JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 97 & 98/95

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE WALKER, J.A. (AG.)

R. V. CYRIL BARTON
WINSTON BARTON

Jack Hines for Appellants

Hugh Wildman & A. Armstrong for Crown

18th October & 20th December, 1996

GORDON, J.A.

On 29th June, 1995 the appellants who are father and son were convicted for the murder of Chester Strachan on 1st March 1994. Each was sentenced to imprisonment for life. Winston Barton, the son, was ordered to be considered ineligible for parole until he has served fifteen years of his sentence. Cyril Barton, his 77 years old father, in the absence of any pronouncement made by the trial judge, would fall to be considered for parole after he has served seven years of his sentence; this by virtue of the Parole Act.

There was but one eyewitness to the incident, one Paulette Duncan. She testified that at about 7.00 a.m. on 1st March, 1995 she went to the pipe to fill a pail of

water. She saw the appellants whom she knew for several years before as father and son. She heard them quarrelling with the deceased o/c "Devon" or "Bionic". She did not actually see the deceased at this time but heard and recognized his voice. On her way back home with the water she heard "trash mashing" and saw the deceased running and being chased by Winston Barton (son) on the bank of the road. The deceased slid under a wire fence and fell in the road. As he got up to run Winston Barton jumped down behind him and chopped him across his back with a cutlass. The deceased fell. Thereafter Winston Barton continued to chop the deceased all over his body. The father, Cyril Barton, came on. He threw a stone at the deceased; the stone hit Winston Barton. Then Winston Barton told Cyril Barton to come - saying "Come Papa". Cyril Barton responded "I dont get my share yet" and, using his cutlass, he started to chop the deceased who was then against the gatepost of a church and in a sitting position. Eventually Cyril Barton and Winston Barton both went away together down the road. The witness looked at the deceased, and noticed a big chop across his back and that he was seriously injured. At no time did she see the deceased attack Cyril Barton and Winston Barton. The deceased was running when Winston Barton chopped him across his back. The deceased was sitting on his bottom and leaning against the gate post of the church as Winston Barton continued to chop him. She did not see the deceased with a cutlass that morning. After the appellants left she spoke to the deceased as he requested help. She sought to get help as she was then pregnant and could render no physical assistance.

Detective Corporal Patrick Callum on receipt of a report about 9.00 a.m. drove a police vehicle from the Annotto Bay Police Station on the Comberwell road. There, some three miles from where he saw the corpse of the deceased, he was hailed and stopped by the appellants. Cyril Barton addressed him "We chop up the boy and se

him machete ya whe him attack mi wid and a chop mi wid", Cecil then delivered a machete to the witness. Cpl. Callum asked Winston Barton if he was involved in the incident and he replied "yes mi and mi old man." Cpl. Callum took the appellants in the jeep and drove on. At the gate of the Jehovah Witness' Church Cyril Barton pointed to the body of the deceased lying on the ground and said "See the boy deh". Cpl Callum took the appellants to the Police Station and carried out investigations in the case. He later returned to the police station and arrested and charged the appellants for murder. Cautioned, Cyril Barton said "Why not me, ah mi do the chopping, mek mi hang." Winston said "mi nuh have nothing fi say." This witness said he saw no injury on either appellant and neither pointed out an injury to him nor made any complaint of any injury.

Where the incident occurred was two chains from the home of the deceased and one mile from the home of the appellants. Evidence in the case showed that there was bad blood between the appellants and the deceased and a confrontation between them the previous day. The appellants had complained to the police of threats allegedly made by the deceased. On the morning of the incident and shortly before the event witnessed by Paulette Duncan, Mr. Patrick Britton returning from his field, saw the deceased standing by his gate unarmed while the appellants, each armed with a machete, stood in the road quarrelling. He asked the Bartons why they had taken war to his gate and Cyril Barton replied that the deceased had brought them there. Mr. Britton went inside his house, changed his clothes and left to go to Annotto Bay. On his way he saw the body of the deceased by the church gate two chains from his home.

Dr. David Crawford performed the post mortem examination. He identified 18 wounds on the body. They were on the left leg, left knee, left shin, left hand, left wrist, left forearm, left elbow, left upper arm, near left shoulder, right shoulder, right elbow,

right forearm, right wrist, right hand, left buttocks right lower back, left side of face and jaw. Death he said resulted from multiple chop wounds. From the number and severity of the wounds he estimated death would have occurred in ten minutes.

Later the same morning, according to the witness, Juliet Strawn, Winston Barton described himself to her as a "cold-bloodied murderer."

Winston Barton in an unsworn statement said the deceased attacked him with a machete, having first knocked him down with a stone. In these circumstances his father, Cyril Barton, chopped deceased "fi save me life". He was unarmed when deceased knocked him down. But Winston Barton's witness, Inspector Cunningham said that Winston Barton said "Mi chop him too." Cyril Barton, in his unsworn statement, said the deceased was armed with 2 stones and a cutlass. Deceased flung a stone hitting down Winston Barton. Thereafter deceased ran down on Winston Barton. He thought deceased was going to kill Winston Barton. He went up to the deceased whose back was then turned to him and chopped him. Then deceased turned around to face him and lifted the hand in which he was holding the cutlass to chop him. He gave deceased another chop and, after that, several chops. Afterwards he took possession of the deceased's cutlass which later the same day he handed over to Inspector Callum.

Leave to appeal having been granted Mr. Hines advanced two grounds of appeal thus:

> "1. That the learned trial Judge erred in that he misdirected the Jury in law that there was a burden on the part of the Defendants to satisfy them as regards the issue of self- defence (see in particular page 13 final paragraph and paragraph two page fifteen) and further that that burden was one of the balance of probabilities (see page 14 paragraph one).

> 2. That the learned trial judge's direction on the issue of self-defence was generally inaccurate and confusing particularly on the matter of the use of force (see in particular final paragraph on page 12) and further on the said matter of force he wrongly directed that the Prosecution was saying that the deceased in effect was immediately destabilised after the first wound to the back. However, the evidence of destabilisation comes from the doctor who states with the significant difference (see page 41) that 'overtime, it (i.e. the wound) would be destabilising.' This does not contrast definitively and or at all with the appellants evidence that immediately after he chopped the deceased, the deceased 'Chester Strachan turned around and face me and lift up his hand with his cutlass to chop me and I give him a chop again' And he added 'I give him several chops' (see page 53). This misdirection and or misquotation was gravely prejudicial to the appellants."

Mr. Hines submitted that the impugned directions are so fundamental as to lead to a miscarriage of justice which warrants the quashing of the conviction. We give below the extracts:

> "Page 13 - For this defence of self defence to satisfy you you must look for the following: That there was an attack upon the accused. They are saying, the defence is saying that the deceased man flung a stone, hit down Winston Barton and then came over him with the machete. So the defence must satisfy you that that did really happen. Then as a result of that attack, the accused must have honestly believed that he was in imminent danger of death or serious bodily injury. So this is what Mr. Cyril Barton has said, that when he looked and saw the deceased standing over his son, about to chop him up, he realized that his son was in serious danger, and then he inflicted the injuries. He told you yesterday that he made one chop, and then he made several chops afterwards.

> Page 14 - ... when I say the Defence has got to satisfy you, whatever the Defence has got to produce any defence. In a court of law, the Defence is only required to do so on a balance of probabilities. It doesn't have the strong burden that the Prosecution have in proving anything. It doesn't have to satisfy you so that you feel sure but this is what the defence has raised by the accused persons and there are certain requirements that they must satisfy you about. One is that they must satisfy you about is that the force used by the accused must have been used to protect either themselves or somebody close to them, their relatives, protect themselves from death or serious injury intended towards them or even an apprehension of it. The force that is used must not be by way of revenge.
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> Page 15: The defendant must satisfy you also that they honestly believed that the force used by them was necessary to prevent or resist the attack but in deciding this whether it was necessary to have used such force as, in fact was used, regard must be had to all the circumstances. One of them is the possibility of retreating or if he can safely retreat, then it was not necessary to use any force at all or having used the first infliction of the first chop, the man is down and out, there is no necessity to put any more unless there is some evidence that the man is about to get up, to come back at you and so forth. So, here it is, this man is flat out, helpless. It was never suggested to any of the witnesses for the Prosecution or one of the witnesses the Prosecution called as to what she saw happened, was never, it was never suggested to her that after the first chop that the man had any machete and was trying to get up or trying to do anything at that time. So, there will be no necessity for any continuation of the attack."

The directions are, without doubt, in part incorrect, but the summing-up must be considered as a whole and the extracts in isolation do paint the picture outlined by Mr. Hines. Later in his summing up the trial judge said:

> " Page 16: Notwithstanding the fact that I am saying that the defence has to satisfy you on these issues, the onus and burden remains throughout on the Prosecution to prove the case so that you feel sure. If, on consideration of all the evidence including the statements given by both accused persons, you are left in doubt whether the killing may not have been done in self-defence, the proper verdict would be one of not guilty.
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> Page 18: ... there is no burden upon them to prove that. It is the Prosecution who must bring evidence to disprove both self-defence and to disprove provocation.
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> Page 44: As I told you in my preliminary instructions yesterday, the accused men don't have to prove anything. There is no burden in law for them to prove anything. So, the Prosecution is depending upon the evidence that they have brought before you.
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> Page 61: Once again, just let me give you a words (sic) of caution that it is the Prosecution who has brought this charge against these two men. The Prosecution must make you feel sure about their guilt. They are not required to prove their innocence."

The trial judge in these extracts corrected the erroneous directions given earlier by emphasising that there was no burden of proof on the defence but on the prosecution.

Mr. Wildman urged that the misdirection was given once and never repeated by the learned trial judge who, thereafter, on the occasions identified in the excerpts I have given, corrected his error by giving the correct directions on the burden of proof. This is a proper case for the application of the proviso to Section 14(1) of the Judicature (Appellate Jurisdiction) Act, he submitted. The proper test the Court should apply was whether a reasonable jury properly directed would have arrived at the same verdict. Application of this test would evoke an affirmative response he submitted. The appeal should, therefore, be dismissed.

In ***Director of Public Prosecutions vs. Leary Walker*** [1974] 12, J.L.R. 1369 Lord Salmon in the Privy Council gave guidance on the "objective evidential value of an unsworn statement" and it is for this guidance that reference is often made to the case. The case, however, dealt with self-defence and we find the judgment of the Board very helpful in our deliberations.

The accused Walker inflicted on his wife "eleven stab wounds any one of three could have caused her death." He was found guilty of manslaughter on the ground of diminished responsibility. He appealed to the Court of Appeal against his conviction and argued that the trial judge should have left self defence to the jury. The Court of Appeal accepted this argument, allowed the appeal and ordered a new trial. The Director of Public Prosecutions by leave appealed to the Board of the Privy Council. In allowing the appeal - Lord Salmon at page 1372c said:

> "... (a) the accused has not relied on self-defence and (b) the evidence is consistent only with the force used being far greater than could conceivably have been necessary, no appeal can succeed on the ground that the judge has not left self-defence to the jury. The judge would be quite wrong to do so because any verdict of manslaughter on the ground of self-defence would be perverse: There would be nothing to support it."

In ***Walker's*** case there were eleven wounds and the court held that they were consistent only with the force used being greater than could conceivably have been necessary in self-defence. In the instant case there were eighteen wounds inflicted by machetes. Self-defence was raised but was rejected by the jury. Indeed, if the jury had accepted self-defence that would have been a perverse verdict.

The doctor found six of the wounds serious, the one numbered 17 being the most serious. This wound on the right side of lower back was nine and three quarter

inches long, four and three quarter inches wide and three inches deep. This injury in his opinion, would "over time" have been destabilizing. This injury, Miss Paulette Duncan said, was inflicted by Winston Barton and the immediate effect of it on the hapless victim was that he fell. Thereupon he was set upon and chopped by the appellants. Here we have the opinion of the doctor, the expert, at variance with the direct evidence of the eye witness who saw the chop administered with the immediate effect of destabilizing the victim. This chop which Miss Duncan saw administered by Winston Barton, Cyril Barton, claimed he inflicted. The defence claimed that Winston Barton was struck down with a stone thrown by the deceased who thereupon attacked Winston with a machete. Cyril then went to his son's defence and chopped the deceased when he turned his back, in his back. The deceased then turned with an upraised machete to face Cyril Barton who proceeded to chop the deceased. On the evidence of the police no injuries were sustained by Winston Barton and none was complained of by Winston Barton or Cyril Barton. The prosecution case was that the deceased was unarmed, it was the appellants who had arms and used them.

In ***Vasquez v. R*** [1994] 3 All E.R. 674 a multiplicity of stab wounds were administered to the deceased, self-defence was raised and it was alleged that there were two misdirections on self-defence given by the trial judge. One misdirection was accepted as such; of the other Lord Jauncey who delivered the judgment of the Board said:

> "Even assuming that there was a further misdirection in this respect their Lordships do not consider that the two misdirections require that the conviction be quashed. Given the multiplicity of stab wounds inflicted on the deceased and the absence of any similar wounds on the accused, together with the evidence that the deceased was unarmed, whereas accused continued to stab her

> while dragging her through the hall, it is difficult to imagine that the jury could have reached a different verdict even if they had been properly directed upon the two foregoing matters. In their Lordships' opinion, no substantial miscarriage of justice has occurred and this is a clear case for the application of the proviso ...".

Vasquez v. R affords an excellent example of how the powers of the appellate tribunal should be applied. The trial judge wrongly directed on the burden of proof placing the onus in provocation on the appellant. Provocation did arise on the evidence and the Board of the Privy Council held that the conviction for murder must be reversed and a verdict of manslaughter substituted. This had to be so as the failure of the judge to give the appropriate directions to the jury denied the appellant the opportunity of a favourable verdict, hence there was a miscarriage of justice. Directions on self defence were likewise erroneous but the Board held that self defence did not arise hence the erroneous directions could not avail the appellant. The appellant had inflicted what was described as a multiplicity of stab wounds on the victim which injuries negatived self-defence. The Board held that the injuries were conceivably more than were necessary for self-defence.

I now turn to a consideration of the application of the proviso. In ***Walker's*** case the Privy Council held that the appeal could not succeed on the ground that the judge had not left self-defence to the jury. In that case there were eleven stab wounds. In ***Vasquez*** there was a multiplicity of stab wounds and misdirections, the Board's judgment on self-defence was: - "it is difficult to imagine that the jury could have reached a different verdict even if they had been properly directed. In their Lordships' opinion, no substantial miscarriage of justice has occurred and this is a clear case for the application of the proviso."

The proviso was applied by the Court of Appeal in Grenada in ***Charles Ferguson v. R*** 25 W.I.R. 559: Here -

> "The court found that despite the misdirection of the Judge to the jury on the question of intent which must be proved, the verdict of guilty of murder was the only proper verdict on the evidence, the appellant suffered no injustice and there was no miscarriage of justice."

The appeal to the Privy Council was dismissed. The Board, in dismissing the appeal, held "There was no miscarriage of justice at the end of the trial and the proviso would be applied."

Lord Scarman in delivering the judgment of the Board said at page 563B:

> "The application of the proviso is justified only if the court considers that no miscarriage of justice has actually occurred."

These cases make it clear that the strength of the prosecution case is a factor of paramount importance in a consideration of the disposition of a case on appeal. Where there is misdirection the primary consideration of the court must be whether a reasonable jury properly directed would have convicted. If the court is of the opinion that a reasonable jury in the circumstances would have convicted then that, in all probability, would justify the conclusion that no miscarriage of justice had actually occurred and render the proviso applicable.

This court sought the opinion of their Lordships of the Privy Council on 'What are the principles which should apply in considering whether or not a new trial should be ordered." See ***Reid v R*** [1978] 27 W.I.R. 27. Section 14 of the Judicature (Appellate Jurisdiction) Act makes these provisions -

> "14-(1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that

> the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.
>
> (2) Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

The Privy Council, cognizant of these provisions of our Appellate Act responded authoritatively per Lord Diplock at page 258 d-f:

> "Their Lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing-up to the jury. Save in circumstances so exceptional that their Lordships cannot readily envisage them it ought not to be exercised where, as in the instant case, a reason for setting aside the verdict is that the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed. It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the accused.
>
> At the other extreme, where the evidence against the accused at the trial was so strong that any reasonable jury if properly directed would have convicted the accused, prima facie the more

> appropriate course is to apply the proviso to s 14(1) and dismiss the appeal instead of incurring the expense and inconvenience to witnesses and jurors which would be involved in another trial." [Emphasis added]

For there to be a contemplation of a new trial there must be fault in the conduct of the trial or the summing-up. Where by such fault the accused is denied the fair chance of an acquittal there has been a miscarriage of justice and the appeal must be allowed and a determination on whether there should be a new trial made on the guidelines given. Where, however, there has been no miscarriage of justice the strength of the prosecution case is the determinant. When the prosecution case is overwhelming there should be no new trial but an application of the proviso dismissing the appeal.

The injuries inflicted on the deceased in this case are "far greater than could conceivably have been necessary." Self-defence cannot avail the appellants. A misdirection on self-defence cannot affect the justice of the case.

On the authorities to which we have made reference and on the facts of this case we hold that there has been no miscarriage of justice. Applying the proviso we would dismiss the appeal and order that sentence should commence on 29th September, 1995.

RATTRAY P (Dissenting):

On the 30th of June 1995 the appellants Winston Barton and Cyril Barton were convicted in the St. Mary Circuit Court of the non-capital murder of one Chester Strachan and sentenced to life imprisonment with 15 years set as the period before which the appellant Winston Barton would be eligible for parole.

A single Judge of the Court of Appeal granted leave to appeal because of the Judge's directions to the jury on self-defence.

The Learned Trial Judge, as he was bound to do in his summing-up, dealt with the issue of self-defence which had been raised by the appellants. He stated that:

> "The deliberate and intentional killing if done in self-defence is no offence at all."

He listed the ingredients which the prosecution is required to prove to establish the offence of murder and stated:

> "They must go further to prove the killing was not done in lawful self-defence."

He outlined the evidence relied upon by the defence in relation to the issue of self-defence and then stated:

> "For this defence of self-defence to satisfy you you must look for the following: That there was an attack upon the accused. They are saying, the defence is saying that the deceased man flung a stone, hit down Winston Barton and then came over him with the machete. So the defence must satisfy you that that did really happen. Then as a result of that attack, the accused must have honesty believed that he was in imminent danger of death or serious bodily injury. So this is what Mr. Cyril Barton has said, that when he looked and saw the deceased standing over his son, about to chop him up, he realized that his son was in serious danger, and then he inflicted the injuries. He told you yesterday that he made one chop, and then he made several chops afterwards." [Emphasis mine]

Then immediately followed an intervention by Crown Counsel and the Learned Trial Judge continued:

> "As a result of what Crown Counsel has said, when I say the Defence has got to satisfy you, whenever the Defence has got to produce any defence, in a court of law, the Defence is only required to do so on a balance of probabilities. It doesn't have the strong burden that the Prosecution have in proving anything. It doesn't have to satisfy you so that you feel sure but this is what the defence has raised by the accused persons and there are certain requirements that they must satisfy you about." [Emphasis mine]

He later stated:

> "The defendant must satisfy you also that they honestly believe that the force used by them was necessary to prevent or resist the attack but in deciding this whether it was necessary to have used such force as, in fact was used, regard must be had to all the circumstances." [Emphasis mine]

Later on he cautioned:

> "Notwithstanding the fact that I am saying that the defence has to satisfy you on these issues, the onus and burden remains throughout on the Prosecution to prove the case so that you feel sure. If, on consideration of all the evidence including the statements given by both accused persons you, you are left in doubt whether the killing may not have been done in self-defence, the proper verdict would be one of not guilty."

He later continued:

> "Once again, just let me give you a word of caution that it is the Prosecution who has brought this charge against these two men. The Prosecution must make you feel sure about their guilt. They are not required to prove their innocence. You have to take into consideration the explanations they give, and you might recall that the direction and law of self-defence that I gave you, you give one chop and destabilize a man, so that he can't be of any further problem to you, and you go on to chop him, give him seventeen, sixteen more chops. That surely would be excessive

> force and therefore the whole question of self-defence would have been destroyed." Emphasis mine]

Here the Learned Trial Judge is making a determination on a question of fact which is for the jury. This of course is not permissible.

And finally:

> "If you are satisfied that the defendants acted in lawful self-defence, and that they didn't use more force than was necessary, then it means that the Prosecution failed to make you feel sure that they were not acting in lawful self-defence, in which case, you would have to acquit them."

It has been urged on us by Mr. Wildman for the Crown that although the Learned Trial Judge may have erred in his earlier remarks he corrected his error in his later directions.

The Trial Judge is required in every criminal case to give to the jury a clear direction as to where the burden of proof lies, and that is with the prosecution. The burden never shifts to the defence. Any exception can only arise in relation to a plea of insanity, and exceptions or provisos created by statute where the statute casts a burden upon the defence. If the issue of self-defence is left to the jury it is for the prosecution to disprove it.

In ***Woolmington v. Director of Public Prosecutions*** [1935] AC 462 HL Viscount Sankey at p. 481 made the famous pronouncement:

> "Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that

> the prosecution must prove guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

In ***R. v. Abraham***, 57 Cr. App. R. 799, Edmond Davies LJ made observations on the necessity, whenever the issue of self-defence is raised, of a clear direction to the jury on the burden of proof following the principles laid down in ***Wheeler*** [1967] 52 Cr. App. R. 28. A question raised was whether there was any adequate direction to the jury that it was for the Crown to negative self-defence. The Learned Lord Justice at p. 802 quoted from Winn LJ in ***Wheeler*** as follows:

> "The Court desires to say, and this is a convenient moment to say it for general application, that wherever there has been a killing, or indeed the infliction of violence not proving fatal, in circumstances where the defendant puts forward a justification such as self-defence, such as provocation, such as resistance to a violent felony, it is very important and indeed quite essential that the jury should understand, and that the matter should be so put before them that there is no danger of their failing to understand, that none of those issues of justification are properly to be regarded as defences: unfortunately, there is sometimes a regrettable habit of referring, for example, to the defence of self-defence."
>
> [Emphasis mine]

The Trial Judge must make it clear to the jury that self-defence is not a defence on which any onus rests upon the accused but is a matter which the prosecution must disprove "as an essential part of their case before a verdict of guilty is justified."

It is true that as in ***Abraham*** eventually, the Learned Trial Judge did say that the burden is always on the prosecution to prove its case. The failure however to give "a clear positive and unmistakable" direction on the onus of proof with respect to self-defence, in my view could still leave the lay juror

muddled and confused as to where that burden of proof lay despite the submission of Counsel for the Crown that the Judge eventually got it right.

Having determined that there was a clear error on the part of the Judge in his directions on self-defence, the question now is what order should the Court of Appeal properly make as a consequence of the flawed direction given to the jury by the Learned Trial Judge?

There are three alternatives to be considered:

(a) to allow the appeal, quash the conviction and enter a verdict of acquittal;

(b) to allow the appeal, quash the conviction and order a new trial;

(c) to apply the proviso to Section 14(1) of the Judicature (Appellate Jurisdiction) Act and to dismiss the appeal.

The principles laid down by Lord Diplock in ***Reid v. The Queen*** [1980] AC 343 at pp. 349-350, an appeal from our jurisdiction, and adopted by the Board in the judgment delivered by Lord Goff of Chieveley on the 17th October 1996 in ***Berry v. Director of Public Prosecutions and the Attorney-General for Jamaica [No. 2]*** (Privy Council Appeal No. 74 of 1995) constrain me against adopting the first alternative. This course would not be appropriate.

The proviso to Section 14(1) of the Judicature (Appellate Jurisdiction) Act reads as follows:

> "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

In determining whether the Court should avail itself of the proviso the nature of the misdirection is of the greatest importance. A misdirection or a

failure to direct accurately on the burden of proof resulting in any indication that a burden rests upon the accused or creating a confusion in this regard is a most serious error and, in my view, it cannot be said that no substantial miscarriage of justice has actually occurred. It is no mere technical error. The error undermined the fundamental right of the appellants to a fair trial. An order for a new trial presents the opportunity to restore that right to the appellants. I am unable to hold that in a criminal appeal misdirections by a trial judge to a jury in an area as fundamental to their assessment of the evidence on which they must determine guilt or innocence as the burden of proof can leave a conviction intact by the application of the proviso and on the basis that the Crown's case was a strong one. Taken to its startling conclusion the right of accused persons to a fair trial could be negated if, in the opinion of this Court, the prosecution's case is strong. Their Lordships of the Privy Council were restrained by no such inhibition in ***Berry v The Queen*** (PC) 1992 WLR 153 in which their Lordships stated:

> "The case against the defendant was indeed a strong one and for that reason their Lordships would not be prepared simply to recommend that an acquittal be ordered ..."

The main flaw at the trial was the failure of the prosecution to disclose to the defence copies of statements given by witnesses who had testified at the trial, and which statements contained material inconsistent with their evidence. Their Lordships referred the matter back to this Court to decide, not whether the proviso should be applied, but whether an order of acquittal should be made by the Court of Appeal in Jamaica, or a new trial ordered.

I would allow the appeal and order that there be a new trial. If precedent in this jurisdiction is to be required, it is to be found inter alia in the Judgments of this Court in ***R. v. Grant*** [1965] 9 JLR at p. 61 and in ***R v Earl Watson, Supreme Court Criminal Appeal No. 92/88*** (unreported) delivered on November 8, 1988, both cases in which new trials were ordered resulting from a misdirection by the Trial Judge on the burden of proof.