IN THE COURT OF APPEAL OF BELIZE AD 2017

CRIMINAL APPEAL NO 5 OF 2014

MAY BUSH Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

A Sylvester for the appellant.
C Ramirez, Senior Crown Counsel for the respondent

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9 October 2015 and 24 March 2017.

DUCILLE JA

[1] The Appellant, May Bush was indicted for the murder of David Guerra and was tried by a Judge alone. Appellant was subsequently found not guilty of murder, but found guilty, in the alternative, of manslaughter. She was sentenced to a term of thirteen years imprisonment. The Appellant appealed on grounds that (1) the learned Trial Judge erred in directing herself on the law of self defence; (2) the learned trial judge erred in failing to give herself a Lucas direction in respect of the portion of the Appellant's unsworn statement she disbelieved; and (3) the learned trial judge failed to

direct herself adequately and properly on intoxication. During arguments before us, the Appellant abandoned ground (2).

[2] The case for the Crown was that The Appellant, her common law husband, Gregorio Cal and her daughter were in a restaurant. An altercation broke out between the Deceased and Gregorio Cal, which resulted in Cal pushing the Deceased out of the restaurant. Cal was holding the Deceased by his long hair, when the Appellant exited the restaurant and stabbed Deceased with a knife. All the parties appear to have been drinking and cursing before the incident. There was a witness, Louise Leslie, who saw the actual stabbing, but who had not been in the restaurant to witness the start of the altercation. Police Officer Lionel Waight, who had also been in the restaurant, pulled the Deceased away from Cal. Officer Bonilla arrived and saw the Appellant put the knife in the pocket of her jeans. He requested that she give it to him. She did and he escorted her to the station. During the trial, the Appellant made an unsworn statement from the dock to the effect that she did not stab the Deceased, but that the Deceased threatened her and her pregnant daughter while they were in the restaurant, and that the owner of the restaurant ejected the Deceased. She also stated that the Deceased returned about fifteen minutes later, grabbed her daughter by her shirt and said he would kill her. Cal intervened and the Deceased hit him. The Deceased then broke a bottle and cut Cal with it. Cal then pushed the Deceased out of the restaurant. The Appellant stated that she then went outside with her daughter and that she was afraid that the Deceased would kill "one of us either my daughter, my common law or me."

Ground One: the learned Trial Judge erred in directing herself on the law of self defence.

[3] Section 36(4) of the Criminal Code provides that "[f]or the prevention of or for the defence of himself or of any other person against any of the following crimes, a person may justify the use of necessary force or harm, extending in case of extreme necessity even to killing …" The "following crimes" include "murder" (section 36(4)(c)) and "dangerous or grievous harm" (section 36(4)(k)).

[4] In Shaw v the Queen [2001] UKPC 26, their Lordships held that in a case of murder, where from the evidence before the jury there was any reasonably possible justification under the Criminal Code, the Trial Judge was under a duty to give the jury a specific direction on the effect of the subsection, the evidence relevant to the application of its provisions and the burden on the prosecution to negative justification under the subsection, regardless of whether the defence was raised as an issue at trial or not.

[5] In the instant case, the learned Trial Judge followed this direction when she rejected the Appellant's claim of self defence. First, she addressed the issue by referring to the Shaw case. In particular, she considered the two-prong test as follows: (1) Did the Appellant honestly believe or may honestly have believed that it was necessary to defend himself; and (2) [i]f so, and taking the circumstances and the danger as the Appellant honestly believed them to be, was the amount of force which he used reasonable? Then, the learned Trial Judge considered the evidence and could not find that the Appellant "believed or may have believed she was in imminent danger since the Deceased was at no point attacking her."

[6] The learned Trial Judge's findings of fact included that: "the Deceased used obscene language towards her and her daughter … [he] came to the table where the Appellant and her daughter were seated and pulled the Appellant's daughter from the table by her blouse and said he would kill her;" and that " the common-law-husband of the Accused, Gregorio Cal, intervened" at which point "[t]he deceased hit Cal in his mouth and broke a bottle and tried to stab him, but Gregorio Cal … was cut on his elbow … and … face." Although the learned Trial Judge used these findings to support her conclusion that the Prosecution had not disproved provocation in this case, she did not believe that the deceased "threatened [the Appellant] with death", but believed that "the deceased assaulted and injured Gregorio Cal when Cal intervened." The learned Trial Judge also found it "credible" that "the deceased was molesting and even assaulted the daughter of the accused."

[7] Learned counsel for the Appellant argued that while the trial judge correctly applied the two-prong Shaw test to the Appellant's own case of self defence, she stopped short of applying that same test in the cases of the Appellant's daughter and Gregorio Cal. He submitted that, having made the findings of fact that she did (see 6-7) above), it was incumbent upon the learned Trial Judge to do so, even if she believed that the Appellant was lying when she said that she did not stab the Deceased. He added that even if it were an improbability that the Appellant may have had a subjective belief that she honestly believed herself, her daughter, or Cal to have been in danger, the learned Trial Judge as a matter of law ought to have considered self defence also as it pertained to the Appellant's daughter and Gregorio Cal. We do not agree.

[8] The learned Trial Judge stated that she addressed the issue of self defence because it arose from the defence closing submissions. She pointed out that the Appellant did not herself claim self defence in her unsworn statement from the dock. Rather, the Appellant maintained that she did not kill the Deceased.

[9] Learned Counsel for the Respondent argued that since Gregorio Cal was holding the Deceased by the head, the Deceased was in fact the underdog, and the Appellant could not have held the honest belief that Cal was in imminent danger. Counsel also indicated that the learned Trial Judge found that "[t]he assault against [the Appellant's] daughter had been averted and her common law husband was defending himself seemingly without need for assistance from her." Further, the learned Trial Judge did "not believe the deceased threatened to kill the accused or her daughter. He wanted the daughter who was an adult to go with him and was trying to have her to do so."

It is interesting to note that although the learned Trial Judge did in fact rely on Shaw, she did not choose to start her deliberations from the threshold inquiry in Shaw, to wit "the effect of the subsection, the evidence relevant to the application of its provisions and the burden on the prosecution to negative justification under the subsection, regardless of whether the defence was raised as an issue at trial or not." However, there is every indication that the learned Trial Judge did bear this inquiry in mind and did

advise herself as to the provisions of sections 34(4) even though the subsections are not mentioned in the Judgment. She stated that " [a]s the trier of fact and the judge of the law, I remind myself and kept in mind throughout my deliberation of this matter that the Prosecutor has the burden of proof in this case and that the accused stands before me as an innocent person." But she concluded that self defence did not arise since the Appellant's only defence came from her dock statement, where the Appellant claimed that she did not stab anybody. This would explain why she omitted from her consideration the words "or of any other person" in section 34(4). However, learned counsel for the Respondent suggested in Skeleton Arguments that the learned Trial Judge did consider "defence of another." At pages 206 - 207 of the Record the following words appear in the learned Trial Judge's Judgment: "… the accused said and repeated more than once that she feared for the lives of herself, her daughter and her common-law-husband, saying she thought one of them would be killed, yet, she did not claim self defence in her unsworn statement, she said she did not kill the deceased. However, the closing address of the Defence Counsel for the Accused, seems to be pleading an alternative argument of self defence. If the Court concludes that the accused did indeed stab the deceased as I have now concluded, that the stabbing was done in self defence or in the defence of another."

[10] Although the learned Trial Judge found that the Appellant's daughter was no longer in danger and that Cal was defending himself at the time of the stabbing, she yet proceeded to take into consideration what the Appellant's subjective view might have been. In Shaw, the court held that "[i]t was not the actual existence of a threat but the appellant's belief as to the existence of a threat which mattered. The jury were obliged to assess the situation as it appeared to the appellant, 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." In this case, we take note of the words "I do not find that the accused believed or may have believed she was in imminent danger since the Deceased was at no point attacking her." Additionally, the learned Trial Judge expressly stated, "The law of self defence directs me to look at the situation not based on the objective facts however but on the subjective view of May Bush; that comes from the

Shaw case." We conclude that the learned Trial Judge properly took into account what the Appellant may have subjectively believed in the circumstances and she considered all the evidence relevant to the application of section 34(4).

[11] Further, we conclude that there was no misdirection in that the learned Trial Judge duly considered self defence as it related to the Appellant, her common-law-husband and her daughter.

Ground Three: The learned Trial Judge failed to give an adequate and proper direction on intoxication.

[12] Section 27(2)(a) of The Criminal Code states that "[i]ntoxication shall be a defence to any criminal charge, if the person charged was by reason of intoxication, insane as defined in section 26, at the time he committed the act in respect of which he is accused. Section 26 states that "[a] person accused of crime shall be deemed to have been insane at the time he committed the act in respect of which he is accused- (a) if he was prevented by reason of idiocy, imbecility or any mental derangement or disease affecting the mind, from knowing the nature or consequences of the act in respect of which he is accused; (b) if he did the act in respect of which he is accused under the influence of a delusion of such a nature as to render him, in the opinion of the jury, an unfit subject for punishment of any kind in respect of such act. Further, section 27(4) states that [voluntary intoxication shall be taken into account for the purpose of determining whether the person charged had formed any specific intention in cases where a specific intent is an essential element in the offence charged.

[13] Learned counsel for the Appellant argued that the learned Trial Judge arrived at the conclusion that "the consumption of alcohol by the accused and the deceased helped (sic) to fuel this tragedy and contributed to the circumstances that resulted in the killing of the deceased." However, he argued that the Judge could not then have gone on to conclude that the Appellant was not "intoxicated to the extent, if at all that she could not form the required intent." Counsel argued that absent an analysis of the law of insanity, the learned trial judge could not have applied the law to the facts before her.

[14] Counsel for the Respondent contended that the learned Trial Judge only dealt with the issue of intoxication because Appellant's counsel referred to it in his closing speech, and that this was not actually substantiated by evidence at trial. The learned Trial Judge did in fact refer to the evidence of Lionel Waight that the Appellant appeared to be drunk. She also referred to Corporal Bonilla's evidence where he said that the Appellant did not look intoxicated to him and to the Appellant's own dock statement where she did not say that she was intoxicated. The trial judge then concluded that there was contradictory evidence about whether the Appellant was drunk or not.

[15] Be that as it may, the learned Trial Judge did however, go on to cite the cases of Calbert Smith v The Queen, Criminal Appeal No. 3 of 2003, and Zelaya v R, Criminal Appeal No. 2 of 1977. In Zelaya, the Court of Appeal stated that "[t]he burden is always on the prosecution to prove that the Accused actually had the intent to constitute the crime", and that "if there is material suggesting intoxication the jury should be directed to take it into account and to determine whether it is weighty enough to leave them with a reasonable doubt about the accused's guilty intent." (citing Broadhurst v. The Queen (1964) A.C. 441, at 463). The Court of Appeal went on to state that "there must be material suggesting intoxication before that issue need be left to the jury."

[16] In the instant case, the learned Trial Judge did take the issue of intoxication into account. The Appellant had been drinking and the Trial Judge found that Appellant's actions "do not seem that of an intoxicated person who could not form the mens rea but rather a person who had their wits about them and made an effort to conceal her wrongdoing." As to the issue of whether the Judge should have gone into a detailed analysis of section 26 of the Criminal Code, there was no need for her to do so when, from her language, it was clear that she was addressing sections 26 and 27. She concluded that she "could not believe that the accused was intoxicated to the extent, if at all, that she could not form the required specific intent to kill." We therefore find that there is no merit in this ground.

[17] For the reasons stated above, the appeal is dismissed. The conviction and sentence are affirmed.

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SIR MANUEL SOSA P

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AWICH JA

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DUCILLE JA