IN THE COURT OF APPEAL OF BELIZE, A.D. 2011

CRIMINAL APPEAL NO. 19 of 2010

BETWEEN:

TED ARMSTRONG **Appellant**

AND

THE QUEEN **Respondent**

—

BEFORE:

The Hon Mr Justice Sosa	**-**	**President**
The Hon Mr Justice Morrison	**-**	**Justice of Appeal**
The Hon Mr Justice Alleyne	**-**	**Justice of Appeal**

Darrell Bradley for the appellant.
Mrs Cheryl-Lynn Vidal, Director of Public Prosecutions, for the Crown.

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7 June, 28 October 2011

MORRISON JA

[1] At the conclusion of the hearing of this matter on 7 June 2011, the appeal was allowed, the conviction of the appellant quashed and the sentence set aside. Pursuant to section 30(2) of the Court of Appeal Act, the court accordingly directed a judgment and verdict of acquittal to be entered. These are the promised reasons for this decision.

[2] The appellant was tried before Lord J and a jury at the September – October 2010 Session of the Supreme Court in its Central District and, on 20 October 2010, he was convicted of the offence of manslaughter. On 29

October 2010, he was sentenced to imprisonment for 12 years. He had been tried on an indictment charging him with the murder of Jerome Longsworth ('the deceased', who was also known as 'Jazzi'), on 14 July 2006, at Hattieville Village in the Belize District.

[3] The prosecution called a total of 21 witnesses at the trial, but only two of them, Mr Ruben Barrow ('Ruben') and Miss Rosita Rita Armstrong ('Rosita'), who was the appellant's younger sister, purported to have actually witnessed the incident which led to the deceased's death. Their evidence, as will presently emerge, was divergent in significant respects.

[4] Ruben, the appellant and the deceased were all residents of Hattieville Village. At approximately 8:45 in the evening of 14 July 2006, as Ruben approached the 'Bin Bin' grocery shop on Sylvester Boulevard in the village, he heard what he described as "a loud noise". Shortly afterwards, he observed the appellant and his (the appellant's) sister fighting with each other in the vicinity of the Armstrong family home on Sylvester Boulevard. Both the appellant and Rosita were well known to Ruben.

[5] After making an unsuccessful attempt to find the appellant's brother, Herbert, Ruben encountered the deceased, who was in the area and told him what was happening at the Armstrong home, to which they both immediately proceeded. There, they found the fight between the siblings still in progress. The deceased approached the appellant, telling him to "hold it down, you don't have to go through that my boy".

[6] This was Ruben's account of what happened next:

> "Jerome Longsworth run into Mr. Ted Armstrong's yard and get a piece of stick to defend himself.
>
> He (Jerome Longsworth) fake him with a stick.

Jerome Longsworth run out of the yard, then Ted Armstrong was still attacking him, so then Jerome Longsworth slipped in a hole. Then Ted Armstrong grabbed the end of the stick and pulled him in.

Then Ted Armstrong stab Jerome Longsworth on the left side of the neck with the scissors.

Q. What if anything happen next?

A. He come to me and said I got juck my boy, stop play.

Then after that he showed me and said see and blood spraying out of his neck.

I took my rag off my head and wrap it around his neck to hold the blood."

[7] The deceased was then taken by car to the nearby health centre and then to the Karl Heusner Memorial Hospital ('KHMH') in Belize City, where he was pronounced dead. The subsequent post mortem examination conducted by Dr Mario Estrada Bran would in due course reveal that the deceased had received a stab wound (two and a half inches deep) to the left side of his neck, two inches above the collar bone, and that he had died of a fatal malfunction of the heart and lungs known as cardio-respiratory arrest, a direct sequel of the injury to the neck. In the opinion of the doctor, the deceased's injury would have been inflicted by a "pointed and sharp instrument".

[8] In her evidence, Rosita confirmed that there had been a fight between herself and the appellant, who was her older brother, on the night in question. What had led up to it, on her account, was that the deceased, who she described as her friend, had passed by her house on Sylvester Boulevard and had, at her request, gone to the nearby store to purchase biscuits for her. While she awaited his return, she stood by the gate at the entrance to the

premises talking to her brother in law (who was also a neighbour). The appellant, who was on the veranda of the family home and who disapproved of her "being with no boys", saw her standing there at the gate and appearing, she said, to be offended, approached her "in an aggressive manner telling me that I need to go inside". As a result, she "got offended too", talked back to the appellant "in a rough manner" and then went into the house to complain to their mother, Mrs Rosita Louise Armstrong ('Mrs Armstrong').

[9] But the disagreement was not yet over. Having spoken to her mother, Rosita returned to the gate to complete her conversation with her friend. The appellant, who was still there, slapped her and, she said, she "reacted in the same way". In short order, a fight erupted between them, during which Herbert Armstrong (who was also a brother of Rosita and the appellant), Ruben and the deceased came on the scene. The fight ended and Rosita began telling Herbert what had happened. The deceased was also present. Rosita told the court that Herbert "reacted in a rough way too because I dah the lee sista and he (Herbert) noh use to stand there and see my next brother Ted fighting you noh".

[10] So Herbert got into the action in defence of Rosita by picking up a cement block, which he broke into two pieces, and approaching the appellant. The deceased for his part went to the front of the house ("the foundation part") and took up and broke a "line stick" (used to assist with the hanging up of clothes). On the scene now were the appellant, who had nothing in his hands, Herbert, holding both pieces of the cement block in his hands, the deceased armed with the stick, and Ruben. According to Rosita, who was by this time on the veranda of the house, the three men were "standing around" the appellant, Herbert on one side, the deceased on the other and Ruben behind him. They appeared to be arguing.

[11] We cannot avoid setting out in full Rosita's account of what followed:

> "A. First move was Jerome, he whap after my brother foot but he miss and my brother (Ted) run across the street to my

neighbour Mr. Gordon but while Ted was running Jazzi was running behind him.

Now Jazzi is Jerome and he whap my brother (Ted) in his back but it look like the whap never really had no effect on Ted and then Ted manage to reach the front step of my neighbour house and then Jerome catch up with him and he was looking to whap my brother with the line stick again but when Jerome try to pick up the line stick I saw my brother pull in the stick bring Jerome closer to him and I saw my brother Ted made a stab movement.

Now after I couldn't tell what happen I see Jerome drop the stick.

Q. Where did Ted stab at Jerome?

A. To the neck.

Q. Could you see what he used to make the stabbing motion?

A. I see wah shiny object, but I was still on the veranda.

After I see Jerome drop the line stick I see ih start run cross the street back and after he run across the street he reach almost in front of the shop which is close to my house and he stoop down and hold his neck.

Q. What is the name of the shop?

A. Bin Bin.

I was on the veranda my brother came back and try to take me inside but I refuse, I went closer to where Jerome was but I went at the entrance of my house where everything began.

Q. When Jerome and Ted ran into Mr. Gordon's yard, where was Ruben and Herbert?

A. Ruben was on the street and Herbert was on the veranda with me.

When Jerome got stab nobody never know he get stab until Jerome started shouting he got stab.

The (sic) Ruben took action, he left Jerome and he went and asked the shop keep who had a van to take Jerome to the hospital.

Now when all that happen Herbert my brother and a whole group of boys I neva notice weh deh come from, most of them were running towards the neighbours house Mr. Gordon with objects like long sticks and cement blocks; but Mr. Gordon let Ted inside and close the door."

[12] When she was cross examined, Rosita agreed with the suggestion that at one point Herbert "went after [the appellant] with blocks", and that, when the deceased hit the appellant on his foot with the line stick, the appellant's reaction had been to run away. Further, that as the appellant ran away, trying to escape, the deceased, who was the aggressor, "was chasing him, running after him to hit him with the line stick". When the deceased caught up with the appellant on Mr Gordon's front step, as the appellant tried to open the gate at the top of the step, the deceased again tried to hit the appellant with the line stick and it was only at this point that Rosita saw the appellant make a stabbing motion towards the deceased and noticed that he had a shiny object

in his hand. When it was finally suggested to Rosita that, “at all material time whatever the accused did was in defence of himself”, her response was, “Because in this situation my brother is human we react in the same way if someone try to act and you try to get away and you have no other option but to defend yourself”.

[13] Ruben’s account of the incident that had such tragic consequences derived some support from the appellant’s brother Herbert, while Rosita’s account derived considerably more support from Mrs Armstrong’s evidence. Herbert for his part attributed to himself no greater role than that of peacemaker in the fight between his siblings. Thus he denied having armed himself with a cement block or having participated in any way with the deceased in an attack on the appellant. Herbert also denied that the deceased had approached the appellant in a hostile and aggressive manner, or had menaced him with a stick at any point.

[14] Mrs Armstrong, on the other hand, who had observed the early stages of the disagreement between the appellant and Rosita, as well as the actual fight itself, unequivocally depicted the deceased as the aggressor in the subsequent exchanges with the appellant. She supported Rosita’s evidence that the deceased had armed himself with the line stick (which was hers) and also said that at one point she and Herbert had tried “to stop” the deceased, she by holding on to the stick and telling him, “boy violence doesn’t make sense”. She actually succeeded in taking away the line stick from the deceased at a point, but, Mrs Armstrong said, “he went and pick it up back and he was disobedient so I walk away, I was trying to protect him more than my son”. However, Mrs Armstrong observed in re-examination, she was not taking up for anyone, as both the appellant and the deceased “were becoming violent”, although the deceased was the more aggressive one. She lamented the fact that they had refused to heed her warnings to them to desist, saying that, “If both of them would have listened to me none of this would have happened”.

[15] Mr Elijah Gordon lived at 24 Sylvester Boulevard, which is directly in front of the Armstrong residence. On 14 July 2006, at about 9:20 p.m., he was at home watching television when he heard a banging sound on the side of his house. When he opened the screen door at the front of the house, the appellant bolted inside, pursued by five to seven young men, one armed with a stick and one with a machete. The appellant ran into Mr Gordon's bedroom and locked the door. After about five to ten minutes, during which Mr Gordon spoke to the invading young men (urging them to "noh brok notin enna mi house"), two policemen (who had been summoned by Mr Gordon by telephone) arrived and were directed to the room in which the appellant had locked himself. The appellant was taken from the room and in due course, after the arrival of additional police support, he was taken away from Mr Gordon's home.

[16] In cross examination, Mr Gordon agreed that the appellant did not have anything in his hands when he rushed into his house. He confirmed that the group of men pursuing the appellant appeared to be violent and that it was in fact the appellant who had asked him to call the police. Finally, Mr Gordon agreed with the suggestion put to him by counsel that the appellant looked to be in fear and was crying.

[17] Sergeant Ernel Dominguez, who in July 2006 was stationed at the Hattieville Police Station, was among the first police officers to become involved in the investigation of the death by stabbing of the deceased. On the night in question, after the deceased had been sent to the KHMH in a police vehicle, Sergeant Dominguez proceeded to Sylvester Boulevard to a point in the vicinity of the Bin Bin grocery shop. There, he observed what appeared to be blood spots on the road and, on the other side of the boulevard, immediately in front of Mr Gordon's house, he observed a pair of scissors, measuring about eight inches, with a pink handle, and what appeared to be blood stains on the metal portion. The pair of scissors was retrieved and secured and in due course submitted for analysis to the National Forensic Science Unit, along with a sample of the deceased's blood. Upon analysis, the deceased's blood group was determined to be type 'O', which was also

the type of the human blood which was detected on the unpainted steel portion of the pair of scissors.

[18] When the appellant was taken to the police station in Hattieville on the night of 14 July 2006, he was observed to have what appeared to be a wound and abrasions to his left hand. On the instructions of Sergeant Dominguez, he was also taken to the KHMH, where he was seen by a doctor, who certified on a medico-legal form a case of 'wounding'.

[19] On 15 July 2006, Sergeant Dominguez arrested and charged the appellant with the deceased's murder. On that same day, in response to the appellant's request, a statement after caution was taken from him (in the presence of a justice of the peace) by Sergeant Kent Paulino, then posted to the Crimes Investigation Branch, Belize City. The statement was tendered in evidence by the prosecution and admitted without objection from the defence at the trial. This is what the appellant said in his statement:

> "I was at home attending to my baby sister because my dad had died and I am the only man in the family. At about 45 minutes after I got home attending to my sister [sic]. Whilst scolding my sister I was viciously and violently attacked by a gang of about four or five guys. Missiles were thrown at me and beaten with a clothes line stick out of my own yard. As I struggled on the ground in the drain for my life bleeding from a succumed [sic] injury I frightenedly retrieved a scissors from my pocket that I use to shave. They continued beating me with the stick and took away the scissors. I took cover in my neighbors yard and waited for the police because people wanted to kill me. A lot of people tried to go up my neighbors house but he secured me until the police came and I was taken to the hospital."

[20] At the end of the statement, Sergeant Kent Paulino put further questions to the appellant as follows:

"Q. Where do you call home?

A. Sylvester Blvd in Hattieville.

Q. Who is your baby sister?

A. Rosita Armstrong, she has the same name as my mother.

Q. At what time did you get home?

A. I got home at about 6:00 p.m.

Q. From where did you get the scissors?

A. I retrieved it from my front right pants pocket.

Q. What is your neighbors [sic] name?

A. I know him as Mr. Gordon."

[21] The prosecution called a number of other witnesses, whose evidence it is not necessary to rehearse in detail for the purposes of this judgment. The evidence which we have already summarised was, essentially, the case for the prosecution.

[22] The appellant elected to remain silent and the defence was content to rest its case without calling any witnesses.

[23] Early in his lengthy summing up, Lord J told the jury that the evidence given by Ruben and Rosita respectively was "the two most important evidences [sic] that you have to look at carefully and decide which if any you accept, because of the [con]sequences". He directed the jury, unexceptionably, on the burden and standard of proof and, as regards the appellant's statement after caution, he reminded the jury, having read it to

them, that "throughout this caution statement the defendant made no admission of any guilt".

[24] On the issue of self-defence, Lord J pointed out to the jury that, it having been raised in the trial, it was for the prosecution to prove that the appellant did not act in self-defence. He further emphasised that it was not for the appellant to prove that he was not acting in self-defence. The judge went on (again, in acceptable terms) to tell the jury what self-defence meant and in this context reminded them of Rosita's evidence. He reiterated that the burden of disproving self-defence lay squarely on the prosecution and that it was only if the prosecution made them sure that the appellant did not stab the deceased in the belief that it was necessary to defend himself that the jury could find him guilty of murder.

[25] The judge then wound up a fairly accurate, if somewhat (unnecessarily) repetitive, direction on self-defence in this way:

> "Remember you will judge him as he saw it and only how he saw it; but if you think the force he used was or may have been reasonable in the circumstance of the case then you must find him not guilty of murder (and acquit him).
>
> **If you are in doubt whether the accused was acting in self-defence then you may find him guilty of murder as charge**" [sic]. (Emphasis supplied).

[26] Lord J then went on to give directions on the concept of unlawful fight, provocation or other justification, excessive force or harm. After a further summary of the issues for their consideration as he saw them on the evidence, the judge asked the jury to retire to consider their verdict. However, before they could retire, counsel for the prosecution sought to draw an issue to his attention, in the following terms:

> "My Lord just before the jury retire one point that I am duty bound to bring to your attention, while addressing the [sic] you said that if they are in doubt that Ted Armstrong was acting in self defence, so the doubt he was acting in self defence they must find him guilty of murder.
>
> But in actuality they have to look at the offence of murder and the elements and if they don't find him guilty then look at manslaughter, so the direction was just a little bit unclear in my humbly [sic] opinion."

[27] In response to counsel's intervention, the judge then addressed the jury further as follows:

> "I have been told by the crown that I said to you, if you are in doubt when I was addressing you on self defence, that Ted Armstrong was acting in self defence then you may find guilty of murder.
>
> If I said then I will expound on it cause is may have given you the wrong impression.
>
> Members of the jury when I was dealing with the defence of self defence raised by the evidence for the defence, I said to you remember you will judge him as he saw it and only how he saw it, if you accept the evidence in favour of the defence.
>
> If you think the force he used was or may have been reasonable in the circumstances of the case. Then you must find him not guilty of murder and acquit him.
>
> **If you are in doubt whether the accused was acting in self defence then you may find him guilty as charged; here then members of the jury I must now say to you that if you are in**

doubt whether the accused was acting in self defence then you may find him guilty as charged; but that is only providing you are satisfied also that the elements of the charge of murder has also be proven to you.

Thank you, you may now retire." (Emphasis supplied).

[28] After an almost five hour retirement, the jury returned unanimous verdicts of not guilty of murder, but guilty of manslaughter and the appellant was in due course sentenced to 12 years' imprisonment.

[29] In his amended grounds of appeal filed on 6 June 2011, the appellant advanced three grounds of appeal, as follows:

"(a) There was a material misdirection relating to the burden of proof. This misdirection was repeated twice during the summing-up: once at **Line 10 Page 332** and then at the end of the summing up and following a question from the prosecuting counsel (**Line 10 Page 357**). The learned trial judge gave a direction that if the jury was in doubt whether the accused acted in self defence then they could still properly convict. The proper direction should have been the reverse, that if the jury was in doubt then they must acquit. This misdirection made the entire summing up unbalanced and more so because the final reference was the last thing the jury heard before they retired.

(b) There was a material misdirection in that the learned trial judge failed to give the jury a proper direction relating to self-defense. In particular, the learned trial judge failed to direct the jury that self defense could prevail so long as the accused reasonably believed the force used was necessary and even in circumstances where this belief was unreasonable or where the accused was mistaken or wrong in his belief.

(c) The verdict was unsafe because it was against2 the weight of the evidence having regard to the evidence led on the issue of self-defense."

[30] It will be seen that in ground (a), the appellant's complaint was of a material misdirection by the learned trial judge, to the effect that, if the jury was in doubt whether the appellant had acted in self-defence, then it was still properly open to them to convict (see paras. [25] and [27] above) and that the proper direction "should have been the reverse, that if the jury was in doubt then they must acquit". At the outset of the hearing of the appeal, the learned Director sought and was granted permission to address the court. Hardly surprisingly, and entirely to her credit, Mrs Vidal told us, with her customary candour, that, in the light of this egregious misdirection by the trial judge, she considered that the verdict of guilty of manslaughter entered against the appellant was unsafe and could not be allowed to stand.

[31] We agreed without reservation. It is hardly necessary to go further in this regard than the pellucid statement by this court in **Gonzalo Rivas v R (Criminal Appeal No. 2 of 1983**, judgment delivered 25 May 1983, page 3), to which we were very helpfully referred by Mr Bradley for the appellant in his skeleton argument, on the burden of proving self-defence:

> "The jury should be told that the burden of proof remains on the prosecution; that the defence does not have to prove that the accused was acting in self-defence; that the prosecution must negative that possibility and must do so beyond reasonable doubt. Above all…it must be explained that if the jury have any reasonable doubt as to whether or not the accused was acting in self-defence they must resolve that doubt in favour of the accused and acquit."

[32] In the instant case, as both Mr Bradley and Mrs Vidal pointed out, the judge, having already given the jury an incorrect direction on the issue during the course of the summing-up (para. [25] above), not only failed to grasp prosecuting counsel's (admittedly somewhat imprecise) invitation at the end of the summing-up to correct it, but instead compounded the error by repeating the misdirection in even more explicit terms (at para. [27]).

[33] It was clear from the cross examination of Ruben, Rosita and Mrs Armstrong, as well as the appellant's statement after caution, that self-defence was the crux of the appellant's case at trial. It was therefore incumbent on the judge to explain the nature of the defence with care to the jury and to give them a clear and accurate direction as to the incidence of the burden of proof in that context. This the judge ultimately failed to do, leaving us wholly unable to say that the jury was left "with a clear and certain picture" (the telling phrase is taken from an early judgment of this court in **Ellis Taibo v R**, referred to by the court in **Anthony Pop v R, Criminal Appeal No. 2 of 2005**, judgment delivered 27 October 2006, at para 12) of how the cardinal point of the appellant's case should be dealt with.

[34] These are the reasons for the decision of the court stated at para. [1] above. Quite sensibly, in our view, the Director did not seek an order for a re-trial of this matter, which arose out of a five year old incident and in respect of which there remained at the end of the day a sharp and unresolved conflict of evidence on the Crown's case.

[35] But we cannot leave this matter without commenting on the manner in which Lord J summed up the case to the jury. Despite the fact that, as we have already indicated, the prosecution called many witnesses at the trial, there was in essence but a single issue for the jury's consideration in the case; that is, did the appellant stab the deceased in his neck without lawful justification, as Ruben testified, or did he act in lawful self defence, as Rosita testified and as he said he had in his statement after caution. The judge nevertheless felt able (in an exercise that consumed 146 pages, or almost 40% of the printed transcript of 375 pages) to devote four and a half pages to the question of identification (telling the jury that "in this trial the case against the accused depends to a large extent on the correctness of the identification …which may be mistaken") and a full four pages to the evidence of Dr Estrada Bran (reminding the jury that the doctor's opinion was that "the direct cause of death was cardio-respiratory arrest due to compressive hematoma of the neck as a direct consequence of the stab wound to the area"). In addition, a further four pages were devoted to the question of accident, despite the absence of

any evidence whatsoever to suggest an accidental killing, on the strength of counsel for the defence having "raised accident in his closing summation to the court and to you".

[36] This court has on more than one occasion sought to remind trial judges that a summing-up must be carefully adapted to the particular circumstances of the case which the jury is being invited to consider (see, for example, **David McKoy v R, Criminal Appeal No. 30 of 2007**, judgment delivered 26 October 2007). As recently as 2009, in **Jose Maria Zetina v R, Criminal Appeal No. 9 of 2008**, judgment delivered 19 June 2009), we again had reason to draw attention to the well known observation of Lord Hailsham LC in **R v Lawrence [1982] AC 510, 519**, that a direction to a jury "should be custom built to make the jury understand their task **in relation to** a particular case" (emphasis ours). On the evidence of the instant case, these observations obviously bear repetition, but we sincerely hope that it will not be necessary for us to repeat them yet again in the future.

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SOSA P

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MORRISON JA