Keith Flowers and the other two persons names I do not know came to Dangriga on a mission to get five packs of cocaine. The vehicle in which we came a cougar car would be exchanged for three packs and would have paid in cash for two packs. The deal did not go as planned. We bought two packs for $4,000. On our way to Belize the three fellows drop me home on Collect Canal in Belize City. When I reached at my home I noticed a piece of dough on my pants on the left leg. I took it off my pants and I tasted it. I took the piece of dough on my tongue and realised it was flour. I then went out by Bismarc Q Club where I met Keith Flowers and told him that the package we got from Dangriga was flour. He told me that we will return to Dangriga to negotiate to get the money or the genuine cocaine. On Thursday 4 July 1996 the four of us, myself, Keith and the same other two persons came to Dangriga. On reaching Dangriga we parked the cougar and caught a taxi and went to Jerry's house. Jerry Martinez house and told him what had happened. He mentioned to us that he had warned us that fake packages are going around. On finishing the discussion Keith Flowers asked him if he could left the cougar and borrow the cherokee. Jerry told us that if anyone asked about the cherokee and especially if any incident would have happened we were to say that we did not know him. On looking for the fellows we found out where the fellows lived and returning to go to Jerry's house we met him on the way. He stopped us and pulled us over. He came out of the cougar and myself and my friends came out of the cherokee and we told Jerry we found where the fellows lived. Jerry told us to be careful

because the fellows always carry their gun. On discussing this Jerry told us that he will try to get two pistols for us. Me and my friends drove off in the vehicle to go to Jerry's home. Before we reached Jerry's home we spotted the fellows vehicle parked on a corner but I do not know the name of the street in fact I do not know Dangriga. When we spotted the fellows vehicle we came out of the cherokee – the four of us came out of the cherokee – and Keith Flowers approached the vehicle tapping on the glass on the blue van glass on the driver's side the driver came out of the van and we asked him where was the fellow we made the bargain with. Then I realised someone was in the van when I noticed that there was slight movement in the van. I told the driver if he could ask his friend to come out of the van so that we could talk to him about our money. The driver opened the van door the driver's door and a person came out. My partner realised that there is someone else in the van. The driver then sat back on the driver seat extending his feet outside the van. Meanwhile I noticed that the driver was extending his hand behind the seat. I did not realise at the time what it was. When he pulled his hand from behind I then realise it was a pistol so when he was pointing it at us I hit his wrist and I grabbed on to his gun and at the same time one of my partners approached him with a gun and pointed at him the driver and told him to let go the gun. I realised [that] someone else pulling a next gun from inside the van and at the same time shouted 'Bust it, bust it'. I then cranked the pistol that I took away from the driver and fired a shot because I knew I would have gotten shot if I did not do so. Firing the shot I heard a person in the van said 'shoot them, shoot them'. I had no other chance but to fire anther shot. On firing the next shot the four of us turned to go to our vehicle then one of the four of us, someone shouted 'Look out, look out'. When I turned around I saw someone coming out of the van and I fired a third shot not knowing the damage it would cause. We then ran to our vehicle and went to a young girl's house I did not know ..."

7. A further statement made by the appellant to the police, on 8 July 1996, gave further detail of his associates but threw no significant light on the killings.

8. The third source was an unsworn statement from the dock. In this the appellant said:

> "I, Norman Shaw, never had been in any trouble, never arrested nor convicted in any court.

> On 3rd and 4th July of last year I came to Dangriga Town not to kill or hurt anyone. On 3rd July of last year I came with some friends to buy cocaine from Mantock and Kilo Boy. It was arranged already. Knowing Mantock and Kilo Boy, Mantock as a jacker, I still trusted them. Although I was afraid of them, me and my friends thought that Kilo Boy and Mantock had sold us genuine cocaine. Reaching back to Belize City we found out it was flour. So we came back to Dangriga with one honest intention to get our money back or real cocaine. On reaching Sabal Street, we saw Mantock's vehicle and then noticed Kilo Boy who had sold us flour for cocaine the day before. Mantock denied that Kilo Boy was not (sic) in the vehicle when I had already seen him. Mantock came out of the vehicle right and then Kilo Boy handed him a gun. Mantock then crank the gun as he was pointing it at me I jumped at him and struggle with him over the gun and then suddenly I got the gun struggling backwards. I heard Mantock saying 'Bust it, bust it, Kilo Boy'. Meanwhile trying to regain my balance the gun went off. I then saw Kilo Boy through door that Mantock had left open going down for something then I fired two more shots in vehicle. … I had to defend myself. I think in situation that I was if I didn't fire the fellows would have killed me. Knowing the reputation of these fellows as a jacker, I had to defend myself. … This was Mantock's vehicle [indicating] parked on Sabal Street. He came out of his vehicle leaving the door open still standing between the door and bonnet when he received the gun from Kilo Boy and cranked it. I struggled and took away the gun from Mantock and when I was trying to regain my balance the gun went off. Then I saw Kilo Boy going down. Then I fired two more shots not knowing the damage it would cause."

9. At the trial counsel for the appellant put self-defence at the forefront of his case. The judge recognised the significance of this defence in his summing-up, although he told the jury, incorrectly, that the appellant's counsel in his address had not mentioned self-defence in respect of the death of Bermudez.

Section 35 of the Criminal Code.

10. Section 35 of the Criminal Code of Belize, so far as relevant to this case, provides:

> "(4) For the prevention of or for the defence of himself or of another 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 –

(c) Murder

(k) Dangerous or grievous harm.

(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."

11. It appears that no reference was made to section 35 (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.

12. The Board cannot of course express any view on factual matters not explored before the trial judge and the jury. But if the view were taken that the purpose of the appellant and his associates might have been to wreak vengeance on those who had deceived them or to enforce a demand for the supply of drugs or the return of their money by unlawful violence or threats, it would have been appropriate to consider the potential application of section 35 (6).

13. The Board views the omission to consider the subsection as a defect in these proceedings, but it is an omission which can only

have worked to the advantage of the appellant and it is not therefore an omission of which he can complain.

The trial judge's direction on self-defence.

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."

15. Counsel for the appellant put the matter even more pithily in his closing address to the jury:

> "You see, the law of self defence is very peculiar in that you will judge him as he saw it and only how he saw it."

16. Mr Fitzgerald QC for the appellant submitted, as the first ground of the appeal, that the trial judge misdirected the jury on self-defence by failing to make clear that it was the appellant's contemporaneous perception of the facts (whether right or wrong, reasonable or unreasonable) which mattered, not the facts as they were actually proved to be. He relied in particular on certain passages of the summing-up including the following:

> "The law justifies the use of necessary force or harm extending in case of extreme necessity even to killing in cases where grievous or dangerous harm is imminent. It is for the Prosecution to disprove that the accused was not in imminent danger of dangerous or grievous harm which justifies the use of necessary force or harm by the accused in inflicting the gun shot wounds to Bermudez as well as to Mantock.
>
> Now, Mr Foreman and Members of the Jury, you will have to examine the facts of this case and you will have to decide whether at the time, whether, Mantock was disarmed because you have to examine all the circumstances. Was Mantock disarmed at the time when he was shot? Was he capable at the time when he was shot of causing imminent grievous harm or dangerous harm to the accused? If you accept the evidence of Noralez, you may find that the accused had three other persons with him outside, the gun that Mantock had was

taken away from him by the accused. If you find the gun was taken away from him, you will [or] may find that he was disarmed.

In respect of Bermudez, the evidence of Noralez, if you accept it as judges of the facts, is that he was lying in the van. He tried to hide when he was shot. You have to ask yourself if he was in a position to threaten any imminent or dangerous harm to the accused. He was in a van and there is no evidence that a gun was found in that van."

These passages, it was submitted, were plainly directed to the facts as they were and not to the facts as the appellant believed them to be.

17. In resisting this submission the Director of Public Prosecutions of Belize drew the Board's attention to other passages which, he submitted, invited the jury to approach the evidence correctly:

"If therefore the defendant did no more than what he instinctively thought was necessary that is very strong evidence that the amount of force was reasonable and necessary because the Prosecution must prove the defendant's guilt.

But again in dealing with this question of self-defence as I told you earlier a person defending himself cannot be expected to weigh precisely the amount of defensive action which is necessary. Sometimes he is permitted to make what is called a pre-emptive strike. If therefore the defendant did no more than what he instinctively thought was necessary that is very strong evidence that the amount of force was reasonable and necessary.

He raises the defence of accident and also as his counsel advocated that he believed that Mantock intended to get at him to cause grievous and dangerous harm and therefore he was justified in using self-defence, that is by shooting.

But these are matters for you as you consider this one and in respect of Bermudez he is saying that when the accused saw Bermudez in the car trying to reach for something, he feared an imminent attack, imminent danger to himself, he was in fear of grievous harm or dangerous harm to him then he fired these two shots in the vehicle that he had to defend himself and I said the questions for you to decide as questions of fact is this question of whether the defence of accident if the

> Crown has satisfied you so that you feel sure that the accused did not fire the shot that killed Mantock.
>
> I told you when a person is defending himself he cannot be expected to weigh precisely the amount of defensive action which is necessary. If therefore he did no more than what he instinctively thought was necessary that is very strong evidence that the amount of force that is reasonable and necessary."

18. Counsel for the appellant made the same complaint before the Court of Appeal which rejected it. It held that:

> "The present case did not, however, as counsel seemed to argue, involve the issue of the reasonableness or otherwise of the appellant's belief as regards the intention of his victims. That never arose as an issue. The trial judge seems to have left the case to the jury on the assumption that if the facts narrated by him were true and their only consideration was whether they warranted the reaction as stated by him or were left in doubt about that conclusion. This direction cannot be faulted and in our opinion the appellant's first ground of appeal must fail."

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?

20. The Board cannot find that a direction to this effect was given. The passages relied on by the appellant point towards an objective approach. Even if it were accepted that the passages relied on by the Director might lead an intelligent juror to view the matter through the appellant's own eyes, this was not enough. Self-defence was the crux of the appellant's defence to these very grave charges. The rudiments of that defence should have been stated in clear and simple terms which left no room for doubt. In the Board's opinion this was not done. There was accordingly a misdirection. But that conclusion does not, without more, entitle the appeal against either conviction to succeed.

21. It is first necessary to ask whether, in relation to the killing of Mantock, this misdirection was potentially prejudicial to the appellant. This issue has caused the Board very great difficulty and anxiety. As the Director cogently pointed out, the appellant shot Mantock with Mantock's own gun which had been taken from him. Mantock was then unarmed. The only other gun then in evidence was held by Broaster, one of the appellant's associates. There was no evidence of a continuing threat by Mantock or anyone else. On the other hand, the appellant's answer overheard by Terrylee Miguel clearly applied to both the deceased, not just one of them. Though disarmed, Mantock was standing very close to the appellant and there was nothing to suggest he had retired from the fray. The appellant had reason to regard Mantock as a man of violence. In his statement to the police the appellant spoke of someone pulling a gun from inside the van and of a shout, "bust it, bust it" (meaning "shoot") before he fired. He again asserted that he would have been shot if he had not fired. The appellant's unsworn statement from the dock, advancing an inconsistent and unconvincing suggestion of accident, did not assist him. Despite real misgivings, and recognising that a jury would probably have rejected the appellant's plea of self- defence even if properly directed, the Board concludes that the misdirection was potentially prejudicial to him. The jury may have rejected the appellant's plea of self- defence because Mantock in fact had no weapon and there was in fact no weapon in the van. This would have been an unsound conclusion, since it was not the actual existence of a threat but the appellant's belief as to the existence of a threat which mattered. The jury were obliged to assess the situation as it appeared to the appellant, a factual enquiry which was pre-eminently one for them which (it may be) they never carried out and which the Board cannot safely undertake itself.

22. The misdirection was also potentially prejudicial, and more obviously so, in relation to the killing of Bermudez. The appellant's overheard answer applied to that killing also. According to his police statement, when firing the first shot he heard a person in the van saying "shoot them, shoot them". In his unsworn statement from the dock he said he saw Bermudez through the van door, which Mantock had left open, "going down for something". The appellant's account was of course directly contradicted but it was for the jury to decide which (if either) account was credible. In this instance also the misdirection was potentially prejudicial to the appellant because the jury could have rejected his plea of self-defence on the ground that Bermudez and Noralez had no gun and therefore, in fact, presented no threat.

Section 116 (b) of the Criminal Code.

23. Section 116 of the Criminal Code provides:

> "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 either of the following matters of extenuation be proved on his behalf, namely –
>
> (a) that he was deprived of the power of self-control by such extreme provocation given by the other person as is mentioned in section 117; or
>
> (b) that 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) that 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, that, although she was not insane, she was deprived of the power of self – control by a disease or disorder of mind produced by child-bearing."

24. It was submitted to the Board on behalf of the appellant (although not so argued in the Court of Appeal) that the facts of the present case brought it within section 116 (b); that if there was evidence raising a potential defence under the subsection the judge was obliged to direct the jury on the meaning of the subsection and the facts potentially relevant to it whether the appellant placed reliance on the subsection or not; and that, if there was some evidence raising a potential defence under the subsection a burden lay on the prosecution to prove that the appellant was not entitled to rely on the subsection rather than the appellant having the burden (as the language of the provision might suggest) of proving that he was entitled to rely on it. The Director took issue with these contentions.

25. A provision to the effect of what is now section 116 (b) has formed part of the Criminal Code of Belize since 1888. Similar provisions were or are to be found in a number of other jurisdictions including St Lucia, The Bahamas and Ghana. This is not the same provision as was recommended by the Criminal Law Revision Committee (CLRC) in its fourteenth Report in 1980 (Cmnd. 7844) or which appeared in the Law Commission's draft Criminal Code (Law Com. No. 177, vol. 1) (see *R v Clegg* [1995] 1 AC 482 at

498-499), although addressed to a similar problem. It is noteworthy that subsections (a), (b) and (d) all refer to deprivation of the power of "self-control", an expression also found in section 118 which reproduces (with one verbal amendment) the terms of section 3 of the English Homicide Act 1957. In all of these instances the expression "self-control" plainly bears the meaning familiar in the context of provocation. But whereas, for purposes of the defence of provocation, the defendant must be provoked to lose his self-control by things done or things said or both together, for purposes of section 116 (b) the deprivation of the power of self-control must be caused by terror of immediate death or grievous harm. In each case the defendant's loss of self-control must cause him to act in the manner charged against him, but the triggering event in the two cases is different.

26. The opening words of section 116 clearly intended to impose the burden on the defendant to establish any of the matters in (a) to (d) on which he wished to rely. In *Vasquez v. R* [1994] 1 WLR 1304, however, the Board held, considering section 116 (a), that lack of provocation was one of the essential ingredients of murder and that the subsection should accordingly, on constitutional grounds, be read as placing a burden on the prosecution to disprove provocation if the evidence in the case raised the question whether the defendant when performing the act complained of had been provoked to lose his self-control and act as he did. In considering the essential ingredients of murder the Board in that case referred to section 114 of the Code, which is in these terms:

> "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."

27. The matters listed in section 116 plainly fall within the closing words of section 114. Despite the Director's contrary submission made both orally and in writing, the Board cannot accept that section 116 (b) can be construed differently from section 116 (a). It must accordingly hold that the onus of disproving justification under section 116 (b), if the evidence discloses possible grounds of such justification, lies on the prosecution as it has been held to do under section 116(a).

28. If there is no evidence which, even if believed, discloses any reasonably possible justification under section 116 (b), the trial judge is under no duty to direct the jury on that subsection. If there is such evidence he must do so, whether the defence raised the issue

at trial or not and whatever the trial judge's opinion of the weight of the evidence. This is clearly established to be the law in relation to provocation (see *Kwaku Mensah v. The King* [1946] AC 83 at 91–92; *Vasquez v. R* [1994] 1WLR 1304 at 1314) and self-defence (*Director of Public Prosecutions* (*Jamaica) v. Bailey* [1995] 1Cr App R 257). There is no reason why a possible justification under section 116 (b) should be approached differently, and to do so would conflict with the reasoning of Lord Goddard, giving the advice of the Board in *Kwaku Mensah v The King,* in the passage referred to above. Cases may arise in which, for reasons good or bad, a defendant may choose to present the jury with a stark choice between convicting of murder and acquitting; but the state has an interest in ensuring that defendants are convicted of the crimes which they have in truth committed, which may (depending on the jury's assessment of the facts of a particular case) be manslaughter.

29. In considering the possible application of section 116 (b) to these killings, it is necessary to pose a series of questions:

(1) Was there evidence of a situation in which the defendant was justified in causing some harm to Mantock or Bermudez or both? This question directs attention to section 35 (4) (c) quoted above, and assumes (in the absence of any judicial direction or jury finding) the inapplicability of section 35 (6). The answer must be affirmative if, in relation to either of the deceased, the appellant's life was threatened or the appellant genuinely (even if mistakenly or unreasonably) believed it to be threatened. For reasons already given the Board is of the opinion that there was such evidence, tenuous though it was in the case of Mantock particularly.

(2) Was there evidence that the appellant caused harm in excess of the harm he was justified in causing? It was argued that on the facts here the question of excessive force could not arise, since if the jury believed Noralez the appellant was not justified in causing any harm to either of the deceased and if the appellant's account was fully accepted he was justified in killing both of them. This is a possible conclusion but not in the Board's opinion an inescapable one. The jury could reasonably have doubted whether either Noralez or the appellant had given a wholly accurate account of the confrontation and could have concluded that in all the circumstances as the appellant thought them to be the appellant was justified in causing some harm short of fatal harm to both the deceased.

(3) Was there evidence that the appellant was acting from terror of immediate death or grievous harm when acting as he did? The answer would depend on the credence given to the appellant's

account. The Board cannot rule out the possibility of an affirmative answer.

(4) Was there evidence that such terror (if found possibly to have existed) deprived the appellant for the time being of his power of self-control? In the absence of direct evidence from the appellant, the answer to this question can only be a matter of inference. Was the shooting of Mantock at close range when he was unarmed and the shooting of Bermudez when he was trying to hide in the van suggestive of a wild and panicky response by the appellant to a threat which he perceived? Again, the Board cannot rule out the possibility of an affirmative answer to that question.

The Board reluctantly concludes that there was just enough evidence in this case to require a judicial direction to the jury on the effect of the subsection, the evidence relevant to application of its provisions and the burden on the prosecution to negative justification under the subsection. The judge's failure to direct the jury, even though this issue was not raised by the defence, was in the circumstances a misdirection.

Character.

30. The appellant is a man without any previous convictions. The trial judge reminded the jury of the appellant's statement to that effect, but did not give the standard direction on good character and its bearing on credibility and propensity. Mr Fitzgerald argued that the judge should have given such a direction, even in a qualified form. He relied on *R v. Vye* [1993] 1 WLR 471 and argued that Lord Steyn's qualification in *R v. Aziz* [1996] AC 41 at 53B was only expressed to apply where "a defendant, who has no previous convictions, is shown beyond doubt to have been guilty of serious criminal behaviour similar to the offence charged in the indictment".

31. This submission did not impress the Court of Appeal and it does not impress the Board. The jury knew that the appellant had never been convicted before. They also knew, from his own admissions, that he had dealt in a substantial quantity of cocaine and had been a member of an armed posse which had set out to obtain reparation from the deceased in Dangriga. Had the judge given the jury a full direction it could properly have been so qualified as to do the appellant more harm than good. The absence of such a direction cannot possibly have deprived him of a favourable verdict.

Conclusion.

32. It has been necessary to consider whether, despite the misdirections it has found, the Board should apply the proviso to section 31 (1) of the Court of Appeal Ordinance on the ground that no substantial miscarriage of justice has actually occurred. Given the absence of an adequate direction on the central issue in the case, the appellant's contention that he acted in self-defence, the Board cannot be sure that no such miscarriage of justice has occurred. A proper direction could, even if improbably, have led to a different outcome.

33. Had the appellant's complaint only related to the lack of a direction under section 116 (b) convictions of manslaughter could have been substituted, since the appellant could have achieved no better results. But a proper direction on self-defence could have led to acquittals, and to substitute manslaughter convictions would represent a possible injustice.

34. Accordingly the Board will humbly advise Her Majesty that both appeals ought to be allowed and both convictions quashed; and that the cases ought to be remitted to the Court of Appeal for that court to decide whether a retrial should be ordered. In view of this advice the further ground of appeal relating to the constitutionality of the penalty of hanging under the Constitution of Belize does not arise.