IN THE COURT OF APPEAL OF BELIZE AD 2013

CRIMINAL APPEAL NO 6 OF 2011

PAULINO ASSI Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Mr Justice Manuel Sosa	President
The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Mr Justice Douglas Mendes	Justice of Appeal

B S Sampson SC for the appellant.
C Vidal, Director of Public Prosecutions, for the respondent.

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28 March 2012 and 1 November 2013.

SOSA P

Introduction

[1] This appeal has raised for consideration by the Court a situation in which, as was the case in *Uriah Brown v The Queen* [2005] UKPC 18 and *Peter Stewart v The Queen* [2011] UKPC 11, it did not emerge until the sentencing hearing that the accused was a person of previous good character; but in the present case the trial judge, unlike the trial judges in *Brown* and *Stewart*, had already purported to give a good character direction

to the jury even although defence counsel had at no time raised the issue of the accused's good character,

[2] San Pablo and Douglas, both villages of the Orange Walk District, are situate, respectively, on the oft-travelled Philip Goldson Highway (formerly the Northern Highway) and the haughty Río Hondo. At about eight o'clock on the night of Saturday 22 November 2008 there was, in San Pablo, a shooting incident involving the firing of three shots by 20-year-old Private Paulino Assi ('the appellant') of the Belize Defence Force ('the BDF') and the sustaining by George Kenny Cortez of Douglas ('the deceased') of injuries which proved fatal no later than the next day. The appellant was charged with the manslaughter of the deceased and pleaded Not Guilty at arraignment on 27 January 2011. His trial, which followed before Lord J and a jury and at which he was represented by Mr L R R Welch, ended with his conviction of manslaughter, by a majority verdict of seven to two, three weeks later, on 17 February 2011. (The jury considered its verdict for two hours and forty-five minutes.) Thereafter, on 3 March 2011, the appellant was sentenced to imprisonment for a term of ten years. On 23 March 2012 his appeal from his conviction and sentence was allowed by this Court, in consequence of which such conviction and sentence were, respectively, quashed and set aside but, in the interests of justice, a retrial was ordered. The appellant was further granted bail on the condition that he enter into a recognizance, for the sum of $6,000.00 (with two sureties, each in the sum of $3,000.00), to appear before the court below for his retrial. This Court now gives the reasons for decision which, on 28 March 2012, it undertook to provide.

The pertinent evidence at trial

[3] The deceased and all four purported eyewitnesses called by the Crown to testify at trial ('the eyewitnesses') were members of a group of villagers of Douglas who were being temporarily sheltered in the building which houses the Community Centre in San Pablo following the evacuation of the former village owing to flooding. The appellant, with only about 16 months of military experience, was, on the day in question, present at the premises of the Community Centre ('the premises') for the purpose of, in his words, 'providing security' for the evacuees. With him was his superior officer, a Lance-

Corporal Pop ('the Lance-Corporal'); but, of the two, he was the only one who was armed, and he had only one weapon on him. A firearm purporting to be that weapon was identified by the sole expert in firearm examination who testified for the Crown at trial as an AR-15 rifle (which is, by notorious definition, a semi-automatic firearm, in contrast to, say, the M16, which is fully automatic).

[4] There was undisputed Crown evidence at trial that the deceased arrived at, and actually entered, the premises in a state of intoxication at some stage on the day in question and that his behaviour met with the disapproval of the Lance-Corporal and the appellant (who shall, when referred to together in the remainder of this judgment, be called 'the soldiers') and gave rise to loud argument amongst the three. The defence also refrained from contesting that the deceased thereafter left the premises upon being ordered by the soldiers so to do. However, as to the precise circumstances existing immediately before and at the time the deceased came to be injured, there was sharp difference between, on the one hand, the general thrust of the evidence of three of the eyewitnesses and, on the other, the testimony of the appellant himself (who called no witnesses).

[5] For present purposes, such difference does not assume the importance which it otherwise might, for reasons which shall appear in due course. Suffice to say, therefore, that whilst, on the Crown side, it was the clear testimony of three of the eyewitnesses, viz Germaín Méndez, Clarissa Uk and Alexandrina Román, that the deceased was shot whilst walking away from, and with his back turned to, the soldiers, on the defence side, the equally clear evidence was that the shots were all fired as the deceased advanced towards the Lance-Corporal and 'in an angle' *vis-à-vis* the appellant. (The fourth of the eyewitnesses, Saul Rodríguez López, was inconsistent in his evidence, stating twice in examination-in-chief that he did not know where the deceased was when the shots were fired but testifying under cross-examination that he (the deceased) was face-to-face with the soldiers when shot.)

[6] It is useful, before proceeding to consider in greater depth the evidence of the appellant, to note that his defence was foreshadowed in a statement which was made by him to the police under caution on 24 November 2008, led in evidence by the Crown

and admitted by the judge without objection. The appellant said in that statement that he fired the three shots as the deceased 'tried to advance towards us' with his hands in his pockets and, further, that the second 'warning shot' was fired when the deceased was already 'in close reach to' the Lance-Corporal.

[7] Under oath at trial, the appellant testified in considerable detail as to the circumstances under which he fired the three shots on the night of 22 November. According to his testimony, he was, immediately before the shooting, following the Lance-Corporal, who was only about five feet ahead of him. Also ahead of him, but by about as many as eight feet, was the deceased. A short distance of some three feet separated the deceased and the Lance-Corporal. The appellant repeated a detail he had brought out in his statement under caution, viz that the deceased was advancing with his hands in his pockets; but the allegation now (as already noted at para [5], above) was that he was advancing towards the Lance-Corporal and 'in an angle' *vis-à-vis* the appellant. It was his further testimony that he fired the three shots out of fear for the safety of the Lance-Corporal. The evidence of the appellant thus raised the issue of defence of another person and was largely consistent with the statement under caution.

The grounds of appeal filed

[8] The grounds of appeal filed on behalf of the appellant by Mr Sampson SC were as follows:

'Ground I

> The trial judge gave an inappropriate and erroneous direction in respect of good character.

Ground II

> The trial judge's misdirection on the burden/standard of proof was most confusing. He did not make it clear that the presumption of innocence can only be rebutted by proof beyond reasonable doubt that the defendant is guilty.

Ground III

> The judge's direction on self-defense (*sic*) with no reference or relation to Sec 2(1) (n-z) S.I. No. 75/2002 i.e. BDF Rules of Engagement was unbalanced and unfair to the appellant because he omitted any specific reference to Sec. 33 of the Criminal Code in conjunction with those provisions where relevant to the Appellant's evidence.

Ground IV

> The learned judge misdirected the jury on the proper test of self-defense (*sic*).'

The two areas of concern

[9] The terms of those grounds of appeal notwithstanding, the Court indicated at the outset of the hearing that, in view of serious concerns as regards two specific areas of the case, it did not require to hear Mr Sampson and wished instead to hear the learned Director of Public Prosecutions on such concerns.

(a) *The absence of a good character direction properly so-called*

[10] The first area of concern drawn by the Court to the attention of the Director centred around the fact, already adumbrated above, that defence counsel at trial did not lead evidence as to the good character of the appellant. The concern arose despite the purported good character direction of which mention has already been made at para [1], above. Such direction was the last given by the judge to the jury in an overly long summing-up occupying some 165 pages of the Record. What the judge is recorded as having said to the jury is as follows:

> 'Now members of the jury I have done a lot of thought and I have concluded that since [the appellant] is a member of the BDF out of an abundance of caution I will give you what is called a good character direction.'

[11] In 1995, some two years before the definitive statement of principle of the Privy Council in *Thompson v The Queen* [1998] 2 WLR 927, 955D, as to the absence of a duty on the part of a trial judge to raise the issue of a good character direction, Lord Steyn in his speech in the House of Lords case of *R v Aziz and others* [1996] AC 41, 53F, expressed the applicable rule of practice thus:

> '… whenever a trial judge proposes to give a [good character] direction, which is not likely to be anticipated by counsel, the judge should follow the commendable practice of inviting submissions on his proposed directions'.

(With this speech all other members of the House agreed.) It appears to the Court that, upon the trial judge evincing to the jury his intention to give them a good character direction (at the latest), he found himself in just the judicial position described by Lord Steyn in the passage from his speech in *Aziz* just quoted above. The trial judge was, in other words, proposing to give a good character direction which was not likely to be anticipated by counsel. There is no indication on the record that he had previously intimated to counsel his intention to give such a direction and the Court can think of no reason why counsel should independently have anticipated the giving of one. The trial judge's evident lack of familiarity with the authorities then led him into twofold error. Plainly, he was not aware of the statement of principle in *Thompson* which has just been mentioned above. Had he been aware of it, he would have known better than to purport to give a good character direction when defence counsel had conspicuously refrained from raising the issue of the appellant's good character. Nor can he have been aware of the rule of practice endorsed by Lord Steyn in the passage from his speech in *Aziz* just reproduced above. Had he been, he would undoubtedly have adopted the commendable course of inviting submissions from counsel on the direction he intended (albeit ill-advisedly) to give. The Court is confident that, in the face of such an invitation, counsel would have taken time out to conduct proper legal research and thereafter provided the judge with its fruits, the essential raw materials for a legal direction worthy of the name. The conduct of legal research would have, in all likelihood, served the additional purpose of focusing attention on the need for the raising

of the issue of the good character of the appellant by his own counsel whilst there was still time to do so.

[12] What followed the trial judge's announcement that he had decided to give the jury a good character direction must now be examined. The judge's summing-up continued as follows:

> 'Members of the jury evidence of general good character cannot avail the accused where the facts clearly proved his guilt. But where some reasonable doubt exists as to his guilt, it may tend to strengthen a presumption of innocence. And proved good character should be taken into consideration with all other facts and circumstances, not as positive evidence contradicting anything that has been brought out on the other side. But as testimony, probably to induce the court to doubt whether the other evidence is correct and not to discard that evidence if the court thinks that is so. And that court means you the jury.'

These remarks are, with respect, lacking in clarity and would not, in the view of this Court, have been of any real assistance to a reasonable jury. The Court, being unable to identify in them anything resembling either of the essential limbs of a good character direction, regarded as altogether correct and responsible the concession of the Director that neither limb of the direction was given. To all intents and purposes, no good character direction was given in the instant case.

[13] A good character direction is not, of course, appropriate in any and every case. Why, then, did the fact that defence counsel failed to raise the issue of the good character of the appellant at trial give rise to serious concern on the part of this Court? The answer to that question falls into two parts, one having to do with fact and the other with law. On the factual side, the failure gave rise to such concern for the reason that, as indicated at para [1], above, it came to light at the sentencing stage that the appellant was, in fact, a person of previous good character. Not only did a lieutenant of the BDF, called as a character witness at that stage, attribute to him the 'quality of becoming a great leader someday' – another officer, said to be the second-in-command of a named

company of the BDF, called him 'an asset of the [BDF]'. What is more, Mr Welch himself, in the course of his plea in mitigation, informed the judge that the appellant had no previous convictions. All of these revelations came about after a trial in which the appellant had given sworn evidence but maintained an ear-splitting silence as to his unblemished record.

[14] On the legal side, the Court's cause for concern over the fact that defence counsel did not raise the issue of the good character of the appellant at trial calls for an explanation at some greater length. By way of preface to such an explanation, the Court notes that a letter dated 28 March 2012 and written by Mr Welch to Mr Sampson gave, in the respectful opinion of the Court, no good reason for the failure to raise the issue in question at the appropriate time. The Court thus found itself in a position akin to that of the Privy Council in the case of *Nigel Brown v The State* [2012] UKPC 2. That position was described by Lord Kerr, delivering the judgment of their Lordships' Board, when he said, at para 32:

> 'In the absence of an explanation from counsel [a Mr Welch] … as to why he did not raise the issue of the defendant's good character, the Board considers that it is necessary to examine whether the lack of a propensity direction has affected the fairness of the trial and the safety of the appellant's conviction on the basis that such a direction should have been given.'

Nigel Brown, however, was a case, unlike the present one, in which the appellant gave no evidence at his trial; and hence the Board saw no reason to differ from the conclusion of the Court of Appeal of Trinidad and Tobago that, whilst the credibility limb of the good character direction did not arise, there was certainly a need for a modified direction, that is to say one made up of the propensity limb only. (The Board further agreed, however, with the Trinidad and Tobago Court of Appeal's application of the proviso to section 44(1) of the Supreme Court of Judicature Act.) In the instant case, given that the appellant did testify under oath at his trial, what this Court found it necessary to examine was the effect, if any, of the lack not only of a propensity direction

but (in view of the patent inadequacy of the trial judge's relevant efforts) of a full good character direction.

[15] The proper content of such a direction has been the subject of numerous decisions of the Privy Council in recent years. It suffices for present purposes to quote from only one of them, viz *Errol Arthurton v The Queen* [2004] UKPC 25, in which Dame Sian Elias, rendering the advice of a Board which included Lord Hope of Craighead and Lord Rodger of Earlsferry, said, at para 4:

> 'Once absence of previous convictions is established, the trial judge is under a duty to direct the jury as to its relevance. The jury must be directed that the accused's good character is relevant in considering whether it is likely that he would have committed the offence; and, where the credibility of the accused is in issue (either because he gives evidence or because he has made an exculpatory statement), the jury must also be directed that his good character is relevant in considering whether he is to be believed: see *Barrow v State* [1998] AC 846, applying *R v Vye* [1993] 1 WLR 471 and *R v Aziz* [1996] AC 41.'

[16] With these observations in mind, this Court proceeded to conduct the examination regarded by the Board in *Nigel Brown*, cited above, as necessary in the circumstances, the subject of the examination having been, of course, the pertinent effect, if any, of the lack of a good character direction, on the basis that one should have been given. In the circumstances of the present case, that basis was rock-solid for the reason that evidence by the appellant as to his unblemished record would have entitled him to the benefit of a full good character direction from judge to jury. The Judicial Committee were absolutely clear as to that in the passage from their advice in *Arthurton* which has been quoted above.

[17] The Court must emphasise the importance, in conducting the examination made necessary by the advice of the Privy Council in *Nigel Brown*, of recognising that the instant case was not one of the type, encountered with some frequency in the existing body of case-law, in which there is a straightforward issue as to credibility. The Director

was inclined to treat it as such. A prime example of that type of case is *Barrow v The State* [1998] AC 846, in which four prosecution witnesses said they saw Barrow shoot Mr Andrews but Barrow claimed it was an accident and Lord Lloyd of Berwick, rendering the advice of the Board, observed at p 849F: 'It was a case of word against word.' A second such example is *Earle Charles v R*, a case from Trinidad and Tobago (Criminal Appeal No 26 of 2001), in which the main issue was whether the victim was telling the truth when she said that Charles was the one who had raped her on the day in question whilst the case for the defence was one of fabrication and R Hamel-Smith JA, writing for the Court of Appeal in that jurisdiction, commented at para 5 of the judgment delivered on 17 January 2003: 'It was a matter of credibility.' A third such example is *Arthurton*, cited above, in which an 11-year-old complainant alleged that Arthurton had had unlawful sexual intercourse with her but Arthurton denied such allegation in his police interview and Dame Sian Elias, speaking (as already noted above) for the Board, stated, at para 2, that the 'the prosecution case against the appellant depended on the uncorroborated evidence of the complainant'.

[18] The instant case is, instead, the relatively rare one in which the question of a good character direction arises in the context of the issue of the use of justified force for purposes of self-defence or defence of another person. In such cases, it would, in a real sense be misleading simply to say that it is a matter of word against word. This is so for the reason that, in dealing with these defences, the jury must not be concerned as to whether the circumstances in which the force was allegedly used have been truthfully described in and by such evidence as the Crown will have adduced against the accused. And what renders the truthfulness of such description irrelevant is that, under the law of self-defence and defence of another person, it matters not whether the description of the pertinent circumstances upon which the accused relies (whether contained in the evidence of a Crown witness, a statement under caution given by the accused to the police, the accused's own sworn evidence or unsworn statement from the dock or the evidence of some other person testifying for the defence) accords with the actual facts. (If, of course, there is an alternative defence, eg accident, then, in the context of that defence alone, the case will certainly be one of word against word.)

[19] This point is admirably illustrated in the advice of the Judicial Committee in *Norman Shaw v The Queen* [2001] UKPC 26. Shaw was charged with the murders of M and B; and the sole eyewitness called by the Crown testified that Shaw fatally shot both (M outside, and B inside, a van) whilst they were unarmed. Raising the issue of self-defence, counsel for Shaw relied on two pieces of Crown evidence as well as on Shaw's own unsworn statement from the dock. The first piece of Crown evidence so relied upon was given by a witness who claimed to have overheard Shaw essentially telling another man (on the day of the shootings, as it appears) that, had he not shot M and B, they would have shot him. The second such piece of evidence came from a statement made under caution by Shaw and admitted in evidence by the judge. It was to the effect that he had wrested a pistol from M but only fired a shot from it upon realising (a) that someone inside the van had pulled another gun and (b) that he would be shot unless he shot first. He further said in that statement that he fired a second shot on hearing someone in the van say 'shoot them, shoot them'. In his unsworn statement from the dock, Shaw said that the first shot was fired accidentally whilst he tried to regain his balance after a struggle with M and that he fired twice thereafter when he saw another man 'going down for something'. He again said that, had he not fired, he would have been killed. In the opinion of the Board, the desideratum of the summing-up consisted of two questions, viz:

> '(1) Did [Shaw] honestly believe or may he honestly have believed that it was necessary to defend himself?
>
> (2) If so, and taking the circumstances and danger as [Shaw] honestly believed them to be, was the amount of force which he used reasonable?'

The Board concluded that the jury had thus been misdirected in a manner potentially prejudicial to Shaw. In the words of Lord Bingham of Cornhill, speaking for the Judicial Committee, at para 21:

> 'The jury may have rejected [Shaw's] plea of self-defence because [M] in fact had no weapon and there was in fact no weapon in the van. This

> would have been an unsound conclusion, since it was not the actual existence of a threat but [Shaw's] belief as to the existence of a threat which mattered. The jury were obliged to assess the situation as it appeared to [Shaw], a factual enquiry which was pre-eminently one for them which (it may be) they never carried out and which the Board cannot safely undertake itself.'

[20] It follows from the above discussion that, for purposes of the issue of defence of another person, it was not, in the present case, a matter of the word of Mr Méndez, Ms Uk and Ms Román against the word of the appellant as to whether the deceased was, indeed, walking away from the soldiers (and with his back turned to them), or, in fact, advancing towards the Lance-Corporal whilst 'in an angle' *vis-à-vis* the appellant. From the strict standpoint of defence of another person, it did not matter whether the deceased was, in actual fact, walking away with his back turned to the soldiers at the time the shots were fired. What mattered, and mattered a great deal, however, was the jury's answer to the question whether the appellant honestly believed, or may honestly have believed, that it was necessary to defend the Lance-Corporal for the reason given by the appellant, viz that he (the Lance-Corporal) was unarmed and the deceased was advancing towards him in the manner already described above. If the jury answered that question in the negative, that would mean that the defence of defence of another person could have no application. But an answer in the affirmative would mean that, to the advantage of the appellant, the jury would then have to go on to ask themselves the second of the two questions set out above.

[21] A reasonable jury told by the trial judge that the appellant was of good character and given a full good character direction would be much more inclined, in the opinion of this Court, to accept the appellant's statement of his relevant belief as an honest one than would a reasonable jury not so told and given no such direction. Therefore, although the issue in the present case was not the familiar and straightforward one of the word of a Crown witness or witnesses against the word of the accused and a defence witness or witnesses, if any, the case was, nonetheless, one in which the

credibility of the appellant was, to adopt the language of the Privy Council in *Barrow, ibid*, 'a crucial ingredient in the defence case'.

[22] The question whether the proviso to section 31(1) of the Court of Appeal Act applied in the present case shall be dealt with later in this judgment, following consideration of the second of the Court's two areas of major concern. As was pointed out by Lord Kerr, writing (as already indicated above) for the Board in *Nigel Brown*, at para 24:

> '… the application of the proviso must be considered in light of all alleged defects in the trial procedure which might have an impact on the trial's fairness and the safety of the appellant's conviction …'

(b) *Directions on the relevance of Statutory Instrument No 75 of 2002*

[23] The examination-in-chief of the appellant was relatively brief, the transcript of it occupying less than eight full pages of typescript. Cross-examination of him was longer, the transcript of it occupying about 19 full pages of typescript. Prosecuting counsel introduced the subject of Statutory Instrument No 75 of 2002, also referred to by her as 'the White Card', early on, at a point corresponding with the second of the 19 pages of typescript concerned with the cross-examination. (This statutory instrument introduced regulations known as the Belize Defence Force (Rules of Engagement in Peacetime) Regulations and to be called 'the Regulations' in the remainder of this judgment.) Of the 17 remaining such pages of typescript, 11 are occupied by cross-examination relating to the Regulations.

[24] Worthy of special note, in the view of the Court, are the extracts from the cross-examination set out in this paragraph and those immediately following:

> 'Q. In fact I'll state exactly what paragraph (n) says -.
>
> "When encountering an aggressive or procative (*sic*) civilian, warn the civilian of the possible results of his action."
>
> A. Yes ma'am.

Q. And of course you did this?

A. Yes I did inform him of it.'

[25] As a matter of fact, this topic had not arisen in examination-in-chief and a reasonable jury might well have wondered (to the detriment of the appellant) whether no evidence had been led on it by his counsel at that stage simply because it had never occurred.

[26] The cross-examination continued as follows:

'Q. [Paragraph] (o) goes on to state -

"that further to warning in paragraph (n), always attempt to disarm or disable the aggressive or procative (*sic*) civilian if possible". Yes or no?

A. Yes ma'am.'

[27] A reasonable jury would have noted that, whilst the appellant had testified that the deceased had been advancing towards the Lance-Corporal with his hands in his pockets, he had mentioned no attempt at all on his part to ascertain whether the deceased was in fact armed with a view to then disarming him. Such a jury may well have concluded that the requirement was for one to attempt to disarm before attempting to disable and that the appellant had not complied with it.

[28] At a later stage of the cross-examination, the appellant accepted that he was using his own initiative when he fired all three shots. The following exchange is recorded as having followed:

'Q. But [the Regulations] specif[y] how you are supposed (*sic*) to made (*sic*) ready your weapon (*sic*), doesn't it?

A. Yes ma'am.

Q. And it states that you are to make ready your weapon when your patrol commander who would be Lance Corporal Pop tells you to, isn't that so?

A. Yes ma'am.'

[29] The reference there was to paragraph (t) which simply requires a member of the BDF to 'make weapons ready when ordered by his patrol commander', but then goes on to provide for other situations in which a soldier may make his weapon ready, including one in which:

'(1) there is a likelihood of encountering hostile civilians in his area of operation …'

[30] It appears from the summing-up that a copy of the Regulations was to be made available to the jury for use during their deliberations.

[31] With paras [23] to [30], above, serving as a background, the Court turns to the second area of major concern on which the assistance of the Director was sought at the hearing, viz the propriety of the direction of the judge which effectively encouraged the jury to

'look at [the Regulations] and take into consideration what [they] require along with the evidence presented in this case, as a whole and thereafter give serious consideration to [the Regulations] and look to see if any breaches occurred or if [the appellant] acted as were (*sic*) cognizant with (*sic*) [the Regulations] …',

particularly in the light of the striking amplitude of the judicial remark which followed it, viz:

'I leave this decision to you the jury to make as you see fit from the whole of the evidence before you.'

[32] This combination of direction and remark, to which the Director commendably confessed herself unable to give any support, was, in the opinion of this Court,

calculated to be interpreted by a reasonable jury as a species of *carte blanche* to go on and determine whether the appellant had breached any of the Regulations. Since their central role in the trial was to pronounce on the guilt or otherwise of the appellant on the charge of manslaughter, it would have been natural for them, in the view of this Court, to come to the conclusion that any finding on their part of such a breach of the Regulations would be of relevance and assistance to them in reaching a verdict of guilty on the charge of manslaughter as well. One has only to reflect for a moment on prosecuting counsel's suggestion to the jury that the appellant's making ready of his rifle without a prior order from the Lance-Corporal constituted such a breach to begin to realise the potentially disastrous consequences the judge's direction and remark in question could have had.

[33] This Court returned then to the question of the applicability, in the circumstances of the instant appeal, of the proviso. With regard to the absence from the summing-up of a full good character direction, it would have been, for the reason that has already been given above, a grave mistake for this Court to have regarded as overwhelming in any material respect the common evidence of the three eyewitnesses in question as to the circumstances existing immediately before and at the time of the appellant's firing of the three shots. Any perception of the evidence adduced against the appellant as very strong would have been illusory. The issue in the trial was whether the appellant had acted in defence of another person in carrying out an act, viz the firing of three shots, which resulted in the causing of fatal injury to the deceased. The appellant's sole defence of defence of another person could not succeed if the jury disbelieved that what the appellant held out to them as his honest belief at the time of the shooting was, in truth, his honest belief. The chances of their disbelieving that the appellant had been truthful about his honest belief can only have been improved by the absence of a full good character direction from the summing-up.

[34] As regards the direction relating to possible breaches of the Regulations, it undoubtedly created the danger of an unsafe conviction for the reason already given above.

[35] Applying the governing principle as it was set out by Lord Hope of Craighead in *Stafford v The State* (Note) [1999] 1 WLR 2026, 2029 – 2030, this Court asked itself whether, had the jury been properly directed in both respects already identified, they would, upon a review of all the relevant evidence, inevitably have arrived at the same verdict. Relatively speaking, the deliberation of the jury in this case was not short. And the verdict, as noted above, was not unanimous. The Court usefully reminded itself, also, of what the Board underscored in their majority judgment in *Sealey and Headley v The State* [2002] UKPC 52, para 36, viz that the question is not whether the jury would probably have convicted but whether they would inevitably have done so. That question could not, as the Court saw it, be answered other than in the negative.

[36] It was for the reasons set out above that the Court allowed the appellant's appeal and made all the consequential orders already noted above.

Addendum

[37] Following the announcement by the Court of its decision in the present appeal, there was a joint request by counsel on both sides for the Court to address, on giving its reasons for decision at a later date, that which they saw, for the most part correctly in the view of this Court, as three additional problem-areas in the summing-up. As this Court understood them, these problem-areas, which were said not to be by any means new, were as follows:

i) contradictory directions on the law of self-defence or, to put it more accurately, defence of another person;

ii) incorrect use of the words 'may' and 'must' in the context of appropriate verdicts; and

iii) the unnecessary giving of a *Turnbull* (*R v Turnbull* [1977] QB 224) direction.

[38] In acceding to the manifestly earnest request of counsel, the Court must emphasise that its reasons for decision are confined to what it has stated outside of,

and stand on their own independently of anything that is contained in, the present addendum.

[39] The Court will deal with each of these problem-areas with suitable brevity and under separate sub-headings.

i) Defence of another person

[40] The Court considers it important to say that it agrees entirely with the criticism of long-windedness implicit in the joint observation of counsel at the hearing that 'the directions on [defence of another person] traversed many, many pages in the summation'. The sheer length of the summing-up forces the Court to be highly selective in its identification of examples of contradictory directions. On the side of directions flagrantly inconsistent with the decision in *Shaw*, as explained above, there is, first, the following passage (pages 432 – 433, Record):

> 'However in the given circumstances of this case the prosecution is inviting you to accept the evidence of its witness, whose evidences (*sic*) are that the deceased was shot with his back to [the appellant] whilst walking away from him and the other BDF soldier. So it is saying to you in these given circumstances the act was unlawful and it is inviting you if you accept its evidence to say and find that the act was indeed unlawful and I leave this to you to decide as you see fit.'

[41] Secondly, there is this passage (page 442, Record):

> 'So it is not a case of what the attacker intended, but did he [the appellant] have reasonable apprehension that he was in danger (or in this case his NCO) of death or serious bodily harm (imminent danger impending danger.'

[42] Thirdly, there is the passage which reads (page 465, Record):

> 'Now then self defence would consist of the following (eg) that there was an attack upon the accused, or that the accused must have believed on

> the reasonable grounds that he or another was in imminent danger of death or serious bodily harm. The force used by the accused must have been used to protect himself or another from death or serious bodily injury intended towards him or another by his attacker or from the reasonable apprehension of it, induced by words, and or conduct of his attacker even though the latter may not have in fact intended death or serious bodily injury to him. So it is not a question of what the attacker intended but (the accused) did, he have a reasonable apprehension that he or another was in danger of death or serious bodily harm (eg) imminent danger/impending danger.'

[43] On the side of directions consistent with *Shaw*, the Court would single out, first, the following passage (p 444, Record):

> 'Now members of the jury in deciding this issue you must judge what [the appellant] did against the background of what he honestly believed the danger to be, this is critical. Remember it is what he believed the danger to be at the given instance (*sic*) in time on the 22nd November, 2008 that night at the San Pablo Village. Therefore if he honestly believed that he (*sic*) was being attacked then his actions are to be judged in that light.'

[44] Secondly, the Court would direct attention to this passage (p 466, Record):

> 'What [section 36, Criminal Code] basically is saying members of the jury is that self defence is lawful when it is necessary to use force to resist or defend oneself (*sic*) against an assault or threatened assault, or attack which a person honestly believes that he (*sic*) is or was about to suffer.'

[45] The Court fully agrees with counsel that the jury were wrongly subjected to mixed-signals in the summing-up.

ii) Incorrect use of the words 'may' and 'must' in the context of appropriate verdicts

[46] The Court has studiedly refrained from employing a more apposite adjective before the noun 'use' in the latter of the two sub-headings. The fall below acceptable

standards is, to be sure, not on the same scale as that in *Tiffara Smith v The Queen*, Criminal Appeal No 11 of 2009, in which judgment was delivered by this Court on 19 March 2010 and which was cited by the Director. That was a case in which ill-advised indulgence in a double negative resulted in an extraordinary direction which, if and when deciphered by the jury, would have conveyed to them that, in the event that they found that the prosecution had failed to disprove self-defence, they ought to convict the accused. Examination of the summing-up in the present context reveals the same lack of consistency encountered above in the judge's treatment of the law of defence of another person. And, again, it is not convenient to be exhaustive in identifying instances of appropriate and inappropriate use of either word in directions on verdicts open to the jury.

[47] It is, however, important to highlight in this addendum the first instance in the summing-up in which the jury were directed that their verdict 'must be guilty'. That occurs at p 434, Record, where the judge said:

> 'Now members of the jury if on the evidence presented by the prosecution, if you find that the prosecution has proven all the elements of manslaughter to you beyond a reasonable doubt then, your verdict must be guilty.'

[48] The Court is unable, however, to agree with the Director, speaking (as we understood her) on behalf of herself and counsel for the appellant, that the use of the word 'must' in this direction was correct. The Court was required to address this point in its judgment of 27 October 2006 in *Louis Gillett v The Queen*, Criminal Appeal No 13 of 2006. In that case, the Court agreed with the position as stated by the Court of Appeal of Jamaica in *R v Cunningham* (1965) 9 JLR 74, which was to the following effect:

> 'It is clear that there is never any duty upon a jury to convict though it is always open to the jury to convict, providing they are satisfied with regard to the evidence.'

In *Cunningham*, the complaint was that the judge told the jury it would be their duty to convict of rape if satisfied beyond reasonable doubt that the accused had carnal

knowledge of the virtual complainant without her consent. This Court took the view in *Gillett* that telling a jury they must convict was no different from telling them it was their duty to convict and ought not, therefore, to be done.

[49] But, as already indicated above, the trial judge did not adhere to the terms of this direction on repeating it later. Thus, he gave the proper direction (in this respect at least) at p 447, Record, when he said:

> 'Therefore if you do not accept that[the appellant] was acting in self defence and provided you are satisfied that all the elements of the charge of manslaughter are also proven to you beyond a reasonable doubt, then you may/or (*sic*) can find [the appellant] guilty as charged …',

as well as subsequently.

[50] With regard to the verdict of Not Guilty open to the jury, the first direction was, again, inadequate in terms of wording. The trial judge said, at p 434, Record:

> 'However, if you find the prosecution has not proved all the elements, or if you feel, you do not feel sure that the prosecution has proven all the elements then your verdict may be not guilty.'

This was clearly wrong. The word 'must' should have been used instead of the word 'may'. Fortunately, when the Jury were next directed on this point (p 453, Record) it was in the terms following:

> 'However if you are not sure [of the appellant's guilt] then your verdict must be not guilty.'

And, as well, on both that same page and page 473, they were told that, in the situation described, 'you will return a verdict of not guilty'. But the point of counsel is well made. The words 'may' and 'must' were used interchangeably and that was, and is, unacceptable.

iii) Unnecessary Turnbull direction

[51] The Court will be succinct regarding this sub-heading. The judge's decision to give a *Turnbull* direction is unfathomable. The Crown evidence was clear that no one but he could have fired the three shots in question on that fateful night; and the appellant, in his sworn testimony, admitted that he was the shooter. In the circumstances, to give such a direction was, as counsel rightly suggested, unnecessarily to run the risk of confusing the jury and, hence, decidedly inappropriate.

[52] It is strongly to be hoped that the extra time taken by the Court to prepare this addendum will prove, sooner rather than later, to have been well-spent.

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SOSA P

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MORRISON JA

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MENDES JA