JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 154/77

BEFORE: THE HON. MR. JUSTICE ZACCA, J.A. - PRESIDING
THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CARBERRY, J.A.

R. v. ALFRED HART

Mr. Noel Edwards, Q.C., and
Dr. Adolph Edwards for the Appellant.

Mr. N. Sang for the Crown.

June 7 & 8 and July 12, 1978.

KERR, J.A.

This is an appeal from a conviction for the murder of Lloyd Henry in the Home Circuit Court, Kingston, on June 15, 1977, before Carey, J., and a jury.

The deceased with his friend and neighbour, Ralston Dickson on the night of January 16. 1976 were promenading in Cross Roads, St. Andrew. They visited but did not attend the Regal Theatre and at about 11 p.m. were returning to central Cross Roads by way of Half-Way-Tree Road when they met Pamela Murray and Patricia Buchanan on the sidewalk by or near the Caymanas Park Betting Shop. According to Dickson while the deceased, himself and the girls were in conversation, the appellant, a District Constable, came up. There was an exchange of words in which the appellant and the deceased in turn declared they did not love each other. After this exchange the appellant left and returned shortly after with Magnus Anderson, then Inspector of Special Constabulary. According to Dickson, Buchanan and Murray, the appellant went up to the deceased and told him he was going to carry him to the Cross Roads Police Station. The deceased enquired the reason for this and indicated he was unwilling to go with the appellant. Whereupon the appellant held the deceased in his chest, pulled a revolver from his waist and shot the deceased. The deceased held his chest with both hands and shortly after fell to the ground. According to Dickson the appellant then held him and asked where he would like his shot. Anderson called to the appellant who then released Dickson. The accused then went to the deceased's body and took from his back trousers

pocket a closed knife which he then opened. To Dickson the deceased appeared dead. The body was later removed by the Cross Roads Police. Pamela Murray and Patricia Buchanan corroborated Dickson as to the manner in which the deceased was shot. All three witnesses firmly refuted the suggestion that at the time he was shot the deceased had had a knife in his hand. Dickson who knew the appellant about three years before admitted that the appellant had once taken him to the Cross Roads Police Station but said he bore him no ill will. Buchanan said she knew him before but he had never earlier told her to "move on and keep moving". Arthur Fraser, Sergeant of Police in evidence said he received a report from Magnus Anderson and soon after he also received one from the appellant who handed over his Service Revolver and a ratchet knife. Doctor Percival Henry who performed the post-mortem on the body of the deceased said he found a bullet entry wound with burnt edges on the left chest at the junction of the left clavicle and first rib and an exit wound on the right back two inches from the midline of the spine approximately in the medial border of the right scapula. The bullet in its passage had damaged the upper lobe of the left lung penetrating it and the aorta. Death was due to haemorrhage and shock secondary to the damage to the aorta and left lung. While admitting he was no expert in ballistics he gave as his opinion that the muzzle of the firearm would be from 12 - 36 inches from the body of the deceased while Deputy Superintendent of Police Daniel Wray, the Ballastic Expert, to whom was put certain of the Doctor's findings, gave as his opinion that the muzzle would have been within nine inches of the body.

The appellant did not go into the witness box. In his unsworn statement he said that while walking along Half-Way-Tree Road, he heard two women complaining about the deceased and company impeding passage on the side-walk and from one of them indecent language in reply. He spoke to the group and the deceased said, "Go whey D.C. boy, yu can't carry nobody a jail", and after advising that he was merely pointing out the offence that had been committed, the deceased then said, "Yu see you, yu waun dead, an' mi wi kill you". He left and made a report to Inspector Magnus Anderson in premises nearby. Anderson returned with him to the scene. In the course of making a reply to the accused's complaint to Anderson about the deceased's threats, the deceased started to speak so loudly that there was a gathering crowd to whom

Anderson gave the usual "move on" order. According to the appellant's unsworn statement while Anderson was so engaged, the deceased pulled a knife at him, he stepped back and said, "Don't approach, don't approach". As the deceased was still coming towards him he drew his revolver and fired because he was in fear for his life. The deceased held his chest and the knife fell from his hand. He took it up and showed it to Anderson. As to the witnesses, the appellant said in his unsworn statement, that he had previously arrested the crown witness Dickson on a warrant and that as to Murray and Buchanan, they were "frequenters" in Cross Roads who had on previous occasions been chased by him from the streets. Inspector Magnus Anderson (now promoted to Assistant Commissioner) was called and gave evidence for the defence to the effect that the appellant had made a report to him and he had gone with him to the Half-Way-Tree Road where the appellant pointed to the deceased saying, "Here is the man who threatened me", whereupon the deceased said, "No D.C. can't arrest me". Some 7 - 8 persons gathered and while giving the usual order to disperse and having his back to the appellant and the deceased he heard the appellant shout, "Do not approach me - do not approach me", and then he heard a shot - he spun around and saw the deceased holding his breast with both hands. The deceased fell in the road. As he moved off to go to the Police Station, the appellant rushed up behind him and handed him a ratchet knife which he said he took from the hand of the deceased. In cross-examination he said he did not see the knife in the hand of the deceased - he first saw it when the appellant showed him and he was then in the middle of the street on his way to the Police Station.

Leave was sought and granted to argue two Supplementary Grounds of Appeal. Ground 2 which is concerned with the presentation of the defence to the jury by the learned trial judge will first be considered:-

Ground 2:-

> "That the learned trial judge misdirected the jury as to the legal effect of an unsworn statement and the way in which it should be treated in law".

Counsel submitted that in a summing-up that was otherwise lucid and elegant the learned trial judge in his directions to the jury as to their approach to the appellant's unsworn statement from the dock directed them in such terms and in a manner which had a "debilitating effect on the defence" and the issue of self-defence which depended to a great extent on the statement of

he was considering the effect of an unsworn statement by one accused with relation to the position of a co-accused. To persons learned in the law his earnest efforts may seem commendable; to those desirous of learning the law, helpful, but it seems to be asking too much of a jury of laymen to appreciate the nice distinction of a statement being of some weight but yet of no evidential value. It is confusing to tell the jury in one breath that they should give the unsworn statement such weight as they think it deserves and in the next that it has "no evidential value whatsoever" - and all this after telling them at the outset that their verdict must be according to the evidence. Indeed, the judge in Coughlan's case was not unaware of this difficulty; thus at page 18 he said:-

> "It is perhaps unnecessary to tell the jury whether or not it is evidence in the strict sense. It is material in the case. It is right, however, that the jury should be told that a statement not sworn to and not tested by cross-examination has less cogency and weight than sworn evidence".

and later after referring to certain cases in point:-

> "The controversial question is in the end reduced to a mere logomachy. Whatever status may be assigned to an unsworn statement, it can hardly vie with sworn evidence in cogency and weight".

The appellant's attorney further contended that even if as general directions the correctness of this passage was debatable, the detailed treatment of the statement from the dock against the background of those directions in effect withdrew from the jury's consideration those portions of the statement which were unsupported by independent evidence. Illustrative of this were the following directions:-

> "Now, let's look at the Defence. The accused man tells you on that day he was on duty. Well now, Assistant Commandant Magnus Anderson confirms that, so there is therefore evidence of that. He tells you that, there are four people out there on the road. Well, there is also evidence on that point, so again you can accept this, that there are four persons on the road. Now, he said that the deceased man said, "Go away D.C. boy, can't carry anybody go a jail". Well, so far as that is concerned, he is the only person who speaks about that. There is no evidence of it; it only forms part of the conversation that has any reference to jail, and you will recall that Mr. Dickson did mention about this fact about taking the man to jail. So again you must see what the accused is saying in the light of evidence that had been given. He says, "Yu si yu; yu wan' dead. Mi wi kill yu". That is his statement. There is no evidence anywhere else of this fact..... He says, at that point the deceased man went for his knife. He used certain words - "Whey yu call man for"? The witness who is called to support the accused man didn't hear that; or

> doesn't say anything about that. Again, that is the word of the accused man..... Now, the man continued to approach and the accused man said he pulled his revolver and fired it. Assistant Commandant Anderson did not see that. So that stands by itself and it is to be contrasted with the crown's version, to see if it throws any light on what the crown witnesses say on this matter. Indeed, so far as the knife is concerned, the accused man said when he fired he did so because he feared this knife. The deceased had held his chest and the knife fell out of his hand. The Inspector who was there said, after he heard the words and the shot, he turned around. He saw the man's hands to his chest; nothing in those hands, nor did he see anything on the ground. It was pointed out and he did afterwards say in re-examination that he took no notice of what was on the ground; but he did at one time say nothing was on the ground".

Counsel submitted that as the allegation of the drawing of the knife and the attack, actual or threatened, rested almost entirely on the words of the appellant, the effect of this treatment would cause the jury to reject out of hand this vital part of the defence and in the circumstances this would amount to a denial of a fair trial.

While we consider that it is often helpful to a jury for a judge in his summing-up to isolate and identify the important issues and to collate the evidence for the prosecution and defence relating to each issue, this apparently was not the purpose here. The trial judge indulged in dissecting the statement from the dock and to each dissection he applied the Coughlan prescription. Our anxious concern is whether in so doing he withdrew from the jury a full and fair consideration of the issues raised in defence. To determine this question, regard should be had to all the summing-up on this aspect of the matter because it is the total effect which matters.

Early in his directions when dealing with the nature and conduct of the defence the trial judge said:-

> "Now, although there is no duty on the accused to prove his innocence, common prudence would suggest that he will attempt to do so and this accused man did attempt to prove his innocence. He stood where he was in the dock and he made a statement. He also called a witness to support him. Now, if you consider that attempt has succeeded, then, of course, he is not guilty and you will be obliged to return a verdict of not guilty. If, however, he fails in that attempt, then you must consider all the evidence including what he has told you and what his witness testified from the witness box, and see whether you are satisfied to the extent that you feel sure that the Prosecution has proved its case. If, upon a review of all the evidence, including what he has told you and what his witness has also told you, you are left in a state of reasonable doubt, then in those circumstances you will be obliged to resolve that doubt in his favour and find him not guilty".

Immediately after his "treatment" of the unsworn statement he continued thus:-

> "Now, it is not being suggested that there is any burden upon the accused man to prove his innocence; but you have to look at his evidence and that of his witness reasonably and intelligently. Give to it what weight it deserves. You have to consider his evidence in the same way you consider the evidence for the prosecution and say to yourselves, "What effect what I am told have on my mind? Is it a remarkable story; could it go like that"?"

Here ignoring the question for the moment, the judge here treated the statement from the dock as part of the evidence for the defence. This shows that it is not only unnecessary but often undesirable to categorise the statement from the dock as "evidence" or "non-evidence". As in the Coughlan case (page 18), the trial judge here "reinstated the statement as having a possible evidential value". Finally, in the course of advising what verdicts were open to them he said:-

> "So then what are the verdicts open to you? If, having applied your minds to what the accused man has told you, giving it such weight as it deserves, and you come to the view that the knife was pulled, there was an attack and he was defending himself, then, of course, he would have succeeded in proving his innocence and you would be obliged to acquit him. If having considered what he has told you it leaves you in doubt whether self-defence could arise or couldn't arise, again it would mean that the Crown had not proven the case to the extent that you feel sure, in which case you are required also to acquit him. If having given what he has told you proper consideration and very best consideration and you reject what he tells you all together, then you have to consider the Crown's case and see whether you are satisfied to the extent that you feel sure that when he killed this man, as he indeed killed, he said so, he had the required intention when he pulled that trigger at that close proximity to the man, he intended to kill him or to cause him serious bodily injury, he wasn't defending himself against any attack, then in those circumstances you accept the evidence of Dickson and the two girls that he merely grabbed the man and shot him. If you accept that as being the truth, that is evidence on which you are entitled to come to the conclusion that he is guilty as charged".

In view of the fact that the case for the prosecution and that of the defence were so diametrically opposed on the issue of self-defence, and considering the summing-up as a whole, we are of the view that the jury could have had no doubt as to what were the important issues of fact, and that these issues, including what was alleged in the unsworn statement were before them for their consideration. We think in short that the later directions cured the earlier confusion involved in telling the jury that the unsworn statement was not evidence, seeing that on the issue of self-defence they were clearly

invited to consider it and to acquit if they accepted it, or if it raised a reasonable doubt.

In cases such as Coughlan's where there are two or more accused and it is necessary to make it clear to the jury what is the effect of the unsworn statement of one accused upon the position of the other, the directions there may be in order. But in the ordinary case a trial judge should avoid the Coughlan prescription, which, as worded seems to go too far and to go beyond the context of that case.

The judge in the ordinary case should follow the "guidance" on the "objective evidential value of an unsworn statement" as authoritatively advocated in D.P.P. v. Leary Walker at p. 1096:-

> "The Jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should give the accused's unsworn statement only such weight as they may think it deserves".

See also R. v. Frost & Hale (1964) 48 Criminal A.R. 284 to like effect, and we notice that this case does not appear to have been cited in Coughlan's case.

So far as self-defence is concerned, if this ground had stood alone we might not have interfered with the conviction in as much as the unsworn statement had been ultimately left to the jury, despite the misdirection that it was not evidence. However as regards provocation the position is quite different, this issue was completely withdrawn from the jury and the unsworn statement was not left to them on this issue. This therefore brings us to Ground 1:-

> "That the issue of provocation arose on the evidence but the learned trial judge withdrew the issue of provocation from the jury".

In support of this ground Counsel argued that from the evidence of the appellant i.e. his unsworn statement and the evidence of his witness the issue of provocation arose. He submitted:-

> (i) that the rejection of self-defence did not necessarily involve that there was no threatened attack but rather that the shooting of the deceased was not reasonably necessary in the circumstances; in that he could have avoided shooting the accused but he did so because he had lost his self-control;

(ii) that the evidence of Inspector Anderson the witness for the defence supported the appellant in showing:-

(a) that at the first encounter he was threatened (an inference from the answer given by the deceased when he was pointed out by the appellant as the man who threatened him);

(b) shortly before the shot was fired he heard the appellant shout, "Do not approach me";

(c) the appellant showed him the knife before he left for the Police Station alleging that it was drawn by the appellant.

(iii) the shooting was so sudden as to indicate a loss of self-control.

The learned trial judge withdrew the issue of provocation from the jury thus:-

> "Now, the Crown must also prove that the killing was unprovoked. Well there is no evidence in this case that provocation arose. The accused man has not sought to show that he was provoked, that there was any provocative acts, so I withdraw from your consideration any defence, any suggestion of provocation".

Despite the form in which it was done we interpret the withdrawal to be based on his opinion that the issue had not been raised by the evidence rather than on the more fact that the issue "had not been specifically pleaded". Indeed for a defence to do so as a secondary issue when self-defence is being urged would tend to create the impression that there was lack of faith in the cardinal issue. In this regard the authorities are clear.

On the trial of a person charged with murder it is the duty of the judge in his summing-up to deal adequately with any view of the evidence which might show that the crime committed was manslaughter and not murder. (R. v. Thompson (1960) 2 W.I.R. p. 265).

Nor is it necessary in the case of provocation that the issue should be specifically pleaded. In the Privy Council case of Bullard v. R. (1957) 42 C.A.R. p. 1 at p. 5 lord Tucker in delivering the judgment said:-

> "It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and, whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked".

D.P.2

and at page 7:-

> "In the present case the fact that the jury rejected the defence of self-defence does not necessarily mean that the evidence for the defence was not of such kind that, even if not accepted in its entirety, it might not have left them in reasonable doubt whether the prosecution had discharged the onus which lay on them of proving that the killing was unprovoked. Their lordships do not shrink from saying that such a result would have been improbable, but they cannot say it would have been impossible. As was said by Humphreys J. in Roberts (1942) 28 Cr. App. R. 102, at p. 110:
>
> > "As for the question whether it was open to them on the facts, counsel for the prosecution has argued with good reason that no reasonable jury could come to such a conclusion. The court may be disposed to take much the same view, but it cannot delve into the minds of the jury and say what they would have done if the issue had been left open to them".
>
> Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached".

Our concern here is with the existence of the issue and not with the probability of the jury finding provocation. Therefore the question is: "Was there evidence sufficient to raise the issue for the determination of the jury"?

In his endeavour to give a negative answer Counsel for the Crown contended that the evidence was insufficient and that here there was no more than a provocative incident. In support he referred to the following statement in Lee Chun-Chuen v. Regina (1963) 1 A.E.R. p. 73 at p. 79:-

> "Provocation in law consists mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other - particularly in point of time, whether there was time for passion to cool - is of the first importance. The point that their lordships wish to emphasize is that provocation in law means something more than a provocative incident. That is only one of the constituent elements. The appellant's submission that if there is evidence of an act of provocation, that of itself raises a jury question, is not correct. It cannot stand with the statement of the law which their lordships have quoted from Holmes v. Director of Public Prosecutions (11). In Mancini v. Director of Public Prosecutions (12) the House of lords proceeded on the basis that there was an act of provocation - the aiming of a blow with the fist - but held that it was right not to leave the issue to the jury because the use of a dagger in reply was disproportionate".

As illustrative of the applicant of this proposition he referred to Supreme Court Criminal Appeal No. 42/74 - R. v. Morris (unreported, delivered 21/5/75). In that case after reviewing the evidence for the Prosecution and defence, Edun, J.A., then dealt with the issue of provocation which had been withdrawn from the jury:-

> "Provocation
>
> We repeat what has so very often been cited as good authority on this subject, lord Devlin's dictum in the Privy Council in Lee Chun-Chuen v. R. (1963) 1 A.E.R. p. 73 at 79 - "Provocation..... disproportionate"."

Then continued:-

> "What are the elements of provocation in this case? In our view, there is no credible narrative of events suggesting the three elements of provocation. There is none arising in the case for the prosecution. In his defence the applicant claimed that the deceased demanded from him money which was not due, threatened to kill him if the money was not given to Steadman; rushed upon him with an open knife; and backed him up against the club door with repeated threats. The witness Coley, on behalf of the defence, said he saw when the deceased opened his knife, and that he heard him use threats, but that the deceased did not make any attempts to cut at the applicant. The wound was large and deep, and the moderate degree of force used to cause that wound establishes that if the weapon was a knife, it must have been as sharp and deadly as a razor. It is our view that the use of threats and advancing with an open knife (self-defence apart) amount to no more than a provocative incident and, in those circumstances, to slash the deceased's throat and make blood flow "like a burst water pipe" in reply was disproportionate. The learned trial judge in our view did not err in withdrawing the issue of provocation from the jury".

It is difficult to appreciate in the absence of written reasons the logical steps by which the learned judge of appeal concluded that there was no credible narrative of events in the face of the statement from the dock and the direct evidence from defence witness Coley as set out in the judgment. Be that as it may the decision seems to rest on an interpretation of that sentence in Lee Chun-Chuen's case (supra) approving of dicta in Mancini v. D.P.P. (1941) 3 A.E.R. p. 272 and as applied to the particular facts of the case. It is worthy of note that in Lee Chun Chuen's case, the modern law of provocation as set out in the statutory provisions of the Offences against the Person Act (Section 6) - was not discussed. It is clear that in the law relating to provocation "disproportionate force" cannot be interpreted on the reasonable

comparative basis as in self-defence, or else words alone which can cause no physical injury would never be sufficient provocation. But the legislature in its wisdom, recognizing that grossly insulting or degrading words may cause such mental anguish as to break the bonds of self-control has so provided. Accordingly, it is our view that the passages in the cases of Mancini and Lee Chun-Chuen dealing with this element in legal provocation should be interpreted in the light of the more recent case of Phillips v. The Queen (1969) 2 W.L.R. p. 581 - which case was neither cited nor apparently considered in Morris' (unreported - supra).

The facts in Phillips' case as summarised in the head-note are:-

> "On April 24, 1967, the appellant killed his mistress with a matchete. She had ended her liaison with him a week earlier and three days before the murder he and she had a dispute. On April 24, he was present at a quarrel between her and his mother during which each spat at the other, whereupon he seized a matchete from his mother's bag and rained six blows upon his mistress, as a result of which she died. He was charged with murder. The trial judge, taking the view that there was evidence on which the jury could find that the appellant was provoked to lose his self-control, directed the jury on provocation, following closely the words of section 3c of the Jamaica Offences against the Person (Amendment) Act, 1958. The trial judge make it clear to the jury that it was their responsibility to decide whether a reasonable man would have reacted to the provocation in the way that the appellant did. The appellant was convicted. On appeal, the Court of Appeal upheld the contention that the direction on provocation was wrong in law but dismissed the appeal under the proviso to section 16 (1) of the Judicature (Court of Appeal) Law as they considered that there had been no substantial miscarriage of justice".

In delivering the judgment lord Diplock said at p. 585:-

> "The test of provocation in the law of homicide is two-fold. The first, which has always been a question of fact for the jury assuming that there is any evidence upon which they can so find, is, "Was the defendant provoked into losing his self-control"? The second, which is one not of fact but of opinion, "Would a reasonable man have reacted to the same provocation in the same way as the defendant did"?

In comparing the summing-up of the learned trial judge Smith, J., (as he then was) with what he termed the Mancini formula he said at p. 586:-

> "In that part of his direction which the Court of Appeal held to be objectionable, the learned trial judge followed closely the actual words of the section and made it clear to the jury that it was their responsibility, not his, to decide whether a reasonable man would have reacted to the provocation in the way that the appellant did. In their lordships' view this was an impeccable direction. Since the passing of the legislation it may be prudent to avoid the use of the precise words of Viscount Simon's in Mancini v. Director of Public Prosecutions (1942) A.C. 1 "the mode

> of resentment must bear a reasonable relationship to the provocation" unless they are used in a context which makes it clear to the jury that this is not a rule of law which they are bound to follow, but merely a consideration which may or may not commend itself to them. But their lordships would repeat, it is the effect of the summing-up as a whole that matters and not any stated verbal formula used in the course of it. As already pointed out the learned judge in the instant case did not use the Mancini formula at all. He made it abundantly clear to the jury that it was their function and theirs alone to decide whether or not a reasonable man would have reacted to the provocation in the way the appellant did".

Accordingly, the third element as defined in Lee Chun-Chuen's case is essentially a matter for the jury. It is what lord Diplock in Phillips categorised as "one not of fact but opinion". It cannot therefore be used by the trial judge as a basis for deciding whether or not the issue of provocation has been raised. What is required is evidence of a provocative conduct on the part of the deceased and evidence from which it may be inferred that as a result the killing was due to "a sudden and temporary loss of self-control". If there is such evidence then it is the duty of the judge to leave the issue to the jury for them to determine with due regard to the two-fold test as laid down in Phillips v. The Queen.

In support of his contention that in the circumstances of the instant case a rejection of self-defence was not incompatible with provocation, the appellant's attorney adverted our attention to the following passage in the summing-up dealing with self-defence:-

> "Well, look at what the accused man has told you and you ask yourselves, "Could some simple avoiding action be taken by him"? If a man pulls a knife on you at that distance, is it possible to take a simple avoiding action? Can you step back? Can you go sideways, or something of that nature? That is the avoiding action; the evasive action".

By itself this passage could be taken as being no more than a prudent endeavour in the general directions to cover a remote possibility. However, having regard to the evidence for the defence and in particular the comment of the deceased - the threats, the insult to the District Constable's Office and the drawing of the knife as alleged by the appellant we are of the view that there was sufficient evidence to raise the issue of provocation for the

determination of the jury. It is not for us to pass judgment or speculate on the probabilities of such a finding were the issue left to them.

Accordingly, for the reasons contained herein, the appeal is allowed, the conviction for murder quashed and a verdict of manslaughter substituted

the appellant, was thereby denuded.

The learned trial judge in his directions on this aspect of matter said:-

> "Now in this case the accused man in his statement has sought to contradict or explain the evidence which has been given against him as to his intent or his state of mind in this case. Now, I must tell you that in those circumstances the accused must not and he is not obliged to go in the witness box. He has a completely free choice either to do so or to make an unsworn statement or to say nothing. This accused man elected to make an unsworn statement, but as intelligent persons you may probably be wondering why the accused man has elected to make an unsworn statement. It could not be because he has any conscientious objection to taking the oath, since if he has any he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination, if so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and and by the court. It is exclusively for you Mr. Foreman, members of the jury, to make up your minds whether this unsworn statement had any value and if so, what weight should be attached to it, and it is for you to decide whether the evidence for the Prosecution has satisfied you of the accused's guilt to the extent that you feel sure; and in considering your verdict, you should give the accused's unsworn statement only such weight as you think it deserves".

So far the directions were impeccable and followed the advice given in that regard by the Privy Council in D.P.P. v. Walker (1974) W.L.R. p. 1090 at p. 1096 and having regard to the nature and conduct of the defence were appropriate.

Then follows this passage which is the basis of the appellant's complaint:-

> "Now an unsworn statement from the dock has no evidential value and cannot prove facts not otherwise proven by evidence. Its potential effect is persuasive, in that it might make you Mr. Foreman and members of the jury see the proven facts and inferences to be drawn from them in a different light; so that when you come to consider the statement made by the accused man, he cannot prove anything in his statement. If there is evidence given on any particular point, then his statement may be used to explain it, to understand it, you see it in a particular light, but the statement is not evidence, it cannot prove any fact. So anything that is introduced in his statement that is not in evidence anywhere, has no evidential value whatsoever".

It is reasonable to deduce from the words and tenor of this passage that the learned trial judge was influenced by the judgment of Shaw, L.J., in R. v. Coughlan (1976) 64 Criminal Appeal Reports p. 11 at p. 17. In that case the learned trial judge was endeavouring to distinguish between evidence on oath by an accused and an unsworn statement from the dock but in a context in which