CRIMINAL LAW — Murder — Trial Judge's Summing up — Provocation — Whether trial judge gave jury sufficient guidance in the area of the facts in so far as the words or conduct of the deceased may have amounted to provocation in law. APPEAL ALLOWED — Conviction for murder quashed — verdict of manslaughter substituted — Sentence seven years h/e.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 27/87

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A. (Ag.)
THE HON. MR. JUSTICE BINGHAM, J.A. (Ag.)

REGINA

VS.

JACQUELINE SMITH

Mr. L. Wellesley for the applicant

Mr. P. Dennis for the Crown

October 29 and December 15, 1987

BINGHAM, J.A. (Ag.):

After hearing arguments addressed to us by learned Counsel for the applicant and for the Crown, at the conclusion of the matter we treated the application for leave to appeal against the conviction for murder as the hearing of the appeal. The trial was before Reckord J (Ag.) and a jury in the Home Circuit Court on February 11, 1987 and on October 29 we quashed the conviction and set aside the sentence of death. We substituted a verdict of manslaughter and imposed a sentence of seven years at hard labour to commence as from the date of conviction. We promised to put our reasons for arriving at this decision into writing and this we now do.

The charge arose out of the death of one Cecille Roberts on 15th day of March, 1986 as a result of a stab wound which the doctor who performed the post mortem in her testimony described as:-

> "A small round wound 3 millimetres in diameter located below a sutured surgical wound under the left nipple of the left breast. This injury corresponded with a puncture wound of the heart which resulted in variable degrees of collapse of both lungs."

There were a number of other wounds seen by the doctor, but these were surgical in nature as a result of efforts made by surgery in an attempt to save the deceased's life. In the doctor's opinion death was due to acute heart failure secondary to arrhythmia, that is an abnormal beating of the heart, triggered off by abnormal electrical impulses from the small 3 mm. wound previously described.

There is no question but that this wound was inflicted by the applicant with an ice pick. The circumstances in which the deceased met her death based on the Crown's case were not conflicting and may be summarised as follows:-

On 14th March, 1986, Carla Saddler who is also called 'Kim' followed the deceased's mother and the deceased who was known also by the name of 'Donna' to a bus stop between 8 and 9 p.m. The deceased's two children as well as one Parnell Clarke known as 'Jean' were present. After the deceased's mother had left on the bus the other persons mentioned including the deceased were on their way back home walking along Collies Road. As they were walking up they were all talking and according to Miss Saddler, the applicant who is known by the name of 'Princess' was "tracing" the deceased. The applicant said to her "Go wey dutty gal, me no dash weh no belly". The deceased and the applicant then came in front of the other members of the party and there was an exchange of words between them. In the words of Carla Saddler "them start to trace them one another". The deceased then stepped on the applicant's slippers, the latter pushed her off and the two of them caught up and started to fight. Parnell Clarke made an unsuccessful attempt to part them. During the fight the applicant was seen to pull an ice pick from her skirt pocket and make three stabs at the deceased, one of which caught her in her left breast. The deceased who was unarmed then called out to a man who was passing the scene to lend her his knife, but he refused. The applicant then ran away, followed by the

deceased who was not able to go very far because of failing strength. From that point Carla Saddler and Parnell Clarke assisted the deceased to the Olympic Gardens Police Station which was situated near to the scene of the incident. The applicant had reached there ahead of them. The police took the deceased to the Kingston Public Hospital.

Carla Saddler who said she was able to witness the incident by the glare of the street light situated on Binns Road at the corner of Collies and Binns Roads, testified that after the deceased received the stab she bawled out that she had been stabbed, and upon her lifting up her blouse the witness said that she saw a hole under the deceased's breast.

At the Police Station the deceased told the Police in the presence and hearing of the applicant that it was the applicant who had stabbed her. To this the applicant responded that it was the group of women who had troubled her.

The account of Carla Saddler was also supported by the testimony of Parnell Clarke.

The applicant gave an unsworn statement in her defence. According to her on the night in question she was walking on her way to her home at 59 Binns Road. She stopped at Binns Road and Collies Road talking to one Pauline. Pauline then walked away and she then heard an argument behind her. She looked around and saw the deceased and Parnell Clarke. They were "throwing words" at her. Carla Saddler was also present. The three of them came down to where the applicant was. The deceased addressed her saying "Dutty gal Princess a you me a talk". There was a further exchange of words between the two of them. Carla Saddler also came into the argument. There was a further exchange of words between the deceased and the applicant. The deceased then came up in front of the applicant and stood on her feet. The applicant told her to come off and when she refused the applicant pushed her off. The deceased then pulled an ice pick and stabbed at the applicant who held her hand and the ice pick fell to the ground. The two women then started to wrestle and during this the applicant said the other two women Kim and Jean were hitting her in her back. One Mousy then came up and parted

them. The applicant ran off in the direction of the Police Station being chased by the three women who were now joined by the deceased's brother, The applicant took refuge in the station. She denied having an ice pick or any knowledge as to how the deceased received the stab wound to her breast.

On the evidence, ruling out the fact that the stab wound which the deceased received to her left breast had been accidentaly inflicted, and in this regard the learned trial judge, in an over-generous mood, adverted the jury's mind to the law relating to accident - the two main issues which arose were:-

(1) Self-defence

(2) Provocation

There is no complaint about the directions on self-defence. The complaint about the treatment of the issue of provocation does not relate to the law either. The substance of complaint was directed as to the inadequacy of the manner in which the issue of provocation was left to the jury.

Learned Counsel for the applicant has contended that the jury required greater assistance in the area of the facts in so far as the words or conduct of the deceased may have amounted to provocation in law. In this regard therefore, the jury were required to be told what amounted to the provocative words or conduct upon which the defence was relying, assuming that the jury rejected the cardinal line of defence which was self-defence. When the Crown was called upon in relation to this ground learned Counsel for the Crown agreed that the learned trial judge might have assisted the jury in so far as he went in his directions as to the provocative acts were concerned. He further agreed that although the trial judge did give what amounted to clear directions on the law, in so far as he was required to relate the law to the facts, he fell short in that area. With this last comment of learned Counsel for the Crown we entirely agree and wish to commend him for his candid and frank approach to the matter.

When the printed record of the summing-up, the substance of which took up some twenty-six pages, is examined the only reference that one can

find to what could have amounted to provocative words or conduct is to be found at page 101 where the learned trial judge expressed himself thus:

> "Now, you heard in the evidence, the witnesses, both witnesses told of words being passed. They were tracing each other. Now the burden of proving provocation is not passed to the accused."

The only other aspect of the summing-up which sought to deal with conduct capable of amounting to provocation was the reference to the fight between the deceased and the accused which was dealt with by the learned trial judge by way of the issue of self-defence. Here, having regard to the events preceding the stabbing, the tracing match and the ensuing fight between the deceased and the accused, there was the need for the learned trial judge having dealt as he did fully and adequately with the issue of self-defence to direct the jury that if they rejected the defence of self-defence or entertained a reasonable doubt in relation to self-defence then they had to go on to consider the defence of provocation and in that regard it was then necessary for him to alert the jury's mind to the material facts which in his opinion were capable of amounting to the provocative words or conduct which they as judges of the facts could consider as in fact amounting to provocation. Unfortunately, the directions were lacking in this regard. In effect it appears that the learned trial judge seemed to have been somewhat carried away in his directions on self-defence and most of the summing-up seemed to have been focussed in that area.

It is clear from the jury's verdict that self-defence was rejected. But it is not equally clear that had they received adequate direction on provocation that they would necessarily have arrived at the same verdict. Accordingly, because of this non-direction the applicant lost the opportunity of being convicted on the lesser count for manslaughter. Hence the course we adopted because we are of the opinion that there is evidence on which such a verdict could have been returned.