IN THE COURT OF APPEAL OF BELIZE AD 2011

CRIMINAL APPEAL NO 5 OF 2010

SHANE JUAREZ Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Mr Justice Manuel Sosa	President
The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Sir Brian Alleyne	Justice of Appeal

A Moore SC for the appellant.
C Vidal, Director of Public Prosecutions, for the respondent.

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9 March and 24 June 2011

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Introduction

[1] On 30 April 2008, some five days after Mark Anthony Young ('the deceased') was seen leaving RZ's Tavern in the village of Hope Creek, Stann Creek District in the company of 21-year-old Shane Juárez ('the appellant'), his dead body was found by police buried in what the appellant was later to describe as a 'septic pit', in the yard in that village where the appellant and his grandmother lived. On 3 May 2010, the appellant was convicted of the murder of the deceased after a trial before Lucas J and a jury which had commenced on 3 March 2010. On 10 May 2010, Lucas J imposed a sentence of life imprisonment

on the appellant, who then appealed from his conviction. On 9 March 2011, this Court, after hearing counsel on both sides, saw fit to exercise its relevant powers under section 31(2) of the Court of Appeal Act by substituting, for the verdict returned by the jury, a judgment of guilty of manslaughter and, for the life sentence passed at trial, a sentence of 15 years' imprisonment, effective as from 3 March 2010. The Court promised, and now gives, its reasons for judgment.

The facts

[2] None of the witnesses called by the Crown at trial witnessed the killing of the deceased. The only evidence adduced of a struggle between him and the appellant was contained in a brief statement which was made under caution by the latter to the police in Dangriga on 30 April 2008 and which reads as follows:

> 'On Friday 25 April, 2008 at about 9.00 pm to 10.00 pm I was drinking a Flask (*sic*) of one barrell (*sic*) rum at RZ's Bar located in Hope Creek Village, Coastal road side. Then Mark Young came and asked me to go with him at my house and make us drink and before we reach my house he mentioned that he is very thirsty and I told him let's go I have a faucet at my house and upon Mark Young turn on the pipe he pulled out a machete, when comming (*sic*) up from drinking water and he told me if I remember what I did to his friend, when I burst a belikin (*sic*) bottle in his friend head and he the (*sic*) swing the machete at me and I manage to

take away the machete from Mark Young hand. Mark Young then felt (*sic*) inside the septic pit that we have in the yard near the water pipe. Mark Young then tried to come out of the septic pit and I got freightened (*sic*) and I throw a cement pillar on his head and I then saw him lying down inside the pit and I taught (*sic*) that he was dead and I got so frightened that I covered him with dirt.'

Nowhere in his statement under caution did the appellant claim to have been injured by the deceased. Moreover, two Crown witnesses, viz Russel Blackett, Senior Superintendent of Police, and Esmeralda Polanco, Justice of the Peace, testified that they observed no injuries on the appellant on 30 April 2008.

[3] Dr Mario Estrada, who described himself as a 'forensic doctor specialist', gave evidence for the Crown as to a *post-mortem* examination he performed on the body of the deceased. In his opinion, the time of the deceased's death was sometime on 26 April 2008 and the cause was trauma shock due to head injuries. He was shown an object recovered from the 'septic pit' on the disinterment of the body of the deceased and admitted as an exhibit at trial. (This object was described by the police officer through whom it was adduced as a 'septic tank cover' made of concrete.) In Dr Estrada's view, the injuries in question were consistent with the dropping of that object on the head of the deceased.

[4] In an unsworn statement made by the appellant from the dock at trial, he said that he had spoken to the deceased at a bar which he referred to as RZ's Turf but pointed out that he had later, in his words, 'jump on my bike and rode off' to the home of a Jessica, with whom he spent the rest of the night. The defence of alibi thus raised by the appellant was, quite obviously, categorically rejected by the jury (following no more than 72 minutes of deliberation); and there is no challenge of the pertinent finding before this Court.

The principal ground of appeal

[5] The principal, and first, ground of appeal relied upon by the appellant is that the trial judge erred in law in not sufficiently directing the jury concerning the use of excessive force in self-defence and the legal consequences of such use of force, thus depriving the appellant of a possible manslaughter conviction.

[6] The relevant partial excuse is commonly referred to as excessive harm in self-defence. Section 117 of the Criminal Code broaches the subject of partial excuses in the terms following:

> '117. Every person who intentionally causes the death of another 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.'

[7] Excessive harm in self-defence is amongst the subjects of section 119, which 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) …

(b) he was justified in causing some harm to the other person, and that in causing harm in excess of the harm which he was justified in causing he acted from such terror of immediate death or grievous harm as in fact deprived him, for the time being, of the power of self-control; or …'

[8] It is of some interest to note the content, as relevant, of counsel's respective closing speeches at trial. Prosecuting counsel, Ms Purcell, speaking

with admirable restraint following the appellant's unsworn statement from the dock and immediately preceding defence counsel's speech, made passing mention of the issue of alibi before focusing briefly on self-defence; but she made no reference whatever to the partial excuse of excessive harm in self-defence. For her part, Mrs Moore SC, defence counsel at trial and appellant's counsel on this appeal, also emphasised self-defence in her closing speech, taking care to point out that it was the duty of the Crown to negative it. But, very much like prosecuting counsel, she did not unambiguously place the partial excuse of excessive harm in self-defence before the jury. Whilst referring to the fright of which the appellant allegedly spoke in his caution statement, and to the possibility that he may have 'lost his self-control', she went on in the very same breath to speak of 'this issue of self defence' in a manner that could not have been very helpful to the trial judge. What is more, she replied in the negative, when pointedly asked by the trial judge at the end of his summing-up, whether he had omitted anything. (There can be no doubt that, like the defence of alibi, adverted to at para 4, *supra*, that of self-defence was roundly rejected by the jury; and it was not the subject of either ground of appeal before this Court.)

[9] There is, however, a limit to the amount of sympathy that an appellate court can feel for a trial judge in an appeal such as this one. This was clearly a case of the type of which Lord Bingham of Cornhill was speaking when, giving the judgment of the Board in *Norman Shaw v The Queen*, Privy Council Appeal No 58 of 2000, on 24 May 2001, he said, at para 28:

> '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.'

[10] In this type of case, both the Crown and the trial judge must keep in mind that, as Lord Bingham put it, *ibid*:

> '… [T]he 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.'

[11] Prosecuting counsel ought perhaps to have given some expression to this interest in her closing speech. But her failure to do so provides no excuse for what is, in the respectful view of this Court, a complete omission of the judge to direct the jury on the possible application of the partial excuse provided for under section 119(b).

[12] The proper approach, as counsel for the appellant rightly submitted and the Director of Public Prosecutions properly conceded, is to be found in the very case of *Shaw*, as well as in that of *Cleon Smith v The Queen*, Privy Council Appeal No 59 of 2000, in which judgment was also delivered on 24 May 2001.

Those are decisions followed by this Court in *Asband Anderson v The Queen*, Criminal Appeal No 15 of 2006, in which judgment was delivered on 8 March 2007 and which was cited to this Court by Mrs Moore. But the test formulated by the Board in *Shaw* in 2001 for determination of the question whether the 'matter of extenuation' (as it was then statutorily designated) of excessive harm in self-defence should be left to the jury in any particular case had been adopted and applied by this Court long before the decision in *Anderson*: see *David Jones v The Queen* and *Deon Cadle v The Queen*, Criminal Appeals Nos 20 of 2001 and 23 of 2001, respectively, in which judgments were delivered on 28 June 2002 and 27 March 2003, respectively.

[13] The test in question is, quite plainly, as valuable to the appellate court considering whether excessive harm in self-defence ought to have been, or was properly, left with the jury as it is to the trial judge seeking to decide whether or not to leave this partial excuse with the jury.

[14] There being at the present advanced stage in the development of this area of the law no need for extensive citation from the judgments in *Shaw* and *Smith*, the Court proceeds to apply the test under discussion by focusing on the first of the four questions concerned: whether there was evidence of a situation in which the appellant was justified in causing some harm to the deceased. There is no difficulty in arriving at an affirmative reply to this question. According to the

statement under caution, the deceased, as he came up from the faucet at which he had drunk water, produced a machete, which he proceeded to 'swing' at the appellant. This piece of evidence cannot, in fairness, be separated from that relating to the rest of the incident so as to justify a conclusion that the appellant was faced with no threat to his safety.

[15] It is to be noted that in *Shaw*, a case of double murder, the Privy Council, in the context of the question under consideration, stated at para 29:

> 'The answer must be affirmative if, in relation to either of the deceased, the appellant's life was threatened or the appellant (even if mistakenly or unreasonably) believed it to be threatened.'

The appellant having gone on in his statement under caution to speak of having been frightened when he saw the deceased trying to come out of the pit, there was some basis in the evidence for an inference that the appellant believed his life to be threatened.

[16] Next to be answered is the second question: whether there was evidence that the appellant had caused harm in excess of the harm he was justified in causing. The Court considers that there was such evidence to the extent that,

according to the statement under caution, the appellant actually took away the machete in question from the deceased. It was not simply a case of the appellant causing the deceased to let go of the machete, which then fell to the ground. Having wrested possession of the machete from the deceased, the appellant could have then used it, rather than the concrete object in question (which seemed heavy to the judge), to disable the deceased by the infliction of some non-fatal injury. (Machete lashings which do not result in death are not unheard of in this country.) Alternatively, he may have used his bare hands or, better yet, his feet to inflict injury on the deceased as the latter, obviously in a position of some physical disadvantage, sought to get himself out of the hole into which he had fallen.

[17] The third of the four questions comprising the test being applied is whether there was evidence that the appellant was acting from terror of immediate death or grievous harm when acting as he did. The Court keeps firmly in mind the purely subjective nature of the test. As was stated by Lord Clarke, rendering the advice of the Board in *Kirk Gordon v the Queen*, [2010] UKPC 18 (an appeal from this Court), on 21 July 2010, at para 25:

> '[T]he ordinary and reasonable man … has no role to play in the partial defence introduced by section 119(b).'

The appellant, in his statement under caution, clearly said that he was frightened as he saw the deceased attempting to come out of the 'septic pit' and, further, that he proceeded thereupon to throw the 'cement pillar' on the latter's head. This evidence justifies, in the view of this Court, an affirmative answer to the third question.

[18] This brings the Court to the fourth and final question recommended by the Board in *Shaw*: whether there was evidence that such terror (if found possibly to have existed) deprived the appellant for the time being of his power of self-control. The question is best approached, as the Court sees it, by further asking whether it may have been a 'wild and panicky response' (the words of the Board in *Shaw*, at para 28, page 14) to a perceived threat for the appellant to have hurled at the head of the deceased, as he sought to clamber, unarmed, out of the hole in question, the apparently heavy concrete object adduced in evidence by the Crown (and tellingly described by the appellant in his unsworn statement at trial as a 'cement pillar' – the very words he had previously employed in his statement under caution to describe the object he had thrown at the deceased). The Court is in no position to say that the latter question does not admit of an affirmative reply. Therefore, the fourth question of the test here being applied may well be correctly answered 'Yes'.

[19] It is, accordingly, the opinion of this Court that the evidence in the instant case called for a direction from judge to jury explaining the effect of section 119(b) and summing up such of the evidence as was relevant for purposes of that subsection's application. The judge by omitting to give the jury such a direction unquestionably deprived the appellant of the possibility of a verdict of 'Guilty' in respect of manslaughter, as Mrs Moore contended and the Director frankly acknowledged.

The Second Ground of Appeal

[20] In the circumstances, the Court refrains from expressing a concluded view on the second ground of appeal.

Sentence

[21] As regards sentence, the Court has on more than one previous occasion, in dealing with different types of manslaughter cases, stated that an appropriate sentence is not to be calculated mechanically and that, accordingly, the overriding purpose of examining other cases should not be to find exact comparisons but to arrive at an approximate range of sentence which is appropriate in the particular type of case: see *Anthony Pop v The Queen*, Criminal Appeal No 2 of 2005, at para 15, and *Director of Public Prosecutions v Clifford Hyde*, Criminal Appeal No 2 of 2006, at para 12. In the instant case,

counsel was unable to provide us with a number of cases which could be fairly said to have involved manslaughter of the type here involved. She did, however, submit that guidance may be derived from the sentencing of Kirk Gordon by this Court, not the subject of a written judgment, following the remission of his case to us by the Privy Council. The Court accepts that submission. Gordon's case was also one involving the infliction of head injuries. Like the appellant here, Gordon claimed to have been attacked without justification by an armed man (though having no injuries of his own to display) and to have defended himself with an object which simply happened conveniently to be within his reach at the time. Such object was not one ordinarily used as an offensive weapon, such as a firearm or a knife; and it continued to be used on the putative assailant even after he was put in a position of acute physical disadvantage. Judgments of this Court dealing with such cases seem hard to find. In the absence of the ideal of an approximate range of sentences, the Court, guided by the approach adopted in the case of Kirk Gordon in 2010 (which resulted in the imposition of a sentence of 15 years' imprisonment on him), imposed a like sentence on the appellant.

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MORRISON JA

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ALLEYNE JA