JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 109 OF 2006

BEFORE: **THE HON. MR. JUSTICE PANTON, P.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

BAYNE SIMMS
v
REGINA

Miss Althea McBean for the Applicant.

Miss Kathy-Ann Pyke and Leighton Morris for the Crown.

January 12 and April 24, 2009

HARRISON, J.A.

1. The applicant Bayne Simms was on the 5th of July, 2006 convicted of the murder of Ricardo Richards in the St. Elizabeth Circuit Court held at Black River, after a trial before Campbell J., and a jury. He was sentenced to imprisonment for life, with the recommendation that he should serve 15 years before becoming eligible for parole. He was refused leave to appeal by the single Judge and has now renewed his application to the Court.

The Case for the Prosecution

2. On the evening of May 4 2005, a group of men including the deceased were playing dominoes in front of Mr. Bruce's shop along Logwood Avenue in Black River. The applicant who is called "Ben" was also present. The area was well lit. There was a street light 9-10 ft. away from the domino table and there was also light coming from the shop.

3. Richard Logan, a witness called by the prosecution testified that the applicant was engaged in an argument with other persons during a domino game. At some point he borrowed Logan's bicycle and returned it within minutes. On his return the applicant continued the argument which according to Logan got "heat up" between the deceased man and himself. He said that their voices got "higher and higher". The applicant then went across the road and stood beside the street light. A little boy who was standing near to the applicant had a machete in his hand and the applicant took it away from him. Logan on seeing this got up from around the domino table, and went to the applicant. He held on to him, took away the machete from him and threw it away. Logan then pushed him along a Lane and told him to go home and that he was not to put himself in any trouble. The applicant took out a knife from his pants pocket as he was led away and a struggle started between both of them. Logan said he held on to the blade of the knife but had to release his hold on the knife. The applicant then rushed the deceased man across the road but ran back to the middle of the road and spoke words to this effect, "yuh bus mi head". He held his head as he spoke. The

applicant then rushed back to where the deceased was standing but Logan said he was unable to see anything else because people began running "up and down". Shortly thereafter, Logan said he saw the deceased man and he was "acting strange". He fell to the ground and Logan asked him what happened. The deceased told him that he "get cut". He lifted the deceased's man hand and saw blood on his shirt in the area of his chest. Logan got assistance from other persons and placed the deceased on a wrecker which took him to the Black River Hospital.

4. Under cross-examination Logan said that Ben and the deceased were calling each other names. He had also heard someone mentioned the words "country boy" and "fool". He knew that a stone was flung but he could not recall who had flung it. He said he did not think that the stone had hit anyone. He did not recall that if after the stone was flung the deceased had rushed Ben with a chair. He did not see the deceased hit Ben in his head with a chair and he could not say if Ben had slipped and fell to the ground. He could not say if while Ben was on the ground the deceased used a chair and hit him in his head. He recalled testifying however, before the Resident Magistrate but he could not recall saying there that he had seen both Ben and the deceased wrestling. He was shown his deposition and when pressed if he had said this to the Magistrate, he said he could have said that they were wrestling. He was asked if people had dispersed when the wrestling began and he said that everyone started to run up and down when the fight started. He recalled telling the police in his statement to them, that Ben had taken away the chair from the deceased man. He also agreed when he was further cross-examined that Ben had taken away a chair from the deceased man. He was asked

if the deceased had chased Ben with the chair in his hand and he said he knew that they "ran after each other". He was unable to say whether Ben had pushed out his hand when the deceased ran after him with the chair. It was suggested to him that Ben was attacked by the deceased man but he said he did not know. He did not see when the deceased man lifted a chair. After his deposition was shown to him he agreed that he had said that the deceased had lifted up the chair and hit Ben. He agreed with Counsel that what he had said at the preliminary enquiry was true. He said that he knew Tyrone Marshall but he did not give an answer when he was asked if Marshall was present during the incident. He said the closest that Ben got to the deceased that night was about an arm's length.

5. Tyrone Marshall, another eye-witness, was also called by the prosecution. He testified that both the deceased and applicant were quarrelling. He said that the applicant was standing on one side of the road and he saw when they moved towards each other. The deceased then picked up a metal chair, swung it at the applicant and it caught him on the left side of his head. The applicant had a stone which he threw at the deceased but it did not hit him. The deceased picked up the said stone and flung it back at the applicant.

6. Marshall also testified that after the applicant got the hit in his head he had a brown handle knife in his hand and started to chase the deceased man who was running away from him. They ran around until they returned to the domino table. The deceased then picked up a stool which he used to strike the applicant. He said that as

the deceased hit the applicant with the stool, the applicant swung his hand with the knife and stabbed him under his left breast. The deceased walked off as if he was staggering and he saw blood running down his white T-shirt.

7. Marshall said that the entire incident lasted for about 15 minutes and that nothing had blocked his view of both men.

8. Under cross-examination, Marshall said that both men were separated he saw the applicant touch his head and he noticed that the applicant's head was bleeding. Marshall was asked whether it was after the second time that the deceased hit Bayne he used the knife and stabbed Ricky. He said: "They hit each other at the same time. When Ricky hit Bayne, Bayne stabbed Ricky at the same time".

9. Cpl. Simpson, testified that on May 4, 2005, at about 10:45 pm she received a report and she went to the Black River Hospital. Whilst there she observed a male person who was lying on his back on a stretcher and he appeared to be dead. She returned to the Black River Police Station where she saw the applicant sitting in the guardroom. He had a wound to his head so she took him to the Black River Hospital where he was treated by Dr. Lewis. She returned with him to the station and commenced investigations into a case of murder.

10. Dr. Ledford, the Medical Officer for the parish of St. Elizabeth performed a post-mortem examination on the body of the deceased on the 12th May. On external examination, he observed a half inch stab wound to the left chest of the deceased.

Internally he saw a large volume of blood in the left chest cavity. The left lung had collapsed and there was also a large amount of blood in that lung. Death, he said, was due to asphyxia, as a result of the stab wound to the left chest, which had punctured the lung. He said that death would have resulted in a fairly short time. He also said that the stab wound which he observed could have been caused by a knife and that a moderate to severe force would have been required to cause the injury. It was suggested to him in cross-examination that the wound could have been caused by no more than slight force but he disagreed.

11. Det. Sgt. McCurdy-Caine, who was the investigating officer, had taken over the investigations from Woman Cpl. Simpson and had obtained a warrant for the arrest of the applicant. He was pointed out to her at the cell block of Black River Police Station. She arrested and charged him for the death of Ricardo Richards and when cautioned he said, "Yes."

The Defence

12. The applicant made an un-sworn statement from the dock. He said that on the night of the incident a domino game was in progress. He got a "six love" so he had to get up from the game. He borrowed a bicycle from someone called "Skungie" and went to a friend's home at the top of Logwood Avenue in order to pick up a DVD. When he returned, he saw Richard, Ricardo, 'Skungie', and Marvin playing dominoes. He parked the bicycle and went over to the other side of the road. He spoke to Richard and said: "Richard, you and you country fren a play domino". Ricardo then turned to him and

said: "A who dah fool yah a call country man?" He said: "A you mi a talk". They started to argue and were talking loudly. Ricardo then told him about his mother, that he was to "s" his mother. He picked up a stone and flung it at Ricardo who got up, picked up the stone and flung it back at him. He walked up to Ricardo and "Skungie" got up and came between them. "Skungie" pushed him and told him to go back to the other side of the road.

13. He said as he walked off, he saw Ricardo with a chair in his hand and he used it to hit him. Ricardo ran and he chased him. He fell in the gravel and Ricardo came towards him in order to hit him. He said he had a pocket knife in his pants pocket. They wrestled and afterwards he heard that Ricardo had been stabbed. He went home and made a report and his mother told him to go to the station.

The Grounds of Appeal

14. The applicant sought and was granted leave to argue four (4) supplemental grounds of appeal. The original grounds of appeal were abandoned. The grounds of appeal are set out hereunder:

1. The verdict arrived at was unreasonable having regard to the evidence before the Court.
2. The learned Trial Judge did not properly address the issue of self-defence in his directions to the Jury.

3. The learned Trial Judge failed to adequately deal with the issue of provocation in his directions to the Jury.
4. The learned Trial Judge erred in his treatment of previous inconsistent statements and discrepancies and the effect these should have on the findings of the jury.

GROUND 1

15. The issue raised in this ground is that the verdict was unreasonable having regard to the evidence before the Court. Miss McBean, for the Applicant, submitted in support of this ground that the eye-witness Logan did not assist the Court to any great extent because he was unable to see when the stabbing had taken place. She said that the witness Marshall spoke about the events happening quickly and did not see the actual stabbing. He spoke however of a fight and said that "as Ricky hit Bayne, Bayne swung his hand". She submitted that in the circumstances, it could reasonably be inferred that it was at that point that the deceased was stabbed and as such the applicant would have been acting in lawful self defence.

16. Miss McBean further submitted that once there was a grave discrepancy between the evidence of the two eye-witnesses, the discrepancy and or doubt should have been resolved in favour of the applicant. In the circumstances, she submitted that the no case submission ought to have been upheld since (i) there was a difference in the accounts of both eye-witnesses; and (ii) the Crown had failed to negative self-defence.

17. We have considered the submissions of Counsel but are unable to agree with her. In our view, a prima facie case had been made out by the Crown so the applicant was properly called upon by the learned judge to answer the case. In any event the jury obviously did not think that the discrepancies, had affected the veracity of the witnesses. We therefore find no merit in ground 1 and it fails.

GROUND 2

18. This ground complained that the learned trial judge did not properly address the issue of self-defence. Miss McBean submitted that the learned trial judge did not make it sufficiently clear to the jury that the burden was on the Crown to negative self defence. We cannot agree with Counsel. The learned judge did explain to the jury what amounted to self defence and on whom the burden lies. At page 198 of the Record he said:

> "What is self—defence? Madam Foreman and your members, a person who is attacked, or believes that he is about to be attacked, may use such force as is reasonably necessary to defend himself. If that is the case, he is acting in lawful self-defence and is entitled to be found not guilty.
>
> It is for the prosecution to make you feel sure that the defendant was not acting in lawful self-defence, not for him to prove that he was...." (emphasis supplied)

19. It will be recalled that the eyewitness, Tyrone Marshall, had testified that during the fracas between both applicant and deceased, the applicant was hit by the deceased in his head. He had also said that the deceased ran away but was chased by the applicant who had the brown handle knife in his hand. He also said that it was during

the chase that the deceased had picked up a stool and used it to hit the applicant who at that moment, swung his hand with the knife and stabbed the deceased under his left breast.

20. The learned trial judge in directing the jury said:

> "What the Crown counsel is saying, okay, so he struck him he took flight by running. Who is the aggressor? That is what the Prosecution is asking, who is the aggressor, in the scenario described by this witness and you saw him and heard him describe the relationship with both men. He said Bayne at the time had a knife in his hand, "Ricky" was in front and Bayne was behind chasing him. The accused has himself said so that he was chasing him, and that time they ran around and came back at the domino table. When Bayne was chasing 'Ricky' the knife was in Bayne's right hand. When they got back to the domino table, 'Ricky' then picked up a stone. He struck Bayne with the stone he held in his hand. It appeared he threw it, he held it and struck him. The words this witness said, "As 'Ricky' hit him then Bayne swung the knife and stabbed 'Ricky' under his left breast." So, that is the evidence and it is a vital area of the evidence. This evidence is very vital, because what this witness is saying if you believe him, is that this accused man chased the deceased, they ran around the chairs. "At one time they ran around and came back to the domino table. When Bayne was chasing 'Ricky', the knife was in Bayne's right hand. When they got back to the domino table he struck Bayne with the chair he held in his hand as Ricky' -- as the deceased hit Bayne, Bayne swung the knife and stabbed 'Ricky' under the left breast. I saw the stab wound, it was his left breast. Bayne was holding the left side of his head. 'Ricky' fell to the ground when we tried to assist him." So, those are the circumstances..."

21. Miss McBean complained on the one hand that the learned judge had placed too much emphasis on Crown Counsel's address to the jury where she had mentioned that

it was the applicant who was the aggressor. She submitted that it would have been more appropriate if the learned judge had told the jury that where the applicant apprehended imminent danger and had to defend himself he would be acting in lawful self defence.

22. Miss Pyke argued on the other hand, that a man cannot be an aggressor and then say that he was acting in self defence. It was quite obvious she said, that the deceased man was repelling the attack of the applicant when he armed himself with the stool, so self defence could not avail the applicant in those circumstances.

23. It was said in **The State v Hansraj Ori and Tulsie Persaud** (1975) 22 WIR 182 at page 205 I:

> "If a man sets up self-defence, he may well strengthen the case for the prosecution by showing the jury he was really the aggressor..."

24. The authorities clearly show that where the defendant is involved in a fight and is the aggressor, self defence could hardly arise. It was abundantly clear from the evidence adduced, that at the material time of the stabbing, the deceased was being chased by the applicant who was armed with an opened knife. It could very well be said that on the prosecution's version of the events that took place, that the applicant was the aggressor. However, the learned judge did not take away self defence from the jury's consideration but had given the jury meticulous directions on this issue. Indeed, it could be said that the learned judge's directions were extremely generous to the

applicant. We feel compelled to say that implicit in the jury's verdict there was a substantial acceptance of the prosecution's case that throughout that night it was the appellant who was the aggressor. We are therefore unable to agree with Miss McBean that the judge had not properly addressed the issue of self defence. This ground of appeal also fails.

GROUND 3

25. The third ground raised an issue which we have considered at length having reserved our decision. This ground was presented thus:

> "3. The learned judge failed to adequately deal with the issue of provocation".

26. The directions on legal provocation were eminently correct and were accepted by Miss McBean but she complained that in relating the defence to the facts on which provocation could arise, the learned judge referred only to what was said by the deceased and had failed to direct the jury on the deceased's further conduct of hitting the applicant in his head with a chair to the point where he received a wound. She submitted that the latter conduct was the immediate incident which had led to the death of the deceased. Reference was made to the cases of **R v Paul Miller** SCCA 278 of 2001 delivered April 2, 2004 and **R v Jeffrey Davis** SCCA 203 of 2002 delivered 20 December 2004.

27. However, Miss Pyke submitted that the directions on provocation were full. The learned judge she said, had directed the jury to look at everything when considering whether or not the applicant was acting under legal provocation. She submitted that although the judge did not inform the jury about acts done by the deceased (that is, the hitting of the applicant with a stool in his head) this could amount to a non-direction but it would not be fatal to the Crown's case. She submitted that in those circumstances the proviso should be applied.

28. It is the law that for the defence of provocation to arise there must be a credible narrative of events suggesting:

(a) evidence of provocative conduct; and

(b) evidence from which it may be inferred that as a result the killing was due to a 'sudden and temporary loss' of self-control.

29. It will be the function of the jury to decide whether or not a reasonable man would have reacted to the provocative conduct in the way the applicant did. See **R. v. Sara Thornton** [1993] 96 Cr. App. R. 112.

30. A review of the evidence is necessary. The applicant in his statement from the dock said that after he had spoken to Richard Logan, the deceased turned to him and said: "A who dah fool yah a call country man?" He responded: "A you me a talk". They started to argue and the deceased then told him about his mother, and that he was to "s" his mother. He then picked up a stone and flung it at the deceased who got up,

picked up the stone and flung it back at him. Thereafter, he walked up to the deceased and Skungie got up and came between them. Skungie pushed him and told him to go back to the other side of the road. It is also clear from his account, that the deceased man had hit him with a chair and that he had chased the deceased man. He also said that there was a struggle between them whilst they were on the ground and he had the knife in his pocket. It was after the incident that he learnt that the deceased man had been stabbed.

31. On the Crown's case, Tyrone Marshall said that both the deceased and the applicant were quarrelling and had approached each other. The deceased picked up a metal chair, swung it at the applicant and it caught him on the left side of his head. The applicant had a stone which he threw at the deceased but it never hit him. The deceased then picked up the said stone and flung it back at the applicant. Marshall also said that after the applicant got the hit in his head he started to chase the deceased who was running away from him. At that time the applicant had a brown handle knife in his hand and was chasing the deceased. They ran around until they finally returned to the domino table. The deceased then picked up a stool which he used to strike the applicant and as the deceased hit the applicant with the stool, the applicant swung his hand with the knife and stabbed the deceased under his left breast.

32. The jury had rejected both self defence and provocation so the question is: did the learned trial judge direct the jury adequately on the issue of provocation? It is our judgment, that even if it were said that provocation was self-induced such a defence

would still have to be left to the jury by the trial judge. See **R v Johnson** [1989] 2 All ER 839 where it was argued and the trial judge said: 'It is rather difficult to see how a man who excites provocative conduct can in turn rely on it as provocation in the criminal law.' The Court of Appeal held:

> "Since anything said or done which provoked a defendant to lose his self-control could amount to provocation for the purposes of s 3 of the 1957 Act a defendant was entitled to rely on 'self-induced provocation', i.e. a reaction by another caused by the defendant's conduct which in turn led him to lose his own self-control, as a defence to a charge of murder and accordingly if there was evidence which might lead the jury to find provocation, whether self-induced or not, such a defence had to be left to the jury by the trial judge. Since the appellant had been deprived of having his defence of provocation considered by the jury the appeal would be allowed, the conviction for murder would be quashed and a verdict of manslaughter substituted".

33. In giving directions on provocation in this case, the learned judge told the jury at pages 201 – 204 of the transcript:

> "...before you can convict this accused man of Murder, the prosecution must make you feel sure that he was not provoked to do as he did. Provocation has a special meaning in this context, which I will explain to you.
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> If the prosecution's case makes you feel sure that he was not provoked to do as he did, he would be guilty of Murder. If on the other hand, you conclude either that he was or that he may have been provoked, then the defendant may not have been guilty of Murder, but he would be guilty of the offence of Manslaughter, a lesser offence.
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> Now then, to determine whether the defendant was or may have been provoked to do as he did, there are two questions which you will have to consider before you are entitled to

conclude that the accused was or may have been provoked on that occasion. It may be the deceased conduct which is, things the deceased did or things he said or both, which caused the accused suddenly and temporarily to lose his self control. If you are sure that the answer to that question is no, then the prosecution would have disproved provocation and proved that the prosecution's case have made you feel sure of the ingredients of Murder to which I have referred, your verdict should be guilty of Murder. If however, your answer to the question is yes, then you must go on to consider whether the conduct may have been such as to cause a reasonable and sober person of his age, he said he was what, 21? A man of 21 with same sort of background. Would a reasonable and sober person of his age, with the defendant's conduct have caused a reasonable person of his age to lose – of the deceased to cause a reasonable and sober person of the defendant's age and sex to do as he did? A reasonable person, who has a degree of self-control which is expected of the ordinary person who is sober and of the accused age and sex? Ask yourself whether a person with the relevant characteristics of the accused might have been provoked to do as he did. When considering this question, you must therefore, take into account everything which was done and/or said, because remember he said that the man tell him something about his mother and that there was this cussing going on. You didn't hear the details of the cussing. He said something about – you remember in the unsworn statement something about fool country bwoy, "Which fool dat a call man country bwoy" or words to that effect. Those are - "Him turn to me and say, a who dah fool yah a call country man. And is after that, me and him start to argue". So, you look at the words that the defendant said, things that the defendant did, not the defendant rather - the deceased. The words that the deceased, that is, Ricardo Richards said, if he said. If you found that he said anything, and I gave you two illustrations of things that he said. You look at the actions and you say whether those things, if you are sure, that what was done and/or said would not have caused an ordinary sober person, the accused age and sex and any other special characteristics you find that he had to do what he did. The prosecution would have disproved provocation, then providing the ingredient of the offence of Murder is proved, your verdict would be guilty of Murder.

> In other words, if your answer is that what was done, and what was said, would have caused an ordinary sober person of Bayne Simms' age to do as he did, your verdict will be, not guilty of Murder but guilty of Manslaughter by reason of provocation. But it is the prosecution who must make you, Madam Foreman and your members, feel sure that the defendant was not provoked to act as he did. You will have to examine the evidence, Madam Foreman and members of the jury".

34. In his final charge to the jury (pages 206 - 207 Record) the learned judge directed them inter alia:

> "...If you find all of the ingredients of Murder and if you feel sure of them, Madam Foreman and members of the jury, then you go on to consider what I have directed you in respect of legal provocation, bearing in mind the duties of the Crown to prove that he was not provoked, he being the accused, was not provoked. If you find legal provocation, then it has the effect of reducing the Murder to Manslaughter. I am going to ask you members of the jury, to retire and to consider".

35. Miss Pyke had referred to the case of **Benjamin James Stewart** [1996] 1 Cr. App. R 229 in support of her submissions on the issue of provocation. We are certainly grateful for this assistance and have found the case quite useful. In that case, a husband was convicted of murdering his wife and provocation was left for consideration by the jury. Counsel for the appellant contended on appeal that the trial judge gave the jury no assistance as to what evidence they had to consider in relation to provocation. The judge's direction was as follows:

> "I want to deal with one matter which has not been touched on by either side in the course of their addresses to you and it is provocation. The prosecution have to satisfy you that

the defendant was not provoked. What is provocation? It is some act done or words spoken which caused the defendant a sudden and temporary loss of self-control and which would cause a reasonable person to lose his self-control and act as the defendant did. So there would be two questions: (1) Did what was done or said cause the defendant to lose his self-control? (2) Would that cause a reasonable person to lose his self-control and act as the defendant did? In considering that second question you should take into account everything done according to the effect which it would have on a reasonable man or woman. A reasonable man is a person having the power of control to be expected of an ordinary person of the sex and age of the defendant. *However, in other respects such of the defendant's characteristics as you think would affect the gravity of the provocation. By characteristics I mean some temporary omission or state of mind, for example, drunkenness, something directly connected with the provocation. You include anything which you regard as part of his character, some connections between the characteristics in question and the nature of the provocation in question*: would a reasonable man react as you may find the defendant did? If you are satisfied that such a reasonable man would not have acted like that then you reject provocation because the prosecution must prove this defendant's guilt or any defendant's guilt, it is not for the defendant to prove he was provoked. Indeed, in this case he was asked about his self-control and he said he was not so upset as to lose his self-control, he was in control at the time of the accident and his intention was to calm his wife down when he threw her across the bed. The prosecution must make you sure that he was not provoked before you can convict him of murder. As I say, he told you he was at no stage provoked; however, if you are satisfied he was provoked, if you think he may have been provoked then you can only convict him of manslaughter. As you approach this case, any judge in a case of this sort has to alert the jury to the question of provocation, if you thought he was or may have been provoked then he would be not guilty of murder but guilty of manslaughter." (Our emphasis.)

36. At page 236 of the judgment Stuart-Smith L.J said:

> "...But while there is evidence that the appellant in fact may have lost his self-control, the jury can look only at what the appellant said the deceased did or said as provoking such loss of control, since there is no other testimony which bears on this vital time before the killing. In other words, it is not open to the jury to speculate that the deceased may have done or said something else..."

37. And at page 237 the judge of Appeal continued:

> "In our judgment, where the judge must, as a matter of law, leave the issue of provocation to the jury, he should indicate to them, unless it is obvious, what evidence might support the conclusion that the appellant lost his self-control. This is particularly important where counsel has not raised the issue at all. In many cases it may be obvious, for example if there has been a fight and a defence of self-defence is rejected by the jury, or if there is evidence of a row or violence and the defence is nevertheless one of accident, however improbable that may be. If this guidance is not given, the jury will find it difficult to answer the two questions posed, namely: did the accused lose his self-control as a result of things done or said and, more particularly, whether a reasonable man would have been so provoked by such things? In the present case the judge did not give any such assistance to the jury; he merely gave the direction which we have cited as to the law and then rehearsed the evidence of the various witnesses, including of course that of the appellant.
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> This, in our judgment, amounted to a non-direction. But that is not the end of the matter, because we are satisfied that in this case there can have been no miscarriage of justice. Had the jury been told to consider other factors to which we have referred as indicating the possibility that the appellant did lose his self-control, the judge should equally have concentrated their minds upon the fact that it was only from the appellant's evidence as to what the deceased said or did that the provocative acts or words could be gleaned. Even if they accepted his account, they could not properly conclude that a reasonable man would have lost his self-control as a result of those matters. In other words, they were entitled, if they thought fit, to reject the appellant's evidence that he did not lose his self-control, but they could not speculate

> that the deceased had said or done something more provocative, which might have provoked the reasonable man to act as the appellant did. Had the judge focused the jury's attention on the relevant evidence, as in our view he should have, it would have had the inevitable result of demonstrating the total falsity or lack of evidence from which any jury could conclude that a reasonable man would have acted as the appellant did. For these reasons, we take the view that we should apply the proviso to section 2(1) of the 1968 Act".

38. In the instant case, the learned judge did direct the jury that it was not only conduct constituting words spoken but of things done by the deceased which could have caused the applicant to be provoked. He did remind the jury of those directions on at least four occasions. He had also reminded the jury of the words allegedly used by the deceased concerning the applicant's mother. However, he did not remind the jury of the evidence that the deceased had used a stool to hit the applicant. This, in our judgment, amounted to a non-direction. But, as Stuart-Smith L.J said in **Benjamin James Stewart** (supra) "that is not the end of the matter" because we are satisfied that in this case there could have been no miscarriage of justice. Had the jury been told in more precise terms what the deceased had done we are of the view that they would inevitably have returned the same verdict. For these reasons, we are of the view that we should apply the proviso to section 14 (2) of the Judicature (Appellate Jurisdiction) Act and we now do so. Ground 3 also lacks merit and fails.

GROUND 4

39. Ground 4 complained that the learned trial judge erred in his treatment of previous inconsistent statements and discrepancies which it is said arose on the

evidence. Miss McBean sought to support this ground by pointing out some instances of discrepancies between the evidence of Logan and Marshall (the two eyewitnesses). She submitted that the trial judge did not properly assist the jury how to deal with the vast differences between the evidence of these two witnesses but we find no merit in this complaint. The learned judge, in our view, dealt with the matter adequately. He gave clear instructions to the jury as to how they ought to address such matters.

40. At pages 156 – 159 of the Record the learned judge directed the jury as follows:

> "Now, in most criminal trials it is always possible to find variations in the evidence of witnesses or differences in witnesses testimony, especially when the facts about which they speak or not of recent ocurrence (sic) and these are referred to as discrepancies and inconsistencies or contradictions.
>
> Now, a discrepancy may be slight or it may be serious. If it is slight, you may think it does not affect the credit of the witness on the particular point at all. In other words, if the discrepancy is serious you may say that because of it, it may not be safe to believe the witness on that point at all. It is a matter for you, Madam Foreman and your members, to examine the evidence to say if there is any discrepancy and whether if so, if they are slight or they are serious.
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> I remind you again, you take into account the level of intelligence of the witnesses because sometimes this discrepancy comes about because people have different intelligence level. The witness' ability to put accurately into words what he or she has seen or heard.
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> Their powers of observation and any defects that the witness may have had. I must tell you further that is for you to say, members of the jury, whether or not you find contradictions or discrepancies in the evidence of the witness.

> You must only reject the evidence given at the trial and substitute the evidence given at the Preliminary Enquiry if the witness says the conflicting evidence is truthful. So it is for you, Madam Foreman and members of the jury, to assess the level of intelligence of a witness and also it is open to you to accept a part of what the witness has said and reject a part of what the witness has said. That is the purpose of cross-examination, to ferret out contradiction and provide material to say that the truth has not been spoken. And, you will recall what defence counsel said in relation to the evidence that was given by both Logan and Marshall. She did not contend that these persons were untruthful. She wasn't contending that, so you bear that in mind.
>
> It is for you to say, after having examined the evidence whether you find any inconsistency in the evidence and if you find any, what you have to say, whether these discrepancies are profound and you do not believe what the witness said or whether or not the inconsistency is not trivial and central to the issue involved in the case. These are all matters for, you the jury to assess as judges of the facts".

41. We find no merit in this ground of appeal and it also fails.

Conclusion

42. The application for leave to appeal is refused. Sentence shall commence from October 5, 2006.