

IN THE COURT OF APPEAL OF BELIZE A.D. 2026

CRIMINAL APPEAL NO. 4 of 2022

BETWEEN:

SHANE BENNETT

Appellant

and

THE KING

Respondent

Before:

The Hon. Mme. Louise Esther Blenman

Chief Justice

The Hon. Mme. Sandra Minott-Phillips, KC

Justice of Appeal

The Hon. Mme. Michelle Arana

Justice of Appeal

Appearances:

Mrs. Peta-Gay Bradley and Ms. Sherigne Rodriguez, for the Appellant

Mr. Javier Chan, Assistant Director of Public Prosecutions, and

Ms. Maria Nembhard-Santana, Crown Counsel, for the Respondent

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2026: March 3;  
May 11.  
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JUDGMENT

Introduction

- [1] **BLNMAN, C.J.:** This is an appeal by Mr. Shane Bennett ("Mr. Bennett") against his conviction for the offence of murder, contrary to **section 117 read together with section 106(1) of the Criminal Code** ("Criminal Code").<sup>1</sup> On 26<sup>th</sup> April 2022, Mr. Bennett was convicted by the Honourable Justice Antoinette Moore ("the learned trial judge"), sitting without a jury, of the murder of Mr. Anthony Parks ("the deceased"). Mr. Bennett was

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<sup>1</sup> Chapter 101 of the Substantive Laws of Belize (Revised Edition) 2020.

subsequently sentenced to life imprisonment with eligibility for parole after twenty-five years. The Crown resists his appeal.

## **Background**

- [2] On 22<sup>nd</sup> January 2020, the deceased was shot multiple times on King Street in Independence Village and later died on 2<sup>nd</sup> February 2020 from complications arising from those injuries.

### The Crown's Case in the Court Below

- [3] The Crown's case was that Mr. Bennett intentionally caused the death of the deceased. The Crown called eleven witnesses in support of its case. Ms. Shakira Diaz ("Ms. Diaz"), the common-law wife of the deceased, testified as the sole eyewitness to the shooting. Ms. Diaz's evidence, largely, was that she knew Mr. Bennett for all her life, he was her cousin and they lived together at one point. Ms. Diaz said that on 22<sup>nd</sup> January 2020, she was at home with the deceased when Mr. Bennett called out to him. She said she heard the deceased say to Mr. Bennett, *'Please no bring your stupidity yah because you no good weh we live.'* She said that she was on her veranda when she saw Mr. Bennett shoot the deceased. According to her, Mr. Bennett first shot at the deceased multiple times while facing him but missed. After, the deceased said to Mr. Bennett, *'Bwoy, you da wa punk'* and turned to walk away. Ms. Diaz stated that Mr. Bennett continued shooting as the deceased turned away and shot him in his back.
- [4] The Crown also adduced evidence from the investigating officer, Police Constable Santiago Ico ("PC Ico"), Crime Scene Technicians Pablo Mai and Jason Reneau ("Mr. Reneau"). Additionally, the statements of Ms. Tiffany Hamilton ("Ms. Hamilton"), the deceased's sister who stated that she identified the body of her brother at the morgue, and of DC Enair Montalvo, were admitted by agreement. Dr. Mario Estrada Bran ("Dr. Estrada Bran"), who performed the post-mortem examination on the deceased's body, testified that the deceased

died from complications arising from multiple gunshot wounds. This body of evidence, however, was largely circumstantial.

- [5] In the result, the Crown's case against Mr. Bennett was based largely on the acceptance of the visual identification evidence of Ms. Diaz as reliable.

#### The Defence's Case in the Court Below

- [6] At the close of the Crown's case, Mr. Bennett elected to give an unsworn statement from the dock in his defence. In that statement, Mr. Bennett denied committing the offence. He advanced an alibi. He stated that he did not shoot the deceased and was not present at the scene. He asserted that at the material time, he was in Dangriga Town, where he had been residing and working on a farm. Mr. Bennett further stated that although he had previously had a dispute with the deceased, the matter had been resolved, and they had thereafter agreed to avoid each other. Mr. Bennett also denied knowing or living with Ms. Diaz. Mr. Bennett called no witnesses to support his defence.

#### Judgment in the Court Below

- [7] I am of the view that no useful purpose will be obtained by fully reciting the judgment below. It suffices to say that the learned trial judge held that the Crown had proven its case against Mr. Bennett. Among the matters that the judge addressed, in her clearly reasoned written judgment, are the following:

- (1) The learned trial judge directed herself on the need for caution in cases dependent on identification evidence. The trial judge expressly recognised that no identification parade had been conducted; that the identification of Mr. Bennett occurred in court; and that such dock identification is 'permissible but undesirable.'<sup>2</sup> The trial judge also warned herself of the dangers of relying on

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<sup>2</sup> See p 11 pp 30 of the Judgment.

identification evidence. The trial judge treated the evidence as one of recognition, relying on the asserted prior familiarity between Ms. Diaz and Mr. Bennett. Having reviewed the evidence, the trial judge determined that Ms. Diaz had sufficient opportunity to observe Mr. Bennett and that her identification was reliable.

- (2) The learned trial judge rejected Mr. Bennett's alibi. While acknowledging that Mr. Bennett bore no burden to prove his alibi, the trial judge concluded that the alibi was not credible considering Ms. Diaz's evidence placing him at the scene, which the trial judge found credible and reliable. In effect, the judge was of the view that the Crown had disproved Mr. Bennett's alibi beyond a reasonable doubt.
- (3) The learned trial judge also rejected the defence's submissions that there was insufficient proof of the identity of the deceased. The trial judge found that the cumulative evidence of Ms. Diaz, Ms. Hamilton, Dr. Estrada Bran and Mr. Reneau established beyond reasonable doubt that the deceased who was shot was the same person who later died and was examined at the post-mortem.
- (4) In considering whether there was any lawful justification, including extreme provocation, the learned trial judge found that there was none. The trial judge concluded that Mr. Bennett acted with the requisite intent and that the words allegedly spoken by the deceased did not amount to extreme provocation.

[8] Having carefully evaluated the totality of the evidence, the learned trial judge was satisfied that the Crown had proved beyond reasonable doubt that Mr. Bennett intentionally caused the death of the deceased. Consequently, the trial judge found Mr. Bennett guilty of the murder of the deceased.

[9] Mr. Bennett has appealed against his conviction.

## Grounds of Appeal

[10] Mr. Bennett filed the following four grounds of appeal:

- (1) “There was a miscarriage of justice as the statement of the deceased was not used in the High Court Trial of the appellant;
- (2) The learned trial judge erred in concluding that the prosecution had proven that the person shot was the same person on whom the postmortem was conducted thereby rendering the conviction unsafe;
- (3) The learned trial judge erred in her treatment of the defence of extreme provocation; and
- (4) The learned trial judge erred in her treatment of the defence’s evidence and reversed the burden on the appellant.”

[11] In addition to filing Grounds of Appeal, Mr. Bennett filed a Notice of Motion for leave to adduce fresh evidence. The motion was brought under **sections 20 and 33 of the Court of Appeal Act**. However, it is noteworthy that the Court of Appeal Act has been repealed and replaced by the **Senior Courts Act, 2022** (“SCA”).<sup>3</sup> The corresponding sections of the **SCA** are **sections 206 and 219**.

[12] Mr. Bennett’s Notice of Motion was filed in support of ground 1 of his appeal. For the sake of convenience, I will consider the Notice of Motion for leave to adduce fresh evidence together with Ground 1 of the appeal.

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<sup>3</sup> Act No. 27 of 2022.

## Ground 1 – Miscarriage of Justice – Failure to Consider Material Evidence

### The Motion to Adduce Fresh Evidence

- [13] Mr. Bennett sought leave to adduce, as fresh evidence, a document purporting to be a statement made by the deceased on 26<sup>th</sup> January 2020 (“the Statement”). The motion is supported by the affidavit of Mr. Bennett sworn on 30<sup>th</sup> December 2025, to which the Statement is exhibited. Mr. Bennett maintained that the Statement formed part of the materials disclosed at the preliminary inquiry but was not adduced or relied upon at trial.
- [14] Learned counsel Ms. Sherigne Rodriguez (“Ms. Rodriguez”) contended that the Statement is exculpatory in nature, in that it records that the deceased did not see the person who shot him and that the assailant was in a tinted vehicle. Ms. Rodriguez submitted that the deceased’s account in the Statement directly conflicted with the evidence of Ms. Diaz, and that, had it been before the court, it would have materially affected the assessment of the reliability of her identification. Ms. Rodriguez relied on the principles articulated in **Ryon Lorman Wagner v The King**<sup>4</sup> to support the motion.
- [15] Though not canvassed in her written submissions, Ms. Rodriguez, in her oral arguments to this Court, submitted that while the Statement may not be ‘plainly capable of belief’, it is not ‘incapable of belief’. Ms. Rodriguez posited that the Statement is ‘possibly capable of belief’ and the Court ‘may find it necessary to hear from witnesses, *de bene esse*, in order to determine whether the evidence is indeed capable of belief’. In this regard, Ms. Rodriguez referred the Court to the case of **Rayon Williams v The Queen**,<sup>5</sup> a decision of the Jamaican Court of Appeal.
- [16] Assistant Director of Public Prosecutions Mr. Chan (“Mr. Chan”) opposed the motion and relied on the affidavit evidence filed in opposition to Mr. Bennett’s motion to adduce fresh evidence. In particular, he referred this Court to the affidavit of Sergeant Mark Pascascio

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<sup>4</sup> Criminal Appeal No. 2 of 2019.

<sup>5</sup> [2022] JMCA Crim 41 at p 32.

(“SGT Pascascio”), in which SGT Pascascio deposed that he did not, at any time, record a statement from the deceased and did not recognise the document exhibited by Mr. Bennett; the affidavit of Sergeant Leteisa Lambey (“SGT Lambey”) the police prosecutor at the preliminary inquiry, in which SGT Lambey deposed that no such statement was disclosed to Mr. Bennett and that it did not form part of the disclosure material; and the affidavit of PC Ico, the investigating officer, in which PC Ico similarly deposed that no such statement formed part of the investigation file. On the basis of this evidence, Mr. Chan, contended that the purported statement exhibited by Mr. Bennett is not credible and is, in fact, a fabrication. He argued that the Statement does not reach the requisite threshold.

- [17] Mr. Chan further reinforced the fact that the motion to adduce fresh evidence rests solely on Mr. Bennett’s affidavit and is unsupported by any independent or credible evidence. He maintained that the principles governing the admission of fresh evidence are not satisfied, and the motion should fail.

### **Discussion and Analysis**

- [18] I have reviewed the written submissions of both learned counsel and have given careful consideration of the oral arguments presented during the hearing of the notice of motion and the substantive appeal.
- [19] **Section 206 of the SCA** provides the statutory footing on which this Court may admit fresh evidence. It provides, so far as material:

“206. On the hearing of an appeal from any order of the High Court or of a judge thereof in any civil cause or matter, the Court may, if it thinks fit—

(a) **order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to be necessary for the determination of the case, provided that no person shall be compelled to produce under any such order any writing or other document which he could not have been compelled to produce at the hearing or trial;**

(b) order any witness who would have been a compellable witness at the trial to attend and be examined before the Court whether or not he was called at the trial, or order the examination of any such witness to be conducted in manner provided by rules of court before any judge of the High Court or before any officer of the High Court or other suitably qualified person appointed by the Court for the purpose, and at any place and allow the admission of any deposition so taken as evidence before the Court;

(c) receive the evidence, if tendered, of any witness (including any party) who is a competent but not compellable witness and, if a party makes application for the purpose, of the husband or wife of that party in cases where the evidence of the husband or wife could not have been given at the trial except on such application...”  
[Emphasis added]

[20] In Sub-Part 3 of the **SCA**, which deals with criminal appeals, at **section 219**, it provides for supplementary powers of the Court. It states:

“219. For the purposes of this Part, the Court may, if it thinks it necessary or expedient in the interests of justice—

(a) exercise any or all of the powers conferred by section 206 on the Court (other than those contained in paragraph (d)) but in the application of section 206 to an appeal in any criminal cause or matter, for the words “any party” and “that party” in paragraph (c), there shall be substituted the words “the appellant...”

[21] Summing up the power of the Court of Appeal to admit fresh evidence, this Court explained in **Jason Lawrence v The Queen**,<sup>6</sup> which followed its previous decision in **Lavern Longsworth v The Queen**,<sup>7</sup> that under these provisions, the Court has a discretionary power to receive fresh evidence on appeal, if it thinks it necessary or expedient in the interest of justice.

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<sup>6</sup> BZ Criminal Appeal No. 12 of 2014.

<sup>7</sup> BZ Criminal Appeal No. 21 of 2012.

[22] **Lundy v The Queen**<sup>8</sup> is one of the leading cases on the admission of fresh evidence on appeal. Lord Kerr, at paragraph 120 of the judgment, explained the necessary steps a court must take in deciding whether to admit fresh evidence in the following way:

“The Board considers that the proper basis on which admission of fresh evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.”

[23] **Lundy v The Queen** establishes the following propositions: (1) where the evidence to be adduced is not credible, that is the end of the matter; (2) where it is both credible and fresh it should be admitted unless the court is at that stage satisfied that it would not affect the safety of the conviction; (3) where it is credible but not fresh, the court must make an assessment of its strength and possible impact on the safety of the conviction. If, on assessment, the court considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted even if it is not fresh. These principles have also been adopted and applied by this Court in several decisions, including **Lawrence v The Queen**.

[24] Similar albeit not identical principles are set out in **Lawrence v The Queen** and **Longworth v The Queen** and distilled in **Ryon Wagner v The King** at paragraph 11 by Woodstock Riley JA as:

“(i) whether the evidence is capable of belief,  
(ii) whether the evidence would have been admissible at the trial;  
(iii) whether there was a reasonable explanation for the failure to adduce the fresh evidence at trial;  
(iv) whether it appeared to the Court that the fresh evidence may afford a good ground for allowing the appeal.”

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<sup>8</sup> [2013] UKPC 28.

- [25] Applying the staged process alluded to above, this Court's first inquiry is whether the Statement sought to be adduced is credible. Mr. Bennett asserts that the document represents a statement made by the deceased. However, the affidavit evidence of SGT Pascascio is unequivocal. He expressly denies having recorded any statement from the deceased and disavows the document exhibited by Mr. Bennett. He further deposes that, due to the deceased's medical condition, he was unable to communicate with him.
- [26] SGT Pascascio's evidence is reinforced by that of SGT Lambey, who confirms that no such statement was disclosed at the preliminary inquiry, and by PC Ico, the investigating officer, who states that no such statement formed part of the investigative file. There is therefore consistent evidence from the relevant officers that no such statement exists within the official record of the case.
- [27] In these circumstances, the provenance of the document is wholly unclear. There is no evidential foundation upon which this Court could conclude that the document is what it purports to be, namely a genuine statement made by the deceased. On the contrary, the available evidence points strongly in the opposite direction. I am of the view that the purported statement is not credible.
- [28] In keeping with the sequential approach set out in **Lundy v The Queen**, this brings to an end the scrutiny of the new evidence, and the motion is denied for lack of credibility. Further consideration of whether the evidence is fresh or what impact it might have had on the safety of the conviction would be otiose. It is evident that Mr. Bennett has failed at the first stage of the inquiry and there is no basis to admit the statement on the alleged basis that it is fresh evidence. However, I will briefly address the second arm of the **Lundy** test.
- [29] The second inquiry is whether the evidence is fresh. It is trite that evidence is considered fresh if it is evidence which could not have been obtained for the trial with reasonable diligence. Mr. Bennett asserts that the Statement formed part of the materials disclosed at the preliminary inquiry. However, as indicated above, this assertion is directly contradicted by the Crown's evidence. Even on Mr. Bennett's evidence, the Statement is not information

which came to his knowledge after the trial, in fact it would have come to his attention before the trial begun. Mr. Bennett states that he relied entirely on his attorney in the court below to identify and place before the court any evidence disclosed by the Crown which could assist his defence. I find it difficult to accept that had this Statement been existence, neither Mr. Bennett nor his attorney, would have referred to or relied on it at trial. In my considered view, the Statement, if it existed, could have been obtained for the trial with reasonable diligence and cannot therefore be described as fresh. The motion would also fail at this stage of the **Lundy** test.

[30] Given the totality of the circumstances, I am not of the considered opinion that the purported statement of the deceased should be admitted on the basis that it is fresh evidence. Accordingly, Mr. Bennett's motion for the admission of fresh evidence is denied.

[31] Consequently, there is no basis upon which this Court could conclude that the exclusion of the Statement gives rise to any risk of a miscarriage of justice or impacts the safety of the conviction. Therefore, Ground 1 of the appeal fails.

[32] I turn now to address the remaining grounds of appeal.

## **Ground 2 – Failure to Prove the Nexus Between the Deceased and the Post-Mortem**

### **Appellant's Submissions**

[33] Learned Counsel Ms. Rodriguez contended that the Crown failed to prove beyond reasonable doubt that the person who was shot was the same person upon whom the post-mortem examination was conducted. Ms. Rodriguez submitted that, while the Crown relied on the evidence of Ms. Diaz and Ms. Hamilton, neither witness provided evidence establishing continuity between the person shot and the body examined. In particular, Ms. Rodriguez argued that Ms. Diaz did not testify that she observed and identified the injured

person at the hospital throughout the period leading to death, and Ms. Hamilton's identification of the body at the post-mortem did not bridge that evidential gap. Ms. Rodriguez submitted that the learned trial judge recognised this deficiency but improperly supplied the missing link by inference, rather than requiring the Crown to prove the element by evidence. Ms. Rodriguez argued that, in accordance with **Simms v R**,<sup>9</sup> the Crown bears the burden of establishing this nexus and that it was not open to the judge to cure a deficiency in proof by inference where identity is in issue.

- [34] Ms. Rodriguez therefore submitted that the finding that the Crown had established this element beyond reasonable doubt was unsupported by the evidence and rendered the conviction unsafe.

### **Respondent's Submissions**

- [35] Learned Assistant Director of Public Prosecutions Mr. Chan submitted that the learned trial judge did not err in concluding that the person who was shot on 22<sup>nd</sup> January 2020 was the same deceased upon whom the post-mortem examination was conducted. Mr. Chan emphasised that the trial judge carefully reviewed the evidence establishing continuity, including the evidence of Ms. Diaz, who testified that she was present when the deceased was shot and that she transported him to the Independence Polyclinic; the evidence placing the deceased at the Southern Regional Hospital in Dangriga, and thereafter at the Karl Heusner Memorial Hospital ("KMH"); the evidence of PC Ico, who investigated the shooting, tracked the progress of the deceased, and later confirmed his death; and the agreed evidence of Ms. Hamilton, who identified the body of her brother, the deceased, at the KMH morgue prior to the post-mortem. Mr. Chan submitted that this evidence established an unbroken chain from the shooting to the death and identification of the deceased.

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<sup>9</sup> [2023] JMCA Crim 7.

- [36] Mr. Chan submitted that, in those circumstances, the learned trial judge was entitled to conclude, as she did, that she had 'no doubt' as to the identity of the deceased. The verdict, therefore, could not be said to be unsafe on this basis.

## Discussion and Analysis

- [37] The principles governing proof of identity in a charge of murder are well established. Indeed, in **Simms v R**:

"49... the prosecution is required to prove that the person named in the indictment as having been murdered by the accused is, in fact, dead, and that he died from injuries caused to him by the accused. The prosecution is also required to prove that the person who is alleged to have been killed, is in fact the person on whom the post-mortem examination was conducted. The cause of death will assist in proving or disproving the prosecution's contention as to how the deceased met his death. In the case of Bish, this court commended the following guidance for prosecutors from the 3<sup>rd</sup> Edition Wilkinson's Road Traffic Offences at page 114:

"The prosecution should be careful to see that there is evidence of the death of the actual victim, i.e., it may not suffice for a police witness to say that John Smith was knocked down by a car on Sunday and removed to the hospital and then for a doctor to say that John Smith died there on Monday. There must be evidence to show that the two John Smiths are the same person."

This evidence showing, in any given case, that "the two John Smiths are the same person" is now commonly referred to as "the Bish nexus".

- [38] In **Simms v R**, no challenge was made to the cause of death identified by the doctor who performed the post-mortem, that is, that he died from injuries caused by a gunshot wound. In that case, the contention by counsel was that there was no evidence that the person on whom the post-mortem examination was conducted was the same person that had been shot. However, the Court of Appeal of Jamaica held that there was 'ample evidence from which the jury could have concluded that the person on whom the post-mortem examination

was conducted, was in fact Oney, who was shot and killed by persons identified as the applicants.'

[39] With respect, Ms. Rodriguez's submission cannot be sustained on a proper reading of the Record. It proceeds on the footing that the Crown was required to adduce direct evidence accounting for the deceased's presence at each stage, from the scene of the shooting to the post-mortem examination. There is no such legal requirement. The question is whether the evidence, viewed as a whole, established the necessary continuity. In my view, it did.

[40] Based on what I have said, it is evident that I have no difficulty agreeing with Mr. Chan, that there is sufficient nexus provided in the Crown's evidence that the person who Ms. Diaz witnessed being shot by Mr. Bennett, and who Dr. Estrada Bran performed the postmortem on, was the deceased. It is clear that the Crown had proven it beyond reasonable doubt.

[41] In the appeal at bar, the learned judge, in dealing with the evidence that she found supports the conclusion that the named deceased was indeed the same person shot and killed at the material time outlined in the indictment, stated the following:

[12]... the sister Ms Hamilton gave her late brother's address as King Street in Independence village. This was significant to me as trier of fact because it is the same address, according to the eyewitness, that the shooting occurred at. I do not believe this is a coincidence.

[13]... Ms Diaz testified that after the shooting she took her husband Anthony Parks to the Polyclinic. She said in response to a cross-examination question about what the deceased was wearing, "All I could recall is he had on a black  $\frac{3}{4}$  Dickies and he had on a red shirt which the doctor da cut off ah." I take this response to mean that Ms Diaz observed the doctor as he prepared to treat the injured man. Ms Diaz also responded to the defence lawyer when being cross examined that, "Only when my husband got shot they asked me who did it. Two CIB police came to see me at the hospital and then they took me to Queen Street to give my

statement.” This evidence which I find credible from Ms Diaz counters the defence submission.

[14]... Based on my review, there is evidence from both Dr Estrada Bran and the Scenes of Crimes technician Jason Reneau that the body of the deceased seen at the morgue was clothed in a hospital gown and showed signs of recent surgery. Indeed, the evidence indicates that the deceased contracted sepsis during his hospital stay, leading, in part, to his demise. There is no question in my mind that Anthony Parks was shot multiple times, taken to the Polyclinic, then to the hospital in Belize city where he was treated but ultimately died.

[15] ... After considering this submission from all angles I must roundly reject it. Taken together, the doctor’s evidence, along with that of Tiffany Hamilton and the eyewitness, is sufficient to make me sure that Anthony Parks of King Street Independence Village, who was shot several times while Ms Diaz looked on King Street, is the same Anthony Parks treated in the hospital where he contracted sepsis and died. Thereafter, that same Anthony Parks was identified to the doctor by his sister Ms Hamilton before the post mortem examination was conducted on him.

I have no doubt about who the deceased is in this matter.”

[42] In my considered view, there was sufficiently cogent evidence before the learned trial judge, once she accepted it, to conclude, as she did, that the person who was shot was the same Anthony Parks who was treated in hospital, subsequently died, and was the subject of the post-mortem examination. My ineluctable conclusion is that the learned trial judge was entitled to so find based on the uncontroverted evidence before her. I must disagree with Ms. Rodriguez that the learned trial judge speculated or filled gaps in the evidence. It was plainly open to the learned trial judge, on the evidence before her, to draw reasonable and inescapable inferences and therefore ultimately find, as a fact, that the body of the person on whom the postmortem examination was conducted, and who was declared to have died from gunshot injuries, was the deceased. The nexus was properly established beyond a reasonable doubt to prove that the deceased died at the hands of Mr. Bennett. This ground of appeal is also devoid of merit and must fail.

### **Ground 3 – Error in the Treatment of the Defence of Extreme Provocation**

## **Appellant's Submissions**

- [43] Ms. Rodriguez submitted that the learned trial judge misapplied the law on extreme provocation by treating her finding of an intention to kill as being inconsistent with the availability of the defence of extreme provocation. Ms. Rodriguez emphasised that **sections 117 to 120 of the Criminal Code** expressly contemplate that an accused may intentionally cause death and yet be guilty of manslaughter if deprived of self-control by extreme provocation. Ms. Rodriguez relied on **Wilser Echeverria v The Queen**,<sup>10</sup> and argued that the proper approach is to determine intention and then consider, notwithstanding that finding, whether the evidence raises a reasonable doubt that the accused acted while deprived of self-control.
- [44] Ms. Rodriguez pointed to evidence that the deceased used certain words immediately before and during the incident, which the learned trial judge accepted were spoken. Ms. Rodriguez submitted that the judge erred by discounting their significance and by reasoning that it was difficult to determine when the intention to kill was formed. Ms. Rodriguez argued that this approach was inconsistent with the authorities, which recognise that intention may be formed in the course of loss of self-control. Ms. Rodriguez submitted that, by effectively treating intention as negating provocation, the learned trial judge applied the wrong legal test, and that, on the evidence, a verdict of manslaughter by reason of extreme provocation was reasonably open.

## **Respondent's Submissions**

- [45] Mr. Chan argued, first, that the evidence did not disclose a sufficient factual basis to raise the partial defence of extreme provocation. Mr. Chan posited that the words relied upon by Mr. Bennett, namely, "Please no bring your stupidity here..." and "Bwoy, you da wa punk", were, Mr. Chan submitted, incapable of amounting to extreme provocation. Mr. Chan also

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<sup>10</sup> Criminal Appeal No. 5 of 2018.

submitted that, even if the issue arose, the statutory provisions, particularly **section 121 of the Criminal Code**, operated to disqualify Mr. Bennett from relying on the defence. In this regard, Mr. Chan emphasised that the evidence demonstrated that Mr. Bennett arrived at the scene armed with a firearm; that he fired multiple shots; that, after initially missing, he regained his aim and shot the deceased multiple times; and that the fatal shots were inflicted while the deceased's back was turned. These matters, Mr. Chan submitted, demonstrated that Mr. Bennett acted with a formed intention to kill and not in a loss of self-control.

- [46] Mr. Chan also relied on the authority of **Wilser Echeverria v The King**, and **Jose Montez v The Queen**,<sup>11</sup> and **Osmar Sabido v The Queen**<sup>12</sup> to emphasise that provocation requires more than the mere existence of provocative words; there must be evidence of loss of self-control and proportionality, which were absent in Mr. Bennett's case.

### Discussion and Analysis

- [47] **Section 117 of the Criminal Code** provides for murder to be reduced to manslaughter, by reason of extreme provocation or other partial excuse as follows:

“117. 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.”

- [48] The extreme provocation in **section 117** is provided for in **section 119 of the Criminal Code**. It provides, so far as relevant:

“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—

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<sup>11</sup> Criminal Appeal No. 12 of 2015.

<sup>12</sup> Criminal Appeal No. 6 of 2016.

(e) he was **deprived of the power of self-control by such extreme provocation** given by the other person as is mentioned in section 120 of this Act...”

[49] **Section 120 of the Criminal Code** defines extreme provocation:

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

...

I anything said to the accused person by the other person or by a third person which were **grave enough** to make a reasonable man to lose his self-control.

[50] Under **Section 121 of the Criminal Code**, notwithstanding the existence of extreme provocation as mentioned in **section 119**, the crime of the accused shall not be deemed to be thereby reduced to manslaughter if it appears, either from the evidence given on his behalf, or from evidence given on the part of the prosecution that he was not in fact deprived of the power of self-control by the provocation.

[51] It plainly follows from the provisions of the **Criminal Code**, that an accused charged with murder may raise a defence of extreme provocation even though he has killed intentionally. Intention to kill and provocation are not mutually exclusive concepts.

[52] It is clear that a person can have the intention to kill and in appropriate circumstances avail himself of the defence of extreme provocation. In the case at bar, the question whether the provocation was grave enough to make a reasonable man do as he did is left to be determined by trier of fact, and in determining that question, the trier of fact shall take into account everything both done and said according to the effect which in her opinion it would have on a reasonable man.

[53] The applicable legal principles are well settled. The Board in **Attorney General for Ceylon v Kumarasinghe Don John Perera**,<sup>13</sup> where Lord Goddard delivering the decision of the Board, said:

**“The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation. An illustration is to be found in the case of a man finding his wife in the act of adultery who kills her or her paramour, and the law has always regarded that, although an intentional act, as amounting only to manslaughter by reason of the provocation received, although no doubt the accused person intended to cause death or grievous bodily harm.”**<sup>14</sup> (My emphasis).

This principle of law was reaffirmed in **Lee Chun-Chuen alias Lee Wing-Cheuk v The Queen**<sup>15</sup> and again approved in **R v Plinton**.<sup>16</sup>

[54] Equally instructive is **R v Bunting**,<sup>17</sup> where the Jamaican Court of Appeal cautioned against directions which suggest that the existence of an intention to kill necessarily excludes provocation. Where the intention to kill or to cause grievous bodily harm results not from premeditation but solely from the loss of self-control induced by provocation, the accused is guilty not of murder but of manslaughter. In that case, it was stated per curiam that the phrase ‘for the moment not master of his mind’ should be omitted in directing juries on the law of provocation. Lewis JA explained that:

“...this phrase was in our opinion likely to lead the jury to believe the provocation required to reduce murder to manslaughter must be such as to deprive the accused of his self-control to such an extent that at the time he struck the blow he was temporarily deprived of his mental capacity to form an intention and therefore to form the intention to kill or to do grievous bodily harm.”<sup>18</sup>

[55] I can do no more than adopt those helpful pronouncements referred to above, which correctly reflects the legal position.

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<sup>13</sup> [1953] AC 200.

<sup>14</sup> Ibid at p. 206.

<sup>15</sup> [1962] 3 WLR 1461.

<sup>16</sup> (1965) 9 WIR 44.

<sup>17</sup> (1965) 8 WIR 276.

<sup>18</sup> Ibid at p. 278.

[56] In **Joseph Bullard v The Queen**<sup>19</sup> it was stated that:

“It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to the jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked.”<sup>20</sup>

[57] And at paragraph 644:

“Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached.”

[58] Moreover, in **Antoine and Bass v R**,<sup>21</sup> Fraser JA speaking on behalf of the Court of Appeal of Trinidad and Tobago on the issue of provocation said:

“We think it would be helpful if, in future, attention is paid to the dictum of Lewis JA in *R v Bunting* ((1965), 8 WIR 276) which we cite with approval. He said ((1965) 8 WIR at p 279):

‘... in the light of recent authorities it is desirable that the phrase ‘for the moment not master of his mind’ should be omitted in directing juries on the law of provocation. Care should also be taken in a case where provocation arises as a defence to avoid the use of expressions which suggest that the presence of intention in the mind of the accused must inevitably lead to a verdict of murder rather than manslaughter.’<sup>22</sup>

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<sup>19</sup> [1957] AC 635.

<sup>20</sup> *Ibid* at 642.

<sup>21</sup> (1968) 13 WIR 289.

<sup>22</sup> *Ibid* at p. 290.

[59] The Court of Appeal of Trinidad and Tobago in **Fabien LaRoche v The State**<sup>23</sup> gave what they thought was the correct definition of provocation having examined the cases of **R v Duffy**,<sup>24</sup> **Lee Chun-Chuen alias Lee Wing-Cheuk** and **R v Bunting**:

“Provocation is some act or series of acts done or words spoken by the deceased to the accused which would cause in any reasonable person and actually causes in the accused, a sudden and temporary loss of self control, rendering the accused so subject to passion as to cause him to retaliate.”

[60] I would commend the sound advice given in **Fabien LaRoche v The State** at paragraph 55: ‘We advise that when dealing with the issue of provocation, trial judges specifically direct in clear and unequivocal language that an intention to kill is not inconsistent with provocation’. I will go further and give credence to the words of Kelsick CJ [Ag.] in **Baptiste v The State**:

“...when the issue is one of provocation, the judge should refrain from suggesting to the jury that for the “defence” to succeed the defendant must not have been “master of his mind”, thus implying (i) that he was incapable of forming the intention to kill; and (ii) the corollary that if he was “master of his mind” and had formed the intention to kill, he must be found to be guilty of murder and not of manslaughter.”<sup>25</sup>

[61] Looking closer to the present appeal, it is apparent that Mr. Bennett did not testify in the court below, neither did he call witnesses. The issue of provocation emanated from the case for the Crown, in particular, the evidence of Ms. Diaz as to the words spoken by the deceased immediately before and during the shooting.

[62] The learned trial judge addressed the issue at paragraphs 50 to 52 of her judgment. The trial judge expressly considered whether the words attributed to the deceased constituted extreme provocation capable of causing a reasonable person to lose self-control. She stated:

“[50] I now consider whether there was extreme provocation during the encounter. Ms Diaz testified that the deceased said two things to the accused so I consider if these words constituted “extreme provocation” such as would cause a reasonable person hearing these comments to lose

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<sup>23</sup> TT 2011 CA 8.

<sup>24</sup> [1949] 1 All ER 932.

<sup>25</sup> (1983) 34 WIR 253 at p. 265.

their self-control. Ms Diaz testified that her husband upon leaving the house and approaching the accused, said, *"Please no bring your stupidity here because you no good where we live."* Then after the shooting had begun, the deceased said, *"Bwoy, you da wa punk."*

...

[51] In the context of this incident, the accused came to the home of the deceased in the early morning armed with a gun, called the deceased out of his house, and shot at him multiple times until striking him as the deceased walked away. As the accused tells it, he and the deceased had settled a recent dispute and had agreed to keep a distance from each other. If this was their agreement, why did the accused go to the home of the deceased? According to the evidence, the initial words said at the scene by the deceased regarding *"stupidness"* were said before the shooting began. Applying the worldly experience as trier of fact, these words are part of the ordinary banter between persons in Belize and would not constitute extreme provocation to cause a reasonable person to lose his self-control. The more arguably provocative word *"punk"* is used by the deceased as the shooting is already underway, if I am to accept the sequence of events as told by the eyewitness. Was the use of this word *"punk"* enough to provoke the accused to lose his self control? I believe the accused was in control of himself and came to the house intending to shoot the deceased, forming, at some point, an intention to kill him. I deliberated whether the intention to kill formed as the accused heard the deceased utter the words, *"Bwoy, you da wa punk."* The accused denies being present at the scene so he is not saying he became outraged and lost control because of what the deceased said to him but I must consider that if the accused was present, as I believe he was, is this what could have happened. If not before his arrival, it is difficult to parse the exact point at which the accused formed his intention to kill the deceased, but I am of the firm view, based on all of the circumstances, that the accused did not lose his self-control because of anything said to him by the deceased or anyone else. Thus, I do not find that extreme provocation was present to cause the loss of self-control.

[52] Accordingly, based on all of the evidence, the accused had no lawful justification, partial or otherwise, to harm the deceased.

[63] In my considered view, contrary to the submissions of Ms. Rodriguez, the learned trial judge was properly seized of all of the material evidence of the case. She did not misdirect herself by treating intention as legally inconsistent with provocation. When the learned trial judge's reasoning is examined fairly, and as a whole, it is apparent that the trial judge recognised the need to consider whether Mr. Bennett had, notwithstanding the intentional shooting, lost self-control because of the deceased's words.

[64] Quite correctly, the learned trial judge expressly considered whether Mr. Bennett may have formed the intention to kill upon hearing the deceased utter the word “punk”. However, having considered the entirety of the evidence, she concluded as a matter of fact, that Mr. Bennett ‘did not lose his self-control because of anything said to him by the deceased or anyone else.’

[65] Give the totality of the circumstances, I am of the clear view that that conclusion was plainly open to the learned trial judge on the evidence. Several matters strongly supported the conclusion that Mr. Bennett acted with deliberation and purpose rather than from sudden passion. The evidence accepted by the trial judge was that Mr. Bennett went to the deceased’s residence armed with a firearm in the early morning hours; called the deceased outside; commenced firing multiple shots; persisted after initially missing; and ultimately shot the deceased multiple times, including whilst the deceased turned away. To my mind, the learned trial judge’s analysis demonstrates a proper appreciation of the governing legal principles of extreme provocation. I see no reason to impugn the trial judge’s decision. Accordingly, this ground of appeal fails.

#### **Ground 4 – Errors in the Evaluation of Evidence and Burden of Proof**

##### **Appellant’s Submissions**

[66] Ms. Rodriguez submitted that the learned trial judge erred in her evaluation of the evidence, particularly in her treatment of the credibility of Ms. Diaz and the defence case. Ms. Rodriguez argued that the learned trial judge improperly relied on the absence of any apparent motive for Ms. Diaz to fabricate her evidence as a basis for accepting her testimony as truthful. Ms. Rodriguez submitted that this amounted to treating the absence of a motive to lie as affirmative proof of reliability, contrary to established principles. Further, Ms.

Rodriguez contended that the learned trial judge impermissibly shifted the burden of proof by observing that no reason had been put to Ms. Diaz as to why she would falsely implicate Mr. Bennett. Ms. Rodriguez argued that this approach required the defence to establish a motive for fabrication, thereby undermining the presumption of innocence and the principle in **Woolmington v DPP**.<sup>26</sup>

- [67] Ms. Rodriguez also submitted that the learned trial judge erred in rejecting Mr. Bennett's unsworn statement on the basis that the Crown's case had already satisfied her beyond reasonable doubt, thereby allowing the acceptance of the Crown's case to drive the rejection of the defence, rather than independently assessing whether the Crown had discharged its burden. In the round, Ms. Rodriguez argued that the learned trial judge's reasoning disclosed a flawed evaluative process which diluted the standard of proof and failed to subject the Crown's case to the requisite scrutiny.

### **Respondent's Submissions**

- [68] Mr. Chan submitted that this ground is without merit, as the learned trial judge repeatedly and correctly directed herself on the burden of proof. Mr. Chan referred this Court to paragraphs 57 to 59 of the judgment, where the judge expressly stated that Mr. Bennett bore no burden of proof; disbelief of Mr. Bennett's unsworn statement could not, of itself, justify a conviction; and the court was required to be satisfied of guilt based on the Crown's evidence.
- [69] Mr. Chan submitted that the trial judge's rejection of Mr. Bennett's alibi did not amount to a reversal of the burden but was based on the trial judge's acceptance of the Crown's evidence, particularly that of Ms. Diaz.

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<sup>26</sup> [1935] AC 462.

[70] In relation to the assessment of the defence evidence, Mr. Chan highlighted the judge's reasoning in accepting the evidence of Ms. Diaz, including her prior familiarity with Mr. Bennett; the absence of any suggested motive to falsely implicate Mr. Bennett; and the consistency of her account under cross-examination.

[71] Mr. Chan submitted that the trial judge's evaluation of the evidence fell squarely within her province as trier of fact and disclosed no error of principle.

### **Discussion and Analysis**

[72] The governing principles are well settled. The burden rests throughout upon the Crown to prove the guilt of an accused person beyond reasonable doubt. An accused bears no burden to prove his innocence, to prove an alibi, or to establish a motive on the part of a witness to fabricate evidence. The presumption of innocence remains throughout the trial.

[73] Equally well established is the principle that disbelief of an accused person's account does not, standing alone, strengthen the Crown's case or relieve the Crown of its burden of proof. A conviction must ultimately rest upon the strength of the Crown's evidence and not upon the weakness of the defence.

[74] At the same time, a trial judge sitting as trier of fact is fully entitled to assess the credibility and reliability of witnesses, to examine the internal consistency of their accounts, to consider whether their evidence withstands cross-examination, and to evaluate whether there exists any apparent motive for fabrication. Such considerations form part of the ordinary judicial assessment of evidence. Error arises only where the absence of a motive to lie is elevated into positive proof of truthfulness, or where the defence is effectively required to explain why a witness would fabricate evidence before reasonable doubt may arise. The appellate court is enjoined to exercise restraint in relation to the trial judge's findings of fact.

[75] I turn therefore to examine the relevant portions of the learned trial judge's reasoning. At paragraph 57 of the judgment, the learned trial judge expressly directed herself in the following terms:

**"[57] As I consider the unsworn statement of the accused, I continue to direct myself that the accused has nothing to prove to this court and even if I do not accept his unsworn statement as true and give it little to no weight, it does not mean that I may convict him because I do not believe him. It is the prosecution evidence that must make me feel sure of the guilt of the accused in order for me to convict him because the burden of proof rest with the prosecution."**

[76] Further, at paragraph 58, in addressing the alibi, the learned trial judge stated as follows:

**"[58] Having directed myself accordingly, I have considered the contents of the unsworn statement. The accused is saying he was not at the scene of the incident. He is saying that he was elsewhere, in Dangriga, at the time of the shooting. The accused has raised the defence of alibi. He said he did not shoot and kill the deceased. I do not believe that the accused was elsewhere. The reason I do not believe that the accused was elsewhere is because I am convinced by the evidence of the Crown's witness who saw the accused at the scene. As trier of fact I may reject the alibi of the accused but this does not entitle me to convict the accused. He has no burden to prove his alibi."**

[77] Those self-directions were entirely correct. They accurately reflected the governing principles concerning the burden and standard of proof and the treatment of alibi evidence.

[78] At paragraph 59, the learned trial judge stated, in part:

**"[59]... No reason was put to Ms Diaz and I can detect no reason why she would say she knew the accused if she did not. I have already stated that I do not believe Ms Diaz is mistaken in her recognition of the accused at the scene. If she is not mistaken, she would be fabricating that she saw the accused shoot the deceased. But there is no reason why she would blame**

a person she believes to be her cousin, a person who resided with her, prior to the incident...”

- [79] Viewed in isolation, those remarks are capable of attracting criticism. The absence of an apparent motive to fabricate does not, by itself, establish that a witness is truthful or reliable. Nor is the defence required to establish why a witness would lie before a reasonable doubt may arise.
- [80] It is no part of this Court’s function to go trawling through the evidence below to ascertain whether the trial judge came to proper findings of fact. The learned trial judge, as the tribunal of fact, had the benefit of seeing and hearing the witnesses testify, an advantage which this Court does not enjoy and to which due deference must be accorded.
- [81] However, appellate review requires that the judgment be read fairly and as a whole, and not through isolated excerpts divorced from their context. When the entirety of the learned trial judge’s reasoning is examined, it becomes apparent that her acceptance of Ms. Diaz’s evidence did not rest solely, or even substantially, upon the absence of a motive to fabricate.
- [82] The learned trial judge carefully evaluated the totality of Ms. Diaz’s evidence. She considered that Ms. Diaz claimed to have known Mr. Bennett for many years and regarded him as a cousin; that he had resided with her and the deceased for approximately one year; that the incident occurred in circumstances of recognition rather than fleeting identification of a stranger; and that Ms. Diaz maintained her account under extensive cross-examination.
- [83] The learned trial judge also considered the surrounding circumstances of the incident, including Ms. Diaz’s evidence that she saw and heard Mr. Bennett at close proximity, that there was lighting in the area, and that she had interacted with him only days before the shooting. These were all matters properly bearing upon reliability and recognition.

- [84] Importantly, the learned trial judge did not reason that Mr. Bennett was guilty because he failed to prove a reason for fabrication. Rather, she considered the absence of any apparent motive to falsely implicate Mr. Bennett as one factor among several in evaluating the credibility of Ms. Diaz. A trier of fact is entitled to take that circumstance into account, provided it is not treated as determinative.
- [85] It is unfair to state that the learned trial judge reversed the burden of proof in her treatment of Mr. Bennett's unsworn statement or alibi. The judgment repeatedly demonstrates an acute awareness that Mr. Bennett bore no burden. The learned trial judge expressly reminded herself, more than once, that rejection of Mr. Bennett's account could not itself justify conviction and that the Crown's evidence must independently satisfy her beyond reasonable doubt.
- [86] There is no basis for the complaint that the learned trial judge improperly used disbelief of Bennett's account to bolster the Crown's case. The sequence of reasoning discloses that the learned trial judge first accepted the evidence of Ms. Diaz as truthful and reliable and, against that evidential background, rejected Mr. Bennett's denial that he knew Ms. Diaz or was present at the scene. That was an evaluative conclusion properly open to her as trier of fact.
- [87] It must also be recalled that this Court will be slow to interfere with findings of credibility made by a trial judge who had the advantage of seeing and hearing the witnesses testify unless those findings are plainly unsupported by the evidence or disclose demonstrable error of principle.

[88] In my considered view, the judgment demonstrates that the learned trial judge properly directed herself on the burden and standard of proof, properly appreciated that Mr. Bennett bore no burden to establish his innocence or prove his alibi, and reached her findings upon an assessment of the entirety of the evidence as adduced by the Crown.

[89] I therefore discern no reversible error in the learned trial judge's treatment of the defence evidence or in her assessment of the credibility and reliability of Ms. Diaz. This ground of appeal accordingly fails.

### **Conclusion**

[90] Given the totality of the circumstances and for the above reasons, I am of the considered opinion that Mr. Bennett's appeal against conviction must be dismissed and the conviction for murder is affirmed.

[91] I gratefully acknowledge the assistance of learned counsel.

**Louise Esther Blenman**  
Chief Justice

I concur.

**Sandra Minott-Phillips, KC**  
Justice of Appeal

I concur.

**Michelle Arana**  
Justice of Appeal