

IN THE COURT OF APPEAL OF BELIZE AD 2011

CRIMINAL APPEAL NO. 20 of 2010

BETWEEN

WAYNE GABB

Appellant

AND

THE QUEEN

Respondent

BEFORE

| | | |
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| The Hon. Mr. Justice Manuel Sosa | – | President |
| The Hon. Mr. Justice Dennis Morrison | – | Justice of Appeal |
| The Hon. Mr. Justice Douglas Mendes | – | Justice of Appeal |

The Appellant in person

Mrs. Cheryl-Lynn Vidal, Director of Public Prosecutions, for the Respondent

11 & 28 October 2011

MENDES JA

1. On 11 October 2011, we ordered that this appeal be dismissed and that the Appellant's conviction for manslaughter and his sentence of 13 years imprisonment be affirmed. We now give reasons for this decision.
2. The Appellant was charged for the murder of Marcos Ishim who met his death on 12 January 2009 at a building which housed the Guan Dong restaurant. At trial before Gonzales J and a jury, the prosecution relied primarily on the eye witness evidence of Christopher Emmanuel and

Daniel Puerto. They both testified that the deceased launched a hostile and aggressive verbal assault on the Appellant, one which was peppered with obscene language. In response, the Appellant stabbed the deceased with what appeared to them both to be a knife. Blood immediately appeared on the deceased's white shirt. The jury returned a verdict of not guilty of murder but guilty of manslaughter.

3. The Appellant represented himself on the appeal. He had initially appealed against his sentence but notified us that he wished only to challenge his conviction on the basis of a number of inconsistencies in the evidence which, as we understood him, made the jury's verdict of guilty of manslaughter one which was unreasonable or could not be supported having regard to the evidence. Most if not all of these inconsistencies had been relied upon by defence counsel in his address to the jury and had been adverted to by the trial judge in his summation. While some of these inconsistencies were no doubt serious enough to merit consideration by the jury in deciding whether they should accept the prosecution's evidence as reliable, most of them were either inconsequential or on further examination turned out not to be inconsistencies at all.
4. Among those which were inconsequential was the Appellant's complaint that the witness Puerto had estimated the length of the knife to be three inches whereas Dr. Estrada Bran, the forensic expert, estimated that the length of the knife which killed the deceased was between three and one half to four inches based upon the depth of the stab wound. The Appellant also complained that the witness Emmanuel described the Appellant as making a 'forward thrust' towards the deceased while Puerto spoke of the Appellant "inflict(ing) a small thing inside the man here." Again, from Emmanuel's point of view the Appellant stabbed the deceased from the front in his stomach, while as far as Puerto was concerned the deceased was stabbed on the left side of his body. As it turned out, both

witnesses were wrong since Dr. Estrada Bran put the stab wound in the deceased's chest, just one and a half inches below the left nipple.

5. It is not uncommon that witnesses of the truth differ in the minor details of an incident which they both observed. We did not consider any of these inconsistencies to be sufficiently weighty as would cast doubt on the safety of the jury's verdict.

6. In the category of inconsistencies which the Appellant relied on which turned out on further examination of the evidence not to be inconsistencies at all are the following. The Appellant submitted that Puerto swore that the deceased fell in front of the Guan Dong restaurant while the witness Roger Young testified that he fell in a parking lot. It turns out that they were speaking about the same spot. Young said that he saw the deceased coming out of the Guan Dong restaurant and fell on the ground outside the building in a parking lot which was right in front the building. As he said, "you drive up and you park in front of the building." According to the transcript, Puerto said much the same thing: "The man just went there front of Guan Dong there and the vehicle, in front the vehicle and the man collapse there." Apparently, the trial judge also recorded Puerto as saying that the deceased fell in the car park. This was their exchange:

The Court : Yes, but I think your evidence in chief you said, "he walked into the car park and he fell by a vehicle".

Mr. Willis : That's right, that's right.

The Court : He reached to a vehicle and fell.

Witness : He fell by the vehicle yes.

Mr Willis was the Appellant's lawyer.

7. Similarly, the Appellant claimed that whereas Emmanuel said that the deceased's blood poured out on to the verandah, the crime scene technician found no such blood on the verandah. He spoke only of blood mixed with dust in the parking lot. However, Emmanuel never actually said that there was blood on the verandah. What he did say is captured in this exchange:

Q: : ... Now you told the police that you saw blood pouring from Ishim while he was on the verandah there, that's what you told the police?

A : When I went to the Carl Thompson building ...

Q : No, you said that you saw Wayne make a thrusting motion and you saw blood pouring from Ishim, that's what you told the police?

A : Yes

Q : You saw blood pouring from Ishim?

A : Yes he had on a white shirt.

Q : You saw blood pouring from the ...

A : Yes

Q : ... while on the verandah?

A : Yes

What he appears to us to be saying is that he saw blood pouring from the deceased onto his white shirt while he was on the verandah, not that blood was pouring onto the verandah.

8. Slightly more significant is the disagreement between Emmanuel and Puerto as to where exactly the stabbing occurred. From the evidence it appears that the Guan Dong restaurant is located on the ground floor of a

building. Right next to it is a Quick Stop establishment and next to that is a pool room. There is a verandah which serves all three. Emmanuel said that the Appellant stabbed the deceased in front of the pool room while Puerto said that it happened in front of Guan Dong. Both however, put the incident on the verandah. We do not think much can be made of this discrepancy. There is nothing to indicate that there is any great distance between the outer boundaries of the Guan Dong restaurant and the pool room. The Appellant suggested to us that it was 40 feet and assumed that the witnesses were putting the incident at the opposite ends of the verandah, even though this was not brought out in the evidence. It may very well have been that in both their minds the incident took place close to the Quick Stop office, in other words, towards the middle of the building. In the absence of evidence indicating that the witnesses put the incident at such a great distance apart from each other as to cast doubt on whether either of them witnessed the incident, we are unable to see how this discrepancy would make the jury's verdict unsafe.

9. More serious is the inconsistency between Puerto's oral evidence and his statement to the police concerning where the Appellant produced the knife from. Emmanuel testified that when the deceased approached the Appellant he had a knap sack on his back which he threw to the floor in front of the Appellant and started shouting at him in Spanish. The Appellant then got up and took the knife out of his right pocket and stabbed the deceased. In examination in chief, Puerto said that in response to the deceased's verbal onslaught, "Mr. Gabb get up and he get up with a small instrument", which he later said was a three inch knife. Consistent with Emmanuel's evidence, he accepted in cross-examination that the deceased had a knap sack slung across his shoulder and that he was the only person there who had a knap sack. He was then confronted with his written statement to the police where he is recorded as saying that "I then saw Wayne took out an object from a black knap sack that he had

on his back.” He initially insisted that he told the police that the Appellant “took out an object from his pocket and just slip it in front of Mr. Ishim” but when he was shown the statement this exchange ensued:

Q : Now you are saying to the court that that was not so, what you told the police that was not correct.

A : Well may be I was intoxicated at that time so I....

Q : You were intoxicated at that time. So you was mistaken in what you saw?

A : Yes sir.

10. The trial judge brought this contradiction frontally to the jury’s attention and directed that it was for them “to decide what you make out of the evidence of two witnesses, given the fact that they were drinking, one admitting he was tipsy and the other one admitting that he was intoxicated” and to decide “whether you can come to the conclusion or you feel sure that they have spoken the truth.” He also reminded the jury that they had to give the Appellant the benefit of the doubt and find him not guilty if they were not sure about what the witnesses said. It may very well have been that in these circumstances the jury paid little attention to Puerto’s evidence and relied instead upon the less tainted evidence of Emmanuel. They would have been quite entitled to do so. For this reason, we are unable to conclude that the jury’s verdict was unsafe because of this one serious blemish in the evidence of one of the prosecution’s witness.

11. These are our reasons for concluding that the Appellant's conviction for manslaughter should stand and, since no issue was raised with regard to his sentence, we also agreed that his sentence should be affirmed.

SOSA P

MORRISON JA

MENDES JA