

**IN THE SUPREME COURT OF BELIZE, A.D. 2020
CRIMINAL JURISDICTION**

CENTRAL DISTRICT

Indictment No. C45/2019

THE QUEEN

V

KYLIE MONTERO

BEFORE: Honourable Justice Mr. Francis M. Cumberbatch

APPEARANCES: Mr. Cecil Ramirez - Sr. Crown Counsel along with
Natasha Mohamed for the Crown
Ms. Kathleen Lewis - Counsel for the Accused

TRIAL DATES: 27th, 28th, 29, and 30th January, 2020.
5th, 10th, 18th, and 20th February, 2020.
10th March, 2020.

JUDGMENT

[1] The Accused was indicted by the Director of Public Prosecutions for the offence of murder for that he on the 25th day of June, 2017, in San Ignacio Town, in the Cayo District, in the Central District of the Supreme Court, murdered Akeem Guzman ('the Deceased') contrary to *Sections 117 and 106 (1) of the Criminal Code CAP 101 of the Substantive Laws of Belize (Revised Edition) 2011*. At his arraignment, he entered a plea of not guilty and his trial was conducted by a single Judge pursuant to the provisions of *Section 65 A of the Indictable Procedure Act CAP 96 of the Substantive Laws of Belize*.

The Facts

[2] The Crown called **SERGIO ANDINO**. This was the only eye witness called at the trial. He stated that on the 25th day of June, 2017, he was 16 years old and resided at Flamingo Street, San Ignacio Town. At around midnight on Sunday the 25th day of June, 2017, he was at home when he was awoken by his friend the Deceased who was banging at the side of his house. He got up and when he asked who it was, he heard and recognized the voice of his friend, the Deceased. He went outside and saw the Deceased sitting on a blue crate smoking a cigarette. He started to roll a marijuana cigar whilst sitting on the steps outside of his home. After he rolled the cigar he lifted his head and looked where the Deceased was sitting. He saw someone creeping behind the Deceased. The person was dressed in full black and fired a shot at the Deceased. The Deceased got up and ran to the back of the house and he ran behind him. He flashed his lighter and saw that he was bleeding. He then ran into his house and told his mother to call the police because Akeem had just been shot. He stated that the police did not take long to arrive at the scene and it was one Corporal Zetina who arrived accompanied by another officer and a police woman.

[3] The witness continues that he did see who shot the Deceased and it was Kylie Montero. He said he knew Kylie Montero for about ten to 15 years prior to that day. They attended the same primary school, Sacred Heart Primary School, and at one time they were in the same class. He went on to state that he would speak to him twice weekly when he came to visit him at his home. He said when he came out of his house it was night but he was able to see his surroundings because there was a lamp post on his neighbour's land which had a light and it was five to ten feet away. He

stated that when the Deceased was sitting on the blue crate he was about two to three feet from him and Kylie Montero was about five feet away when he first saw him creeping up on the Deceased. He said he knew it was Kylie Montero because he saw his face as he was able to observe him for about 20 seconds. From where he was, he saw Kylie creeping up on the Deceased and nothing obstructed his view of him. The light from the lamp post was working and it was very bright. He said in June 2017, Kylie Montero's mother lived on Easy Rider Road in San Ignacio. He is of Creole descent, brown skinned with curly hair, short and slim built and that he could identify him if he sees him again. He then identified the Accused as Kylie Montero. He said that Akeem Guzman is dead.

- [4] Under cross-examination the witness said that at around midnight that night he was asleep. His mother, grandmother, three brothers and a sister were at home. His little sister is about 12 years old. About six persons were at home that night. One of his brothers was 14 years old whilst another was five. Akeem was banging on the side of his house which has three doors and his bed is near the side door. He was aware that it was Akeem who was at the door because when he asked who it was, Akeem answered. He expected him coming as they had planned that night to go to steal, to rob. He said he did not have a gun that night and if he had one the police would have caught him with it. He said his yard is fenced. There is a fence at the front but there is no gate. Both sides of the land are fenced. The yard is fully fenced except that there is no gate. The house is three to four steps from the ground and where he sat was on the last step to the house. When he was smoking his cigar he was seated on the last step to the house. It was the steps to the front door and the Deceased was sitting on a crate to his right and he was

about 10 to 12 feet from him. They were both facing the street which was about 20 feet from where they were sitting. There was a chicken wire fence at the sides and the front of the yard. He saw the person creeping from the neighbour's yard. There are two different neighbors and two different lots. He cannot say how long the neighbour's lived there and at that time they had no dogs. The front of the neighbour's yard is not fenced but the rest of it was fenced. There was a chicken wire fence and a zinc sheet on a part of the fence. The zinc was to the left of the Deceased. The person was creeping from the neighbour's yard and he was able to see the person through the holes in the chicken wire fence. There is no cement fence close to where the blue crate was. There are no trees where Akeem was sitting, there were trees in front. Witness demonstrates how the person was creeping. When he was coming from the neighbor's yard, I saw him. He was in the Neighbour's yard that night. He fired the shot from the neighbour's yard and not in his yard because of the fence. Akeem was about two and a half feet from the fence. He did not see how or when the person got into the Neighbour's yard. The person wore a black shirt, black pants and a black warm cap which covered his ears and hair but not his face. He said it took him about five minutes to break up the marijuana and as he rolled it and was about to light it, he turned his face and saw the person. He looked up to his right and saw the person creeping up and shot Akeem. It all took about 20 seconds. When he saw Kylie he shouted, "Bwoy". He did not call Kylie's name.

- [5] The lamp post is to the front of the neighbour's yard. He said he wants justice for his friend who is dead and that the area was well lighted. He saw Kylie Montero shoot Akeem that night. When he was creeping he did not

see his face as yet. When he got close and fire the shot was when he saw his face. At that time he was about ten to 12 feet away. When the shot was fired Akeem was sitting down. He crept towards Akeem then stood up and fired the shot.

[6] He said, "I saw who shot Akeem and there is light."

[7] There is another lamp post close to my yard and that flashes the front of my yard. There are no trees where Akeem was sitting. There are Hibiscus trees to the front. Where Akeem was sitting on the crate there were stones, there were no chairs for sitting purposes. The neighbour's yard had banana trees. The hibiscus trees in my yard covered the fence in front, not to the side. The side is just fence. Akeem was about five to ten feet away from the lamp post. At no time when the incident happened did I call out the name Kylie. I did not see the shots I saw sparks. After the shot Akeem got up and ran to the back and the person ran away towards the Easy Rider Road and I ran towards Akeem. I am not sure what direction the person took. Easy Rider Road is a back road. It is behind the area of my neighbour's house. I did not chase behind the shooter, I ran to where Akeem was. I did not call out the name Kylie Montero, I shouted, "Bwoy". Akeem ran a distance, from the witness box to the wall behind the jury box when he got shot. I had to flash my lighter because behind my yard where Akeem ran had no light. Akeem first ran to the front then he turned and ran to the back. Where he ran was very dark. The front was bushy there were hibiscus trees and the back had no light. I would not agree that the area where Akeem was sitting was dark and not well lighted. At 12:15 a.m., it was not daylight. After I went and saw Akeem I went inside and told my mother Akeem got shot, call the police. My mother is Aisa Modina. The police came and we took

Akeem to the hospital. I walked home. I got some clothes and fled from there because I was afraid they would come for me. At around 10:00 a.m., the following day I was not at the police station. The police went to my house that same day and I was taken to the station. The police asked me to give a statement. I was placed in a cell at the station. At that time I was 16 years old. I was kept for a day and a half. When I was first questioned, I did not tell the police I saw Kylie Montero shoot Akeem Guzman. The police were going to charge me because I did not want to work with them. I was afraid at first because I was afraid of what would happen. I was under investigation for the murder of Akeem Guzman, I was not under arrest. The lamp post is not located at the far end of the second house next door to mine but at the end of the first house. I do not accept that it is 75 feet away from the end of my house. The lamp post is by the neighbor's house right beside mine. You have to step down to get into the yard from the road.

[8] Re-examination was declined.

[9] **FILIBERTO POTT-** This witness is a Crime Scene Technician. On the morning of the 25th day of June, 2017, at around 10:15 a.m., he accompanied Sergeant McCulloch to Flamingo Street, San Antonio, to process a crime scene. He observed that the incident happened on the west side of Flamingo Avenue. On entering the house and lot he observed two buildings. He then observed what appeared to be blood between the two board buildings. He numbered that substance as number one and took a photograph thereof. He also took a swab of the red substance.

- [10] The witness then proceeded to the southern portion of the house and lot and observed three chairs near to a zinc and wire fence. One of the chairs was on the ground. He took a photograph of the three plastic chairs.
- [11] On Monday 26th day of June, 2017, he visited the Karl Heusner Memorial Hospital morgue and observed the lifeless body of the Deceased which was identified by Geraldine Jones to Dr. Estrada Bran, PC Nunez and himself. He took photographs of the body and collected blood samples, pellets and a circular plastic wad from Dr. Estrada Bran. He tendered into evidence photographs taken at the crime scene and post mortem examination.
- [12] He said that the blue plastic crate with two small wheels attached to the side is seen in photograph number four. It is next to the zinc sheet.
- [13] Under cross-examination, the witness stated that the zinc sheet in photograph number four is a part of the fence. The zinc is on the southern side of the yard. The trees in the photograph are located on the eastern side of the yard. The house would be to the right side of the photograph. He said he accessed the yard from the road going downhill.
- [14] In reply to questions by the Court the witness said that photograph number four is part of the yard in photograph number one. Photograph number one shows the side of the house.
- [15] **DR. MARIO ESTRADA BRAN** testified. The Court deemed him an expert in the field of forensic medicine. He stated that on the 26th day of June, 2017, he performed a post mortem examination on the body of the Deceased. He stated he found the direct cause of death to be traumatic

shock due to shotgun injuries to the abdomen and chest. The gun was close or near to the body. Close means a distance less than 32 inches, near is a few inches before the muzzle gets in contact with the person.

[16] Under cross-examination, the witness stated that a shotgun was used but he cannot speak about its caliber. He could not say the position of the shooter but the muzzle of the gun was pointed slightly upward.

[17] **CORPORAL ZETINA** testified. He stated that in June of 2017, he was attached to the Quick Response Team, San Ignacio Police Station. On Sunday 25th day of June, 2017, he was on routine patrol when he received information of shots fired in Flamingo Street in San Ignacio. He visited the location and entered a yard where beside a small house is an outside toilet. At the front door of the toilet he saw a male person lying face down bleeding from the stomach area. Since he was still breathing, he got assistance from Sergio Andino and officers patrolling with him and placed the male person who he knew as Akeem Guzman in his vehicle and took him to the San Ignacio hospital where he handed him over to the doctor in charge for treatment. He then left to continue patrolling and that was the extent of his involvement in this matter.

[18] Under cross-examination, he said in front of the small house was not clear but in front of the door of the toilet where the person was lying down was a small bulb. He observed only one house and a small toilet. The street in front of the house was the same level as the house. He entered the yard through a small gate down a hill. The house is about four feet off the ground on small posts.

[19] The witness stated that the toilet is to the left side of the house going in. There was a light in front of the toilet. He said he was able to see the person lying down in front of the toilet door clearly. The person was lying beneath the light. He said the light was not that bright so he had to use his flashlight. He said he recalls the lighting conditions in the yard that night. He did not know if Sergio Andino resided in that house. As far as he knew he was the first officer on the scene that night. When he arrived he saw a group of four to five persons one of whom was Sergio Andino.

The witness stated that he took the person lying on the ground to the hospital. He did not remove anybody else from the yard. Andino was removed from the yard and taken in the mobile. He was not aware that he was an occupant of that house. The area where the man was lying was not dark the incident took place in June 2017 and was still clear in his mind.

[20] Under re-examination, the witness stated that when he said he removed Andino he meant that Sergio Andino assisted him to take the person to the hospital.

[21] **PC UBALDO GUZMAN** testified that on Thursday 31st day of August, 2017, whilst on patrol he saw the Accused who was released from police custody earlier that day and was wanted for murder walking along Hudson Street in San Ignacio Town. He stopped the mobile and got out. He informed Kylie Montero that he was under arrest for murder and cautioned him. He then escorted him to the San Ignacio Police Station and informed Sergeant McColluch of his detention.

[22] Under cross-examination, he said the Accused was released earlier that day but he cannot now remember. When he picked him up he was on Hudson

Street which is not far away from the San Ignacio Police Station. He denied that he elbowed him. He stated that there were other officers with him but he cannot recall how many and their names. Kylie Montero he said was placed inside the mobile but he can't recall who the driver was at that time. That essentially was the case for the Crown.

[23] At the close of the Crown's case the Accused elected to give sworn testimony. He stated that he did not shoot the Deceased and on that fateful night he was at home with his girlfriend one, Jolene Hyde. They went to sleep at around 10:00 p.m. that night and he never left his home after that time that night.

[24] Under cross-examination, he said he told the Magistrate at San Ignacio, that Jolene Hyde was his alibi witness. He does not remember telling the Magistrate that his alibi witness was one Kristy Lewis and that he does not know who Kristy Lewis is. He stated that on the night in question he was with Jolene Hyde. That was the case for the Defence. He called no witnesses.

[25] The Court granted leave to the Crown to adduce evidence in rebuttal pursuant to the provisions of section 125 (4) of the Indictable Procedure Act. This was to disprove the evidence of the Accused that Jolene Hyde was his alibi witness.

[26] **SERGEANT JOSE PINELO** was called by the Crown. He testified that on the 27th day of November, 2018, he was the prosecutor at the San Ignacio Magistrate's Court and he conducted the preliminary inquiry in the case of The Queen v Kylie Montero. He further stated that the Magistrate, Ms.

LaDonna John, gave the Accused an alibi warning and explained the process to him. In response he provided the name, Kristy Lewis, as his girlfriend as his alibi witness.

[27] Under cross-examination, the witness stated that the Accused was the only person charged for this offence. The Accused was at the time unrepresented by Counsel and no community rehabilitation officer was called to assist him. He cannot say if the Magistrate gave the Accused documents to sign about his alibi warning. However, he has it recorded that he gave the name of Kristy Lewis as his alibi witness.

Analysis and Verdict

Analysis

[28] It is common ground that this case turns on the evidence of visual identification of the Accused by the sole identifying witness, Sergio Andino. There is no forensic or other supporting evidence which strengthens the Crown's case on identification. Thus I will now proceed to analyze the evidence of visual identification herein.

[29] There are certain inconsistencies arising from the evidence of Sergio Andino on matters pertaining to the lighting conditions of the scene that night. There are also discrepancies between the evidence of Sergio Andino and Corporal Zetina on the lighting conditions in the yard where the Deceased was shot.

[30] In his examination-in-chief, Sergio Andino testified as follows:

- “... I was able to see my surroundings as there is a lamp post on the neighbor’s yard, the lamp post had a light, there was no other light. **The lamp post was about five to ten feet away;**
- **Akeem was about two to three feet away from me.** Kylie Montero was about five feet away when I saw him creeping up on Akeem;

[31] Under cross-examination he stated:

- **The distance from where I was to where Akeem was is about 10 to 12 feet** (estimated distance from witness box to end of Marshall’s table);
- **There is another light post close to my yard and that flashes in the front of my yard;**
- Akeem was about two and a half feet from the fence;
- When he was creeping I did not see his face as yet;
- When he got close and fire the shot that’s when I saw his face he was about ten to 12 feet away (estimated). When the shot was fired Akeem was sitting down. He crept up towards Akeem then he stand up and fire the shot;
- **Akeem was about five to ten feet away from the lamp post**
- After the shot Akeem got up and ran to the back and the person ran away.

[32] The Court visited the locus and observed the lamp post in question to be close to the roadside and not in the neighbour’s yard. It was some 53 feet away from the yard. There was between Andino’s yard and the lamp post a big concrete building. The lamp was hanging over the roadway in a direction facing away from the crime scene. The distance from where the witness was to where Akeem was is measured at 23 feet. The zinc sheet is still present and is 12 feet long and four and a half feet high.

[33] The Court did not expect the witness to give precise mathematical measurements or exact demonstrations of distances during his testimony. However, his answers to questions about the position of the lamp post are wholly unreliable. It was more than three times the measured distance from what the Accused stated in his sworn testimony and it was certainly not in the neighbour's yard but on the roadside. Moreover, the Court was not shown any other lamp post which could have aided the lighting conditions at the scene.

[34] I now turn to the discrepancies between the testimony of the witness and Corporal Zetina. He was the first police officer on the scene. He stated that when he visited the yard **he found that the front was not clear but at the back where the Deceased was found lying near to the toilet door there was a light on that door which was not that bright.** That was in stark contrast to the testimony of Andino who stated that the lighting at the front was very bright. He said that there are no lights at the back where Akeem lay and that area was very dark, hence, he had to flash his lighter to see Akeem. Corporal Zetina insisted that he does recall the lighting conditions of the yard that night and that the incident is still clear in his mind.

[35] It is common ground that Corporal Zetina did visit the scene that night. However, his recollection of lighting conditions thereat differs significantly from that of Sergio Andino.

[36] I find it astonishing that neither the investigator nor any other detective visited the scene at night to verify the quality of lighting conditions during that time. The only police officer, Corporal Zetina, who visited the scene, said his duties were confined to taking the injured person to the hospital. He

certainly did not enhance the Crown's case when he gave testimony of the lighting conditions which starkly contrasted with that of Sergio Andino.

[37] Defence Counsel submits that the alleged identification of her client amounted to no more than a fleeting glance under difficult conditions. Moreover, the Accused relies on the defence of alibi. Hence, it is even more important for the Court to carefully consider the evidence of visual identification herein. The evidence does not reveal any further sighting of the Accused by the witness, Sergio Andino, after the shooting of Akeem Guzman.

[38] I must also consider that the witness disclosed the name of the Accused as the shooter after he was held in custody for this offence. He originally denied knowing who the shooter was. He did not tell it to Corporal Zetina who was the first officer on the scene nor to his mother whom he asked to call the police. He states that his reason for this is because he was afraid.

[39] The Court is not unaware that witnesses in cases of homicide have testified to being afraid of violent reprisal for disclosing details of participants in a homicide. However, the manner in which the Accused made the revelation raises the possibility of him naming just about anyone to take the heat off of him.

[40] Defence Counsel raises the discrete point that the evidence of Dr. Estrada Bran discloses that when the Deceased was shot the gun was pointed slightly upwards. As stated aforesaid Sergio Andino testified that at the time when the Deceased was shot he was sitting on a blue crate. This crate is shown in photograph number four. It was also seen by the Court in the visit to the

locus. It is a small object very low to the ground. Andino further testified that the shooter stood up and shot the Deceased.

[41] Ms. Lewis is asking the Court to infer that if indeed the shooter was standing then he would have been standing over the Deceased; hence, the gun would have been pointed downwards and not slightly upwards as opined by the doctor.

Verdict

[42] As stated, aforesaid the Accused is indicted for the offence of murder contrary to Section 106 (1) of the Criminal Code. That section provides thus:

“106 (1) - Every person who commits murder shall suffer death”.

[43] Section 117 of the Criminal Code provides:

“117 - Every person who intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of such extreme provocation, or other matter of partial excuse as in the next following sections mentioned”.

[44] The Crown must prove the following beyond reasonable doubt:

- i. That the Deceased is dead;
- ii. That he died from unlawful harm;
- iii. That the unlawful harm was inflicted by the Accused;
- iv. That the Accused intended to kill the Deceased when he unlawfully caused harm to him.

[45] The Court is satisfied to the extent that it feels sure that Akeem Guzman is dead. I believe and accept the evidence of the Crime Scene Technician Filiberto Pop who was present at the post mortem examination and took photographs when the body of the Deceased was identified by Geraldine Jones. I also accept the evidence of Dr. Mario Estrada Bran who testified that he performed a post mortem examination on the body of Akeem Guzman on the 26th day of June, 2016, and the cause of death was traumatic shock due to shotgun injuries to the abdomen and chest.

There is no evidence nor is there any contention by the defence that this homicide was justified. Indeed, the Accused has distanced himself from the crime scene on that fateful night and has testified under oath that he was at home. Thus, the Defence relies on the defence of alibi. Accordingly, I am also satisfied to the extent that I feel sure that the Deceased died from unlawful harm.

[46] I now turn to the question of whether the unlawful harm was caused by the Accused. In making this determination, I must direct myself on the law as it applies to visual identification.

[47] To avoid the risk of injustice I have warned myself of the special need for caution before convicting the Accused on the visual identification in this case. A witness who is convinced in his own mind that the person he saw is the Accused may as a result be a convincing witness but may nevertheless be mistaken. Mistakes can also be made in recognition of someone well known to the witness such as a close friend or relative. So, I must carefully examine the circumstances in which the identification was made, for how

long was the Accused under observation by the witness, at what distance, in what light, did anything interfere with his observation?

- [48] It is common ground that no identification procedure was conducted herein. The evidence discloses that the witness, Sergio Andino, has prior to that fateful day known the Accused some 12 to 15 years, they attended the same school, they speak to each other twice weekly and the Accused visits his home. They last spoke to each other on the Friday prior to the 25th day of June, 2017. In a statement to the police on the 26th day of June, 2017, he stated that Kylie Montero was the shooter. In the circumstances, I find that no useful purpose would have been served by the holding of an identification parade or any other form of identification procedure as it is obvious that the Accused would have been picked out not necessarily because he was the shooter but because he was Kylie Montero.
- [49] An analysis of the evidence of this witness aforesaid reveals that there are certain inconsistencies in his evidence especially as it pertains to the lighting conditions at the time when the identification was made. What is more important is that the evidence of Corporal Zetina differs significantly as to the lighting conditions at the front of the yard where the incident allegedly took place.
- [50] The Accused said he saw the face of the shooter for about 20 seconds and that happened when he stood up and fired the gun. That estimation may or may not be accurate; however, the Court must consider whether or not it was no more than a fleeting glance as submitted by Defence Counsel.

[51] In the Privy Council decision of *Larry Raymond Jones v The Queen Privy Council Appeal No. 4 of 1995*, the Board held thus at page 6:

“The question now remains as to whether the verdict here on the evidence can be said to be unsafe or unsatisfactory.

An important issue for the jury is whether it was light enough for Mrs. Taylor to see the man. She clearly said there was enough light even though dusk was falling; darkness only fell about twenty minutes after the incident and she had to wait some twenty five minutes for the ambulance. There is no real discrepancy between her evidence and that of the ambulance driver. After the shooting she had to telephone for an ambulance; the driver had to receive the message to set off and drive to the scene. If the shooting was at 8:05 p.m., he says he arrived between 8:10 and 8:24 although Mrs. Taylor would put it nearer to 8:30 p.m. Even if he arrived twenty minutes after the shooting there could be a substantial difference in the amount of light as Mrs. Taylor herself recognised. The jury would, moreover, have been very familiar with the degree of visibility at that time of the evening allowing for the change to daylight saving time.

Mrs. Taylor said that she saw the man’s face three times. The first was no more than a fleeting glance at the back of the car, and if that had stood alone it might well have not been sufficient even to justify leaving the case to the jury. But it did not stand alone. She saw his face twice subsequently at a short distance (four feet and eight to ten feet) when she was out of the car. She was no doubt distressed but she was equally concerned to see who it was who had shot her husband. Even if her estimate of fifteen seconds was an overstatement it seems to their Lordships that the Jury were entitled to conclude that she had

seen him sufficiently to identify him in the light of the judge's warning about the factor to be considered and as to the possibility of mistake."

- [52] It is clear in that case that the Board held that a fleeting glance standing alone would not even have been sufficient to justify leaving the case to the jury. However, the witness had seen the Accused on three occasions that night and there was no real discrepancy between her evidence and that of the ambulance driver as to the time of the incident and prevailing visibility at that time.
- [53] In the case at Bar, however, the witness states he only saw the face of the Accused once. Moreover, apart from the inconsistencies in and the unreliability of the witness' evidence of the position of the lamp post and lighting conditions, there is that glaring discrepancy between his evidence and that of Corporal Zetina aforesaid. Indeed, as mentioned aforesaid, neither the investigator nor the crime scene technician visited the scene at night to ascertain the nature and extent of the visibility at that time.
- [54] The circumstances under which the witness named the Accused to the police as the shooter are far from desirable. Thus in all the circumstances of this case, I am not satisfied to the extent that I feel sure that it was the Accused who caused unlawful harm to the Deceased thereby causing his death.

[55] Accordingly, the Accused is found not guilty of the offence of murder and is discharged.

Dated this Tuesday 10th day of March, 2020.

Honourable Justice Mr. Francis M. Cumberbatch
Justice of the Supreme Court