Privy Council Appeal No. 59 of 2000

Cleon Smith *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF BELIZE

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 24th May 2001

Present at the hearing:-

Lord Bingham of Cornhill
Lord Hoffmann
Lord Cooke of Thorndon
Lord Scott of Foscote
Sir Patrick Russell

*[Delivered by **Lord Bingham of Cornhill**]*

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1. On the evening of 27 July 1996 the appellant shot and killed Ainsworth Wagner (also known as "Pie") in Belize City. At his trial for murder of the deceased the appellant admitted the killing but raised defences of self-defence and provocation. He was convicted and his appeal against conviction was dismissed by the Court of Appeal. In this further appeal by special leave of the Board the appellant accepts that his primary plea of self-defence was conclusively rejected by the trial jury on a proper direction, but he complains that the trial judge misdirected the jury on provocation and failed to give a direction which should have been given on the possible application of section 116 (b) of the Criminal Code of Belize. Provocation or justification under section 116 (b), if not disproved by the prosecution, would lead to acquittal of murder but conviction of manslaughter. It is that verdict for which the appellant now contends.

2. The prosecution relied on the evidence of four eye witnesses, all of them members of the extended family of the deceased, one of

them his brother Glenroy. There was evidence that on the evening of 27 July at about 7.30 – 8.00 p.m. the appellant went to a small house on Mayflower Street where the deceased lived, carrying a handgun. He opened the door, looked in, left, walked away and stood on Mayflower Street, gun in hand. The deceased approached, riding a bicycle with his brother Glenroy close to him on foot. There was an exchange of words between the deceased and the appellant. The deceased got off his bicycle. They continued to talk. The appellant came towards the deceased and said "I am going to shoot your fuck". The deceased replied "Shoot boy, duh mi what yuh haf tu duh mi if u want". The appellant then fired a shot at the head of the deceased from short range. The deceased ducked and the shot missed. The appellant then took some steps towards the deceased and fired a second shot at close range into the body of the deceased. The appellant then ran off firing a third shot, this time at Glenroy.

3. This prosecution evidence was strong, but not without inconsistencies and weaknesses. One witness said that the deceased was holding his bicycle during the final confrontation, another that he threw it on the ground. The former account was harder, the latter easier, to reconcile with the appellant's own account. There was differing evidence whether the first two shots followed in quick succession or were separated by some minutes and continuing argument. Although all four witnesses spoke of three shots, only two spent cases were found. There was evidence of bad blood between the deceased and the appellant and evidence that, shortly before the fatal confrontation, the deceased had said to the appellant "Before the night finish I will catch you and stamp you down". The unchallenged medical evidence was that the deceased had sustained not only a bullet wound to his chest which killed him but also a bullet wound to his left upper arm.

4. To rebut the prosecution evidence the appellant did not give sworn evidence on his own behalf nor did he call witnesses. Instead, he relied on a statement which he made to the police under caution on 26 September 1996, adduced in evidence by the prosecution, and an unsworn statement from the dock.

5. His police statement was to this effect (so far as relevant for present purposes):

> "On Thursday, 25th day of July, 1996 between 1.00 p.m. and 2.00 p.m. whilst at home at the above mentioned address, one, Mark Mosiah, alias 'Pantyman' arrived at my house. Mark then told me that Ainsworth Wagner alias 'Pie' say if I don't send something for him he 'Pie' and 'Cat' will come for

it at my house. 'Cat' is the nickname of Steven Requena who is Ainsworth Wagner's brother-in-law. On Friday the 26th day of July 1996 at about 7.00 a.m. I was riding my bicycle accompanied by 'Pantyman' on Vernon Street. Upon reaching Brads Store on Vernon Street I met 'Pie' who punched after me with his left hand. He then said to me, 'pussy, if you no give me something I will kill you like how they kill Saragosa'. I told Ainsworth Wagner, 'Pie', 'what I have is for me and my children'. I then rode off and went home along with 'Pantyman' ... I went home to my house on Sibun Street at about 12.00 midday on 27th day of July 1996 … I then went back to 'Pantyman' house on my bicycle. I stayed at 'Pantyman' house until about 5.00 p.m. and went back to look for my girlfriend on Vernon Street. I then rode up Vernon Street and pass Mayflower Street when I saw Ainsworth Wagner alias 'Pie' standing corner of Vernon and Mayflower Street playing with a ball. I then stop at my girlfriend house but she was not at home. I then rode on Central American Boulevard and then into Banak Street and made checks at one Rosina house for my girlfriend. I did not find her there so I rode into Lakeview Street and rode into Vernon Street. I then rode up Vernon Street towards Mayflower Street. Upon reaching the junction at Mayflower and Vernon Streets I saw that Ainsworth Wagner alias 'Pie' was still standing there but this time he was along with his brother name unknown to me. I then decided to go right from Vernon Street into Ebony Street. This was about 5.30 p.m. As I was turning right into Ebony Street Ainsworth Wagner and his brother chase me on his bicycle and Ainsworth Wagner had a knife which looked like a butcher knife in his right hand. Ainsworth Wagner was riding his bicycle, a beach cruiser, blue in colour and his brother was seated on the handle of the bicycle. When he chased after me, he was holding the knife in his hand which was against the handle of the bicycle which he was holding. When Ainsworth Wagner saw that he cannot catch up with me he shouted to me saying that he will get me like how he get Saragosa. I believe that Ainsworth Wagner wanted me to give him money, hence, the reason he chased me and threaten me. I then decided to get hold of a firearm to protect myself as I believe that Wagner was getting serious. After Wagner chase me on Ebony Street I went home and got hold of my .380 pistol and I went to look for my girlfriend. I did not find my girlfriend. I then decided to go to the village which is St Martin De Porres to cool off … I then left St Martin de Porres area and went to Rosina house and about 8.00 p.m. I did not find my girlfriend there. I

then decided to go through an alley from Banak Street to see a lady who owed me some money which I lent to her. The lady live in a white house on Mayflower Street. Upon reaching the lady house on Mayflower Street, I spoke to her and she told me to return in the morning to collect my money. I then left walking on Mayflower Street towards Vernon Street to see if my girlfriend had arrived home. I was walking on foot as I had left my bicycle at one of my cousin's house on Banak Street, before I went through the alley to Mayflower. Just before reaching the junction of Mayflower and Vernon Street, Ainsworth Wagner came up on a bicycle from Vernon Street into Mayflower Street. As Ainsworth Wagner see me he jumped off his bicycle and said to me that he want to see me run like how I run earlier in the evening. I saw Ainsworth Wagner came walking towards me and he pulled out a knife from his pants side. I then made two steps backward and pull out my pistol and told him I do not want to shoot him as we are friends. Ainsworth Wagner then told me that I am not his friend and that he will fuck me up pussy boy. He was still advancing toward me with his knife. I then fired a shot on the ground and told Wagner 'Pie, I really do not want to shoot you'. Ainsworth Wagner then told me, well you will have to shoot me. He then advance towards me with the knife in a stabbing position. I then lift up my pistol and squeeze the trigger and I saw him fell to the ground. I then saw his brother who was nearby run toward where he fell and picked up the knife and said to me, 'You dead, pussy boy'. I then run down Vernon Street and went on Banak Street where I met my girlfriend along with Rosina. I then told my girlfriend that I had just shot 'Pie'. My girlfriend told me that 'Pie' brother told her that he and Pie had chased me earlier. I then went to hide at a hotel until Sunday 28th July 1996 and went across the border."

6. In his unsworn statement from the dock, the appellant described the threat made to him by the deceased on 25 July 1996 ("if I don't send something for them [the deceased and Requena] they will come for it at my house", the punch and threat by the deceased on 26 July and the chasing and reference to Saragosa on 27 July. Saragosa, he said, was a man the deceased had killed. Then he described his attempt to find his girlfriend and obtain repayment of a debt. He then continued (omitting questions put to him by the judge and repetitions):

"Before reaching corner of Mayflower and Vernon Streets I see Ainsworth Wagner coming around the lane with a bicycle so like when he come around the lane on Vernon Street and I

> going towards Vernon Street he sight me and thing and he jump off of the bicycle. When he jump off the bicycle he drop it on the ground then he walk around toward me he say he wanted to see how I run like how I run this evening from him … [he hauled out a knife] … and then come toward me and see I run like how I run this evening, pussy … I tell him like me and you are friend I don't want to go through nothing with you and I just haul out my gun and at the time … I don't want to have to shoot you and I haul out my gun and he tell me I will have to shoot him tonight then he come towards me so I bust the first shot on the ground because I tell him I don't want to shoot you because we are friends but he insist he come my way … then when I burst the first shot he told me that I have to shoot him and he come in stabbing position … he tell me I will have to shoot him with stabbing position toward me and I make to step backward and I lift up the gun and I shot him … When I shot I see him drop on the ground and when he dropped on the ground when I see him drop on the ground his brother was in a little distance away from him so I just lift up my head and watch him and I run gone that way and he run to his brother and pick up the knife … he run to his brother and pick up the butcher knife and said you dead pussy … his brother grabbed the knife and holler after me and say I dead pussy and I gone down that way … I run down Vernon Street …"

Provocation.

7. Under the Criminal Code of Belize a defendant accused of murder is not guilty of that crime if he lacks an intention to kill or if he kills when provoked to lose his self-control by words or conduct if the provocation is so extreme that a reasonable man would have been provoked to act as the defendant did. Unless the prosecution disprove these possibilities, the defendant must be acquitted of murder and may only be convicted of manslaughter.

8. The requirement that a killing must be intentional follows from section 114 of the Criminal Code, which provides:

> "Every person who intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of such extreme provocation, or other matter of partial excuse as in the next following sections mentioned."

An intention to cause serious bodily injury but not death is not enough to support a conviction of murder even though death has resulted.

9. The law on provocation is found in sections 114, already referred to, 116(a) and 118. Section 116 (a) provides so far as relevant:

> "A person who intentionally causes the death of another person by unlawful harm shall be deemed to be guilty only of manslaughter, and not of murder, if either of the following matters of extenuation be proved on his behalf, namely –
>
> (a) that he was deprived of the power of self-control by such extreme provocation given by the other person as is mentioned in section 117; …"

Section 117 instances certain matters which may amount to extreme provocation. Section 118, very closely modelled on section 3 of the English Homicide Act 1957, provides:

> "Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was extreme enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

10. It plainly follows from these provisions that a defendant charged with murder may raise a defence of provocation even though he has killed intentionally, and if the evidence discloses an arguable defence of provocation the judge must leave it to the jury. Unless the jury are sure that the defendant was not provoked within the meaning of these provisions, the defendant may only be convicted of manslaughter. The appellant's first submission on this appeal is that the judge, in the course of an otherwise fair and accurate summing-up, directed the jury that they could not acquit the appellant of murder and convict him of manslaughter on the ground of provocation if they found his killing of the deceased to have been intentional.

11. In support of this submission the appellant relies on several passages in the summing-up:

> "So members of the jury, if on this evidence, you are satisfied beyond reasonable doubt or you are sure that [the appellant]

had the intention to kill Pie then this element would have been proved and you will return a verdict of guilty of murder provided all the other elements that I have outlined to you have been proved to your satisfaction so that you feel sure of the guilt of the accused … So now I will address you on the question of manslaughter and tell you what is manslaughter. Now, members of the jury, manslaughter has all the ingredients in the crime of murder except that in the crime of manslaughter the intention is not to kill, but to cause harm. …. If you find that he had the intention to kill and provided the other elements of the offence of murder have been proven to your satisfaction so that you feel sure of his guilt, you will return a verdict of guilty, you need not consider the manslaughter verdict. It will be only after you have determined that he is not guilty of murder that you will consider the alternative verdict of manslaughter. …"

12. But the appellant most strongly relies on the penultimate paragraph of the summing-up, just before the jury retired, when the judge said:

> "Now, before I ask you to retire and consider your verdict let me tell you the possible verdicts you can return. If on the evidence you are sure of the guilt of the accused in respect to the charge of murder you will return a verdict of guilty, however, if you are not so sure or if you have any reasonable doubt then you will return a verdict of not guilty of murder. You will then go on to consider the alternative verdict of manslaughter. Now, if you find on the evidence that at the time Cleon Smith shot the deceased Ainsworth Wagner, his intention was not to kill him but only to cause him harm, but Wagner, nevertheless, died, then provided you are sure of his guilt in this regard, according to evidence you will return a verdict of guilty of manslaughter. If you are not so sure or if you have any reasonable doubt as to his guilt you will return a verdict of not guilty. Now, if having decided that he is not guilty for murder and not guilty for manslaughter because of the lack of intention to kill you will then go on to consider the alternative verdict of manslaughter which arises from the accused defence that he was provoked. If you find on the facts that the accused was provoked and you are sure of his guilt in this regard you will return a verdict of guilty of manslaughter. If you are not so sure or you have any reasonable doubt you will return a verdict of not guilty."

13. Counsel's submission is simple: whether or not this passage is somewhat garbled, the judge was telling the jury that they should

only consider a verdict of guilty of manslaughter on grounds of provocation if they had acquitted of murder because of a lack of intention to kill. In other words, if they found that the appellant had intended to kill the issue of provocation did not arise. That, counsel submits, was a plain misdirection.

14. The Court of Appeal accepted that this was a misdirection. They said of the last passage quoted in paragraph 12 above:

> "This is clearly a misdirection. If the jury came to the conclusion that the appellant did not intend to kill Wagner or were left in reasonable doubt as to whether he intended to kill him they must return a verdict of not guilty of murder. The jury could only convict of murder if they were satisfied so that they felt sure of the guilt of the appellant. … The direction that if they found that he was not guilty of manslaughter because he lacked the intention to harm the deceased the jury should go on to consider the alternative verdict of manslaughter which arises from the accused defence that he was provoked was wrong. In these circumstances provocation would be irrelevant. Provocation would arise if they found that the appellant intended to kill the deceased but this intention arose because he was provoked by the conduct of the deceased."

But the Court of Appeal did not accede to this ground of appeal. They observed:

> "This direction would have had the effect of depriving the appellant of a not guilty verdict if the jury came to the conclusion that the appellant did not intend to harm the deceased or were left in reasonable doubt as to whether he so intended. However, in this case the jury by their verdict of guilty of murder must have rejected the defence of self-defence and provocation and thereby must have accepted that the appellant intended to kill the deceased."

15. The reasoning of the Court of the Appeal does not, in the opinion of the Board, address the substance of the appellant's criticism. The jury must (it is accepted) have rejected the appellant's plea of self-defence. They also rejected his case on provocation. But they rejected his case on provocation having been wrongly directed that it did not fall to be considered if they found the killing to have been intentional. On the facts the jury could scarcely have doubted that the killing had been intentional. The effect of the misdirection was effectively to withdraw from the jury a crucial plank of the appellant's defence.

Section 116 (b) of the Criminal Code.

16. The appellant's second ground of appeal is that the trial judge wrongly failed to direct the jury in accordance with section 116 (b) of the Criminal Code of Belize. That subsection provides:

> "A person who intentionally causes the death of another person by unlawful harm shall be deemed to be guilty only of manslaughter, and not of murder, if either of the following matters of extenuation be proved on his behalf, namely-
>
> > (b) that he was justified in causing some harm to the other person, and that in causing harm in excess of the harm which 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;".

The construction and effect of that subsection have been considered by the Board in its advice of even date herewith in *Norman Shaw v. R.*. The Board refers to what is there said, which need not be repeated.

17. In considering whether the trial judge should in this case have directed the jury in accordance with section 116 (b) the same questions must be considered *mutatis mutandis* as set out there:

(1) Was there evidence of a situation in which the appellant was justified in causing some harm to the deceased? The answer must depend on whether and to what extend credence is given to the evidence of the appellant as against that of the prosecution eye witnesses. But if the jury accepted that the appellant had been the subject of serious intimidation by the deceased and his associates over a period of time, that the appellant had armed himself with a gun for purposes of protecting himself and that immediately before the fatal shot the deceased had been advancing on him with a knife making a stabbing motion, it could well have considered that the appellant had believed himself to be physically threatened and so justified in causing some harm to the deceased. The evaluation of this evidence was a matter for the jury.

(2) Was there evidence that the appellant had caused harm in excess of the harm he was justified in causing? The same problem arises as in *Norman Shaw v R*: on the prosecution evidence the appellant was not justified in causing any harm; on the appellant's account he was justified in shooting to kill. But the jury were not bound to accept either account at its face value, and there were

problems in the evidence on any showing (the two wounds to the deceased, the finding of two bullet cases only, the discrepancy about the length of the altercation). The jury would probably have concluded that the firing of two shots at the deceased was excessive, even if he genuinely believed his life to be threatened.

(3) Was there evidence that the appellant was acting from terror of immediate death or grievous harm? The answer must be that there was such evidence, from the appellant. It was for the jury, properly directed, to decide whether and how much of that evidence they accepted.

(4) Was there evidence that such terror deprived the appellant for the time being of the power of self-control? Since the appellant's case on provocation, which necessarily required some evidence of loss of self-control, was left to the jury, the Director of Public Prosecutions was constrained to accept that there was evidence of a loss of self-control for purposes of section 116 (b) also. To shoot twice at close range at a man armed with a knife could perhaps be thought to suggest such a loss of self-control; it was evidently thought at the trial that there was evidence of loss of self-control fit for the jury's consideration. Whether, if such loss of self-control were found to have occurred, it could be attributed to terror of immediate death or grievous harm could only, in the absence of evidence from the appellant, be a matter of inference by the jury. But it would, in the opinion of the Board, be a possible inference if that stage were reached.

18. It is not entirely clear whether reference was made to section 116 (b) at the trial. There appears to have been no consideration of it in the Court of Appeal. But there was some evidence which, if accepted, would have attracted the application of the subsection, and the Board is of opinion that the jury should have been directed in accordance with the subsection. In the circumstances of this case the absence of a direction amounted to a misdirection potentially prejudicial to the appellant, as it was held to do in *Hall v R* (1977) 24 WIR 547, a decision referring to this same provision.

Conclusion.

19. Since a proper direction on provocation and on section 116 (b) could each have led to the appellant's acquittal of murder and conviction of manslaughter, the Board cannot consider this a proper case for application of the proviso to section 31(1) of the Court of Appeal Ordinance. The Board cannot be confident that a miscarriage of justice has not occurred. The Board will humbly advise Her Majesty that the appellant's appeal ought to be allowed,

his conviction of murder quashed and a conviction of manslaughter substituted; and the case should be remitted to the Court of Appeal for that court to impose an appropriate sentence.