

IN THE COURT OF APPEAL OF BELIZE, A.D. 2007

CRIMINAL APPEAL NO. 15 OF 2005

BETWEEN:

ASBAND ANDERSON	Appellant
AND	
THE QUEEN	Respondent

BEFORE:

The Hon. Mr. Justice Mottley	-	President
The Hon. Mr. Justice Carey	-	Justice of Appeal
The Hon. Mr. Justice Morrison	-	Justice of Appeal

Ms. Antoinette Moore for the appellant.
Mr. Kirk Anderson, Director of Public Prosecutions, for the respondent.

17 October 2006, 8 March 2007.

MOTTLEY P.

1. The appellant was convicted of murder and was sentenced to life imprisonment. The indictment charged him with murdering James Alexander McKoy on 13 December 2003.
2. The case for the prosecution rested mainly on the evidence of Louise Vasquez and Otho Armando Hyde the proprietors of the Plum Tree Bar in Unitedville Village in Cayo District. McKoy, the appellant and others were on the verandah of the bar drinking liquor for over two and a half hours. After hearing a noise which was coming from the verandah, Vasquez

looked outside and saw the appellant with his arm around McKoy's shoulder. She told the appellant and McKoy to behave as they had previously been drinking together. Vasquez and Raquel Locke, sister of the deceased, tried to separate the appellant and McKoy. Vasquez held the appellant's hand but was not aware that he had a knife. After trying to separate them for two to three minutes, the appellant released McKoy who then fell on the ground on his knees. After McKoy attempted to stand up, the appellant punched him causing him to fall. The appellant then sat in an old plastic chair which he had placed over McKoy who was then lying on the floor. The appellant thereupon gave McKoy a number of stabs. The appellant told Vasquez and others present that they should be glad that McKoy was dead "bikaoz the police waahn he dead long time".

3. An autopsy on the body of McKoy which was conducted by Dr. Mario Estradabran showed that McKoy had five external stab wounds. A 4.5 cm injury to the chest was the wound which caused injury to the heart. The cause of death was stated by the doctor as cardiac tamponade syndrome which means bleeding inside the chambers of the heart.
4. The appellant made an unsworn statement from the dock in which he said:

“...I was having a few drinks with a friend. And about close to midnight, my friend got up and told me that he was leaving. I then went to the bathroom to urine. Upon returning to the bar, just as I climb the stairs at the floor level, I was approached by one James McKoy. He mentioned to me that I should haul my rass from here. I then said to him, ‘The owner of the bar does not have a problem with me being here.’ I said to him what give him that right and I tried to walk around him and that’s when I felt something sharp pressing against my body. I then spin around and saw a knife in his hands. He mentioned to me that he’s going to ... kill me. James McKoy is a person whom I have known to be very violent

when drinking. When he said that to me, I grabbed his hands and that's when we started to struggle. I had seen him on several occasions at that bar beating up on people. I believed him when he told me that he was going to kill me from experience I have seen with him before. While we were struggling, he was one spell against the wall of the building, the bar, cross the railing of the verandah. All this time he was mumbling, 'Ah wahn ... kill yuh.' He was talking, Your Honour. I have known James McKoy to be a very physical person as a football player. Strong. At that I time I would say he weighed about 180, 190, and myself, I was between a 155, 160 pounds. I tried to fight him, Your Honour, to get away the knife from him because I felt like I was going to die. I felt I was going to die because of the voice he used to me and the way he was holding me, Your Honor. I couldn't get away the knife from him so I then bite him on his hand; the knife fell on the floor and the two of us went down for it. I managed to grab it before he did, that's when he started to choke me, Your Honour. He had me in a head lock. That is when he lock his hands around my neck like this and started to choke. From what I can recall, he was choking me so hard that I stool in my pants. I truly believe that I was going to die either from that knife or from the choke hold that he had me in. Either from that knife or from the choke hold. Ladies and gentlemen of the Jury, I didn't want to kill James McKoy. I strike at him with the knife, Your Honour, but I had no other else choice. He let me go and that's when I proceeded to walk away. Mr. Foreman, ladies and gentlemen of the Jury, I want you to put yourselves in my position on that night. That night I had no other choice but to do what I did to save my life. That night when that struggle started, me and Mr. McKoy were the only two people on that verandah. I guess we struggle for about two to three minutes when the incident happened. There was no one else out there on that verandah that

night. While walking away, that is when I started to see some people coming around. I went to my aunt's house and I explained what had happened at the bar. I asked her to call the police. That's what happened that night. That's it."

The appellant had earlier told Marie Benjamin, his aunt, that McKoy had a knife and the two of them had a fight in the bar.

5. The appellant relied entirely on self defence, that he acted in the manner he did because he considered that his life was in danger. In his summation, the judge left the issue of whether the appellant was acting in self defence to the jury in this way:

"The element which is in dispute, Members of the jury, is whether the act of the accused was unlawful in that it was not justified. The act of the accused was unlawful, he had no justification for doing that act; the defence is saying, Oh, no man, that is not so. He was justified in taking the course of action he did to preserve his life. So, Members of the jury, it is this element of the lawfulness, or the lack thereof on the act of the accused that you will have to focus most of your energies on. This is the real issue. So what evidence, if any had the prosecution adduced in an effort to prove that at the time of the stabbing incident or the alleged stabbing incident, the accused was not justified in what he did, and therefore, his act is deemed to be unlawful, or is said to be unlawful, or is unlawful? You see, Members of the jury, if the accused was justified in doing what he did, for example, if he was acting in lawful self defence, as the defence alleges, the defence commits no offence. This is so because a person in the defence of himself, as the accused alleges, in this case, has a right to defend himself given an attack or even a threatened attack. The prosecution in this case is not in

a position to say whether or not there was an attack or a threatened on the person of the accused because remember that when the witnesses got out there, this thing had already started, so they cannot say who attacked who, initially.”

6. In dealing with the extent of the injuries inflicted on the deceased, the judge told the jury that the appellant had punched the deceased who fell to the floor of the verandah whereupon the appellant then sat on a chair and inflicted multiple injuries. The judge pointed out that the prosecution was saying that this conduct, on the part of the appellant, could not have been lawful. The prosecution case was that the appellant’s actions went beyond acting in self defence and used excessive force, such force being unnecessary as McKoy had already fallen and was lying helplessly on the floor. The judge told the jury:

“The acts of the accused at the stage of the altercation in terms of force he used, they are saying is excessive. It was not necessary in the circumstances because James McKoy had already fallen and he was helpless on his back, therefore, they are saying, the accused cannot avail himself of the defence of self defence, and therefore, the act of the accused is unlawful. So this is how the prosecution is asking you, members of the jury, to look at this element and find that they have proven that the act of the accused is unlawful. What began, according to them, as a lawful act, ended as an unlawful act. The first act of striking the deceased in the area of the abdomen, from the prosecution’s case, can be said to be lawful; but surely then, Members of the jury, they are saying that once the deceased is on the floor and then he proceeds to inflict multiple injuries, the prosecution is saying, those injuries were unnecessary, excessive, the accused cannot avail himself self defence, therefore, he’s not justified and his acting is unlawfully. The prosecution here, Members of the jury, here is also asking you

to consider the extent and the nature of the force used by the accused to repel the force. Because, you see, if excessive force was used by the accused, as I said before, his act of inflicting multiple stab injuries to him would be unnecessary and therefore excessive and his act would have been unlawful and therefore the accused could not avail himself of the defence of self defence.”

7. In his first ground of appeal the appellant alleged that the trial judge erred by failing to instruct the jury that it was open to them to return a verdict of manslaughter if they found that the appellant, in purporting to act in self defence, had exceeded the amount of force which was necessary to deflect the attack against him because he acted from such terror of immediate death or grievous harm as set out in section 119(b) of the Criminal Code.

8. Counsel for the appellant stated in so far as the use of excessive force is concerned the judge told the jury:

“The prosecution here, Members of the jury, here is also asking you to consider the extent and the nature of the force used by the accused to repel the force. Because, you see, if excessive force was used by the accused, as I said before, his act of inflicting multiple stab injuries to him would be unnecessary and therefore excessive and his act would have been unlawful and therefore the accused could not avail himself of the defence of self defence.”

Counsel submitted that in these circumstances the jury had been left the stark choice of finding the appellant guilty of murder if they were of the view that the appellant had used excessive force in resisting the attack against him or returning a verdict of not guilty of murder if he had used reasonable force. Counsel contended that the direction amounted to an

error of law in so far as it deprived the appellant of the benefit of a verdict of guilty of manslaughter based on the use of excessive force.

9. The Criminal Code Cap. s 119(b) formerly 116(b) 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 -

- (b) that he was justified in causing some harm to the other person, and that in causing harm in excess of the harm which 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.”

It should be noted that, although the subsection speaks of matters of extenuation being proved on behalf of the defendant, the onus of disproving justification under section 119(b), if such justification arises on the evidence, is on the prosecution and not the defendant (see **Shaw v. The Queen [2001] UK PC 26**). If there is evidence to suggest that it was reasonably possible that the justification under s 119(b) exists, it is incumbent on the trial judge to leave the issue to the jury even though it was not raised specifically by the defendant.

10. In **Shaw v The Queen** (supra) and **Cleon Smith v The Queen [2001] UK PC 27**, the Privy Council dealt with the proper direction which the judge should give to the jury when the issue of excessive force arises in circumstances where the jury might consider that the defendant was not acting in self defence because of the use of excessive force. In the judgments which were delivered on the same day, Lord Bingham of Cornhill considered the circumstances in which section 119(b) applies.

Lord Bingham stated that four questions must be left by the trial judge to the jury – These questions are:

- (i) was there evidence of a situation in which the appellant was justified in causing some harm to the deceased?
- (ii) was there evidence that the defendant caused harm in excess of the harm he was justified in causing?
- (iii) was there evidence that the appellant was acting from terror of immediate death or grievous harm when acting as he did?
- (iv) 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?

11. In dealing with the issue of excessive force under section 119(b), the judge was required to leave for the consideration of jury the four questions stated above.

- (i) Was there evidence in which the appellant was justified in causing harm to the deceased? As stated by Lord Bingham in cases of Shaw and Smith the answer depended “on whether and to what extent credence is given to the evidence of the appellant as against the prosecution eye witness”. The prosecution was required to show from the evidence that the appellant was not acting from such terror of immediate death or grievous harm. While the statement of the appellant from the dock was not evidence, the jury was required to consider it. In that statement the appellant said that the deceased, who was a violent person, had a knife which he was pressing against his body and telling him that he was going to kill him. The prosecution witnesses were unable to testify as to the circumstances which led to noise on the verandah. These witnesses were only able to say that they heard a noise coming from the verandah where

the appellant and the deceased had previously been drinking. They observed the appellant with his arm around the shoulder of the deceased. The witnesses were unable to separate them for two to three minutes. It was for the jury to consider whether the appellant believed himself to be physically threatened by the conduct of the deceased and consequently was justified in causing some harm to the appellant.

- (ii) Was there evidence that the appellant had caused harm in excess of the harm he was justified in causing? The prosecution contended that the appellant was not justified in causing any harm to the deceased. However as stated above the prosecution was unable to lead evidence of the circumstances which led to the altercation between the deceased and the appellant. The jury was required to take the unsworn statement of the appellant into consideration in deciding whether the appellant had caused harm in excess of the harm he was justified in causing. While the jury could have rejected self defence on the ground that the appellant used more force than was justified it would have been open to them to say that the appellant, in the circumstances, was justified in causing some harm to the deceased.

- (iii) Was there evidence that the appellant was acting from terror of immediate death or grievous bodily harm? Again the judge would have had to direct the jury that, while the statement was not sworn evidence, they had to take it into consideration when deciding if the appellant was guilty. It was for the prosecution to disprove that the appellant was

acting from terror of immediate death or grievous bodily harm.

- (iv) Was there evidence that such terror deprived the appellant for the time being of the power of self control? The judge accepted that there was some evidence that the appellant had lost his power of self control. In his summation on the issue of extreme provocation, the judge told the jury they had to consider whether the conduct of the deceased is such as to cause a reasonable person to lose his power of self control and to behave as the appellant did. The judge went on to point out to the jury that they also had to consider what effect the words of the deceased would have had on the appellant. Would it cause a reasonable man to lose his self control? The fact that the judge directed the jury on the issue of extreme provocation is a clear indication that there was sufficient evidence which ought to have been left to the jury when considering whether the terror of the deceased was such as to deprive the appellant for the time being of his self control. Whether such loss of self control could have been caused by terror of immediate death or grievous harm, again this was an issue which ought to have been left to the jury for their consideration in deciding whether the appellant was justified in causing some harm but nonetheless caused harm in excess of the harm which was justified.

12. In our opinion, the failure of the judge to direct the jury on these issues was a material non direction which was prejudicial to the appellant. The appellant was in the circumstances deprived of the opportunity of having the jury return a verdict of not guilty of murder but guilty of manslaughter. It was for these reasons that we allowed the appeal and quashed the

conviction for murder set aside the sentence and entered a verdict of not guilty of murder and substituted a verdict of manslaughter. The appellant was sentenced to a term of imprisonment of twenty years. In view of the decision reached we did not consider it necessary to deal with the second ground of appeal.

MOTTLEY, P

CAREY, JA

MORRISON, JA