JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 190/79

BEFORE: THE HON. MR. JUSTICE ROWE, J.A. - PRESIDING
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A. (AG.)

DONALD REID V. REGINA M

Mr. Richard Small for appellant.

Mr. G. Andrade, Deputy Director of Public Prosecutions and Miss D. Harrison for the Crown.

October 14 and 15; December 4, 1981.

CAMPBELL, J.A. (AG.):

This appeal was heard on the 14th and 15th day of October, 1981, on which latter date the appeal was allowed, the conviction quashed and the verdict set aside. We intimated that our reason therefor would be put in writing. This we now do.

The appellant was convicted in the Manchester Circuit Court on October, 24, 1979 for the offence of 'causing grievous bodily harm with intent' and was sentenced to undergo imprisonment for nine years at hard labour.

On November, 19, 1978 between 6.30 p.m. and 7.30 p.m. one Septimus Graham, a plumber of Chudleigh, Manchester, received serious bodily injuries on the pavement of a bar situated by the main road at Succeed in Manchester.

It was a Sunday evening. The prosecution's case was that Graham and three others, travelling in an estate car from Trelawny towards Christiana stopped alongside the bar on their left or near side at Succeed in Manchester to purchase milk for a puppy acquired earlier that day by Graham. No milk was available but the group proceeded to regale themselves with spirituous refreshments. The puppy was left

crying in the car. The accused, driving a Cadillac hearse along the same main road but in the opposite direction, also stopped at the same bar.

His purpose as disclosed by him, was to purchase cigarettes. He parked his hearse on the side of the road opposite to the bar. The accused hit the crying puppy on its head and this triggered off a fight between Graham and the accused.

There is divergence in the evidence between the prosecution and the defence as to where the puppy was and what was done to or in relation to it which resulted in the fight.

Continuing with the prosecution's case, Graham said the fight between him and the accused stopped when they were parted by persons among whom was Neville Jones a teacher. Almost immediately thereafter, while he Graham was returning to the bar, the accused hit him again and another fight developed. Again they were separated by persons among whom was one Barnes.

The accused returned to his hearse, started it, turned and drove in the direction of Christiana from which direction he had previously come. Within five to ten minutes the accused returned, and said he wanted to speak to Graham. Graham said that people advised him against going outside from the bar. Against this advice, he went outside and was walking towards his car when the accused, who had all along remained seated at the driving wheel of the hearse, drove the hearse at him. He jumped back and the hearse hit down a motor-cycle which was parked on the pavement near the bar, about two to three feet from the edge of the road, and in front of the hearse.

Graham said in jumping back he exclaimed "An you going to kill me?" to which he heard no reply. The accused reversed the hearse for a couple of feet and while he Graham renewed his bid to go to his car, the accused again drove the hearse at him, pinning him against the wall of the building, part of which constituted the bar. Graham said he did not recall what happened after that. He denied that Barnes ever thrust a knife at the accused while the latter

was in the hearse or at all.

The only other eye-witness account for the prosecution came from one Neville Jones a teacher who was a member of Graham's company of four. One Barnes otherwise called 'Cuttie' who was also of the company was the driver of the estate car but he did not give evidence.

Mr. Jones' evidence differed from Graham's in certain areas. It was in connection with the treatment of these differences that learned counsel for the appellant, Mr. Small, based one of his additional grounds of appeal which in a nutshell was that the learned trial judge in saying repeatedly that these differences were minor, pre-empted the exclusive right and function of the jury to decide whether the differences amounted to minor or serious contradictions, particularly as some of those differences were, in the view of learned counsel, of more than passing significance.

Mr. Jones in his evidence confirmed Graham's version that there were two fights, but he was emphatic that one fight took place before the hearse was driven off in the direction of Christiana and the other after its return. This view of the facts was stated earlier under cross-examination by Graham to be a lie. Equally stated to be a lie by Graham, is the evidence of Mr. Jones that on the return of the hearse, the accused disembarked and that he and Graham were engaged in talking by Graham's parked car before the second fight developed. In relation to the alleged knife attack on the accused by Barnes, Mr. Jones said he did not see Barnes when the hearse hit the motor-cycle. He however admitted that there was so much happening that he could not see everything.

The defence case was that after the first fight, Reid the accused drove off in the direction of Christiana ostensibly to make a report to the police. En route he thought the better of it and returned to the bar to purchase the cigarettes which was the unfulfilled purpose of his original stopping. On getting down from the hearse and approaching the bar he was pounced upon by Graham who said, "Boy you

come again, I bet I kill you this time." Graham having uttered these words there was a fight between them. In the words of John Edwards, defence witness, aged sixty-five years, who was a co-worker of, and present with the accused at the time, "plenty people helped to 'murder' Reid again". One Collector Peart drove up, said something and the fight stopped. The accused jumped into the hearse which was a left-hand drive and started it up. A man whom the accused says was Barnes ran down by the hearse with a knife and stabbed at him. He the accused shifted to his right to avoid the knife thrust, the hearse moved forward, rode over something and dropped back. He swerved deeply to the left, eventually straightened up and proceeded directly to the funeral home.

Another witness for the defence Errol Harriott who said he saw what actually happened, provided the factual basis for the sensation felt by both the accused and John Edwards of the hearse having hit something and dropping back. He said when "Cuttie" stabbed at the accused who was in the hearse, that vehicle in moving forward hit from a motor-cycle which in turn hit down Graham. The motor-cycle fell and rested on Graham. The hearse in the meanwhile rode over the wheel of the motor-cycle in making a quick departure from the scene.

The first ground of appeal argued namely Ground 5 is that:

> "The learned trial judge erred in directing the jury that it did not matter whether the motor-bike fell on the complainant. This direction was given despite the fact that it was the prosecution's case that the injury had been caused by the accused pinning the complainant against a wall and despite the nature of the defence advanced at the trial."

In order to appreciate the full import of this ground of complaint, it is necessary to refer to parts of the learned trial judge's summing-up. In doing so, it will become apparent that the direction was faulty, primarily because the learned trial judge in our view misread the evidence of the prosecution witnesses as to the significance of the motor-cycle in the tragedy. It seems that the learned trial judge's view of the prosecution's case was that the knocking down of the motor-cycle took place in the course of and was contemporaneous with the infliction of the injury to Graham by the

hearse driven by the accused.

The learned trial judge at page 8 of his summation said:

> "On his return (the accused) he called out the complainant who was then at the door of the bar. The complainant refused to go but, it ended up that while the complainant is walking along a wall towards a car, that is, the vehicle that he had parked, the accused drove his hearse at the complainant who jumped out of the way using words, asking him if he wanted to kill him, reversed, drove again, knocked down a motor-bike and pinned the man along the wall ..... According to the prosecution's case it was a deliberate act, and the prosecution is saying that his motive was the resentment after the fight that he had been engaged in with this complainant....."

Contrary to the learned trial judge's view of the prosecution's case as being that the motor-cycle was hit down by the accused simultaneously with his pinning Graham against the wall, the prosecution's evidence in reality was that the motor-cycle was hit down in the first unsuccessful attempt to injure the complainant. It thus played no part in the further attack on the complainant. It was however central to the defence, in that in the circumstance in which the accused and his witnesses said that the motor-cycle fell on the complainant, it did not admit of being a deliberate act.

The direction complained of was given by the learned trial judge at page 11 when considering the medical evidence adduced by the prosecution relative to the intent of the accused. He said:

> "The doctor said it would be consistent, the injuries that he saw, consistent, by pinning the patient against the wall. When he was cross-examined, Mr. McFarlane ..... for the defence asked him this question: Would the abrasion be consistent with a heavy weight being applied to the right thigh. The doctor's answer was yes. Remember the defence is saying that it was the motor-bike that was in front of the car that had fallen on the man and the injury that he received was (not) as a result of the vehicle pinning him against the wall. And remember when Mr. Allen was addressing you on that point, I told him then and I will come back to that later on, that I will be telling you that it doesn't matter whether the motor-bike fell on the man and gave him the injuries or whether it was the motor vehicle that pinned him against the wall. If the accused drove the vehicle against the man or at the man and the motor-bike is in the way, it doesn't matter whether it is the motor-bike hit him down or pinned him against the wall; it comes within the ambit that that caused grievous bodily harm with intent."

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Again at page 34 the learned trial judge in crystallizing for the benefit of the jury the issue in the case said:

> "The issue in this case now really is this; the accused man and the witness in the motor-car are saying, what they are really saying in effect, they did not know that the hearse had hit down a man. They felt it run over something which could be a stone; but a witness for the "prosecution" (sic) - has been called to show that in fact the vehicle hit a motor-bike that was in front of it and the motor-bike in turn hit down the man and went on top of him. I have already told you that even if it happened that way, but it was a direct move by the accused in his hearse to hit the man and the bike first it wouldn't matter."

These directions were susceptible of confusion to the jury. It was not the case for the prosecution that the complainant was or could have been knocked down and injured by the motor-cycle, or that it was the motor-cycle which pinned the complainant to the wall by the act of the accused in driving his hearse at him.

The case for the prosecution was that the accused drove the hearse which pinned the complainant directly against the wall. The deliberateness of the accused's act on the prosecution's view is manifested by his second onslaught on the complainant after merely hitting down the bike in the first attempt.

The defence case had been correctly stated by the learned trial judge earlier in his summation at page 8. He there said:

> "The defence is saying that the accused did not drive deliberately at the complainant. The accused having returned he was attacked and he went into the hearse that was about to drive off when a man with a knife on the left hand side came there to attack him and in order to get away, he is leaning on his right in the lap of an old man, an elderly man who was sitting beside him when he felt the vehicle run over something which could have been a stone or a bike, but he was able to lock out, take it out, take the lock out .... then he got away. So, he is saying that it was not his act, it was a case where he had to do this manoeuvre of driving with one hand while reclining on the right to get away from a knife cut, and that this attack made on him after his return of five or ten minutes was a concerted one made by the complainant and his supporters or his friends, and in those circumstances the accused is saying that he is not guilty of any offence; there was no intention in him to cause any grievous bodily harm to anyone and

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what was done was forced upon him by circumstances over which he had no control."

Had the learned trial judge left unqualified this summation of the defence, he could not possibly have been faulted. But in considering the medical evidence adduced by the prosecution at page 11 relative to the intent of the accused and further in crystallizing the issue raised by the defence at page 34 he regrettably propounded a third case in relation to which the accused could be found guilty which was advocated neither by the prosecution nor the defence.

In so far as this third case dealt factually with the situation of a bike injuring the complainant in circumstances different to what the defence is saying, the jury could well have understood the learned trial judge's direction in relation thereto as meaning that they were entitled to find the accused guilty if they found these facts namely: (a) that the complainant was injured by the bike falling on him; (b) that it was the act of the accused in manoeuvring his hearse which caused the bike to fall on the complainant; and (c) that it was a deliberate act albeit a manoeuvre to avoid a knife thrust.

In our view, the likely effect of the direction of which complaint was made, was to deprive the accused of his right of having his case considered exclusively within the context of the circumstances given in evidence by the defence as well as to expose him to the risk of being convicted on a hybrid case constituted by the application of the mens rea postulated by the prosecution to the actus postulated by the defence.

It was a direction to the jury capable of being understood by them that they could, even if they rejected the prosecution's case nonetheless find the accused guilty on his own view of the act done by him, namely the manoeuvre if they found it was, notwithstanding the knife being thrust at him, a direct move by him with his hearse to hit the man. This direction was distinctly in conflict with the learned

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trial judge's own reminder to himself that unless his summation to the jury is patterned upon how the case is conducted a judge would not be putting his summing-up along the lines that the jury can understand. We entertain the gravest doubt that this misconstruction of the facts might not have led to the conviction in this case.

The learned Deputy Director of Public Prosecutions intimated properly in our view that he was unable to support the conviction having regard to the merit he found in this ground of appeal. He accordingly did not address us further on the other grounds.

Grounds 3 and 4 of the additional grounds of appeal can properly be considered together. The essence of the complaint is that the learned trial judge in summing-up made strong comments both as regards the issues of fact, and the defence. It was submitted that this was particularly serious against a background where the learned trial judge having earlier directed the jury that they could be influenced in their verdict by views propounded by him, had thereafter failed to direct the jury that it was always open to them to reject his comments and views. The consequence of this non-direction taken with the strong comments was that the appellant was deprived of a fair trial or the appearance thereof.

The learned trial judge at page 3 of his summation directed the jury as follows:

> "You will consider the evidence carefully. If anything is to influence you it is to be the facts that have been put before you, the law, as I shall try to explain it to you, and what views have been propounded both by the attorneys and myself, if I use the right to express my views, what reasonable inferences you are to draw from the facts; those are the only matters that concern you."

A minute perusal of the learned trial judge's entire summing-up failed to disclose that he, at any time thereafter, made clear to the jury that if they did not accept his view of the fact they were entitled to discard it and substitute their own. Undoubtedly this must be an oversight on the part of the very experienced and learned trial judge, but the absence of any such direction juxtaposed

as it was, with his view in regard to the variations in the evidence of the prosecution witnesses, his very strong adverse comments with regard to the sincerity of the defence put forward and the credibility of the defence witnesses, in our view, could not but leave an ineradicable impression on the minds of the jury that while the prosecution witnesses must be considered truthful despite variations in their evidence the accused and his witnesses were to be considered if not manifestly untruthful totally unreliable and that the appellant was accordingly guilty.

A few excerpts from the summation will indicate the nature of the comments and will demonstrate that in many instances they had the effect of pre-empting the decision of the jury in critical areas.

The learned trial judge in giving directions on intent, at page 9, after directing the jury that a man is generally presumed to intend the natural consequences of his acts, stated as follows:

> "So, in a situation like this if you accept that the accused is using this twenty-one foot hearse and driving at the man to pin him against the wall, what would be the intention but at least to cause serious bodily harm. So you are not surprised when the police officer who gave evidence, told you that at first the police arrested him for attempt at murder, because it could be that too, but the count which is before you is one of causing grievous bodily harm with the intention to do it."

The learned trial judge at page 12, in dealing with variations between the evidence of Mr. Graham and Mr. Jones said:

> "Coming to the end of the case, I am going to summarise something and show you where there were variations between the evidence of Mr. Graham and Mr. Jones on certain minor points."

The learned trial judge at page 21 said:

> "When Mr. Jones gave evidence, Teacher Jones, he impressed me as a very intelligent man..... In the outline he supports Graham. In a few details, minor details I want to call them, he and Graham are at variance, and as I promised I will remind you of what they are."

The variations between the evidence of Graham and Jones which the learned trial judge stated were minor details were given by him at page 23.

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These were:

(a) whether there was one or two fights between the accused and Graham on the first occasion that the accused came to the bar;

(b) whether Graham's car was moved from its original parked position alongside the bar by Barnes during the interval that the accused had driven towards Christiana and had returned;

(c) whether on the return of the accused he had come out of the hearse;

(d) whether there was another fight between accused and Graham after the former returned from the direction of Christiana.

The contention of learned counsel for the appellant was that these variations were far from being minor in that they were capable of seriously eroding the credibility of Graham.

Graham's insistence that the two fights took place on the first occasion that the accused came to the bar, and that there was none on the second occasion when the accused came back and drove the hearse at him, coupled with his denial that the accused ever came out of the hearse on this latter occasion could be a deliberate suppression of facts to negative the probability of any knife attack on the accused by Barnes. There was unlikely to be on the view of the evidence given by Graham, any knife attack because there was never this second fight. This second fight was on the contrary crucial to the defence and was supported in this respect by Jones.

The evidence by Graham of the movement of the car by Barnes from where it was parked alongside the entrance to the bar could also be a necessary plank in Graham's evidence to indicate that he was walking away from the bar entrance not to engage the accused in any fight, but solely for the purpose of entering his car.

We have adverted to this view of the facts which it was likely the jury could have formed if they considered the variations in evidence to be material, to indicate that the learned trial judge ought to have left for the jury the determination of the question whether the variations in evidence between the two eye-witnesses for

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the prosecution were minor or on the other hand substantial. Had they been left to determine this, and had considered the variations substantial they may well have considered that the prosecution witnesses were unreliable especially as Jones himself admitted that so much was happening that he could not see everything.

We are mindful of the fact that the learned trial judge after isolating and highlighting the above-mentioned variations did at page 24 direct the jury in these words:

> "Those are four points there which came out of cross-examination. It is all left for you to say, Mr. Foreman, and Members of the Jury, whether, as I have been trying to indicate to you, these variations are indications, whether or not, withstanding these variations, you are still able to consider the remainder of the evidence - and the vital point, the vital point is what did take place after the accused, having left the scene for five, ten minutess, returned, what did take place?"

We are however of the view that this latter direction was totally inadequate to alert the jury to their duty, if they disagreed with the views expressed by the learned trial judge, to reject the same and substitute their own.

As to comments on the conduct of the trial by defence attorney, and in relation to the witnesses for the defence and their evidence, a few excerpts will suffice to indicate how robust were the learned trial judge's comments.

At page 3 the learned trial judge in giving directions on how to assess the credit to be given to witnesses said:

> "You remember there were two chief witnesses, the complainant, Septimus Graham, and the teacher, Neville Jones, who gave evidence. You saw them, you heard the lengthy cross-examination that each was subjected to by counsel."

At page 5 he continued:

> "Then you remember during the cross-examination by Mr. Allen very careful cross-examination? He was asking both Mr. Graham and Mr. Jones a lot of questions, questions in my view, which as I said to him when I commented: it is only if the men were prophets they could have foreseen most things that they were being asked."

At page 20 the learned trial judge in considering the suggestion put by defence attorney to Graham that the accused vehicle got out of control said:

> "Now, it was suggested to him that the vehicle got out of control and hit the motor-cycle. That he denied, it never got out of control. 'Now that the vehicle got out of control', that is a suggestion to a prosecution witness, but the accused man did not tell us that the vehicle got out of control. What he told us was that the thrust is made at him, he lies down on his right on the lap of Mr. Edwards, Mass John, he felt when the thing ran over something which could have been a stone and he was able to take out the lock. The accused is not saying, he is not saying that the vehicle got out of control and it ran down on Graham. He is not saying that, because he said he never see the car touch anybody. So, the only bit of evidence which could support the suggestion is the one coming from Harriott who is telling you now that it was the motor-cycle that hit off the man."

The learned trial judge in embarking on an analysis of the evidence of the prosecution and defence witnesses commented derisively of the defence witnesses.

At page 12 he said:

> "So then, in all this evidence that you have before you; there are three witnesses in the case, two for the prosecution telling you how it happened, how the injuries were received. One from the defence, Harriott, the man who told you that these men within a short time would have consumed nine QQ's of white rum. He is the man now, who is telling you how the man was injured."

At page 16 he said:

> "According to Mr. Brooks - and I don't know how he struck you, he did not strike me as a very bright tavern keeper - according to Mr. Brooks, he sold them thirteen dollars fifty cents worth of White Rum at one dollar eighteen cents a Q. When I asked him how many QQs that, he is there going and coming till eventually he comes out with four or five."

At page 17 he said:

> "Mr. Harriott even gave a little, he went on a little further here, he used the word "taggering"; he didn't say staggering, between 6.30 and 7.30, the men were "taggering"

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> the men were under heavy waters, according to the defence. According to Mr. Graham and Teacher Jones, it was nothing like that. So you will have to consider, Mr. Foreman and Members of the Jury, what is the significance of that piece of evidence used to tell you that the men had taken too much white rum, for what? Is it to bolster up what is coming now, that the men were in a fighting mood and that one of them who was drinking the rum takes part in it, it was the same man who had the knife, Barnes, to attack him? You think it out. The facts are for you. The only view that I will put on it for your consideration is that you will have to walk the length and breadth of Jamaica to find four rum men, hard rum men who could destroy so much white rum in a short time. I suppose it is possible but you will have to look very carefully and see if you can find them."

At page 29 he said:

> "Mr. Harriott, Errol Harriott - you remember him? - he had on his pretty shirt jack but he didn't know he is an amusing witness, he does not know he is amusing."

Again at page 32 he said:

> "But then again, as I have made mention, Mr. Brooks did not strike me as very bright. He too may be one who can't judge time, could be that. You can put it that way and that would be a charitable way of doing it, or you may take it that that is a little too charitable, but it is all for you. You may very well take the view, it is too charitable, he is saying that because he is painting it up, trying to mislead us. All those are matters for you."

Taking all things into consideration we do not think that the ad hoc desultory comments by the learned trial judge that "the facts are for you" or that "all those are matters for you" were adequate to remove the influence on them of the learned judge's personal view which in a nutshell was that they were not to be taken seriously.

In R. v. Grant 1971 12 J.L.R. page 394 Fox, J.A. in delivering the judgment of this court allowing the appeal on the ground of adverse comments by the trial judge upon critical facts in the defence re-echoed the principle applicable to adverse comments in these words:

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> "A judge is entitled to express his views strongly in a proper case, but the fact must be left to the jury to decide. The stronger the comments the greater is the need to make it abundantly clear to the jury that if they do not accept the judge's view of the facts they must discard it and substitute their own."

We are of the view that the learned trial judge regrettably did not hearken to this precept. The jury was not left unfettered to embark on an independent evaluation of the evidence adduced, because they could not but be influenced by the learned trial judge's view of the prosecution witnesses as being intelligent and truthful as against the defence witnesses being dull, amusing and untruthful.

A strong and clear direction to the jury by the learned judge to discard his views if they were not in agreement therewith and to substitute their own, was in our view necessary to restore equilibrium and to ensure a fair trial for the appellant.

Ground 2 of the addition grounds of appeal was to the effect that:

> (a) The learned trial judge failed to direct the jury in relation to the defence whether he acted recklessly and
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> (b) As to the foreseeability of the consequences of appellant's conduct.

As we understood the submission, Mr. Small in relation to the first limb contended that the necessity arose for the learned trial judge to give a more detailed direction on "intent" because he had wrongly postulated an objective test of intent when he directed the jury that "a man is generally presumed to intend the natural consequences of his act." Secondly having used the word "presumed" the learned trial judge was guilty of misdirection by "non-direction" in failing to direct the jury that this presumption was rebuttable. Thirdly since the facts which were before him were susceptible of establishing various states of mind of the accused either by reference to the prosecution's case, the case for the defence, or a variation of these cases the intent which the learned trial judge postulated as being capable of being presumed was inappropriate.

Learned counsel for the appellant in making the above submissions not only structured his arguments on, but relied heavily on

the views expressed by Byrne, J. in the Court of Criminal Appeal in D.P.P. v. Smith (1960) 44 Cr. App. R. 262 at pages 263 and 264 where he said:

> "Once more accident was excluded, there was, only room for a verdict either of capital murder or of manslaughter.
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> At no stage did the prosecution submit that there had been established against the appellant an actual intent to kill P.C. Meehan; .... thus the issue for the jury upon the charge of murder was whether the prosecution had established that the appellant intended to cause the police officer grievous bodily harm..... On that issue the prosecution's case was that the above intention ought to be inferred from the appellant's conduct, whilst the case for the defence was that the appellant in fact had no such intent and that in any event the intent was not established as an inference from the facts. In the above circumstances it fell to the learned judge to direct the jury on the meaning and application to the particular facts of the maxim on which the prosecution had relied and which is often stated in the following terms: "A man must be taken (or presumed) to intend the natural consequences of his acts," this is a presumption to which the learned judge at the outset referred in the following terms: "The intention with which a man did something can usually be determined by the jury only by inference from the surrounding circumstances including the presumption of law that a man intends the natural and probable consequences of his acts." Neither at that stage nor later was the jury given any explanation in general terms of the meaning or effect of the word "presumption" or that any such presumption may be rebutted.
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> Whatever may have been the position last century ..... it is now clear, ... that the presumption embodied in the above maxim is not an irrebuttable presumption of law. The law on this point as it stands today is that this presumption of intention means this: that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule reasonable to infer that he did foresee them and intend them. But while that is an inference which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yet if on all the facts of the particular case it is not the correct inference, then it should not be drawn."

The above statement of the significance and effect of the presumption embodied in the maxim, was expressly approved by Lord Hailsham, L.C. in Hyam v. D.P.P. (1974) 59 Cr. App. R. 91 at pages 96 and 101. The disavowal of the objective test for ascertaining intent which is implicit in the presumption, and of the presumption being irrebuttable were also expressed by Lord Diplock in Hyam v. D.P.P. (supra)

at page 116 when he said:

> "Intention can only be subjective. It was the actual intention of the offender himself that the objective test was designed to ascertain. So long as the offender was not permitted to give evidence of what his actual intention was, the objective test provided the only way, imperfect though it might be, of ascertaining this. The Criminal Evidence Act 1898 changed all this. A defendant to a charge of felony became entitled to give evidence in his own defence. The objective test no longer provided the only means available in a criminal trial of ascertaining the actual intention of the offender.... It was no more than one means of ascertaining the relevant intention, to which the Criminal Evidence Act 1898 added another - the defendant's own evidence of what his actual intention was."

In the light of the above statement of the law, approved recently by this court in R. v. Loxley Griffiths (unreported) in S.C.C.A. No. 31/80 delivered October 26, 1981, a duty fell on the learned trial judge once he had resorted to the presumption, to go on further and explain in general terms the meaning or effect of the presumption and that it was rebuttable. However though the learned judge did not propound the meaning of the presumption, he illustrated what he meant when he said - "So in a situation like this, if you accept that the accused is using this twenty-one-foot hearse and driving at the man to pin him against the wall, what would be the intention but at least to cause serious bodily harm." In this illustration the learned judge was in effect telling the jury that they could infer that the accused did foresee the consequence of his act, and if with this foresight he deliberately drove the hearse at the man to pin him against the wall, he did intend serious harm. Not only did this illustration operate as a sufficiently intelligible explanation of the presumption, but by using the illustration the learned judge brought home that the test of intent to be applied was subjective. We accordingly see no merit in this submission.

Learned counsel for the appellant also complained of inadequate direction on intent with reference to the appellant's case. If we understood learned counsel correctly, what he was saying was that because the learned judge had commented adversely on an answer

given by the appellant to a question from the crown that he drove the vehicle at Graham, the answer of the appellant being, "I would not be so skilled to drive a vehicle in a large crowd of people and only knocked down one man," it was incumbent on him to give directions as to the various states of mind which could possibly be inferred from the manoeuvring exercise of the appellant. As we understood Mr. Small, he was saying that the learned judge commented strongly in inviting the jury to draw the inference that the appellant was a skilful driver having regard to his ability to manoeuvre the hearse with one hand while lying on his side. The effect of so implanting in the minds of the jury that the appellant was a skilful driver was that the injury to the complainant did not take place in the manner contended by the appellant rather it was likely by a deliberate and skilful manoeuvre executed by the appellant to pin the complainant to the wall in the course of escaping from the knife attack, or a reckless manoeuvre by a skilful driver in endeavouring to escape or a mere negligent manoeuvre by a skilful driver. Thus three possible states of mind could be inferred on the defence version having regard to the judge's invitation to the jury to find that the accused was a skilful driver, and it was the duty of the learned judge to direct the jury as to the law applicable in such circumstance, in particular as to their duty to acquit if even though they found it was not an accident, they were to find that it was a mere negligent act.

We think this submission is equally without merit because even though the learned judge did invite the jury to infer that the appellant was a skilful driver based on the appellant's ambiguous answer in cross-examination, he adequately atoned therefor when in his closing direction to the jury he delivered himself thus at page 34:

> "So the real question here is, first of all, do you agree with how the prosecution said that it happened? If you are satisfied to the extent that you feel sure then you would have to do your duty and find him guilty as charged. If, on the other hand, skilful driving as it was, how the accused told you it took place, if in attempting

> to get away from this man who had a knife ..... put his hand inside, slashed at him and he was able to make that manoeuvre, first of all by lying down in the lap of the old man and while in that lying position he was able to make a lock to the left, because apparently, if he did not make the lock to the left he could not have gone further, he was able to get away, if that is so, then it would not be really his act, it would be that of a force outside, so, if you accept that as how it went you would have to find him not guilty. Short of that if you are left in a state of reasonable doubt as to whether it happened that way you have to find him not guilty too."

The learned judge by not giving the directions in regard to which complaint is here made, left to the jury as far as this aspect of the matter is concerned a more favourable view of the appellant's case namely that if they accepted his version, then the manoeuvre was simply not his act but that of a force outside.

The final ground of appeal argued by learned counsel for the appellant was that the learned trial judge's directions on inferences were wholly inadequate. This ground was not argued with much vigour or with a conviction that it merited a separate ground of appeal. As we understood learned counsel, inferences being largely presumptions of fact, the points in the summing-up where appropriate directions on inferences ought to have been given were on the occasions when the facts were being analysed and not at the beginning of the summing-up. We do not think this complaint is merited. The learned trial judge at pages 3 - 5 in mentioning to the jury about drawing reasonable inferences was not really giving a direction on inferences, rather he in referring to the divergent evidence given by the defence namely that the puppy was not left in the car as told by the prosecution but was taken into the bar by the complainant when the latter went in to purchase milk, was asking the jury to use their common sense in determining which view of the fact seemed more truthful.

The facts of this case, provided very limited scope for inferences of fact to be drawn from the proof of primary facts. In the two areas, namely in relation to intent and in relation to variations between the evidence of the prosecution witnesses, where

inferences could be drawn, the complaint has already been made that the learned judge was not so much guilty of failure to direct the jury as to how reasonable inferences are drawn, rather he had directed the jury on the inferences to be drawn. We see no merit in basing this complaint as a separate ground of appeal.

For the reasons given in dealing with grounds 3, 4 and 5 of the additional grounds of appeal we were of the view that the cumulative effects of the complaints made were such as to be so prejudicial to the appellant and so inimical to his having had a fair trial that we unanimously allowed the appeal, quashed the conviction and set aside the verdict and entered a verdict and judgment of acquittal.

We did not order a new trial in this case, not because we were unmindful of the learned trial judge's strong conviction as to the correctness of the majority verdict given by the jury, but because we would have been minded to reduce the sentence of 9 years imprisonment to one of 5 years as being adequate in the circumstances of the case. Having regard therefore to the length of time the appellant has been in custody, the time which must necessarily elapse before a new trial could be mounted and concluded, the appellant would at the end of any second trial have nearly completed five years in custody assuming he was not admitted to bail. It was as a result of due consideration of these factors that we concluded that the interest of justice did not justify an order for a new trial.