CA. CRIMINAL LAW — Murder — Conviction for manslaughter — Trial — Provocation — self-defence — standard of proof. Whether there was no evidence of provocation it was a misdirection to have left provocation to jury — whether jury misdirected on self-defence — whether judge's direction on the standard of proof wrong. APPEAL dismissed. Cases referred to

Lee Chun-Chuen v Regina (1963) 1 WLR 73.
Solomon Beckford's Appeal: 9 JAMAICA LAW REPORTS 1986 (page 5)
D.P.P. v Morgan (1976) AC 182
Harry Wallen v The Queen 13 W.I.R 394.

Evidence

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 200/87

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

VS

GARFIELD WALLACE

K.D. Knight, for the appellant

Kent Pantry, Ag. Senior Deputy Director of Public Prosecutions for the Crown.

14th November & December 19, 1988

DOWNER, J.A.:

The appellant was convicted for manslaughter on the 11th November, 1987 after a trial lasting four days before Wolfe J, and a jury in the Home Circuit Court. This Court on 14th November 1988 affirmed the conviction and ordered that the sentence of imprisonment for eight years with hard labour, should run from the date of conviction. We now put our reasons in writing as we promised at the end of the hearing.

In order to appreciate the proceedings in this court it is necessary to rehearse the evidence in the court below, and thereafter examine the grounds of appeal and submissions of counsel.

The case for the crown depended on the sole eye-witness Hugh Levine who happened to be the brother of the deceased Marlon Morris. As a background to the incident for which there was an indictment for murder, the record disclosed that Sofia Spence the girlfriend of Marlon Morris had a dispute with a man called Ray at a club known as the Malibu. From Sofia's account Ray had asked her to dance with him and she had refused. Whereupon Ray poured the contents of a beer bottle on her and inflicted an injury to her head with the bottle.

The narrative was then taken up by Hugh Levine who spoke with Garfield Wallace the [illegible] at the club, and they both departed. At this juncture Hugh Levine saw Ray coming towards him with a knife and Hugh Levine recalled that he hurled a bottle at Ray and then they both wrestled. While the wrestling was in progress Marlon Morris walked towards them and assaulted Ray who had previously assaulted his girlfriend Sofia. Ray then stabbed Hugh Levine in his side and then the [illegible] Marlon Morris' chest and from that wound he died.

The accused gave sworn testimony and denied he was on the scene when Marlon Morris was stabbed. He said he was at the Malibu and that he had heard shouts that there was a fight and that he saw Ray running from a club with blood all over his shirt, while the deceased was lying on the ground. He further stated that he went and remained on the scene until the body was taken away and then he went home.

As for the cause of death Dr. Clifford stated that the wound penetrated both ventricles and went to a depth of four to six inches into the heart and the doctor further stated that a severe degree of force would have been necessary to cause a wound of such depth.

It is pertinent to expand on Hugh Levine's evidence to see why the judge thought it prudent to leave the issue of provocation and self defence to the jury although the defence was in the nature of an alibi. Hugh Levine stated that he overheard his brother Marlon saying that Ray had assaulted Sofia his girlfriend and that the matte was not yet finished.

Moreover he further stated that Marlon went up to the appellant Garfield, and called him an idiot whereupon the appellant replied"Marlon would see in time who was idiotic." He explained that, that was the background when Ray came on the scene and Marlon had flung a bottle at Ray as he Marlon had thought that Ray approached him in an aggressive mood. At that point the learned trial judge stressed to the jury that it was from these circumstances that the appellant might have thought Marlon was going towards Ray to do him something and that it was then that Garfield fatally wounded Marlon.

The learned trial judge was at pains to put this evidence in the most favourable light to the jury and he was generous in applying the law to the facts. He left murder and manslaughter on the ground of provocation and lack of intent. As regards the evidence of the defence, although the appellant pleaded alibi, the trial judge also left self-defence to the jury. It was against that background that Mr. Knight made three submissions which alleged misdirections which ought to warrant setting aside the conviction for manslaughter.

The initial complaint was that as there was no evidence of legal provocation then it was a serious misdirection to have left that issue for the jury's consideration. It is well known that there are three elements necessary to constitute legal provocation. These must be the provocative incident, a loss of self control either immediately or shortly after the provocative incident and the retaliation proportionate to the provocation. The trial judge had before him the evidence of Hugh Levine who told the court that his brother Marlon went to Garfield the appellant and said 'Ray kick mi baby mother and it nah go so.' He further said his brother was in an angry mood and that he told the appellant that he was an idiot whereupon the appellant said 'you will see who a idiot' Additionally he said Marlon had a bottle in his hand. The trial judge left these circumstances to the jury on the ground that it could cause a reasonable man to loose his self-control and so reduce the offence of murder to manslaughter. If it be said that this was viewed favourable to the appellant then this approach was recognised as appropriate in Lee Chun-Chuen v Reginam (1963) 1 All E.R. 73.

A favourable view of the evidence is for the protection of the accused. Lord Devlin who gave the opinion of the Board cited Viscount Simon in Holmes v Director of Public Prosecutions (1946) All E.R 126 as follows: at p 78.

> "If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death, it is the duty of the judge as matter of law to direct the jury that the evidence does not support a verdict of man-slaughter. If on the other hand, the case is one in which the view might fairly be taken [a] that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and [b] that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict."

Then Lord Devlin continued:

> "This is the right test to apply to both when the trial judge is considering whether or not to leave provocation to the jury and when an appellate court is considering whether or not it was properly withdrawn from a jury. But their Lordships must observe that there is a practical difference between the approach of a trial judge and that of an appellate court. A judge is naturally very reluctant to withdraw from a jury any issue that should properly be left to them and he is therefore likely to tilt the balance in favour of the defence. An appellate court must apply the test with as much exactitude as the circumstances permit."

We are of the opinion that the judge tilted the balance in favour of the accused and we can find no justifiable criticism for this.

The second ground of appeal complained that Wolfe J, misdirected the jury on the issue of self defence. It will be recalled that the accused pleaded alibi so the evidence to raise the issue of self defence must have been raised on the Crown's Case. The same facts which gave rise to the

issue of provocation were capable of raising the issue of self-confidence. The aspect which necessitated a direction on self defence was the evidence that when the accused inflicted the fatal wound on Marlon Morris it could be inferred that the accused thought a felonious attack was being or about to be made on Ray by Marlon.

It is useful to cite two passages from Solomon Beckford's unreported Privy Council Appeal 9 of 1986 to demonstrate why the critism aduced by the appellant as to the directions on self defence was not justified.

The first at page 9 of the judgement reads as follows:

> "Their Lordships therefore approve the following passage from the judgement of Lord Lane in Gladstone Williams at p 281 as correctly stating the
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> law of self defence:-
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> The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned is neither here nor there. It is irrelevant. Were it otherwise the defendant would be convicted because he was negligent in failing to recognise that the victim was not consenting or that a crime was not being committed and so on. In other words the jury should be directed first of all that tje prosecution have the burden or duty of proving the unlawfulness of the defendant's actions; secondly, if the defendant may have been labouring under the mistakes as to the facts he must be judged according to his mistaken view of the facts; thirdly, that is so whether the mistake was, on an objective, a reasonable mistake or not." (Emphasis supplied)

The importance of this passage is that it emphasised the importance of the reasonableness or the unreasonableness of the defendant's belief as material to the issue of whether the belief was held by the defendant and as regards the unlawfulness of the accused's action, so that the introduction of the word reasonable in a summing up does not necessarily mean there was a material misdirection. What it can do is to establish the basis

of the unlawfulness of the defendant's action and the judge must bring it home to the jury that the burden of proof lies on the crown.

The second passage is closely connected to the previous one and is to be found on page 11 of the judgement. It reads as follows:-

> "It was submitted that the jury must have accepted the evidence of Peart that the deceased had been shot down in the act of surrender and reject the accused's account that he was killed in a gun battle, which the judge had clearly directed them would amount to self-defence. Their Lordships have given anxious consideration to this submission for there is much force in it if on the facts as they appear from the summing up the judge had left the matter to the jury on the basis of a choice between the two accounts then any misdirection as to the reasonableness or otherwise of the appellant's belief would have been of only academic interest."

This was a clear statement that the proviso ought to have been applied if the matter were left to the jury as a choice between the two accounts as emerged on the summing up. An illustration of this was the seminal case of D.P.P. v Morgan [1976] AC 182 where the proviso was applied although there was a misdirection on the issue of the defendant's belief in a rape case. It was because the learned trial judge interpreted the evidence as to include the further situation, namely that the appellant could have mistakenly believedthat the deceased was armed and would have shot the appellant if he did not shoot first, that it was mandatory to leave the subjective test to the jury as regards the appellant's belief and that a failure to do so compelled their Lordships to allow the appeal.

It is against this background that the criticised passage p 33 of the record must now be examined:-

> "So if you say yes, I believe that Hugh and Ray were grappled together, we believe that Marlon was walking towards both of them with a bottle, and if you believe that the accused man, you are satisfied that the accused man honestly believed that Marlon was going to attack Ray, in those circumstances he the accused man would have been entitled to use reasonable

> force to prevent the attack upon Ray by Marlon, and in those circumstances self defence would [illegible] him. Once he honestly believes it, but how you decide whether he believes it, you look at all the circumstances and say, was this honest belief reasonable in all the circumstances? Because you can't see a man walking towards a man and just on that basis say I honestly believe, and you kill the man, but with reasonable circumstances, and the force you see must be reasonable, Because, if you use more force than is reasonably necessary in all the circumstances of the case, then self defence don't avail you, because what we are talking about is the use or reasonable force to repel an attack You must consider, if you accept it, walking towards with the bottle, if you find that this was happening, if it was reasonable in the circumstances, that if you find that he did the stabbing, it was reasonable in the circumstances to have stabbed the man in chest, the question is, did he honestly believe that Marlon was about to attack Ray?"
>
> (Emphasis supplied)

We have quoted this passage at length to demonstrate that Wolfe J, was at pains to direct the jury that it was the 'honest belief' of the appellant which mattered as regards the likelihood of an imminent attack on Ray by the deceased. Further the jury was directed that to decide whether the appellant held the belief at all it was necessary to examine the reasonableness or unreasonableness in the circumstances when the fatal wound was inflicted. This was necessary in order to comply with the requirement that the Crown must first establish that the appellant's action was unlawful. Further the learned trial judge emphasised that as the defence pleaded alibi the only basis on which the plea of self defence could arise from the direct or inferential evidence of the crown witness Hugh Levine. So considered, we found no fault in the judge's summing up, as regards his directions on the issue of self defence.

The third ground of complaint was that the learned trial judge's direction on the standard of proof was wrong. It was contended that the distinction between what was certain and what was sure confused the jury. Here are

the exact words of the summing up as appeared at page 12 of the record:-

> "The standard of proof required before you can return a verdict adverse to him, is that the prosecution must make you feel sure, not certain, sure, because you can only be certain if you were at Seven Miles on the night in question and saw with your eyes what happened. They say you must feel sure. Put another way, the prosecution must satisfy you of his guilt beyond a resonable doubt and all reasonable doubt means Madam Foreman and members of the jury, is a real doubt, not a fanciful or flimsy doubt, a doubt which goes to the root of the matter; a doubt which is germane to the issues which you must decide; a doubt which leaves you in a state of mind where you cannot feel sure. Because you can have doubts in relation to peripheral issues, side issues, but it dosen't affect your mind as to the central issue. Well, that is what a real doubt means, a doubt which goes to the root of the matter; a doubt which leaves you in a state of mind where you cannot feel sure, that is the type of doubt that the law refers to."

It is sufficient to dispose of this ground by quoting the words of Lord Diplock in Henry Walters v The Queen 13 W.I.R. 354 at 356:

> "By the time he sums up the judge at the trial has had an opportunity of observing the jurors. In their Lordship's view it is best left to his discretion to choose the appropriate set of words in which to make that jury understand that they must not return a verdict against a defendant unless they are sure of his guilt; and if the judge feels that any of them, through unfamiliarity with court procedure, are in danger of thinking that they are engaged in some task more esoteric than applying to the evidence adduced at the trial the common sense with which they approach matters of importance to them in their ordinary lives, then the use of such analogies as that used by Small J., in the present case, whether in the words in which he expressed it or in those used in any of the other cases to which reference has been made, may be helpful and is in their Lordships' view unexceptionable."

We have no hesitation in finding that the jury was properly directed on the standard of proof that the verdict therefore cannot be faulted.

It was in the light of the foregoing considerations that we dismissed this appeal.