IN THE COURT OF APPEAL OF BELIZE AD 2019

CRIMINAL APPEAL NO 6 OF 2016

OSMAR SABIDO Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal
The Hon Mr Justice Christopher Blackman	Justice of Appeal

O Selgado and L Banner for the appellant
S Smith, Senior Crown Counsel, and J Chan, Crown Counsel, for the respondent

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17 and 23 March and 5 June 2017 and 21 June 2019

SIR MANUEL SOSA P

Introduction

[1] On the night of 28 February 2011, in the area of Orange Walk Town, Orange Walk District known as the San Lorenzo Housing Site ('the Site'), 22-year-old Christie Alexandra Carrasco ('the deceased CAC'), suffering from four fresh stab wounds, ran, as best she could, down the street on which she lived and collapsed into the arms of an approaching police officer, PC Shean Bainton. Her death, which ensued shortly thereafter that same night, was the result of one of those wounds, which penetrated her heart. On 26 April 2016, following a trial before Lord J ('the judge'), sitting without a jury, her former common law spouse, Osmar 'Virgin' Sabido, ('the appellant') was convicted of her murder

and sentenced to life imprisonment. By notice filed on 29 April 2016, he initiated his appeal against conviction and evinced a desire to seek leave to appeal against sentence. Having, at the close of oral argument on 17 March 2017, intimated that it would take time to consider its judgment, this Court announced on 23 March 2017 that, instead of allowing or dismissing the appeal, it was, pursuant to section 31(2) of the Court of Appeal Act, substituting for the verdict of Guilty of Murder returned by the judge a judgment of Guilty of Manslaughter. At the same time, the date 5 June 2017 was fixed for a sentencing hearing and directions were given for the filing and delivery of skeleton arguments on sentencing. At the end of the sentencing hearing on 5 June, the Court set aside the sentence of life imprisonment imposed by the judge and substituted therefor a sentence of imprisonment for 14 years and 347 days. With sincere apologies for its delay in so doing, the Court now gives its reasons in writing for the substitutions above referred to.

The Crown evidence

[2] The Crown adduced evidence at two separate stages of the trial: first, following the opening by prosecuting counsel and before the sworn evidence of the appellant ('the appellant's evidence') and, secondly, following the appellant's evidence and before the closing speech of prosecuting counsel.

[3] During the first of these two stages, the principal witness for the Crown, Deon Faber, testified, under examination-in-chief, to the following effect. On 28 February 2011, he was living in a house across the street from, and immediately in front of, that in which the appellant and the deceased CAC then lived ('the Carrazco house'). He was at home at about half past eight on the night of that date, watching television, when his attention was caught by 'a police mobile with lights on' passing in front of his house. He immediately went outside, just in time to see the appellant stab the deceased CAC in the chest with an unidentified object, some 8-10 feet away from him (Mr Faber) on the street in question. He proceeded onto the street and, having seen the appellant toss the unidentified object onto the rear seat of the deceased CAC's car, which was parked nearby, he grabbed the appellant and held him for some two minutes. The police arrived on the scene. Mr Faber gave no indication in his evidence as to whether this was while he was holding the

appellant or after. The police shortly thereafter carried away both the deceased CAC, accompanied by his (Mr Faber's) stepdaughter, and the appellant.

[4] Mr Faber was evidently unshaken by the cross-examination of defence counsel, Mr Selgado, who, if a colloquialism be permitted, latched on to the absence from the former's statement to the police of any claim that he had grabbed the appellant. Mr Selgado, not entirely fairly, asked Mr Faber to explain such absence. But the latter, obviously unable to speak for the police officer who recorded the statement, limited himself to insisting, in reply, that he had in fact told the police that he had grabbed the appellant and that he had not thitherto known that that part of his statement was not recorded. When referred by Mr Selgado to the note at the foot of the statement in which the recording officer stated that he had read over the statement to Mr Faber before he (Mr Faber) signed it, Mr Faber replied that he was unable, after the passage of five years, to recall whether the recording officer had, in fact, so done. Prosecuting counsel opted not to re-examine Mr Faber.

[5] Mr Faber's step-daughter, Handa Cambranes, who also testified for the Crown, supported the evidence of her step-father in an important respect, as shall presently appear. Her testimony was that she was on the veranda of the family home at the Site sometime after 8.40 on the night in question, talking to someone on her mobile phone. In her case, her attention was caught, not by the passing of a police motor vehicle, but by the sound of increasingly loud and frequent screams coming from the Carrazco house, across the street from hers. She ran out onto the street and saw the deceased there, 'slightly running', as she (Ms Cambranes) put it. The appellant was near the deceased CAC. (Ms Cambranes pointed out in court a distance which, as she testified, was both (a) the distance from which she saw the appellant and the deceased CAC at that point of time and (b) the distance separating the deceased CAC and the appellant when she first saw them that night; and the judge and counsel on both sides were in agreement that the distance so pointed out was a distance of some 8-9 feet.) Ms Cambranes also saw Mr Faber. Initially, however, she omitted to make clear where she saw him. She was too busy, she explained, rendering aid to the deceased CAC, who was her neighbour and

friend. Everything, she said, was happening 'in a rush' – the deceased CAC was holding her (the deceased CAC's) chest and collapsing; she (Ms Cambranes) was helping her to get back on her feet; a police vehicle was arriving; and a police officer was joining her in her efforts to aid the deceased CAC. Later on, however, when pointedly asked by prosecuting counsel whether she saw Mr Faber doing anything when she 'first came out', she responded that he was holding the appellant.

[6] Defence counsel found it necessary to launch some sort of attack on so much of the evidence of Ms Cambranes as supported that of Mr Faber in the manner just explained. This attack resulted in her admitting in cross-examination that she had not mentioned anywhere in the statement she gave to the police that, on the night in question, Mr Faber was on the scene, let alone that he was both there and holding the appellant at one point. She however repudiated counsel's suggestion to her that the reason for those omissions was that Mr Faber was neither on the scene nor held the appellant that fateful night. The Record indicates, at page 69, that, having done so, she further said, 'and I did mention part to the police'. That may or may not be what she actually said. The word 'part' does not, by itself, fit in well with the other words quoted. The quote provokes the question: 'Part of what?' Exactly what she said, while unclear to this Court, may have been very clear to the judge and may well have proved of considerable significance to him in assessing the credibility of this witness and her step-father. What is, however, clear to this Court is that, as far as the Record goes, in re-examination, Ms Cambranes stated without a trace of ambiguity that she did see Mr Faber holding the appellant on the night in question.

[7] In asserting that Mr Faber was on the scene, and holding the appellant to boot, Ms Cambranes stood alone amongst the Crown's witnesses. None of the other three who testified to having arrived on the scene at one or another stage on the night of the killing claimed to have seen him there. Elra Álvarez, the first of these to be called to the witness-box and a next-door neighbour of the appellant and the deceased CAC, gave evidence that, after having first seen a police vehicle pass by and heard a scream, she rushed to her front door, from where she saw the appellant holding the deceased CAC by the hair

on the street. The deceased CAC then 'ran' (Ms Álvarez's word) and she (Ms Álvarez) followed with a view to assisting her. The deceased CAC soon fell to the ground; but she got up again and ran towards an approaching police vehicle. Ms Álvarez saw the deceased CAC fall once more, at which point Ms Cambranes went to her rescue. The deceased CAC and the appellant both ended up in the police vehicle.

[8] It not having been part of Ms Álvarez's evidence-in-chief that she saw Mr Faber at the scene on the night of the killing, counsel sensibly refrained from questioning her on the point in the course of his limited cross-examination of her.

[9] The second of the said three witnesses to be called to the witness-box, Sharlette Flowers, a daughter of Ms Álvarez, gave testimony indicative of the following. She was watching television at home at about half past eight on the night of 28 February 2011 when the discrete sounds of two motor vehicles caught her attention. The first sound was that of a passing police vehicle with blue lights. The second, heard some five minutes later, was also that of a passing motor vehicle. But this sound very much resembled the noise made by the vehicle of the deceased CAC, who was a next-door neighbour. To paraphrase Ms Flowers, the deceased CAC's vehicle made a noise which was both distinctive and familiar. Shortly after the passing of the second vehicle, Ms Flowers heard a scream and peeped out through her door, from where she saw the deceased CAC and the appellant near to what she now called 'their vehicle'. The deceased CAC was slouched in front of the appellant. The appellant was, she testified, close to the deceased CAC, in the latter's 'personal space' (her slang term for 'right up in her face', a slang expression thrown out by the judge). At that point no one was close to them. She then ran to fetch alcohol. When she emerged from the house with it, the deceased CAC was lying on the ground next to a police vehicle. Both the deceased CAC and the appellant were thereafter taken away in that vehicle.

[10] It may fairly be said of defence counsel's cross-examination of this witness not only that it was brief but also that it was unnecessary.

[11] Of the three witnesses mentioned in para **[7]**, above, the last to testify at trial was PC Bainton, whose evidence indicated that which follows in this paragraph. At about 8.30 pm on 28 February 2011, he was in fact on his way to the address of the appellant and the deceased CAC in a police vehicle following the receipt of certain information. In the course of his search for that address, the vehicle had stopped, and he was speaking to a woman, on the street in question, when he heard a loud scream. Looking in the direction from which the scream had come, he saw, in his own words, 'a red skin female, clear red skin, black blouse with curly hair running away from a … Toyota Corolla vehicle' and, next to the driver's side of this vehicle, 'a Hispanic male'. The female person was screaming for help. He having alighted the police vehicle, the female person, who, as it turns out, was the deceased CAC, ran towards him and fell into his arms, as previously indicated: para **[1]**, above. With the assistance of the civilian driver thereof, he placed her in the police vehicle. He proceeded to detain and caution the Hispanic male, who, as it turns out, was the appellant. The appellant ended up in the rear seat of the police vehicle, together with the deceased CAC and Ms Cambranes, who sat between them and, as he (PC Bainton) believed, assisted the former as best she could. (The deceased CAC may well have been dead by then.)

[12] The deceased CAC (or her lifeless body) was then taken to hospital in Orange Walk Town and the appellant to the Orange Walk Town Police Station.

[13] Properly recognising the overwhelming importance of Mr Faber's evidence in the grand-scheme of the Crown case, Mr Selgado, in his cross-examination, pounced on the conspicuous absence from the evidence-in-chief of PC Bainton of any indication that he had seen Mr Faber at the scene on the night of the slaying. Going to the root of the matter, counsel referred the witness to his own report in the investigation and obtained from him an admission that there had been no such indication even in that report. He went on thereafter valiantly to take the bull by the horns, so to speak, in the following exchange (of which he can hardly be said to have got the better):

> 'Q. So he was not there when you arrived?

A. I wouldn't be able to say that he … when I arrived at the scene he was not there.

Q. And is it not true that he was not there until you left the scene, that throughout your entire presence he was not there.

A. That I cannot recall.

Q. Sir the question is, whilst you were there observing the area you did not see him at all until you left.

MR CHAN: Asked and answered My Lord.

THE COURT: Accepted.

A. I cannot recall that sir.

Q. Witness, this report was dated the 1st of March, 2011 (*sic*) I don't think I need to give it to you to read it, this is one (1) (*sic*) day of (*sic*) the following day after that incident correct?

A. Correct.

Q. I am putting it to you that <u>because you did not include in this report that you in fact saw Deon Faber on the crime scene … on the site, that in fact he was not there</u>, agree or disagree?

A. I would disagree.' [underline added]

The cross-examination of this witness (classic *non sequitur* underlined above and all) cannot justifiably be said to have, as it were, paid dividends. The elaboration by him in reply to the judge, post-cross-examination, to the effect that, people having appeared on the scene after the incident, he could not pinpoint exactly who had emerged from their homes was a belabouring of the obvious. He was a young rookie police constable caught up, virtually alone, in a highly fraught and dramatic situation. Why, at any rate, would he have been looking for, or taking particular note of, the face of one whose alleged involvement in the night's events was not yet known to him?

[14] As will appear, the medical evidence adduced by the Crown at trial was, unlike, say, the testimony of Mr Faber, a double-edged sword of sorts. Given by Dr Estrada, its pertinent highlights were as follows. *Post-mortem* examination (external) revealed four wounds, viz, (i) stab wound 1.9 cm in length in the area of the chest, 3 cm to the left of

the anterior mid-line of the body ('wound No 1'); (ii) stab wound 5 cm in length also in the area of the chest, 7.5 cm to the left of the anterior mid-line of the body and 4 cm above the left nipple ('wound No 2'); (iii) stab wound 2 cm in length on the palmar side of the left thumb ('wound No 3'); and (iv) stab wound on left knee ('wound No 4'). Internal examination showed that wound No 1 extended to a depth of 13 cm, with full penetration of the heart and puncturing of the left lung. Dr Estrada found as much as 2,100 cm^3 (ie 2.1 litres) of fluid and clotted blood in the left chest cavity. Wound No 2 involved the skin and pectoral muscles. Its depth is stated in the Record to have been 13 cm. Wound No 3, a defensive wound in the opinion of the doctor, was found by him to have affected superficial tissue only. Wound No 4 turned out, on internal examination, to have extended to a depth of 14 cm. In the opinion of Dr Estrada, the cause of death was exsanguination due to internal and external bleeding due to a stab wound to the heart. In response to separate questions posed in examination-in-chief as to the degree of force which might have caused Wounds Nos 1 and 2, the doctor said they would have been caused by 'heavy force'. He does not appear, however, to have been similarly questioned in regard to Wound No 4, which, as just mentioned, was found to be 14 cm deep.

[15] The cross-examination of this witness was, at best, perfunctory and yielded nothing worth noting here. What is, however, more than noteworthy is that Dr Estrada was not asked whether the deceased CAC was pregnant at the time of her death: see in this regard para **[19]**, below.

[16] Dr Estrada's testimony having ended, Mr Chan intimated to the judge that the Crown was closing its case.

[17] The appellant elected to give, and gave, evidence under oath on the afternoon of 15 March 2016. The plot of his story was that, whilst the deceased CAC had indeed sustained injuries on the day in question, these had all been suffered inside the Carrazco house during a struggle which had ensued when she had physically attacked him with a knife. This attack had been led to by a verbal one, which had also taken place inside the Carrazco house and which, in turn, had been preceded by an earlier one staged against

him on his return home from work earlier that day. He had not at any stage stabbed the deceased CAC.

[18] It is now necessary to turn to the details of this story. On his return from work at about 6 pm, so testified the appellant, he was greeted by the deceased CAC with the accusation that he had been with another woman and an expression of disapproval of his late arrival at home. Then, as he vaguely and no doubt figuratively put it, 'she started to fight with me'. Seeking relief from her finger-pointing, he went into the 'kitchen/hall'. She, for her part, exited the Carrazco house and drove off in her car.

[19] When the deceased CAC returned home sometime around 8-8.30 that night, the appellant was in the kitchen/hall. In his words, 'She continued arguing with me.' She went on to tell him that she thought she was pregnant for another man. He slapped her and sat down in a chair, holding his head. At the sound of footsteps behind him, he turned around in time to catch the deceased CAC, as he put it, 'in a stabbing motion towards me'. He reached out and held her hand and a struggle ensued. He was, with both hands, holding her right hand, in which she had a knife. What followed thereafter is best put in the form of a quotation from the appellant's inarticulately rendered account:

> 'When she put strength with her left hand I try to … the word would be jerk … when I had my hands holding her she put strength with her body with her left hand trying to continue to stab to me but at the same time I tried to move the knife that is when the word I was going to say is jerk (pull) ---'

[20] After having been interrupted by the judge with a considerate invitation to testify in Spanish if he wished, the appellant surprisingly chose to plod on, in English, as follows:

> 'That's when I pulled at the said moment when the knife … when I pull or jerk she got stab by her leg and at the time she was cut on her thumb.'

Asked for clarification (eminently understandably) by the judge, the appellant went on to say:

> 'Well when I jerk and when I pull automatically her hands went down and that's when I saw she got cut by her thumb and leg, that's what I wanted to mean.'

[21] As the appellant continued repeatedly doing violence to the English language, the judge again invited him to switch to Spanish, but strangely insisting again on sticking to English, he continued the mayhem to the latter language thus:

> 'When I saw blood coming out of her hand I asked her what she had done … I told her what she had done. Immediately, I get frighten and walk towards the hall door and I start thinking that she had been aggressive that she is an aggressive manner and very seriously to hurt me. Then I try to exit from the door she grab me from my shirt and intended to juck me that is when I grab her again, hold her from her hands and I utter out "what are you doing?", I told her what are you doing, at that said moment, I grab her hands and try that would be I already had her grab from her hand I mean, sorry bout that My Lord, I already had her on her hands, grab by her hands.'

[22] In the portion of his evidence-in-chief reproduced immediately below, the appellant raised the suggestion of a stab or stabs to the chest sustained as a result of accident:

> 'We were struggling back again at that said moment she had strength and we were fighting that is when we both fall down. That is where accidentally she got stab. That is when I try to get up … and I try to get up … when I tried to get up she pull me back and I fell on top of her again when I realized she had blood on her … by her chest. I immediately make an effort to get up back again and try to go back outside. I was so frighten at that moment and I grab the knife while I was coming out and put it on the car.'

[23] The police vehicle had arrived on the scene by the time he took the last-mentioned action and the deceased CAC, for her part, had already come out of the Carrazco house. The following was the confused and confusing response of the appellant when asked by his own counsel where precisely the deceased CAC was when the police vehicle arrived at the scene:

> 'On the road … by coming out by the fence … to the edge of the road … by the road. My Lord, that would be she was coming out and she was on the road.'

No one else, said the appellant, was on the scene when the police arrived there that night. Not content to let the matter rest there, defence counsel elicited from the appellant, through leading questions, express denials that Mr Faber held him by the hands or was even 'in the area' on the night of 28 February 2011.

[24] Towards the end of his examination-in-chief, the appellant gave evidence that, during the 'fighting' inside the Carrazco house, the deceased CAC had ordered him to pack up and leave, threatening to set the Carrazco house on fire over his head if he failed to comply.

[25] Prosecuting counsel's cross-examination of the appellant quickly extended into the theretofore gray area of quasi-marital infidelity. Objection by defence counsel seemed only to intensify Mr Chan's interest in exploring that area. Determinedly, he further pressed the appellant as follows:

> 'Q. When [the deceased CAC] told you this according to you, did you get upset, yes or no.
> A. Yes.
> Q. So you got upset because it was true?
> A. No, because she was accusing me false.'

In this way, the judge came to hear, for the first time during the trial, of the alleged effect upon the appellant of the accusation of infidelity allegedly levelled against him by the deceased CAC.

[26] Mr Chan's efforts to discredit, with finesse, the appellant's evidence of a knife attack by the deceased CAC against him were largely frustrated by a witness bent, it would seem, on giving unintelligible answers to questions and on acceding to no request for a demonstration in the courtroom. In the end it was bluntly put to the witness that, in fact, the deceased CAC had never attacked him and he, with matching flatness, rejected that suggestion.

[27] Matters proceeded similarly with respect to the appellant's assertion from the witness-box that there had been, on the night of 28 February 2011, a struggle between the appellant and the deceased CAC inside the Carrazco house, during which the latter had accidentally suffered knife wounds. When finesse failed to get him anywhere, Mr Chan put it to the appellant point-blank that there had in truth been no struggle inside the Carrazco house – that the appellant had, in fact, stabbed the deceased CAC in the immediate vicinity of her car which was, at the time, at the side of the street. This suggestion was, of course, rejected by the appellant. But when Mr Chan followed up with the question whether the appellant disagreed with the four Crown witnesses who had given evidence of having seen him with the deceased CAC in close proximity to her car that night, the appellant was mum. And he only gave his answer, in the negative, after a singularly unmeritorious objection by defence counsel which clearly, if unintentionally, bought him (the appellant) much-needed recovery time.

[28] The appellant, whose testimony occupied the entire afternoon of 15 March 2016, called no witnesses. Following that testimony, the judge adjourned to 17 March 2016, when closing speeches were to be given.

[29] But there is no indication on the Record that the trial resumed on 17 March. It appears instead that there was a short resumption on the morning of 21 March, when the

judge announced that he would be hearing certain submissions by the Crown that same afternoon.

[30] What unfolded that afternoon was an application on the part of the Crown for leave to call additional witnesses to rebut the evidence of the appellant to the effect that there had been an incident in the Carrazco house involving him and the deceased CAC at about six o'clock on the evening of 28 February. It was the contention of the Crown that the appellant had, by giving that evidence, raised an entirely new matter *ex improviso*, in that the Crown had not, and could not have, foreseen the matter, such matter being one which could only be rebutted by witnesses who had not been called during the presentation of the Crown case. (One, viz Marie Sandra Carrasco, had, in fact, been called during such presentation.) Mr Chan sought to place reliance on the decided cases of *R v Frost* (1839) 9 C & P 129, *R v Blick* (1966) 50 Cr App R 280 and *Gill (Trevor) v R*, Civil Appeal No 15 of 2006 (a judgment of this Court delivered on 22 June 2007).

[31] At the end of Mr Chan's submissions in support of the application, Mr Selgado sought and was granted an adjournment to the next morning, 22 March.

[32] The judge heard the short submissions in reply of Mr Selgado on the morning of 22 March. In the course of those submissions, Mr Selgado cited the cases of *Frost* and *Blink* upon which Mr Chan had sought to rely and contended that each was distinguishable from the instant case.

[33] Afforded the opportunity to rejoin, Mr Chan underlined the purpose of the proposed additional evidence, ie to show that the deceased CAC could not have been at the Carrazco house at about 6 pm on the day of the killing because she was at other locations from around 4.45 pm to about 8.05 pm that day. He further maintained that the evidence of the appellant as to the accusation of infidelity allegedly levelled at him at about 6 pm was new matter. Moreover, Mr Chan reiterated with emphasis, the Crown had neither foreseen, nor been in a position reasonably to foresee, the alleged new matter.

[34] The judge having, unusually, given defence counsel yet another bite at the craboo, the latter submitted that *Gill's* case was just as distinguishable from the present case as all the others to which the Crown had directed attention.

[35] There is no indication on the Record that the judge reserved his ruling on the Crown's application. Readily finding, as it seems, support in the cases of *Frost*, *Blick* and *Gill*, he granted the application of the Crown, having concluded that the Crown could not have foreseen 'this matter' during the presentation of its case at trial. The judge opened the resumed hearing thus:

> 'My ruling has been made. I know at times rulings are not liked by some people; but that's not my problem. I made it …',

a remark that was, as this Court considers, entirely gratuitous.

[36] It was thus that the Crown came to adduce further evidence after the appellant had testified, doing so through three witnesses.

[37] Berta Alonzo, the first of these three witnesses to be called to the witness-box, said in evidence-in-chief that, from about 5 pm to about shortly after 7 pm on 28 February 2011, she and the deceased CAC were amongst several people who gathered for, *inter alia*, Christian prayer at the former home of the late Ms Florence Herrera ('the Herrera house'). Ms Florence Herrera had recently passed away. The deceased CAC was present at the Herrera house, located on Market Lane, Orange Walk Town, for the entire duration of the prayer meeting, which ended at about 6.50 pm. When, at about 7 pm or a little thereafter, Ms Alonzo decided to leave the Herrera house in order to meet a commitment elsewhere, she was escorted out by the deceased CAC and her mother. Nothing to speak of arose in cross-examination.

[38] The next such witness, Marie Sandra Carrasco ('Mrs Carrasco'), the mother of the deceased CAC and a granddaughter of the late Ms Florence Herrera, also testified

concerning the holding on 28 February 2011 of a prayer meeting at the Herrera house. The deceased CAC, she said, had been at this meeting, which had lasted from about 5 pm to about 6.45-6.50 pm. Refreshments had been served after the meeting. Mrs Carrasco and other family members left the Herrera house and got into the deceased CAC's car shortly after 7 pm. The deceased CAC proceeded to drop off two such family members at a Sylvestre Street, Orange Walk Town address. She then dropped off Mrs Carrasco and a granddaughter of hers at Mrs Carrasco's Price Avenue, Orange Walk Town address. Another family member, who was to be dropped off at 7 George Street, Orange Walk Town, now remained in the car with the deceased CAC, who drove off.

[39] Under cross-examination, Mrs Carrasco, confronted with the witness statement she had given to the police in 2011, agreed with defence counsel's suggestion that Ms Alonzo had left the Herrera house at about 6.45 pm. The significance, if any, of that fact is hard to find. Mrs Carrasco had not testified under examination-in-chief as to the time of Ms Alonzo's departure, only as to the approximate time at which the prayers had ended, viz about 6.45-6.50 pm. Mrs Carrasco demurred, however, to counsel's further suggestion that her evidence as to the time she, and others, including the deceased CAC, left the Herrera house was, to put it colloquially, a mere guestimate.

[40] Next to be called to testify was Carol Ann Chavarria, an aunt of the deceased CAC. It was her testimony that she was residing in the USA at the time of trial but had been in Orange Walk Town on 28 February 2011. At about 5 pm on that day, people who had gathered at the Herrera house, started praying the Rosary. These people, amongst whom were the deceased CAC and herself, continued praying for the next two hours or so. When the praying ended, light refreshments were served. Thereafter, several family members were dropped off by the deceased CAC, in her car, at their respective addresses. In this regard, the deceased CAC made stops at Sylvestre Street, Price Avenue and 7 George Street. At this last address, both Ms Chavarria and the deceased CAC alighted from the car and entered the house. The deceased CAC left this house without Ms Chavarria at about 8.05 pm. Such cross-examination as there was of this witness made no impact whatever on her evidence-in-chief.

The decision of the judge

[41] The judge wrote at great length in providing his judgment in this case. The judgment occupies 93 pages of the Record. His main findings were as follows:

i). the deceased CAC is dead;

ii). her death was caused by harm within the meaning of section 96 of the Criminal Code;

iii). such harm was caused by the appellant;

iv). it was moreover, harm so caused with the intention to kill;

v). in addition, there was no justification for the causing of such harm to the deceased CAC.

In his deliberations leading up to the last of these findings, the judge, as trier of fact in this case, had perforce to direct himself on the applicable law as he understood it. And given the evidence of the appellant, in particular, this resulted in his seeking to direct himself as to the law relating to the three discrete 'defences' of self defence, accident and provocation. It may be noted, in passing, that, in such endeavour, the judge devoted 25 pages to self defence, 6 to accident and 4 to provocation

[42] Insofar as it can be traced from his judgment, the following was the path taken by the judge in arriving at his conclusion that, on the evidence and having regard to the law, the partial excuse (which he incorrectly termed a 'justification') of provocation had been negatived by the Crown and hence did not avail the appellant in the instant case. (The judge for some reason referred in reverse chronological order to the two incidents alleged by the appellant to have occurred on 28 February 2011: Record, pages 414-415.) First, with respect to the appellant's claim that, upon the alleged return of the deceased CAC to the Carrazco house somewhere around 8-8.30 that night, she had resumed her verbal

attack on him and thereafter become physical, as it were, whilst armed with a knife, the judge dismissed it as unworthy of belief. Interwoven as such claim was with the further allegation that there had ensued a struggle, inside the Carrazco house, in the course of which the deceased CAC had been accidentally wounded four times with the knife in question, the judge apparently felt that he could have no part of it once he accepted Mr Faber's contrary evidence that he (Mr Faber) had seen the appellant stab the deceased CAC in the chest at a spot near to her car, which was stationary on the street at the time. But also weighing heavily with the judge, as he himself made clear, was the fact that there was evidence, clearly credible in his (the judge's) view, from the crime scene technician that blood spots were found on the street not far from the deceased CAC's car. Moreover, it seems to have impressed the judge that the crime scene technician gave no evidence of having found blood in the Carrazco house itself. As the judge, with exaggerated emphasis, put his relevant finding (albeit only in the part of his judgment – Record, page 412 - dealing with the particular defence of self defence):

> 'I now accept the evidence of the witnesses for the Prosecution and therefore I rule I am convinced beyond a reasonable doubt and so accept that the incident which unfolded and which caused harm to [the deceased CAC] occurred in the street near the vehicle (a Toyota Corolla) car which was parked in front of [the Carrazco house] … and I so rule.'

In regard specifically to the appellant's evidence that the deceased CAC, in the heat of the latter verbal onslaught upon him, had told him that she thought she was pregnant for another man, the judge evidently attached no credence to it. But having so indicated in his judgment, he nevertheless proceeded to express the view that the appellant's reaction to the supposed taunting declaration was decidedly mild anyway. In other words, so seems to have run the reasoning of the judge, the alleged declaration (to this Court nothing less than a confession of infidelity, given the context in which it was made) cannot conceivably have risen, on the evidence, to the level of provocation, in law, upon the individual before him, ie Osmar Sabido. In the words employed by the judge (Record, page 415):

> 'In the second provocation when told by [the deceased CAC] that she thinks she is pregnant for another man, he stated here all he does is slap her and then he sits down on the kitchen chair and holds his head in his hands and does nothing else, and when approached by her in a stabbing motion with the knife he only holds her hands and does not injure or harm her in anyway (*sic*); all he acted was in self-defence and he was walking away leaving [the Carrazco house] by the door. During all of these provocations he was from his evidence not provoked as he never injured or inflicted any injury to [the deceased CAC] … and from his [the appellant's] evidence looking at it very carefully the inference is he remain (*sic*) calm and was not angered or lost his self-control by the provocations listed in his evidence.'

[43] Secondly, as regards the appellant's allegation that the deceased CAC had launched an earlier verbal attack upon him on his arrival home from work at about six o'clock in the evening on 28 February 2011, the judge's finding was that it was unfounded. The deceased CAC was elsewhere, not only at that approximate time but, indeed, from about 5 pm to about 8.05 pm on that day, according to the rebuttal evidence of Ms Alonzo, Mrs Carrasco and Ms Chavarria, which he (the judge) embraced as truthful. This conclusion and the judge's inference therefrom (the latter italicised by this Court) are captured in the following passage (Record, pages 387-388) taken from what may be called the general part of the section of his judgment dealing with the subject of justification ('the general part'):

> 'I … do not accept that [the deceased CAC] from the evidence before the court was at home at [the Site] at or about 6.00 pm on 28th February 2011 *or that the events described in evidence by [the appellant] took place at all*. I reject that part of his testimony.' [original underline]

The judge omitted to make clear whether he was here speaking only of the events described by the appellant as having occurred at about 6 pm or whether he was speaking of all the events described by the appellant as having occurred on the day in question, ie

those allegedly commencing at about 6 pm as well as those said to have commenced sometime around 8-8.30 pm. He had still not, when he turned from the general part to consider the particular defence of self defence (Record, page 389), provided this essential clarification. Nor was this important matter addressed in the section of the judgment in which the judge gave exclusive consideration to the defence of provocation (Record, pages 414-418).

[44] Having plainly stated that he was inferring that the appellant was not provoked, the judge went on to say,, with the same clarity, that he was 'therefore' noting the following paragraphs from the judgment of their Lordships' Board in *Logan (Linsberth) v R* (1996) 47 WIR 92:

> 'Provocation to be left to the jury
>
> When on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or both together) to lose his self-control, the question whether the provocation was extreme enough to make a reasonable man do as he did shall be left to be determined by the jury and in determining that question the jury shall take into account everything both done and said according to the effect which in their opinion it would have on a reasonable man.
>
> When provocation shall not be admitted
>
> (1) Notwithstanding proof on behalf of the accused person of such matter of extreme provocation as mentioned in Section 117 (now renumbered as Section 119) his crime shall not be deemed to be thereby reduced to manslaughter if it appears either from the evidence given on his behalf, or from the evidence given on the part of the prosecution.
>
> (a) that he was not in fact deprived of the power of self-control by the provocation.'

[45] The judge here paused to recall the evidence of the appellant which, in the view of the judge, indicated that he had done nothing to the deceased CAC. The judge then quoted as follows from the judgment in *Logan*:

> '… provocation shall not be admitted and his crime shall not be reduced to manslaughter if it appears either from the evidence given on his behalf …
> (a) That he was not in fact deprived of the power of self-control by the provocation.'

He went on to end his discussion of provocation by reiterating his main finding in respect thereof in the following terms:

> '…I find no evidence that indeed [the appellant] was in fact deprived of the power of self-control by any of the provocations noted and given in his evidence before the court in trial.'

The grounds of appeal

[46] Five grounds of appeal against conviction and one against sentence were filed by the appellant. In the event, only the following three were argued or otherwise pursued beyond the filing stage:

1. that the trial was unfair;

2. that the judge failed critically to examine the evidence of Mr Faber; and

3. that the judge wrongly imposed the sentence of life imprisonment.

[47] At the outset of the hearing, the President, rather than calling upon counsel for the appellant to argue the appellant's grounds, raised for the consideration of the Crown the paramount question whether the judge properly directed himself on the partial excuse of provocation. The question was accordingly canvassed at considerable length in this

Court; and tribute is here paid to Ms Smith, Senior Crown Counsel, for the skill and ability with which she dealt with all subsidiary questions posed to her from the bench. Without intending the slightest disrespect to counsel for the appellant, it is to this question that the Court will primarily direct its attention in the present judgment.

Concerns (briefly stated) of the Court at the hearing

[48] The dominant concern over the handling of the provocation issue was as to the significance (if any), in the context of provocation, attached by the judge to the evidence of the wounds sustained by the deceased CAC. (To these wounds, ample reference has already been made: see para **[14]**, above.) Specifically, did he stop to consider whether the very nature and number of such injuries, coupled with the fact that they occurred both in the upper and lower regions of the deceased CAC's body, might be pointing to a possible loss of self-control? Ought he to have done so? If in fact he failed to do so, was the appellant thereby prejudiced and, if so, to what extent? There was, however, the ancillary concern as to whether the judge approached the appellant's evidence of provoking conduct in a manner sufficiently conducive to a fair assessment thereof. Did he, so to speak, throw away more than just 'the bath water' when he rejected the claim of the appellant that he had been verbally assaulted by the deceased CAC inside the Carrazco house at about 6 pm on 28 February 2011. And, underlying these concerns, was the question whether the judge had in mind at all material times the law on provocation which was in force in Belize on such date.

[49] There was, however, also a perhaps less than overarching concern voiced from the bench. It was as to the propriety of the ruling of the judge on the application for leave to call rebuttal evidence on the matter alleged to have arisen *ex improviso* in the course of the testimony of the appellant. The concern stemmed from the provisions of section 69 of the Evidence Act, which refers to section 68 of the same Act and thus falls to be read in conjunction therewith. These sections together place drastic restrictions on the freedom of a party to adduce evidence to contradict an answer given by a witness for another party whilst under cross-examination. Was it proper, on the facts of the instant case, to apply

the *ex improviso* rule and thus enable the Crown to call witnesses to contradict the appellant? Or was the judge faced with a situation requiring to be dealt with in accordance with these two sections of the Evidence Act? The Court further referred to the provisions of section 4 of the Evidence Act, under which common law principles relating to evidence shall only apply in Belize 'subject to the provisions' of that Act.

The submissions of the Crown in response to the Court's concerns

[50] As regards the calling of rebuttal witnesses in circumstances where an accused person's evidence at trial was in conflict with the evidence adduced by the prosecution when presenting its case, Ms Smith cited the decision of the Trinidad and Tobago Court of Appeal in *Benjamin (Kester) v The State*, Cr App: 54 of 2008 (judgment delivered on 17 December 2009), a case in which, after the prosecution had led evidence of the alleged arrest of Mr Benjamin on 5 June 2002 at Frederick Street, Port of Spain, he gave evidence denying that he had been arrested on that street and alleging that, in fact, the arrest had been made when he was stopped whilst driving his BMW car on Wrightson Road; and the State was thereafter permitted to call witnesses to prove that the car was not sold to the appellant until October 2003, after it had been involved in a July 2003 road accident. Amongst the grounds of appeal of Mr Benjamin was one to the effect that the judge erred in law by permitting the State to adduce evidence in rebuttal on collateral matters. Questions as to ownership and possession of the motor car, so ran the argument on behalf of Mr Benjamin, went only to his overall credibility, not to any issue that the jury had to decide. The Court of Appeal of Trinidad and Tobago rejected that argument and held that the judge's exercise of his discretion in permitting the calling of rebuttal witnesses under the *ex improviso* principle could not be faulted.

Discussion

[51] The Court will deal with the above-noted matters in descending order of importance.

1. The provocation direction

[52] Starting, then, with the concerns set out at para **[48]**, above, the Court must emphatically state that it remains unpersuaded, after hearing the submissions of the Crown, that the judge properly directed himself on the issue of provocation. There is nothing in the judgment of the judge to satisfy this Court that he was, during its preparation, conscious of the potential importance of the Crown's medical evidence in establishing at least a reasonable doubt that the appellant had been subjected to provocation within the meaning of the law at some time shortly prior to the death of the deceased CAC. That evidence, proceeding from the mouth of a Crown witness having no axe to grind, was capable of demonstrating that the deceased was attacked with some degree of wildly uncontrolled savagery by a person wielding a knife. The respective depths of three of the wounds sustained were considerable – 13 cm, 13 cm and 14 cm. And three of the wounds were indicative, by their respective dispersed locations, of a lack of concentration by the assailant on any one part of his victim's body. The knife was clearly, on this evidence, being repeatedly wielded with much force and striking home in parts of the body relatively distant from one another. In short, it could not safely be concluded that the attack, for attack it most certainly was, was less than frenzied, although obviously it could hardly have been as frenzied as, say, the attacks in cases such as *Pasqual Bull v R*, Privy Council Appeal No 77 of 1996 (judgment delivered on 27 April 1998) *and Danie Ku v R*, Criminal Appeal No 15 of 2010 (a majority judgment of this Court – Sosa P and Mendes JA – delivered on 30 March 2012), both of which were drawn to the attention of Ms Smith. An attack of that kind unquestionably constituted evidence of a loss of self-control. As Lord Steyn, writing for the Board in *Bull*, put it, at the 14th para, unnumbered, of the pertinent advice to Her Majesty:

> '… if there was evidence that the appellant lost his self-control the defence still had to be left to the jury. And the frenzied nature of the attack was material upon which a jury could infer loss of self-control.' [underline added.]

[53] Of course, evidence of loss of self-control alone does not suffice to make out the partial excuse of provocation. There must also be evidence of provoking conduct – on the part of the deceased, in a case such as the present one where no third party is involved. Here, however, there was no difficulty in that regard. There was ample evidence of provoking conduct; but it was rejected out of hand by the judge. The process of reasoning by which he so rejected it has already been identified above. He began by rejecting the evidence of provoking conduct allegedly occurring a little after 8 pm on the night in question. Then he rejected the evidence of provoking conduct allegedly occurring at about 6 pm that same evening. But could the latter evidence reasonably have been rejected if the judge had considered both these aspects of the evidence of provoking conduct in their proper chronological order? And, more crucially, would the evidence of provoking conduct allegedly occurring at about 6 pm on 28 February have been rejected if the Crown's application to lead rebuttal evidence had failed and the three rebuttal witnesses never been seen and heard by the judge?

[54] Concentrating, first, on the rejection by the judge of the evidence of provoking conduct allegedly occurring sometime after 8 pm, the judge was, it is crystal clear, much impacted by the testimony of Mr Faber. That testimony was diametrically opposed to the evidence of the appellant as regards the place at which the deceased CAC had been when she sustained her final, and fatal, wound. This Court is obviously not (and need not be) in a position to pronounce on what precisely the proper impact of Mr Faber's evidence ought to have been. The Court accordingly refrains from questioning the extent of that evidence's impact upon the judge. But it certainly was, in the view of this Court, going much too far for the judge to leap, as he plainly did (see the italicised part of the quote at para **[43]**, above), from a finding that the deceased CAC sustained her wounds outside, rather than inside, the Carrazco house to an 'inference' that the provoking conduct alleged by the appellant to have occurred inside the Carrazco house never, in fact, occurred. So to leap was to fly directly in the face of the powerfully reinforcing medical evidence of Dr Estrada already highlighted above. It was the result, with respect, of a massive judicial failure to see the forest for the trees reminiscent of that which occurred in the notable 2004 murder trial of Francis Eiley and his co-accused: see *Eiley & ors v R*, [2009] UKPC

40. This failure emerges in stark relief in the penultimate sentence of the judge's short discussion of the case for provocation, already quoted in part at para **[45]**, above, which reads:

> 'Here in the given circumstances of this case I find no evidence that indeed [the appellant] was in fact deprived of the power of self-control by any of the provocations noted and given in his evidence before the court in trial.' (underline added)

Nothing could make it clearer that, ill-advisedly focussing on the testimony of the appellant himself as the only possible source of evidence of loss of self-control, the judge never saw the evidence of Dr Estrada as the double-edged sword it most palpably was.

[55] What is more, the judge manifestly held it against the appellant in this connection (ie regarding the alleged occurrence of an incident involving provoking conduct sometime after 8 pm inside the Carrazco house) that the crime scene technician, a Crown witness singularly unimpressive on paper, gave no evidence of having found any trace of blood inside the Carrazco house. The judge evinced no concern whatever that the Crown left him, the trier of the facts, in what can only have been total suspense as to the nature of the colourless liquid mysteriously found by the crime scene technician all over the floor and certain furniture inside the Carrazco house. There was, most assuredly, no onus on the appellant to explain the baffling presence of that liquid inside the Carrazco house. Given that the version of events provided by the appellant to raise the partial excuse of provocation contained assertions that blood had been shed inside the Carrazco house, the Crown's flagrant failure at least to identify the liquid in question, through scientific evidence, with a view to eliminating the glaring possibility that it was, or contained, a cleaning agent ought, as this Court sees it, to have been held against the Crown, and the Crown alone. Not to be forgotten, in this regard, either is the evidence of Ms Cambranes, already alluded to at para **[5]**, above, that she had heard, from her veranda rather than from inside her house, screams coming from the Carrazco house.

[56] Returning, for the sake of completeness, to the questions posed earlier in this judgment, the judge, as has been demonstrated, threw out more than just "the bath water", represented in this case by the evidence of the appellant to the effect that the deceased CAC had been at the Carrazco house upon his arrival there from work at about 6 pm on 28 February 2011, when he rejected such evidence. He threw out with it the evidence of provoking conduct, patently failing to consider at any stage that such evidence was significantly reinforced by the special features of the medical evidence as to the injuries sustained by the deceased CAC, which features, for their part, pointed to loss of the power of self-control.

[57] It is necessary, before leaving the topic of the provocation direction, to consider in brief the question of the judge's sources as to the relevant provisions of law. Quite unorthodoxly, he went not to the statute book, but rather to the 1996 decision in *Logan*, in search thereof. As it turns out upon examination of the *Logan* judgment, the three quotations already set out at paras **[44]** and **[45]**, above are, in truth, not of the learning of their Lordships but of the pertinent provisions of the Criminal Code in force in 1992. This Court has previously, in its judgment in *Torres (Jose Victor) v R*, Crim App No 4 of 2002 (judgment delivered on 23 October 2003), reviewed the amendments to the law of provocation in Belize subsequently made in 1998. The reader is referred to paras 22-28 of that judgment. As there pointed out by Sosa JA, speaking for a strong court (the other two panel members were Rowe P and Mottley JA, the latter of whom, like Sosa JA, was later to ascend to the presidency), section 118, which was predicated on the bearing by an accused of the burden of proof in cases of provocation, was repealed in 1998. (It is the provisions of that long since repealed section of the Code that the judge in the instant case, without so stating, was erroneously quoting under the sub-heading 'Provocation to be left to jury'' in his judgment: see the first of the quoted paragraphs, reproduced at para **[44]**, above). The second of these paragraphs, reproduced *ibid*, consisted of what, in 1992, was section 119(1) of the Code. It may be a small mitigating factor *vis-à-vis* the criticism of the judge inevitably conveyed in the present necessary remarks of this Court that section 119, with all its baggage, was not repealed, or at least amended, in 1998, only renumbered 121.

[58] The judge did not refer in his judgment to any other provision of the Code, past or present, dealing with the law of provocation, save for section 117 (defining murder and thus mentioning provocation). He seemed to attach overwhelming significance, for the wrong reason, to the presence in what was section 119(1)(a) in 1992 of the words 'his crime shall not be deemed to be thereby reduced to manslaughter <u>if it appear</u> … that he was not in fact deprived of the power of self-control by provocation …'. (underline added) (As just indicated above, that provision has not been repealed to date, section 119 simply having become section 121.) It appears to have been somehow lost on him that the Board in *Logan* had been at pains to refresh all concerned memories that section 119(1) had previously been held to be in conflict with section 6(3) of the Belize Constitution and in need of appropriate modification: see the 27th paragraph, unnumbered, of the Board's judgment. The conflict had arisen because, whereas section 119(1)(a) proceeded on the basis that the burden of proof of provocation rested on the accused, section 6(3) required such burden to be on the Crown. By omitting to consult the Code current on 28 February 2011, the judge deprived himself of the opportunity to discover that the problematic phrase 'if it appear' (underlined in the second sentence of this paragraph) had never been excised from the Code, as it should have been, and was, in fact, now to be found at section 121(1). In those circumstances, this Court cannot rest assured that the judge, his assurances to the contrary (at pages 332, 375 and 411-412) notwithstanding, consistently and unwaveringly regarded the burden of proof of provocation as resting squarely on the shoulders of the Crown. The judge's finding that the appellant was not, in fact, deprived of the power of self-control by provocation is therefore unsafe. Given that that finding led, in turn, to the conviction for murder, such conviction is, necessarily, for this additional reason given in this paragraph and the one immediately preceding, itself unsafe.

[59] In the circumstances, this Court is driven to the conclusion that, on two separate scores, the judge failed adequately to direct himself on the partial excuse of provocation. That failure amounted to a misdirection. The appellant was thereby prejudiced to the extent that he was deprived of an acquittal on the charge of murder and a conviction of the lesser crime of manslaughter.

2. The *ex improviso* ruling

[60] Which brings the Court to the question of the appellant's evidence of the alleged six o'clock incident inside the Carrazco house on the evening in question. The judge not only rejected this evidence. He rejected it for the reason that he preferred the rebuttal testimonies of Ms Alonzo, Mrs Carrasco and Ms Chavarria, testimonies which were permitted to be given only because he ruled against Mr Selgado on the *ex improviso* point. (Of the three 'defences' relied upon by the accused, that of provocation was, without a doubt, the only one impacted by these testimonies) The judge's ruling was, however, with the greatest respect, wrong for two reasons. First, he allowed himself to be guided by strictly common law principles, as enunciated/applied in the English cases of *Frost* and *Blick*, with no regard to the provisions of the Evidence Act already referred to above, provisions which, it should be noted in fairness to the judge, were not drawn to his attention in the course of the relevant argument. Secondly, he wrongly applied those cases.

[61] Section 4 of the Evidence Act reads as follows:

> 'Subject to the provisions of this Act and of any other statute for the time being in force, the rules and principles of the common law of England relating to evidence shall, so far as they are applicable to the circumstances of Belize, be in force therein.'

Self-evidently, "the provisions of this Act" include that which is contained in sections 68 and 69 thereof, which, for their part, respectively state:

> '68. When a witness is cross-examined, he may, in addition to the questions referred to in section 66 [ie questions relating to facts in issue or relevant thereto, or which may be proved], be asked any questions which tend –

(a) to test his accuracy, veracity, impartiality or credibility; or
(b) to shake his credit, by injuring his character,

but the judge has the right to exercise a discretion in those cases, and to refuse to compel the witness to answer any of those questions when the truth of the matter suggested would not in his opinion affect the accuracy, veracity, impartiality, credibility or credit of the witness in respect of the matter to which he is required to testify.

69. When a witness under cross-examination has been asked and has answered any question referred to in section 68, no evidence can be given to contradict him, except in the following cases –

(a) if a witness is asked whether he has been previously convicted of any felony or misdemeanor, and denies or does not admit it, or refuses to answer, evidence may be given of the previous conviction; and
(b) if a witness is asked any question tending to show that he is not impartial and answers it by denying the facts suggested, he may, by permission of the judge, be contradicted by evidence of those facts.' [underline added]

[62] The appellant, having testified of the six o' clock incident allegedly occurring inside the Carrazco house, was questioned at some length on the matter in cross-examination: Record, pages 168-172. It was not put to him in so many words at any stage in his cross-examination that such incident had never in fact occurred. But that is not to say that he was not asked questions 'tending' to test his veracity and/or credibility within the meaning of section 68 of the Evidence Act. In the view, of this Court, it is at least arguable that some of the questions to which he was subjected by Mr Chan tended so to do. In any event, it matters not whether any of those questions so tended. The restrictions placed by section 69 upon a party to court proceedings, including the Crown, with respect to the adducing of contradictory evidence would have been reduced to a worthless paper tiger in criminal trials if they could be circumvented by the Crown through the simple expedient

of refraining from questioning within the meaning of section 68 an accused person on a material part of his testimony. It cannot have been the absurd intention of the legislature that, by merely choosing not to ask an accused person giving evidence at his trial any question falling within the classes of question set out in section 68, the Crown should be free to engage in the strictly taboo, ie to contradict such accused person even in cases falling outside of the two categories of case specified in section 69. This Court therefore considers that section 69 constituted an insuperable obstacle for the Crown in its effort to secure leave to call rebuttal witnesses at trial.

[63] Regarding the judge's wrong application of the English case law relied upon by the Crown in the argument at trial, this Court shall strive for relative concision. In relation, first, to the 1839 high treason case of *Frost*, the report of the case, by Carrington and Payne, is lengthy but far from excellent in quality. (This, of course, is not exactly surprising to anyone who has read that which is famously said about these reporters in that faithful companion of the first-year law undergraduate of yesteryear, ***Learning the Law***, written by the late Professor Glanville Williams (at p 36 of the Eighth Edition)). According to the report of *Frost*, what occurred in the trial of Mr Frost was that one Hopkins was recalled by the Crown with the leave of the Monmount Special Commission, 1839 (Tindal CJ, Parke B and Williams J) to rebut certain evidence given on behalf of Mr Frost by one Williams. That evidence had been to the effect that 'when the insurgents came to the Westgate Hotel, the first man who came up said to the witness and others, who were there as special constables, "Surrender up your prisoners".' This evidence was in keeping with the case for the defence of Mr Frost, one of the insurgents, which was that the simple object of the insurgents had been to obtain the liberation of certain prisoners and that their design was thus not treasonable in character. The report notes that that great lawyer, Sir Jonathan Frederick Pollock (later to be appointed Lord Chief Baron of the Exchequer), unsuccessfully objected on behalf of Mr Frost to the application for leave, one of his grounds being that Hopkins had already been called and examined as a witness. The report indicates that the Crown made it quite clear in presenting its application that the question proposed to be asked of Hopkins was whether, when the insurgents came to the

hotel door, a special constable asked them what they wanted and whether or not one of them replied, 'Surrender up your prisoners'.

[64] The short extempore ruling delivered by Tindal CJ is reported thus by Carrington and Payne, at page 159:

> 'There can be no doubt about the general rule, that where the Crown begins a case (as it is with an ordinary plaintiff), they bring forward their evidence, and cannot afterwards support their case by calling fresh witnesses, because there may be evidence in the defence to contradict it. But if any matter arises *ex improviso*, which the Crown could not foresee, supposing it to be entirely new matter, which they may be able to answer only by contradictory evidence, they may give evidence in reply. In this instance, there appears to be a necessity for asking this question, and, therefore, that it is reasonable for the Crown to call this witness back.'

As appears at page 162 of the report, while a Case was stated for the opinion of 15 judges, the questions raised therein were wholly irrelative to the *ex improviso* principle.

[65] The difficulty posed, in the respectful view of this Court, by the quality of the report of *Frost* is as follows. The report does not deal with the evidence given by Hopkins on first testifying at the trial. The absence of any mention of the questions, if any, which he was asked in cross-examination seems particularly lamentable. Plainly, the judges were of the opinion that Williams' evidence of the insurgents' request for the surrender of prisoners was 'entirely new matter'. But what was the cause of their regarding it as new matter? Was it that counsel for Mr Frost had actually suggested to one or more of the Crown witnesses that words not amounting to, and inconsistent with, a surrender request had been uttered by one or more of the insurgents at the hotel door? Or was it simply that counsel had not suggested to any of those witnesses that such a surrender request had been made? The absence from the report of the case of answers to these important questions materially restricts its helpfulness in the context of the present appeal.

[66] Then there is the case of *Blick,* upon which the judge, misguidedly in the view of this Court, placed much reliance as well. In the judgment, short and extempore like that in *Frost*, James J, speaking for the now-defunct English Court of Criminal Appeal, treated the case, rightly as this Court sees it, as one involving an *alibi* defence. So too, for that matter, did the learned counsel for Mr Blick: see the headnote of the report. Mr Blick's point regarding the calling of rebuttal evidence received summary treatment. Identifying it, the court said, at page 283:

> 'The second [point] is that the Common Sergeant allowed wrongly, submits Mr Solley, the introduction of evidence in rebuttal …"

In disposing of it, the court further said, *ibid*:

> 'With regard to the matter of the evidence in rebuttal, Mr Solley puts it forward as a matter of law, or perhaps law mixed with fact. He contends that this is not a case where the evidence was of the sort that is sometimes introduced to rebut an *alibi* defence, and he says that it does not come within [the] normal ambit of the law which permits a judge, in the exercise of his discretion, to allow rebutting evidence to be called. He refers to *Day* (1940) 27 Cr App Rep 168. On consideration of this matter, this court strongly takes the view that the evidence called in rebuttal here was called in order to rebut that which was in fact an *alibi*. A crucial question and a central question was: where was the applicant at a particular time, that particular time being when the robbery had taken place and when the persons who had taken part in the robbery were escaping, first in a car and then on foot? This was a matter which the Crown could not foresee as likely to arise, and, in the view of this court, the matter comes well within the principles that have previously been laid down with regard to the admission of evidence in rebuttal.'

[67] It is not for this Court to comment on the present status of *Blick* as an authority in England on the question of the calling of evidence in rebuttal in cases involving the defence of *alibi*. As regards this jurisdiction, however, it needs to be pointed out that things

have not stood still since 1966. In particular, there has been statutory intervention in the area of the raising of *alibi* by an accused at his trial. As a result, part of the relevant law of Belize is now to be found in the Indictable Procedure Act, section 125, which was enacted into law in Belize in 1998. By subsection (1) of that section, on a trial on indictment, an accused shall not, without the leave of the court, raise the defence of *alibi* or adduce evidence in support of an *alibi* unless he gave notice of particulars of the *alibi* before the end of the period prescribed in subsection (8). That period is delimited as the period of seven days from the end of the relevant proceedings before the examining magistrate. The Crown is thus protected against the raising of the defence of *alibi* against it without due prior notice, as occurred in *Blick*. Given that *Blick* was decided first and foremost as a case of *alibi*, this Court does not regard it as of other than academic interest in the context of the instant case, in which *alibi* is not, and never was, an issue.

[68] The third decided case from which the judge seemingly derived some underpropping for his ruling is the local one of *Gill*. But, with the greatest respect to the judge, it is impossible to fathom how this case can be regarded as an authority on the *ex improviso* principle. That principle simply did not arise on any of the grounds of appeal advanced in *Gill*. In those circumstances, there was no argument whatever, and the Court (Mottley P and Sosa and Morrison JJA) made no comment at all, on it.

[69] This leaves alone on centre stage ***Benjamin's case***, commended to this Court by Ms Smith during oral argument though not cited at trial. The first point which requires to be stressed in considering this case is that the pertinent ground of appeal was, not exactly unambiguously, that the trial judge erred in law by permitting the State to adduce 'evidence in rebuttal' on 'collateral issues'. Whilst the expression 'evidence in rebuttal' suggests invocation of the *ex improviso* principle, the term 'collateral issues' brings to mind the separate principle embodied in section 69 of the Evidence Act of Belize. Interestingly, there is no reference in the judgment to comparable provisions of any statute in force in Trinidad and Tobago. Nor, for that matter, is there any mention therein of the corresponding rule at common law that the answers given by a witness to questions put to him in cross-examination concerning collateral facts must be treated as final.

Rather, the entire discussion of the ground of appeal in question is based on cases, eg *Frost* and *Blick*, relating to the *ex improviso* principle. But, from all appearances, Mr Scotland, counsel for Mr Benjamin, was approaching the appeal from a different angle. As is stated at page 13 of the judgment itself:

> 'Mr Scotland contends, inter alia, that the issue of the ownership and possession of the BMW car was clearly a collateral issue which was not relevant to any matter that the jury had to decide, but merely impacted on the credibility of the appellant.'

To react to such a contention by quoting from the authorities on the *ex improviso* principle is not, in this Court's respectful opinion, to address it. If, as the judgment's thunderous silence on the applicability of any statutory provisions suggests, there is in Trinidad and Tobago no counterpart to sections 68 and 69 of the Evidence Act of Belize, it is difficult to see why common law rules would not govern the point. And the test at common law for determining whether a matter is collateral or not is not in any doubt. (Party A may contradict a witness for party B where that witness's answer is a matter which party A would be allowed to prove by virtue of its connection with the issues in the case.) This Court regrets having to say that it is quite unable to see how that test could have been satisfied in *Benjamin*. The BMW car had no connection with the real issues in the case, which centred on the elements of each of the offences charged. The rejection of Mr Scotland's submission is, it has respectfully to be said, a trifle mystifying. Accordingly, this Court hesitates to apply and follow *Benjamin* in the instant case.

[70] Turning, with these considerations in mind, to the circumstances of the present case, what semblance of justification was there for labelling the evidence of the six o'clock incident 'new matter'? The appellant had, in exercise of his rights (legal at least, if not also constitutional under section 5(2)(b)), refrained from giving a statement of any kind to the police. Clearly then, this was not a case of an accused person who had given the police a previous inconsistent statement. On top of that, the presentation of the Crown case and the nature of its evidence had been such that no occasion or need had arisen for the defence to refer to the six o'clock incident before the appellant went into the

witness-box. It would have been decidedly odd, if not bizarre, for defence counsel to have raised the matter in his cross-examination of any of the nine witnesses, including the star-witness himself, Mr Faber, who were called by the Crown before the appellant testified. Mr Faber's potentially damaging allegation against the appellant had been that he had seen the appellant stab the deceased CAC with an unidentified object. Defence counsel firmly challenged that allegation, presumably on the instructions of the appellant. The Court does not consider that the defence was under any obligation to go farther and take up the six o'clock incident with a witness who was not even remotely suggesting that he had been inside the Carrazco house at any time during the day in question. The Court is at pains to make these remarks for the reason that it senses, in struggling to make sense of the ruling of the judge on the *ex improviso* point, a temporary loss on his part of all awareness of the fundamental principle that an accused person has a right to remain silent not only when detained by the police but also when on trial in court. The appellant's not having put the six o'clock incident to the Crown witnesses, in the particular circumstances of his trial, cannot defensibly be used as a ground for saddling him with any "old matter" contained in the Crown evidence given before he himself testified. The fact is, and remains, that he had never, whether expressly or by implication, espoused the contention of the Crown that 'everything', so to speak, had taken place outside of the Carrazco house. To call the six o'clock incident 'new matter' is therefore, with the greatest respect, to utter a misnomer. Surely, the appellant is not be penalised for having, by the mere lawful exercise of his right to remain silent inside and outside of court, created inconvenience for prosecuting counsel. As to the specific suggestion of the Crown that the new matter was the allegation of provoking conduct in the form of a false accusation of involvement with another woman, apart from what has already been said above, there is the additional answer that the Crown ought reasonably to have foreseen that in a case concerning the alleged killing by a man of his spouse, through marriage or otherwise, the partial excuse of provocation based on provoking conduct sometime on the very day of the killing was a strong likelihood. The case of *Day*, adverted to, but not followed, in the judgment in *Blick* (see the quote at para **[66]**, above) shows the Crown being held to an appropriately high standard in this regard.

[71] The Court proceeds hence on the basis that leave to call rebuttal witnesses was wrongly granted by the judge and that, accordingly, the evidence of such witnesses ought never to have been admitted. It is not possible sitting here in an appellate court to assess the full impact that was made on the mind of the judge by that evidence, coming as it did from three truly dream Crown witnesses. It obviously left the credibility of the appellant, in the mind of the judge, in tatters. In rejecting the relevant evidence of the appellant, the judge, in his judgment, said:

> 'Having compared the evidence called in rebuttal I am satisfied that I feel quite sure that the Prosecution has rebutted the evidence of the Defence as regards the events of or about 6.00 pm on 28th February, 2011 as related by the Defence. The Prosecution has proved by its evidence that [the deceased CAC] could not (*sic*) and was not at [the house] at or about 6.00 pm on the 28th February, 2011.' [underline added]

Later in his judgment, as already noted at para **[43]**, above, he further wrote:

> 'I therefore do not accept that [the deceased CAC] from the evidence before the court was at home at [the Carrazco house] at or about 6.00 pm on 28th February, 2011 or that the events described in evidence by [the appellant] took place at all. I reject that part of his testimony. [original underline]

The evidence of the six o'clock incident was rejected, then, not because of anything inherent in it but because of how it fared upon comparison by the judge with the testimonies of the three irresistibly sympathetic rebuttal witnesses. What would have been the fate of such evidence had there been no such sharply conflicting testimonies of three obviously devout grieving women, all mourning the then recent death of Ms Florence Herrera on the date of the killing of a loved one, with which to compare it?

[72] Apart from that, what became of the evidence of the pertinent alleged verbal assault? Given the emphatic tone of the rejection of the appellant's evidence that the

deceased CAC was at the Carrazco house at a little after 6 pm on 28 February 2011 (as noted in the immediately preceding paragraph, the emphasis shown in the last quotation from the judgment is original rather than added), did the allegation of the verbal assault itself end up a casualty of that categorical rejection? Put slightly differently, did the judge conclude that that part of the provoking conduct alleged by the appellant never occurred simply because the deceased CAC could not have been at the Carrazco house at a little after 6 pm on the day in question? The difficulty with the adoption of such an otherwise attractive line of reasoning would be, as already suggested, that, in the present case, the medical evidence speaks eloquently of a loss of self-control on the part of the killer of the deceased CAC. That evidence was the forest of whose presence the trial judge had constantly to remain aware. Seeking to whittle away piecemeal the evidence of provoking conduct was a dangerous exercise, comparable to becoming obsessed with the minutiae, the proverbial individual trees which together make up the forest, and thus blinding oneself as regards the big picture. And yet, it is perfectly plain from the second quote in the immediately preceding paragraph that the judge in fact somehow 'inferred' that it could not be that 'the events described in evidence by [the appellant] took place at all'.

[73] Returning for completeness to the questions posed above, this Court concludes, in short, that it was not proper, on the facts of the present case, to apply the *ex improviso* rule and thus enable the Crown to call witnesses to contradict the appellant. The judge was, in the view of this Court, faced with a situation requiring to be dealt with in accordance with sections 68 and 69 of the Evidence Act. The judge should, in addition, have had due regard to the provisions of section 4 of that Act.

Brief consideration of the grounds argued

[74] Consideration of the only grounds of appeal against conviction argued in the written submissions revealed that their allowance could not lead to an outcome more favourable to the appellant than the one actually arrived, already described at para [1], above. As to the sole ground of appeal against sentence dealt with in such submissions, it was rendered wholly academic by the quashing of the conviction and sentence for

murder. Focussing, then, only on the two grounds against conviction addressed in those submissions, the Court turns to the first of them, whose complaint was unfairness in the trial. The unfairness alleged consisted of the judge's granting of the Crown's application for permission to call rebuttal witnesses which has already been discussed above as an error of law. The Court fails to see how more can properly be made of that legal error than has been made. Certainly, it is not an error that could justify a complete acquittal. What was rebutted was evidence of the appellant relating only to alleged provoking conduct on the part of the deceased, evidence going as such only to the partial excuse of provocation. Looking next at the second ground, under which it was claimed that the judge failed critically to analyse the evidence of Mr Faber, the Court can find no substance in it. From the vantage point of this Court, which, of course, is not to be equated with that of the judge, Mr Faber, giving evidence in 2016 of events which had occurred in 2011, said nothing intrinsically incredible. He was believed by the judge, who took into account the evidence of other witnesses whose testimony needed to be kept in mind in assessing his credibility, the chief amongst these being PC Bainton and Ms Cambranes. Credible evidence is not, and never was, required to be perfectly flawless testimony.

The substitution of sentence

[75] An automatic sentence of life imprisonment no longer being appropriate in this jurisdiction, the Court considered the applicable sentencing range for comparable cases of manslaughter, guidance being taken in particular from its decisions in *Logan (Linsberth) v R*, Criminal Appeal No 12 of 1996, *Pop (Anthony) v R*, Criminal Appeal No 2 of 2005 (judgment delivered on 27 October 2006), and *Zetina (Jose MarÍa) v R*, (judgment delivered on 19 June 2009). In *Pop*, writing for the Court, Sosa JA, as he then was, subscribed, at para 15, to the view that "it is proper to look at the trend of reported decisions to establish the range of sentence normally regarded by appellate courts as appropriate for the type of case which is under consideration): *per* Carswell LCJ in *McCullough v R* [1998] NICA I, at para 28. In the instant case, the Court found, on considering the three cases just cited, not a range as such but a common term of imprisonment of 20 years imposed in all three cases. All of these cases involved

convictions for manslaughter, substituted on appeal, of men who had killed women who were at the material time, or had previously been, their common law spouses. In *Logan*, cited in *Pop*, a case referred to by both sides in their submissions, Mr Logan stabbed his former common law wife to death in an alley behind the Chateau Caribbean Hotel in Belize City. The Privy Council substituted a conviction for manslaughter and remitted the case to this Court for sentencing. In *Pop*, Mr Pop also fatally stabbed his estranged common law spouse, who was at her home in Dangriga at the time. In *Zetina*, also cited by both sides before this Court, the common law spouse of Mr Zetina died from knife wounds which he inflicted on her at their home in the town of Santa Elena. Mr Selgado's strident and emotive submissions to the contrary notwithstanding, the Court unreservedly accepted the rock-solid contention of Ms Smith that there is nothing peculiar in the instant case which renders inappropriate the sentencing precedents established in *Logan*, *Pop* and *Zetina*. Indeed, the Court considered that the messages sought to be sent to perpetrators of domestic violence in those cases may not have quite reached home, given the steady increase in such violence in the intervening years.

[76] At the sentencing hearing before this Court, the father and an uncle of the appellant joined their voices to his in his plea for leniency. The appellant also expressed remorse for his actions on 28 February 2011, in reaction perhaps to Ms Smith's portrayal of him as a remorseless figure in her hard-hitting submissions a few minutes earlier. That said, it must be emphasised that the Crown waived its right to respond to anything said by the appellant and his witnesses.

[77] All things considered, and proceeding on the basis that the appellant had a clean criminal record, the Court formed the view that the appropriate sentence in this appeal would have been one of 21 years, rather than 20 years, were it not for the fact that the appellant (a) was in custody pending his trial from 28 February 2011 to 26 April 2016 and (b) was thereafter, for the purposes of section 34(2) of the Court of Appeal Act, deemed to be a prisoner awaiting trial from 26 April 2016 to 17 March 2017. The Court therefore deducted a grand total of six years and 18 days from the period of 21 years and thus arrived at a figure of 14 years and 347 days. Accordingly, the Court sentenced the

appellant to serve a term of 14 years' and 347 days' imprisonment commencing on the date of sentencing, ie 5 June 2017.

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SIR MANUEL SOSA P

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HAFIZ BERTRAM JA

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BLACKMAN JA