[2010] UKPC 18
Privy Council Appeal No 0032 of 2009

JUDGMENT

Kirk Gordon *v* The Queen

From the Court of Appeal of Belize

before

Lord Saville
Lord Rodger
Lord Collins
Lord Clarke
Sir Christopher Rose

JUDGMENT DELIVERED BY
Lord Clarke
ON

21 July 2010

Heard on 17 May 2010

Appellant	*Respondent*
Paul Bogan Lucy Corrin (*Instructed by Simons Muirhead & Burton)*	Not represented

LORD CLARKE

Introduction

1. On 14 July 2006 the appellant was convicted of murder after a trial in the Supreme Court of Belize before Mr Justice Gonzales ('the judge') and a jury. On the same day he was sentenced to life imprisonment. He appealed to the Court of Appeal in Belize but his appeal was dismissed on 8 March 2007, full reasons being given on 22 June 2007. On 17 November 2009, the Board granted special leave to appeal against his conviction.

2. Four grounds of appeal are advanced against the conviction:

i) that the judge effectively withdrew the issue of intention to kill from the jury;

ii) that the judge misdirected the jury as to the partial defence of loss of self-control;

iii) that the judge misdirected the jury in stating that the appellant could not be convicted of manslaughter if he intended to kill the victim; and

iv) that the jury were wrongly denied the opportunity of considering the appellant's statement under caution and police interview.

The facts

3. The deceased was Arthur Ellis. The appellant was alleged to have killed him at about 1130 pm on 14 November 2003 by striking him a number of times with a piece of wood. In short, four police officers were in a marked police car when they saw the appellant about 600 feet away just in front of 21 Kraal Road in Belize City, which was his home address. He was hitting a motionless body on the ground with a one foot by three foot piece of wooden board. He was observed to be bending over, holding the piece of wood with both hands and hitting the man on the ground to the face and head as he lay on his back on the ground.

4. The evidence of the four police officers was shortly to this effect, so far as relevant to this appeal. Before the police car stopped Corporal Aldana saw the appellant strike the deceased with four or five blows. After the car stopped he got out, drew his revolver and ordered the appellant to stop. The appellant initially refused, still holding the board, but after Corporal Aldana had given a second warning he dropped the board. After a struggle, the appellant was handcuffed, arrested and put in the police car, where he was cautioned. He said "If unu neva reach in time this would have been a straight murder." No contemporaneous note was made of that comment. Corporal Aldana could smell alcohol on the appellant's breath and formed the view that he was under the influence of alcohol. There was no sign of injury to the appellant except for a cut lip sustained in the struggle with the police. On the other hand, the deceased had face and head injuries and was bleeding from his mouth and nose. Corporal Aldana also described a groaning or gargling noise coming from his throat. PC Tillett retrieved the board from where it lay about four feet from the deceased. It had two nails embedded at the centre and end of it. Corporal Aldana saw PC Meighan pick up a knife with a blade measuring about six and a half inches in length. It was on the pavement about nine feet from where the deceased was lying. Corporal Aldana denied that, when he approached, the appellant said that he had been attacked by the man on the ground with a knife and that he had retaliated with a stick.

5. PC Meighan's evidence was to much the same effect, although he said that he saw the appellant hit the man on the ground about seven times. He described the latter as lying on the ground, apparently motionless in a pool of blood, bleeding from his face and head. He saw the knife when a van was moved so that they could gain access to the man on the ground. The knife was about six feet from the man on the ground. It was a shiny stainless steel knife with a pointed blade about four to five inches in length and a handle about three to four inches in length. It was put to him in cross-examination: '… you cannot say that this thing was not in his hands. You cannot deny it?' and he said 'No, sir'. The judge then said: 'What you are saying in effect is that – did you see that knife in his hands?' and the witness replied: 'I did not see it, my Lord.' He described the board much as the others had but also said that it was bloodstained.

6. DC Tillett gave evidence to similar effect. He described the appellant as using obscene language and being disorderly. SC Banks, who was driving the police car, also described what she saw, albeit more briefly. She described the appellant with an object in his hands 'whopping down' on a man on the ground whom she identified as Arthur Banks. The appellant did not reply when cautioned.

7. There was expert evidence that there were two large stains of human blood on the board. A pathologist gave evidence that, in his opinion, death was caused by traumatic asphyxia. More than one blow had been delivered to the face by a blunt instrument. The lower mandible of the deceased had been fractured, which would have required heavy or strong force using the board which had been retrieved from the

scene. The deceased had a wide contusion on the left pectoral muscle. The pathologist expressed the view that the deceased had received a blow to the major pectoral muscle and a blow to the face whilst facing the appellant. His opinion was that those two blows were likely to have been inflicted while the deceased and the appellant were standing face to face.

The appellant's case at trial

8. The appellant made a statement under caution followed by a police interview in which he said that he had been threatened by a knife, whereupon he picked up a nearby piece of board and hit the deceased. Neither the statement nor the contents of the interview was adduced in evidence at the trial.

9. At trial the appellant elected not to give evidence but made an unsworn statement from the dock. It was in these terms:

> "I went home on the 14th day of November 2003, bout after 11:00. When I went home, I met this man in front of my house. I walked up to him and told him to fu mek ih please move the vehicle from front of the gate. Replying that to him, he told me, 'Weh the fuck the gwine with you, pump?' So when he told me that I said nothing to him. He get in his vehicle and drove off. When he drove off, I walked in front of the building standing there waiting for someone. At the time standing there, I watched this man turned on Waight Street on the left-hand-side. When he turned into Waight Street, he reversed the vehicle, straightened up the vehicle. Watching him doing all of this, I didn't neva know if dah after me this man was coming. So when I was standing up front of the building, this man stopped the vehicle and come out of the vehicle with ih right hand underneath ih shut. When he reached into me, about three feet, he moved his hand from underneath ih shut, ih put ih right hand in ih right pocket and he came back up with a knife and put it to my throat, the left side of my throat. When he have the knife at my throat, he told me, 'If yuh waahn I fucking kill yuh now?' So when he told me that, he tek his left hand and punched me in the right side of my face. When he did that to me I didn't neva know what to do so I struggled with him. When I struggled with him, I managed to push him off backward where he stumbled and I run from managed to push him off backward where he stumbled and I ran from front of him going on the left hand side going to the fence, I managed to see a stick leaning up against the fence and when I saw the stick this man was right behind me with the knife. So I ended up grabbing the stick which was leaning up against the fence to defend myself from this man who have the knife. So when I end up grabbing the piece of stick that was leaning up against the fence, I swing

around and fired a whop, the stick end up hitting him in his face so I keep whopping cause this man keep rushing into me and stabbing after me with the knife. I keep on whopping to mek this man noh reach into me with the knife. I musi hit him standing up about three times. Then he fell backward. When he fell backward on the ground, he still have the knife in his hand. So when he was on the ground he was still yet attacking into me with the knife. So when this man was on the ground, the man still yet firing juck after me on the ground trying to get up from off the ground. So at the time I keep on whopping. I whop him three times more on his hands fu mek the knife fly outa his hands. When the knife fly outa ih hand, he was still yet trying to get up, so I whopped him and same time the police was coming up the street. …"

10. The appellant also said that he later told the police and a JP that he was defending himself in a life and death situation. In short, the appellant admitted 'whopping' the deceased with the board but said that he only did so because he had been threatened with a knife. Moreover, even after the deceased had fallen or been knocked to the ground, he still had the knife in his hand and was still trying to attack the appellant with it and trying to get off the ground; so he kept on whopping him. Even after the knife flew out of his hand he was still trying to get up; so he whopped him again.

Legal defences

11. Sections 117, 119, 120 and 121 of the Criminal Code of Belize provide, so far as relevant, as follows:

"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.

119. A person who intentionally causes the death of another person by unlawful harm shall be deemed to be guilty only of manslaughter and not of murder, if there is such evidence as raises a reasonable doubt as to whether -

(a) he was deprived of the power of self-control by such extreme provocation given by the other person as is mentioned in section 120; or

(b) he was justified in causing some harm to the other person, and that in causing harm in excess of the harm which he was justified in causing he acted from such terror of immediate death or grievous harm as in fact deprived him, for the time being, of the power of self-control; or ….

120. The following matters may amount to extreme provocation to one person to cause the death of another person, namely -

(a) an unlawful assault or battery committed upon the accused person by the other person, either in an unlawful fight or otherwise, which is of such a kind either in respect of its violence or by reason of words, gestures or other circumstances of insult or aggravation, as to be likely to deprive a person, being of ordinary character, and being in the circumstances in which the accused person was, of the power of self-control; ….

121(1) Notwithstanding the existence of such evidence as is referred to in section 119(a), the crime of the accused shall not be deemed to be thereby reduced to manslaughter if it appears, either from the evidence given on his behalf, or from 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;…

12. By section 30, Title VI of the Criminal Code sets out the limits in which force or harm is justifiable and constitutes a defence to a criminal charge. Section 31(f) provides that one such circumstance is "the necessity for prevention of or defence against crime". That expression is amplified *inter alia* by section 36(4) and (6), which provide, so far as relevant:

"(4) For the prevention of or for the defence of himself … against any of the following crimes, a person may justify the use of necessary force or harm, extending in case of extreme necessity even to killing, namely

(c) Murder

(k) Dangerous or grievous harm.

(6) No force used in an unlawful fight can be justified under any provision of this Code, and every fight is an unlawful fight in which a person engages, or which he maintains, otherwise than solely in pursuance of some of the matters of justification specified in this Title."

Ground 1. The judge effectively withdrew the issue of intention to kill from the jury.

13. As appears above, in Belize the offence of murder requires proof of an intention to kill. An intention to cause really serious harm is not enough. There is nothing in the unsworn statement (or elsewhere) which amounts to an admission that the appellant intended to kill the deceased. It was therefore for the prosecution to prove it. Counsel for the prosecution recognised that that was the position and in the course of her final speech, from pages 209 to 215 of the Record, addressed the jury at some length on the relevant facts. She naturally stressed the size of the board, the fact that the board had two nails in it, the considerable force which must have been used and the persistent way in which the appellant continued whopping the deceased after the deceased was on the ground and, on his own case, even after the knife had flown out of his hands.

14. Counsel for the defence did not refer to intention to kill in the course of his final speech. However, no admission of intention to kill was made, so that the jury had to be sure that the appellant intended to kill the deceased before they could return a verdict of murder. Mr Bogan, who (like Ms Corrin) did not appear for the appellant in the courts below, submitted that the judge wrongly withdrew the issue of intention from the jury by telling them that the appellant accepted that he had an intention to kill.

15. Mr Bogan relied upon a number of specific passages in the summing up, while at the same time correctly accepting, both that the summing up must be considered as a whole, and that the judge also summed up the issue of intention to kill at some length. The summing up spans 59 pages of the transcript from pages 186 to 243 of the Record. It is true that there are some passages which are not entirely clear.

16. At page 195 the judge quoted section 117 of the Criminal Code and then said this in a passage relied upon by Mr Bogan:

> "Operative in this definition of murder, is the words 'intentionally' and 'unlawfully'. The word that is most important in this particular case is going to be the word 'unlawful'. Whether the harm caused to the deceased was unlawful, because as crown counsel has told you, the defence is not saying the accused did not kill Arthur Ellis. So they couldn't care less about anything else. They are saying he killed Arthur Ellis but he did so by reason of self defence and therefore his act was a lawful act. The law gives him that right to defend himself. So the crucial element in this case of murder now, is the unlawfulness of the harm which led to the murder."

17. Mr Bogan stressed the fact that the judge said that 'they (ie the defence) could not care less about anything else', by which he meant that the defence did not care about anything other than whether the killing was unlawful. The judge then referred at page 196 to the partial defences in section 119 of the Criminal Code which would reduce murder to manslaughter. He returned at page 197 to section 117 and made it clear that the prosecution must prove that Mr Ellis was dead, that he died as a result of harm inflicted on him and that the appellant killed him. Those were the first three of the five elements or ingredients of the case against the appellant. The judge then turned to the other two at pages 197 to 199:

> "The prosecution must prove that at the time when the accused is said to have inflicted the harm which caused the death of the deceased, he had the specific intention to kill. Because if you were to find that the accused did not have the specific intention to kill Arthur Ellis at the time, then, Members of the jury, there cannot be a murder. Without an intention to kill, the crime would only be manslaughter. Nothing else. Finally, Members of the Jury, the prosecution must prove that at the time when the accused, Kirk Gordon, inflicted the harm to the person of Arthur Ellis, he did so lawfully. And this is the crux of this trial. Unlawful in the sense that he had no legal justification to inflict the harm. These are the five elements or ingredients of this charge of murder which the prosecution must prove. The prosecution cannot prove one or some and not others. The prosecution must prove each and every one of these elements to a degree that makes you sure of the guilt of the accused person, or they must do so beyond a reasonable doubt. And both expressions, Members of the Jury, "beyond a reasonable doubt", and "proving the case to make you sure of his guilt", means one and the same thing. And this burden, Members of the Jury, which the prosecution bears, as I have told you, they bear this burden throughout the trial. They must prove this throughout the trial.
>
> Members of the Jury, in this trial relative to the five elements which the prosecution must prove, only one is in dispute, and that is the element as

> to whether or not the act of the accused at the time of the alleged incident was unlawful. In other words, the issue here: Was he or was he not justified in killing Arthur Ellis, if you find that he killed Arthur Ellis? Was he justified? But though, Members of the Jury, that is the only contested element in this charge of murder, as judges of the facts, it is still a matter for you to determine whether or not the prosecution has proven even the undisputed elements. So even if the defence is saying, yes, he killed Arthur Ellis; yes he has had the intention to kill him. You understand me? He died by harm. We have no problem with that. It is not for them to say whether those elements have been proven. It is for you to say whether or not those elements have been proven. So I will, Members of the Jury, as a matter of law, summarise the evidence relative to all the elements, even the unchallenged elements."

It is true that in that passage the judge said that only one issue was in dispute, namely whether the appellant acted unlawfully. However, he also made it crystal clear to the jury that, whatever the appellant admitted, the jury must be sure that each of the five elements was proved. In the opinion of the Board the jury could not have been in any doubt about that.

18. Immediately after the passage just quoted, the judge directed the jury on each of the five elements he had identified, including intention to kill. He addressed that question in detail between pages 209 and 215. He first reminded them that, if they accepted that the deceased was killed by the appellant, before they could find him guilty of murder they must find and be sure that at the time of the killing he had the specific intention to kill the deceased. The judge then reviewed the evidence relevant to that issue at some length. He concluded at pages 214-5 by saying that it was for them 'to determine and conclude whether on the evidence' they could draw the inference that the appellant had the specific intention to kill the deceased when he was inflicting the blows on the body and face. Pausing there, the Board is in no doubt that the jury must have been aware that they must consider and be sure of that fact. Moreover, that is so, even though, when turning to the question whether the appellant acted unlawfully, he said that was the final element in the case 'and the controversial one'. The judge then summed up the issue of self-defence in considerable detail. Moreover, he introduced his analysis of the evidence by asking

> "what evidence, if any, has the prosecution adduced from which you can draw the inference that at the time when the accused was inflicting blows to the body of Arthur Ellis, he had the specific intention to kill?"

19. The Board is unable to accept the submission that the judge in effect withdrew the issue of intention to kill from the jury. It is true that he emphasised the fact that the defence focused on the issue of self -defence. That is perhaps understandable

given the way the trial had been conducted, although the Board is of the opinion that the judge went too far when he said that self-defence was the only issue the defence cared about. However, he at no time withdrew the issue of intention from the jury. On the contrary he told the jury that it was one of the five elements about which they must be sure before they could convict the appellant of murder and he summed up the facts with regard to it in detail. In these circumstances the first ground of appeal fails.

Ground 2. The judge misdirected the jury as to the partial defence of loss of self-control.

20. At the trial the defence relied upon the partial defence contained in section 119(b) of the Criminal Code quoted above. Mr Bogan submitted on behalf of the appellant that the judge misdirected the jury in this connection by directing the jury that the question was whether a reasonable person would have lost his self control, whereas he should have directed them that the question was whether the appellant in fact lost his self control. These submissions raise two questions: first, whether the test is an objective or subjective one and, secondly, whether the judge misdirected the jury.

The test

21. Section 119(b) is quoted above. It provides that an accused is guilty of manslaughter and not murder where he intentionally causes death by unlawful harm and there is such evidence as raises a reasonable doubt as to whether he was justified in causing some harm to the other person, and that in causing harm in excess of the harm which he was justified in causing he acted from such terror of immediate death or grievous harm as in fact deprived him, for the time being, of the power of self-control. Section 119(b) is to be contrasted with section 119(a), which also reduces murder to manslaughter but does so where there is such evidence as to raise a reasonable doubt as to whether the accused was deprived of the power of self-control by such extreme provocation given by the other person as is mentioned in section 120. Section 120 provides a list of matters which may amount to extreme provocation for the purposes of section 119(a). They include, in section 120(a), an unlawful assault or battery committed upon the accused by another person, either in an unlawful fight or otherwise, which is of such a kind either in respect of its violence or by reason of words, gestures or other circumstances of insult or aggravation, as to be likely to deprive a person, being of ordinary character, and being in the circumstances in which the accused person was, of the power of self-control. Section 121(1)(a) makes it clear that the accused must in fact be deprived of the power of self-control by the provocation.

22. It can immediately be seen that there is a distinction between section 119(a) and section 119(b). By reason of section 120(a), the unlawful assault or battery must be of such a kind as to be 'likely to deprive a person, being of ordinary character, and being in the circumstances in which the accused person was, of the power of self-control'. The test is thus to that extent objective. There is no similar provision in section 119(b), where it is sufficient for there to be a reasonable doubt as to whether the accused 'acted from such terror of immediate death or harm as *in fact* deprived him, for the time being, of the power of self control'. The Board emphasises the words 'in fact' because they demonstrate that, for the purposes of this part of section 119(b) the test is entirely subjective and has no objective element.

23. The Board accordingly accepts Mr Bogan's submission in this regard. It does so on the basis of the express language of section 119(b). It finds support for its conclusion from two decisions of the Judicial Committee on appeal from Belize delivered on the same day, namely 24 May 2001. They were *Norman Shaw v The Queen* (No 58 of 2000) and *Cleon Smith v The Queen* (No 59 of 2000), in each of which the judgment of the Board was delivered by Lord Bingham of Cornhill. He identified four questions which should be asked under a provision of the Criminal Code then in force, which was in very similar terms to section 119(b) quoted above. As set out in para 17 of *Cleon Smith*, they were:

> "(1) Was there evidence of a situation in which the appellant was justified in causing some harm to the deceased?
>
> (2) Was there evidence that the appellant had caused harm in excess of the harm he was justified in causing?
>
> (3) Was there evidence that the appellant was acting from terror of immediate death or grievous harm?
>
> (4) Was there evidence that such terror deprived the appellant for the time being of the power of self-control?"

It is to be noted that none of the questions asked whether a reasonable person would or might have acted in the same way.

The summing up

24. Mr Bogan submitted that the following part of the summing up (at pages 240-1) wrongly introduced an objective element not justified by section 119(b) of the Code:

> "Again Members of the Jury, here you have to ask two questions. May the deceased conduct, that is the things he did and the words he used to the accused at the alleged scene of the crime cause the accused to experience terror of immediate death or grievous harm to himself to a point where he lost his power of self control for the time being and behaved as he did excessively, by whopping multiple times to the person of the deceased? If you are sure that the answer to this question is no, then the prosecution would have disapproved the loss of self control by reason of terror of immediate death or grievous harm to himself and provided the prosecution has made you sure of the elements of this offence of murder, to which I have been referring, your verdict will be guilty of murder. If, however, the answer to that question is yes, then you must go on to consider the second question.
>
> *Did the conduct of the deceased have been such as to cause an ordinary or reasonable and sober person of the accused's age and gender to experience terror or immediate death of grievous harm as a result of the acts of the deceased with the result that her loss his power of self control and behaved as he did. As to that second question, Members of the Jury, take into account everything said and done according to the effect, which in your opinion, it would have on an ordinary and reasonable person.*
>
> And again because the prosecution must prove the guilt of the accused person, it is not for the accused to prove that he did not lose his power of self control by reason of terror of immediate death of grievous harm when he inflicted the blows to the deceased."

25. The Board has put the passage complained of in italics. The Board accepts Mr Bogan's submission that the italicised passage is a misdirection. It wrongly introduces the ordinary and reasonable man, whereas, for the reasons given above, such a person has no role to play in the partial defence introduced by section 119(b). The question is not whether an ordinary and reasonable man would have been caused to experience terror of immediate death but whether there was evidence that that the appellant was acting from terror of immediate death or grievous harm and whether there was evidence that such terror deprived the appellant for the time being of the power of

self-control? See questions (3) and (4) in *Cleon Smith*. If there was such evidence, the burden of disproving the defence was on the prosecution.

26. The Court of Appeal said that it was not submitted on behalf of the appellant that there was a misdirection in this respect. That is odd because the submissions and the skeleton argument (but not the grounds of appeal) had raised the issue. In any event, the point was fully argued before the Board. For the reasons given ground 2 succeeds. The Board has concluded that for this reason the conviction for murder must be quashed and a verdict of manslaughter substituted. There was evidence both that the appellant was acting from terror of grievous harm and that such terror deprived the appellant for the time being of the power of self-control.

Ground 3. The judge misdirected the jury by stating that a verdict of manslaughter was not available on a finding of intention to kill.

27. In the course of his summing up the judge said at page 242:

> "But if you are not satisfied that he is guilty of murder by reason of intention to kill, it is then, as I told you before, that you will go on to consider the alternative verdict of manslaughter.
>
> And then, Members of the Jury, you will go through the same exercise. Look to the Prosecution's evidence at all times, and if on their evidence you are sure that the accused is guilty of manslaughter by reason of lack of intention to kill but that his intention was only to cause harm but the deceased Arthur Ellis nevertheless died, you will return a verdict of manslaughter. But if you are not sure of his guilt or if you have any reasonable doubt about his guilt, Members of the Jury, it is your duty to return a verdict of not guilty. Okay?
>
> In considering, Members of the Jury, whether the accused is guilty of murder, you will also have to take into consideration the two defences of provocation or loss of self-control by reason of provocation and loss of self-control by reason of terror of immediate death or grievous harm. And, Members of the Jury, if you accept the defence's position that the accused was provoked or may have been provoked or if you find that he lost his power of self-control by reason of immediate terror of death or he may have lost it, Members of the Jury, then you will return a verdict of manslaughter only by reason of provocation or by reason of terror of immediate death or grievous harm. So, you will have to consider those two defences when you are considering whether the accused is guilty of

murder. You see, Members of the Jury? You will consider those at one and the same time.

With respect to the verdict of manslaughter, it is only after you rejected murder, but you think that there might be something there with respect to the intention, the intention was not to kill but only to harm, that you will then consider the alternative verdict of manslaughter."

28. Mr Bogan submitted that the part of the passage just quoted, which the Board has put in italics, was a misdirection. He submitted that, following immediately after a direction on the partial defences, its effect was wrongly to instruct or suggest to the jury that the partial defences were not available if the jury found an intention to kill. He also noted that, when earlier giving directions on the partial defences, he had not directed them that the partial defences were only available if, and only if, they found an intention to kill. He submitted that the italicised direction, which was given immediately before they retired, effectively deprived the appellant of a proper consideration of the partial defences, especially that under section 119(b), and consequently deprived him of the possibility of a verdict of manslaughter on that basis.

29. The Court of Appeal rejected this ground. The Board too rejects this ground. In the passages quoted above, the judge was drawing a distinction between two kinds of manslaughter. The first was the traditional type of manslaughter, where the jury acquit of murder on the basis that there was no intention to kill, but convict the accused of manslaughter on the basis that he was acting unlawfully and his intention was to cause harm. At the start of the passage quoted above, the judge said:

"But if you are not satisfied that he is guilty of murder by reason of intention to kill, it is then, as I told you before, that you will go on to consider the alternative verdict of manslaughter."

The reference to 'as I told you before' was a reference back to an earlier part of the summing up, where he explained the position by reference to section 116(1) of the Criminal Code, which provides that every person who causes the death of another person by any unlawful harm is guilty of manslaughter.

30. By contrast, the second type of manslaughter is that provided for in section 119 of the Criminal Code quoted (and discussed in some detail) above. The judge had previously twice referred to the two defences to murder set out in section 119(a) and (b) as partial defences in the sense that they would not result in acquittal but only in a verdict of manslaughter. The judge told the jury that they should consider these partial defences when they were considering the offence of murder. It is implicit in his

direction that they should convict of manslaughter if they decided that the appellant had the intention to kill but that either section 119(a) or section 119(b) applied. This is clear from the contrast with the first type of manslaughter, to which the judge returned in the italicised passage and only applied where the jury rejected murder on the ground that there was no intention to kill but only an intention to harm. While it would have been better if the judge had expressly stated that he was referring to the traditional type of manslaughter, the Board does not think that the jury can have been in any doubt that he was doing so. In all the circumstances the Board has concluded that, when the summing up is read as a whole, there was no misdirection in this regard and that ground 3 fails.

Ground 4: The jury were wrongly denied the opportunity to consider the appellant's statement under caution and his police interview.

31. The day after the appellant's arrest he made a statement to the police which included the following:

> "Last night I went home and I saw a guy in front of my house. Me and he went through a little argument and he got into his van and drove away and came back to the house. He came out of his vehicle and approached me by the gate. Then he fake like he had a gun and he took out a knife and put it at my neck and punch me in the face. Me and him got into a struggle and I escape. He was still approaching me and I pick up a piece of board and I hit him. The police then came and arrested me. …"

32. The appellant also gave a police interview which included the following:

> "Q. What do you mean when you say you got into a struggle?
>
> A. After the guy punched me on the mouth, I pushed him away, but he came back.
>
> Q. How far away was the guy when he approached you the second time and you pick up the board?
>
> A. He was about 4 feet away.
>
> Q. When he approached you the second time did he have the knife?

A. Yes.

Q. You said that you hit him, where did you hit him?

A. I hit him on the left side of his head.

…

Q. You said you hit him, how many times did you hit him?

A. Two times, once when he was standing and once when he was on then ground because he still had the knife."

33. Neither the statement nor the interview was put before the jury, although a passing reference was made to it during defence counsel's final speech, when he said to the jury that the appellant had told the police in the presence of a JP what had happened and that the statement he made was in the possession of the prosecution, who for some reason did not tender it in evidence. He said that the reason he was referring to it was so that the jury should not think that the appellant had made his evidence up when he made the statement from the dock the day before.

34. In a letter dated 8 July 2009 the acting DPP explained that the statement and interview had been made available to the defence. She added that she could not say why counsel for the prosecution decided not to adduce the statement as part of the prosecution case. Both counsel and the DPP at the time were no longer in Belize. However, she added that counsel may have been guided by the position of the then Director, which, according to a note on the file, was that the statement was 'primarily exculpatory' and could not 'possibly advance the prosecution's case' and so should not be tendered.

35. Mr Bogan submitted that the prosecution should have put the statement before the jury. It was a 'mixed statement' in that the appellant admitted violence with a weapon but gave an explanation for his behaviour. He submitted that the statement was admissible in accordance with *R v Sharp* [1988] 1 WLR 7 and *R v Aziz* [1996] 1 AC 41 and should have been adduced. This was on the basis that the rationale for its admission was that, in fairness to the accused, the jury was entitled to know the explanation given by him shortly after his arrest because the alternative is for the jury (as here) to hear an account apparently given for the first time years later, by which time he will have had time to fabricate one.

36. It was further submitted on the facts here that the appellant's account was not so inconsistent with the prosecution case as to render it wholly unreliable or obviously fabricated. On the contrary, it was consistent with the prosecution case in that it could not be gainsaid that the incident began when the appellant was subjected to attack, that the appellant admitted his assault with the piece of wood, both when the deceased was standing and when he was on the ground, and that a knife was found lying on the road within a few feet of the deceased. It was submitted that the jury would be likely to have had far greater confidence in the appellant's explanation if they had been aware of the contents of the statement and interview shortly after the incident.

37. This point was not taken in the Court of Appeal or in the petition for leave to appeal. However, the Board accepts that neither counsel nor their instructing solicitors now instructed on behalf of the appellant was aware of the letter from the acting DPP until after the petition hade been submitted. In these circumstances the Board decided that the appellant should be permitted to take the point.

38. The Board accepts the submissions made on behalf of the appellant. Both the statement and the contents of the interview were mixed statements and were thus admissible in evidence in accordance with the principles in *Sharp* and *Aziz*. In the opinion of the Board, as a matter of fairness, the prosecution should have adduced them in evidence. Accordingly ground 4 succeeds.

CONCLUSION

39. It follows from the above conclusions that the appeal must be allowed and the verdict of murder quashed. The question is whether the Board should conclude that a verdict of manslaughter should be substituted. The effect of allowing ground 2 is that such a verdict should be substituted. As to ground 4, it was not suggested by Mr Bogan on behalf of the appellant that the Board should not substitute a verdict of manslaughter. He no doubt recognised, in the opinion of the Board entirely correctly, that there was no realistic possibility that, had the jury seen the statement and interview, the appellant would have been acquitted of both murder and manslaughter. In these circumstances the just course is to substitute a conviction for manslaughter. The Board will accordingly humbly advise Her Majesty that the appeal be allowed, that a verdict of manslaughter be substituted and that the issue of sentence be remitted to the Court of Appeal. Subject to written submissions to the contrary being made within 28 days, the Board will humbly advise Her Majesty that the respondent should pay the appellant's costs of the appeal.