JAMAICA

IN THE COURT OF APPEAL

CRIMINAL APPEALS Nos. 33 and 34 of 1970

BEFORE: The Hon. Mr. Justice Luckhoo, Presiding
The Hon. Mr. Justice Smith J.A.
The Hon. Mr. Justice Hercules J.A.

R. v. WILBOURNE WALTERS and EDWARD WALTERS

L. Robinson, Q.C., and A. Campbell (the latter by assignment) for the appellant Wilbourne Walters.

V.O. Blake, Q.C., N.O. Edwards, and R. Taylor (the last named by assignment) for the appellant Edward Walters.

J.S. Kerr, Q.C., D.P.P. and Mrs. Ruby Walcott and P.T. Harrison for the Crown.

March 15-19, 24-26, 29-31, April 1, 30, 1971.
June 4, 1971

LUCKHOO J.A.

The appellants Wilbourne Walters and Edward Walters who are brothers were convicted in the Home Circuit Court on March 13, 1970, before Parnell, J., and a jury on an indictment charging them jointly with the murder of Vankirk Abrahams on February 1, 1969, and were sentenced to death. On April, 30, 1971, we allowed the appellants' appeals against their convictions, set aside the sentences of death recorded against them and instead, in the case of each appellant, substituted a verdict of manslaughter and a sentence of imprisonment for 18 years at hard labour stating that we would put our reasons therefor in writing at a later date. This we now do.

In setting out the salient features of the case we will refer to the first appellant as Wilbourne; to the second appellant as Edward; and to the deceased as Fellows.

It appears that at about 8 p.m. on Saturday February 1, 1969, two women and four men one of whom was Fellows were on their way to a party in a motor car. Fellows was driving the car. He wished to see his sister before proceeding to the party. He drove along Waltham Park Road, turned into Waltham Avenue and proceeded towards his sister's home which was situate above a shop on the corner of Waltham Park Road and Waltham Avenue. What occurred thereafter according to the prosecution's case was related by two of the occupants of the car - Leslie Clarke and Shearer Williams.

According to Clarke as the car turned into Waltham Avenue he saw two men ahead standing in the roadway. Fellows sounded his horn. The men remained standing in the roadway. Fellows stopped the car and said to the men "This is a car and is iron and you is flesh". Fellows came out of the car and went towards the men. There was some "hard talking". Fellows and the men started to fight. They fought for about 2 to 3 minutes with their fists. The men who Clarke later identified as the appellants Wilbourne and Edward then ran up Waltham Avenue. Then Wilbourne came down Waltham Avenue towards Waltham Park Road. Fellows in the meantime returned past the car and went to the house where his sister lived. After about 10 to 15 minutes had elapsed Shearer Williams left the car and went to call Fellows. Fellows came and was approaching the driver's door of the car when he was set upon by the appellants. The appellants had returned armed, Wilbourne with a machete and Edward with a ratchet knife. They proceeded to attack Fellows who was unarmed. Wilbourne cut Fellows with the machete somewhere across the shoulder while Edward cut Fellows with the knife in the abdomen. Fellows fell before the gate to his sister's home and the appellants left the scene. It was proved that at the preliminary examination into the charge laid against the appellants before the learned resident magistrate Clarke had said that after Fellows left the car he went towards the appellants and there was "hard talking" but that he did not speak of seeing a fight between Fellows and the appellants. Further, Clarke admitted that at the preliminary inquiry he did say that the man who had the machete chopped Fellows in the belly but he insisted that his evidence at the trial to the effect that the man armed with the machete, Wilbourne, chopped Fellows somewhere across the shoulder, was true. Shearer Williams gave a somewhat different account. He said that as the car came towards the house where Fellows' sister lived Wilbourne was standing in the roadway and Edward was standing under a tree on the sidewalk near to a gate. This would appear to be a reference to the gate to the premises where Fellows' sister resided. Fellows stopped the car and putting his head out of the window spoke to Wilbourne "You are not coming out the road, you make of iron, suppose the car bounce you and kill you?" To which Wilbourne replied "Bounce me down and see if I don't kill you." Wilbourne came off the road onto the sidewalk. Fellows parked

the car properly. Wilbourne was still arguing and Fellows came out of the car, went up to where Wilbourne was standing and told him that he was in the roadway, had seen the car coming and was not made of iron. Wilbourne then said "Say you should a bounce me and see if I don't kill you" and Fellows replied "you kill me fe dat and I don't bounce you?" Wilbourne pointed his finger in Fellows' face whereupon Fellows boxed Wilbourne's hand away. Someone from the car called out "No, Fellows, leave him and come". Fellows observing that they had to go to a party then left and went upstairs to his sister. The appellants went up Waltham Avenue. After Fellows was upstairs for sometime he (the witness) went upstairs to call Fellows as he wished to get to the party. Fellows left his sister's home and was about to open the driver's door of the car when he was attacked by the appellants who had returned to the scene, Wilbourne armed with a machete and Edward with a knife. Fellows was unarmed. He (witness) then ran upstairs to Fellows' sister's house.

Fellows died later that night. Dr. dePass performed a post mortem examination on the body of the deceased on February 4, 1971, and found the following injuries -

(i) an incised wound one centimetre in length on the left side of the root of the neck;

(ii) an incised wound one centimetre in length on the left side of the chest in the left intercostal space 6.5 centimetres from the midline entering the chest cavity by piercing the lower border of the fifth rib and penetrating the root of the main pulmonary artery;

(iii) an incised wound 3.5 centimetres in length below and to the right of the navel. Loops of the small bowel were protruding through this wound.

Death was due to shock and haemorrhage secondary to the stab wound of the left chest. All of the wounds were consistent with their being inflicted with a sharp cutting instrument such as a knife. To inflict the wound to the chest it would require a moderate to severe degree of force. Possibly a machete could have inflicted that injury. In the opinion of Dr. dePass the wound at the root of the neck was more consistent with the use of a knife than with a machete though he did not rule out the possibility of a machete with a narrow tip being used to inflict that wound. The injury to the abdomen could have been caused by a machete or by a knife.

At about 6.15 p.m. on Tuesday February 4, 1969, the appellants went to Hunts Bay Police Station. There Wilbourne in the presence of Edward told Deputy Superintendent of Police Wanliss - "Inspector, I hear that the police looking for two of us in connection with the killing at Waltham Park Road on Saturday night and we come to give up we self. Is not Tony (meaning the appellant Edward) cut him, is me". Edward did not say anything. Wilbourne was then cautioned and he made the statement set out hereunder -

> "Saturday the 1st of February, 1969, at about 10.30 in the morning, I see a man name Jack at Waltham Avenue and he told me he had a 'roast' - some painting work. I tell him it is O.K. I tell him I am not a professional painter but I will carry my brother to him. I ask him if he would like to see my brother right now. He said he would be out on the road the whole night for a dance will be on the road. Well, I went up same time and tell my brother about it and he said I will check him in the evening. At about 8.30 the Saturday night, I and my brother went down Waltham Avenue and ask a fellow if he see Jack and he he say Jack is in a barber shop. We asked over the barber shop and he was not there. We were at Waltham Avenue standing at a wall. I was in the sidewalk, I saw a blue Morris Oxford drive up. He was going to park and I move out of the sidewalk to the banking. I heard somebody in the car say, 'wait, you want dead'. I never answer. The driver came out the car and point his finger in my face and said, 'you going dead soon, you going dead.' I said if I dead, nothing going to wrong. He still pointed his finger in my face and still cursing a whole heap of bad words. I boxed his hand out my face and someone in the car said, 'no Mellos, leave him and come'. When the person speak, he was still pointing his finger in my face. I box out his hand and he thumped me in me face. I start to go backward and he still follow me up. Him push him hand in him waist like him going to draw a gun. I run off and him tek up a stone and throw at me. A man in the car said, 'come Mellos, leave him, leave him'. I went over to the other side of the road, him move across behind me and I see him coming to me with something in him hand. I did have a small pocket knife. I see him following me. I take the knife out of my pocket, open it and keep walking down the road. He run after me, catch me and held me in mi waist. He hit me with something hard in mi face and I get frighten and push mi knife before me and I see him run off and drop and say, 'I dead now'. I run off and go up the road."

This statement was relied on by Wilbourne in his defence at the trial. Both appellants were later that day arrested and charged with the murder of Fellows and cautioned. Wilbourne then told Detective Corporal Mullings "Me throw the knife over Maxfield Park". A search for the knife made by the police proved fruitless. Later that day both appellants were again cautioned and asked for the clothes they were wearing on the night of February 1, 1969. Wilbourne said that he was then wearing the clothes (shirt and trousers) he wore on that night while Edward said that his clothes were with his sister at Waltham Avenue. That evening Edward's clothes (shirt and trousers) were recovered from his sister, the trousers being, as described by Detective Corporal Mullings, "wringing wet" and the shirt dry. The clothes which the appellants said they had worn on the night of February 1, 1971, were later sent to Dr. Noel March, Government Pathologist for examination. It was elicited from Dr. March by counsel for Edward that traces of human blood were found on the lower front and right sleeve of Wilbourne's shirt and human blood in the form of drops, droplets and pale brown smudges on the back and front of Wilbourne's trousers. It was also elicited from Dr. March by counsel for Edward that no blood was found on any of Edward's garments while in reply to a question from counsel for the Crown Dr. March said that if there had been bloodstains on Edward's trousers immersion of that garment in water might or might not remove the bloodstains. It would depend on the amount of blood present on the garment and the amount of water in which it is immersed. It was further elicited by counsel for Edward that there might be spuing of blood from wounds such as those received by Fellows to the chest and abdomen though not from the wound inflicted on Fellows at the root of the neck.

The case therefore as presented by the prosecution was that there were two incidents - the first in point of time, an unarmed fight between the appellants and Fellows on the version of the witness Clarke, an altercation between Wilbourne and Fellows on the version of the witness Shearer Williams, and a second one, an armed attack made by the appellants upon Fellows who was unarmed upon Fellows' return to the car after the appellants and Fellows had left the scene and gone their separate ways and an interval of 10 - 15 minutes had elapsed.

The case for Wilbourne who in an unsworn statement relied on the statement he made to the police set out above was in effect one of self defence though if that were rejected the issue of manslaughter by provocation would arise. The case for Edward who gave sworn testimony was an alibi his evidence being to the effect that he was in company with his brother on Waltham Avenue when the car driven by Fellows was coming into that road but immediately left and went on his own business into a shop situate at the corner of Waltham Avenue and Waltham Park Road and was thereby absent from the scene and unaware of what was occurring between Fellows and his brother. He only returned to the scene after the injuries had been inflicted on Fellows.

In respect of Wilbourne the learned trial judge left to the jury the issue of self defence and provocation as arising on Wilbourne's statement. In respect of Edward the learned trial judge left to the jury the issue of alibi as arising on the evidence given by Edward. In respect of each of the appellants the learned trial judge expressly withdrew from the jury the issue of manslaughter as arising on the prosecution's case and directed the jury that the proper verdict if they accepted the prosecution's case was one of guilty of murder in respect of both appellants.

The jury after retiring for 37 minutes returned with unanimous verdicts of not guilty of murder and of guilty of manslaughter in respect of both appellants. Thereupon the learned trial judge declined to accept those verdicts stating that he did not think that the jury had followed the directions he had given them and that a judge was under no duty to accept the first verdict given by a jury. He told the jury that on the basis of the prosecution's case against Edward there was no room for a verdict of manslaughter against Edward and that he was either guilty of murder or guilty of nothing. He pointed out that while he had left the issues of murder and manslaughter in respect of Wilbourne he could not accept the verdicts returned. He asked the jury to reconsider the matter in the light of his directions. He then proceeded to give the jury further directions as to the verdicts which were open to them depending upon what view of the facts they took, directions similar in content to those he had originally given the jury before they first retired. The jury thereafter retired for a further period of one hour and four minutes and returned with unanimous

verdicts of guilty of murder against both appellants. Counsel for the appellants thereupon moved in arrest of judgment on the ground that the jury having once returned a verdict of not guilty of murder was functus officio in respect of the charge for murder and that there was therefore no power in the judge to recommit for the jury's consideration the issue of murder. In the result counsel urged the proper verdicts should be guilty of manslaughter in respect of Wilbourne and, to be in accord with the judge's directions, not guilty in respect of Edward. The learned trial judge denied these motions and proceeded to pronounce sentence of death on both appellants.

A number of grounds of appeal were filed in March 1970 by each appellant with his respective notice of appeal against conviction and during March 1971 supplementary grounds of appeal were filed on behalf of each appellant. At the hearing of these appeals some of the original and supplementary grounds filed were abandoned and on the application of counsel leave was granted to argue the remaining supplementary grounds. Mr. Leacroft Robinson for Wilbourne first submitted that the learned trial judge was in the circumstances of the case wrong in law in refusing to accept the first verdict of the jury respecting both appellants, to wit, not guilty of murder and guilty of manslaughter. Before dealing with this submission it is perhaps convenient to ascertain why the learned trial judge refused to accept the first verdict of the jury. He told them that he did not think that they had followed his direction that it was not open for them on any view of the evidence to find Edward guilty of manslaughter. He appeared to think that the verdicts first returned may have proceeded by reason of a compromise, hence his exhortation to consider the matter in the light of his directions, to show strength, not to compromise, and, if any of them could not accept the Crown's case, to say so and stand on it. As the trial judge saw the matter it was only if the jury accepted the Crown's case that a verdict adverse to Edward could at all be returned. The Crown's case in the trial judge's view amounted to a concerted attack upon Fellows by both appellants without provocation and if that case were accepted the verdict in respect of each appellant should be guilty of murder.

Under the common law on an indictment for murder it is open to the jury to convict of manslaughter if, and only if, there is evidence on which they can so find (R. v. Roberts [1942] 28 Cr. App. R. at p.107). If a jury on an indictment for murder returns a verdict of manslaughter where there is no evidence upon which they can so find the trial judge is entitled to ask them to reconsider their verdict and is only bound to accept their verdict of guilty of manslaughter if they insist upon such verdict being recorded. Two questions arise for consideration. The first is, did the issue of provocation arise in respect of the appellants on the Crown's case and if so could the trial judge for any reason lawfully refuse to accept the jury's first verdict of guilty of manslaughter in respect of the appellants, and secondly, if the issue of provocation did not arise on the Crown's case could the learned trial judge lawfully ask the jury to reconsider the first verdict of manslaughter in respect of Wilbourne upon the basis that the verdict of manslaughter in respect of Edward was inconsistent with the evidence whether of the Crown or of the defence? We take the view that the issue of provocation ought to have been left to the jury on the evidence of the witness for the prosecution Clarke who spoke of a fight between the appellants on the one hand and Fellows on the other and in dealing with the second ground of appeal argued on behalf of both appellants we shall state our reasons for taking that view. The learned Director of Public Prosecutions Mr. Kerr while contending that there was no issue of provocation arising on the prosecution's case sought to urge before us that in any event a trial judge has a wide discretion to ask a jury to reconsider its first verdict albeit that that discretion is to be judicially exercised and exercised in the interest of justice and a fair trial. He cited in support of that contention the dictum of Pollock, C.B. in the Court of Criminal Appeal in R. v. Meany (1862) 9 Cox at p. 233 -

> "If the question is, as I recollect from the case, this, whether the judge may, after the jury has pronounced a verdict, require the jury to re-consider their verdict, and they do so, and find a different verdict, the latter can be received, it is utterly unarguable. I recollect that, when I was a young man, a person was tried for shooting the Hammersmith ghost, before three of Her Majesty's Judges and the Recorder. The jury retired to consider their verdict, and after some time came back and found a verdict of manslaughter. Thereupon each of the three Judges addressed the

> jury, and told them they were at liberty to acquit the prisoner or find him guilty, and that if he were guilty of anything he was guilty of murder. They retired again, and returned finding him guilty of murder. He was told that he would not be executed, and he was pardoned. There is no doubt that a judge, both in a civil and criminal court, has a perfect right, and sometimes it is his bounden duty, to tell the jury to reconsider their verdict. He may send them back any number of times to reconsider their finding. The judge is not bound to record the first verdict unless the jury insist upon its being recorded. If they find another verdict that is the true verdict."

That was a case of an ambiguous first verdict which the trial judge refused to accept and told the jury that they must find the prisoner guilty or not guilty. After a short consultation the jury found the prisoner guilty. The matter was submitted to the Court of Criminal Appeal where the conviction was affirmed. The reference to the Hammersmith ghost case by Pollock, C.B. was to the case of R. v. Smith (1804). The neighbourhood of Hammersmith had been alarmed by what was supposed to be a ghost and the prisoner went out with a loaded gun to shoot the ghost. Upon meeting a person who was dressed in white the prisoner shot and killed him. The jury at first returned a verdict of manslaughter but the court refused to receive that verdict. Fresh directions were given to the jury. They were told that if they believed the evidence they must find the prisoner guilty of murder and if they did not they should acquit the prisoner. Macdonald, L.C.B. and the judges who charged the jury appear to have formed a view of the facts that the prisoner had at the outset intended to kill a person who was a practical joker. The dictum of Pollock, C.B., set out above if read without reference to the facts of the case then under appeal would appear to support Mr. Kerr's contention for a wide discretion in a trial judge to refuse to accept the first verdict of a jury. However, the other authorities cited to us by Mr. Kerr as well as those cited by Mr. Robinson do not go so far as to support that contention. Examination of those authorities Mr. Robinson contends supports the view that a trial judge may refuse to accept the first verdict of a jury only in cases where that verdict is (1) inconsistent with the evidence; or (2) ambiguous; or (3) one which the jury could not lawfully bring in on the indictment or the evidence. In R. v. Harris (1964) Crim. L.R. 54, C.C.A. it is thereat stated (at p. 35) as being held by the Court of Criminal Appeal (after the reasons given for dismissing the appeal)

"where a single verdict is ambiguous, or two verdicts are inconsistent, or the verdict is one which cannot on the indictment or in the circumstances be lawfully returned, the judge is entitled, unless the jury insist, to refuse to accept the first verdict and ask the jury to reconsider the matter and if they change their verdict to record only the second verdict." We have examined the cases cited to us on this point and do not think that it is necessary to say more about them than that they do appear to fall into one or other of the categories enumerated in R. v. Harris (ubi. sup.). We need not express any opinion as to whether those categories are exhaustive as Mr. Robinson contends they are or merely illustrative as Mr. Kerr contends they are, though we would say that where a verdict may lawfully be returned upon the indictment and the evidence, is unambiguous and is not inconsistent with any other verdict it can only be in exceptional circumstances, if at all, that a trial judge may refuse to accept it and ask the jury to reconsider it. Finding as we do that the issue of provocation ought to have been left to the jury on the evidence of the witness for the prosecution Clarke and there being in that event no suggestion of any exceptional circumstance we are of the view that the learned trial judge could not in the circumstances of this case lawfully refuse to accept the first verdict of guilty of manslaughter and that when he did so he was in error. The second question whether, if the issue of provocation did not arise on the Crown's case could the learned trial judge lawfully ask the jury to reconsider the matter in respect of Wilbourne now becomes academic. However, as there was considerable argument on this question we should perhaps state our views thereon. When the jury returned their first verdicts they could only have done so upon an acceptance of one or other or both of the witnesses for the prosecution Clarke and Williams that there was a concerted attack by both appellants upon Fellows. If provocation be excluded there is no room for a verdict of manslaughter. On no view of the defences advanced by the appellants or either of them was a verdict of manslaughter possible in favour of Edward. Upon the view of the evidence or circumstances the jury must have taken for them to find Edward a participant in the killing it is inescapable that the verdict of manslaughter in favour of Wilbourne was inconsistent with that evidence or those circumstances and if that were so it would be competent for the judge to refuse to accept not only the first verdict in respect of

Edward but also that in respect of Wilbourne.

In dealing with this ground of appeal Mr. Blake for Edward adopted the arguments advanced by Mr. Robinson on behalf of Wilbourne and further submitted that in respect of the verdict of guilty of manslaughter as to Edward the learned trial judge ought to have directed the jury to return a formal verdict of not guilty of manslaughter as Edward was entitled to be acquitted consistent with the directions the trial judge had given them; alternatively the verdict of manslaughter against Edward ought to have been accepted since such a verdict was open to the jury on the evidence. Mr. Blake contended that implicit in the verdict of guilty of manslaughter was a rejection of the prosecution's case or doubt in the minds of the jury about it for the purpose of establishing murder and that having regard to the directions given the jury by the trial judge as to the possible verdicts open to them on the evidence he should have directed a complete acquittal in respect of Edward. In no event, Mr. Blake argued, could the judge lawfully recommit to the jury for reconsideration the verdict of acquittal for murder implicit in the jury's verdict of guilty of manslaughter. We do not agree that the finding of manslaughter against Edward proceeded on a rejection of the prosecution's case. Indeed it could only have proceeded on an acceptance of it for on no other view of the evidence in the case could a finding against Edward have been made. Had there in fact been no issue of provocation arising on the Crown's case it would have been a matter where the verdict of manslaughter would have been returned by the jury where there was no evidence upon which they could have done so and as we have already indicated it would have been quite competent for the trial judge in such circumstances to ask the jury to reconsider their verdict. In such an event the jury would be entitled to reconsider the matter and might lawfully return a verdict of guilty of murder.

It was next submitted by Mr. Robinson that the learned trial judge erred in law in directing the jury that there was no provocation arising on the prosecution's case. In dealing with the first ground of appeal argued we have already said that we think that this submission is well founded and we will now proceed to give our reasons for so concluding.

The learned trial judge in directing the jury said -

"Now Mr. Foreman and Members of the Jury, on the prosecution's case, there is no evidence, no material whatever to support

provocation or self defence. But I will have to discuss with you the issues of provocation or self defence from what Wilburn Walters is saying in this statement, 'what he told the police. If I repeat, if you accept the prosecution's case as to what took place there is no room whatever for you to consider provocation or self defence because there is no evidence.

Now, let me remind you of something. The prosecution's case deals with the car driving up, parking and this talking and to use the language of Clarke, this 'hand passing for about two to three minutes', and as he calls it, 'a fight, a little fight, then the men went up the road'. He said one went up the other going down. There is a period of about ten to fifteen minutes according to the witness, two witnesses, before the deceased is attacked, during which time, according to the prosecution, each man, both men would have armed himself with a weapon. My duty as Judge, and I am dealing with the question of provocation now, is to leave for you material, if I find that there is material in it to support provocation for your consideration, but I am dealing with the prosecution's case first. The ten to fifteen minutes would have been sufficient time for these men to cool down if, in fact, what did take place was this 'hand passing for the two or three minutes.' Even if that is so, going to arm themselves with the weapon which is alleged to have been used, couldn't be said, and use it in that manner after that lapse of time, couldn't be regarded, and I am taking the responsibility, I am telling you this, that what the Section says is:

> '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 of 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.'

"What I am saying, what the prosecution is saying, there is none. However, in the statement of Wilburn Walters, there is material which I have to leave for your consideration. You remember we were discussing provocation at the start this morning but we have to go further.

Now, provocation arises, and I am dealing with this case, arises if the deceased did something to the accused Wilburn Walters or said something or a combination of both, which would

> cause a reasonable man to be provoked; and remember you are the ones to mark out, ascertain your own reasonable Jamaican man, which would cause this reasonable man to lose his self-control and cause him to do what the accused did. If therefore, there was this thing done, this thing done or could cause this reasonable man to lose his self-control or which in fact caused Wilburn Walters to lose his self-control, what was done or said by the deceased Fellows then Mr. Foreman and Members of the Jury, that would be enough for you to say that he was provoked and the charge of murder would go and it would be open for you to convict him of manslaughter. "

That portion of the passage which comes immediately before the recital of the provisions of s.3C of the Offences Against The Person (Amendment) Law, 1958, shows that the learned trial judge took the view that Clarke's evidence in relation to a fight between the appellants on the one hand and Fellows on the other if believed by the jury (on Williams' evidence no issue of manslaughter could be said to arise) could be regarded by them as evidence of the appellants being provoked into losing their self control. However, the learned trial judge took the view that having regard to the interval of time stated by Clarke as having elapsed between the end of that fight and the armed attack on Fellows no reasonable jury could say that there was not sufficient cooling time intervening and that even if the jury could reasonably take a different view, in any event the provocation offered was not enough to make a reasonable man do as the appellants did. Quite clearly if the learned trial judge was right in holding that on Clarke's evidence the jury could find that the appellants had been provoked into losing their self control it became a matter (of fact) for the jury, once the jury found that the appellants were indeed provoked into losing their self control, to say whether the interval of time which elapsed between the unarmed fight and the armed attack was sufficient to allow passion to subside and reason to be restored as it was also a matter (of opinion) for the jury to say whether a reasonable man would have reacted in the same way as the appellants did if still subject to the passion aroused by the provocation offered (see Glasford Phillips v. The Queen (1968) 13 W.I.R. 356). We think that we ought not to take a view different from that taken by the learned trial judge that the evidence of Clarke relating to the unarmed fight was such that the jury could conclude that the appellants had been provoked into losing their self control. Even though it might well be said that it was

not probable that they would have so concluded so long as it is possible that they may have done so the question ought to be left for their determination. The learned trial judge was therefore in error in withdrawing the issue of manslaughter on the prosecution's case and it is for this reason that we have found that the verdicts of murder must be set aside.

It was submitted by Mr. Blake that, assuming the issue of provocation did not arise on the prosecution's case, it was still open for the jury on the totality of the evidence to convict Edward of manslaughter. Having regard to the conclusions we have reached on the grounds of appeal already dealt with this question becomes academic. However, we feel that we ought still to give our views thereon because of the nature of the arguments advanced by Mr. Blake. He urged that even if the jury rejected the defence of alibi put forward by Edward it was still open to them to find on the unsworn statement of Wilbourne that there was but one continuing incident and not two incidents separated in point of time by an interval of 10-15 minutes as stated by the witnesses Clarke and Williams, that immediately prior to the fatal violence Wilbourne had been provoked by Fellows and to find in accordance with the case for the prosecution that Edward was present and struck Fellows in circumstances in which the provocation offered Wilbourne by Fellows was provocation also to Wilbourne's brother Edward. Mr. Blake contended that the omission of the trial judge to direct the jury that such a view of the matter could be taken on the evidence and thereby could found a verdict of manslaughter in respect of Edward was a non-direction which amounted to a misdirection which deprived Edward of a chance of an acquittal of murder. We do not think that it is permissible to use the contents of Wilbourne's unsworn statement in the way suggested by Mr. Blake. The contents of that statement do not form any part of the admissible evidence in relation to Edward. Further, even if it were permissible so to use the contents of Wilbourne's unsworn statement no credible narrative of events emerges from the material treated in that way and for the jury to take a view of the case as advanced by Mr. Blake would be pure speculation on their part. The case of R. v. Porritt (1961) 1 W.L.R. 1372, cited by Mr. Blake in this regard is easily distinguishable for the issue of provocation clearly arose on the totality of the evidence in that case, a credible narrative of events emerging therefrom.

It was next submitted by Mr. Blake that the learned trial judge erred in law in failing to direct the jury on the danger inherent in and the undesirability of a dock identification. The witnesses Clarke and Williams who it is conceded did not know the appellants before the fatal night did not attend any identification parade for the purpose of pointing out Fellows' attackers. They first purported to identify the two appellants as Fellows' attackers when they came to testify before the learned resident magistrate at the preliminary examination into the charge laid against the appellants. It was stated by one of the police officers who testified at the trial that Clarke and Williams could not be found when it was sought to hold an identification parade. Mr. Blake urged that in view of the fact that Edward had advanced an alibi in his defence and as the onus was on the Crown to establish that Edward was present at the time of the attack made on Fellows, the trial judge ought to have warned the jury that in deciding whether the evidence satisfied them that Edward was on the scene they should not place any weight on the fact that he was pointed out in the dock but the essential question that they should ask themselves was whether on an examination of all of the evidence there was a sufficient opportunity for the witnesses to be reasonably certain that Edward was on the scene at the material time.

It will be observed that there was never any suggestion on the part of the defence that someone other than Edward had participated along with Wilbourne in the armed attack on Fellows or in the events taking place prior thereto. Further, it was not denied that immediately before the arrival in Waltham Avenue of the car driven by Fellows the two appellants were together on that road. Once the jury believed Clarke or Williams or both of them that two men took part in the attack they described upon Fellows even if the warning Mr. Blake submitted the judge should have given the jury were given it was inevitable that the jury would find that Edward was one of the attackers. We do not think that there is any substance in this ground of appeal.

It was also submitted by Mr. Blake that the learned trial judge wrongly left it open to the jury to infer that the trousers worn by Edward on the night of February 1, 1969, were wet when the police got them on February 4, 1969 because Edward wished to have bloodstains removed from them

and that he ought to have directed the jury that the evidence did not warrant an inference adverse to Edward on this point. The evidence relating to the condition of Edward's trousers arose in this way. Counsel for the prosecution proposed to examine the Government Pathologist Dr. Noel March as to the result of his examination of the appellants' clothing for the presence of bloodstains when the learned trial judge intervened to suggest to counsel that such evidence would not take the case for the prosecution any further. Counsel for the prosecution in agreeing that that was so said that as the witness's name was at the back of the indictment he thought that it was his duty to call him. Upon the trial judge observing that there was no such duty counsel for the prosecution said that he accepted the trial judge's advice. He did not examine the witness any further. All of this was said in the presence of the jury. Counsel for Edward, however, embarked upon a cross-examination of the witness eliciting that blood had been found on Wilbourne's clothing, that none had been found on Edward's clothing and that in all likelihood blood would have spued from the wounds inflicted to the chest and abdomen whereas spuing of blood from the wound at the root of Fellows' neck was unlikely. Edward in his evidence said that he had sent his clothing to be washed by his sister in the normal course and not for the purpose of the removal of any bloodstains. All of this material was elicited by counsel for Edward for the purpose, as counsel's address later indicated, of supporting Edward's defence of an alibi, counsel contending that such testimony rendered it more likely that all of the wounds on Fellows were inflicted by Wilbourne rather than that Wilbourne inflicted only the wound at the root of the neck. Counsel for the prosecution by way of re-examination elicited that if Edward's trousers did in fact have blood before it was given to his sister to be washed such blood could have been removed by washing but that this would depend on the amount of blood present and the amount of water in which immersion takes place. When summing up the case to the jury the learned trial judge told the jury that the case for the prosecution rested on the evidence of the witnesses Clarke and Williams. Then he proceeded to remind the jury of the evidence given by those witnesses, and the criticism of counsel thereon. He thereafter reminded the jury of the evidence given by the other witnesses in the case which included the answers elicited by counsel for Edward in cross-examination

of Dr. March and the answers given in re-examination of that witness. He reminded the jury of the contentions advanced by counsel for Edward in relation to Dr. March's testimony and that counsel for the prosecution had in reply said that the trousers had been immersed in water for the purpose of removing bloodstains therefrom. The learned trial judge after putting the views advanced by counsel told the jury that it was a matter for them. Mr. Blake has urged that the learned trial judge was in duty bound to tell the jury that the evidence did not warrant an inference adverse to Edward on this point and that his failure to do so might have tipped the scales against Edward in the jury's decision to reject his defence of an alibi. We do not think that any reasonable jury could have resolved the matter in that way. Not only were they aware that the learned trial judge had expressed the view that the condition of Edward's trousers could not be used to advance the case for the prosecution and that counsel for the prosecution had stated his agreement with that view but they were also aware that it was only because counsel for Edward had utilised the evidence of the absence of blood on the trousers in support of the defence of alibi and of a greater likelihood that Wilbourne had inflicted the wounds attributed by the witnesses to Edward that counsel for the prosecution had sought to show that had there been blood on the trousers it could have been removed by immersion of the garment in water. In addition, the learned trial judge had made it quite clear from the very commencement of his summing up that the case for the prosecution depended on the evidence of the two eye-witnesses Clarke and Williams. It was in that context that the jury would decide whether there was a likelihood of blood spuing onto Edward's garments and if so, the reason for its absence when Dr. March came to examine them three or four days later. We are therefore of the view that in the way the matter proceeded the learned trial judge did not err in dealing as he did with this aspect of the matter.

Another ground of appeal argued by Mr. Blake related to the directions given by the learned trial judge on the defence of alibi advanced by Edward. Mr. Blake submitted that the learned trial judge failed to direct the jury that rejection of that defence would not be sufficient ground for convicting Edward. While it is true that the learned trial judge did not give such a direction in specific terms it is clear that having regard

to the way in which he directed the jury in relation to the burden of proof and the defence raised by Edward there was no danger of the jury coming to a conclusion adverse to Edward by reason only of a rejection of his defence of alibi. As Mr. Kerr observed, apart from the general directions given by the trial judge in respect of the burden of proof he told the jury that the prosecution had to prove Edward's involvement in the crime and also had to disprove his defence of alibi. There was no doubt at all that the trial judge in effect told the jury that a conviction against Edward must be founded on the strength of the case for the prosecution. This ground of appeal therefore fails.

A further ground of appeal urged related to the directions given by the learned trial judge in respect of contradictions, inconsistencies and discrepancies which admittedly appear in the testimony of the prosecution witnesses Clarke and Williams. This ground of appeal was fully argued by Mr. Taylor counsel for Edward. Mr. Taylor stressed the importance to Edward's case of the determination by the jury of the question raised as to whether or not only one person attacked Fellows and inflicted the injuries on him and the bearing that the credibility of the witnesses Clarke and Williams would have on the answer to that question. He rightly urged that this necessarily involved consideration of any contradictions, inconsistencies and discrepancies appearing in the evidence they gave. He contended that these witnesses at the trial deviated on material points from the evidence they had given at the preliminary examination and in some instances under cross examination from their evidence given when examined in chief. He submitted that the trial judge ought to have directed the jury to disregard those portions of the evidence in respect of which unexplained deviations or discrepancies existed and to consider the extent to which deviations in the testimony of each witness affected his credibility in their evaluation of his evidence. He further submitted that the trial judge approached the matter in a manner calculated to derogate from the effect of the contradictions, inconsistencies and discrepancies and to exclude a proper evaluation of the evidence whereby there was occasioned improper prejudice to Edward. Mr. Taylor in examining the testimony of the witnesses Clarke and Williams pointed to a number of instances which he contended disclosed contradictions, inconsistencies and discrepancies on material points on the part of these

witnesses. It is not necessary to catalogue these instances. Suffice it to say that there were among them instances which a jury might well consider to have remained without a satisfactory explanation on the part of the particular witness and therefore the evidence in those instances to be unworthy of acceptance. The learned trial judge did indeed specifically refer to almost all of the instances of which complaint was made pointing out the criticisms made in those regards by counsel at the trial. However, we will say at once that in more than one instance he put the explanation offered by the witness in such a way that complaint might justifiably be made that he was indicating that the explanation offered was worthy of acceptance. However, the learned trial judge did in the final analysis leave to the jury the determination of these matters as questions of fact and we do not take the view that he went so far as to derogate from the effect of the contradictions, inconsistencies and discrepancies pointed out to the jury or to exclude an improper evaluation of the evidence. Mr. Taylor submitted, relying on R. v. Golder (1960) 3 All E.R. 457, a judgment of the Court of Criminal Appeal in England, that the trial judge ought to have directed the jury that the evidence of the witness in those instances should be regarded as unreliable in the sense that they should disregard it. R. v. Golder was a case where a previous statement of a witness was put to an adverse witness to destroy his credit but was treated by the trial judge as evidence in the case upon which the verdict could be based. It was held on appeal that this was wrong as previous statements, whether sworn or unsworn, do not constitute evidence upon which a jury can act. The direction which Mr. Taylor has asked us to say is the proper one in fact is that mentioned in R. v. Harris (1927) 20 Cr. App. R. 144. However, as Wooding, C.J. has observed in Mills & Gomes v. R (1963) 6 W.I.R. 418 at p. 421, the direction given and approved in R. v. Harris (ubi sup) "prescribes no rule of law. It simply provides guidance to a judge as to the nature of the direction he ought justly to give to a jury in the circumstances mentioned." Bearing in mind the criticisms we have already made of the manner in which the learned trial judge dealt with some of the explanations offered by the witnesses we cannot say that the way in which the learned trial judge finally left these matters for the determination of the jury was unjustified in the circumstances. There is one discrepancy to which we ought to make specific

reference for considerable importance was attached to it at the trial and on appeal. The witness Clarke said at the preliminary examination that he saw the man with the machete chop Fellows on the belly whereas at the trial he said that he saw the man with the machete chop Fellows somewhere on the shoulder. The learned trial judge dealt with the discrepancy in this way. He told the jury -

> "There again, as Mr. Campbell rightly said and Mr. Taylor said, there is a difference between a man's belly and his back. That is correct. Here again the whole substance of the matter is, you are required to, again, call on your commonsense, bearing in mind the directions that I gave you. If Wilbourne Walters has the machete and he is making an attack on the deceased along with his brother intending, each helping the other, intending to do him grievous bodily harm or to kill him, does it matter whether he chopped him in the belly or his back? In law he would still be guilty whether or not the machete chopped him in his belly or that part of the region of the chest where was this serious wound that the doctor found."

Mr. Taylor urged before us as we are sure that he did before the jury that the importance of this discrepancy was as to whether or not a machete had in fact been used and if not used that would tend to establish the contention of Wilbourne that he alone was involved with the deceased and used a knife, thereby indirectly giving support to Edward's alibi. Mr. Taylor urged that not only had the trial judge failed to put the significance of this contradiction to the jury but in fact completely distorted the significance of the contradiction and in fact told the jury that it was of little or no importance. We do not think the learned trial judge dealt with the contradictory statements made by the witness in this regard as fully as he ought to have done and had this evidence stood alone we might have been constrained to take the view that the learned trial judge's failure in this regard was a fatal defect. However, there still remained the evidence of the other eye-witness Williams who spoke of an attack by the two appellants on Fellows and the unsworn statement of Wilbourne adopted by Wilbourne at the trial in which no account is given by Wilbourne as to how as many as three separate incised wounds came to be inflicted on Fellows. Indeed it is fair to say that the statement refers to no more than one blow given by Wilbourne. In those circumstances and in view of the fact that the matter was as in the

case of the other discrepancies left for the determination of the jury we are of the opinion that the inadequacy in the summing up pointed out is not fatal. In the result this ground of appeal cannot succeed.

The last ground of appeal urged was that the verdict of the jury was unreasonable or unsafe having regard to the nature and character of the evidence. We have come to the conclusion upon a consideration of the several matters to which our attention was attracted during the course of the argument that this ground cannot be sustained.

The appellants having succeeded on the second ground of appeal argued - that is to say, that the learned trial judge erred in not leaving the issue of manslaughter to the jury on the prosecution's case, the convictions for murder cannot stand. It is clear from the verdicts returned that the jury rejected Wilbourne's plea of self defence and the defence of alibi advanced by Edward. In those circumstances we allowed the appeals of both appellants, quashed the convictions for murder, set aside the sentences of death and instead in the case of each appellant entered a conviction of manslaughter and a sentence of imprisonment of 18 years at hard labour.

Before finally parting with the case we would like to record our appreciation of the careful and helpful arguments addressed to us by all counsel engaged in the appeals.