C.A. CRIMINAL LAW — Murder — Provocation — Judicial Intervention — whether judges direction on provocation wrong or inadequate and amounted to misdirection — whether judge misdirected jury on evidence — whether judge by his intervention did not hold scales even between prosecution and defence — Appeal allowed on grounds of misdirection. New trial ordered. [Per curiam "The judge did take a very active part in the trial --- but we are not persuaded --- he exceeded the legitimate boundaries ---"]

IN THE COURT OF APPEAL

J A M A I C A

SUPREME COURT CRIMINAL APPEAL NO. 178/87

Case referred to
Jones v National Coal Board
(1957) 2 ALLER 155 at 158

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA

VS.

CARL DAVIS

STATUS (Judicial Intervention)

K.D. Knight for Appellant

Kent Pantry, Deputy Director of Public Prosecutions and Miss Verna Bennett for Crown

July 6, 7, and 22, 1988

ROWE P.:

Kevington Garvin, a twelve year old student of Kingston College died of gunshot wounds which he received at his home, 13 Old Harbour Road, St. Catherine on the night of April 9, 1986. After a four day trial, the appellant was convicted of the murder of Kevington Garvin before Wolfe J. and a jury and he was sentenced to death. Through his counsel, Mr. Knight, the appellant has attacked that conviction on five grounds, as set out herein:

> "1. (a) The Learned Trial Judge's direction on provocation to the jury was wrong/ or inadequate (246) and further his final direction contained a material omission which amounted to a mis-direction in law. (p. 271 paragraph 3).

"(b) (b) The learned Trial Judge having directed the jury on provocation set about to effectively destroy the defence thus depriving the applicant of any real consideration of the issue by the jury.

2. The defence of provocation did not properly arise on the evidence and by putting same to the jury the applicant's real defence of alibi was whittled away and the jury were confused and hindered in reaching a true verdict.

3. The interventions by the Learned Trial Judge were numerous and were not designed to clear up ambiguities or to enable the judge to make an accurate note but appeared to have been cross-examination of the witnesses and to the prejudice of the applicant.

4. The The conduct of the trial by the Learned Trial Judge was biased and unfair and deprived the applicant of a real chance of an acquittal and in particular the Learned Trial Judge derided the defence witnesses.

5. The Learned Trial Judge fell in error when he:

(a) effectively usurped the jury's functions regarding the findings of fact, (254-255);

(b) invited the jury to speculate on several aspects of the case;

(c) misdirected the jury on the evidence; (see pp. 264, 147, 179, 219, 220);

(d) failed to point out the discrepancies in the prosecution's case."

Two sisters Clora Dawes and Burnetta Dawes lived in separate houses on the same plot of land, No. 13 Old Harbour Road. Their inter-personal relationship deteriorated to the point where in January 1986, Burnetta Dawes was charged with maliciously damaging the house of Clora Dawes for which she was convicted and fined either $600.00 or $800.00 in the Resident Magistrate's Court, Old Harbour. The prosecution alleged

that the appellant Davis was a party to the stone-throwing which damaged the house of Clora Dawes although he was not charged on account of the incident. Sometime in February 1986 the left foot of the appellant was choped off at the ankle which led to his hospitalization for a period of two months. The appellant alleged that the injury was inflicted by Clora Dawes and her brother. As a result of the allegation Clora Dawes was arrested and committed to stand trial for the offence.

On the night of April 9, 1986, some three weeks after the appellant was discharged from the hospital, young Garvin was shot to death. The prosecution's case, in summary, was that the appellant in the company of his sisters Vivetta and Veronica Mallette; Burnetta Dawes and one 'Tallman', invaded the home of Clora Dawes; that Burnetta Dawes passed a red plastic bottle to 'Tallman' from which he splashed a liquid with the smell of gasolene onto a door, struck a match, applied it to the door and then there was a blaze. Clora Dawes and Kevington Garvin threw sundry liquids upon the fire to no avail and both essayed outdoors towards a drum of water. Clora Dawes gave evidence that she saw the appellant standing in her yard a short distance from the water-drum and he was holding a firearm in his hand. She exhorted him by name not to kill her: "Do Donovan, no kill me", she cried. Just then the firearm was discharged and Kevington Garvin was mortally wounded. She testified that she bawled for murder and later she looked through the kitchen window and saw the appellant "with the crutch under his left arm and his sister Vivetta Mallette holding him under his right arm ..... and my sister Burnetta Dawes with a plastic bottle in her hand and a tall guy, them call Tallman."

The appellant gave sworn evidence and called five witnesses. The purport of the evidence of Burnetta Dawes, Valda Mallette and Cynthia Mallette was that they were not present at the home of Clora Dawes when her son was murdered, that they took no part in setting the house on fire, that they were not in the company of the appellant on that night and that each was at her home in bed. They supported the appellant that he was

not living in a house situate beside that of Clora Dawes on the night of the fatal incident, as that house formerly the property of Mrs. Mallette had been sold and possession had been given to the new owners. Nehemiah Mallette, the father of Cynthia and Valda Mallette said that they were both at Milk Lane, Kingston and could not conceivably be on the Old Harbour Road on that night.

Errol Harrison, whom the learned trial judge described as "an important witness" was called to support the alibi of the appellant that he was in bed with a female companion at about the time when Clora Dawes was making her alarm. The appellant had said that he watched television at about 11:30 p.m., and later retired to bed with a woman named Fema who was his girlfriend. Errol Harrison said in examination-in-chief that he lived on the same building with Burnetta Dawes and the appellant Davis. He said he heard the gunshot and the voice of Clora Dawes, bawling for murder. At that time too, he heard the voices of Burnetta Dawes and of two other women Joan and Pauline as the three women talked together in a room on his building. He estimated that he walked by the room of the appellant about two minutes after he heard the gunshot but he did not then look in. He returned to his room, spoke to his companion and then went to the appellant's room, looked through a curtain and saw the appellant and a woman in bed. He said he did not awaken the appellant, from which it can be inferred that he thought that the appellant was asleep. It was about ten minutes after he heard the shot that he saw the appellant in bed.

Mr. Harrison was cross-examined to determine whether a woman did domestic chores for the appellant after his discharge from hospital or visited him as a girlfriend. The witness said one Cynthia who lived in that same yard washed for the appellant. He said further that he could not identify the woman whom he saw in the appellant's bed, beyond saying it was a woman. He did not know anyone by the name of "Fema" or "Phema." The trial judge asked Harrison:

"Q: You know anybody name Phema?"

and the witness answered:

"A: No, your Honour."

In the course of his summing-up the learned trial judge directed the jury in relation to the evidence of Mr. Harrison and said:

> "Now, you remember Mr. Harrison gave evidence. Mr. Harrison said this man never had anybody there living with him. Mr. Harrison said nobody was living there with him. He knows Vema but Vema was not there. He said it was a girl who lived there, Cynthia Powell, who was taking care of him, and that Vema wasn't there at all. He never saw Vema come there to look after him. So then, is it true what Mr. Harrison is saying? Why is this man telling you about himself and Vema sleeping together that night? Mr. Harrison said no, he saw him with a woman. Mr. Harrison doesn't tell us who the woman is but one thing Mr. Harrison is certain about, he didn't see Vema."

Counsel submitted that this passage contained a misdirection on the evidence of Mr. Harrison and that the learned trial judge invited the jury to discredit the appellant and Mr. Harrison based on a mistaken view of the facts. In our view the very heart of the appellant's defence was that he was in bed with a woman at the time the offence was committed. His witness, Mr. Harrison, did not know a person by the name of "Phema" or "Fema" or "Vema" and said quite categorically that he was in no position to say who the woman was. When the jury were told that "one thing Mr. Harrison is certain about, he didn't see "Vema", coupled with the earlier misdirection that Mr. Harrison said he did know Phema, they could very easily conclude that the appellant was being untruthful when he said he was at home in bed with a woman, and this would effectively destroy his alibi defence.

At the point when the learned trial judge was sending the jury into retirement, he reminded them of the verdicts which were open to them. He told them that they could find the appellant not guilty of any offence. He did not elaborate by reminding them of the bases on which

they could so find. Then he went on to tell them that they could return a verdict of murder or of manslaughter. In both cases he attempted to set out the bases on which the jury could so convict. Mr. Knight complains that the learned trial judge erred in two respects in his very final directions. The first complaint was that no prominence was given to the defence of alibi, indeed no special mention of that defence was made at all. In the second place, he said that the trial judge dealt with one of the circumstances in which provocation could lead to a verdict of manslaughter, but he omitted to tell them that if they were in doubt as to whether the appellant was acting under legal provocation, they should also find him guilty of manslaughter.

More than once in the course of his summation the learned trial judge had given correct directions in law on alibi and on provocation. What effect, if any, would his failure to remind the jury at that very last moment that alibi was the defence put forward by the appellant have upon the deliberations of the jury? We cannot say with assurance that the jury would undoubtedly have had in mind that the appellant's alibi was the basis on which they could find the appellant not guilty. Equally we cannot be assured that when the trial judge told the jury that "if you are satisfied that when he did it, he was suffering from a temporary and sudden loss of self-control," the jury must have understood him to mean that if they were not satisfied, but were left in a state of doubt, as to legal provocation, that in those circumstances, the appellant would also be entitled to a verdict of manslaughter.

Much time was spent by Mr. Knight combing the transcript in an endeavour to show that the learned trial judge, by his interventions, did not hold the scales even between the prosecution and the defence. He relied on the well-known passage in Jones v. National Coal Board (1957) 2 All E.R. 155 at p. 158. The learned trial judge did take a very active part in the trial but we are not at all persuaded that in putting questions to the several witnesses, he exceeded the legitimate boundaries

which judges have set for themselves in the trial of criminal cases.

For the reasons given earlier, we have come to the conclusion that there is merit in grounds 1(a) and 5(c) and as a consequence the appeal should be allowed. We have considered the evidence in the case and have concluded that in the interest of justice there should be a new trial at the next session of the Circuit Court for St. Catherine.