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

CRIMINAL APPEAL NO. 17 OF 2006

BETWEEN:

KIRK GORDON	**Appellant**
AND	
THE QUEEN	**Respondent**

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BEFORE:

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

Mr. B. Simeon Sampson, S.C. for appellant.
Ms. Merlene Moody for respondent.

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CAREY, J.A.

27, 28 February & 22 June 2007.

1. The appellant whose trial took place between 10 - 14 July 2006 before Gonzalez J and a jury, was convicted and sentenced to imprisonment for life on an indictment which charged him with the murder of Arthur Ellis on 14 November 2003 in Belize City, now appeals his conviction and sentence. We heard submissions with respect to his appeal against conviction on 27 and 28 February

2007 when we intimated that we would take time to consider and on 8 March we dismissed the appeal and promised that reasons for the decision would be handed down at a later date. We now do so.

THE PROSECUTION CASE

2. The incident which led to the death of Arthur Ellis played itself out in public on a street, Kraal Road in Belize City on the night of 14 November 2003 when Police Officers, Sergeant Enrique Aldana, Constable Carlton Meighan, Detective constable Tillett and Special Constable Colleen Banks, who were on mobile patrol in the area, came up on a scene which they related to the court. They witnessed one man lying on his back on the ground while another man was striking him with a 1 x 3 piece of lumber in the region of "the face and head portion of the body". They were able to see what was taking place because of the lighting conditions, namely the location of two street lights and lights from the police vehicle. Sergeant Aldana ordered the attacker to desist and drop the board. He was eventually subdued and arrested He gave his name as Kirk Gordon (the appellant). Upon being cautioned, he said, "If unu neva reach in time, this would have been a straight murder". Constable Meighan picked up a knife some nine feet from where the injured man lay. It was beneath a van which was parked there and only became visible when the van was moved away. The knife was eventually admitted in evidence although we are not clear on what basis this was allowed since nothing in the prosecution case linked it to the appellant.

3. The medical evidence to which we must now refer, was adduced, we regret to say, in a rather untidy manner. Dr. Estrada Bran, who performed the post mortem examination on the body of the victim, Arthur Ellis, was not allowed to testify as to his examination of the body and the injuries he found, but rather, the post mortem examination report was tendered through him. He was asked the cause of death and thereafter a series of questions arising from his report. But

we would very much doubt if the members of the jury were then in possession of the report and thus in a good position to follow the evidence. There is no note in the transcript that copies of the report were handed up to the jury. At all events, the photocopy with which we were provided comprised illegible cacography which would require some deciphering to be understandable to the jurors.

4. According to the pathologist, Dr. Estrada Bran, the cause of death was traumatic asphyxia. He explained that this resulted from trauma for example, a blow to the face by a blunt instrument, which caused upper respiratory tract obstruction. This condition in turn, was created by bleeding from the oral cavity and nose entering the respiratory tract. The judge summarized the situation pithily and graphically in his observation, with which the doctor agreed, that the deceased choked on his own blood. Dr. Estrada Bran said that there were injuries to the face affecting the mandible and soft tissues to the face: the lower mandible was fractured. In his opinion, in order to 'break' the lower mandible assuming the use of the piece of lumber in evidence, would require 'heavy force', strong force', and more than one blow. We would add that so far as the prosecution case went, it was not challenged in any way. No part of the story related by the appellant, was put to the prosecution's witnesses.

THE DEFENCE STORY

5. The appellant chose to make an unsworn statement. He began by relating an incident between himself and a man he had met in front of his house whom he politely requested not to park his truck by the gate. This led to a confrontation between them. The reply courteous to him was – "weh the fuck the gwine with you, pump?" This man did however drive away. But having parked the vehicle elsewhere he returned to where the appellant was standing. What follows, he detailed in these words:-

"…When he reached into me about three feet, he moved his hand from underneath it shirt. He put ih right hand in ih right pocket and came back up with a knife and put in to my throat. Whe he have the knife at my throat, he told me, 'if yuhwaahn I fucking kill yuh naw?" So when he told me that, he tek his left hand and punched me in the right side of my face. When he did that to me I didn't neva know what to do so I struggled with him, I managed to push him off backward where he stumbled and I ran from front of him going on the left hand side towards the fence. Running away from him on the left hand side going to the fence, I managed to see a stick leaning up against the fence, and when I saw the stick this man was right behind me with the knife. So I ended up grabbing the stick which was leaning up against the fence to defend myself from this man who have the knife. So when I end up grabbing the piece of stick that was leaning up against the fence, I swing around and fired a whop, the stick end up hitting him in his face so I keep whopping cause this man was keep on rushing into me and stabbing after me with the knife. So when this man keeping on stabbing after me, I keep on whopping to mek this man no reach into me with the knife. I must hit him standing up about three times. Then he fell backward. When he fell backward on the ground, he still have the knife in his hand. So when he was on the ground, he was still yet attacking into me with the knife. So when this man was on the ground, the man was still yet firing juck after me on the ground trying to get up from off the ground. So at the time I keep on whopping. I whop him three times more on his hands fee mek the knife fly outa ih hands. When the knife fly outa ih hand, he was still yet trying to get up, so I whopped him and same time the police was coming up the street…"

6. By way of a footnote to this account, he added:-

"… Wit all of this commotion weh me and this man was fight, ih tek bout six to seven minutes I was fighting for my life with that piece of board. If

dah board neva was leaning up against the fence, I don't know if I'd be standing in this courtroom telling you the truth and nothing but the truth…"

7. The cardinal line of defence expressly stated in that statement was self defence. That defence, the trial judge clearly and accurately left to the jury for its consideration. As his directions in that regard were not challenged, we need say nothing more in regard to it.

8. By his grounds of appeal, however, the appellant complained as follows:-

> "1. The learned trial judge erred by failing to direct the jury adequately on the use of excessive force in self defence within the meaning of section 119(b) of the Criminal Code, as distinct from the law on provocation in sections 119(a) and 120(a) and 120(e); consequently the basis upon which the jury could properly return a manslaughter verdict was never made clear to the jury. (p.227 line 14 to p. 229 line 11…."
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> 2. At p. 231 lines 12 – 16, The learned judged erred by instructing the jury in a manner suggesting that manslaughter verdict is not available if they found an intention to kill in the context of provocation. The jury were never told that a defendant charged with murder may raise a defence of provocation even though he has killed intentionally. *R v. Cleon Smith* and *R v. Norman Shaw*.
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> The proper result now should be a substitution of a verdict of manslaughter instead of murder because of the failure of the learned judge to put defence of self defence and/or provocation into proper context."

THE APPEAL

9. In light of the dock statement given by the appellant, the trial judge was in our opinion obliged to leave as well to the jury the defence of extreme provocation arising under sections 119(a) and (b) of the Criminal Code Cap 101 which allow a verdict of manslaughter to be returned by the jury. Section 119(a) provides as follows:

"… 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 –

(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, or
(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, or …"

We set out section 120 (a):-

"..The following matters may amount to extreme provocation to one person to cause the death of another, namely –

(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 the circumstances in which the accused person was, of the power of self-control…"

10. It is right to observe that if ever there was a case which required the appellant to give evidence on oath, this was the paradigm. The only person who could contradict the prosecution case of murder and explain away inferences as to his intent and state of mind which would be justified by that case, was the appellant. An unsworn statement from the dock has no evidential value and cannot proved facts not otherwise proved by evidence. Its potential effect is persuasive. *(See R. v. Coughlan The Times, July 1976)*. In *R. v. Beckford [1987] 3 ALL ER 425,* The Board in tendering its advice, observed as follows:-

> "…Now that it has been established that self-defence depends upon a subjective test, their Lordships trust that those who are responsible for conducting the defence will bear in mind that there is an obvious danger that a jury may be unwilling to accept that an accused held an "honest' belief if he is not prepared to assert it in the witness box and subject it to the test of cross-examination…"

We think that those words are equally apposite in relation to the defences articulated in section 119(a) and 9(b) of the Code seeing that they speak to the state of mind of the person causing the death.

11. Mr. Sampson, S.C. conceded also that the judges' directions on section 119(a) and 120(a) were not being challenged in any way and could not be faulted. The gravamen of his complaint was the inadequacy of his directions as to the use of excessive force in self defence, under section 119(b). Although Mr. Sampson was pressed to state the nature of the inadequacy of which he complained and was invited to suggest what he was urging the trial judge, to say, we were not able to appreciate with any clarity wherein lay the deficiency.

12. The trial judge dealt with this defence at p. 227 in these words:

"…But Members of the Jury, you still have to consider the other defence available to him, that is, that when the accused did the whopping to the person of the deceased, he did so because he had lost his power of self-control for the time being by reason of such terror of immediate death or grievous harm. And that terror of death or grievous harm was caused to him by Arthur Ellis who had the knife, who had threatened him and who had pursued him. In other words, he was fearful of his life, he is fearful that he would be hurt, fearful that he would be killed, that for the time being he lost his power of self-control and acted excessively by inflicting multiple blows to the deceased. Again, Members of the Jury, how do you determine whether or not the accused had lost his power of self-control for the time being to the extend that he acted excessively when the words were said to him and when the things were done to him by the deceased, according to his version? Again, Members of the Jury, here you have to ask two questions. May the deceased conduct, that is, the things he did and the words he used to the accused at the alleged scene of the crime cause the accused to experience terror of immediate death or grievous harm to himself to a point where he lost his power of self-control for the time and behaved as he did excessively, by whopping multiple times to the person of the deceased? If you are sure that the answer to this question is no, then the prosecution would have disproved the loss of self-control by reason of terror of immediate death or grievous harm to himself, and provided the prosecution has made you sure of the elements of this offence of murder, to which I have been referring, your verdict will be guilty of murder. If however, your answer to that question is yes, then you must go on to consider the second question. Did the conduct of the deceased have been such as to cause an ordinary or reasonable and sober person of the accused's age and gender to experience terror of immediate death or grievous bodily harm as an result of the acts of the deceased with the result that he lost his power of self-control and behave as he did. As to the second question, Members of the Jury, take into account everything

said and done according to the effect, which in your opinion, it would have on an ordinary and reasonable person. And again, because the prosecution must prove the guilt of the accused person, it is not for the accused to prove that he did not lose his power of self-control by reason of terror of immediate death or grievous harm when he inflicted the blows to the deceased. Members of the Jury, it is for you to decide on the evidence adduced by the prosecution after considering the version of the accused whether or not you think the accused was provoked, or whether you think the accused lost his power of self-control by reason of terror of immediate death or grievous harm. That is a matter for you…"

Mr. Sampson did not contend that these directions amounted to a misdirection nor did he argue that there was any non-direction as was the situation in *R. v. Norman Shaw (unreported)* delivered 24 May 2001 and also in *R. v. Cleon Smith* (unreported) delivered on even date by the Privy Council, both appeals from this jurisdiction. Both cases are of importance because they call attention to the operation of section 119(b) of the Criminal Code and explain the applicability of that section. *R. v. Shaw* is helpful as showing the relationship between section 119(a) and section 119(b). In *R. v. Shaw* it was stated in para 25 (so far as is material):-

"…a provision to the effect of what is now section 116(b) (the present section 119) has formed part of the Criminal Code of Belize since 1888…"

"…It is noteworthy that subsections (a)(b) and (d) all refer to deprivation of the power of "self-control"' an expression also found in section 118 (the present section 120(e)) which reproduces (with one verbal amendment) the terms of section 3 of the English Homicide Act 1957. In all of these instances the expression "self-control" plainly bears the meaning familiar in the context of provocation. But whereas, for purpose of the defence of provocation, the defendant must be provoked to lose his self-control by

> things done or things said or both together, for purposes of section [119(b)] the deprivation of the power of self-control must be caused by terror of immediate death or grievous harm. In each case the defendant's loss of self-control must cause him to act in the manner charged against him, but the triggering event in the two cases is different…"

and the Board concluded:-

> "…the Board cannot accept that section [119 (b)] can be construed differently from section [119(a)]…"

The directions of the trial judge clearly show that he was very much alive to the legal position. His treatment of both these provisions demonstrates this. Mr. Sampson did not show wherein lay the inadequacy and we were not astute to discover it.

13. With respect to ground 2, Mr. Sampson sought to rely on certain directions given in respect of manslaughter if the jury concluded on the facts that the intention of the appellant was not to kill but only to harm. The judge said this (at p.231) having dealt with the verdict of manslaughter by reason of provocation arising under section 119(a) or (b):-

> "…With respect to the verdict of manslaughter, it is only after you have rejected murder, but you think that there might be something there with respect to the intention, the intention was not to kill but only to harm, that you will then consider the alternative verdict of manslaughter…"

There can be no question but that the learned judge was leaving for the jury's consideration a verdict of manslaughter on the basis of no intention. It is to grasp at straws to suggest that by these words the judge was suggesting to the jury that a manslaughter verdict is not available if they found an intention to kill. He

stated explicitly that if they were not satisfied that the intention was to kill, then they were at liberty to return a verdict of guilty of manslaughter on that basis. He had previously clearly explained manslaughter on the basis of provocation and moved to another basis for a manslaughter verdict. This case is altogether to be distinguished from *R. v. Cleon Smith (supra)* where the judge had wrongly directed the jury that provocation did not fall to be considered if they found the killing to have been intentional. In the instant case, the trial judge had given no misdirection along those lines, and it is not possible on the most charitable interpretation to say that the quotation referred to above, can bear the suggestion being put forward. The ground is really without merit.

14. We are satisfied that all the defences which fairly arose on the facts, were left for the jury's consideration. By their verdict, the jury must have been satisfied that the appellant intended to kill the deceased in circumstances where even in his statement from the dock, having disarmed Arthur Ellis, he nonetheless continued to pummel his face until ordered to desist by the police who arrived on the scene, regrettably too late to save his life. We saw no grounds to interfere. In our view, there has been no miscarriage of justice.

SOSA JA

CAREY JA