IN THE COURT OF APPEAL OF BELIZE AD 2012

CRIMINAL APPEAL NO 3 OF 2011

BETWEEN:

WYATT ANDERSON	**Appellant**
AND	
THE QUEEN	**Respondent**

—

BEFORE:

The Hon Mr Justice Sosa	**-**	**President**
The Hon Mr Justice Morrison	**-**	**Justice of Appeal**
The Hon Mr Justice Awich	**-**	**Justice of Appeal**

Kevin Arthurs for the appellant.
Mrs Cheryl-Lyn Vidal for the Crown.

—

4, 5 July, 26 October 2012.

MORRISON JA

Introduction

[1] This matter was concluded on 5 July 2012, at which time the court announced that the appeal would be dismissed and the appellant's conviction and sentence affirmed. These are the promised reasons for the decision.

[2] On 3 February 2011, the appellant was found guilty of the offence of manslaughter, after a trial in the Supreme Court before Lucas J and a jury. On 10 February 2011, the learned trial judge sentenced the appellant to 14 years' imprisonment. This is an appeal against his conviction and sentence.

[3] The appellant was originally indicted for the offence of murder, contrary to section 117, read along with section 106(1) of the Criminal Code. The particulars of the offence were that, on 22 November 2008, the appellant murdered Robert Brown in Belize City.

The case for the prosecution

[4] The main witness for the prosecution was Detective Police Constable Jeremy McCulloch, who, at the date of the offence, as also at the date of trial, was attached to the 'Conscious Youth Development Programme'. On 22 November 2008, at about 12:45 in the morning, Constable McCulloch was driving a pickup truck along Raccoon Street in Belize City, heading towards Central American Boulevard. As he approached the corner of Raccoon Street and Curassow Street, he observed two young men about 20 yards ahead of him. They were, he said, "struggling in a fighting form". He thought at first that they were in fact "just playing", but as he got a bit closer to them he saw "a shiny object", which appeared to him to be a knife, in the hand of one of the young men. In order to get a clearer view of the men, Constable McCulloch immediately switched on the high beam of his vehicle and dialed 911 on his cellular telephone to make a report of what was happening. At a distance of about three to four yards from the two young men, Constance McCulloch brought his vehicle to a complete stop in the middle of the road and alighted from it, leaving its engine running with the headlights still on, illuminating "the entire street". He was dressed in his police combat uniform and had his .38 government issued revolver in his hand.

[5] Standing at a distance of about three yards from the men, Constable McCulloch then heard one of them say, "let me go cause you done juck me already", to which the other responded, "I noh wa hear cause you done mess with my sista". This latter remark was made by a man dressed in a long, white T-shirt, of slim build,

brown complexion, about six feet in height and with “dreaded hair, braided”. This was the man who had in his hand an object which Constable McCulloch now confirmed to be “a regular size kitchen knife with a 7 inch blade”. This man was holding the wooden handle, while the other man, who was standing in front of him, was “holding on to the blade part of the knife.” There were approximately four persons in the area surrounding the men, looking on, a couple of them standing by the street side about seven to eight yards away.

[6] Constable McCulloch then told the men to drop the knife, telling them that he would count to the number three and that, if they didn’t drop the knife, he would shoot. Then, he said, they “let go of each other” and the man in the white T-shirt, threw the knife, which had remained in his hand, into a drain about eight yards away. This man then turned and walked away in the direction of Seagull Street and Constable McCulloch followed him a distance of about six feet, before hearing a noise behind him. This turned out to be the sound of the other man falling to the ground in the street. Some of the men standing by the street side then told Constable McCulloch to help them to take the fallen man to the hospital, whereupon he was placed in the back of the pickup truck and driven off to the emergency room of the Karl Heusner Memorial Hospital (‘KHMH’). There, bleeding from the left side of his body and motionless, he was handed over to hospital personnel.

[7] Constable McCulloch told the court that the entire incident in which the man was injured had lasted for approximately a minute to a minute and a half and he identified the appellant in court as the person he had seen during the struggle between the two men with his hand on the handle of the knife. He was also the person who had spoken the words, “I noh wa hear because you done mess with my sista.”

[8] Constable McCulloch had been met at the hospital by the late Woman Sergeant Erlett Jones, who accompanied him back to the scene of the incident, where the knife was located in the drain by the side of the road and later recovered. At approximately 1:20 am that same morning, at the request of Woman Sergeant Jones, Mr Pablo Mai, a scene of crimes technician, also arrived at Raccoon Street. He conducted a search of the area and saw what appeared to be blood on the street.

He also found a knife, also with suspected bloodstains on it, in the drain to which he had been directed. Photographs of the blood in the street and of the knife were taken and copies later tendered in evidence, while the stained knife was sent to the Forensic Laboratory for analysis.

[9] The investigating officer was Corporal Mark Young, who was at the time attached to the Crimes Investigation Branch, Eastern Division ('C.I.B.'). As a result of a call received while on duty at the C.I.B. Office at approximately 1:00 am on 22 November 2008, he attended the KHMH Trauma Room, where he saw the body of a male, identified as that of Robert Brown, with a dreadlocked hair style and an injury to the left side of his chest. Corporal Young went with Mr Mai to Raccoon Street, where he saw him retrieve a board handle knife, with the blade slightly bent, from a point near to a drain by a cement fence. He then spoke to Constable McCulloch, as a result of which he informed all mobile and foot patrols to be on the lookout for the appellant. Later that same morning, he visited an address on North Creek Road, which is on the south side of Belize City, in search of the appellant, but was unable to locate him.

[10] On 25 November 2008, Dr Mario Estrada Bran, Forensic Doctor Specialist attached to the Ministry of National Security, conducted an autopsy on the body of the deceased. The body was identified to Dr Estrada Bran by Ms Lisbeth Brown-Pitterson as that of Robert Brown, her son. The deceased was male, about 28 years of age, five feet 10 inches in height and approximately 130 pounds in weight. There was a stab wound, four inches deep and one inch long about one and a quarter inches to the left side of the middle line of the body in the chest area. Dr Estrada Bran also observed a two inch surgical wound to the lateral chest area, which he surmised was a result of an accepted surgical procedure performed at the hospital by a surgeon or the doctors "to release the…internal chest pressure due to profuse bleeding". The doctor's conclusion was that the direct cause of the deceased's death was "hyperbolemic [sic] shock due to internal bleeding", the result of a stab wound inflicted to the chest with a knife. The force used to inflict the injury would have been "mild to moderate" and, after receiving an injury to that nature, the deceased would have been able to do no more than make "a few movements", before falling to the ground.

[11] Also present at KHMH when the autopsy was conducted on 25 November 2008 was Ms Audrey Cleland, another scene of crimes technician, who took photographs of the upper part of the deceased's body, including the left side of his chest. She was also handed a glass test tube containing blood, which she had seen drawn by Dr Mario Estrada Bran from deceased's chest cavity. The photographs were subsequently downloaded and printed and copies were in due course tendered and admitted in evidence, while the test tube with the deceased's blood in it was later sent to the Forensic Laboratory for analysis.

[12] Recalled to give evidence, Constable McCulloch identified the deceased from one of the photographs in evidence as the person who had been involved in the struggle with the appellant at Raccoon Street on the morning of 22 November 2008 and who was subsequently taken to KHMH by him. Using the photographs, he was also able to point out to the court the precise location in which he had observed the incident taking place on Raccoon Street that morning, as well as where he had located the knife in the drain upon his return to the scene from KHMH. He also told the court that the blade of the knife was bent when he saw it in the drain.

[13] Despite some four or five subsequent visits to the North Creek Road address, Corporal Young did not succeed in locating the appellant. However, on 10 March 2009, Mr Brentford Longsworth, then a corporal of police, led a team of police officers to a building at the corner of North Creek Road and Seagull Street. There, upon entering a room downstairs the building, Mr Longsworth encountered the appellant. He informed the appellant that he was wanted by the C.I.B. in connection with a murder investigation and cautioned him. The appellant's response was, "I was coming to hand over myself today with my attorney." The appellant was then taken to the C.I.B. office on Queen Street, where he was handed over to police personnel.

[14] That same day, Corporal Young was informed that the appellant was in a detention cell at the Queen Street Police Station. He went to see the appellant, told him of the reason for his detention and cautioned him, in response to which the appellant remained silent. However, later that day at about 7:30 pm, Corporal Young was told by the appellant that he wished to speak to him. Taken to the C.I.B. office,

the appellant then told Corporal Young that he wished to make a statement and he agreed to do so in the presence of a justice of the peace.

[15] Corporal Young sought the assistance of Inspector Suzette Anderson, who was also attached to the C.I.B. Inspector Anderson called Mrs Eleanor Enriquez, a justice of the peace, to witness the appellant's statement while it was being recorded. At about 8:30 that same evening, Inspector Anderson, the appellant and Mrs Enriquez assembled in a room at the C.I.B. office and Inspector Anderson left the appellant and Mrs Enriquez together in the room for about five minutes. She then re-entered the room and asked the appellant if he wished to make a statement, to which he responded in the affirmative. Inspector Anderson then advised the appellant of the reasons for his arrest and advised him of his right to consult an attorney-at-law or friend in private and to make a telephone call. After caution, the appellant proceeded to make a statement, and, Inspector Anderson told the court, he did so freely and voluntarily. This was confirmed by the evidence of Mrs Enriquez.

[16] The completed statement was tendered and admitted in evidence, without objection from the appellant's counsel. Read out in court by Inspector Anderson, the statement was as follows:

> "I, Wyatt Anderson at the time of my arrest was informed of the reason for my arrest by Woman Inspector Suzette Anderson. In that I was arrested for the crime of Murder. I was also informed that I could communicate privately with and give instruction to a solicitor or friend of my choice, and that I am entitled to a telephone call.
>
> Signed: Wyatt Anderson
> Signed: E Enriquez
> Insp S Anderson
>
> You do not have to say anything unless you wish to do so, but what you say may be taken down in writing and given in evidence.
>
> Signed: Wyatt Anderson
> Signed: E Enriquez
> Insp S Anderson
>
> I, Wyatt Anderson wish to make a statement. I want Woman Inspector Suzette Anderson to write down what I say. I understand that I need

not say anything unless I wish to do so and what I say may be given in evidence.

Signed: Wyatt Anderson
Signed: E Enriquez
S Anderson, Insp

When I was coming from my cousin's studio late on the night of the 22nd day of November, 2008, I was met by a little boy in my neighbourhood not too far away from where I live who told me that the dread guy who was around whom I know as Brown just threw Guinness at my sister. I asked him which guy he was talking about and he pointed out to me a dread guy who was not too far away from me who was the same Brown. I then decided to go and check what was going on and so I went up to where Brown was where I asked him something but before I could ask him in full what was taking place I saw him attacking me with a knife that he had in his hand but missed and the knife passed on my right side, without hitting or stabbing me. After he missed, I then saw him lifting the knife and made a motion to stab me with the knife on the upper part of my body where I put up my two hands and grabbed him by the hand trying to stop him from stabbing at me. We were then both swinging with the knife where I was trying to get a hold of the knife from out of his hands. As we were struggling with the knife we moved around and did not remain at the same spot. During the struggle he ended up over me but both of us still had the knife in our hands because he still did not want to let go of the knife. During this time I was telling him to let go of the knife but he kept on telling me that he dealing with my sister. I then heard a voice yelling the word, "Police". I then looked in the direction where I heard the word "Police" where I then saw a male person of fair complexion standing and pointing in our direction with a shiny object in his hands that resembled a small hand gun. I then told Brown to let go the knife and asked him if he didn't hear that the police is here. I told him that he will get shot if he does not let go of the knife because the police is here now. There was a pause then after which Brown let go of the knife where it ended up in my hand. I then looked at the male person who yelled "police" and drew two steps backward and let go of the knife where it landed on the ground. I then walked away and then began running around the lane where I then checked myself to see if I had received any stabbing injuries during the incident. I then took off the shirt that I was wearing. I then reached home on North Creek Road in my mother's yard. My mother was in the yard also my sister. I then began talking to my mother but before I could finish telling my mother about this incident a guy whom I know only as "Dude" came up and told me that the same guy whom I was hassling with just drop. I then asked him what he meant by drop and he told me that the guy got stabbed. I then started to panic and went inside my room. On the following morning I heard on the morning news on the radio that Brown died. Wyatt Anderson E Enriquez

The following questions were put to the accused for clarification.

Q: Who is your sister?

A: Nikita Anderson.

Q: Where was Brown?

A: Brown was on Raccoon Street, Belize City.

Q: Who is your mother?

A: Bernadine Anderson

I, Wyatt Anderson, have read the above statement and have been able to correct, add or alter anything I wish. This statement is true. I have made it of my own free will.

Signed: Wyatt Anderson
Signed: E Enriquez

I, Suzette Anderson, Inspector of Police, have recorded the above caution statement from Wyatt Anderson on Tuesday the 10th day of March, 2009. He read the statement and answered the questions put to him. He made the statement of his own free will in the presence of Ms Eleanor Enriquez, Justice of the Peace.

S Anderson, Insp

I, Eleanor Enriquez, Justice of the Peace on the 10th day of March, 2009, witnessed the recording of a statement made under caution by Wyatt Anderson. He made the statement on his own free well.

E Enriquez."

[17] The signed statement was handed to Corporal Young by Inspector Anderson at around 10:39 pm on 10 March 2009. On the following day Corporal Young obtained a warrant and formally arrested and charged the appellant with the offence of murder. That was the case for the prosecution.

The defence

[18] The appellant elected to give sworn evidence. He testified that on the morning in question he was in the process of leaving his cousin's studio for home when he met a friend who told him that someone had just thrown some 'Guinness'

on his sister. As a result, he went riding on his bicycle, to the location to which he had been directed by his friend. There, he saw a group of about seven people, among whom was someone with "dread hair", known to him as Brown.

[19] According to the appellant, as he begun to ask this man what had happened with his (the appellant's) sister, the man pulled out a knife and ask him if he "want some too". Then, he said, the man "juck at me at the side but I dodge it." The appellant was still on his bicycle at this point. The man Brown then tried to stab him in the upper part of his face, so the appellant defended himself by putting up his hand and grabbing the man's hand with the knife. They then struggled around on the street, with the man shoving the appellant across to the other side of the street, while the appellant was trying "to stay at the middle of the street because I saw a vehicle was coming".

[20] This is the appellant's account of what then ensued:

> "He was strong so we end up over the other side of the street against a vehicle that was parked and my feet slipped in a drain where we both dropped. I drop on the back and he dropped over me while I was holding the knife with one hand and he was holding the knife with one hand too.
>
> The both of us got up. I use this hand to get up and he used the other hand to get up. So both of us got up.
>
> THE COURT: If I understood you, both of you were still holding the knife?
> ACCUSED: Yes sir.
> THE COURT: And both of you struggle with the knife?
> ACCUSED: Yes,
> THE COURT: I don't want to put words in your mouth I am just asking what you're saying.
> ACCUSED: I was trying not to get stab and to try to get the knife from him. So we could stop. So I pushed back to the middle of the street. Then I get the opportunity to swing his hand so and put his hand around this side, the [sic] hold me like this and he held the knife like this and was over me like from back way.
> (Accused demonstrates).
> THE COURT: And held on to what?

ACCUSED: He was over me and the same vehicle that was coming parked.

THE COURT: No what he did, it was just that you were demonstrating. You held on to the knife.

ACCUSED: Like this way

THE COURT: So he was what now, in front of you?

ACCUSED: He was over me from the back that's why I kept the knife this way.
(Accused demonstrate).

THE COURT: To make sure, you were still standing.

ACCUSED: Both of us were standing.

THE COURT: Go ahead now.

ACCUSED: Then while I had the knife like that, I was telling him let go of the knife. Then he told me, "I di deal with yu sista, I di deal with yu sista" and I told him how, "I noh even know weh di go on ya, I just mi di check weh mi di happen."

Then the car was parked in the middle of the street next to the car that was already there and I heard a voice said, "police, uno break up, uno break this up". Then I tell him.

THE COURT: Who is him?

ACCUSED: Mr. Brown, Robert Brown.

THE COURT: Why I asked you that because somebody was saying police, so I want to know which one you're speaking to. So you told him?

ACCUSED: Let go the knife because the police is already there, if he want to get shot. So when I told him that he was just replying like, "police, police", like he was telling me in a way like, "police, police", like what am I saying police for or something like that. In a manner like, mek I stop di cry then and di cry pon police. And I was like this and I look like this and I saw the police right there with his gun like this and I tell him police again and he look as if he look at the same direction and saw the police and then he let got the knife.

Then when he let go the knife he come from over me and stand right at the side there and I stand at the side and the police still had the gun pointed at me and I tell the police, "this guy came after me with this knife", and I dash it right there in the drain, right in front of the police.

THE COURT: When he let go the knife he?

ACCUSED: He let me go too and went on the side.

THE COURT: I told the police?

ACCUSED: That he came at me with the knife and I drop it. I had the knife at that time and I throw it on the

ground, on the side of the drain and tell the policeman that he came after me with the knife. Then the police put his gun back in his side and I fell something fly across my face, so I start to walk.

THE COURT: I feel something on my face?

ACCUSED: Like someone was stoning something at me, at the time. So I turn my face from the direction where it was coming and I walked and trot around the lane. I walked then trot around the lane because they were still stoning at me, so I trot around the lane to my house. I live right around the lane on North Creek.

And I reached home with my shirt wrapped around my hand and my mom and my sister asked me what happened. And I told them I stopped to check on what a guy told me happened to my sister and this guy just attack me.

After I finish explain to them, a guy who was by the club, it was close to a club. He came and told me the guy who was struggling with you, who you were struggling with, look like he got stabbed and I start panic and fret."

[21] The appellant said that when he was holding the knife he received three cuts, one on his wrist and two in his hand. He was not aware that the man Brown had received an injury until he was told subsequently. After that, he was about to go to the police station to give himself in, but he got scared ad did not do so.

[22] In cross-examination, the appellant clarified his position on the circumstances in which the deceased was stabbed, as follows:

"Q: Your position is that you did not know when Mr. Brown got stabbed?

A: No, I did not know.

Q: Is it your position that you neither stabbed him nor attempted to stab him during that struggle?

A: I didn't. Maybe if I did it was when.

THE COURT: Listen to the question, you did not stab him nor you did not attempt to stab him?

ACCUSED: No sir.

Q: So when you left that scene of the incident, on the morning of the 22nd day of November, you had no idea that Mr. Brown had been stabbed or injured in any way?

A: No.

Q: Your position is, if I heard you correctly, is that the only time you had possession of the knife, you had the knife in your hand, is

when you let go of the knife finally, this is after the police had announced his presence there. At the end of the struggle that is the first time you had the knife in your hand. That is what you're saying?

A: Yes."

[23] The appellant denied that the deceased had said to him, "let me go cause you done juck me already", or that he had said in response, "I no care because you done mess with my sister." He also denied the suggestion put to him that the reason he left the scene that morning and did not thereafter present himself to the police was "because you are aware that you had in fact stabbed him."

[24] Mr Reginald Goroy gave evidence in behalf of the appellant. At approximately midnight on 21 November 2008, he had gone to Raccoon Street to buy some food and. while there, he saw an altercation develop between a man who had arrived on the scene on a bicycle and another man who had come out of a yard on Raccoon Street. It appeared to him that the latter, who was armed with a knife, was trying to rob the former of his bicycle. They started to struggle, when another man came out from the same yard, "jump on the guy's bike and he roll off with the guy's bike." Another man then appeared, and someone made a movement as if to pull out a firearm and, the situation looking as though it might get out of hand, Mr Garoy got into his car and left the scene. In his examination-in-chief, Mr Garoy did not purport to identify any of the persons involved in the incident which he described and, hardly surprisingly, counsel for the prosecution did not find it necessary to cross-examine him. That was the case for the defence.

[25] After addresses from counsel, the learned trial judge then embarked on a long and careful summation to the jury, to some aspects of which it will be necessary to refer later in this judgment. The jury in due course retired and, after over four hours of deliberation, returned a verdict of not guilty of murder, but guilty of manslaughter. The appellant was, as already indicated, sentenced to 14 years' imprisonment.

The grounds of appeal

[26] The appellant appeals against his convictions and sentence on three grounds, which are as follows:

> "1. (a) The learned trial judge erred in allowing the case to go to the jury after the close of the prosecution's case or at the tardiest at the close of the case for the defense. The Appellant contends that the trial judge erred in not inviting submissions on a no case to answer (no case submission) at the close of the prosecution case.
>
> i. On the evidence led by the prosecution, it was not proven that the appellant killed the deceased with the intent necessary to support a charge of murder. Further, there was no satisfactory evidence that the appellant killed the deceased.
>
> ii. In his opening speech, counsel for the prosecution had asserted that the appellant intentionally delivered an injury upon the deceased with a knife and that he did so unlawfully and there was no evidence to support this assertion.
>
> iii. The burden of proof was on the prosecution to prove the requisite elements of the offence and prosecuting counsel had explained to the jury in his opening address that he had to prove the guilt of the accused beyond a reasonable doubt.
>
> iv. After all of the evidence for the prosecution had been admitted and, having regard to the onus of proof on the prosecution, the prosecution had failed to prove to a satisfactory standard the very matters which were required to be proved.
>
> 1. (b) Therefore, at the end of the evidence for the Prosecution and in light of the evidence, the trial judge should have removed the case from the jury, and ordered that the jury enter a verdict of not guilty.
>
> 2 The learned trial judge's directions were inadequate as he failed to properly direct the jury as to how to treat the caution statement of the Defendant.
>
> 3. The learn [sic] trial judge erred in failing to direct the jury in respect of the Defendant's (sic) alleged statement "let me go

> cause you done juck me already" and "I noh wah hear cause you done mess with my sista.""

The submissions

[27] Mr Kevin Arthurs presented the case for the appellant with his usual energy and tenacity. On ground 1, he directed our attention to the way in which prosecuting counsel had opened the case to the jury, to make the point that, at the close of its case, the prosecution had not come up to proof and that the judge ought therefore to have withdrawn the case from the jury. In particular, Mr Arthurs submitted that at the end of the prosecution's case there was no evidence to show that the appellant had inflicted harm to the deceased intentionally, nor was there any evidence to rebut the issues of accident and self-defence which clearly arose on the evidence.

[28] In his printed skeleton argument, Mr Arthurs referred to a number of authorities, but in his oral argument before us he relied on two of them in particular, **R v Abbott [1955] 2 All ER 899** and **Springer v R (No 2) (Court of Appeal of Barbados, Criminal Appeal No 17 of 2005**, judgment delivered 12 June 2006).

[29] Mr Arthurs further submitted that the fact that there had been no submission of no case made on the appellant's behalf at the close of the prosecution's case did not relieve the trial judge of the obligation to consider whether there was sufficient evidence at that stage to require the appellant to answer. For this point, he relied on the decision of this court in **Juan Pop v R (Criminal Appeal No 4 of 2009**, judgment delivered 19 March 2010) and the decision of the Privy Council in **Eiley et al v R [2009] UKPC 40**.

[30] On ground two, Mr Arthurs' complaint was that the learned trial judge did not direct the jury on the appellant's statement after caution and "how it related in law to the facts in issue before the court". Accordingly, it was submitted, in the absence of such a direction, the jury was left to speculate.

[31] On ground three, Mr Arthurs referred us to the recent decision of the Privy Council in **Benjamin & Ganga v R [2012] UKPC 8**, to make the point that it was incumbent on the trial judge to direct the jury that, in a case in which the prosecution

relied on oral admissions alone, there was a heavy burden cast on the prosecution and that there were inherent dangers in such evidence.

[32] In her, as always, economical submissions in response, the learned Director submitted that, on ground one, there was evidence at the close of the prosecution case upon which a properly directed jury could have convicted. This evidence came from Constable McCulloch, as well as from the appellant in his statement after caution and it was a matter for the jury to decide what aspects of it they believed. The Director submitted that both **Abbott** and **Springer** were distinguishable on their facts and urged us to consider the actual evidence in the instant case. On ground two, she pointed out that in his sworn evidence the appellant had reiterated what was contained in the statement after caution and added to it. There was therefore no need for a separate direction on the statement in the circumstances of this case, particularly in the light of the judge's full treatment of the appellant's sworn evidence. And finally, on ground three, the Director contented herself with the observation that **Benjamin & Ganga** was a confession case and therefore had no bearing on the instant case.

Discussion

Ground one – a case to answer?

[33] There can be no question that, as Mr Arthurs submitted (and the Director did not dissent from this), a trial judge is, in a proper case, under a duty to withdraw the case from the jury at the close of the prosecution's case, even in the absence of a submission from defence counsel. In a case in which the judge considers at that stage that the evidence for the prosecution is insufficient to found a conviction, his duty in the absence of a submission is to invite submissions from counsel, and, if appropriate, to withdraw the case from the jury (see **Juan Pop v R**, per Sosa JA, as he then was, at paras [9] – [12]).

[34] In **Abbott**, Lord Goddard CJ said (at page 903) that "it cannot be right for a judge to leave a case to the jury where the whole of the structure on which the prosecution has been built up to that moment collapses and fails". **Abbott** was a case in which the Court of Appeal considered that that was precisely what had

happened, leading Lord Goddard CJ to observe (at page 901) that "[a]ll the members of the court are of the opinion that at the close of the case for the prosecution there was no evidence against the appellant at all". In terms of Lord Lane CJ's subsequent authoritative pronouncement in **R v Galbraith [1981] 2 All ER 1060, 1061**, **Abbott** was clearly a case in which, the court having concluded "that the Crown's evidence, taken at its highest, [was] such that a jury properly directed could not properly convict on it", the judge had been under a duty to stop the case.

[35] In **Springer**, in addition to referring to **Galbraith** with clear approval, Simmons CJ referred to **R v Barker (1977) 65 Cr App R 287, 288**, in which Lord Widgery CJ said this:

> "It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the case has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury…"

[36] Thus, in **Springer**, the court considered (at para. [21]) that at the end of the Crown's case, on a prosecution for murder, "there was no satisfactory proof of an essential element that the appellant deliberately intended to kill the deceased or cause him serious bodily harm". Further, on the prosecution's case itself, there was evidence which raised issues of accident and self-defence, both of which it was the undoubted obligation of the prosecution to negative.

[37] We do not doubt that the decision in **Springer** was firmly based in authority which is also binding on us. However, we consider that the learned Director was correct to indicate that it is distinguishable on its facts. In **Springer**, there were no eyewitnesses to the incident which led to the death of the deceased and no direct evidence of the facts, apart from the written statement of the appellant. The statement, which was tendered in evidence by the prosecution and admitted without objection, far from providing evidence of the appellant's guilt, plainly raised the

issues of self-defence and accident. In these circumstances, there being no evidence at the close of the prosecution's case to negative either issue, the trial judge was, on principle and on authority, clearly obliged to withdraw the case from the jury, just as the judge was held to have been in **Abbott**.

[38] In our view, the instant case is wholly different. On Constable McCulloch's evidence, the appellant and the deceased were involved in a struggle, during which the appellant was seen (i) with a knife some 12 inches long in his hand, holding it by the handle, while the deceased held on to the blade; and (ii) after the men came apart, throwing the knife into the drain from which it was later retrieved. There was also the exchange between the deceased and the appellant, the former saying, "let me go because yu done juck me already" and the latter replying "I noh wa hear because yu done mess with my sista". This gave rise, in our view, to the clear implication that the appellant was the aggressor and the deceased was the person under attack and it was a matter for the jury to determine whether this was in fact a reasonable inference to be drawn from the evidence. And further still, there was the appellant's own statement, which tended to confirm in some respects the evidence for the prosecution, in particular that on the night in question it was the appellant who had initiated a conversation with the deceased and that a struggle had ensued between them in which a knife was involved. Again, it was a matter for the jury to determine which of Constable McCulloch's and the appellant's versions of who was the aggressor in this struggle should be accepted.

[39] For all of these reasons, we consider that this was not an appropriate case for an unprompted intervention by the judge at or after the close of the prosecution's case and that Lucas J acted correctly in calling upon the appellant to answer.

Ground two – the judge's directions on the appellant's statement

[40] It is a fact that, as Mr Arthurs complained, the learned trial judge said nothing to the jury as to how they should approach the appellant's statement after caution. If even from the standpoint of accurately rehearsing for the jury the evidence given as part of the prosecution's case, we consider that he should have done so. However, it is clear that this was not the usual kind of case in which reliance was placed on the

content of the statement by the prosecution as an integral component of the evidence being proffered as proof of the appellant's guilt. Rather, the statement in this case foreshadowed to a considerable extent the evidence which the appellant himself ultimately gave at the trial. It seems to us that what was really important in these circumstances was for the judge to ensure that the substance of the case for the defence was fully and fairly left to the jury.

[41] The judge went through the evidence of the appellant at length and in great detail. Admirably, he interspersed his summary of the evidence with careful and accurate directions on matters of law as they emerged from what the appellant had said. Thus, having told the jury that he was moving on in his summing up to the defence, the judge said right at the outset that one of the defences put forward on behalf of the appellant was accident. He then defined an accidental killing, in terms of which no complaint was made, telling the jury that "[a] killing which occurs in a lawful act without intending to cause the act and without negligence is accident".

[42] Then, having taken the jury through the appellant's account of the struggle in the street between himself and the deceased, the judge went on to say this:

> "So I am going to repeat that, if you believe the accused's story that he was trying to get the knife from the now deceased Brown and in that process because remember he said he did not know that Brown got stab, but if you accept that he got stab and he got stab during the time when the accused was trying to get the knife from Brown, I am saying that is an accident because he's saying that he did not thrust a knife at him. So it just happened that he got injured. So I have defined to you what is accident and I've told you in a situation like that, it is lawful for anybody to take away a knife from a person who is about to injure him and he had already throw [sic] stabs at him, he said. In a case like this, you find him not guilty. But I go further, suppose you have a reasonable doubt, so that means, you are not saying you do not believe the accused, you are not sure, well it could happen, once you have that doubt you must resolve the doubt in favour of the accused. So you are to treat it as an accident and you are to find the accused not guilty of murder.
>
> I am directing you further on this accident, you know, Mr. Foreman, ladies and gentlemen of the jury. The burden is not on the accused to prove that the incident occurred by way of accident. Remember I told you earlier the Crown has a burden to prove and the standard is beyond a reasonable doubt, not the defence. He just have to raise it.

> He just have to say it. By saying, the way how he said it and I told you, if you accept the evidence that is accident, I am telling you he is not to prove, he has no burden to prove that it happened by accident. Since he had raised that issue, that means accident, it is for the prosecution to negative accident or to negate accident and the standard is beyond a reasonable doubt. What that means? That accident because he raised it, is shift to the Crown now to prove to you, to make you sure that that did not happen by accident; that's what it really means. All that the accused has to do is just raise it, even though he may not use the word accident but from the evidence, I am telling you, if you accept it because I gave you the definition of accident that would fall under the legal term of accident. So I want to emphasize, he need not prove that, the accident, it is for the Crown to say, no jury that is not accident, that was a deliberate [sic], no accident. And the Crown must negative that accident beyond a reasonable doubt. So you must be sure that it was not an accident."

[43] In similar vein, the judge went on to deal with self-defence, telling the jury that "[y]ou're going to use the same evidence that you use for accident, for self defence"; and that "the burden is not on the accused to prove that he was acting in self defence, since it is for the prosecution to show that the accused inflicted injury unlawfully upon Robert Brown…the prosecution must convince you beyond reasonable doubt that self defence has no basis".

[44] And then, the judge continued, "[t]here is another issue that came up in this case…referred to as provocation". He told the jury what was capable of amounting to provocation in general: "the assumption by the other person, at the commencement of unlawful fight of an attitude manifested in an intention of instantly attacking the accused person with a deadly or dangerous means or in a deadly manner" (an almost verbatim reproduction of section 120(b) of the Criminal Code). Tying that definition back to the evidence given by the appellant, the judge next said this:

> "The attitude according to the evidence of the accused of Robert Brown, was attacking him with a knife, instantly, he didn't finish talk to him and Brown attack him with a knife. Because he strike him at the side, then he tried to stab him in the upper part of his face. That, if you accept that evidence, is provocation."

[45] And, again in this context, the judge reiterated that the burden "is on the Crown to negative provocation…the Crown must prove to you that he was not acting under provocation when he stab, if you find that he stab Robert Brown". Further, "[the] burden on the Crown to negative provocation is beyond a reasonable doubt… you must be sure that the Crown had proven to you that he was not provoked as defined by law when he inflicted the injury on Robert Brown".

[46] Finally, the judge brought the three issues together by emphasizing to the jury the different consequences of a finding of accident or self defence, on the one hand, and provocation of the other:

> "But let me make something clear here, Mr. Foreman, members of the jury. If you find that the accused caused the death by accident, stop there, find him not guilty and stop there. Don't go and look for any other thing. If you do not find that he caused the death by accident then you go to self defence. If you are satisfied from his evidence and from what questions I had posed to you earlier that he acted in self defence when he killed Robert Brown, you stop right there too, don't go to any other because for accident you find him not guilty, for murder and no other crime and for self defence you find him not guilty of murder and for no other crime. The only way you're going to the others now that I am going to tell you, if you reject or if you accept the Crown's evidence, because the burden is on the Crown that it is not by accident and he was not acting by self defence, then you go to provocation. So if you accept this evidence or if you have a reasonable doubt of it, that means you are going to treat it as though you accept it, that when Brown was attacking him with the knife that that was provocation as I told you, according to the law. So I'll read it:
>
> The assumption by the other person at the commencement of unlawful fight, that means you must find out that there was a fight there which was unlawful, of an attitude manifest [sic] an intention of instantly attacking the accused person with deadly or dangerous means or in a deadly manner, that is provocation, according to the law. Because he had said that Brown was attacking him. He didn't finish talking to him yet and he was attacking with a knife. Provocation have [sic] different meaning than teasing; it's not teasing. The law have [sic] its own definition of provocation and I just told you which we are dealing with. If a person kills while being provoked, it will not be murder that is manslaughter. And again, even if he intended to kill, if a person intended to kill whilst being provoked, it is not murder. Provoke as the law dictates. It is not murder. So if you find that the accused was provoked as I've told you, according to section 120(b) of the Criminal Code, you must find him not guilty of murder but you may find him guilty of manslaughter.

> It is for the jury to decide whether or not that the act amounted to provocation, what the deceased did to the accused as I've explained to you under the law. If you find it to be so, that means, provocation and the accused injured Robert Brown while he was being provoked then you are to find the accused not guilty of murder but you may find him guilty of manslaughter.
>
> If you are in reasonable doubt, you find him not guilty of murder but you may find him guilty of manslaughter. Because provocation is not like accident or self defence, so you are not free as such, except that you are free from murder but the jury may find one guilty of manslaughter."

[47] We accordingly consider that the appellant's defence was left to the jury in terms that were accurate and eminently fair to him.

Ground three – non-direction on the exchange of words between the appellant and the deceased

[48] **Benjamin & Ganga**, upon which Mr Arthurs relied on this ground, is an important recent decision by the Privy Council on the law relating to confessions. It concerns in particular the question of the appropriate direction to a jury as to the consequences of a finding by them that a confession relied on by the prosecution was obtained by oppression or by anything said or done to the defendant which is likely to render it unreliable. (The specific issue was in what circumstances should a '*Mushtaq'* direction be given – **R v Mushtaq** [2005] 1 WLR 1513.)

[49] We entirely agree with the Director that **Benjamin & Ganga** has nothing to do with the complaint which Mr Arthurs makes about the alleged exchange between deceased and the accused in this case. The true significance of that evidence, it seems to us, was that, if believed, it might clearly amount to an informal admission by the appellant that he had in fact already inflicted a wound to the deceased and that the reason for his having done so was that the deceased, as he put it, "done mess with my sista." That was entirely a matter for the jury and it was clearly left to them by the judge in those terms.

Conclusion

[50] For all of the foregoing reasons, we came to the conclusion that this appeal could not succeed and we therefore made an order in the terms set out in paragraph [1] above.

_____

SOSA P

_____

MORRISON JA

_____

AWICH JA