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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 158/88

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

VS.

ELSIE WISDOM

Richard Small instructed by Miss Sonia Jones
for Applicant

Miss Yvette Sibble for the Crown

June 19, 20, 2[illegible] and July 10, 1989

ROWE P.:

At the age of 43 years, Winston Williams had fathered six children, he had separated from his wife who was the mother of four of his children, he was a mechanic by trade and was living at premises No. [illegible] Simpson Road, Kingston 2, owned by the aplicant, as her common-law husband. Winston Williams died in the Kingston Public Hospital on January 29, 198[illegible] from shock secondary to burns he had received. Dr. Gayle Codrington who performed the post-mortem found burns covering approximately 35% - 40% of his body surface. These were partial thickness burns of the skin located over the face including the eye-lids, nose, mouth and upper part of the back. The entire area of

the upper part of the back, involving the shoulders as also his upper limbs excluding only the inner parts had burns. It is ironic that the body of the deceased was identified at the post-mortem by his wife.

For nigh on two years, the deceased lived at 5 Simpson Road, Kingston 2, with the applicant as man and wife. According to the applicant they had known each other for some twenty-five years but the deceased moved into her house in February 1986. There was marked difference between the evidence of the prosecution witness and that of the applicant as to the quality of the relationship which existed between the applicant and the deceased.

The applicant was convicted before Reckord J. (Ag.) and a jury in the Home Circuit Court on July 8, 1988 for the murder of Winston Williams and she was sentenced to suffer death in the manner authorised by law. This verdict has been attacked by Mr. Small who complains that the trial was unfair in a number of respects and ought not to be allowed to stand.

It is necessary to recount the facts upon which the prosecution relied in some detail. There was a great big fire at premises No. 5 Simpson Road, Kingston 2 on the night of January 28, 1988. Part of the premises was completely destroyed and another part partly destroyed. There was no direct evidence of what active role the Fire Brigade played in extinguishing the fire but at 2:30 p.m. on January 29, 1988, Mr. Coates, A Scientific Officer, visited 5 Simpson Road, made certain observations and took samples for analysis. In the building that was completely burnt out, he saw a bed which was almost completely burnt out except for pieces of sponge and in the vicinity of

that bed there was water covered with an oily film. Mr. Coates took samples of the water with the film, of the sponge which was on the bed (not resting in the water on the floor) and when he analysed the samples he found residue of a highly inflammable accelerant which could be either gasolene or kerosene.

Miss Angella Silvera was a tenant at No. 5 Simpson Road for one year prior to January 1983. There was no electricity on those premises at the commencement of her tenancy and none was there in January 1983. All the occupants used kerosene oil, candles or coal as fuel. Miss Silvera's evidence was that she arrived home at 10 p.m. on January 28 and coincidentally encountered the applicant and the deceased entering the premises at that time. She went to her room and later she heard the applicant and the deceased quarrelling over their section of the house. In her words: "The same night of the fire a heard she running him out."

Miss Silvera went on to give evidence about three matters, each of which grounded a separate complaint from Mr. Small. She was asked by Crown Counsel:

> " Q: Did you ever at any time see them with your own eyes quarrelling out in the yard or have you ever seen them engage in a fight?
>
> Ans.: When them round there quarrelling or fighting I don't go around there."

This line of examination was developed in re-examination. At the urging of Crown Counsel Miss Silvera said that the deceased was a soft person whom the applicant beat all the while as one would beat a child in so much so

that her own boy-friend jeered the deceased for permitting the applicant to beat him. However, Miss Silvera said it was only one time that she actually saw the applicant and the deceased fighting and explained that the regularity with which they had conflicts rendered the occurrences commonplace and not worthy of her particular attention.

A second feature of Miss Silvera's evidence was her account of an incident of October 28, 1987. She said that prior to that date the applicant had on numerous occasions cursed the tenants including herself and urged them to vacate the premises. On October 28, she said: "If we don't come out and look place, she going to burn down the house." That threat led Miss Silvera and others to make a report to the Rockfort Police Station.

Evidence was led from Miss Silvera that she observed the applicant carrying a bag whenever she left the premises and this went on for some three weeks before the fire. At one time the witness, said: "All the time she going through the gate, all the while she going, she carry her little bag", and at another point in examination-in-chief, to the question: "Big bag or little bag?" She replied: "Big size bag." The applicant, Miss Silvera said, was moving out nix-nax from the house and this caused her to be suspicious.

To return to the night of the fire, the witness Silvera said she had retired to bed when at about 11:15 p.m., she heard the voice of the applicant shouting to her to come out of the house "for Winston ketch th place a fire and a open the door." Miss Silvera opened her door and saw "the big smoke bulge up" in the section of the house occupied by the applicant and the deceased.

With the help of a sympathetic crowd of people she removed her belongings from her apartment.

It was suggested to Miss Silvera by Defence Counsel that the October 28 incident had its genesis in the applicant protesting the fact that the witness and her boy-friend had made an unlawful electrical connection to her apartment and was illegally abstracting electricity from the Jamaica Public Service line and that the applicant caused the illegal connection to be removed as she feared that her premises would be destroyed by fire. This suggestion was rejected by the witness.

Kenroy Tucker was standing on Johnson Avenue facing the side gate of the applicant's house. This house is completely walled around with a gate made of zinc to the side on Johnson Avenue. In this gate at about eye-level there is an aperture 4" x 3" and to the side where the gate is hinged here is a small space. Through the aperture as also through the space separating the gate from the wall, Mr. Tucker said, he looked into No. 5 Simpson Road and was able to see into a passage on to which doors opened from either side. Tucker said he saw the shadow of a person in the passage and heard the voice of the applicant proceeding from where he saw the shadow saying in a loud voice:

> "You not coming out, you nah come out, mi ah go see if you nah come out."

Then, "not even a minute after" Tucker said he saw fire start up towards the applicant's section of the house "in the passage where she was". He saw too, an oily liquid running down the passage and fire running on this

liquid. After this the fire began "to get out of hand" and he heard the applicant shouting to the tenants to "Wake up, fire, fire. Come out, fire fire." Tucker said that he saw the applicant come from the flaming premises to the road into which a curious crowd had gathered and he heard her say to the people that it was the deceased who had burnt down the house. He contradicted the statement by saying in her presence that: "No, is you burn down the house." No reply came from the applicant who merely hung her head.

Continuing his evidence, Mr. Tucker said that he heard stumbling and coughing and knocking on the door of the room which was burning. A window of that room faced Johnson Avenue. Bystanders were endeavouring to unlock that window by removing boards which fastened it and one who climbed on to Mr. Tucker's shoulders finally kicked in the window. The deceased fell out of the window on to Johnson Avenue suffering from severe burns.

Constable Evers was on duty at the Rockfort Police Station at 1:45 a.m. on January 29, 1988 when Winston Williams attended there suffering from severe burns. Williams was placed in a police landrover preparatory to being taken to the hospital. Just then the applicant walked into the station compound. Constable Evers testified that Williams said in the hearing of the applicant: "Officer, see Else deh, sir, a she bun me up in a the house." To this accusation, the applicant is said to have retorted: "Is a lng time mi a tell you fe come out of mi house." The applicant was detained by the police while Williams was hurried to the hospital.

Later that early morning Cons. Evers returned to the Police Station. He testified that he cautioned the applicant that Williams had reported a case of arson and attempted murder against her, whereupon she replied: "Officer, a long time mi a tell the boy fe come out, so a so mek mi bun him out." On January 30 Cons. Evers went to the Kingston Public Hospital Morgue and viewed the dead body of Winston Williams. He then went to the Central Police Station where the applicant was being detained and after cautioning her, he told her of Williams' death. She responded: "Officer mi really sorry mi did burn down the house."

At 10:30 a.m. on January 29, Cons. Garfield Thompson in the company of Cons. Evers, visited Winston Williams in the Kingston Public Hospital. According to the testimony of these two Constables, Williams expressed his view that he was going to die as a result of the pains he was then suffering and he elected to make a statement which was recorded in writing. Williams failed in his attempts to sign the statement due to the swollen condition of his fingers. This statement was admitted in evidence as a dying declaration. It formed an important plinth in the Crown's case. Before us Mr. Small levelled severe strictures as to the treatment which portions of that statement received during the trial judge's charge to the jury. We reproduce the statement in its entirety - (pp. 192-194):

> "Winston Williams says; I am a mechanic, self employed, live at 5 Simpson Road in the parish of Kingston. I live with my common-law wife, Elsie Wisdom, in a six apartment house, (corrected) concrete structure, zinc roofing, glass and board windows with iron grill gate at eastern side.

"On Thursday, the 28.1.88, about 10:30 p.m. I was at a bar on the Windward Road, drinking some liquor, when Elsie came to me for money. I told her I did not have any, and she begun to quarrel with me. I stopped drinking and went home. On the way home she told me some hot words and I punch her in her face. She began to cry and said she's going to burn down the house because me won't come out. She said, 'I am going to burn up yuh blood cloth tonight because you lick me and me nuh do you nothing. The only way me nuh do it, is if yuh nut sleep ina it tonight.'

I lef' her on the street and went home because me did have in two 'juice' well. All the time me and her having quarrel is over man or money. She have a man wha' she don't want fi leave and every time we quarrel or any tenant in the yard, she say she ah go burn down the house. But I did not believe she would ah do it. One of the woman into the yard even go to the Rockfort Police Station and made a report that she say she ah go burn down the house. She all tell me if me ever lick her she ah go burn me up and burn down the house, but tell you the truth officer, me never know seh she would a throw oil pon me and light me a fire.

Officer, the woman is so wicked that when she see me start to blaze, she run out ah the room and lock me inside, me have fi use some sheet fi out miself. She wait till me ah sleep, then she throw the oil pon me, and as me jump up, she draw the matches and throw it pon me and run. By the time I look 'round, the whole room was ablaze, like she throw gas or oil in the room before she light me. Me never have no gas ina the house but she always keep kerosene oil in the house in case the gas fi the stove done.

Officer, me did not know say she would ah do me so. Look pon me how me burn up; me nuh think me ah go live. Officer, me never know say she was so wicked, and look how me mind her. Who buy her 'fridge and T.V. and most of her clothes and is because me could not find nuh place fi rent mek me still there. Officer, when me ask her fi the things,

"she say - when me ask her fi
the things dem she move out of
the house, she say me not to
ask her nothing.

Officer, all the while we quarrel,
all two time a week. Me did get
fed up and was looking somethere fi
live, but me never know say she
would a light me a fire. Officer,
me a feel all kind of pain, me nuh
think me can live. Me feel like me
ah go dead. Me never believe seh
Elsie would ah do this to me, after
mi spend so much of mi money.
Officer, me feel weak, me can't talk
no more.

I gave the police the statement at
Lower Nuttall Ward, Kingston Public
Hospital, same was read over to me
this 29.1.88, and I make my mark as
being true and correct.'X.' I signed
Winston Williams; I add my signature,
my number, date it. Witnessed by
Constable G. Royce, number 3566,
dated 29.1.88. Taken by me at the
Kingston Public Hospital, this 29.1.88.
Same was read over to the maker and he
made his mark, which is an 'X'. Due to
the condition of his fingers, he could
not sign his name. Constable Royce was
present and witnessed same as being
true and correct. Signed G. Thompson,
Constable, number 17371, dated 29.1.88."

When the defence was called on the applicant gave sworn evidence and she was extensively cross-examined. Her principal defence was accident. Coupled with this was her denial of having made any statement at the Police Station or to the police concerning the manner in which the injuries to the deceased were inflicted, a challenge to the veracity of Sivera as to the incident of October 28, 1987, a denial of the account contained in the dying declaration and a challenge to the ability of Tucker to see anything occurring in No. 5 Simpson Road from a vantage point on Junson Avenue.

The applicant said that she lived at No. 5 Simpson Road since 1974. The premises were without electricity for some years and she refused to permit Silvera's boy-friend to abstract electricity illegally which caused both Silvera and her boy-friend to abuse her. She described the premises in detail. The building on which she lived had three rooms. Her teenaged daughter occupied the room nearest to Johnson Avenue, she and the deceased occupied the middle room and her son the last of the three rooms. On the night of January 28, her son was asleep in his room and her daughter was sleeping in the middle room on the bed the applicant shared with the deceased.

According to the applicant the deceased and herself had gone to Windward Road together. She remained talking to a man, heedless of the calls by the deceased for her to come to him. He walked ahead and she followed two minutes later. She arrived home to see him sitting on the bed. An argument developed which betrayed some jealousy on the part of the deceased. On her account, the deceased grabbed her and pulled her into the daughter's room. He punched her in her right eye, held her back against a bed and beat her. In the struggle a small bucket was overturned. The deceased grabbed at a lighted candle, it fell to the ground and she instantly saw "a big yellow flame go right up in front of him." Then, said the applicant, she ran for a bucket of water which she threw on the blaze. The fire did not abate. She ran outside to alert her sister and returned a second time to snatch her sleeping daughter from the bed. No telephone was available to summon the Fire Brigade so she ran to the Rockfort Police Station and made a report. She was returning from the Station when she saw the deceased, aided by another

man, walking to the Station. She said to the deceased: "You never run out of the house"? He merely shook his head but spoke no word. She said that the police used abusive language to her but never cautioned her and to them she made no statement.

During the cross-examination a number of suggestions were made by Crown Counsel, which have come in for adverse comments from Mr. Small. The applicant was asked if she had removed the fridge, T.V. and electric fan in about October 1987 because she had plans to set the house afire. When it was ascertained in cross-examination that the applicant was a widow, prosecuting counsel went on to ask how did her husband die which elicited the reply that the applicant was told that he had been murdered. The learned trial judge intervened to put an immediate end to that line of enquiry.

In his directions to the jury the learned trial judge left for their consideration the defences of accident and provocation and gave explicit directions in respect of manslaughter arising as a result of an unlawful and dangerous act without the intention to kill or to cause serious injury. No complaint has been made as to his treatment of those issues. Mr. Small's first submision related to the directions in law which the trial judge gave regarding the dying declaration. Of these directions, he said that it was both unnecessary and wrong for the trial judge to tell the jury the bases upon which he decided to admit the dying declaration into evidence. Matters he said, which are the sole concern of the trial judge ought not to be put to the jury as that would only tend to confuse them. With this

submission we cannot agree. Any intelligent jury would wish to know in what circumstances can an extra-judicial statement made by a person since deceased be received into evidence. Not every statement made by an absent witness can be put before a jury and where there is an important exception, it is only commonsense that the jury should be properly informed of the circumstances before they are directed as to the manner in which they should conduct their consideration of the contents of that statement. That was the course adopted by Smith C.J. when directing the jury in Nembhard v. R. (1982) 74 Cr. App. R. 144. It does not clearly appear that this point was expressly raised before the Privy Council but the fact that Smith C.J. had given a whole page of explanation as to the reason for admitting the dying declaration as an exception to the hearsay rule, could not have escaped the notice of their Lordships in the Privy Council. Interestingly enough Sir Owen Woodhouse, who delivered the judgment of the Board set out in terse form the reasons for the admission of dying declarations. He said:

> "It is not difficult to understand why dying declarations are admitted in evidence at a trial for murder or manslaughter and as a striking exception to the general rule against hearsay. For example, any sanction of the Oath in the case of a living witness is thought to be balanced at least by the final conscience of the dying man. Nobody, it has been said, would wish to die with a lie on his lips. So it is considered quite unlikely that a deliberate untruth would be told, let alone a false accusation of homicide, by a man who believed that he was face to face with his own impending death."

Mr. Small's second submission was that the language adopted by the learned trial judge was tantamount to withdrawing from the jury their consideration of the weight to be attached to the evidence or alternatively it would have so overwhelmed the jury as to prevent them from making a proper consideration of the weight to be attached to such evidence.

The learned trial judge based himself squarely upon a passage which appears in the 42nd Ed. of Archbolds at paras. 11-17 which is itself taken from the decision of Eyre L.C.J. in Woodcock (1789) 1 Leach 502. Woodcock's case was approved and followed in R. v. Perry (1909) 2 Cr. App. R. 267 where the L.C.J. said:

> "In my judgment the principle to be applied in these cases could not be better expressed than it was by Chief Justice Eyre as long ago as 1789 in the case of Woodcock."

Reckord J. (Ag.) directed the jury that the evidence contained in the dying declaration was not given to them by the mouth of the deceased but through a Constable and he continued:

> "So the first thing, it is not anything that was given on Oath and the other complaint is that it was not subject to cross-examination and when evidence is allowed, not subject to cross-examination although it calls for cross-examination, then you have to know how to deal with it and deal with it very carefully."

He then told the jury quite correctly that it was a matter for the judge to decide whether or not the evidence is admissible and faithfully following the language of L.C.J. Eyre in Woodcock's case he directed them that:

> "The general principle on which this piece of evidence is admitted is that they are declarations made in extremity when the party is at the point of death and when every hope of this world has gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful consideration to speak the truth: a situtìon so solemn and so awful is considered by the law as creating an obligation equal to that which is a positive Oath administered in a court of justice."

Mr. Small took issue with the use of the phrase "when every motive to falsehood is silenced and when the mind is induced by the most powerful consideration to speak the truth" and submitted that the judge was there telling the jury that as a matter of law and of theology a dying declaration is free from all motives to falsehood and is permeated with a desire to speak the truth. In so doing, he said, the trial judge was elevating a dying declaration above sworn evidence and giving to it a superior character that such evidence did not bear in law.

In directing the jury in R v. Neville Nembhard supra, Smith J.J. gave the reason for the admission of dying delcartion in these words:

> "The reason for this sort of exception to the normal rule, is this, that it is recognized, that a person in that condition, in that state, in that mental state, where he knows he is going to die, particularly a religious person, his state of mind has the same sort of sanctity, or it is the same way as if he had come and sworn on the bible to speak the truth, and so it measures up, so to speak, with the person who comes and swears to tell the truth. In other words you would not expect a man at that stage to tell a lie. Now the Authorities put it is that when he is at the point of death, when every hope of the world is gone, in other

> "words, when he knows that he is going, and his mind is induced by the most powerful considerations to speak the truth, as it is put, a situation so solemn and so awful is considered by law as creating an obligation equal to that imposed by a positive Oath administered in Court. So it is equated to a person who comes and swears and so the prosecution is permitted to bring that evidence before you for your consideration."

This formulation by Smith C.J. in simple, everyday language could convey to a jury in unmistakable terms that a dying declaration is not to be equated with the unsworn evidence of a young child or a statement from the dock by an accused and is not to be denigrated because the declarant was not sworn. We think that trial Judges should avoid the very formal language of two centuries ago and should tailor their directions to the jury after the model provided by Smith C.J. in Nembhard's case.

Reckord J. (Ag.) was certainly not telling the jury that the statement attributed to the deceased was free from falsehood, as a matter of law. He expressly directed the jury that:

> "The next thing you have to be satisfied about Mr. Foreman and members of the jury is that the statement by the declarant Mr. Williams did not concoct or distort to his advantage or to the disadvantage of the accused the statement that the Crown has relied on and that he was not actuated by malice. You have to be satisfied by those things, as it is important in the interest of justice. That a person implicated in a killing should be obliged to meet in Court the designing accusation of the victim. ...... In this regard it will also be necessary for you the jury to scrutinize with care this necessary

> "hearsay evidence of what the deceased was alleged to have said .... and also because you will have been denied the opportunity of forming a direct impression against the test of cross-examination of the deceased's own reliability: if you had been given the opportunity to have seen the demeanour of the deceased to determine if he is somebody you can rely on."

We think that the directions of the learned trial judge as to the reasons for permitting a dying declaration to be adduced in support of a prosecution were forensically correct and having regard to the tenor and the substance of the summing-up on those issues, the jury could not have been misled or confused as to the proper weight to be given to the evidence contained in the dying declaration.

Ground 2(a) complained that the learned trial judge admitted irrelevant and highly prejudicial evidence concerning the events of October 28, 1987. In support thereof, Mr. Small submitted that the evidence of Miss Silvera of an alleged threat to burn down the premises was irrelevant and highly prejudicial. It did not, he submitted, fall within the principles which enable similar fact evidence to be adduced and he relied upon the decision of the House of Lords in D.P.P. V. Boardman (1975) A.C. 421; (1974) 60 Cr. App. R. 165, to say that the alleged threats constituted no more than a chain of reasoning rather than a comparison of a state of facts.

It seems to us that the Crown was never at any point seeking to adduce the alleged threats of October 1987 as facts from which the jury could infer that the applicant committed murder on January 18, 1988. As Miss Sibble argued, the Crown was endeavouring to show that the applicant

had a motive to set fire to her house and so expressed herself at a time proximate to January 1988. The Crown was obliged to prove mens rea in the applicant in order to obtain a verdict of guilty of murder and any relevant expression of intention by the applicant would be any admissible. In R. v. Ball (1911) A.C. 47, Lord Atkinson said in the course of argument at p. 68 of the Report:

> "Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to show he entertained feelings of enmity towards the deceased, and that is evidence not merely of the malicious mind with which he killed the deceased but of the fact that he killed him. You can give in evidence the enmity of the accused towards the deceased to prove that the accused took the deceased's life. Evidence of motive necessarily goes to prove the fact of the homicide by the accused, as well as his 'malice aforethought' inasmuch as it is more probable that men are killed by those who have some motive for killing them than by those who have not."

Ball's case was concerned with a charge of incest and therefore the remarks of Lord Atkinson must be taken to be of general application.

The learned Authors of Smith and Hogan, Criminal Law, 5th Ed. at p. 67 puts the matter this way:

> "As evidence, motive is always relevant. This means simply that, if the prosecution can prove that D had a motive for committing the crime, they may do so since the existence of a motive makes it more likely that D in fact did commit it. Men do not usually act without a motive."

It must be made clear, however, that the prosecution is under no duty to prove motive in a criminal case and often is quite unable to fathom the motive for a particular crime.

One must examine the structure of the Crown's case to discover whether or not the alleged threats issued to Miss Silvera and other tenants could assist in proving that the applicant had a motive to destroy her house by fire and to injure the deceased. If the prosecution had been concerned with a fire of mysterious origin and the applicant was the only person with an opportunity to start that fire, then the previous threat might be relevant to show who set the fire and the motive therefor. The deceased was not a tenant of the applicant. Although on the Crown's case, there was much disharmony and unpleasantness in the relationship between the applicant and the deceased, we do not think that the alleged threats issued on October 28, 1987 were relevant to prove motive or intention to commit murder and this evidence was not admissible in proof of the present charge.

Reference was made in the dying declaration by the deceased to threats issued by the applicant to burn down the house. The passage in respect of which a specific complaint is made states:

> "She have a man wha' she don't want fi leave and every time we quarrel <u>or any tenant in the yard</u> she say she a go burn down the house. But I did not believe she would a do it. One of the woman into the yard even go to the Rockfort Police station and made a report that she say she a go burn down the house."

It was never made clear in evidence whether the declarant was present and heard the threats issued to any of the tenants or that he had personal knowledge of the alleged report to the Rockfort Police Station. We think that this evidence could be double hearsay and not saved by any exception to the hearsay rule.

Significantly, although the evidence of the threats of October 28 was recounted to the jury the learned trial judge expressly excluded that evidence when he came to deal with what he called circumstantial evidence. He said on page 276 of the Record:

> "Now, this particular night, there was this fight - the Crown is saying there was a fight or a thumping-up on the street. The defence is saying, in the room. The Crown is saying that not only that we had this little fight, but, that you threaten to burn up the place if I ever sleep there the night and he went and fell asleep, and the next thing, he is inflamed. <u>So that is the circumstantial evidence that the Crown is relying on.</u>"

Earlier, in his summation on p. 276 the learned trial judge had adverted to a set of hypothetical circumstances as an example of what would amount to circumstantial evidence. He was not there endeavouring to apply the facts of the instant case to the law, although he did use some of the factors which were present in the case. To follow the general passage with the specific direction quoted above, places the matter beyond doubt that the trial judge was not incorporating into his directions on circumstantial evidence the facts sworn to by Miss Silvera as occurring on October 28 or the reference to that occasion in the dying declaration.

Miss Silvera gave evidence as to the relationship which existed between the applicant and the deceased. This conflicted sharply with the applicant's account of the love and harmony which predominated.

Incidents of violence were related by Miss Silvera in which the deceased was the tormented and the applicant the victor. We think that this evidence was admissible, along with evidence that the applicant constantly used expulsive language to the deceased, to show that she entertained a degree of enmity towards him and that in the circumstances, it was more probable than not, that the fire was not accidental.

Miss Silvera had not visited the apartments of the applicant within a month of January 1988. She had no personal knowledge of the contents of the applicant's [illegible] house at that time. Nevertheless, she gave evidence of her suspicions that the applicant had been removing small objects from her house for the three weeks, before January 28, 1988, in a bag. This was wholly inconclusive and speculative information, without any probative value and ought not to have been elicited. It was not high-lighted in the summing-up, nor were the jury directed to pay any special attention to it. It is also true that they were not told to ignore this evidence.

Mr. Small complained that the prosecuting counsel made improper suggestions to the applicant during cross-examination to the effect that she had timely removed her clothing and electrical equipment from the premises prior to January 28, 1988. The foundation for these questions came from the dying declaration. There the declarant said inter alia:

"She all move out her fridge
and T.V. and most of har (sic)
clothes and is because mi
could not find no place fi
mi rent why me still there.
Officer, when me ask her for
the things she move out of
the house she say mi must not
ask her anything."

Crown Counsel was entitled to treat the assertions in the declaration as being true and not only to ask questions of the applicant to confirm the truth of those declarations but to positively suggest that what the dying declaration asserted was true. We cannot, in this instance, accommodate the suggestions of Mr. Small, that the Court should provide guidance to over-zealous counsel who are apt to make unfounded suggestions in cross-examination. Counsel did not in this case, exceed the bounds of fairness.

Mr. Small has argued with utmost sincerity and great force that there was a flavour of unfairness in the trial in that the evidence of the alleged threat to burn down the house if the tenants did not vacate, of the reference in the dying declaration to such threat or threats was of such highly prejudicial nature that it ought to be excluded altogether or that there should be the most careful directions from the trial judge as to how that evidence should be viewed by the jury. In addition, he argued, that the applicant's version of the October incident, if accepted, would completely negative much of the evidence of Miss Silvera and it was the duty of the trial judge to give the ncessary assistance to the jury as to how to assess that evidence. We agree that this evidence could have a prejudicial effect upon the jury as tending to show that the applicant harboured a general desire to set fire

to the premises one day.

Mr. Small has invited us to allow the appeal and order a new trial in the interest of justice. We have accorded this submission the most anxious consideration. Some of the uncontroverted facts in the case must be recalled. Mr. Coates, the Scientific Officer, found an oily substance on the remains of the foam rubber which was on the bed in the burnt out room. This was the part of the foam which was not in contact with the liquid on the floor. Somehow kerosene oil or gasolene, had found its way on to the mattress on the bed. The pathologist described the injuries to the deceased. He had no burns to his lower limbs. The burns were concentrated to the front and back of his chest, his upper limbs and his face and head. Prosecuting Counsel was able to mount an argument before the jury that a fire which started from the floor would undoubtedly injure the lower limbs, if the deceased was standing on the floor, the inflammable liquid was poured on to the floor and the flame ignited at floor level. That physical fact must have had a powerful influence upon the jury. Before one gets to the contents of the dying declaration, it is important to refer to the police evidence. The applicant denied making any statement to the police concerning the cause of the injuries to the deceased but she did accept that she saw the deceased in a police vehicle at the Rockfort Police Station. On the Crown's case there was the accusation in the face of the applicant: "Officer see Elsie deh, a she bun me up in a de house" and the response of the applicant: "A long time mi a tell you fi

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come out a mi house." Later when the offences of Arson and Attempted Murder were brought to the attention of the applicant and she was cautioned, she said:

> "Officer a long time mi
> a tell di boy fi come out
> a mi house, a so mek me
> bun him up."

At this early time after the burning of the premises, 5 Simpson Road, one would have expected a person in the position of the applicant to be concerned about her premises and about her children and to be ready to accuse the deceased of the fierce assault upon her, of the accidental spillage of the inflammable liquid and the fall of the candle. In the absence of such reaction, and if the jury believed that the police officers were witnesses of truth, the guilt of the applicant was beyond question. Explicit evidence was contained in the dying declaration of what transpired in the room prior to the fire. Again, if this was believed, all the ingredients of manslaughter at the very least would have been proved.

This is a case in which the learned trial judge went to the utmost lengths to discuss the offence of manslaughter and to indicate to the jury that there was a substantial body of evidence in the dying declaration to support a conviction for manslaughter.

If the jury were of the view that the applicant had a settled intention to burn down her house to force the departure of the deceased, it is possible that they could have given less weight to the events in the dying declaration which preceded the fire. On the verdict, it is absolutely clear that the jury rejected the defence of accident. On the whole of the facts, and with a correct

direction from the trial judge, the only reasonable and proper verdict would be one of guilty of murder or manslaughter. There was no way in which a jury could properly find accident when the lower limbs of the deceased were not even scorched. It would have been a perverse verdict indeed, if they had not accepted the evidence of the Police Officers as to the statement made to them by the deceased.

In the event, however, we cannot say that the only reasonable verdict would be murder, when indeed the jury had for their consideration evidence which might have tipped the scales in favour of provocation, had it not been for the inadmissible evidence and prejudicial evidence from the witness Silvera relative to the incident of October 28, 1987.

In our view the appeal against conviction of murder should be allowed and a verdict of manslaughter should be substituted. To reflect the seriousness of the offence a sentence of eighteen years imprisonment at hard labour is substituted.