IN THE COURT OF APPEAL OF BELIZE, A.D. 2005

CRIMINAL APPEAL NO. 21 OF 2004

KEITH AUGUST	**Appellant**
v.	
THE QUEEN	**Respondent**

—

BEFORE:

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

Mr. Linbert Willis for the appellant.
Mr. Kirk Anderson, Director of Public Prosecutions, and Miss Cheryl-Lyn Branker-Taitt for the respondent.

—

22 February & 24 June 2005.

MORRISON JA

1. On 22 February 2005 at the conclusion of the hearing in this matter, the appeal was dismissed and the conviction and sentence affirmed. These are the reasons for that decision.

2. The appellant was charged with the murder of Juvencio Perez on 26 October 2002 at Guinea Grass Village, Orange Walk District. His trial commenced before Gonzalez J and a jury at the Northern Criminal Session on 7 September 2004.

3. The Crown's case was that on 26 October 2002, which was in fact the appellant's 18th birthday, he and others, including the deceased, were together at a drinking session at the home of Mr. Roberto Patt in Guinea Grass Village in celebration of his birthday. During the course of this drinking session, the Crown alleged that the appellant chopped the deceased, Juvencio Perez (also known as Hugo), with a machete, causing injuries from which he subsequently succumbed at the Northern Regional Hospital.

4. The first witness called by the Crown was Mr. Rabel Westby, himself a participant in the drinking session, described a happy occasion at which "we were drinking, we were celebrating, we were all happy drinking together." During the course of the session, which had apparently commenced well before midday, a full bottle of brandy was consumed, a further half bottle was sent for and at some point in the proceedings, the deceased arrived and joined in the revelry. He was described by Mr. Westby as "thick in body, happy, friendly", fitting in easily with the crowd "as all of us were friends. We know each other very well, we were all chatting." The

group was in a confined space, with the deceased and the appellant described as being about three feet from each other. This is Mr. Westby's account of what happened next:

> "A. We were there chatting as we all drink. Juvencio pulled Keith's pants, he pulled Keith's pants and then he was told to control himself and we continue chatting. Keith was with his hands forward with his hands - - his head forward with his hands. Some five, ten minutes, we just saw he just pulled a matchet (sic).
>
> Q. Could you stop for a second please.
>
> THE COURT: Witness, you sure you are all right?
>
> WITNESS: I am bit nervous.
>
> THE COURT: Just get hold of yourself then speak. Take your time and you talk. Try remember what happened. Okay? Just tell us what happened as you recall. The last note I have that, "Then five to ten minutes Keith (sic) was asked to control himself, yes?
>
> Q. Then about five to ten minutes, what happened?
>
> A. Everything was under control - -

MS. HENRY: My Lord just oblige me for a second, please?

THE COURT: Carry on. Go ahead.

A. We started to chat, continue chatting. Keith was with his hands forward - - with his head forward - -

THE COURT: Keith was what?

INTERPRETER: He indicated Keith was like this, in this motion.

Interpreter indicates.

THE COURT: Okay, he was with his hands like that way, what happened after that? That was Keith?

WITNESS: Yes.

THE COURT: And then when?

WITNESS: When he raised his head he went directly to the matchet (sic), at the same time Juvencio got up to change the cassette.

THE COURT: "When he raised his head" who is he?

WITNESS: Keith.

THE COURT: And what happened when he raised his head?

WITNESS: He went directly to the matchet (sic), he pulled the matchet (sic) and at the same time the deceased went to change the cassette. He was with his back - -

THE COURT: He had something with his back?

INTERPRETER: He said Juvencio was with his back going towards to change the cassette.

Q. With his back towards what or whom?

A. Towards me, towards Keith.

THE COURT: His back was towards, toward me and Keith, it was then that he pulled the matchet (sic).

Q. Who pulled the matchet (sic)?

A. Keith pulled the matchet (sic) and he cut him on his head.

Q. Who did Keith cut on his head?

A. Juvencio.

Q. How many times did Keith use this matchet (sic) to cut?

A. Two times.

Q. And how many times did he cut Juvencio?

MR. WILLIS: My Lord, that is leading.

THE COURT: Yes. Don't lead.

Q. When Keith cut these two times, what if anything happened as a result of these cut?

A. The deceased fell on the edge of the table.

Q. Could you describe how the deceased looked at that time when he fell?

A. He was asking for help. He fell forward and he asked us to take him to the hospital because he did not want to die.

Q. Could you describe how Hugo looked when he fell? When he had been falling, how did he look when he fell?

A. Please repeat the question?

INTERPRETER: He said Juvencio fell to the ground, Hugo fallen onto the table - -

MR. WILLIS: That is not the evidence.

THE COURT: No. He said he fell to the edge of the table.

MS. HENRY: Sorry, edge of the table.

Q. When Juvencio fell to the edge of the table, how - - describe how Juvencio looked at that time?

A. I don't understand.

Q. What if anything did he see?

THE COURT: You see anything when he fell to the edge of the table, on Juvencio? Can you say? You see anything?

WITNESS: Something like what?

THE COURT: Whatever you saw.

WITNESS: I like saw he fell and he was asking us to help him. I just saw a lot of blood around.

Q. Could you describe V's body at that time?

A. He was like in a crouch.

Q. What if anything did Keith do at this time?

A. At that time my cousin took away the matchet (sic) from him.

THE COURT: What is the name of your cousin?

WITNESS: Ermito Patt. Forcefully.

THE COURT: What is that?

WITNESS: At that time, my cousin, Ermito Patt forcefully have him drop the matchet (sic), then Keith came out. He had a knife.

THE COURT: Who is he?

WITNESS: Keith. Keith had a knife stuck in the ground outside.

THE COURT: You saw when Keith did that?

WITNESS: No, I did not see that. I just saw when he pull the knife and he ran.

Q. When you saw Juvencio's body lying on the floor, how many cuts did you see to his body?

A. I only saw two.

Q. And where on his body were these cuts?

A. One here on his head and one on his back.

(Witness indicates).

Q. Could you describe the two cuts that you saw?

A. I don't remember very well.

Q. Do you remember the size of the cuts?

A. No, because I got frighten that day.

Q. What if anything did you do at this time?

A. I went hastily or rushly to get a vehicle so that we could take him to the hospital. I rush out trying to get a vehicle to take him to the hospital."

5. In the ensuing confusion, and after some delay, a vehicle was found to take Juvencio to the hospital. Mr. Westby did not go to the hospital himself but took up the machete that had been used in the attack and went home, where he went onto a parcel of pasture land belonging to a person called Chulim and disposed of it in a watery

area. The following day he went with the police in search of the machete, found it and handed it over to the police.

6. In cross examination on behalf of the appellant, it was put to this witness that "when Juvencio arrived at the house he was already under the influence of alcohol? He had already drank liquor, smell of liquor", to which the witness replied "I don't know." It was further suggested to him by counsel that "Juvencio Perez repeatedly pulled at the pants front of Keith August, pull on his pants fronts" (sic), to which the witness replied "No, only one time, and it was not on the front, it was the side." Pressed by counsel, he insisted that the deceased only pulled one time on the appellant's pants. According to the witness, he had had some drinks "but I was not drunk", but he shortly afterwards pleaded "I don't recall whether I was drunk." Finally, it was put to him:

> "Q. … Okay, you told the court this morning that you saw Juvencio Perez fold up on the floor. Correct?
>
> A. If he had already chopped him?
>
> Q. You said you saw him fold up on the floor?
>
> A. After he was chopped.
>
> Q. Am suggesting to you - - listen me - - that beside him on the floor also was a sharp pointed metal object, like an ice-pick that was right beside him.

A. I did not see.

Q. You did not see it?

A. No.

Q. I suggest to you that when Juvencio Perez got up, he had this ice-pick in his hands and was aiming it at Keith August. That happened when he got up, not to change cassette, but he had this ice-pick in his hands aiming it at Keith August's side.

A. I did not see him when he had an ice-pick."

Q. I suggest to you that Juvencio Perez assaulted, attacked Keith August with an ice-pick when he stood up.

A. I did not see him with an ice-pick.

Q. My final suggestion to you that that ice-pick was left lying on the floor right at the foot of the chair on which Juvencio Perez was sitting.

A. That is not so, I did not see an ice-pick."

7. Ms. Estella Santos then gave brief evidence of having identified the body of her brother, Juvencio Perez, to the doctor who performed the post mortem examination. She described him as "a young man, full of life", who was thirty one years of age at the time of his death.

8. The Crown's next witness was Mr. Ermito Patt, who was also present at the appellant's birthday party on 26 October 2002. In fact, he is the person who bought the first bottle of "tropical brandy" which was consumed in "about an hour and a half" after which, according to him, he went out to a liquor store and purchased a second bottle. Back at the party, which by this time had been joined by the deceased, everyone continued to drink and have a good time when the witness "saw Hugo [that is, the deceased] pulling on Keith's pants." This, according to Mr. Patt's evidence, is what then ensued:

> "Q. Okay. About how many times did Perez pull his pants?
>
> A. Two to three times.
>
> Q. Could you describe Keith's reaction, if he had any at that time?
>
> A. The only thing that he said, "Don't fuck with me, boy." That is all I heard.
>
> THE COURT: He said this before, after the first time, the second time?
>
> WITNESS: Actually, it went consecutively, two to three times then he said, "Don't fuck with me."
>
> THE COURT: After the third time?

WITNESS: Yes.

Q. What if anything did you do or say in response to that?

A. I didn't say anything, I just saw that Keith vomit.

MR. WILLIS: What he said?

THE COURT: Keith vomit.

WITNESS: He was holding here (witness indicates) then I said, "Keith, go and sit where Hugo was sitting and Hugo stand up, so they did that.

THE COURT: Who was holding his stomach?

WITNESS: Keith.

THE COURT: You asked him to do what?

WITNESS: Asked him to sit where Hugo was sitting down.

Q. And did they comply with this?

A. Yes. The moment Keith sat where Hugo was silting (sic) he started to vomit, which Hugo go and push Keith in the back of his head and said, "You are a little boy. Stop drink. You noh suppose to drink."

THE COURT: Yes?

Q. What if anything were you doing at that time?

A. This time I was the DJ. I was going change the cassette around when I heard two chops sounds and I saw Hugo jrap (sic) under a table.

Q. Mr. Patt, what direction where you facing at that time? To who were you facing - -

A. Excuse?

Q. - - when you saw this person fall?

A. They were right over my left-hand-side. The moment I lift my head up I was - -

THE COURT: I don't understand the question. He must have been facing them how else could he see?

MS. HENRY: My Lord, guided on that point.

THE COURT: You were facing Hugo, or you heard the sounds?

WITNESS: Then I saw Keith coming with the matchet (sic).

THE COURT: By the time you looked around Hugo had already drop?

WITNESS: Yes.

THE COURT: You turned around and saw him on the floor?

WITNESS: He was right under the table. I was like this over there, the radio was here.

(Witness indicates)

THE COURT: So you looked around?

WITNESS: I look.

Q. What if anything happened after that?

A. After that, I looked up and I saw Keith coming with the matchet (sic). I grabbed the matchet (sic) off Keith's hands, pushed him out of the house and through the door. I had the matchet (sic) which was bloody.

THE COURT: You saw the matchet (sic) bloody?

WITNESS: Yes. The point was shining, totally sharp. I threw it through the window and I said to Rabel, "Hold him till the police gets here."

Q. To him who were you referring to, who's the him?

A. Keith."

9. Cross examined, Mr. Patt told the court that the drinking session had begun from 8:00 in the morning of 26 October 2002. He agreed with the suggestion of counsel for the appellant that "when Perez was pulling Keith's pants front, … one out of the four of you told Perez to control himself." Indeed, said Mr. Patt, he was in fact the person who had so admonished the deceased.

10. Further evidence was taken by the Crown from the citizen who had kindly taken the deceased to hospital, the police officers involved in the investigation and the doctor who certified the cause of death as "hypovolemic shock due to external and internal haemorrhage and fracture of the skull." It was suggested to P.C. Walter Leonardo, one of the investigating officers, that "there was an ice-pick on the floor by the foot of a chair" at the scene of the incident, to which the witness answered that he did not recall. Corporal Octaviano Victorin also gave evidence of being taken by Mr. Rabel Westby to a pasture about four hundred yards away from Mr. Westby's house, where he retrieved a machete from a pool of water. In due course he formally arrested and charged the appellant for the crime of murder. When cautioned, the appellant remained silent. Corporal Victorin denied that the appellant had told him at the police station that "the man [the deceased] tried to stab him with an ice-pick."

11. The appellant gave sworn testimony in his defence and also called a witness, Mr. Ruby Rodney. He gave evidence of the drinking party and of himself "not feeling too well" because, he said, "I was drinking from the night before." As a result he put his drink down in front of him and "I just hold my hands on my knee and rest my head in my arms." At some point thereafter, about half an hour later, a male, who was not known to the appellant before, entered the house and sat in the empty chair to his left. That person, who "was

smell of liquor" then asked the appellant "in a loud voice", "Bwai, who you, bwai?", to which the appellant made no answer. The appellant shortly after that felt as though he wanted to vomit and did in fact go to sit in the doorway, where he did. He then returned to his seat and again folded his hands and rested is head in his arms. According to the appellant, the newcomer, who was Juvencio then "pulled" at the front of his pants three or four times, telling him "Yuh young bwai, yuh young." Juvencio then pushed him in his head, whereupon the appellant told him "to stop fuck with me." After a while, Juvencio then pulled the front of the appellant's pants again and when he was told by the appellant to "hold it down", Juvencio looked at him in a "vex" manner, "took his right hand and put his right hand underneath his shirt and … took out a bora." A bora, the appellant told the court, is an ice-pick. This one was a steel rod, about 18 inches thick and 8 inches long and, according to the appellant, Juvencio pulled it out and "strike it at me." The appellant "slipped" the blow and fell to the ground, whereupon Juvencio "stood up with a next intent." This is what, according to the appellant's account, then happened:

> "A. He stood up in a vex manner then he lift his arm –
>
> THE COURT: And?
>
> WITNESS: He lift his arm.
>
> Q. Which arm?

A. Right arm.

Q. Where was the ice-pick?

A. It was in his hand.

THE COURT: Yes?

Q. And what happened?

A. Then I just grab the matchet (sic) which was underneath - -

THE COURT: You are not making much sense. He lift his arm with the ice-pick?

WITNESS: Yes, sir, coming towards me.

THE COURT: Why don't you say that.

Q. Yes, man.

THE COURT: "He came towards me."

WITNESS: Yes, sir, which I also believe he was going to - -

THE COURT: You honestly believe?

WITNESS: That he was going to stab me, so I got frighten which I took the matchet (sic) which I strike him two times.

THE COURT: Strike what? The door? The chair?

WITNESS: At the male person.

THE COURT: And strike.

WITNESS: I don't know if I chop him or lash him, I just wanted him to move away from me so - -

THE COURT: You strike at him two times so that he can move away from you?

WITNESS: Yes, sir."

Cross examined by Crown counsel, the appellant maintained that he had acted purely in self defence.

12. Mr. Ruby Rodney gave evidence for the defence. He was a neighbour of Mr. Roberto Patt, at whose house the fateful birthday celebration had taken place and he also described himself as the appellant's brother-in-law (as it turned out, the appellant's sister was his common law wife). He gave evidence that on the morning of 27 October 2002, while he was out in his yard, he saw Inspector Garcia whom he knew before, enter the house "and picked up an instrument looking like an ice-pick", which he described as "about eight to nine inches long." It was made out of metal and was shaped like a "corn beef can opener." Cross examined, it emerged that the appellant in fact lived in the same house as Mr. Rodney. That was the case for the defence.

13. On this evidence, the jury found the appellant not guilty of murder, but guilty of the alternative offence of manslaughter that had been

left to them by the learned trial judge. The appellant was in due course on 17 September 2004 sentenced to fifteen years' imprisonment.

14. The appellant filed two grounds of appeal: firstly, that the conviction was unsustainable in the light of the evidence and, secondly, that the sentence was "too severe." Before this court, Mr. Linbert Willis, who had also appeared for the appellant at his trial, sought and was granted leave to argue the following additional grounds of appeal, as grounds 3, 4 and 5:

> (3) The Learned Trial Judge failed to sufficiently put the defence case to the Jury in respect of the retrieval of the ice-pick.
>
> (4) The Learned Trial Judge failed to adequately direct the Jury in the law of self-defence as it relates to the facts of the case.
>
> (5) The Learned Trial Judge misdirected the Jury on the law of Provocation as it relates to Section 119(b) of the Criminal Code.

15. Mr. Willis, while not formally abandoning ground 1, did not seek to enlarge upon it in his submissions before us. That, in our view, was a prudent decision, as this was a ground patently without merit. We

will return to ground 2, which was dealt with by Mr. Willis last in his skeleton argument. With regard to ground 3, Mr. Willis' submission was that the learned trial judge had failed to point out to the jury that there was evidence before the court which the Crown did not challenge, viz, that the deceased had attacked the appellant with an ice-pick/bora and that Inspector Garcia had retrieved that ice-pick/bora. In support of this submission, Mr. Willis relied on the decision in **R v Hart (1932) 23 Cr. App. R. 202**, for the following proposition:

> "If, on a crucial part of the case, the prosecution intend to ask the jury to disbelieve the evidence of a witness called for the defence, counsel for the prosecution ought to cross examine that witness or, at any rate, to make it plain, while the witness is in the box, that his evidence is not accepted."

16. The root of this complaint is that it was not suggested in so many words to the appellant in cross-examination by counsel for the Crown that the deceased did not attack him with an ice-pick, as he had alleged in evidence, neither was it suggested to the defence witness Mr. Rodney that he did not see Inspector Garcia retrieve an ice-pick from the scene of the crime, as he had stated in his evidence. With regard to the cross-examination of the appellant, it is true that it does not appear to have been put to him specifically that there had been no attack with the ice-pick and, in the

circumstances of the case, this was clearly an omission on the part of counsel for the Crown. But, in our view, the jury could have been in no doubt what the Crown's case was on this aspect of the matter in the light of the suggestions that were actually put to the appellant by counsel for the Crown:

> "Q. You swing at this man?
>
> A. I just defend myself.
>
> Q. You swing at him near the back of his head, isn't that true, Mr. August?
>
> A. I did not know where I hit him.
>
> Q. Did you say first, "I never know if I hit?"
>
> A, I said I don't know if I chop or the matchet (sic) touch.
>
> Q. You know it connected with his head?
>
> A. I know it chop him but not where.
>
> Q. You swing at him again on the shoulder on the back of his shoulder?
>
> A. What I said, I don't know where I hit him.
>
> THE COURT: That is the second time?
>
> WITNESS: I don't know whether I hit him.
>
> THE COURT: First you swing the matchet (sic)?
>
> WITNESS: It was two times repeatedly.
>
> THE COURT: So the second time you swing at him?
>
> WITNESS: It was quick.

Q. I am suggesting, Mr. August, that that man was bending over with his back to you.

A. No, Ma'am.

Q. I am suggesting to you that that man is shorter than you and you taller than him, you were standing over him in the matchet (sic).

A. No, Ma'am.

Q. I am suggesting to you that you chop that man in the back of his head,

A. Like I said, No, Ma'am, I don't know where I hit him.

Q. I suggest to you, you chopped him on his shoulder. I am suggesting to you that you chance that man.

A. No, Ma'am.

Q. You chop that man, Mr. August, you chop that man from behind.

A. No, Ma'am."

As this exchange demonstrates, the case of **R v Hart** is clearly distinguishable, that being a case in which none of the three witnesses for the defence was cross examined by the prosecution ("a remarkable feature of the case", as Hewart LCJ observed at page 206), despite the fact that at the end of the day the "jury were invited by the prosecution to disbelieve the evidence of all three."

17. In any event, the learned trial judge left the appellant's evidence of the attack upon him by the deceased with the ice-pick to the jury in full detail, telling them that "it is good law and good common sense that a person who is attacked or believes that he is about to be attacked may use such force as is reasonably necessary to defend himself." So that there could have been, in our view, no possible prejudice to the appellant from the "omission" of which Mr. Willis complained. In respect of Mr. Rodney's evidence of Inspector Garcia retrieving an ice pick, we do not think that any criticism can properly be made of counsel for the Crown not suggesting to him that this did not happen, for the simple, but important, reason that she may well have had no instructions in this regard: Inspector Garcia gave no evidence at the trial and, and in any event, the witness himself agreed that he could put the incident no higher than that "I first saw Inspector Garcia picked up this instrument then I went home."

18. Mr. Willis's complaint in ground 4 was that the learned trial judge failed adequately to direct the jury on the law of self-defence. In our view, this complaint cannot be sustained. In the previous paragraph we referred to one statement which the learned trial judge made to the jury on the issue of self-defence, and there were in fact several others: they were told that "self-defence in this situation … is a complete defence to the act of the accused", that "if

he honestly believe that he was being attacked with a knife, in this case, if he was attacked with an ice-pick, his actions are to be judged in that light, even if you find as a fact that he was not being attacked with a knife or an ice-pick", that "a person who is defending himself cannot be expected, in the heat of the moment, to weigh precisely the exact amount of defensive action which is necessary. The more serious the attack, or threatened attack upon him, the more difficult the situation will be" and, finally, and hardly least, that "it is for the prosecution to make you sure that at the time of the alleged incident, he was not acting in lawful self-defence. The accused does not have to prove that he was. Okay?"

19. The complaint in ground 5 was that the learned trial judge misdirected the jury on the law of provocation "as it relates to section 119(b) of the Criminal Code." Section 119(b) provides as follows:

> "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 -
>
> (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"

This ground of appeal is also, in our view, without merit: the learned trial judge specifically adverted the jury's attention to section 119(b) and directed them in clear terms that, in addition to self defence, "there is another defence available, or justification available to the accused … So that if at the time of the incident, the accused lost his self control, because he was extremely provoked, or because he felt extreme fear of immediate death or grievous harm, then a justification is available to him and he is entitled to be convicted not of murder but of manslaughter only." The judge also made it clear to the jury that the burden of disproving provocation lay squarely on the prosecution.

20. Mr. Willis submitted, finally, that the sentence of fifteen years' imprisonment was too severe (the appellant's original ground 2) and that Gonzalez J "did not or did not sufficiently take into consideration the mitigating factors that were presented for his consideration." Suffice it to say that nothing this court was told in this regard led us to think that the sentence imposed by this very experienced judge, who heard the evidence given and the submissions made in mitigation by Mr. Willis on behalf of the appellant, could be said to be manifestly excessive in the circumstances.

21. It is for all of the above reasons that at the conclusion of the hearing on 22 February 2005 we dismissed the appeal and affirmed the conviction and sentence.

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SOSA JA

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CAREY JA

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MORRISON JA