IN THE COURT OF APPEAL OF BELIZE AD 2018

CRIMINAL APPLICATION FOR LEAVE TO APPEAL NO 11 OF 2016

**TONY PASOS** Applicant

v

**THE QUEEN** Respondent

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BEFORE

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| The Hon Mr Justice Sir Manuel Sosa | President |
| The Hon Madame Justice Minnet Hafiz Bertram | Justice of Appeal |
| The Hon Mr Justice Murrio Ducille | Justice of Appeal |

H Elrington SC for the applicant.
C Vidal SC, Director of Public Prosecutions, and J Burns, Crown Counsel, for the respondent.

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5 March and 22 June 2018

**SIR MANUEL SOSA P**

*Introduction*

**[1]** The humble place of abode of Rodrigo "Whitey" Ayuso ("Rodrigo") situate at No 10 Fonseca Street in Orange Walk Town in the Orange Walk District was turned into a bloody crime scene as night began to fall on Old Year's Day 2014. Miguel Moises "Chino" Medina ("the deceased"), aged 51, who had turned up at Rodrigo's small unpartitioned house at about six o'clock on the morning of that day to extend New Year's greetings to the latter, a close friend of his, was there slain in a savage attack by knife that evening. Tony Pasos ("the applicant"), then aged 30 and of no fixed address, was arrested and charged with the murder of the deceased on 2 January 2015; and he stood trial before Lord J ("the judge"), sitting without a jury, for five days between 27

June and 11 July 2016. On 16 August 2016, the judge delivered judgment, finding the applicant not guilty of murder but guilty of manslaughter. At a sentencing hearing on 25 August 2016, the judge first sentenced the applicant to a term of imprisonment of 17 years ("the term") then added words to the effect that time spent on remand in custody was to be deducted from the term. This is an application by the applicant for leave to appeal against sentence only ("the application").

*Factual background*

**[2]** The facts, as material for present purposes, are in relatively short compass. Rodrigo and the deceased had started drinking together shortly after the arrival of the latter at No 10 Fonseca Street. They were on their third bottle of rum as evening began setting in, at which point two other friends, viz the applicant and a Raymond Berry called and promptly joined in the carousal. By then, on the evidence of Rodrigo, the deceased was drunk, while he (Rodrigo) was only "high". Not long after the arrival of the applicant and Berry, who, on the evidence of the latter, had also previously been drinking, the deceased began verbally abusing the applicant in terms not revealed by the testimony of any of the witnesses. By all accounts, this was sustained verbal abuse. And there is no evidence that it was being returned by the applicant. When, at length, he reacted, it was with physical violence. Grabbing a knife which was lying on the floor, and which, as it turns out, belonged to Rodrigo, he charged at the deceased who, from all accounts again, was by now lying on a piece of foam (at night, at least thitherto, Rodrigo's bed) and covered with a quilt. During the ensuing attack by knife, plainly a frenetic one, he repeatedly stabbed the deceased all over the upper half of his body.

**[3]** The *post-mortem* examination was conducted by Dr Loyden Ken, who informed the judge that he was an anatomic pathologist attached to Belize National Forensic Science Services. Testifying for the Crown, he said that he found three types of injuries, viz (a) sharp force injuries, (b) sharp wound injuries and (c) blunt force trauma on the body of the deceased. The sharp force injuries and sharp wound injuries consisted of a total of fifty stab wounds, which he found on the left side of the mouth, neck, left thoracic region (15 stab wounds), abdomen (16 stab wounds), right hand, arm and forearm and back. In addition, he found blunt force trauma in the posterior aspect of the left ear and left lateral lower abdomen. Not surprisingly, given the numerous stab wounds in the left thoracic region, internal examination revealed total collapse of the left lung. In the opinion of Dr Ken, the cause of death was hypovolemic shock as a consequence of exsanguinating haemorrhaging due to multiple stab wounds. But he added that "[c]ontributing to his demise was bronchaspiration of blood with left hemopneumothorax".

**[4]** The defence of the applicant at trial, manifestly rejected by the judge, was one of denial, and a patently weak one at that. In an unsworn statement given from the dock, he denied having ever attacked the deceased while at the same time claiming that he could remember nothing that occurred in Rodrigo's house

*Sentencing remarks*

**[5]** At the sentencing hearing conducted on 25 August 2016, the judge, having heard impact statements from Judith Novelo and Germán Novelo, a niece and nephew, respectively, of the deceased, a plea in mitigation by Mr Leslie Hamilton, the then counsel for the applicant and a reply from Mr Jaime Burns, the then counsel for the respondent, was evidently brief in his sentencing remarks. It appears from the record of appeal (page 275) that the only matter referred to in those remarks which has not been adverted to above is the case of *Da Costa Hall v R* [2011] CCJ 6 (AJ), which was only mentioned by name. Even although Mr Elrington SC has, on the present application, had nothing to say *quoad* that decision, I consider it necessary to return to it later in this judgment.

*The rival contentions*

(i) For the applicant

**[6]** Mr Elrington, in both his skeleton argument and oral submissions wasted no time in firmly nailing his colours to the mast of the local case of *Zhang v R*, Criminal Appeal No 13 of 2009, (judgment delivered on 20 October 2010), the sole decision to which he directed the attention of this Court (and in which there is reference to *R v Sargeant* (1974) 60 Cr App R 74, on which he also relied). That case, he contended, lays down the proper approach to be taken by the court below in sentencing in manslaughter cases, regardless of whether the offender was found guilty or entered a plea of Not Guilty. That approach consisted, he said, of examining the facts of the particular case and deciding whether all or any of the well-known four purposes of sentencing were applicable to them. In the instant case, he went on, such an examination would reveal that the applicant's self-control may have been reduced to a minimum by a combination of (a) provocation on the part of the deceased and (b) the influence of alcohol consumed by the applicant. The latter's degree of culpability was therefore low, said Mr Elrington, and the Court should heed the dictum in *Zhang* (para 10) that "the lesser the culpability, the lesser the sentence". He further commended to the Court the principles noted in *Zhang* that a sentence is to be fair to both the offender and the community and that there should be consistency in sentences.

**[7]** Mr Elrington then turned to the question of the applicable range of sentences in a case of manslaughter such as the present one. While unable to avoid at least mentioning the decision of this Court in *Hyde v R*, Criminal Appeal No 2 of 2006 (judgment delivered on 22 June 2007), since it is referred to in *Zhang* for its importance in establishing a range of sentences in manslaughter cases, he did so without directing the attention of the Court to it (in the accustomed manner of providing The Court with copies). He reminded the Court, however, that the mere existence of such a range indicates that the starting point is to be found therein, ie in the relevant range, rather than in the maximum sentence permitted by statute.

**[8]** In the present case, contended Mr Elrington, there had been gross unfairness to the applicant at his trial in that the prosecution had refrained from leading evidence as to the exact words used by the deceased while verbally abusing the applicant. In those circumstances, it was proper, he suggested, for this Court to infer, in his words, "that the provocation was so vile and extreme that [in combination with the influence of alcohol on the applicant] it caused the actions of [the applicant]". Such an inference could only lead the Court, continued Mr Elrington, to one conclusion, viz that the appropriate sentence here was one of only three years' imprisonment, the lowest sentence in a range of sentences said in *Zhang* to apply in England and, in the submission of Mr Elrington, also to be applied in Belize. He therefore invited the Court to set aside the sentence imposed by the judge and substitute therefor one of three years' imprisonment.

(ii) For the respondent

**[9]** For her part, the learned Director of Public Prosecutions, opposing the application, submitted that the relevant authority for present purposes is none other than *Hyde*, whose guidance, including a range of sentence for cases of manslaughter similar to *Hyde*, she forcefully commended to the Court. The core of her argument is made up of three propositions, viz (a) that *Zhang* does not apply to the instant case in the manner suggested by Mr Elrington; (b) that the applicable range of sentences is not three to seven years; and (c) that a sentence of three years for the applicant would be unduly lenient. *Zhang*, contended the Director, was a case whose facts bore no similarity whatever to the facts of the instant case. It does not lend itself to use as a justification for the substitution in the present case of a sentence of three years for that in fact imposed by the judge. Properly viewed, she added, the applicant's case is precisely one of those cases regarded by the judgment in *Zhang* as being "significantly different", in truth a case "on the borderline of murder".

**[10]** The Director prefaced her submissions as regards the proper range of sentence, with the statement that a perusal of the record would reveal nothing to suggest that the judge treated the maximum sentence of life imprisonment as the starting point in deciding on the sentence. Referring to *Hyde* and other Belizean decisions pre-dating and post-dating it, she contended that a range of three to seven years was clearly not appropriate for the category of manslaughter case into which the instant case fell. The authorities being relied upon by her supported, she said, a range of 12 to 25 years. In language of her own, here paraphrased, she argued that, this being a case on the very edge of the murder chasm, so to speak, it warrants a sentence on the high end of the thus-supported range. Her final point was that there was no reason for mitigation to be found in either of the two matters, viz provocation and influence of alcohol, to which Mr Elrington referred.

*Discussion*

**[11]** The Court will deal with Mr Elrington's submissions in the order in which he deployed them and, while so doing, consider any related contention of the Director of Public Prosecutions, whether made by her in direct response to the particular submission of Mr Elrington being so dealt with or otherwise. The latter's opening point as to the proper approach to be taken in manslaughter cases was, for some unknown reason, not developed to the extent necessary. He said that the facts of every such case were to be examined and a determination thereafter made as to whether all or any of the four objects of sentencing needed to be carried out in relation to it. But he made no effort to show what the results of such examination should be nor which, if any, of the four objects of sentencing would need, in the light of such results, to be sought to be furthered. The Court, in those circumstances, considers that it has been left with an incomplete initial submission with which it is under no duty further to deal.

**[12]** Mr Elrington's next contention, on the question of extent of culpability and its relationship to extent of punishment was, with respect, utterly devoid of force. The Court agrees with the suggestion of the Director that here he was in effect baselessly asking it to treat provocation and the influence of alcohol as mitigating features. Taking first the provocation limb, the Court is not surprised that Mr Elrington cited no authority for the alarming implied proposition that having, in respect of a charge of murder, benefited from the presence of evidence of provocation to the extent of being found not guilty of that most serious of charges, an accused person found guilty of the lesser charge of manslaughter can then, thus converted into an offender, obtain further benefit from that very same evidence of provocation by deploying it before the sentencer under the guise of a mitigating feature. The Court knows of no authority for such double counting. Coming now to the influence-of-alcohol limb, again, the implied proposition upon which the argument seeks to rest is nothing short of startling. It is that influence of alcohol can

constitute a mitigating factor in the context of a manslaughter conviction. The Court confesses to being unaware of the occurrence of any such development in the law. The correct position, as the Court knows it, is just the opposite. It was stated as follows by Kerr LCJ in *R v Quinn* [2006] NICA 27 (2 June 2006), a case of a manslaughter conviction, at para **[17]**:

> "Getting drunk and resorting to violence under the influence of drink will be a significant aggravating factor, particularly where the violence occurs in a public place." (emphasis added)

There is no overlooking here of the presence of the closing nine words of this quotation. While completely mindful of such presence, the Court notes that the underlined word "particularly" is not synonymous with the word "only". Nothing that the Court has here stated is meant to question the dictum found in the *Zhang* judgment that "the lesser the culpability, the lesser the sentence" or to challenge the principles there noted that a sentence is to be fair to both the offender and the community and that there should be consistency in sentences. This Court does not, however, disturb sentences on the mere invocation of principles. If a sentence adequately reflects the principles being invoked, there can be no interference with it. Nothing has been urged upon this Court by Mr Elrington to suggest that the principles in question were not borne in mind by the judge.

**[13]** Which brings the Court to the question of the applicable range of sentence. While the question is central to the determination of the application it is not, in the view of this Court, a difficult one. The point of departure must be that, everything else aside, the very thought that two societies as vastly different from each other in just about every sphere of life, but particularly the social and economic ones, as those of England and Belize should share a common range of sentence for cases of manslaughter, or any other type of crime for that matter, immediately takes one's breath away. Why should there be such a sharing? One does not even hear counsel citing sentences imposed in cases from sister Caribbean jurisdictions as fit precedents for adoption in Belize, and with good reason. Even geographically speaking, Belize is, unalterably, part not only of the Caribbean region but also of Central America. We may have some things in common with fully Caribbean countries; but even fully Caribbean countries are, and shall for a long time remain, different from one another in many fundamental respects. These differences between partly Caribbean and fully Caribbean countries, like those between fully Caribbean countries, should be recognized and respected. They constitute the individuality of each of the nations of this region and should therefore not be sought to be glossed over in any sphere of human activity, including the administration of justice. This need to see ourselves, above all, as more than a former appendage of England is all the more critical today when it is the crime statistics,

especially with regard to homicide, of Belize, rather than those of the former mother country, which are with increasing frequency drawing uncomplimentary attention worldwide.

**[14]** And this is not about jingoism at all. The modern progressive attitude of the courts of Northern Ireland, with all its continuing strong ties to England, is usefully illustrative in this regard. The very case of *Quinn*, already cited above, exemplifies the attitude, showing exactly what "this" is all about. As already noted, *Quinn* was a case of a manslaughter conviction. The applicant for leave to appeal against sentence before the Court of Appeal in Northern Ireland ("the NICA") (from which criminal appeals lie to the UK Supreme Court) had been sentenced to four years' imprisonment after entering a plea of Guilty to the lesser charge of manslaughter in a case where death had resulted from a single blow. A question arose in the NICA as to whether the guidance on sentencing in similar cases of manslaughter to be found in an English decision, *R v Coleman* [1992] Cr App R (S) 502, was to be followed. Kerr LCJ, today a very senior member of the UK Supreme Court, said, at para **[14]** of the judgment of the NICA:

> "The learned trial judge in this case had been referred to [*Coleman*] as the principal guideline authority in this area. [The trial judge] observed that in cases decided since *Coleman* he could detect a tendency to impose somewhat higher sentences than had been suggested in that decision. (In *Coleman* a starting point of twelve months' imprisonment had been proposed for cases where there was a plea of guilty and the single blow had caused the victim to fall and sustain injuries that had brought about the death.) [Applicant's counsel] submitted that, since sentence was passed in the present case, the Court of Appeal in England had in effect restored *Coleman* to its position as the principal guideline authority. In so far as the judge had departed from the position established by *Coleman*, therefore, he had fallen into error, [applicant's counsel] argued. We shall deal with this argument shortly."

**[15]** Returning to the topic of *Coleman* (as well as to that of another case, viz *R v Furby* [2005] EWCA Crim 3147), Kerr LCJ said, at para **[19]**:

> "The decisions in *Coleman* and *Furby*, while of course not binding on this court, are of considerable persuasive authority. But in this difficult area of striking a balance between, on the one hand, the culpability of the offender, and, on the other, the public's sense of justice, this court must reflect conditions encountered in our community and the expectations of its citizens. As we have said, it is now, sadly, common experience that serious assaults involving young men leading to

> grave injury and, far too often, death occur after offenders and victims have been drinking heavily. The courts must respond to this experience by the imposition of penalties not only for the purpose of deterrence but also to mark our society's abhorrence and rejection of the phenomenon. Those sentences must also reflect the devastation wrought by the death of a young man such as [Mr Quinn's victim]." (emphasis added)

The learned Lord Chief Justice further justified a sentencing position for Northern Ireland stronger than the existing English one at para **[20]**, where he added:

> "As the [English] court in *Furby* said, however, where the consequences of a single blow were not foreseeable, care must be taken to ensure that the sentence imposed is not disproportionate. While acknowledging the strength of this factor, we cannot believe that the starting point of twelve months' imprisonment adequately caters for the considerations that we have outlined in the preceding paragraph. We consider that a more suitable starting point in Northern Ireland for this type of offence is two years' imprisonment and that this should rise, where there are significant aggravating factors, to six years. It follows that we must reject the argument that the judge's sentence in the present case must be regarded as excessive because it does not accord with the guidelines contained in *Coleman*." (emphasis added)

What "this", then, is all about are the matters underscored in these powerful passages of the judgment of an enlightened NICA. In short, it is about the courts discharging their duty to respond to frightful conditions existing in the community and to the just expectations of peace-loving and law-abiding citizens. It is about returning to sentences which chiefly deter but which also reflect proper abhorrence, rejection and a sense of devastation. It is also about courts being conscientious, spurning timidity and having the courage of their convictions.

**[16]** It is obviously not for this Court to embark on a critique of the 2010 reasons for judgment in *Zhang,* which are, on their face, reasons for judgment of a panel of three of its then members. But deal with the astounding central submission of Mr Elrington in a no-holds-barred fashion we assuredly must. That submission, that the range of sentences for manslaughter should be from three to seven years, as in England, indefensibly turns a blind eye to just about all that has happened in terms of the sentencing policy in manslaughter cases in this Court beginning with its landmark decision in the famous trilogy consisting of *Soberanis v R*, Criminal Appeal No 10 of 1996, *Raymond Flowers v R* Criminal Appeal No 11 of 1996 and *Gregorio Osorio v R*,

Criminal Appeal No 12 of 1996 (composite judgment delivered on 4 February1997), this Court's long-in-coming vigorous reaction to the unprecedented upsurge in serious crimes of violence which began in Belize in the 1980s. The Director has traced the relevant history with references to some of the major manslaughter cases leading up to and following after *Hyde* in 2007, in which last-mentioned case the Court gave a carefully considered sentencing range for the type of case then before it, a range which took into account the fruits of research conducted by counsel (in a case unlike *Zhang* in that both sides were legally represented) following a special request from the bench. The cases so referred to by the Director range over a broad time span of some 15 years, from *Moriera v R*, Criminal Appeal No 12 of 2001 (judgment delivered by the Court - Rowe P, and Mottley and Sosa JJA – on 17 October 2002), a case of manslaughter involving death by a single stab wound, in which we imposed a sentence of 15 years' imprisonment, to *Bush v R*, Criminal Appeal No 12 of 2014 (judgment delivered by the Court – Sosa P and Awich and Ducille JJA - on 24 March 2017), another case of manslaughter involving a single but fatal stab wound, in which we affirmed a sentence of thirteen years' imprisonment. In between these two cases are others such as (i) *Diego v R*, Criminal Appeal No 24 of 2002 (judgment orally delivered on 13 March 2003), involving three stab wounds, in which the Court – Rowe P and Sosa and Carey JJA – affirmed a sentence of 18 years; (ii) *Wade v R*, Criminal Appeal No 12 of 2005 (judgment delivered on 14 July 2006), involving a single and fatal stab wound, in which the Court – Mottley P and Sosa and Carey JJA – also affirmed a sentence of 18 years; and (iii) *Tillett v R*, Criminal Appeal No 21 of 2013 (judgment delivered on 7 November 2014, involving another single stab wound which proved fatal, in which the Court – Sosa P and Morrison and Hafiz Bertram JJA – affirmed a sentence of 12 years. These cases, taken together, amply demonstrate that this Court has, both before and after *Zhang*, been either affirming or imposing sentences well above the upper limit of the range propounded by Mr Elrington. If one thing is clear from this it is that, in Belize, an established range of sentence of between three and seven years for manslaughter cases similar to the instant one is neither in existence now nor has been in existence during the past 16 or so years.

**[17]** This brings the Court back to *Hyde*, to which there has only been passing reference above. The Court is not sure that *Hyde* may properly be called a street fight case, not so much because of the place where the encounter occurred (a parking area for customers of a night club) but because of the nature of such encounter (an armed attack, as in the present case, on a largely defenceless man). But, more importantly, the Court said nothing in its judgment in that case to indicate that the range of sentence there established was to apply only in the case of fights taking place in streets or other public places. Come to think of it, for the Court to have done so would have been wholly egregious. After all, as already pointed out above, the cases which the Court considered in arriving at its range of sentence included *Diego*, where the stabbing occurred in a private yard, and *Wade*, where it occurred at the door of the victim's house, a fact which

cannot escape the attention of anyone who reads para 8 of the judgment (ie the one in *Hyde*). A range of sentence derived from a study of cases including *Diego* and *Wade* cannot logically be inapplicable (on the ground that the killing took place on private property) to the present case. In any event, even if *Diego* and *Wade* had not been among the cases considered in *Hyde*, any distinction drawn between the instant case and cases involving a street fight must, in our respectful view, be rejected for its artificiality. It is impossible to accept that, if the stabbing in question had occurred on, say, the street side in front of No 10 Fonseca Street instead of inside Rodrigo's house, the Court would have had to look at a different range of sentence from the one established in *Hyde*.

**[18]** It is convenient at this point briefly to consider the submissions of both sides regarding the starting point chosen by the judge in determining his sentence in this case. Mr Elrington implied that the judge chose as his starting point life imprisonment. The Director replied that there was no indication of that in the record of appeal. The Court, having examined the record, agrees with the Director.

**[19]** This leaves the Court with only Mr Elrington's further contention regarding the deceased's precise provoking words to deal with. The Court has already made clear its considered view on the question whether the same evidence of provocation is available, first, for purposes of a partial defence on a charge of murder and then, again, in recycled form, as it were, for purposes of mitigation on conviction of the alternative and lesser charge of manslaughter. That view being one in the negative, Mr Elrington's remaining contention must inevitably fall flat.

*Conclusions*

**[20]** For the reasons given above, the Court, concludes that (a) *Zhang* does not apply to the instant case in the manner suggested by Mr Elrington and (b) the applicable range of sentence is not three to seven years but the one given in *Hyde*. The sentence imposed on the applicant by the judge was well within such range and this Court sees no reason to interfere with it. Inclined to agree with the Director that this case wears the badge of one on the borderline with murder, the Court is of the view that the applicant should consider himself fortunate that a longer sentence was not imposed on him. (It is noted, for the avoidance of confusion, that the Court is mindful that its power to increase a sentence arises only on an appeal, not on an application treated as such – ie as an application.)

*Da Costa Hall: a reminder*

**[21]** Those conclusions having been stated, the Court returns to the case of *Da Costa Hall*. The Caribbean Court of Justice, by majority, emphasised in its judgment in that case the importance of adopting, in every case in which a sentence is reduced because of time spent on remand, the guideline which it laid down as follows at para [26] of its judgment:

> "The judge should state with emphasis and clarity what he or she considers to be the appropriate sentence taking into account the gravity of the offence and all mitigating and aggravating factors, that being the sentence he would have passed but for the time spent by the prisoner on remand."

The judge in the instant case omitted to follow this guideline. Instead he started out by imposing the sentence of 17 years' imprisonment and then ordered that time spent on remand in custody be deducted from the term of 17 years. But, from the passage just quoted above and from the way in which the Caribbean Court of Justice set out its order at para [29] in *Da Costa Hall*, this Court is persuaded that the correct approach here would have been to first say that a sentence of 17 years would have, in the view of the judge, been the appropriate sentence had the offender not previously spent time on remand. Then, since he was obviously of the view that a full deduction was in order, he should have stated the length of the time to be so deducted. In other words, he should have done some math, so to speak. Finally, he should have done the remaining math and pronounced the actual sentence in terms of the balance left after the deduction, giving, as well, the commencement date of the term so imposed. This paragraph is meant to serve as a reminder to all trial judges when passing sentence going forward.

**[22]** For the sake of clarity in the present case, then, bearing in mind (a) that at the sentencing phase below, Mr Hamilton represented, without demur from the Crown, that the time spent in custody on remand was 18 months and (b) that the commencement date (ie 25 August 2016) given in the warrant of imprisonment has not been challenged by either side, the term of imprisonment actually imposed on the applicant is taken by this Court to be 15 years and 6 months to run from 25 August 2016.

*Disposal*

**[23]** The application, which is, of course, treated as nothing but an application, is refused.

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SIR MANUEL SOSA P

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HAFIZ BERTRAM JA

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DUCILLE JA