JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 67/88

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

REGINA

v

STANLEY HUMPHREY

W. Charles for Appellant

Miss V. Grant for Crown

December 14 and 15, 1988 and March 8, 1989

GORDON, J.A. (Ag.):

This was an application for leave to appeal against conviction on 17th March, 1988 for the offence of murder before Ellis J. sitting with a jury in the Clarendon Circuit Court. The application was treated as the hearing of the appeal and the appeal was dismissed and the conviction and sentence affirmed. We promised to put our reasons in writing and we do so now.

Miss Karlene Jackson (o/c Caleen) and Mr. Anthony Haddad (o/c Anthony Green), (the deceased), lived at Sutton Road, Chapelton, Clarendon. Miss Sonia Barnes, Miss Jackson's teenaged daughter lived with them. The appellant lived at Suttons and was once the lover of Miss Barnes. At about 4.30 p.m. on the 5th May, 1987 Miss Jackson on her way home from work was on Suttons Road when she met the appellant. She spoke to the appellant saying he had accused Barnes of breaking into his house stealing a shirt and giving said shirt to her cousin, Gregory. She contended that the appellant had given the shirt to Sonia Barnes. In the course of the heated argument that developed the

appellant accused Miss Jackson of procuring for her daughter two abortions. In the course of the argument the deceased and Sonia arrived on the scene. The deceased took objection to the language used to Miss Jackson by the appellant who was a stranger to him. The appellant asked Sonia who the deceased was and continued his tirade over the deceased's protest that he 'cannot disgrace my woman on the street like that'. The deceased said to the appellant 'move away from there'. The appellant repeated what he had said about Miss Jackson and the deceased pushed him. Each man armed himself with two stones but none was flung as Miss Jackson held the deceased and disarmed him.

The incident ended with the appellant saying to Haddad - 'Hey boy a going fix you b..... c..... business'. They proceeded along the road and the appellant rode up on a bike and said to Miss Jackson 'Caleen, a going give you a b..... c..... surprise'.

The following morning about 7.30 Miss Jackson was at home preparing to leave for work when the appellant appeared on the road above her house and called 'Caleen come here'. She told him he should come to her. The appellant started down the track from the main road to her gate and she saw Paul Humphrey, jump from a clump of bush and run to the front of her verandah. Paul asked her 'you know me?'. She said yes. He asked 'then what you know about me and thief?'. She indicated she had not said so. He then asked 'where is the bad man you have here?'. It should be noted that Paul Humphrey, the brother of the appellant had been absent from the area for many years. Sonia Barnes said that Paul Humphrey said 'anyway is the bad man unoo have yah me come for'. At that time Stanley Humphrey had joined Paul by the verandah and engaged Sonia in conversation about the shirt. She told him she had burnt it.

Miss Jackson said the deceased had gone to the shop to purchase cigarettes and shortly after Paul asked for the bad man the deceased appeared on the track leading to the house. The appellant then announced 'see the bad man a come yah' and the appellant and his brother both turned their attention to the deceased. They ran towards him and

he ran off. The appellant pulled a brown paper packet from behind his back and shook from it a bill machete while in pursuit of the deceased. Mr. Haddad scaled a neighbour's wall and ran into their kitchen, but as he tried to close the kitchen door he was cornered by the appellant and fatally chopped. Paul Humphrey stood by his brother and after the deceased fell mortally wounded, Paul looked at him and said, 'come, I don't have to bother use my thing'. While Paul was pursuing the deceased he had his hand stuck in his side. Sonia Barnes' version of this aspect is that Paul said, 'come mek we go home now, that is enough'.

Detective Corporal Elijah Bell summoned to the scene arrived to find the injured man lying where he had fallen - on the floor of Mr. Young's kitchen. He was removed to the Chapelton Hospital then transferred to the Percy Junior Hospital in Spaldings. He succumbed during the night of the said day.

The post-mortem examination revealed (1) a laceration on the left shoulder joint 3½" long and 1" deep extending to the head of the humerus (2) a laceration to the left shoulder joint posteriorly approximated 3¼" long (3) a laceration on the left side of the neck 3 3/4" long and 1½" deep. The sternocleido mastoid muscle was severed and a branch of the common carotid artery was severed also the transverse process of the first vertebra. Injury No.1 revealed that the acrimo clavicular joint was severed. Dr. Satish Chandran was of the view that death was due to haemorrhage and shock resulting from multiple lacerations and the severing of the branch of the common carotid artery. In his opinion, the injuries were consistent with infliction by a sharp instrument such as a machete with a good amount of force.

The brothers, Paul and Stanley Humphrey were taken into custody later on the 6th May, 1987, they were informed of the report Corporal Bell had received. Neither said anything. The following day Corporal Bell arrested them on the capital charge; after caution the appellant said, 'Everyday him check me with gun'.

The appellant gave an unsworn statement from the dock. He agreed with the crown witnesses that there was a fuss over a shirt in the afternoon of the 5th May, 1987 on the road. He said when the deceased intervened he asked, 'who dah boy deh Caleen?'. He admitted there was physical contact between himself and the deceased and they were separated. The next morning he said he went to the home of the witness Jackson to retrieve his shirt. This he did at Sonia Barnes invitation. When he asked for the shirt he was informed by Barnes that she had burnt it. While he was speaking with Karlene Jackson and Sonia Barnes he was attacked by the deceased who was armed with a rachet knife. He avoided the first rush and used his machete to chop his assailant. The knife, he said, fell from the deceased's hand, it was retrieved by Karlene Jackson who gave it to the deceased. The deceased renewed the attack and the appellant chopped him again. The deceased then ran over to Mr. Young's yard.

The appellant said that when Corporal Bell spoke to him and told him of the report he had received, he in reply told Corporal Bell that he had been attacked by the deceased with a knife and he gave him two chops.

Paul Humphrey in an unsworn statement said he left his home in Kingston for Sutton on 5th May, 1987 arriving at Sutton about 8.00 p.m. Next morning he contacted his brother Stanley who said he was going to visit his girlfriend for a shirt. His brother left him walking on the road because he found the journey too far. While he was walking he heard a shout and saw his brother Stanley approach. Stanley told him that he and a youth had a fight. His statement was that he was never at the home of Miss Jackson nor near that of Mr. Young. He was not with his brother when the incident occurred.

Before us Mr. Charles sought and was granted leave to argue two supplemental grounds of appeal. They were -

Ground 1 dated 9th December, 1988

> "1. The Learned Trial Judge's direction on provocation was inadequate - no did he direct the Jury that the defence

" of provocation may arise where a person intends to kill or inflict grevious bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation.

His omission to do this might have had the Jury believe that once they were satisfied of an intention to kill, murder was proven."

Ground 1 dated 14th December, 1988

"1. The Learned Trial Judge failed to direct the Jury that if they were in doubt as to whether or not there was provocation they should resolve that doubt in favour of the accused and find him not guilty of murder but guilty of manslaughter.

It is submitted that the failure of the Learned Trial Judge to give such a direction occasioned a miscarriage of Justice."

Mr. Charles submitted that the events of the afternoon of the 5th May, 1987 by themselves coupled with the statement made by Sonia Barnes on the morning of the 6th amounted to provocation. Neither event by itself he said could suffice to raise the issue of provocation. He submitted that the failure of the Learned Trial Judge to deal with the issue of provocation adequately resulted in a miscarriage of justice - he relied on R. v. Richards 11 W.I.R. p.102 and R. v. Bunting 8 W.I.R. p.276. Reference was also made to Lee Chun-Chuen v. Reginam (1963) 1 All ER p.73. The first ground of appeal advanced by Mr. Charles was supported by Buntings case. The headnote of this case reads -

"At the trial of the appellant on a charge of murder the defence of provocation arose and was left by the trial judge to the jury. In his directions to the jury the trial judge told them that murder was the un-provoked killing of a human being without lawful excuse and with the intention either to kill or to cause such injury as was likely to result in death or from which death resulted. He omitted, however, to tell them that where such intention resulted not from premeditation but solely from the loss of self-control induced by provocation, the accused was guilty not of murder but of manslaughter.

> "Held: in a case where provocation arises as a defence to a charge of murder it is proper and indeed necessary for the trial judge to tell the jury that murder is not established unless an intent to kill or to cause grievous bodily harm is proved, but the converse pro= position, namely, that the accused is guilty of murder if such an intention is proved is not necessarily correct. For where the inten= tion to kill or to cause grievous bodily harm results not from pre-meditation but solely from the loss of self-control induced by provocation the accused is guilty not of murder but of manslaughter. Nowhere in his summing-up did the trial judge point this out to the jury and his earlier categorical direction as to the intention necessary to establish murder, unqualified by any reference to intention resulting solely from provocation went too far and amounted to a misdirection causing a substantial miscarriage of justice."

R. v. Richards was the foundation for the submission contained in the second ground of appeal urged upon this court. In this case the head-note reads -

> "The appellant was convicted of murder and sentenced to death. At the trial there was some evidence of provocation and the trial judge left this issue to the jury. He gave full directions to the jury on the law of provocation but omitted to tell them that if they were in doubt as to whether or not there was provocation they should resolve that doubt in favour of the accused and find him guilty not of murder but of manslaughter.
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> On appeal,
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> Held: following R. v. McPherson (1957) 41 Cr. App. Rep.213, the jury should have been told that if they were left in doubt as to whether or not there was provocation they should resolve that doubt in favour of the accused and find him guilty not of murder but of manslaughter."

In both Richards' case and Buntings' case there was some evidence of provocation fit to be left to a jury and the trial judge in each case did in fact deal with the issue of provocation albeit inadequately. The result of this inadequate treatment was a reversal of the verdicts of murder and the substitution therefor of verdicts of manslaughter.

We find, after a careful examination of the transcript, that the grounds of appeal are not without merit. The learned trial judge did give directions on provocation and insofar as he did deal with that

issue the directions were adequate. The directions were, however, incomplete in the areas complained of by the appellant. What falls therefore to be decided is how does this omission affect the result.

The directions on provocation are contained in this passage -

> "Provocation, Mr. Foreman and members of the jury, Mr. Stamp told you that he wasn't going to leave provocation to you. I have to leave the provocation to you and provocation is this: wherever there is a charge of murder and there is evidence on which a jury can find that the person charged was provoked either by things said or by things done to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did must be determined by you the jury and in so determining you have to take everything into consideration as you think it would have an effect on the reasonable man. I am going to leave it to you and first of all let me tell you the provocative thing that you can look at here, the shirt business. There is no doubt that there was some altercation about a shirt and Sonia who said, 'Come fi di shirt' agreed that on the morning she told him that she burnt the shirt. That was on the evening there was this allegation about the shirt and things like that and this morning now the first bit of provocation you have to look at and I have to leave this to you, leave this provocative thing to you for your consideration, that this first bit of thing that you could call provocation about this shirt happened the evening before, 4.00 o'clock or thereabout the evening before.
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> This incident of the chopping did not take place 'til the other morning at 7.00 o'clock, nearly twelve hours, or a whole night and the morning before this. Is a matter for you Mr. Foreman and Members of the Jury, to ask yourselves, assuming that there was provocation, was there enough time for cooling off, was there enough time for cooling off. And you have to ask yourselves also, even if there was this thing called this provocation, and if you find that there was not enough time for cooling off, if a man steals a shirt, or somebody steals a shirt and Anthony Green involved himself in this argument the evening before, and chuck you, according to the evidence, is it retaliation by going to chop him up in keeping with that type of provocation? Because if it is more than what a reasonable man would do in the circumstances, is not provocation either, you can't say lawful provocation, it must bear a reasonable relation to the provocation.
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> Another thing you have to consider, assuming that this thing happened the evening before, and it took the night, is it a revenge, is it revenge why he goes to do this thing the other morning? Because if it is revenge, it can't be provocation

> "either, can't be provocation, but I am leaving this concept of provocation to you, and when you are considering provocation, you have to ask yourselves two questions: one, was there this provocation, was there a loss of self-control, and would a reasonable man have behaved and do as the accused man is alleged to have done? That is how you look at it.
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> In this case, nobody told you about any loss of self-control, that doesn't matter, because as far as Stanley is concerned, there is this question of self-defence and Counsel hasn't got to raise provocation when he raises self-defence, because self-defence is a complete defence and self-defence is a deliberate action and if he goes and says provocation which demands a lot of self-control, he probably will lose his cooling off thing. Although there is no talk about loss of self-control, I leave it to you, but you must ask yourselves was there a loss of self-control, considering all this time that elapsed between, and would a reasonable man have acted in the way that the accused man acted."

The prosecution's case is that the appellant and the witnesses, Karlene Jackson and Sonia Barnes had an argument about a shirt on the afternoon of the 5th May, 1987. The deceased intervened and physically assaulted the appellant. Next morning the appellant and his brother arrived at the home of the witnesses and there was talk about the shirt but the brother asked, 'anyway is the bad man you have yah me come for'. When the deceased, on his way home from the shop appeared in sight the appellant identified him 'see the bad man a come yah' whereupon both men went after the deceased who ran, scaled a wall in a vain bid to escape but was caught and chopped to death by the appellant.

The appellant's case is that he was attacked by the deceased in the lane, he chopped the deceased in self-defence and the deceased ran over to Mr. Young's yard.

If it can be argued that Miss Jackson and Miss Barnes are witnesses with an interest to serve the same cannot be said of Mr. Young. He was by his kitchen when the chopping took place. He said he was 'backed up against the wall', while the appellant chopped the deceased before him and the deceased fell in the kitchen through the doorway.

In Lee Chun-Chuen v. Reginam (supra) Lord Devlin in giving the opinion of the Board of the Privy Council said at p.79C -

> "Provocation in law consists mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other - particularly in point of time, whether there was time for passion to cool - is of the first importance. The point that their Lordships wish to emphasise is that provocation in law means something more than a provocative incident. That is only one of the constituent elements. The appellant's submission that if there is evidence of an act of provocation, that of itself raises a jury question, is not correct. It cannot stand with the statement of the law which their Lordships have quoted from Holmes v. Director of Public Prosecutions (1946) 2 All E.R. at p.126; (1946) A.C. at p.597. In Mancini v. Director of Public Prosecutions (1941) 3 All E.R. 272; (1942) A.C. 1 the House of Lords proceeded on the basis that there was an act of provocation - the aiming of a blow with the fist - but held that it was right not to leave the issue to the jury because the use of a dagger in reply was disproportionate."
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> (Emphasis supplied)

Mr. Charles submitted that the events of the afternoon by themselves could not raise the issue of provocation. Indeed 15 hours later at 7.30 on the following morning the appellant could not assert with any credibility that he was then provoked. Mr. Charles said that the incident of the morning of the 6th in that the appellant was told by Sonia that she had burnt the shirt could not by itself amount to provocation. It would be no more than a provocative incident and the deceased was not involved. Mr. Charles, however, submitted that the two incidents taken together amounted to provocation.

Mr. Young's evidence as to the occurrence of the chopping gave the lie to the appellant's story that he chopped the deceased in self-defence in the lane. The jury rejected the statement of the appellant and accepted the evidence of Mr. Young and that of Misses Jackson and Barnes. Can it be said that the acts complained of by Mr. Charles gave rise to provocation and 'that this savage retaliation was proportionate to this provocative act?' Lee Chun-Chuen v. Reginam at p.79G.

Before that question can be answered it is natural to enquire how the loss of self-control occurred and how quickly the retaliation followed the act.

In Lee Chun-Chuen's case the appellant claimed he had been injured on his leg by a stone thrown by the deceased. At p.79F Lord Devlin said -

> "In their Lordships' opinion there was no act other than the one which caused the leg injury that could possibly provoke a reasonable man into losing his self-control to the extent of retaliating by battering the deceased almost to death, either with stones or with a hammer. Can it be said that this savage retaliation was proportionate to this single provocative act? Before that question is answered it is natural to inquire how the loss of self-control occurred and how quickly the retaliation followed on the act. It is at this point that the case suggested by the appellant breaks down. There is no direct evidence of actual loss of self-control. In his examination in chief the accused did not testify at all about his state of mind during the struggle. In cross-examination he was twice asked the specific question and in reply he said that he was angry, but not very angry; the whole tenor of his evidence was that he was throughout trying to break off the fight and that is inconsistent even with loss of temper.
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> 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 (1914-15) All E.R. Rep.914; (1915) 2 K.B.431, Kwaku Mensah v. R. (1946) A.C. 83, Bullard v. R. (1957) A.C. 635; (1961) 3 All E.R.470 n. and R. v. Porritt (1961) 3 All E.R.463 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.
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> Their Lordships have carefully examined the four cases cited and are satisfied that in each of them there was in the narrative of events on which the jury might reasonably have acted material that

> "showed a possible loss of self-control connecting the provocation and the retaliation. In all these cases there was, besides the accused's story, other evidence of the struggle on which a jury could act. A jury may reject, as well as an accused's denial of loss of self-control, a part or the whole of his account of events."
>
> (Emphasis supplied)

Loss of self-control is a state of mind. This case clearly illustrates that this is so and shows the desirability of placing before the jury some material of this state of mind which can be supplied by the appellant himself or it can be inferred from the evidence. Where the appellant gives evidence his state of mind can be probed in cross-examination even if he avers he lost his self-control. Where the appellant does not give evidence but makes a statement from the dock then he may assert that he lost his self-control. Where the appellant does not say he lost his self-control that does not dispose of the matter, as Lord Devlin says at p.80C -

> "What is essential is that there should be produced, either from as much of the accused's evidence as is acceptable or from the evidence of other witnesses or from a reasonable combination of both, a credible narrative of events disclosing material that suggests provocation in law. If no such narrative is obtainable from the evidence, the jury cannot be invited to construct one. Viscount Simon, L.C., said in Mancini v. Director of Public Prosecutions (1941) 3 All E.R. at p.279; (1942) A.C. at p.12:
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> > '...it is not the duty of the judge to invite the jury to speculate as to provocative 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'."
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> (Emphasis supplied)

The Evidence Act permits a prisoner to give evidence on his own behalf at his trial but it preserves his right to elect to make an unsworn statement.

Section 9

> "Every person charged with an offence,
> .....
> shall be a competent witness .....
>
> Provided as follows -
>
> '(g) Every person called as a w witness in pursuance of this Act shall, unless otherwise ordered by the Court, give his evidence from the witness box or other place from which the other witnesses give their evidence.
>
> (h) Nothing in this Act shall affect the provisions of section 36 of the Justices of the Peace Jurisdiction Act; or any right of the person charged to make a statement without being sworn'."

The statement from the dock now frequently employed by accused persons is not evidence: that is made clear by D.P.P. v Leary Walker (1974) 1 W.L.R. 1090 where at p. 1096B Lord Salmon said -

> "There are however cases in which the accused makes an unsworn statement in which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence.....
> .....
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> Page 1096E
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> The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should give the accused's unsworn statement only such weight as they may think it deserves."

There is here a clear distinction between evidence, that is, sworn testimony, and unsworn statement.

Where the state of a prisoner's mind is to be considered by a jury, there must be placed before the jury material for assessment. Where self-defence and/or provocation are live issues then the state

of the prisoner's mind must be assessed. In one case the matter raised is 'honest belief' and in the other 'loss of self-control'. A prisoner who does not give evidence and in his statement fails to provide material as to his state of mind cannot complain if matters not raised are not left for the jury's consideration because it is not the duty of the trial judge to invite the jury to speculate.

This is supported by the comment of Lord Griffiths in Solomon Beckford v. Reginam (1977) 3 All ER 425 where he says in the final paragraph (of the judgment) - p.433 -

> "Before parting with this appeal there is one further matter upon which their Lordships wish to comment. The appellant chose not to give evidence but to make a statement from the dock which, because it cannot be tested by cross-examination, is acknowledged not to carry the weight of sworn or affirmed testimony. Their Lordships were informed, to their surprise, by counsel for the prosecution, that it is now the practice, rather than the exception, in Jamaica for an accused to decline to give evidence in his own defence and to rely upon a statement from the dock; a privilege abolished in this country by section 72 of the Criminal Justice Act 1982. Now that it has been established that self-defence depends upon a subjective test their Lordships trust that those who are responsible for conducting the defence will bear in mind that there is an obvious danger that a jury may be unwilling to accept that an accused held an 'honest' belief if he is not prepared to assert it in the witness box and subject it to the test of cross-examination."

In R. v. Hart (1978) 27 W.I.R. p.229 this Court held '(ii) if there is evidence of provocative conduct on the part of the deceased and from which it may be inferred that as a result the killing was due to a sudden and temporary loss of self-control it is the duty of the trial judge to leave the issue of provocation to the jury'.

In Hart's case, Lee Chun-Chuen and D.P.P. v. Walker were considered. This Court also held:

> "(i) It is unnecessary and often undesirable to categorise an unsworn statement as 'evidence' or 'non-evidence'.

"(ii) In the ordinary case a summing-up should follow the guidance on the objective evidential value of an unsworn statement advocated in D.P.P. v. Leary Walker (1974) 1 W.L.R. 1090."

In Hart's case there was evidence of provocation fit to be left for the consideration of the jury. In the instant case we find that the trial judge was generous to the co-accused Paul Humphrey in his directions to the jury, he was acquitted, and that he leaned over backwards when he dealt with provocation. He told the jury at p.155 -

> "If when you go on to consider the other part now, if you reject the self-defence and you consider murder and you look at provocation, if you find that he was provoked, you can say manslaughter, because provocation reduces murder to manslaughter. But before you can reach there, you have to get rid of the murder part first, you have to get rid of the self-defence first, sorry, you have to consider self-defence, self-defence is a complete acquittal, if you find he acted in self-defence, out. If you are in doubt, acquittal also, that is as far as Stanley is concerned. Then, if you reject this self-defence, you look at the thing about murder and provocation and if you find that he was provoked, the charge is reduced to manslaughter, so I am leaving manslaughter to you in relation to Stanley."

On the prosecution's case after the fracas on the afternoon of the 5th the appellant threatened the deceased. The following morning he and Paul arrived at the deceased's home; he had a machete concealed on his person, Paul asked for the deceased - 'where is the bad man you have here?' followed by 'see the bad man a come yah' said by the appellant. There followed the pursuit of the deceased, the baring of the machete and the infliction of the injuries.

It is our view that 'the misdirection on the law of provocation could not have caused any miscarriage of justice because there was no sufficient material on this issue to go to the jury'.

Cases referred to
(1) R v Richards 11 W.I.R 102
(2) R v Banting 2 W.I.R. 276
(3) Lee Chun-Chuen v R [1963] A.C. 220
(4) DPP v Leary Walker [1974] 1 W.L.R 1090
(5) Selvey v Metropolitan Police Commissioner [1968] 3 All E.R 425
(6) R v Hart (1978) 27 W.I.R 229