IN THE COURT OF APPEAL OF BELIZE A.D. 2002

CRIMINAL APPEAL NO. 20 OF 2001

BETWEEN:

DAVID JONES	**APPELLANT**
AND	
THE QUEEN	**RESPONDENT**

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BEFORE:

The Hon. Mr. Justice Mottley	**-**	**Justice of Appeal**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**

Ms. Antoinette Moore for the Appellant.
Mr. Rohan Phillip for the Respondent.

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2002: February 28 and June 28.

MOTTLEY, J.A.

1. On the 26 April 2000 at Belize City, Lincoln Weston was shot and died shortly after. David Jones, the appellant, was charged with his murder under the Criminal Code of Belize and on 30 October, 2001 he was found guilty and was sentenced to life imprisonment.

2. On the day of the shooting the appellant, Jason Gentle, Leon Robinson and one Stephen also known as Eggy, all teenagers, went to Yarborough Road in Belize City in search of mangoes. Having obtained permission from a lady, Robinson and the appellant climbed the tree to pick the mangoes; Gentle and Stephen remained on the ground to catch the mangoes. After picking the mangoes, Stephen and Gentle were leaving by way of an alley, when they encountered Lincoln Winston. Lincoln Winston stabbed Jason Gentle with a small knife and he had to be taken to the hospital. The appellant was not present at the time of the stabbing but subsequently learned of it. The appellant and Robinson had left the

yard by way of an alternate route. After he reached the road, the appellant went to inquire as to what had happened to Jason, while Robinson went to recover their bicycles that had been left in the yard. Jones then rode off on his bicycle. At this stage, he was not carrying anything in his hand. Gary Yearwood, one of the witnesses for the prosecution, was with two friends who were known to him as "E" and "Chap" when the appellant approached "E" and asked him for a machete. "E" did not give him a machete and Jones left. About 15 to 20 minutes after the appellant left, Gary Yearwood stated that he heard a loud bang. He got up to see what it was the source of the loud bang. He saw the appellant who was running away with something like a rifle in his hand. Yearwood looked across the road, under a car, and saw Lincoln Weston on the ground. He observed that Weston had holes in the upper part of his body. Weston was then taken to the Karl Heusner Hospital. A post mortem showed that Weston died from unnatural causes due to cardiac tamponade or blood in the pericardial sac.

3. About 5:30 p.m. on 26 April, the appellant was taken to Criminal Investigation Bureau in Belize City by his aunt Daphne Grant. Sgt. 1590 Horentino Salam spoke to the appellant and a statement was recorded from him. In this statement the appellant said that he and Jason walked through the alley and were challenged by a man about picking mangoes. He told the man that they had asked the lady for permission to pick the mangoes. The man then pulled out a small knife from his left pants pocket. On seeing this, he and Jason pushed passed the man who stabbed Jason on the left side. Jason fell at the entrance to the alley. The appellant who was already on the sidewalk, pulled a gun from out of the bag he was carrying and pointed the gun at the man. The man started to walk on the sidewalk and went towards the front of a blue car and appeared to be coming towards the appellant. The appellant stated that he was walking away from the man when he "tripped over by his slipper since it popped" and he fell back and the same time the gun went off. He was not aware if the man, who at this time was 15 feet away, had been injured. At the trial, the appellant did not give any evidence or make any statement from the dock and relied on his statement which he had given to the police under caution.

4. The first ground of appeal argued by counsel for the appellant was that the judge erred by failing to provide the jury with sufficient direction on how to determine whether the appellant possessed the requisite intent to kill. Counsel for the appellant stated that the judge in his summation repeatedly told the jury that in order to convict for the offence of murder

they had to find that the appellant had the intention to kill Lincoln Weston when he shot him. Counsel for the appellant complained that the judge did not "lend the jury any additional assistance or guidance with respect to the element of intent." The judge, counsel says, ought to have told the jury what factors they ought to look at to determine if the appellant intended to kill the deceased when he shot him. Counsel stated the judge ought to have used the framework set out in section 9 of the Criminal Code Cap. 101.

5. Section 9 of the Criminal Code provides:

> A Court or jury, in determining whether a person has committed an offence:-
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> (a) shall not be bound in law to infer that any question specified in the first column of the Table below is to be answered in the affirmative by reason only of the existence of the fact specified in the second column as appropriate to that question, but
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> (b) shall treat that factor as relevant to that question, and decide the question by reference to all the evidence drawing such inferences from the evidence as appear proper in the circumstances.

6. The judge told the jury that, in considering whether the appellant had the intent to kill, they had to look at all the facts and circumstances as disclosed by the evidence to see whether the appellant intended to kill the deceased when he fired the gun. He reminded the jury that the appellant could only be found guilty of murder if they are sure that he intended to kill the deceased when he fired the gun. Later, he again reminded them of the need to find that the appellant had the intent to kill the deceased.

7. In our view, there is no requirement that the judge should use the formula set out in the Code provided he makes it clear to the jury that in order to convict the appellant of murder they had to be sure that he intended to kill the deceased and in ascertaining whether the appellant had such intent, they had to look at all the facts and consider all circumstances as disclosed in the evidence. The jury was not left in any doubt that they had to look at all the facts and consider all the circumstances in order to find what was the intention of the appellant when he fired the gunshot. We do not think there is any merit in this ground.

8. In respect of the second ground of appeal, counsel alleged that the judge erred in law by failing to fully and accurately direct the jury on the law of provocation in relation to the facts of the case. The gravamen of counsel's complaint was that the judge did not bring to the attention of the jury certain facts which she submitted may have shown that the appellant was provoked and as a consequence lost his self-control and had not regained his composure at the time of the shooting. Counsel referred to the fact that the jury asked the witness, Jason Gentle, if the appellant was upset when he rode off and he replied, "I think so." She also submitted that since he did not say "I think not", this statement should be interpreted as meaning, "Yes, I think so – he was upset."

9. This statement, in our view, means nothing more than it was possible that the appellant may have been upset at his friend being stabbed. It certainly does not mean that he was in fact upset. Further, counsel submitted that the judge ought to have pointed out to the jury that the evidence that the appellant returned carrying a sawn-off shot gun which he made no attempt to hide, could be viewed as a loss of control on the part of the appellant as it is not customary for a person to walk openly with such a weapon. These two factors, counsel contends, should have been left to the jury in support of contention that the appellant had loss his self-control.

10. The judge in his summation told the jury:

> "The prosecution is also suggesting that the defendant was not in fact provoked to the point where he lost self-control at the time when he inflicted these injuries. If you believe that he was in fact the one who inflicted the injuries because you have to always first believe that he was the one who inflicted the injuries, you must have no doubt of that before you even go on to consider the question of justification. The prosecution is suggesting that there was no provocation given to the accused because he was not even present when his friend Jason got the injury. He was told of it but he wasn't present and he ran off, he went off. The defendant went off for some time. He went off and then he came back and it is after he went off and came back some 20 minutes or 30 minutes later that in fact he allegedly inflicted the wounds on the deceased. Our law is that, if either by words or actions or a combination of both, a person is provoked, that provocation can in fact cause a person to lose his self-control temporarily and if during that period when there is a temporary lost of self-control the person commits murder that is reduced to manslaughter. You cannot find him guilty

of murder, you can only find him guilty of manslaughter because he was temporarily out of self-control due to extreme provocation. And the Prosecution is suggesting that this was not the case here because the Defendant did not see, was not present when in fact his friend was wounded although he knew of it because he was informed of it but he himself was not present . . .

All these matters you have to take into consideration when you determine whether or not he was provoked to do what he did. You have to ask yourself whether what was done that day by the deceased was such as to cause a reasonable person in the position of the defendant there to have done what he did. Was it reasonable for a person his age, his sex to have responded in that way, to that kind of action by the deceased towards his comrade and his friend? So in determining whether or not there was any provocation you have got to ask yourself, was the action of the deceased whether what he said or what he did, did that cause the accused to lose suddenly and temporarily his self-control? Did the stabbing cause him to lose suddenly and temporarily his self-control or whatever act of provocation which the deceased may have done. Did that cause him to lose his self control temporarily and suddenly? And the other question you have to ask yourself is, if you say, yes, then you still have to ask yourself, at the time when he in fact shot the deceased was he still acting under that provocation? Was he still under the influence of that provocation or in fact had he in fact recovered from that and was acting intentionally and deliberately out of revenge? Because even if he had for the moment lost his self-control but by the time he came back with the gun he had recovered his composure and was acting out of revenge then he would be guilty of murder and not manslaughter because he would not be acting at the time when he's temporarily lost his self control. He would have recovered it and would have been acting out of revenge. So the justification of provocation will only avail him if in fact he had in fact lost temporarily his self-control and during that time he inflicted the gunshot wound when he was still suffering from that temporarily lost of self control. If in fact it occurred after he had regained his composure and was in fact acting out of revenge then he would be guilty of murder instead of manslaughter if the other elements are there that we have talked about."

11. In his summation the judge directed to the jury on the provisions of section 119 of the Criminal Code. Having read this section to the jury the judge went on to say:

> "He must have been deprived of his self-control by extreme provocation given to him by the other person. So you have to determine whether or not he was deprived of his self-control by the provocation that was given. And the matters of provocation would have been I would imagine the fact that his friend had in fact been stabbed you might have regarded that as extreme provocation for him to lose for the moment his self-control. Of course, you got to take into consideration this circumstances, he's a young boy, might have been frightened, the thing happened so suddenly."

12. Section 119 so far as it is relevant to the ground of appeal, provides:-

> "A person who intentionally caused 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:-
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> (a) he was deprived of the power of self-control by such extreme provocation given by the other person as is mentioned in section 120.
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> (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."

13. The effect of paragraph (a) is that a person who intentionally causes the death of a person by unlawful harm must be convicted of manslaughter and not murder in the instances set out in that section. The evidence must raise a reasonable doubt as to whether the accused person had been deprived of the power of self-control by reason of extreme provocation as set out in section 120 of the Code.

14. In our judgment extreme provocation can only arise if it is within the provisions of section 119(a). The paragraph states that the person must be deprived of the power of self control by such extreme provocation given

by some other person as is mentioned in section 120. The circumstances in which extreme provocation can arise are expressly limited to the circumstances as set out in that section. So section 120 defines what can amount to extreme provocation. See **Vasquez v R [1994] 45 WIR 103, 107** and **Culmer v R [1997] 51 W.I.R. 1**. Effect must be given be given to the word "extreme" since it qualifies the type of provocation required. Section 119(a) speaks not only of provocation but extreme provocation as is defined in section 120.

15. Section 120 provides, in so far as is relevant to this appeal; as follows:-

> "The following matters may amount to extreme provocation to one person to cause the death of another person, namely:
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> (a) an unlawful assault or battery committed upon the accused person by the other person either in an unlawful fight or otherwise which is of such a kind either in respect of its violence or by reason of words gestures or other circumstances of insult or aggravation as to be likely to deprive a person being of ordinary character and being in circumstances in which the accused person was of the power of self-control,
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> (b) the assumption by the other person at the commencement of an unlawful fight of an attitude manifesting an intention of instantly attacking the accused person with deadly or dangerous means or in a deadly manner."

15. It is clear that what was done by the deceased to Gentle, the friend of the appellant, cannot amount to extreme provocation under paragraph (a) of this section as the wording under this paragraph (a) "prescribes an indispensable condition to the availability of the defence that the defendant was deprived of the power of self control" per Lord Steyn in Culmer v R (supra) at page 10. There must be an assault or battery upon the appellant by the deceased. It does not provide for an assault by the deceased upon a third person. The statement of the appellant, to which we will shortly be referring, does not support any allegation of a fight.

17. In so far as paragraph (b) is concerned there is no evidence of any fight, unlawful or otherwise, between the appellant and the deceased. And in any event, the appellant in his statement speaks about the deceased having a small knife. This certainly, in our view, could not support any

allegation that the deceased had manifested any attitude or any intention of attacking the appellant "with deadly or dangerous means or in a deadly manner." In his statement the appellant said that after the deceased had stabbed Jason on the left side of his body, he (the appellant) pulled the gun from out of the bag and pointed it at him. Later on his statement he said that "the man did as if he was coming toward me." We are of the view that there was no evidence which disclosed an assumption by the deceased at the commencement of the altercation of an attitude from which it could be said that he intended to instantly attack the appellant with a deadly or dangerous means or in a deadly manner.

18. The judge in directing the jury on the issue of provocation did not follow the provisions of sections 119(1) and 120 of the Code and did not define what was meant by extreme provocation. It was not in the circumstance of this appeal a material misdirection as in our view there was not any evidence which could possibly raise any doubt as to whether the appellant was deprived of his self control by reason of the extreme provocation.

19. While the trial judge did refer to section 119 of the Code and did make reference to the appellant being deprived of his self-control by extreme provocation, he did not at any stage explain to the jury what was meant by the term "extreme provocation". He gave the jury the common law definition of provocation. But this is not required by the law of Belize. When dealing with provocation, if there is evidence which discloses a reasonable doubt under section 119(a). He must direct the jury in accordance with the provision of that section and 120. He must point out to the jury that the accused must have been deprived of his power of self control and that extreme provocation must have caused such deprivation. He must then tell the jury what amounts to extreme provocation as defined by section 120 and must analyze the evidence to ascertain whether it falls within the closed category of provocation. The judge should be mindful that provocation cannot arise outside the categories of cases described in section 120. The duty of the judge to give this direction arises even though provocation was not specifically raised by the accused. He can and should only do so if there is evidence of the circumstances stated in section 120.

20. The third ground of appeal dealt with the issue of self defence and was based on two limbs:

(a) the judge failed to direct the jury that if they found that the appellant had acted in self defence but used an unreasonable amount of force then a verdict of manslaughter should be returned;

(b) the judge failed to direct the jury that they must use a subjective test in determining the appellant belief that he was in danger and therefore acted in self defence in causing injury to the deceased.

Counsel concedes that the judge did tell the jury that if the appellant "was acting in self-defence he would not be guilty of murder, not guilty of anything because he is acting in self-defence." However, she complains that this direction is an inaccurate statement of the law relating to self-defence. She submits that the judge ought to have directed the jury that "if they believe the appellant acted in self-defence that a verdict of manslaughter ought to be returned if they found that the appellant used an unreasonable amount of force in defending himself."

21. Section 119 (b) of the Code provides as follows:

> "A person who intentionally caused 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 raised a reasonable doubt as to whether
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> (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.

22. Judge when dealing with the provisions of section 119(b) should be mindful of what was said by Lord Bingham in **Norman Shaw v The Queen, Privy Council Appeal No. 58 of 2000** where he said at paragraph 28:

> "If there is no evidence which, even if believed, discloses any reasonably possible justification under section 116 (b) *(now 119(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] 1 WLR 1304 at 1314) and self-defence (Director of Public Prosecutions (Jamaica) v. Bailey [1995] 1 Cr 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."

23. In deciding whether the judge ought to have left to the jury the provision of section 119(b) we are guided by the series of questions which Lord Bingham suggested in Shaw's case should be answered by the Privy Council. The questions are:

(1) "Was there evidence of a situation in which the appellant was justified in causing some harm to Lincoln Weston?"

(2) "Was there evidence that the appellant caused harm in excess of the harm he was justified in causing?"

(3) "Was there evidence that the appellant was acting from terror of immediate death or grievous bodily harm when acting as he did?"

(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?"

24. The evidence to which we earlier adverted does not, in our view, raise any reasonable doubt as to whether he was justified in causing some harm to the deceased. In fact the evidence does not disclose that the appellant was justified in causing any harm to the deceased and consequently it cannot be said that he caused harm in excess of the harm he was justified in causing. Further, the evidence does not show that the appellant was in any way threatened by the deceased or that he may have acted from any terror of immediate death or grievous bodily harm to deprive him for the time being of the power of self control.

25. The appellant in his statement to the police stated that he pulled his gun from his bag after the appellant had stabbed Jason with a small knife. It is of significance that he does not allege that Jason was in any danger. He pointed the gun at the man who "did as if he was coming towards me." We are mindful of the provision of section 36 of the Code which deals with the circumstances in which force may be justified when acting in self defence and thereby causing harm to another person. We do not think that even the circumstances provided for in section 36(1) were satisfied as the evidence does not show that the appellant acted to prevent any crime against his person or Jason. The evidence does not show any assault committed by the deceased upon the appellant or any continuing crime upon Jason.

26. It follows from what we have said therefore that there was no need for the judge to have given any direction as alleged in the second limb of this ground.

27. It was for these reasons that we dismissed the appeal and confirmed the sentence.

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MOTTLEY, J.A.

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SOSA, J.A.

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CAREY, J.A.