JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 140 and 141 of 1975

BEFORE: The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Zacca, J.A.
The Hon. Mr. Justice Watkins, J.A. (Ag.)

REGINA v. FREDERICK DALEY and BURNETT McGHE

P. Atkinson for Daley.

Howard Hamilton for McGhe.

J.S. Kerr, Q.C., Director of Public Prosecutions, and Mr. N. Sang for the Crown.

May 26, 27, 28, 31; June 4, 11, 15, 1976

GRAHAM-PERKINS, J.A.

The appellants were, on December 8, 1975, convicted by a jury before Melville, J., of manslaughter on an indictment which had charged that they, on April 22, 1975, murdered one Sydney Smith (hereinafter called 'the deceased'). They were each sentenced to thirty months at hard labour. Thereafter they successfully applied to a single judge for leave to appeal against their conviction and sentence. The application was granted on the ground that the defence advanced by the appellants at their trial was not fairly and adequately put to the jury. This court, however, granted the appellants leave to argue additional grounds which may be said to raise questions of fundamental importance in connection with criminal trials.

In support of the indictment for murder the prosecution led evidence by which it sought to establish that the deceased met his death as a result of injuries to his head and chest inflicted by stones thrown by one or other of the appellants, acting together in circumstances

amounting to murder. The evidence on which the prosecution relied was placed before the jury principally through three persons who claimed to be eye-witnesses, and a doctor. This evidence described the following general picture.

During the week preceding April 22, 1975, the appellants had been cutting fence posts on certain lands access to which was gained by a gate on premises occupied by the Jamaica Cordage Co. Ltd. On these premises the company operated a factory and among the several buildings thereon were, as far as is material to this case, a building accommodating under a single roof a warehouse, a carpenters' shed and a storeroom, and another building, a mechanics' shed. The storeroom is a small room in the larger carpenters' shed (hereinafter called 'the shed'). Some 12 yards from the shed and approximately mid-way between the shed and the mechanics' shed is a concrete ramp tapering from a height of 4 feet at its highest section to ground level. The terrain between the ramp and the shed is level and free of obstruction to anyone going from the shed towards the ramp.

The deceased had worked with the company for some considerable time, 30 years I think, as a ranger. The appellants had cut a number of posts and had stacked them at some point on the lands on which they had been working, presumably with the intention of returning with some kind of transport to remove them at some later date. The deceased, apparently being of the view that the appellants were not entitled to the posts they had cut, removed them from where they had been stacked and placed them somewhere in the vicinity of the mechanics' shed. On April 22, the appellants arrived at the company's premises and, on discovering that the posts they had cut had been removed, went to the deceased and demanded that he hand over the posts to them or that he pay for them. The deceased and two other persons, the witnesses Laidford and Smith, were then in the shed. In reply to the appellants' demand the deceased told them that they would have to see the company's

manager. The appellants who, according to Laidford, were then armed, Daley with a stone and a piece of iron, and McGhe with two stones, became irate at the deceased's refusal to hand over the posts to them. Daley then threw the stone and the piece of iron with which he was armed at the deceased. McGhe followed this by throwing the stones he had at the deceased whereupon the latter ran into the storeroom in the carpenters' shed and closed the door. The deceased remained in the storeroom for some five minutes. Both appellants threw stones at the door of that room. Thereafter, according to Laidford, he (Laidford) ran from the shed followed by the deceased. They both ran towards the appellants and near by them. After he had passed the appellants, the appellants threw stones at the deceased. It is not clear how Laidford was able to see exactly what happened after he ran from the shed since it appears that he ran in the same general direction as the deceased and remained in front of the deceased. However, in his examination-in-chief, Laidford swore that although he was unable to say what caused the deceased to fall while running, he did see one stone hit the deceased before the latter fell at or near the ramp. As the deceased lay on the ground he saw some eight stones hit him on his head. In cross-examination he said he did not, indeed, see any stone hit the deceased while he was running and before he fell. I observe here that this was by no means the only self-contradiction that emerged in the evidence of Laidford.

Another eye-witness to the events on April 22 was Roy Burke. He described the incident between the deceased and the appellants as "a fuss". He said that he saw the appellants pick up stones from the ground outside the shed and throw them at the deceased who was then sitting on a stone in the shed. He saw the deceased enter the storeroom. It does not appear that the appellants made any attempt to enter the storeroom or, indeed, the shed at any time during this exercise of stone throwing. Nor does it appear from the evidence at all whether the appellants continued throwing stones at the door to the storeroom during the entire period of five minutes that the

deceased remained in there, or how many stones were thrown at the door to that room. When, according to Burke, the deceased left the storeroom the appellants had by then removed from the point from which they threw the first stones to a point about 11 yards from the door to the shed. The deceased ran across the yard in the direction of the ramp and the mechanics' shed. Burke swore that at this time he saw the appellants with stones in their hands but could not say whether they threw any at the deceased or not. He did, however, see the deceased fall some 11 yards from where the appellants stood. After the deceased had fallen Burke saw the appellants throw several stones at him as he lay on the ground but, here again, he could not say if any of these stones hit the deceased. He saw the deceased hit his chest against one of the edges of the ramp.

The other witness, Milton Smith, testified as to the incident in the shed and the deceased leaving the storeroom and running across the yard in the direction of the ramp and the mechanics' shed. He saw the appellants throwing stones at the deceased as he ran but could not say if any of these stones hit the deceased. He saw the deceased fall on his hands beside the ramp. He was unable to say what caused the deceased to fall.

What emerges from the narrative so far related is that no attempt was made by anyone at the trial to elicit from any of the eye-witnesses the cause of the deceased's fall. Burke did say, when pressed, that the deceased "definitely butt his foot against the ramp and fell across". Just before saying so, however, he had said: "When the deceased was running I <u>believe</u> he tripped at the ramp and fell." The witness, Laidford, who said in examination-in-chief that he saw one stone hit the deceased did not say at what point in the deceased's progress across the yard he was hit by this stone. It will be recalled, however, that he changed this version during cross-examination. True it is that two witnesses, Laidford and Smith, spoke of stones being thrown by the appellants at the deceased while the latter was running

towards the ramp, but neither was required to describe this incident in any greater detail than the bald assertion that the appellants threw stones at the deceased. At the end of the prosecution's case the cause of the deceased's fall remained unknown.

In addition to the eye-witnesses already noted the prosecution called Dr. Samuel Morgan who conducted a post mortem examination on the body of the deceased. Externally, the doctor saw signs of haemorrhage inside the right ear. The only injury he saw was a small laceration on the left side of the chin. On dissection the doctor found a fracture of the skull on the right margin of the occipital and right parietal bones. There were signs of haemorrhage at that section of the skull and this penetrated into the dura mater and involved the occipital region and the posterior half of the right parietal. There was also a fracture of the upper third of the sternum. In Dr. Morgan's opinion death was due to shock and haemorrhage following upon the injuries to the head and sternum. He thought that the head injury alone could have caused death and that death would have been instantaneous or at least within two or three hours. It would have required "a fairly large stone thrown with a strong degree of force" to cause the fracture to the skull. He thought, too, that the injury to the sternum could have been caused by a stone. In cross-examination, however, the doctor agreed that both the injury to the head and to the sternum could have been sustained as the result of a fall. He saw no external signs of injury by a stone or stones.

It will now be appreciated that at the outset the case sought to be put before the jury by the prosecution was a case of murder pure and simple - a stoning to death of the deceased by the appellants. Indeed, we are told that in opening the case to the jury learned counsel for the Crown indicated that the prosecution would in due course ask them to say that on the evidence that would be presented to them this was a case of murder, or at least a case of manslaughter as the result of provocation depending on the view they took of the

deceased's conduct in relation to the posts which the appellants had cut and which, rightly or wrongly, they regarded as their property.

In answer to the case advanced by the prosecution the appellants denied throwing a single stone at the deceased at any time. Their defence was to the following effect: They were employed by R. A. Silvera Ltd. who, on behalf of the Jamaica Public Service Co. Ltd., had begun to run lines along certain lands and for this purpose they had to cut away a number of trees. A Mr. McFarlane attached to R. A. Silvera Ltd. confirmed to the manager that they had been sent to cut away trees. They cut a number of fence posts and stacked them intending to remove them in a day or two. On April 22 on their way to where they had stacked the posts they saw these posts near the mechanics' shed. They went towards the shed where they saw the deceased, Laidford and Smith. They asked the deceased why the posts had been removed and the deceased told them that they should see the manager. They said they did not know that the manager was in any way concerned with the posts and insisted on talking to the deceased. An argument followed and the deceased became irate and ordered them to leave the property. They did not leave immediately but continued arguing with the deceased. The deceased rushed towards Laidford who was then cutting up a chicken with a machete or a large knife. Failing to gain possession of this knife from Laidford the deceased picked up a stone and hurled it at the appellants. He then rushed into the storeroom in a manner which suggested that he was looking for a weapon. Shortly after he emerged from the storeroom, ran past them and shouted "Uno stand dey till I come." He then ran in the direction of the mechanics' shed where, according to the witnesses for the prosecution, he was known to keep a gun. While running towards the ramp he tripped and fell hitting his chest and head against the ramp. The deceased did not move after he fell. They left the premises immediately saying that they would return with a truck to move the posts they had cut.

It will, I think, have been observed that the structure on which the case for the prosecution had been built had, by the time Dr. Morgan left the witness box, completely collapsed. Whatever, if anything, was left of the case for the prosecution it was, quite clearly, no longer a case of murder or, indeed, a case of manslaughter on the ground of provocation. Nevertheless, the appellants were required to answer and did, indeed, seek to answer the prosecution's allegation of murder; and in so doing they also, incidentally, answered the alternative adumbrated by the prosecution in its opening, namely, manslaughter on the ground of provocation. When, however, counsel for the prosecution came to make his final address he now sought, in effect, to abandon the case to which he had opened. This was, undoubtedly, due to the very pathetic figure cut by Dr. Morgan in the witness box. The learned trial judge, I observe, made some very unkind, albeit justified, observations about the evidence of the good doctor. He told the jury, inter alia, that the doctor had insulted their intelligence by saying that the deceased could have been hit on his head by stones and not show so much as a slight bruise.

I am by no means certain as to exactly what occurred during the closing addresses of counsel. It appears that Mr. Atkinson who addressed the jury first did not attempt to deal with what was in the end described by the learned trial judge, rather inelegantly I think, as "manslaughter by flight". I think Mr. Atkinson was perfectly correct in refraining from dealing with this matter assuming, of course, that it had occurred to him at all. The possibility of a verdict of "manslaughter by flight" was mentioned for the first time during the trial when counsel for the prosecution referred to it in his closing address. Mr. Hamilton told us that he did refer to it in his address which followed that of counsel for the prosecution but that he did so only by way of objection to the introduction by the prosecution, at that eleventh hour, of what he

described as a completely new case which the appellants had not had an opportunity to meet. Neither Mr. Kerr nor Mr. Sang was able to advise us what occurred during counsel's closing addresses. Be that as it may, when the trial judge was approaching the end of his summing-up, having dealt with the possibility of a verdict of manslaughter on the ground of provocation, he said, inter alia:

> " There is another aspect in which manslaughter arises. Both learned gentlemen, I think Mr. Andrade for the Crown and Mr. Hamilton, they addressed you on this aspect of the matter. Mr. Atkinson didn't address you on this matter at all. Manslaughter arises in another way. Again if you think it was not - if you accept that the deceased man fell down and fractured his sternum and his skull in the same one blow - in other words, it was when he tripped and fell that he got these two injuries, even if his death came in these circumstances, the men would still be guilty of manslaughter and this is the principle you would have to apply; that is why I am asking you to keep them separately. If it is manslaughter then I am going to ask you to just say whether it is manslaughter by reason of provocation, remember I just gave you directions on that, or manslaughter in trying to escape. This is what I will call this other aspect now which I am now going to tell you about and it is this: Where one person causes in the mind of another by violence or the threat of violence a well-founded sense of danger to life or limb as to cause him to suffer or to try to escape and in the endeavour to escape he is killed, the person creating that state of mind is guilty of at least manslaughter."

The learned trial judge then proceeded to deal in extenso with the law relating to "manslaughter in trying to escape". In my view his directions, though lengthy, were not altogether related to the evidence and, in any event, contained certain inaccuracies. I find it unnecessary, however, to dwell on these directions at any length since, in my view, the really important question raised in this appeal is whether the trial judge, in the particular circumstances of this case, ought to have left it to the jury to find a verdict of what I prefer to call constructive manslaughter.

Before attempting an examination of this question I am constrained to express the gravest doubts whether on an indictment for murder a verdict of manslaughter is at common law, returnable on a ground other than provocation or the absence of an intention to kill. In successive editions of Archbold's Criminal Pleading

Evidence and Practice the following statement appears:

> " Upon an indictment for murder, if the prosecutor fails in proving malice aforethought the prisoner may be convicted of manslaughter."

See, for example, the 37th edition at p. 172. Significantly, however, this statement finds no place in the 38th edition. The authority invariably cited in support of the statement is R. v. Mackalley, 9 Co. Rep. 61b. In the 32nd edition the statement appears in the same terms except that for the words "malice aforethought" the words "malice prepense" appear. The statement, however expressed, appears to have been used as the foundation of an assumption that on an indictment for murder a jury may, regardless of the circumstances of any given case, return a verdict of manslaughter. I am aware of no authority that has ever examined the implications and scope of any such assumption. Indeed, in Director of Public Prosecutions v. Nasralla, (1966) 10 W.I.R. 299, Lord Devlin, speaking for the Privy Council, said, at p.301:

> " By a well-established rule of the common law which the industry of counsel has shown to have originated in R. v. Salisbury, (1553) 1 Plowd. 100, it is open to the jury if they are not satisfied of the prisoner's guilt on a charge of murder, to convict of manslaughter."

Here again, it is to be observed, with respect, that this dictum of Lord Devlin appears to embrace the assumption just noted since it does not, ex facie, recognize any distinction between one kind of manslaughter and another, for example, between manslaughter founded on provocation and manslaughter by some unlawful act. It must be borne in mind, too, that up to comparatively recent times where an act or acts was or were capable of giving rise to different bases of criminal liability it was the practice for indictments to detail with essential particularity the bases of such liability. An example of this is R. v. Evans, decided in 1812, where the indictment charged that the accused killed his wife (a) by beating her; (b) by throwing her out of the window; and (c) and (d) that he beat her and threatened to throw her out of the window and to murder her and that by

such threats she was so terrified that, through fear of his putting his threats into execution she threw herself out of the window, and, by the beating and the bruises received by the fall she died. In any event R. v. Salisbury (supra) does not, on any view, authorise a verdict of manslaughter on an indictment containing a single count for murder quite regardless of the particular circumstances in which the deceased met his death.

It will, perhaps, be useful to examine briefly the historical development of the difference between murder and manslaughter. In its earliest history the common law recognised no distinction between murder and manslaughter. Where one person killed another as a result of any unlawful act such a killing was, save in those very exceptional cases where it was held to be justifiable, categorised as murder, the circumstances in which the deceased met his death being regarded as totally irrelevant to the question of guilt. There were no degrees of liability in respect of a voluntary and unlawful act causing death. When the concept of moral blame began to take shape as the foundation of responsibility for the infliction of injury, undoubtedly the result of ecclesiastical influence, those who sought to chart the direction in which the common law should continue its advance did not, understandably, demonstrate the consistency and logic that might have been thought to be necessary at that time. Nevertheless, the concept found gradual acceptance among the judges of the 15th and 16th centuries and in the end came to be enshrined in the maxim actus non facit reum nisi mens sit rea. Thereafter homicides came to be distinguished according to whether they could be held to be justifiable, excusable, murder, manslaughter or suicide. Two other kinds of homicide, infanticide and child destruction, were the creation of comparatively modern legislation. The mens rea of murder, as a matter of history, was identified among early writers by such terms as malice aforethought, malice prepense and malice praecogitata. But these and other expressions used by textbook

writers and judges during the development of the concept of mens rea did not always convey the same meaning. In 1611, in Mackalley's Case (supra) for example, the view of all the judges sitting in the Court of Exchequer Chamber was that in an unprovoked killing the law implied malice prepense "for by the law of God everyone ought to be in love and charity with all men". By the middle of the 19th century the mens rea in murder had come to be identified as an appreciation in the mind of an accused that his conduct might cause the death of some person. The cases decided between the middle of the 19th century and the first quarter of this century demonstrate that the attitudes of mind which satisfied the criteria encompassed in the mens rea of murder were (i) an intention to kill the person who was actually killed; (ii) an intention to kill some person, the identity of the person killed being irrelevant; (iii) an intention to kill some person other than the person actually killed; and (iv) an intention to do an act in the knowledge that such act could cause the death of some person. The foregoing attitudes of mind were irrelevant in those cases where (a) one person killed another by an act of violence "in furtherance of a felony involving violence", and (b) an officer of justice was killed by any person resisting such officer in the execution of his duty. In these latter cases foresight of the consequences of the accused's conduct assumed no significance.

Turning now to manslaughter, it has always been the practice, when once it was distinguished from murder, particularly among judges and those writers of the 17th and 18th centuries (like Coke, Hale, Hawkins, Foster and East) who made such a significant contribution to the early development of the law of manslaughter, to divide this crime into two principal categories, namely, (i) voluntary, and (ii) involuntary manslaughter. The manifest purpose of this division, certainly more important today than it was when Foster and East wrote, was, undoubtedly, to distinguish between those cases which involved an intentional killing in cricumstances which were held to reduce the crime of murder to that of manslaughter - voluntary manslaughter, and all other cases in which

an accused neither intended nor foresaw death as a consequence of his conduct - involuntary manslaughter.

At common law voluntary manslaughter occurred in one case, and in one case only, namely, where one person killed another under the stress of provocation and it was, originally, precisely for this reason that the practice arose, when the petit or common jury as we know it today came into being, of permitting a conviction for manslaughter on an indictment which had charged murder. But this practice, at any rate in the early history of manslaughter, really availed an accused nothing. In the third quarter of the 18th century Foster was able to write in his Crown Law:

> " The distinction between murder and manslaughter, as it is stated by our oldest writers, seemeth to have been in their time merely nominal. By the one they meant an insidious secret assassination..... And homicide under these circumstances, if the offender was not apprehended, subjected the township, as I have already observed, to the amerciament, to which they gave the name of Murdrum. Every other species of felonious homicide they called simply homicidum nequiter et in felonia factum. But both offences with regard to the consequences of a conviction were the same, both capital; unless the privilege of clergy interposed, and when it did both were treated alike. The legal notion of murder in contradistinction to manslaughter was afterwards enlarged, and took in every species of homicide, whether openly or privily committed, if attended with circumstances indicating a preconceived malice in the large sense of that term....."

Mackalley's Case (supra) was, perhaps, the earliest case in which this nominal distinction appeared. Like R. V. Salisbury (supra), Mackalley's Case proceeded on a very narrow ground and dealt with a very particular situation. In the latter case all the judges of England met to consider, inter alia, objections taken to a special verdict. It is important to understand the reason assigned by these judges for their view that a verdict of manslaughter could be sustained on an indictment charging murder. At p. 545 of the All E. R. Rep. (1558-1774) the reason is expressed in the following terms:

> " So if one is indicted for the murder of another upon malice prepense and he is found guilty of

> " manslaughter, he shall have judgment upon this verdict, for the killing is the substance, and the malice prepense the manner of it, and when the matter is found judgment shall be given thereupon although the manner is not precisely pursued."

Later, on the same page, the following appears:

> " I moved all the judges and barons, if in this case of killing a minister of justice in the execution of his office the indictment might have been general, without alleging any special matter, and I concede that it might well be, for the evidence would well maintain the indictment for as much as in this case the law implies malice prepense."

Be it observed that Mackalley's Case concerned the killing of a minister of justice, a circumstance which, in the view of the common law, constituted the necessary "malice prepense" in murder, and that in 1611 that expression bore a meaning quite distinct from that which is contemplated today by the mens rea of murder.

Apart from those cases noted above in which an accused's mental attitude was regarded as irrelevant there grew up side by side the dual doctrines that an intentional killing by reason of provocation and a killing in which there was some equivocation as to the accused's intention resulted in a verdict of manslaughter. It is unchallengeably clear that these were the only instances known to the common law in which, on an indictment for murder an accused might be found guilty of manslaughter. In all other cases, necessarily of involuntary manslaughter, the indictment specifically charged manslaughter when this offence came to be distinguished in its practical consequences from the offence of murder. Examples of those cases in which the indictment charged murder and in which the evidence, in the view of the trial judge, demonstrated some measure of uncertainty as to the intention of the accused are R. v. Walters, (1841) C. & M. 164; R. v. Bubb, (1851) 4 Cox C.C. 455; R. v. Greenwood, (1857) 7 Cox C.C. 404 and R. v. Bottomley, 115 L.T. 88.

All the authorities dealing with cases of involuntary manslaughter show that this was either the subject of a particular charge in an indictment or, as the early cases show, the subject of a

count in an indictment which had also charged murder.

Notwithstanding what emerges from the foregoing I am prepared to assume that it is open to a jury to return a verdict of manslaughter in any case in which an indictment charges murder simpliciter. I turn, therefore, to the proposition advanced by Mr. Kerr. He put it this way:

> "Quite independently of counsel's opening address to the jury in a criminal trial it is perfectly proper for counsel, when all the evidence is in, to address on such issues as arise on the evidence and to seek from the jury any alternative verdict that could reasonably be founded on such evidence."

In support of this proposition Mr. Kerr relied on the following authorities which it becomes necessary to examine.

(1) R. v. Carter and R. v. Canavan, (1964) 1 All E.R. 187. In this case the appellants were convicted of "robbery together" contrary to s. 23 (1)(a) of the Larceny Act, 1916. The indictment had charged that they "being armed with an offensive weapon, to wit a razor blade, together with another person robbed (M) of £10." The jury found that the appellants had indeed robbed M. but that they were not armed. The judge had not dealt with the latter situation in his summing-up although counsel for the prosecution had made reference thereto. Delivering the judgment of the Court of Appeal Lord Parker, L.C.J., said, at p. 188 :

> " The only question here which concerns this Court is whether, the learned Commissioner not having left the alternative to the jury, the jury were entitled to return the verdict of the alternative offence."

I have the gravest difficulty in understanding what the learned Chief Justice meant by his reference to "the alternative offence". Section 23 (1) of the Larceny Act, 1916, provides : "Every person who - (a) being armed with an offensive weapon or instrument, or being together with one other person or more robs, ...any person" is guilty of felony. I would have thought that that subsection created one offence, an offence which has come to be known as "robbery with aggravation". This offence of robbery may be committed by a person

who is "armed with an offensive weapon", or who is "together with one other person or more". It is perfectly legitimate, of course, to charge both species of aggravation in the indictment. See Sookdeo v. R., (1963) 6 W.I.R. 450. What is unmistakably clear is that there is not one offence of robbery when armed and another offence of robbery "being together with" another person. And where two persons are jointly charged in a single count it is nothing to the point that, in proof of the offence, the prosecution fails to satisfy the jury as to one or other or both of the accused being armed. On analysis it is, in my respectful view, quite impossible to see how anyone could successfully challenge the right and, indeed, the duty of a jury to return a verdict of guilty of robbery with aggravation - two forms of aggravation being alleged - on an indictment which had, in fact, charged robbery with aggravation. In the result I am unable to regard R. v. Carter and R. v. Canavan as being relevant.

(2) R. v. Poritt, (1961) 3 All E.R. 463. In this case the indictment charged capital murder and the appellant's defence was that he had shot at his stepfather's assailant but had, unhappily, killed his stepfather, and that he had used his gun in defence of a near relative then in imminent danger of being killed. It was not at any time during the trial suggested by the defence that a verdict of manslaughter could be returned on the evidence. The judge did not in his summing-up refer to manslaughter. On appeal against conviction the appellant contended that the jury should have been directed that it was open to them to find a verdict of manslaughter on the ground of provocation under s. 3 of the Homicide Act, 1957. In delivering the judgment of the Court of Criminal Appeal Ashworth, J., said at p. 468:

> " As has already been said the issue of manslaughter was not raised at the trial but there is ample authority for the view that notwithstanding the fact that a particular issue is not raised by the defence, it is incumbent on the judge trying the case, if the evidence justifies it, to leave that issue to the jury. The leading case so far as chronology is concerned is R. v. Hopper in this

" court, but the same principle has been emphasised in a number of other cases and, for convenience, one can read what I think is the last of them, Bullard v. R. In that case Lord Tucker 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.'"

(3) R. v. Thompson, (1960) 2. W.I.R. 265. This case is to the same effect as those at (1) and (2) above.

(4) Palmer v. R., (1971) 1 All E.R. 1077. Lord Morris, delivering the opinion of the Privy Council, said, at p. 1080 :

" As, however, there was evidence that made possible the view that whoever it was who fired might have done so in self-defence the learned judge very fairly left the matter to the jury. It is always the duty of a judge to leave to a jury any issue whether raised by the defence or not which on the evidence in the case is an issue fit to be left to them. There was a very clear direction that the onus remained on the prosecution to satisfy the jury beyond doubt that the killing was not done in self-defence."

At p. 1088 Lord Morris continued:

" But their Lordships consider in agreement with the approach in DeFreitas v. R. that if the prosecution had shown that what was done was not done in self-defence then that issue is eliminated from the case. If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this then they will acquit. ..... In a homicide case the circumstances may be such that it will become an issue whether there was provocation so that the verdict may be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then that matter would be left to the jury. "

With the greatest respect I do not regard any of the foregoing cases, relied on so strongly by Mr. Kerr, as relevant to the real question posed on this appeal, namely, whether the "issue" of involuntary or

constructive manslaughter ought to have been left to the jury in the circumstances of this case. It is, perhaps, desirable to restate the following observations made as long ago as 1901 by the Earl of Halsbury, L.C., in Quinn v. Leathem,(1901) A.C. at p.506 :

> ".....there are two observations of a general character which I wish to make and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides."

I respectfully adopt the foregoing observations. They are as valid today as they were 75 years ago and, in my view, are applicable to all judgments of all courts.

Murder is by definition an offence committed where one person, by a deliberate and voluntary act, intentionally kills another without lawful excuse and in the absence of provocation. On a trial for murder the onus remains throughout on the prosecution to establish each of the several elements involved in the foregoing definition. Leaving aside the particular circumstances in which an accused seeks to rely on such matters as insanity or diminished responsibility in respect of which he carries the burden of proof on a balance of probability, the prosecution, on the trial of an indictment for murder, is required to establish (i) the identity of the accused as the person inflicting the fatal injury on the deceased; (ii) that he inflicted that fatal injury by a deliberate and voluntary act; (iii) that at the time he inflicted that injury there was present in his mind an intention to kill, or to cause grievous bodily harm to, the deceased; (iv) that he did not act in necessary self-defence and (v) that he did not act under the stress of provocation.

When an accused, charged with murder, pleads the general issue by pleading "not guilty" to the indictment it falls to the prosecution to prove every circumstance, every essential element, that constitutes that offence. It is important, therefore, to appreciate what is meant

by the word "issue" in the context in which that word is used in the cases noted above. An issue does not arise in vacuo. In civil actions in the High Court issues arise for determination when the parties have answered each other's pleadings in such a manner as to arrive at some material point affirmed on one side and denied by the other. It is by this means that a trial judge - or a jury in those exceptional cases where it is still possible to have trial by jury - knows precisely "the point in question" between the parties. From the point of view of criminal procedure, however, a plea of not guilty, as already observed, puts in issue every essential element of the offence charged in the indictment. This follows from the well-established rule that there can be no "admission of facts" in a criminal trial following a plea of "not guilty". The fact that an accused does not seek to challenge one or more of the elements of the offence charged does not relieve the prosecution of the obligation to establish that element, or those elements, beyond a reasonable doubt. At the end of the evidence, however, there will be some "point (or points) in question" between the prosecution and an accused in respect of which the one will have affirmed and the other will have denied. This point in question, or "real issue" or "live issue", as it is sometimes conveniently called, will relate, and can only relate, to some particular circumstance of the offence charged. For example, the point in question, on a trial for murder, may relate to the requisite intention, the prosecution affirming, as it must, that the accused intended to kill or inflict grievous bodily harm, the accused denying any such intention while not seeking to challenge, either explicitly or impliedly, the existence of the other elements involved in the charge. The manner of such denial assumes no particular significance since an accused may himself lead evidence as to his state of mind at the relevant time, or he may be content merely to ask the jury to say that on the evidence adduced before it the prosecution has not discharged the burden of establishing in him the intention necessary to constitute the crime

of murder. Again, the point in question may relate to the issue whether the accused acted in necessary self-defence or not. Here the accused may himself lead evidence with a view to having this issue resolved in his favour, or he may, by cross-examination, elicit evidence on the basis of which he would be able to ask the jury to say affirmatively that he had acted in self-defence, or at least that they are not sure whether he had so acted or not. Be it observed, too, that in this latter circumstance although an accused does not specifically rely on any question of provocation he would ordinarily be entitled to have that issue left to the jury for the reason that the same evidence which has been adduced or elicited in support of an unsuccessful defence of self-defence may often be relied on, in whole or in part, as constituting provocation sufficient to reduce the crime from murder to manslaughter, since conduct which cannot justify may well excuse (see Bullard v. R.) the onus being on the prosecution to eliminate provocation as an issue.

The point I wish to emphasise is that with regard to the essential elements constituting the crime of murder, all of which become issues on a plea of not guilty, any one (or more) of them may be "the point in question" on the trial of a person accused thereof, and it is always the duty of the trial judge to leave to the jury any issue or issues in respect of which the evidence may sustain a finding in favour of an accused.

In support of the indictment for murder in this case the prosecution sought to establish (a) that the appellants, acting in concert, deliberately and voluntarily threw a stone or stones at the deceased which stone or stones inflicted an injury to the latter's head (and chest) resulting in his death; (b) that this act of stone-throwing was done by the appellants in circumstances in which they could not be heard to say that they were acting either in self-defence or under provocation (subject to the qualification introduced in prosecution counsel's opening address noted earlier in this judgment);

and (c) that at the material time there was present in the mind of each of the appellants an intention to kill, or to inflict grievous bodily harm on, the deceased. The appellants did not raise any question of self-defence. Nor did they, either explicitly or impliedly, raise any question as to the absence of an intention to kill or cause grievous bodily harm, or any question as to provocation. The appellants, as noted earlier, answered the allegations levelled at them by the prosecution by a specific denial that they had thrown any stones at the deceased. They went further. They asserted that when they insisted on being paid for the posts the deceased became annoyed and ordered them to leave the premises. They did so but not before the deceased, apparently in search of some weapon, entered the storeroom and thereafter left the shed, running towards the ramp against the side of which "he bucked his foot" and fell. By their clear answer to the allegation of murder the appellants made the deceased's accidental death the live issue between themselves and the prosecution. Put another way, while all the other elements of the offence were, by the appellants' plea of not guilty, always in issue the real point in question was the second constituent element of the offence of murder, namely, that they did not, by any act on their part, inflict the fatal injury to the head of the deceased as the prosecution had alleged.

It was no part of the case for the prosecution that by throwing stones at the deceased the appellants caused him "to entertain a well-grounded fear of danger to his life or limb so as to cause him to try to escape and that in the course of that endeavour to escape he met his death by falling against the ramp." This not being the case advanced by the prosecution the appellants did not, understandably, seek to make any answer thereto. Accordingly they did not seek to show as, clearly, they would have been entitled to show, that, assuming a finding against them that they had thrown stones at the deceased, he did not leave the shed and run in the direction of the ramp because of any reasonably apprehended danger

to his life or limb. The evidence that the appellants did not at any time enter the shed or the storeroom into which the deceased had gone, coupled with the evidence that the appellants had moved some 11 yards away from the shed some time after the deceased entered the storeroom and the evidence that the deceased could have left the shed by a means other than taking a route which brought him into close proximity to the appellants, was evidence which would have been relevant to the deceased's state of mind and would certainly have been explored by the appellants' counsel if they had set out to answer a charge of constructive manslaughter. Nor did the appellants, for the same reason, seek to show that the deceased's fall could not, on the evidence led by the prosecution, be attributed to any stones allegedly thrown by them. Indeed, the prosecution advanced no reason for the deceased's fall. There was certainly no evidence on the part of the prosecution that in his supposed bid to escape the deceased ran into the ramp. It was left to the appellants to assign the cause of the deceased's fall. It would, perhaps, have been a reasonable inference for the jury to draw, if they had considered the matter, that the deceased who had been familiar with the ramp and its surroundings for some 30 years would not have found it difficult to by-pass it. A vital issue, therefore, assuming a case of constructive manslaughter, would have been whether the throwing of stones by the appellants at the deceased was the sine qua non of the latter's fall as distinct from the causa causans of that fall. This "issue" was never even adumbrated during the course of the trial as it would certainly have been on an indictment charging manslaughter.

For the foregoing reasons I am compelled to the conclusion that the trial judge ought not, in the particular circumstances of this case, have asked the jury to consider constructive manslaughter for the simple reason that it was never an issue between the prosecution and the appellants.

Before, however, parting with this case it will, perhaps, be useful to examine some of the authorities dealing with this question of constructive manslaughter. The most recent case is that of R. v. Mackie, (1973) 57 Cr. App. Rep. 453, on which the trial judge appeared to rely. In that case the appellant was convicted of the manslaughter of a boy aged 3 to whom he stood in loco parentis. The boy fell downstairs at a time when he, another small boy and the appellant were alone in the house in which they lived, and died as a result of his injuries. The case for the prosecution was that the appellant had disciplined the boy excessively in the past and that the boy was frightened of him and fell downstairs in an attempt to escape being ill-treated. In delivering the judgment of the Court of Appeal, dismissing the appeal against conviction, Stephenson, L.J., said, at pp. 459-460: "We think that the relevant law was correctly embodied in Mr. Hall's proposition in accordance with such authorities as EVANS (1912), RUSSELL on Crime 12th Edn., p. 414; PITTS (1842) Car. & M. 284; HALLIDAY (1890) 61 L.T.N.S. 701 and CURLEY (1909) 2 Cr. App. Rep. 109; and similar cases where the injuries were not fatal such as BEECH (1911) 7 Cr.App. Rep. 197; LEWIS (1970) Crim. L. R. 647 and ROBERTS (1972) 56 Cr. App. Rep.95. We are of the opinion that Mr. Hall's formulation of the questions to the jury correctly applied the law laid down in these cases."

The learned Lord Justice then set out the criteria which, in the court's view, were to be applied in determining responsibility for the victim's injuries. He said: "Where the injuries are not fatal, the attempt to escape must be the natural consequence of the assault charged, not something which could not be expected, but something which any reasonable and responsible man in the assailant's shoes would have foreseen. Where the injuries are fatal the attempt must be the natural consequence of an unlawful act and that unlawful act 'must be such as all sober and reasonable people would inevitably

recognize must subject the other person to, at least, the risk of some harm resulting therefrom albeit not serious harm'."
For this latter proposition reliance was placed on R. v. CHURCH (1965) 49 Cr. App. Rep.206; (1965 2 All E. R. 72; and R. v. LIPMAN (1969) 53 Cr. App. Rep. 600; (1969 3 All E. R. 410.

I proceed to examine the authorities which were regarded in R. v. Mackie (supra) as correctly laying down the law.

In R. v. Evans (supra) there was strong evidence that the death of the wife was occasioned by the blows she received before her fall, but Heath, Gibbs and Bayley, JJ., were of opinion that if her death was occasioned partly by the blows and partly by the fall, yet if she was constrained by the accused's threats of further violence, and from a well-grounded apprehension of his doing such further violence as would endanger her life, he was answerable for the consequences of the fall, as much as if he had thrown her out of the window himself. The accused was, however, acquitted, the jury being of opinion that the wife had thrown herself out of the window by her own intemperance, and not under the influence of any threats issued by the accused.

In R. v. Pitts (supra) it was alleged against the accused that the deceased had slipped into a river in endeavouring to escape from an assault made with intent to murder or to rob. Evidence was led that the body of the deceased was found in a river and that it bore marks of violence, but not sufficient to cause death. It appeared that death had been caused by drowning. Erkskine, J., told the jury that a man might throw himself into a river under such circumstances as rendered it not a voluntary act, by reason of force applied either to the body or to the mind; and it then became the guilty act of him who compelled the deceased to take the step. The learned judge further directed the jury that the deceased's apprehension must have been of immediate violence and well-grounded from the circumstances by which he was surrounded; and that they

should be satisfied that what the deceased did was such a step as a reasonable man might take.

In R. v. Halliday (supra) the accused was charged with inflicting grievous bodily harm on his wife contrary to s. 20 of the Offences against the Person Act, 1861. The evidence showed that he was drunk and had said to his wife "I'll make you so that you can't go to bed". The wife became frightened and opened the window of her room and got one leg out in an attempt to get out. Her daughter caught hold of her and held her. The accused got within reach of his wife and demanded that the daughter let her go. The daughter did so and her mother fell into the street and broke her leg. It was held, following R. v. Martin, (1881) Q.B.D. 54 (the theatre case), a correct direction to the jury, that if the wife's apprehension was well-grounded, taking into account the circumstances in which she was placed, and if getting out of the window was an act such as under the circumstances a woman might reasonably be led to take, they should find the accused guilty.

In R. v. Beech (supra) the indictment charged the appellant with unlawfully inflicting grievous bodily harm. The appellant went to the complainant's house late at night and gained entry by breaking a window. He went upstairs and began to force open the door of the complainant's bedroom which was locked. She told him that if he forced her door he would not find her in the room. He nearly succeeded in forcing the door when the complainant jumped through the window and was injured. The trial judge directed the jury that if they found that the conduct of the appellant amounted to a threat of causing injury to the complainant, and that the act of jumping through the window was a natural consequence of his conduct, and that the grievous bodily harm was the result of his conduct, they should convict him. This direction was held to be right.

In R. v. Lewis (supra) the appellant was convicted of maliciously inflicting grievous bodily harm on his wife. Her evidence

was that he had treated her with considerable violence and as a result she locked the door of the matrimonial home (a third floor flat) against him and refused to let him in. He shouted threats at her and said that he would kill her. She heard the sound of breaking glass from one of the rooms of the flat. She was in another room and she jumped out of the window because, she said, she had no alternative being in fear of what he would do if she stayed in the flat. She broke both her legs. The trial judge directed the jury in accordance with R. v. Halliday (supra) and his direction was held to be right.

In R. v. Roberts (supra) a young girl who was a passenger in the appellant's car injured herself by jumping out of the car while in motion. Her explanation was that she had been assaulted and threatened by the appellant. The trial judge directed the jury that if they felt sure that they could accept the evidence of the girl on what induced her to jump out of the car they should convict of assault occasioning bodily harm. It was held, following R. v. Beech, that the proper test being not whether the appellant actually foresaw the girl's conduct which resulted in the actual bodily harm, but whether that conduct could reasonably have been foreseen as the consequence of what he had said or done, the summing-up was not open to objection.

A careful examination of the judgments in each of the foregoing cases reveals that each was predicated on the premise of two common and fundamental factors. In the first place, in each case the act causing death or injury, forced upon the victim by the reasonably apprehended violence of the assailant was regarded not as the voluntary act of the victim but the act of the assailant himself and so the actus reus of the crime charged. Secondly, in each case the very manner of escape pursued by the victim as the natural consequence of the assailant's conduct was a manner of escape which, by its very nature, was inherently dangerous in the sense that the consequence suffered by the victim was the natural and, perhaps, inevitable consequence of the manner of escape. Although I do not question the decision in the case of Mackie I venture to think that the criterion which the court thought to be applicable in those cases where the injuries

are fatal is at least open to debate in that it does not accurately reflect the bases on which the decisions just examined were reached.

Can the foregoing considerations, nevertheless, be said to be applicable to the manner of escape described by the evidence in the instant case? Is an attempt to escape from possible hurt by stones by running away from the scene, and running on ground thoroughly familiar to the victim, an act which by its very nature involves the natural consequence of injury? Can it make any difference to the nature of this act - the act of running away from the scene - that the victim trips and falls for some reason unknown and suffers a fractured skull resulting in death? Can it be said that the act of falling while running is an act forced upon the deceased by the appellants' conduct so as to make it the act of the appellants and, therefore, the actus reus of manslaughter? I suggest that the answers to these questions, not debated at the trial herein, may very well be in the negative.

I come now to R. v. Church (supra). It is important to observe that in this case the trial judge had directed the jury in the following terms:

> "If, by an unlawful act of violence done deliberately to the person of another, that other is killed, the killing is manslaughter even though the accused never intended either death or grievous bodily harm to result. If (the deceased) was alive, as she was, when he threw her in the river, what he did was a deliberate act of throwing a living body into the river. That is an unlawful killing and it does not matter whether he believed she was dead, or not, and that is my direction to you"'

and

> "I would suggest to you, though, of course, it is for you to approach your task as you think fit, that a convenient way of approaching it would be to say: What do we think about this defence that he honestly believed the (deceased) to be dead? If you think that is true, why then, as I have told you, your proper verdict would be one of manslaughter not murder."

The Court of Criminal Appeal held that these directions were wrong because the trial judge had, in effect, told the jury that whenever an unlawful act was committed in relation to a human being which resulted in death there had to be, at least, a conviction for manslaughter. The court thought that for such a verdict to follow, the unlawful act must be such as all

sober and reasonable people would inevitably recognize must subject the other person to, at least, the risk of some harm resulting therefrom. Be it observed, however, that the particular factual situation with which the court was dealing was one in which one person had killed another "by an unlawful act deliberately done (by the former) to the person of" the latter. The court was not there dealing with a situation in which the "actus reus" alleged was not necessarily, or inevitably, a natural consequence, or, indeed, a direct consequence, of an unlawful act by the person whose conduct was the subject of enquiry. To this extent it is somewhat difficult to appreciate why the court in Mackie's Case (supra) regarded R. v. Church as apposite to the circumstances with which it was there concerned.

In R. v. Towers, (1874) 12 Cox C.C. 533, the accused was charged with manslaughter arising out of the death of a 4½ month old child allegedly caused by convulsions following upon flight when the child's nurse screamed rather loudly as a result of being hit by the accused. Denman, J., in his summing-up, regretted the lack of assistance from previously decided cases and left it to the jury to determine "whether this death was directly the result of the prisoner's unlawful act - whether they thought that the prisoner might be held to be the actual cause of the child's death ....." He continued: "If, therefore, the jury thought that the act of the prisoner in asaulting the girl was entirely unconnected with it, that the death was not caused by it, but by a combination of circumstances, it would be accidental death and not manslaughter. See also R. v. Hickman, (1833) 5 C. & P. 151.

If anything emerges from R. v. Towers and R. v. Hickman it is that up to the latter part of the 19th century the rule as to strict liability was, in the view of some judges, still very much a part of the common law. Liability depended not on foreseeability but rather on the direct consequence principle.

All the cases noted above reveal that the courts demanded, as a matter of causation, a more logical nexus between an accused's

act and the deceased's death than a mere coincidence, without more, in the time and place of the occurrence giving rise to the charge. They insisted that the accused's conduct be not merely the causa sine qua non, but the causa causans of the death. This approach is strikingly illustrated in R. v. Bennett, 28 L.J.M.C. 27 and R. v. Fenton, 1 Lew. 179. In R. v. Bennett fireworks manufactured by the defendant exploded, through the negligence of the defendant's servants, causing a rocket to shoot across the street and set fire to a house thereby bringing about the death of an occupant. Cockburn, C.J., and Willes, J., in the Court for Crown Cases Reserved, set aside a conviction for manslaughter by adopting the "necessary and immediate consequence" test. The keeping of the fireworks "caused the death only by the super-addition of the negligence of someone else".

In R. v. Fenton (supra) the defendants threw stones down a mine causing scaffolding installed therein to break with the result that the lift in which miners were descending collapsed causing them to be thrown out and killed. Tindal, C.J., spoke of the causal factor in these terms:

> " The real question is whether the death is to be fairly considered as the consequence of the unlawful act; if it followed therefrom, as an effect from a cause the offence is manslaughter, and, if not, it is an accidental death".

The foregoing examination of the approach to causation, albeit brief, suggests that it is not an accurate statement of the law to say, as the trial judge said in this case and as was said in the Mackie Case , that liability attaches, inter alia, where the deceased is killed "in the course of and as a consequence of trying to escape".

For the reasons that I have attempted to give in this judgment I would allow the appeal and set aside the convictions.

WATKINS, J.A. (Ag.):

I have had an opportunity of reading the judgment of Graham-Perkins, J.A. and I am to say that I am in entire agreement therewith.