CA CRIMINAL LAW — Murder — Defence of Duress — whether sufficient evidence trial judge should leave issues of self-defence and provocation to jury. APPEAL ALLOWED. CONVICTION SET ASIDE. NEW TRIAL ORDERED

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL # 7/84

COR: The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Wright, J.A.

REGINA VS. ALBERT THORPE

Mr. K.D. Knight for appellant

Miss Joan Joyner for Crown

December 15 - 18, 1986 &
June 4, 1987

WHITE, J.A.:

At the hearing of this appeal by Albert Thorpe against his conviction for murder, the Court granted leave for Mr. Knight to argue a supplementary ground. It was:

"1.(a) The learned trial judge failed to leave the issue of self-defence to the jury;

(b) he failed to direct the jury on provocation, both issues having arisen naturally on the evidence."

These were the only points taken on appeal although the original grounds were in the usually wide terms of miscarriage of justice, and Insufficient evidence to warrant a conviction.

At page 215 in the summing-up, the learned trial judge advised the jury as follows:

> "You need also to be satisfied by the prosecution that the accused was not acting under legal provocation. Now, in this case, there is no area of provocation to be considered.
>
> The prosecution also has to satisfy you that the accused man did the act, if you accept it, without any lawful justification or excuse; that is, that he was not acting in self-defence. Similarly, in this case there is no evidence to support any act of self-defence, so you will not consider that. Self-defence does not arise in this case."

The judge therefore withdrew from the jury the consideration of the issues of self-defence and manslaughter due to provocation.

At issue in this case was whether there arose a duty on the Judge to put these issues to the jury, if there was some evidence to support them, regardless of the defence actually put forward, when the defence put forward (of alibi) was not merely inconsistent with, but actually completely contradictory to, either self-defence or provocation. The short answer is yes.

The allegations by the Crown were that the appellant murdered Reginald Duhaney on the 16th day of March, 1982. The circumstances leading up to the death of Reginald Duhaney were related by two crown witnesses, Sydney James and Thomas Nelson. According to Sydney James, a farmer living at Endeavour in the parish of St. James, while he was in his field tending his goats on the above-mentioned date he saw the deceased passing by on the Quasi Road. The deceased went out of the sight of the witness round a curve in the road, but in a short while he saw him coming back, and then he saw the appellant / coming from the opposite direction. The two pedestrians were then approaching each other. In his picturesque phrase, the witness told Harrison J. (Ag.), and a jury, that "the two of them buck-up at one spot." He said the deceased, Duhaney, first spoke and the ensuing conversation is set out verbatim from the transcript at pages 7 - 8:

> "Q. What did Duhaney say?
>
> A. Duhaney say, 'Yuh not going away with my herb this morning'.

"Q. Did the accused man reply?

A. He said, 'Is not yours', and Duhaney say, 'Yuh nah go whe wid it this morning'.

Q. Yes.

A. And him say, 'Is not yours'.

Q. Who?

A. Duhaney coming up to him, and the accused is reversing back.

Q. Yes.

A. And after him reversing back him say - beg pardon to the Justice and to the court and to the learned man - 'I will shoot out your bloodcloth'.

Q. Who said that?

A. The accused.

Q. Yes?

A. And him stepping backwards same way, and Duhaney going up to him, and him just pull from a blue bag like this .....

HIS LORDSHIP: Pull what?

WITNESS: And him just fire the first shot shot clearly, but the other four go off straight behind one another clearly, and I just hide myself, because the gun have no friend when it fire, so I just hide myself.

Q. Why you hide yourself?

A. Because I 'fraid of it, and I didn't have anything more than my ...

Q. Right. Now, after you heard those explosions did anything happen to Duhaney?

A. Yes, sir. Duhaney fell on the ground.

Q. What did you do after Duhaney fell on the ground?

A. Well, after Duhaney fell on the ground he look on the gun.

Q. Who look on the gun?

A. Him look on the gun, and him mek to shub it back, but it look like it too hot .....

HIS LORDSHIP: And do what?

WITNESS: Him look on it after him give Duahney the five shot, and him did mek fi shub it down ...

HIS LORDSHIP: Shub it where?

WITNESS: Inside here. (indicating)

Q. YES.

A. And he ran off, and then little after I go up for I see it clearly that him run off, and when I go up the body was a little jumping like."

He gave further details at page 10:

Q. You saw anything come from the gun?

A. Yes, sir.

Q. What did you see?

A. Smoke and fire.

Q. Now, the accused man, did he have anything with him when they meet up?

A. Yes, sir.

Q. What did he have?

A. The bag underneath his arm.

Q. What sort of bag?

A. The crocus bag, the light type like what manure come in - fertilizer.

Q. From where you were, could you see if anything was in the bag?

A. Yes, sir. Something was in it.

Q. Why do you say something was in the bag?

A. Because it stiff."

According to the witness, Sydney James, he had a clear view of the road; he had an unimpeded view of the two men on the road. He had known the deceased for 16 years.

Sydney James recounted also that after the two met there was rough and loud talking between them for about four minutes. At this time they were about two and a half yards from each other. Under cross-examination

he was asked, "So two and a half yards away, what happened?" He replied, "The deceased stepping up nearer to the accused , and said, 'you nah go way wid me things this morning'." He in fact said this loudly. Further, the deceased was 'coming down on' the appellant / while the latter was going back.

Some of the questions in cross-examination sought to find out the general behaviour of the deceased on the fateful morning. From the time that the deceased was going up to the appellant, the deceased had his machette by his side. He did not at any time hold it up, nor did he at any time point it at the appellant.

This is an appropriate point at which to mention that when Sydney James first saw the deceased on that morning, his face appeared to be vexed. But when he saw him returning and approaching the appellant his face, "Just look ordinary." Certainly, when they were approaching each other the deceased was "just walking normally". His cutlass was at his side.

Apart from the appellant telling the deceased that 'the herbs' (presumably ganja), "Is not yours", at a later point in the altercation the appellant reportedly requested "Ease me up no man." Even after these words the deceased repeated "You nah go whey this morning with my herbs." Even then, the deceased still holding the machete at his side was stepping up to the appellant who was still stepping back. The deceased did not act threateningly in any way. He neither pointed his finger at the appellant nor did he wave the machete at the appellant. The deceased did not demand that the appellant / give him the herbs, or he would chop him up.

On the other hand, as disclosed by the extract of the evidence, the appellant told the deceased "He will shoot you", with an expletive. They were then about two and a half yards from each other. The evidence does not disclose over what approximate distance they had moved since first they met. Nonetheless, in the words of Sydney James, "And he draw same time ..... and fired." At this time the appellant had both feet on

the ground while leaning back. Graphically, the witness pictured the deceased coming towards him. "The machete was down, and he draw so fast and stop him he couldn't get near to him." According to this witness, "He fired five shots, one first and four after." There was no talking after that. The deceased fell.

When this witness went and looked at the deceased, he said he saw three holes above the brow of the deceased; one by the left nostril, and one by the right nostril. The face was "mashed up".

Dr. Mohan Yalla, a registered medical practitioner, was called to give evidence for the defence. He had performed the post-mortem examination on the body on the 26th March, 1982; nearly 11 days after death. The Doctor found an abrasion over the left parietal area; there was an entrance wound behind the left mastoid area; there was an exit wound in front of the right temporal area; there was an entrance wound on the right parietal area in its anterior. A bullet was found resting under the scalp tissue in the left parietal area posteriorly. The bullet was removed and handed to the police. He explained that there was one entry wound to the front of the face, to the right parietal area. The entry wound to the left of the mastoid area was correspondent with the exit wound on the right parietal area. He was not able to say which was the first entry wound. It was his opinion that the entry wound to the left mastoid area could not have been received when the person firing the gun, and the person receiving the injury, were face to face. This was "because the bullet was behind the mastoid area." On dissecting the body, Dr. Yalla found the upper mid-brain contused beyond anatomical normalcy along the pathway of the bullet in the cerebral hemisphere. The brain tissue was contused for 2cm in diameter with diffused inter-cerebral bleeding. Death was due to the contusion of the brain secondary to the gun shot wounds.

The prosecution called also, Thomas Nelson, a farmer. He testified that at about 9:30 a.m., on the day in question, while he was

at his farm, the deceased came to him. When the deceased came he looked vexed. They spoke. The deceased left the farm and went towards the Quasi Road. The witness followed behind him, and after passing a curve in the road he saw the deceased and the appellant, whom he called 'Tail', standing up. He heard the deceased say "Me a fi dead fi mi right." According to him, 'Tail' had in his hand a shine thing which he had taken from under his arm. He said that he heard a loud noise; so he ran away. He went to the police station where he made a report. Under cross-examination, he said he did not hear the deceased using any bad words. All he heard him say was he would die for his right. He did look vexed; he did have a machete in his left hand. He held the machete down at his side. He demonstrated how he saw the appellant holding the shine thing in one hand, and the manure bag which he had under his arm. The transcript records his description of the scene thus: "The man stand up so with the machete and the next man in front of him. Him hold him hand so, and the next man have him hand set so, and him hold fi him down so." (indicating) At that time they were about four feet away from each other. This witness said he did not hear deceased make a demand, nor did he see the deceased walk towards the appellant. He iterated that when he first saw them they were standing, facing each other. It was after he heard the loud talking by the deceased that he heard the sound like a gun.

When he was arrested by Detective Acting Corporal Clive Morrison on the charge of murder and cautioned, the appellant reportedly replied, "A nuh me kill Lloydie, sir, mi did deh a mi mother yard." This was in fact the defence which was run at the trial, not only as presented to the Crown witnesses by cross-examination, but also by the unsworn statement which the appellant gave. In pursuance of that defence, it was attempted by cross-examination to show that Sydney James and Thomas Nelson did not at all see the appellant on the fateful day. It was suggested that the vantage point where the first said he was, did not enable him to make out the person who shot the deceased. In so far as Nelson was concerned, it

was the challenge to him that he did not see anyone, but only heard a loud talking which he recognised, as he said, to be the voice of the deceased, and then he heard a loud noise, upon which he ran away without the opportunity of seeing anyone. However, both witnesses were adamant that it was the appellant they saw.

In his unsworn statement, the appellant said that when he was arrested on the charge of murder, the police asked him if he knew the man who had died. He told them no. This is in conflict with his reported remark above.

In this state of the evidence Mr. Knight, arguing on behalf of the appellant, contended that though the accused's defence (an alibi) was completely contradictory to both self-defence or manslaughter due to provocation, the learned trial judge was, nevertheless, obliged to put the issues of self-defence and manslaughter to the jury. He argued that on the evidence there was a dispute regarding the ownership of goods, the deceased claiming 'the herbs' (or ganja) or 'the goods', and asserting that he intended to recover them. The appellant / denied the ownership of the deceased and asserting a right to keep them. He argued that from the evidence, the movements of the deceased, who had a machete in his hand, albeit he held it by his side while he was advancing on the appellant who was retreating, was sufficiently strong for the jury to give consideration to the issue of self-defence, there being no evidence of which of them owned the ganja. He contended that if there had been clear evidence that the deceased had set upon the appellant with the machete raised as a result of which the appellant retreated, and the deceased had actually chopped at the appellant, and the appellant had shot him, and yet said "I was not there", the trial judge would have been bound to put the issue of self-defence. The Crown had to negative that the appellant / was acting in self-defence. In support thereof, learned attorney-at-law cited the cases of R. v. Abraham [1973] 1 W.L.R. 1270; and R. v. Bonnick [1977] 66 C.A. R. 266; [1978] Cr. L. Rew. 246.

The headnote to Abraham's case reads:

"The defendant was charged with causing grievous bodily harm with intent, contrary to section 18 of the Offences against the Person Act 1861. He raised the plea of self-defence. The judge directed the jury as to the onus and standard of proof generally and gave an indication of the nature of the plea of self-defence but he gave no express direction that, when a plea of self-defence was raised, the onus of proof lay upon the Crown to disprove the plea. The jury found the defendant not guilty of the offence charged but guilty of the lesser offence of causing grievous bodily harm, contrary to section 20 of the Act of 1861.

On appeal by the defendant:-
Held, allowing the appeal, that a plea of self-defence was a plea of not guilty and it could not properly be regarded as a defence to a charge of criminal assault and, in his direction to the jury, the judge must make perfectly clear that it was for the crown to destroy the plea and not for the defence to establish it; accordingly, since the jury could have been left in doubt as to where the burden lay on the issue of self-defence and the judge had not directed the jury as to what might constitute an unlawful assault under section 20 of the Offences against the Person Act 1861, the conviction would be quashed."

The short facts in the case are summarized at page 1272 of the judgment:

"..... on August 18, 1972, there was a building strike. The defendant and a Mr. Armour were both officials in the Construction and Allied Trades Union, and the defendant was, as we understand, also chairman of its local 'Picketing Committee.' In the course of their trade union activities these two men went to a building site at Little Sutton, near Ellesmere Port. The foreman in charge, a Mr. Wright, was 64 years of age and there were a joiner there, a Mr. Neil, and a labourer. Mr. Wright was not merely a supervisor, he was a working foreman. When the two trade union officials arrived on the scene, he was working with a shovel. The two officials told him who they were and they tried to persuade him to stop working on the site, but he was a man of spirit apparently for he did not take kindly to the suggestion. He was then informed by the officials that if he did not accede, pickets would be arriving that afternoon. Thereupon, according to the Crown's case, he raised the shovel which he was already holding and pushed it towards the defendant, saying something to the effect that he was not intimidated by any threats of pickets arriving. The defendant then said something to him like: 'Don't talk silly, an old man like you.'

Then (this is the Crown's case) the defendant picked up a 4-foot spirit level and swung it at Mr. Wright, striking him a blow which caught him on the left side of his back and caused him to fall to his knees. When later examined it was found that he had no less than five broken ribs and in consequence a punctured lung. While he was still on his knees

> Mr. Neil, the joiner, saw that the defendant was in a position to strike again. He asked the trade union officials what on earth they thought they were doing, and the defendant replied: 'He asked for it.' Then the officials got into the car and drove away. The evidence for the Crown continued that when he was later questioned by the police and was informed that Mr. Wright had sustained the fracture of five ribs, the defendant showed no concern. He asserted that he had only said a few words to Wright when Wright hit him with a shovel. The account he gave was that: 'He swung the shovel at my head, I put my arm up to ward it off and he hit me here', indicating his left upper arm. The police officer had a look at his arm, but saw no sign of injury. When the defendant was charged under section 18 he said: 'I struck back in self-defence, having received a blow from a shovel'."

In that case it was common ground that the defendant was on the scene and that he acted in self-defence. So that in keeping with the observations of the Court of Appeal in R. v. Wheeler [1967] 3 All E.R. 829; [1967] 1 W.L.R. 1531, it was incumbent on the trial judge to sum up to the jury on the issue of self-defence. It is instructive to quote the relevant passage from Winn, L.J., in Wheeler's case on page 830 (and p. 1533):

> "The court desires to say 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 is essential that the matter should be so put before the jury that there is no danger of their failing to understand that none of those issues of justification is properly to be regarded as a defence: unfortunately there is sometimes a regrettable habit of referring to them as, for example, the defence of self-defence. Where a judge does slip into the error or quasi-error of referring to such explanations as defences, it is particularly important that he should use language which suffices to make it clear to the jury that they are not defences in respect of which any onus rests on the accused, but are matters which the prosecution must disprove as an essential part of the prosecution case before a verdict of guilty is justified. There are many cases where the facts and circumstances of the case itself and the framework of the summing-up to the jury by the learned judge suffices perfectly adequately to make it certain that the matter has been understood by the jury in the true light which I have endeavoured to define. It may be quite unnecessary repeatedly and separately to refer to onus in respect of those issues."

In Wheeler (supra) there was evidence that the deceased attempted to rape the female companion of the applicant, who claimed that he was entitled to use such force as was reasonably thought to be necessary to

repel such a rape on the woman.

It must be observed that in both the Wheeler and the Abraham cases, the issue of self-defence was specifically raised, and therefore the failure of the judge to deal with the matter adequately or at all was rightly criticised. In the instant case, however, the matter was not raised at all by the defence although cross-examination of the two material witnesses for the Crown sought to enquire into the actions of the deceased, vis-a-vis the movements of the appellant. To this enquiry, those witnesses insisted that, apart from holding the machete at his side, and using words laying a decided claim to his property which the appellant had in the bag, the deceased did not threaten the appellant, much less strike at him. This was the line of argument addressed to us by Miss Joyner for the Crown, who iterated that there were no actions or words on the accounts given by those witnesses which could have caused the accused to reasonably apprehend the imminence of attack on him. The deceased never raised his machete at all. In fact, as she pointed out, it was the applicant, as appears from the passages of evidence quoted earlier, who used threatening language on that morning. It was placed before the jury that the applicant drew the gun simultaneously as he threatened to shoot; that that stopped the deceased in his tracks, and then the applicant fired. The stance of both deceased and accused as described by Thomas Nelson, does indicate a "stand off", which did not call for shooting of the deceased. It is certainly significant that the deceased's remarks "You have to shoot me today", and "I have to die for my right", show clearly that he was not displaying any hostile and threatening behaviour towards the appellant. Miss Joyner argued that in the absence of any evidence of an attack, the issue of self-defence could not arise. Mr. Knight replied that for the deceased, armed with a machete, to advance on the accused claiming what he asserted was his, raised a reasonable apprehension of an attack, though the accused had never said so, but had lied.

Mr. Knight further urged that his arguments are strengthened by the judgment of the English Court of Appeal (Criminal Division) in Derek Denton Bonnick [1977] 66 Cr. App. R. 266. The headnote reads —

> "The issue of self-defence should be left to the jury when there is evidence sufficiently strong to raise a prima facie case of self-defence if it is accepted. To invite the jury to consider self-defence upon evidence which does not reach that standard is to invite speculation.
>
> The appellant was charged on two counts of wounding with intent. The prosecution case was that he had stabbed his two victims on a railway station late one night. His defence was at first one of mistaken identity, his solicitors having served notice of alibi pursuant to section 11 of the Criminal Justice Act 1967. At the end of one of the victim's evidence in chief the trial judge suggested that identification was the only issue. Then for the first time the appellant's counsel submitted that self-defence was also an issue. The trial judge overruled that submission and in summing-up told the jury that the reason why he refused to let the issue of self-defence go to them was because the applicant's defence was an alibi—he was not at the scene of the crime. The jury convicted the appellant of unlawful wounding. On appeal that the judge had wrongly disallowed the issue of self-defence to go to the jury.
>
> Held, that there may be evidence of self-defence even though a defendant asserts he was not present when the alleged offence occurred, thus, in so far as the judge told the jury the contrary, he was in error; but in the nature of things it would require to be fairly cogent evidence, when the best available witness disables himself by his alibi from supporting it; accordingly, the trial judge was right to exclude the issue of self-defence on the ground that it was not raised by the evidence of the prosecution witnesses — it was an impossible defence and the appeal against conviction on both counts must be dismissed."

Stephenson L.J., observed at page 269:

> ".....counsel were unable to refer us to any authority where the defence raised and the defence excluded were not merely inconsistent, like provocation and self-defence, but completely contradictory, as in this case. Common sense indeed rebels against allowing a defendant to say on his oath 'I was not there and did not do it' and through his counsel 'I did it but I was acting in self-defence.' It might indeed be thought to confuse judgment and hinder justice if counsel were to be encouraged, in the proper discharge of their duty to do their best to ensure that their clients are not improperly convicted, to raise defences so completely contrary to their instructions."

In fact, the account of the facts of Bonnick's case indicate not just an altercation between him and the two complainants who were wounded, but also that they had followed the appellant, and one had actually 'put his hand' to the appellant or 'put out his arm'. That they were pushing him. On appeal, it was therefore contended that the complainants were the aggressors, and that the appellant was acting in reasonably necessary self-defence when he stabbed the two men. It was also pointed out that in fact by questions in cross-examination, answers had been received which raised the issue of self-defence. At page 270 the judgment of Stephenson L.J., points out:

> "The duty of the prosecution to negative the possibility that the stabbings were acts of self-defence arose only if there was evidence from which self-defence could properly be inferred; until there was evidence raising that possibility there was nothing for the prosecution to negative. We are of the opinion that that was the position here. Mr. Blair-Gould could not suggest to the witnesses that if, contrary to his instructions, the appellant wielded the knife he wielded it in self-defence, and the evidence did not open the door to any real possibility that he so wielded it or support a prima facie case of self-defence. The only evidence which could give rise to the issue of self-defence was the evidence of Sales that the appellant and Sage may have thought that Sales was going to attack the appellant. But Sage did not confirm that evidence, nor of course did the appellant, and how could a jury properly find that it was reasonably necessary for the appellant to stab Sales or Sage at the time when according to their uncontradicted evidence, supported by the evidence of Mrs. Sales and Vowles as to hearing screams, he actually stabbed them?"

The foregoing analysis of the facts was engaged in pursuant to the question at page 269: "When is evidence sufficient to raise an issue, for example, self-defence, fit to be left to the jury?"

In the words of Stephenson L.J., at page 269 -

> "The question is one for the trial judge to answer by applying common sense to the evidence in the particular case. We do not think it right to go further in this case than to state our view that self-defence should be left to the jury when there is evidence sufficiently strong to raise a prima facie case of self-defence if it is accepted. To invite the jury to consider self-defence upon evidence which does not reach this standard would be

> "to invite speculation. It is plain that there may be evidence of self-defence even though a defendant asserts that he was not present, and in so far as the judge told the jury the contrary, he was in error; but in the nature of things it would require to be fairly cogent evidence, when the best available witness disables himself by his alibi from supporting it. We have come to the conclusion that, as in LEARY WALKER (supra) ([1974] 1 W.L.R. 1090 P.C.), the judge was right to exclude the issue on the ground that it was not raised by the evidence of the prosecution witness." (emphasis supplied).

We do not have the benefit of the address verbatim to the jury by the counsel who appeared at this trial, so that this Court does not know whether he then made any reference to the issues of self-defence and/or provocation. Noticeably, the defence counsel in Bonnick submitted that apart from the question of mistaken identity which the trial judge had opined was the only issue, there was the issue of self-defence. Similarly at the trial in R. v. Hopper [1915] 2 K.B. 431; 11 Cr. App. R. 136, the accused, through cross-examination of the Crown witnesses, sought to show that the defence raised was that the killing was accidental. Counsel for the defence, however, before the judge summed up, indicated quite clearly that he did not intend to abandon the defence of manslaughter, and that he meant to ask the jury to return a verdict of manslaughter if they did not acquit the appellant altogether. In the Court of Criminal Appeal, Lord Reading L.C.J., commented at page 435 (& p. 141):

> "Whatever the line of defence adopted at the trial of a prisoner maybe, we think that the judge should put before the jury such questions as seem to him to properly arise upon the evidence, even though these questions may not have been raised by counsel. In the present case counsel for the appellant did not rely only upon the defence of accident; he indicated clearly that if that view failed he should ask the jury to return a verdict of manslaughter and not murder, though the difficulty of putting forward the alternative defences may have accounted for counsel saying very little about manslaughter."

That requisite was also stated by Viscount Simon L.C., when he gave the judgment in the House of Lords on the appeal of Mancini v. Director of Public Prosecutions [1941] 3 All E.R. 272 at page 276C - 277B; [1942] A.C. 1 at page 7:

> "Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence - a defence which, if it had been accepted by the jury, would have resulted in his complete acquittal - it was undoubtedly the duty of the judge in summing-up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given and which would reduce the crime from murder to manslaughter. The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the judge from the duty of directing the jury to consider the alternative if there is material before the jury which would justify a direction that they should consider it."

After quoting from the judgment of Lord Reading L.C.J., in R. v. Hopper (supra), Lord Simon cautioned -

> "To avoid all possible misunderstanding, I would add that this is far from saying that in every trial for murder where the accused pleads not guilty, the judge must include in his summing-up to the jury, observations on the subject of manslaughter. The possibility of a verdict of manslaughter instead of murder arises only when the evidence given before the jury is such as might satisfy them as the judges of fact that the elements were present which would reduce the crime to manslaughter, or at any rate might induce a reasonable doubt as to whether this was or was not the case. Murder by secret poisoning, for example, does not give room for the defence that owing to provocation received the administration of the poison should be treated as manslaughter. On the other hand, if the defence to a charge of murder by poisoning was that the accused never administered the poison at all, the judge might very well be obliged to direct the jury on the alternative view that the administration was accidental, if the facts proved reasonably admitted this as a possible interpretation, even though the defence had not relied on the alternative."

In Mancini's case, the defence did not ask for the reduction of the crime of murder to manslaughter. At the trial the main case set up on behalf of the accused was self-defence, and this clearly failed, since the jury did not accept the accused's story. At page 219 [p. 12 of A.C. Report] Lord Simon added these words:

> "The language of Lord Sankey [in Woolmington v. D.P.P.] does not assert and does not imply that in every charge of murder, whatever the circumstances, the judge ought to devote part of his summing-up to directing the jury on the question of manslaughter or the jury ought to consider it. If the evidence before the jury at the end

> "of the case does not contain material upon which a reasonable man could find a verdict of manslaughter instead of murder it is no defect in the summing-up that manslaughter is not dealt with. Taking, for example, a case in which no evidence, which would raise the issue of provocation has been given, it is not the duty of the judge to invite the jury to speculate as to provocation incidents of which there is no evidence and which cannot be reasonably inferred from the evidence. The duty of the jury to give the accused the benefit of the doubt is a duty which they should discharge having regard to the material before them for it is upon the evidence and the evidence alone that the prisoner is being tried and it would only lead to confusion and possible injustice if either judge or jury went outside it."

In Kwaku Mensah v. The King [1946] A.C. 83 at page 92 Lord Goddard giving the opinion of the Judicial Committee of the Privy Council made these observations on Mancini's case:

> "The reason for the rule is that on an indictment for murder it is open to a jury to find a verdict of either murder or manslaughter, but the onus is always on the prosecution to prove that the offence amounts to murder, if that verdict is sought. If on the whole of the evidence there is nothing which could entitle a jury to return the lesser verdict, the judge is not bound to leave it to them to find murder or manslaughter. But if there is any such evidence then, whether the defence, relied on it or not, the judge must bring it to the attention of the jury because if they accept it or are left in doubt about it the prosecution have not proved affirmatively a case of murder."

It is interesting to note a practical example of the application of the principle which it is contended should have been applied in this case. In Glasford Phillips v. The Queen [1969] 2 A.C. 130 P.C.; 2 W.L.R. 581 P.C.; 13 W.I.R. 356, "the defence presented at the trial was that of automatism. His counsel expressly disclaimed any reliance upon provocation, but Smith J., taking the view, that there was evidence on which the jury could find that the appellant was provoked to lose his self-control, and mindful, no doubt, of the admonition of the House of Lords in Mancini v. Director of Public Prosecutions (supra) thought it right to direct the jury on provocation as well as upon the defence on which alone the appellant counsel had relied." Per Lord Diplock.

That there must be some evidence as the basis upon which to leave the issue of self-defence or provocation to the jury cannot be denied. Whether there was such evidence, is the crucial issue in this case . During the arguments before us, the question was raised whether at the end of the Crown's case the judge could or should have accepted a submission of no case. We are of the view that on the state of the evidence at that stage the trial judge would have had to rule that there was a case to answer. But had the defence then not called any evidence, and the appellant not said anything, we are of the opinion that the trial judge would have had to sum up on the evidence as it was at that stage. The considerations to guide him would additionally, be found in the judgment of the Judicial Committee of the Privy Council on the appeal of Lee Chun Chuen v. R. [1963] A.C. 220 at pages 232-233; [1963] 1 All E.R. 73 at pages 79-80:

> "Their Lordships agree that the failure by the accused to testify to loss of self-control is not fatal to his case. R. v. Hopper, Kwaku Mensah v. R., Bullard v. R. and R. v. Porritt were cited as authorities for that. These were all cases in which, as in the present case, the accused was putting forward accident or self-defence as well as provocation. The admission of loss of self-control is bound to weaken, if not to destroy the alternative defence and the law does not place the accused in a fatal dilemma. But this does not mean that the law dispenses with evidence of any material showing loss of self-control. It means no more than that loss of self-control can be shown by inference instead of by direct evidence. The facts can speak for themselves, and if they suggest a possible loss of self-control, a jury would be entitled to disregard even an express denial of loss of temper, especially when the nature of the main defence would account for the falsehood. An accused is not to be convicted because he has lied."

In fact, in the present case, the judge directed the jury that if they accepted or were in doubt about the alibi, they should acquit the appellant. "If you reject him, you do not convict him of that, you still go back and consider the evidence of the Prosecution and what he, the accused man, has said and on that examination, if you are satisfied so that you feel sure of the accused man's guilt, then it is your duty to convict of this charge."

By their verdict it is undeniable that the jury found that the appellant was present on Quasi Road, on that morning. But the mere fact of his presence did not conclude the question that the jury had to decide: "In what circumstances did Duhaney meet his death?" The jury should have been told that if they found the applicant had lied when he said he was elsewhere, it would be inescapable that he was present on the scene. They should then go on to examine the facts disclosed by the evidence and to determine therefrom whether the appellant acted in self-defence or reacted as he did by reason of provocation. There was just enough evidence to raise these questions.

We looked at the case of DPP v. Leary Walker [1974] 21 W.I.R. 406; [1974] 1 W.L.R. 1090 P.C.. At the trial, self-defence was not raised. And that issue was withdrawn from the jury. It was argued on appeal that the judge should have left self-defence to the jury. The headnote to the report of the judgment of the Privy Council reads in part:

> "Held: that where an accused has not relied on self-defence and the evidence before the jury 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 did not leave self-defence to the jury; the decision of the Court of Appeal [that the judge should have left self-defence to the jury, and therefore ordered a new trial] could not, therefore, be allowed to stand, because it would follow that in addition to the defences (automatism, provocation, diminished responsibility) actually raised, trial judges might, in the future, feel obliged to leave to the jury not only possible but also any impossible defence which had not been raised but which human ingenuity might devise. Otherwise, after the defences put before the jury at the trial had failed, the accused might succeed in having his convictions quashed on the ground that the impossible defences had not also been left to the jury, and this would indeed divert the due administration of justice."

In that judgment their Lordships of the Privy Council advised that there was not in that case 'a scintilla of evidence from which self-defence could be inferred.' A significant deficiency, which was emphasized by the appellant saying in his unsworn statement that he had restrained the deceased, his wife, when she tried to get away from him, after which

she squeezed his private parts as a result of which he inflicted multiple stab wounds on her body.

The narrative of events in the case before us cannot, however, be described as showing a situation where human ingenuity devised an impossible defence. We are of the view that on the evidence here, it was incumbent on the trial judge to place the issues of self-defence and/or provocation before the jury for their decision, and in failing to do so, he did not give the jury that assistance which was vital towards their verdict. This is not to say that there was not ample evidence to support the jury's verdict, but these issues should have been left for their consideration. We agree with the learned editors of Archbold Criminal Pleading Evidence and Practice (39th ed.) when they note that the obligation for the judge to leave to the jury all the issues upon which there is evidence fit for their consideration, is particularly important on a charge of murder, for example, where the defence is mistaken identity and alibi and yet there may be evidence from the lips of the witnesses for the Crown which raise issues of self-defence or provocation, and which should be left to the jury to decide.

Accordingly, we will treat the application as the appeal. The appeal is allowed. We quash the conviction, set aside the sentence, and in the interests of justice, order a new trial.