JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 46/86

BEFORE: The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Bingham, J.A. (Ag.)

Regina

vs.

Donovan Douglas

Mr. K. D. Knight and Mr. Robert Pickersgill for Applicant

Mr. Walter Scott for the Crown

September 25, 26 and December 19, 1986

Wright, J.A.:

On the 5th day of May, 1986 in the St. Catherine Circuit Court, before Orr J sitting with a jury, the applicant on an indictment charging him with the murder of Fitzroy Jackson was convicted of manslaughter and was subsequently sentenced to three years imprisonment at hard labour. From such conviction and sentence he now seeks leave to appeal. To set the grounds of appeal in proper perspective it will be necessary to detail the evidence as it was set out in the summing up of Orr J.

On the fateful night of August 5, 1985 the applicant was both a promoter of, and the gate-keeper at, a dance held at the Ewarton Community Centre in the parish of St. Catherine. The events which culminated in the charge preferred against the applicant began at about 1 a.m. on August 6 when, according to seventeen years old Owen Jackson,

a younger brother of the deceased, he went to the gate of the dance premises where he saw the applicant with a bottle of beer in his hand. The applicant announced "Every body leave yah" then shook up the beer and sprayed it on several persons including the witness who said it caught him in his face and on his shirt. The witness thereupon took out his handkerchief to wipe his face. Judging by the applicant's response as related by young Jackson it is possible that the applicant may have misinterpreted his move. The applicant said "Bwoy, whey you ah do, bwoy?" then he drew a dagger from his waist and stabbed at his head. The dagger missed but Owen received a blow in his face which was enough to make him run for his life. The applicant chased him but Owen escaped through the gate and for some unexplained reason the applicant ran into a wall. It is Owen's evidence that he had no weapon. All he had was the handkerchief to wipe his face.

Not far away Owen came upon the deceased standing beside his car on the road and after they had spoken to each other Fitzroy, the deceased, entered the car which was then reversed to the Community Centre while Owen followed on foot. According to Owen, by the time he reached the Centre he saw the applicant and the deceased under a light at the dance gate, some five yards away, with people gathered around. The next thing that Owen said he saw was the applicant grabbing the deceased, with his left hand, in his shirt collar from behind and "I see the dagger up in the air and the accused man just juck Wesley (the deceased) with the dagger in his head". The deceased went down on his knees and the applicant grabbed him back and juck him in his head again. The deceased fell and the applicant ran off.

From what Owen related the deceased had no weapon and the two stabs were inflicted from behind.

Consistent with his version of the events Owen denied the defence contention that he and his Brother Carlton Jackson and the deceased ganged up on the applicant who in the circumstances defended himself. Indeed, although Carlton maintained he was there and took action to ward off further assault on the deceased Owen said he did not see Carlton nor any of his seven brothers. He did not see Carlton fling a beer bottle at the applicant; which Carlton said he did after he had seen the stabbing. Also, he denied the accusation that he was trying to get into the dance without paying and that on being pushed away by the applicant he had responded "You ah bad man, bwoy, just wait till me come back, bwoy". Further, it was demonstrated - and this is not difficult to do in a case of this nature - that on certain matters he was at variance with his deposition. And in repulsing the thrust of the defence he denied seeing the deceased pulling the applicant towards him; the deceased reaching towards somebody's waist as well as hearing the applicant say "Onoo boy from up so gwan like onoo bad". In the said context he did not hear the deceased say "Yuh wait till when me come back bwoy; yuh know mi brother".

It was put to Owen, but denied as not happening, that the deceased chucked the applicant in his chest as well as that the applicant held the deceased in his shirt front. Also rejected by Owen was the suggestion that the applicant told a brother of the deceased to let him go. While this witness testified to seeing two stabs the medical evidence revealed one injury. But of course, if the applicant was holding the deceased, as Owen testified, at the time when both stabs were made it would be a question of fact for the jury to decide on the likelihood of both blows striking the same spot. And, be it noted, the defence did not contend

that Owen was absent.

Owen's brother, Carlton Jackson, testified that he was on his way home from a club where he had had fish soup only and had reached the centre gate of the dance premises when he saw the deceased's car reversing towards the gate. (It appears that he was approaching from the opposite direction to that from which both the car and Owen came). The car passed him, continued to the gate and stopped. He followed and went beside the car. According to Carlton the deceased emerged from the car went towards the applicant at the gate and said to him "What the matter with you and my smaller brother?" to which the applicant replied "A long time a wa'an stab up a boy from up so". Whereupon he, Carlton, touched the deceased on his left hand and said "Come, we a go home, for is leave wi leave to go home". The deceased turned around to face him and he stepped off followed by the deceased. Just then the applicant stretched over the crowd at the gate and grabbed the deceased at the back of his jacket or the top of his waistcoat, pulled him back, held on to his left hand reached to his waist then "I see him come up with a knife and stabbed Wesley (the deceased) in his head". The applicant had apparently let go of Wesley's hand because he said that the applicant was not then holding Wesley's hand and that Wesley's back was turned when he received the stab. It is his evidence that the deceased was stabbed twice. In somewhat graphic terms he described the stabbing. Having received the first stab "the deceased go down like he stooped; the accused rushed him again and "grabbed him up back and stabbed him again in his head same way". The brother dropped. "The accused man still held on to him and same time I looked for something to get Lincoln (the applicant) scared. I found a red stripe bottle and shied at him and he go down. It didn't catch him". At this point friends of the applicant

said "Run, Lincoln, run; yuh no si the man dead" and the applicant ran back into the dance premises while the deceased lay bleeding on the ground unable to get up.

During all this time, and indeed, for the whole night Carlton said he did not see his brother Owen. Indeed, it was not until the following morning that he saw him at the Linstead Police Station where he also saw the applicant in whose presence he identified a knife.

Cross-examined, he admitted that what he had said at the Preliminary Examination was that when the deceased approached the applicant the deceased had said to him "Why you have to wet up me little bredda with the drink". He was again shown to be at variance with his deposition which had him saying that he had held the deceased's left hand and dragged him saying, as he did so, "come". His evidence before the jury was that he held him but did not drag him but when he was shown the deposition he admitted the statement therein but explained the difference by saying that at that time (i.e. in the deposition) he had said that because the defence attorney was bawling at him.

The substance of the defence was put to him. First it was put to him that he Carlton had a knife. He denied this. Next it was put to him "that the three of them were attacking the applicant, one of them hit him in his chest and that the deceased grabbed at one of his brother's waist and took out a knife, and that the three of them were on the applicant. He denied all these suggestions which were obviously intended to cradle self-defence.

It was put to this witness that inasmuch as his deposition did not contain the words attributed to the applicant viz, "A long time me want stab up a bwoy from up so" this bit of evidence was something just made up by him but during

re-examination reference to his statement to the Police revealed he had originally told the Police this: "Lincoln said, Bwoy, you bwoy whey come from up Cassava Pond bad; you want me stab oonu up, nuh?". Although the words are not identical he was shown to be consistent on the question of the applicant having spoken of stabbing at the gate of the dance. Probing questions by the learned trial judge in an effort to ascertain the circumstances in which the alleged statement was made elicited, quite surprisingly, the information that Owen had complained to the deceased Fitzroy Jackson and himself that the applicant had thrown beer on him and in consequence he and the deceased had gone to ask the applicant about it but that neither of them had any weapon.

The other witness, Winston Brown, who was in the deceased's car testified that he did not leave the car until after the crowd had run from the gate and he heard a calling that "they stab John" (the deceased). He did not see the applicant. He put the deceased into the car and took him to the Linstead Hospital.

On the following morning Detective Gouldbourne received information on the matter and went to the district of Waterloo where he picked up the applicant and took him to the Ewarton Police Station and left him there. The officer then went to the Linstead Hospital where he saw the deceased. On returning to the police station he cautioned the applicant and asked him where was the knife with which he had stabbed Fitzroy Jackson to which the applicant replied "Officer, a whole heap a dem rush me and me a try fe back them off and the knife ketch him in a him head. The knife deh a me yard into my room under the mattress". The officer duly retrieved the knife and thereafter arrested and charged the applicant with murder. Cautioned, the applicant said nothing then.

Medical evidence was supplied by the reading of the deposition of Dr. Richards who was too ill to attend Court. The jury's attention was alerted to factors attendent upon the reading of the deposition in contrast to having the viva voce evidence of the witness. The deposition disclosed that the postmortem examination on the deceased Fitzroy Jackson was performed on August 7, 1985 and that -

> "On external examination I found a laceration on the left side of the scalp, two inches long, penetrating the bone and into the brain with haemorrhage ...
> Death was caused from a lacerated wound of the skull due to shock and haemorrhage.
> A moderate degree of force had been used to cause the injury".

In contrast to the two eye witnesses who had alleged that two stabs were made by the applicant, the medical evidence disclosed one injury.

After a submission of no-case to answer was overruled the defence version of the incident was supplied by an unsworn statement made by the applicant. He related that the dance was being kept by himself and Colin Bancroft and while he was standing at the gate three young men came and wanted to enter the dance but since upon enquiry he ascertained that they had no money he would not let them in. One of the three was Owen Jackson who two minutes later returned and tried to force his way in but was pushed out. He tried a second time to come in and was pushed out and beer from a bottle in the applicant's hand splashed on Owen who then remarked "You ah bad bwoy, wait till me come back" and then left. Some twelve minutes later while still standing at the gate he saw a car reverse up to the gate and then "I saw three of the car doors open and three of the Jackson brothers and two more of their friends come out." The Jackson brothers walked up to the gate where the applicant was standing. Fitzroy Jackson, the deceased, then said to him

"Bwoy, ah wha you a deal with, you know sey is mi small brother this?". To this the applicant responded "Your brother tried to force himself inside; he don't have any manners". Then, said he,

> "One of the brothers hit me in mi chest. One of them had a bottle in his hand and they began beating me. Fitzroy Jackson held on to the front of my shirt pulling me towards him. I was resisting. They were still beating me and I was still resisting. Fitzroy then pulled a knife from his brother. When he pulled the knife from his brother I then pulled my knife from the back of my pocket. I flash it to make my get-away. I felt when Fitzroy held me down on to the ground in a stooping position and his brother was beating me. Someone came and pulled his hand away from my shirt. Then I heard someone from the crowd say "Run Youth, you nuh see them ah go kill you".

Thereafter he walked home and on the following morning when he heard that Fitzroy Jackson was in hospital he decided to go to the Police Station but on the way he met the Police and Detective Gouldbourne took him into custody. Finally he said "Me and the Jackson brothers never had anything before".

The learned trial judge left for the jury's consideration the issues of murder and manslaughter. After deliberating for 43 minutes the jury returned a verdict of Guilty of Manslaughter. Against this conviction an application for leave to appeal is sought on the following grounds:

> "1. That the Learned Trial Judge erred in that:
>
> (a) He sought not to have put the defence of provocation as in doing so he eroded the issue of self-defence and denied the Applicant of a real chance of acquittal.
>
> (b) He wrongly directed the Jury to disregard the essence of the case for the Defence that the Applicant was ganged by men (page 2), (see also page 21, paragraph 2) and in so doing negatived the defence.
>
> 2a. The Verdict is unreasonable and cannot be supported by the evidence which contained numerous discrepancies and inconsistencies.

"2b. The Learned Trial Judge erred in that he ought to have upheld the No Case Submission based on the manifest unreliability of the witnesses for the Prosecution

PARTICULARS

a. Page 13 - Evidence as to number of stabs

b. Page 19 - Evidence as to number of persons in the vicinity of the Community Centre

c. Page 21 - Evidence as to concerted "gang" attack."

It may be convenient to deal with Ground 2b first which we have no hesitation in dismissing as unmeritorious. Undoubtedly there are discrepancies and inconsistencies in the case for the prosecution but these did not have the effect of destroying the fabric of the case presented by the prosecution. Such discrepancies and inconsistencies as there were fell eminently to be assessed by the jury in their pursuit of a true verdict and in the end they were left for their consideration. The contention on this ground was that the submission should have been upheld because the witnesses for the prosecution were discredited or shown to be manifestly unreliable. We do not agree. There can be no doubt that Fitzroy Jackson met his death at the hands of the applicant in circumstances where it would have been strange if some conflict did not arise on the evidence. The nature of these circumstances, we hold, were matters to be resolved by the jury, the tribunal of fact, where as we have said the fabric of the prosecution's case had not been destroyed but tested. This ground fails.

Ground 2a as framed is wanting in particulars and does not, for that reason, merit consideration. It is in a sense Ground 2b in a different guise. But in all fairness to Mr. Knight it must be stated that all he did was to state that the discrepancies relied on had been indicated in treating with

Ground 1. There is therefore no need to accord it any greater respect than counsel did.

The real burden of Mr. Knight's submissions was concerned with the complaints in Ground 1 viz, that the learned trial judge had wrongly left the issue of provocation to the jury, an issue, which he submitted arose neither on the case for the prosecution nor on the defence, and that in addition he had wrongly directed the jury on the essence of the case for the defence: self-defence against a gang attack. Consequently, the applicant had been denied a real chance of acquittal.

All too often submissions are made seemingly predicated on the promise that the principal pre-occupation of the criminal process is the acquittal or persons charged. Justice is no more served by the acquittal of the guilty than by the conviction of the innocent and a trial judge is charged with the responsibility of identifying for the benefit of the jury all the factors in the evidence which tend to acquittal as well as those which could found a conviction and to lay them all fairly before the jury to enable them to return the true verdict which they are sworn to return. In the discharge of this responsibility the trial judge is not limited to such issues as counsel may find it convenient to address. He has to deal with such issues as arise on the evidence before him, irrespective of the approach adopted by counsel for the defence.

With reference to the issue of manslaughter the parameters within which a trial judge is required to operate are set by statute and respected decisions of competent courts giving effect to the statutory provisions. The statutory provisions in Jamaica, which are in terms identical to the English provisions contained in section 3 of the Homicide Act, 1957, are to be found in Section 6 of the Offences Against The Person Act and were introduced by Section 3 of Law 43 of 1958 not long after

the English provisions were introduced. The section reads:-

> "6. Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man".

The learned authors of Archbold Criminal Pleading, Evidence and Practice are of the view that the English provisions (and the same would apply to the Jamaican provisions) have to some extent altered and clarified the common law on the subject and that accordingly it would not be helpful to refer at length to decisions prior to 1957 (Archbold Criminal Pleading, Evidence and Practice 40th ed. para. 20-28).

While it is true that the issue of provocation does not necessarily arise for consideration in every case of murder it is also true that where, as in this case, the defence of self-defence has been rejected by the jury such rejection does not ipso facto negative provocation because conduct which does not justify may excuse.

In dealing with this issue in Bullard vs. R [1957] A.C. 635 at 642; 42 C.A.R. 1 at p. 5 Lord Tucker delivered himself thus:

> "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".

Then at p. 643; and p. 7 he said:

> "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".

Authority of a more recent date is in similar vein. Lord Diplock in DPP v Camplin [1978] A.C. 705; [1978] 2 All E.R. 168; 67 C.A.R. 14 in outlining the two changes in the law relating to manslaughter which were introduced by section 3 of the Homicide Act, 1957 said this (at Cr.App.R. p. 19) (A.C. at p. 716):

> "Secondly it makes it clear that if there was any evidence that the accused himself at the time of the act which caused the death in fact lost his self-control in consequence of some provocation however slight it might appear to the judge, he was bound to leave to the jury the question which is one of opinion not of law: Whether a reasonable man might have reacted to that provocation as the accused did". (Emphasis supplied)

In the face of such authorities it must have taken more than a little courage for Mr. Knight to submit that had the applicant been convicted of murder, on a proper assessment of the evidence, it could not have been argued that a probable or possible verdict could have been manslaughter based on provocation.

and that manslaughter or provocation ought not to have been left to the jury. Agreeing that the course adopted by the learned trial judge in leaving manslaughter to the jury expanded the options in favour of the acquittal of murder Mr. Knight nonetheless maintained that this course ought not to have been adopted because it was done to the detriment of the applicant because he ought to have been acquitted. And indeed he is correct that where there is no evidence of provocation the issue ought not to be left to the jury nor should they be invited to speculate: R vs. Samuel Moxam [1973] 12 J.L.R. 1251; 21 W.I.R. 389. Further Mr. Knight submitted that since, in his assessment of the evidence, provocation did not arise on the case for the prosecution which, he contended, consists of two un-provoked incidents, namely, the first attack on Owen and the attack on the deceased, then it could only have arisen on the case for the defence but as that would indicate a rejection of the case for the prosecution the conviction would not stand. But isn't such an approach too simplistic?

Such a contention ignores the fact that a denial of a suggestion by a witness for the prosecution does not necessarily lay the matter to rest. The demeanour of the witness accompanying the denial may say more than the witness intended to say thus giving rise to a matter for the determination of the jury. Furthermore, in the applicant's unsworn statement the case for the defence was expanded beyond what was projected in the cross-examination of the witnesses for the prosecution. It then became the duty of the jury from the totality of the material laid before it to ascertain the truth. We do not agree that the issue is as cut-and-dried as Mr. Knight's submission would make it.

Mr. Scott on the other hand approached the issue from two angles:

1. Assuming that provocation was not properly left to the jury did this result in the applicant being denied a real chance of acquittal with a resultant miscarriage of justice?

2. Was the issue properly left to the jury?

With reference to 1 (supra) he submitted that it is not every case where a trial judge leaves for the consideration of the jury a defence which does not properly arise in law that an accused will be denied a real chance of acquittal and there will be a miscarriage of justice. R v Norman Johnson [1978] 15 J.L.R. 277 is cited in support. At p. 280I Kerr J.A. said:

> "It is not every time that a judge is unduly generous to an accused by leaving to the jury an issue not arising that there is a miscarriage of justice".

Further Mr. Scott submitted that the test is whether the summing-up leads to a confusion of the jury. R v Thomas and others [1978] 15 J.L.R. 266. See also R v Moxam (supra). In the end, he submitted that the summing up was very clear and free from any possibility of confusion. So that even if provocation ought not to have been left there was no miscarriage of justice. In as much as this submission is supported by authority it cannot be gainsaid.

As regards his second approach Mr. Scott submitted that the facts in each case must be looked at because the issues of self-defence and manslaughter may often properly be canvassed from the same facts. And if both issues are present then both ought to be left to the jury even though in the opinion of the judge no reasonable jury would convict for manslaughter. And indeed the issue ought to be left to the jury even though in the opinion of the trial judge .... a verdict of manslaughter would be perverse. R v Gilbert [1978] 66 C.A.R. 237. He concluded that on the evidence the issue was properly left to the jury.

It remains therefore to examine the evidence closely in an effort to identify such evidence as would justify the leaving of the issue to the jury and then to see what directions the learned trial judge gave them.

To begin with, the dual position of the applicant and his resultant interest in the financial returns from the dance are relevant considerations. The extent of the applicant's financial expectations from the venture is not known but it is obvious that it was a money-making endeavour. If those expectations were threatened in any way, e.g. by the entry of persons who refused to pay, he could be expected to react. Coupled with that he was the gateman whose responsibility it would be to ensure that only paying patrons entered the dance. He must therefore have had a deeply entrenched interest in that dance. We were told by counsel that in Jamaica a gateman is an outstanding character - something more than a "bouncer".

A question germane to the issue is this: What really took place at the gate when Owen first arrived there and was sprayed by the beer from the bottle in the applicant's hand? Why would the applicant with an interest in the financial returns from the dance exclude paying patrons? Is the truth, as the applicant said in his unsworn statement, which must be given its due weight, that Owen was trying to get into the dance without paying? Even without the benefit of the applicant's statement the jury would be correct in seeking a reason for the conduct of the applicant at the gate as related in the case for the prosecution by a prosecution witness in his evidence-in-chief. Then, too, it is obvious from the applicant's response to Owen's reaching for his handkerchief that the atmosphere was sufficiently charged for the applicant to reach for his dagger and to stab at Owen, apparently in the mistaken belief that Owen was reaching for a weapon as witness his words, "Bwoy, whey you a do bwoy?"

question: Had Owen been stabbed fatally at that juncture viewing the evidence in its proper setting, could it be said that no case of provocation would have arisen? We think not.

On the case for the prosecution it was within minutes of this first incident that the deceased confronted the applicant (the applicant makes it twelve minutes). The first incident had ended with Owen receiving a blow in his face and the applicant chasing Owen who ran and found his brother, the deceased, not far away. Owen's account was that during the chase he had run through the gate but the applicant charged into a wall. Accordingly, even from the prosecution's case a proper inference could be drawn that it was an angry Owen who reported to the deceased and that at least when the deceased confronted the applicant both would not be in the calmest frame of mind. There was no time for the applicant to have recovered from the effects of the encounter with Owen when he was faced by the deceased, Carlton and possibly Owen as well. It should be noted that although it was put to Owen in cross-examination that he, Fitzroy and Carlton ganged up on the applicant the latter in his unsworn statement added two friends of these three! But whether the encounter was by one, two, three or five one thing is quite certain and that is that the ingredients of a peaceful meeting were not in that company.

It is obvious that the severe beating detailed by the applicant in his unsworn statement is not reflected in the cross-examination of the witnesses for the prosecution. Significant, too, is the fact that despite such a beating there were no injuries to show. For if there were injuries they would either have been shown and/or observed later the said morning when Detective Gouldbourne saw the applicant. But despite the applicant's statement it is our view that the state of the evidence is such that even if the defence had rested its

case at the end of the Crown's case the learned trial judge would have been required to leave provocation to the jury or be found wanting. What he told them on provocation is to be found at pages 32-34 of the summing-up as follows:-

> "If you are in doubt as to whether or not the accused man was acting in self-defence, well, you give him the benefit of the doubt. In that case the crown would not have satisfied you that he did not act in self-defence. He would be not guilty. But if you find that he did not act in self-defence, then you have to consider the question of provocation, legal provocation, even though it is intentional, is not murder but manslaughter, and killing under legal provocation will reduce the offence from murder to manslaughter.
>
> And again, I must tell you. There is no burden on the accused man to prove that he was provoked. The prosecution must satisfy you that there was no provocation.
>
> Now this is the law on provocation: (The learned trial judge then read to the jury Section 6 of the Offences Against the Person Act set out earlier).

He continued:

> "Provocation has been defined as some act or series of acts done or words spoken by the deceased to the accused and or by other persons, not only by the deceased, which would cause in any reasonable person, and actually caused in the accused a sudden and temporary loss of self-control, rendering the accused so subject to passion as to cause him to retaliate."
>
> So the first thing is that the accused man must have lost his self-control and while in that state he committed the act by which the deceased was killed and the loss of self-control must have been the result of provocation either by the things done or things said by the deceased or other persons, and what was done or said, or said and done to provoke the accused must have been enough to make a reasonable man lose his self-control and do as the accused man did.
>
> And in coming to your conclusion you will take into account everything both said and done according to the effect which in your opinion it would have on a reasonable man.
>
> Of course, if you are in doubt as to whether or not there was provocation, then you will

> "find that there was provocation, because the crown would not have presented a case free of provocation.
>
> Now, as I told you, these same acts, if they do not amount to self-defence they could be considered in the light of provocation.... that,according to him (the accused) the three Jackson brothers come, accosted him, asked him about the thing with their brother... nothing wrong with that... but then he says one of them hit him in his chest and they began beating him. The deceased, Fitzroy, held on to the front of his shirt, pulled him towards him, he was resisting, they were beating him, the deceased pulled a knife, he reached for his knife and flashed it. You must say whether the ordinary reasonable man, if those things were done to the ordinary reasonable Jamaican, whether he would have lost his self-control to such an extent as to use his knife in those circumstances.
>
> That is the law on provocation. But as I told you, there is no burden on him to prove that. So then,you have to look at all the evidence in the case and the statement of the accused man.
>
> If you find that he acted in self-defence, that's an end of the case. If you are in doubt as to whether or not he acted in self-defence, that's an end of the case; he is not guilty; the crown would not have satisfied you that he did not act in self-defence. If you find he did not act in self-defence then you consider whether or not there was this legal provocation, as I have just told you. If you find there was provocation then he would be guilty of manslaughter, not murder. If you are in doubt as to whether or not there was provocation, then you would have to find him guilty of manslaughter, because the crown would not have presented a case free from provocation. But if you find that he was not acting under self-defence, he was not acting under provocation, then, of course, he would be guilty of murder".

Mr. Scott had cited the last paragraph (supra) in support of his contention that the summing-up was clear and free from confusion. We are in agreement with him.

On the question of provocation however, we wish to draw attention to one sentence in the judgment in the recent and unreported case of R v Devon Thorpe (S.C.C.A. 143/84) delivered on 20/3/86 (another case involving the finances of the appellant) where Wright J.A. (Ag.) (as he then was) said at p. 18:

> "In dealing with the issue of provocation, we think it important that a summing-up should do more than enumerate relevant factors, for although the determination of the issue is for the jury, it is incumbent on the trial judge to assist the jury in interpreting those factors".

The learned trial judge did direct the jury in terms of the law:-

> "And in coming to your conclusion you will take into account everything both said and done according to the effect which in your opinion it would have on a reasonable man " (p.38)

and again at p. 34:

> "So then, you have to look at all the evidence in the case and the statement of the accused man".

These directions together with the directions on drawing inferences viz:

> "Now, not everything can be proved by a witness who comes and says, I see this or heard that; that is why, members of the jury, you are entitled to draw inferences and come to your conclusions from facts which you find proved to your satisfaction; but you must not draw an inference unless it is the only reasonable inference that can be drawn in all the circumstances"

though not as full as they could helpfully have been, would nevertheless, leave it open to the jury to draw the inferences which we have indicated would, in the circumstances, be proper inferences to be drawn in the effort to capture the dynamics of the encounters related. And in so doing it would have been within the purview of the jury to accept the evidence of both Owen and Carlton that there were two stabs as an indication of the loss of self-control, with the regrettable consequence.

In the circumstances we hold that the issue of provocation was properly left to the jury. We accordingly treat the application for leave to appeal as the appeal, dismiss the appeal and affirm the sentence which will run from the 12 th day of May, 1986.