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

CRIMINAL APPEAL NO. 33 OF 2005

BETWEEN:

SHELDON ARZU **Appellant**

AND

THE QUEEN **Respondent**

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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 L. Willis for appellant.
Mr. Kirk Anderson, Director of Public Prosecutions, for respondent.

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13 October 2006, 8 March 2007.

CAREY, JA

1. The appellant, a police officer in the Belize Police Department, was convicted before Gonzalez J and a jury of manslaughter on an indictment which charged him with the murder of Ruben Alarcon on 7 June 2003. He was sentenced to a term of thirteen years' imprisonment. We heard submissions last October when we dismissed his appeal against conviction and sentence. We intimated that our reasons would follow. They appear below.

FACTS

2. The prosecution case may conveniently be divided into two segments, “the street incident” and “the police station incident” in the course of which Ruben Alarcon met his death at the hands of the appellant. On 6 June 2003 at about 8:00 p.m., Keith Welch, a witness for the prosecution said he was having drinks with friends behind the Sunset View Disco which is situated in a back street in Caye Caulker. Among their number, was Alarcon, the victim. A man came by on a bicycle, pedaling furiously, followed by a golf cart with two police officers aboard, the appellant and constable Cowo. It stopped in an alley behind the disco. The drinking companions got up and approached it, enquiring of the officers what was the problem. The response was for the appellant to leap from the golf cart, unholster his firearm, and voice a dire warning – “back up, back up. I wahn shoot and watch one a unu flattta”.

3. A less sanitized version was provided by another of the drinking companions, Michael “Yellow Man” Henry, who confirmed that he was with two other friends “chilling out”, which is current jargon for passing time idly. They were having drinks at the Sunset View Disco, when the police came to the back of the disco. Before they came up, however, a man known to him as “Popcorn”, rode a bicycle through the back of the disco and went through the alley. When the police officers arrived in their golf cart, they jumped out and were asked what was the problem but they gave no answer. Indeed, they were suggesting that they had been obstructed which allowed the man to escape. An argument developed with them and one officer pulled his gun and pointed it at them shouting – “step back, step back”. He identified that officer as the appellant. Thereafter the police left.

4. The second segment occurred on the following day. On the morning of 7 June, two police officers came to Ocean Side, a restaurant and bar, to advise Michael Henry that his presence was required at the police station. When he arrived there, he was placed in a cell. Later that morning his friend, Ruben Alarcon

accompanied by “Flash“, another friend, visited him and brought a meal. When they arrived at the police station, he was able to see Sergeant Pitts, the appellant, Constable Arzu and Constable Cowo. Alarcon requested information of Sergeant Pitts whether he intended to charge Henry and was told by him, (surprisingly as it seems to us, in view of the fact that he was the senior officer present), that he should ask the man who was to charge him. That person was Constable Arzu, the appellant. When however, Alarcon spoke with him, he gave no answer. Alarcon then pointed out the obvious to Sergeant Pitts: that it was not possible to speak with someone who did not wish to speak. The Sergeant repeated what he had stated earlier, that Alarcon should speak with the appellant, and then removed himself through a back door. At this point, the appellant pulled his firearm, pointed it at Alarcon and fired, hitting him in his face. He fired another shot which caught Alarcon in the back. After the injured man fell, further shots were fired apparently into the ground. The Sergeant returned at this stage. He removed the appellant through the back door and “took him upstairs”, according to Henry. These events Henry viewed through a peep-hole in his cell.

5. Sergeant Pitts also gave evidence for the prosecution. He was the officer in charge at the material time. He first spoke with Alarcon at about 4:00 p.m. while attending a meeting of the Fisherman’s Co-operative on the beach which was scheduled to take place between 10:00 a.m. and 6:00 p.m. At 5:00 p.m. at the police station, he was again spoken to by Alarcon but on this occasion, the latter was accompanied by a man known to the sergeant as “Flash”. Sergeant Pitts knew the reason for Alarcon’s presence in view of their earlier conversation. He related that at about 5:10 p.m. he was outside the back door of the police station in conversation with two police officers, when he heard a noise inside the station. When he entered, Alarcon was behind the counter nearest the cell while Constable Arzu, the appellant, was standing in front of him barring his way to the cell. Sergeant Pitts spoke firmly to Alarcon and removed him from his position behind the counter. At this time, the sergeant had to leave because it was the

time scheduled for the departure of the last boat and he left to go upstairs to fetch a bag which was to go on the boat. As soon as he reached upstairs, he heard two shots which caused him to retrace his steps. He saw Alarcon lying on the floor while the appellant was behind the counter with a gun in his hand. He took possession of it. He asked the appellant what happened. His reply was – "he was gonna kill me". We doubt if this response was admissible evidence; it seemed to be self-serving and was produced from the question – "where was the weapon at the time?" The officer went on to say that he removed four live rounds and two expended shells from the revolver. There was also a bottle of Guinness and a small machete on the counter. Sergeant Pitts volunteered that he was told by police officers that the Guinness belonged to Alarcon, and the machete was "for the gentleman that leave the station". The judge interjected – "you know who is the gentleman?" The answer – "I know him by Flash". This hearsay evidence was then highlighted by the judge's observation – "So the machete was for Flash? The witness was very helpful and replied – "That's what I was told". We think it right to point out that in keeping with his obligation to ensure a fair trial, the judge is entitled by wise and timely intervention to remove uncertainty or clarify what is obscure. In that way, he assists the triers of fact to better appreciate the flow of evidence. We doubt that what occurred in the instance just noted, is a conspicuous illustration of that responsibility.

6. Having set out the circumstances of the crime itself, we can now detail the medical evidence which confirmed that Alarcon had been shot twice, one entry wound was to the left eyelid, the exit wound of which was in the temporal region, the other wound was by the shoulder blade and a bullet was retrieved from the left side of the tongue. The cause of death was given as hypovolemic shock and internal injuries caused by gunshot.

7. A number of other persons were called to give evidence, the effect of which, added nothing of significant value to the prosecution case. That case portrayed an example of police over-reaction.

8. The appellant, in his defence, gave evidence on oath. His version of the two segments of the events differed, not surprisingly, from the prosecution details. As to the first segment, on 6 June 2003 he was on mobile patrol with Constable Cowo in Caye Caulker. He received a report of the stealing of a bicycle by a "dark-skinned person" in the early hours of 7 June. Constable Cowo and himself set off to investigate. They arrived at the Sunset View Disco where a "dark skinned person" on a bicycle was pointed out to them. That person who was looking in their direction, made off. They pursued him, but stopped when a narrow alley way prevented further progress of their golf cart. Pursuit continued on foot until they were confronted by eight men who blocked their path. Among this group, were Michael Henry, Keith Welch, Steven Flowers and "Chubby". Henry warned them against coming on private property to arrest anyone. "Chubby" pushed Constable Cowo in his chest and commanded him to remove the golf cart from the property, whereupon Cowo told him not to touch him because he was assaulting a police officer - when Chubby clenched his fist and raised it as if he intended to strike the officer. This conduct prompted the appellant to unholster his firearm and tell the man to "back off" the officer. Welch then remarked – "Dat noh you I waahn. Dat Arzu I waahn". After that the men moved away.

9. On 7 June at about 4:00 p.m. he reported for duty. He was dressed in uniform. There were two prisoners, Michael Henry and Marlon Arnold, known as "Popcorn", in a cell. He checked the prisoners by peering through a porthole which had a sliding cover. Other officers were at the station including Constable Cowo. Sergeant Pitt told him that two men had come earlier demanding the release of Michael Henry and he should keep alert because they would be returning.

10. At 5:00 p.m. "Flash" and Alarcon entered the station. Marcus who had a bottle of Guiness in his hand, inquired when Michael Henry would be released and was advised that he would be charged for obstruction and taken to court. On the trial

judge's intervention to enquire, "how", the question was asked, the appellant told the jury that it was done in a loud tone of voice and added for good measure that Marcus seemed to be under the influence of alcohol or drugs. He went on in his narration to say that Alarcon then went to the cell where Michael Henry was secured. Sergeant Pitts then removed Alarcon from near the cell and pushed him to the front of the counter and then left. Marcus said that Henry should be released immediately or he would wipe the appellant from the face of the earth, and pushed his right hand in his pocket which the appellant interpreted to mean that he was going to pull out a dangerous weapon, possibly a gun. At this point, he noticed that Flash was armed with a machete which he had raised in a "chopping motion". As both men were advancing on him, he pulled his revolver and fired two shots in the direction of Alarcon who staggered and fell. Sergeant Pitts returned quickly and took away his firearm and enquired what had happened. The appellant told him they were about to kill him. Flash dropped the machete and ran through the back door.

11. The appellant called in support of his defence, Constable Guzman. He testified that he came on duty 7 June 2003 and was present when two men Marlon Arnold and Michael Henry were brought to the police station on charges of theft of a bicycle and obstructing a police officer, respectively. They were placed together in a cell. In the course of the morning Michael Henry received two visitors, his wife and Ruben Alarcon and another man unknown to him. Constable Guzman ended his tour of duty at 4:00 p.m. when he handed over the appellant. He remained in the station. Other police officers were at different parts of the station.

12. At about 5:00 p.m. Alarcon returned to the station accompanied by "Flash". Alarcon had a pint of Guinness stout in his left hand, while he had his right hand in his pants pocket. Alarcon passed through an opening in the counter and announced that he had come for his man Yellow Man now because he was in charge of him. Sergeant Pitts who was outside the back door of the station,

walked inside and pushed Alarcon out but he returned followed by Flash. In answer to the judge's query as to where Sergeant Pitts was, he said he was in his quarters. It is not readily apparent how the witness divined this fact. When Flash re-entered, he still had the machete and Alarcon still had his right hand in his trouser pocket. Flash raised the machete and advanced on the appellant as did Alarcon, hand in pocket. The appellant drew his revolver and fired two shots. Alarcon staggered and fell. Sergeant Pitts came downstairs, took away the revolver from the appellant and shepherded him into the sergeant's office. When the appellant fired, Flash threw the machete on the counter and ran through the front door. This witness did not comport himself well under cross examination and by his answers, would not, we think, present a convincing figure in the witness-box.

13. It was clear that the issue for the jury was, in what circumstances did Ruben Alarcon meet his death. The matter resolved itself into a matter of credit. Which side did the jury believe? In the event, the jury believed a portion of each version. They returned a verdict of guilty of manslaughter on the footing that the appellant was justified in causing some harm, but caused harm in excess of that justified under section 119 of the Criminal Code which provides as follows:

> "Every person who causes the death of another person by unlawful means shall be deemed guilty of manslaughter and not murder if there is such evidence as raises a reasonable doubt as to whether that person was justified in causing some harm and that in causing the 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 of the power of self control".

THE APPEAL

14. Some six grounds of appeal were filed and argued on behalf of the appellant by Mr. Willis.

GROUND (1)

"The learned Trial Judge in his summing up failed to properly direct the jury as to the full thrust of the defence".

The submission which amplified this ground in the skeleton arguments, was, that the judge failed to properly direct the jury that the law provided that a person was justified in using force in extreme necessity even to the extent of killing to prevent or defend himself against the crimes of murder, manslaughter, dangerous or grievous harm as set out in section 36(4) of the Criminal Code.

15. The trial Judge did not express the defence in these specific terms. The question then, is whether that criticism has caused a miscarriage of justice. There is no question and it was not suggested by Mr. Willis that the defences open to the appellant were not correctly and fairly put before the jury. Thus self defence, provocation and the defence compendiously called defence of excessive force (under section 119 of the Criminal Code) were put to the jury. At the conclusion of his summing up, the judge specifically addressed defence counsel as to whether he had omitted any important point of law, and defence counsel answered in the negative.

16. We can now examine the judge's directions to discover whether they fail in the manner suggested by Mr. Willis. The trial judge structured his directions, we would suggest, in a manner that would be readily appreciated by the jury. He began thus at p. 421:

> "…In this case, Members of the Jury, the defence position is that the accused at the critical time when he fired the two shots which caught the deceased on the left side of his face and the other on his left side of his back, he did so in a lawful way because he was defending himself…"

The factual matrix in which the defence of self defence was to be considered was first spelt out. The judge then proceeded to present all the defences raised in this way at p. 423:-

> "So in effect, Members of the Jury, the defence is raising three defences, the defence of self defence which is a complete defence, and the loss of self control by reason of provocation, which is a partial defence, and the loss of self control by reason of immediate terror of death or bodily grievous harm, which defence again is a partial defence. Because what those two defences do, provocation and loss of self control by reason of immediate terror of death, or grievous bodily harm, Members of the Jury, is to reduce the offence from murder to manslaughter. Self defence is a complete acquittal."

The judge then indicated that he would give directions as to how to deal with the evidence in terms first of self defence and then the other two defences which are partial. At p. 429, he stated as follows:

> "Members of the Jury, usually when a person uses deliberate violence towards another, and injures or kills that person, he acts unlawfully. However, it is both good law and good 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. If that is the situation, his use of force is not unlawful because he is

acting in lawful self defence and he is entitled to be found not guilty. But how does a person act in lawful self defence? The law is that a person only acts in lawful self defence if in all the circumstances he believes it is necessary for him to defend himself, and the amount of force which he uses in doing so, is reasonable. The prosecution in this case is telling you that though the first shot might be evidence that the accused feared that he was going to be killed and therefore shoot in self defence, what about the second shot after Alarcon had turned? What about the second shot, if you accept the evidence of Michael Henry? That, the prosecution is saying, is excessive force and that takes away the defence from the accused. Nevertheless, there are two main questions for you to answer in respect to this defence. Now, did the accused believe or may he honestly have believed that it was necessary for him to defend himself? If the prosecution has not make (sic) you sure that the accused did not shoot Alarcon in the belief that it was necessary to defend himself, then self defence simply does not arise in this case and the accused is to be found guilty. But if you decide that he was or may have been acting in that belief – and these are crucial words, Members of the Jury, that you should listen to – then Members of the Jury, you must go on to answer the second question, which is: taking the circumstances as the accused believed them to be on that day in question at the police station, when confronted with these two persons, was the amount of force which he used reasonable? Was that force reasonable? The law is, Members of the Jury, that force used in self defence is unreasonable and unlawful if it is out of proportion to the nature of the attack, or if it is in excess of what is really required of the accused to defend himself."

The judge after those directions, expanded on them with further directions which occupied some five pages of letter size typescript. In our opinion, these directions correctly and fairly brought home to the jury the issues they were required to consider. The jury could be in no doubt, we think, that if they came to the conclusion that if they thought that the appellant honestly believed his life was in danger in the circumstances narrated by the judge, that the appellant was entitled to defend himself by discharging his firearm.

With all respect to the pertinacious arguments of counsel, for which he is to be commended, we are unable to agree that there was any deficiency as suggested in the summing up. Section 36(4) justifies the use of lethal force as part of the principle of self defence. In our judgment, the directions given did not deprive the appellant of the defence of self defence which he expressly raised. For these reasons, we reject this ground.

GROUND (2)

17. "The learned Trial Judge improperly withdrew an issue of fact from the Jury".

Mr. Willis condescended to particulars when he came to address us on this amorphous ground. He submitted that in giving evidence, the appellant testified that Alarcon advanced towards him as if to pull out a dangerous weapon like a gun but the deceased did not produce anything from his pocket. This evidence, it was submitted, raised the issue of mistake and obliged the trial judge to direct the jury that the reasonableness or otherwise of the mistake is a factor to be considered.

18. Mr. Willis, it has to be said, did not press this ground seeing that the judge in giving directions on the aspect of honest belief had faithfully followed the Privy Council case of *Queen v. Beckford [1988] A.C. 130*. The trial judge was very careful to say this at p. 432 in the course of his directions on self defence:-

> "Now, each case, Members of the Jury, comes before the court in a different way, and in deciding this question (viz. self defence) use your common sense, experience and knowledge of human nature, and of course, your own assessment of what actually happened at the time of the alleged incident. In deciding this question, Members of the Jury, judge what the accused did against the background of what he honestly believed the danger to be out there at the police station when he was confronted by these two persons. So, for example, if the accused honestly believed that he was being attacked with a machete, and believed that Alarcon was going to draw a weapon on him, be it a gun or something else, his actions are to be judged in that light, even if you find as a fact that he was not being attacked with a machete or any other weapon. Members of the Jury, the law is saying, it is what the accused believed at the time. Did he believe, or may he have believed that he was about to be attacked? That is what is crucial."

This decision of the Privy Council amplified and expanded on *Reg. v. Williams 78 Cr. App. R 296* which was the first case to introduce the concept of honest belief into the defence of self defence. Thus the defence of mistake of fact was incorporated into the defence of self defence. This had been foreshadowed in *Reg. v. Fennell [1971] 1 Q.B. 428* where Widgery, LJ (as he then was) had commented:

> "Where a person honestly and reasonably believes that he or his child is in imminent danger of injury, it would be unjust if he were deprived of the right to use reasonable force by way of defence merely because he had made some genuine mistake of fact".

We have little difficulty in holding that the submissions on this ground are misconceived and that the mistake apparent in the circumstances of this case were directly and clearly addressed by the trial judge. This ground is, we fear, without substance.

GROUND (3)

19. "The learned Trial Judge misdirected the Jury on matters of self defence and Provocation raised by way of defence".

Despite the criticisms of misdirection as to self defence and provocation, counsel said that he had intended his criticisms to refer to non directions. In the event, he was constrained to resile from that position when the court drew his attention to specific directions in that regard. We refrain from quoting them in the light of his frank *mea culpa*.

GROUND (4)

20. "The learned Trial Judge failed to give the Jury directions as to the good character of the defendant".

Counsel conceded that the good character of the accused had not been raised at trial. It was not an issue. He conceded also that when the trial judge at the conclusion of his direction, asked him if there was any important point of law which he had omitted, he had assured the trial judge that he had not. We are content to say that directions on good character were not called for as it was not raised in the case. See *R. v. Lockhart (1995) 50 WIR 183* where the principle is encapsulated in the headnote:

"Where an accused adduces no evidence of good character and where the accused's good character is not relied on as an integral part of the defence there is no obligation on the part of the trial judge to give a direction to the jury as to the accused's good character "

We cannot approve of criticisms being levelled at a trial judge after assurances that he has not omitted any matter of importance in his direction. Counsel should do well to advise themselves before responding to such queries by a trial judge. We wish to make it clear that this comment in no way lessens the import of what the Privy Council has pointed out in *Edmund Gilbert v. The Queen [2006] UK PC 15* at para. 21, namely that where in doubt over the specific question whether a good character direction should be given, a trial judge is required by good practice to raise the matter with counsel. The question put to counsel by the judge in the instant case was the general one whether he had omitted to deal with any important point of law, not the specific one whether a good character direction was in order.

21. There were two other grounds of appeal which were not pressed and we therefore refrain from setting them out and dealing with them. We merely add that they were without merit.

22. Before leaving this matter, we note a practice which has no authority, whereby the trial judge directs that some reply by a witness "be struck from the record", and would suggest that it cease. The Court Reporter is required to record the proceedings and cannot therefore omit or be directed to omit any part of the proceedings. Where evidence is adduced which the judge considers inadmissible, he can and should ask the jury to ignore it and not take it into consideration.

23. Finally, we wish to say that the issue in the case was essentially simple. The jury, as it appears, believed a part of the respective versions, and found the

appellant guilty of manslaughter on the basis of excessive force. There were good grounds for their decision which is supported by the evidence.

SOSA JA

CAREY JA

MORRISON JA