JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 143/84

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE WHITE, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A. (AG.)

DEVON THORPE vs. REGINA

Mrs. M. Forte and Mr. M. Saunders for Appellant

Mr. G. McBean for Crown

October 7, 8, 1985 & March 20, 1986

WRIGHT, J.A. (AG.):

The hearing of this application for leave to appeal from a conviction for murder in the Portland Circuit before Walker, J., and a jury, was treated as the hearing of the appeal, involving as it does questions of law. The appeal was allowed, conviction quashed, a verdict of Guilty of Manslaughter substituted and a sentence of ten (10) years imprisonment at hard labour substituted. As promised, we now put our reasons in writing.

The charge arose out of the death of Vinroy Norman on the 2nd day of September, 1984 as a result of stab wounds:

1. in the root of the left side of the neck penetrating the chest cavity and severing the aortic arch,

2. on the left side of the back in the inter-scapular area - bone deep.

There is no question but that these injuries were inflicted by the appellant with a knife. The circumstances in which the hapless victim met his death are not complicated and are as follows:

The 2nd day of September, 1984 was a Sunday and about 10:30 a.m., a number of raftsmen - about ten (10) - including Lancelot McFarlane, George Gaye, Vinroy Norman, the deceased, and the appellant was at the entrance to Rafters Rest in the parish of Portland awaiting the arrival of customers. After a while the appellant left the group and went to the St. Margaret's Bay end of the bridge / leaving the others at the Port Antonio end of the bridge. It appears that apart from the applicant other persons were in the area where he went. It is known that the appellant is an apprentice raftsman, though it is not clear whether he was the only apprentice present, and that others including those named above were captains. It seems that the apprentices cannot contract with customers - that is, within the purview of the captains. The job of the apprentices is to take the empty raft back up-stream.

A car arrived and stopped at the St. Margaret's Bay entrance. Someone spoke to the occupants and the car drove on towards Port Antonio. George Gay and Vinroy Norman shouted 'rafting' and the car stopped. Both men went to the car and were speaking to the occupants when, according to Lancelot McFarlane, the appellant came running along the bridge. He got up to the car, pushed his head under George Gaye's arm and said to the occupants of the car, "I was the first person you speak to down at the bridge end". The occupants of the car required identification whereupon George Gaye pulled out his bill-fold and showed them his identification. Someone in the car said they were going to Port Antonio and would be back soon. The car then drove off. Lancelot McFarlane remained standing by a mile post, George Gaye went and sat on top of a column on the bridge while Vinroy Norman stood by the entrance with his arms folded across his chest. The appellant went to George Gaye, pointed his finger in the latter's face and said, "You bwoy want to dead to 'rass cloth'." Lancelot McFarlane took him away. He did the same thing three times and McFarlane took him away three times finally telling him to go

back to the entrance whence he came and not to put himself into worries. At this point, Vinroy Norman said to the appellant that he should leave George alone because George was a licensed captain. This apparently nettled the appellant who then went up to Norman and pointed his finger in Norman's face. The latter's response was apparently not immediate but eventually he pulled his folded arm and pushed the appellant away. This is how the prosecution witness McFarlane relates the incident. McFarlane continued that the appellant went back to Norman and shortly after that he saw Norman "run back and hold his neck (demonstrates) and said that he stab him". At that stage McFarlane saw the blade of a knife in the appellant's hand. The appellant ran after Norman who had by then gone just five or six feet away, and stabbed him in his back. And indeed it appears that the infliction of further injury was stayed only by the intervention of one Tex Martin who shouted at the men as to whether they were going to stay there and let the appellant kill Norman. Martin then took up two stones and attempted to throw them at the appellant who then ran away. This tragic drama was all over within 10-15 minutes after the car had driven off. It was McFarlane's evidence that he did not see Norman with anything in his hands.

It was suggested in cross-examination that after the car had driven off the witness McFarlane had hit the appellant in his back with a piece of grown stake stick and said to him, "You must run go way". This was denied thus. "No, I and him never have no dispute, sir. I couldn't hit him. Is not me M'Lord". He also denied hearing Norman say that the appellant was organising with the tourists for Twenty-five Dollars or that the appellant had no manners or that "oono boy come fi mash up the trade". Denied also was the suggestion that Norman punched the appellant in his face and that Norman was stabbed in the neck immediately after the appellant had staggered as a result of that blow. Further, this witness said there was no show

of annoyance with the appellant by any of the raftsmen.

Substantial agreement with McFarlane's evidence is provided by Rupert Johnson but there are certain differences worthy of note. For instance, he admits in his evidence-in-chief that Norman did accuse the appellant, whom the witness knows as Granpatoo, of ill-manners thus: McFarlane, whom he termed a peacemaker, had thrice removed the appellant who was confronting George Gaye, and said to him, "ease off the man, the man no do anything, ease off the man", when Norman said -

> "You have no manners man, you can see a man arranging with the people in the car and you just run between them? No manners".

He also disclosed that Norman said to the appellant - "Leave and go back where you come from, you is apprentice, you no have no manners". Questioned as to whether he had heard any talk between Norman and the appellant about twenty or twenty-five dollars, he responded:

> "At the present time Norman never have no time to speak, quick death".

When the question was repeated with reference to anybody at the entrance to Rafters Rest, he responded -

> "All I know, sir, that him leave from Gaye on to Norman and no one else wasn't paying him no mind to have any argument".

After the appellant ran away from the scene, he was observed by another witness to hand the knife to his mother on arrival at his home. The knife was recovered and handed to Detective Sergeant Joslyn Bailey who later the same day arrested and charged the appellant with murder. It was Sergeant Bailey's evidence that after caution the appellant said "a him come to fight me". He saw no injuries on the appellant.

In an unsworn statement the appellant related that there were two people, a white man and a white woman in the car which stopped and -

> "They ask me about rafting and I told them I can take them rafting. They ask me the price I told them twenty dollars ($20.00). After I told them $20.00 said time the lady said to me she going Port Antonio and when she told me she going Port Antonio the car drive off. Lance turn to me at the entrance of Rafters Rest and say 'Is $25.00 you charge them'? I turn to him and told him no is not $25.00 is $20.00. Said time him take a piece of grown stake stick and hit me in my back and said time he hit me Vinroy Norman was outside of the street on the iron, and said time he come into the entrance of Rafters Rest where me is. He turn to me and ask me that, 'Is twenty-five dollars you charge the tourist them'? I say no. He come down to me and say, 'Then is how much'? I said, 'twenty dollars'. But he said, 'you don't have no manners'. He thump me into my face and said time he thump me into my face I stagger back, and I see whole heap of kittyboo. The place turn dark, and I have a knife into my pocket I use on the small raft, and that is the knife I use and do little hustling with, and same time he thump me in my face I tek it out and give him a cut in him neck, and after I give him a cut in him neck he crouch, go down. After he go down I give him a next stab at him shoulder here at him back. And that guy was my cousin, Vinroy Norman. I was him apprentice, and most of the time when I work for him and have to get Twenty Dollars him don't give me twenty and he give me Ten Dollars and I don't quarrel with him, I tek it. And after I work for him and he give me Ten Dollars I don't quarrel with him and everything alright and I tek me raft up from the street and give him work, same way I don't quarrel, I don't have nothing gens him. I don't have anything more to say, sir".

It is clear that from the material put before the jury a verdict of acquittal, except it was founded on self-defence, was out of the question. But self-defence does not arise on the case for the prosecution and even on the case for the defence, self-defence is rather tenuous.

Nevertheless, the submissions for the appellant raised two major areas of complaint which we were asked to consider - the issues of self-defence and provocation. Subsumed in these complaints was the questioning of whether the learned trial judge had properly expressed for the guidance of the jury, the burden of proof on these issues.

First, as regards self-defence. Early in his summing-up, the learned trial judge said this at page 52:

> "I will tell you something too, about self-defence in this case, and I am going to do so out of an abundance of caution, because self-defence arises where a man who is attacked by another person in circumstances where he reasonably believes his life to be in danger, or that he is in danger of serious bodily injury, uses force, such force as on reasonable ground he believes is necessary to prevent and resist the attack being made upon him and if in using such force he even kills the person who is attacking him, he is not guilty of any crime at all, even if the killing is intentional".

It was argued that although the learned trial judge thus included directions on self-defence, and he left that issue to the jury for their consideration, he treated it in such a way as to make it a non-issue and so invited the jury to pay little attention to it. In fact, although the learned trial judge left the matter for the consideration of the jury by telling them that he did so "out of an abundance of caution", the terms in which he called upon their judgment restricted their consideration. At the outset of the summing-up, it was said, what he did was to effectively remove the issue from their consideration, by telling them that "On the case for the prosecution, on the case against the accused man, it is a straight case of murder or nothing at all". Continuing, the learned trial judge in the second paragraph of his summing-up, put the issues thus:

> "On the case for the Prosecution, on the case against the accused man, it is a straight case of murder or nothing at all. However, on the basis of what he has said, if you believe him, if you believe that Vinroy Norman punched him in his face, if you believe that the witness Lancelot had previously hit him with a stick, with a piece of grown stake stick, if you believe he got that hit from the stick, if you believe he got the punch in his face, then you will have to consider whether you find provocation proved in this case. And if you find that in truth and in fact he was hit with the stick, and/or punched in his face, and that that amounted to legal provocation, as I will describe it to you later on, then it would be open to you to find this accused man not guilty of

> "murder, but guilty of manslaughter. If you find that what he said happened to him really happened, and if you find that that amounted to legal provocation, then that legal provocation would reduce murder to manslaughter, and in those circumstances you could say that he is not guilty of murder but guilty of manslaughter".

What is manifest at this point is that within the parameters thus set for the jury, although the intermediate position occasioned by doubt created by the appellant's unsworn statement was not included, the most that could enure to the appellant's benefit was a verdict of guilty of manslaughter. But this expression of personal opinion must be regarded in the light of the later directions on self-defence which immediately follow upon the expression of opinion.

Significantly, he did instruct the jury as to the consequences of their finding that the appellant had acted in self-defence. At page 54 they were told:

> "If you were to find that self-defence was made out in this case, then your verdict would have to be one of not guilty, because a person who is acting properly in self-defence is not guilty of any crime, even if he kills his attacker. So those are matters that you will have to consider in due course".

Immediately thereafter he commented:

> "It seems to me, Mr. Foreman and members of the jury, that on the evidence in this case that one would have to stretch one's imagination to believe that this accused man was in danger of being killed or caused grievous bodily harm that day. It seems to me that one would have to stretch one's imagination to believe that this accused man believed, even if he mistakenly believed, that he was in danger of either being killed or being caused grievous bodily harm that day. He has not told you that he thought he was in danger up to now, either of being killed or being caused serious bodily harm. What he has told you is that one man hit him with a piece of stick, another man, the deceased, thumped him in his face and told him that he had bad manners and that he pulled out his knife and stabbed him in his neck and that when the man was going down he gave him another stab in his back. That is what he told you what happened .....".

But despite the immediate foregoing remarks, the learned trial judge repeatedly asked the jury to decide whether there was an attack

on the appellant, by the deceased or others, and what was the nature of the attack. The relevant facts were, generally, the conduct of Vinroy Norman who, according to the appellant, thumped him in his face causing him to stagger and see peenie-wallies. Added to this was the fact that the witness, Mr. Lancelot McFarlane, had reportedly hit the appellant with a stick. At page 76 the learned trial judge said to the jury, "If you believe him, either that he was struck with the stick or thumped in his face or both, then you could say that he was being attacked". But, surely, the jury had to contemplate whether in those circumstances, not only was the attack serious, but was it of such a nature as to indicate peril of the appellant either being killed, or being subject to serious bodily injury, so that he was justified to stab the deceased twice in his neck? Did the appellant act to protect himself from death or serious bodily injury intended toward him by the deceased? "Was the act done to protect the prisoner from the reasonable apprehension of death or serious bodily injury induced by the words and conduct of the deceased, though the deceased may not in fact have intended death or serious injury". ..... "Did [the Prisoner] apprehend he was in imminent danger either of death or serious injury?"

It is clear that the judge was here putting to the jury not only the question of an actual attack, but also, may the appellant not have reasonably apprehended serious injury or death? At page 77 the record shows the words of the judge:

> "You see, Mr. Foreman and members of the jury, if the deceased Norman by either his words or conduct or both caused this accused man to believe that worse was to come after the thump in the face, then even if the deceased really didn't intend to attack the accused further, yet if the deceased behaved in such a way as led the accused reasonably to believe that he was in imminent danger of death or serious bodily injury, then in those circumstances if the accused drew his knife and stabbed him, he would have been acting in self defence in which case your verdict would have to be one of guilty. But you ask yourselves the question:

> "did the deceased behave in any such way; did he say anything or did he do anything which could have led this accused man to believe that the deceased was going to kill him or cause him serious bodily injury that morning, and if the deceased did nothing which could have led the accused to believe that he the accused was going to be killed or to be caused serious bodily injury. if all that the deceased did was to thump him in his face, then in stabbing him and killing him was the accused using more force than was necessary in the circumstances?
>
> If you think that all that happened was that the deceased thumped him in his face, didn't give him any ground for thinking that he was going to kill him or cause him serious bodily injury, then you may think that to draw a knife and stab the deceased twice was not necessary. In doing that you may think the accused was using more force than he needed to use, and if that is the case he couldn't rely on self defence; self defence wouldn't help him in this case if he used more force than he needed to have used".

The passages which have been quoted above, do indicate that the judge, in fact, did not ignore the issue of self-defence, nor did he in effect qualify the defence in a manner for which there is no authority in law. It was submitted that he ought to have given the usual full and proper direction on the issue or not at all, whatever that means. Indeed, on page 85 towards the end of the summing-up he reiterated his directions on the issue thus:

> "However, if you believe what he says is true, or you are in doubt as to whether it is true or not, then you have to decide whether what happened that morning amounted to an attack being made on him in circumstances where he was justified in defending himself in the way that he says he did, and if you find that self-defence is made out, if you feel that he didn't use any more force than was necessary, if you believe that his life was being threatened, that all he could do was to stab the man and that that was reasonable, if that is what you believe, then your verdict must be one of not guilty on the ground of self-defence".

He emphasized this by telling them -

> "The only way you can find him not guilty of anything at all is if you believe that self-defence has been made in this case".

Added to which he instructed them how to resolve any doubts arising between the various verdicts which he had postulated during the summing-up.

The Court desires to say that in the general tenor of the summing-up it would not be correct to criticise the judge where he is reported as saying -

> "If the accused drew his knife and stabbed him, he would be acting in self-defence in which case your verdict would be one of guilty".

The words underlined can be regarded either as a lapsus lingue, or as an error in typing the transcript, or mishearing by the Court Reporter. In any event, we do not think that that alone would depreciate the summing-up on this point. A careful reading of the summing-up leaves one with the strong awareness that the judge did make the jury well aware of the importance of considering self-defence, although he had said initially he was dealing with it out of an abundance of caution.

One of the ingredients of the discussion of self-defence is the factor of retreat. Another is the nature of the force which was used. In this case, it was argued that there was a misdirection when the judge told the jury at page 77 about the possibility of the appellant running away after Vinroy Norman had, on the appellant's account, punched him. We do not see any misdirections in the following passage which was criticised. Pages 77-78:

> "Again, if he could have avoided the danger, if he saw danger, what was to stop him from running away? If he was there and a man punched him in his face and he believed the man was going to do worse, what was to stop him from running away rather than standing up and stabbing him with a knife. If a man points a gun at you, it may be dangerous to run because the bullet can travel, so you might say if a man corners another man with a gun, you wouldn't expect the man to run if to run would be to expose himself to the bullet; he would probably stand up and fight him there. But, if you can run, if all the man is using is a fist, you can run from the fist, you don't have to stab the man with a knife. These are matters for you to consider".

The fact of the matter is that in the circumstances of the case the jury, using ordinary common sense, would have questioned

the reaction of the appellant to what was done to him by Vinroy Norman and his co-workers. And in fact, nowhere has the appellant himself said that there was a pressing attack on him by the deceased or anyone else so that he was unable to take any other action but to stab the deceased. Although it is the prosecution which must disprove the assertion of acting in self-defence, it is not inappropriate to point out that on the case for the prosecution the witnesses thereto denied any suggestion that the appellant was in the predicament which he sought to describe. No one hit him with a stake and all Vinroy Norman did was to push off the appellant.

On any view of the evidence, the strictures on the expressed views of the learned trial judge are not sufficiently cogent to lead this Court to say that the judge was wrong in his approach to the issues raised by the defence at the trial. Indeed, it was said that certain comments of the judge regarding the degree of the assault on the appellant served to de-emphasize the pressure and effect of that assault. Thus, it was wrong for him to have told the jury that because Detective Sergeant Bailey did not see any injuries on the appellant, "then if the accused is speaking the truth, it would mean that the blow to his back did not injure him, the push in his face did not injure him, if he received the blow and the punch". This, it was argued, must have affected the jury's consideration of the issue of self-defence adversely to the accused. Here again, the judge is dealing in essence with the prosecution's case, albeit, he was there asking them to bear in mind the case for the defence, which was not by those comments excluded from the consideration of the jury. While the absence of injuries did not invalidate the assertion of action by way of self-defence, certainly the judge left it to the jury to decide the truth or otherwise of the evidence, in the light also of whether the attack was so serious as to attract immediate defensive action. Nor did the learned trial judge in any way misdirect the jury,

when he pointed out to them that "If you find that his life was in danger .... and that all he could do was to draw his knife and stab him, then you can say that self-defence is made out". In those words were a practical and forthright way of bringing home to the jury the result of their accepting the defence as projected at the trial, and was not in the context of the summing-up a mis-statement of where the burden of proof lies.

It is clear, therefore, that as regards self-defence, out of the 'abundance of caution' with which the learned trial judge expressed himself, in the long run he did leave the issue in some tangible form with the jury. Even if he had outrightly withdrawn the issue from the jury, he would have properly done so on the basis that there was not sufficient evidence to raise the issue. That was his view which he was entitled to state and to act upon. This expression of view is supported by the decision of the Court of Criminal Appeal in R. v. Larkin [1943] 29 Cr. App. R. 18; [1943] 1 All E.R. 217. In that appeal, counsel for the appellant contended that the judge was wrong in his directions to the jury in a similar situation.

Humphreys, J., in giving the judgment of the Court of Criminal Appeal in R. v. Larkin [1943] 1 All E.R. 218, 29 Cr. App. R. 18 at p. 22 set out that counsel for the appellant contended that the judge was wrong in the following direction to the Jury:

> "Upon the facts of this case there was only two verdicts, one of which you must return; one is a verdict of murder, the other is a verdict of manslaughter, and in this case I direct you as a matter of law you cannot return a verdict of not guilty".

Humphreys, J., then opined on -

> "Whether (Oliver, J.) was right in law in giving the direction to which I have referred, which in our opinion, was a perfectly correct direction.
>
> Counsel for the appellant argued in this way. Although the direction was, as an abstract statement of the law correct, Oliver, J., ought to have left it to the jury to say whether the act was lawful in this case or not. That we

> "think is not so. Where facts are proved and accepted, then whether those facts amount to a crime or not must be a question of law, not of fact. Where the facts are in dispute, it is always for the jury to determine what are the true facts. They must have a direction as to what their verdict must be, if they accept the facts one way, or if they accept the facts the other way. But where the facts are proved in such a way that there can be no question about them, then it is perfectly right for the judge to tell the jury: Those facts amount to a lawful or an unlawful act. In this case, in our opinion, it was perfectly right for Oliver, J., not to leave to the jury any question of acquittal, but to tell the jury, as he did, on the facts of the case, accepting the evidence of the accused man to the highest extent, that it was not open to them to return a verdict of not guilty".

[1943] 1 All E.R. at pages 219[H] - 220[A]; [1944] 29 Cr. App./R. at pages 24-25. In the instant case the learned trial judge has posed three possible verdicts for the jury's ultimate decision.

From the commencement of the summing-up, the learned trial judge adumbrated the significance of 'legal provocation', a term to which the appellant's counsel took objection, on the ground that it 'might well have had the effect of making the jury feel that a finding that the accused was provoked to the point where he lost his self-control was one which should be difficult for them to find and so to arrive at a verdict for murder'. Throughout the summing-up the learned trial judge made it quite clear that the jury would have to give pre-eminence to the matter of provocation as defined by him. The phrase 'legal provocation' is no more reprehensible than any of the phrases: 'according to law provocation is' or 'in law provocation is', or 'the law relating to provocation is' or 'let me tell you the law as to provocation'. In fact, the judge's duty here is to place before the jury how the law defines provocation, and that law is the standard by which they should judge the relevant actions of the accused in a particular case. No complaint was made about the terms in which the learned trial judge explained what provocation involves. At page 79 he is recorded as saying:

> "Let me tell you, Mr. Foreman and Members of the Jury, what provocation is. For legal provocation to exist, you must have evidence before you of conduct consisting of things having been done or said, or both together which caused the accused to lose his self-control suddenly and temporarily, and while in that state of loss of self-control to retaliate by committing the act which caused death. The accused having gone into that state, you, Mr. Foreman and Members of the Jury, must now place a reasonable person in the shoes of this accused man in the situation created by the facts as you find them in this case, and then consider whether such a person, that is a reasonable man, to whom these things were done or said, would, firstly, lose his self-control, taking into account everything done or said according to the effect, which in your opinion, it would have on a reasonable person; and, secondly, retaliates in the way that the accused did".

Complaints regarding the statement of the burden of proof in relation to provocation, formed the subject-matter of grounds 2 and 4. Instances are cited from the summing-up in support of the contention that an onus was being placed upon the appellant to prove the issues raised. Examples are:

> "(a) ..... you will have to consider whether you find provocation proved in this case". (p. 51)
>
> "(b) and if you find that a reasonable man in those circumstances would have done that, then you can say that legal provocation has been proven in this case".

Admittedly, the language is infelicitous, there being no burden on an accused person of proving either self-defence or provocation when either is raised. (See R. v. Lobell 41 Cr. App. R. 100, [1957] 1 All E.R. 734; R. v. Wheeler (1967) 3 All E.R. 829; R. v. Abraham [1973] 3 All E.R. 694). Indeed, if at the end of the day the position remained as complained of, we would find ourselves constrained to say that there was justification in the complaint. But it is trite learning that a summing-up must be viewed as a whole. Then, too, it is helpful to note a statement by Winn, L.J., in Wheeler's case (supra) at page 830 and relied upon by the Crown in Abraham (at pages 697-698):

> "There are many cases where the facts and circumstances of the case itself and the framework of the summing-up to the jury by the learned judge suffices perfectly adequately to make it certain that the matter has been understood by the jury in the true light which I have endeavoured to define. It may be quite unnecessary repeatedly and separately to refer to onus in respect of those issues".

The issues to which reference was made include self-defence and provocation.

The relevance of this passage to the instant case lies in the significance it attaches to the framework of the summing-up to which attention will be directed shortly because it is by reference to the framework of the summing-up that counsel for the Crown set out to answer the objections raised. As regards provocation, he submitted that "when the summing-up is taken as a whole (see direction on burden of proof and standard of proof at pages 58 and 73), coupled with the directions as to the elements which the prosecution has to prove for murder on pages 82-84, and also the specific direction as to the burden of proof on page 84 paragraph 2 taken together, the learned trial judge made it clear to the jury that it was for the prosecution to prove to the extent that they felt sure that the killing was unprovoked and that it was not necessary to be more specific." With reference to self-defence, he relied on the passage cited above from Wheeler's case and submitted further that:

> "Even if there was a misdirection with regards to self-defence as a whole in this particular case it is not fatal because self-defence on the accused's unsworn statement does not arise. Consequently, there is no miscarriage of justice in this case where self-defence ought not to have been left to the jury especially having regard to the strength of the crown's case and the fact that even on the accused's unsworn statement, if a reasonable jury had been properly directed they would inevitably have come to the same conclusion".

Reference to these passages is therefore necessary in determining whether the submissions meet the objection. The passage at page 58 is as follows:

> "This accused man is presumed to be innocent until you by your finding say that he is guilty. He is not required to prove his innocence. There is no duty on the accused to prove anything at all. The burden or duty of proving the case against the accused is on the Prosecution throughout and it never shifts. Before you can convict this accused man, the Prosecution must satisfy you by the evidence so that you feel sure of his guilt.
>
> Although there is no duty on him to prove his innocence, he may attempt to do so. If he attempts and succeeds, then obviously, he is not guilty. If he attempts and he fails, you must now consider all the evidence in the case including what he himself has said, and then see whether you are satisfied so that you feel sure that the Prosecution has proved its case".
>
> (Emphasis supplied).

This passage is unexceptional as regards the clarity with which the burden as well as the standard of proof is stated. The direction at page 73 similarly emphasizes the burden as being on the prosecution as well as drawing attention to the weight to be given the unsworn statement of the accused. Pages 82-84 are occupied with a list of six ingredients which the prosecution must prove to the stated standard, viz., the death of Vinroy Norman, the identity of the applicant as the killer, that the killing was a voluntary or deliberate act and not an accident, intention, the absence of legal provocation and that the applicant was not acting in defence of himself. We are satisfied, therefore, that when the directions on the burden of proof and the standard of proof are taken as a whole, the jury could be left in no doubt as to where the onus lay. Accordingly, these grounds fail as being without merit.

It was in the directions on the issue of provocation complained of in Ground 1 of the Grounds of Appeal, that we felt there was a lacking which we resolved in favour of the appellant. However, we must make it clear that we are not in agreement with Mr. Saunders on various matters which he listed as acts of provocation and which ought to have been left to the jury as such. These include -

(a) Evidence that the deceased Vinroy Norman told the applicant to

leave Mr. Gaye because the latter was a licensed captain. Per se this was an act of peace-making. (b) Evidence that having spoken to the applicant the deceased stood before him with his arms folded across his chest. This represents a misunderstanding of the evidence which shows that this was the posture assumed by Norman after the car drove off and before he was accosted by the appellant. (c) Evidence that the deceased pushed the applicant away. Again, it must be noted that Norman pushed the appellant away after the latter had accosted him with finger pointing in face. How could this be an act of provocation? (d) Statement of underpayment of the applicant by the deceased over a period. We do not see how this could qualify as an act of provocation. Rather would it breed resentment. Criticisms of the summing-up on the basis that evidence amounting to provocation was not left to the jury are best met by looking at what the learned trial judge directed the jury to consider. At pages 79-81 of the record after defining legal provocation he proceeded:

> "So let us look at the evidence in this case to see whether you can find any evidence on the basis of which you could find provocation. Well, again, Mr. Foreman and members of the jury, if you believe that the accused is speaking the truth when he says that the deceased told him that he had no manners, and remember, a witness for the prosecution also said that Mr. Norman did tell him that, if you believe Mr. Norman did tell him that; if you believe that Mr. McFarlane hit him in his back with a piece of grown stake stick; if you believe that Mr. Norman punched him in his face, then you consider whether those words and that conduct of Mr. Norman and Mr. McFarlane caused the accused to lose his self-control. Remember he told you that when he got the punch, he staggered back and the whole place turn dark, and he began to see something like peenie wallies. So he said that is the state that he was in after he got the punch. Do you believe at that stage, if those things really happened to him, do you believe at that stage now, he just lost his self-control? Well, if you believe that he did lose his self-control, he was stunned by the stick hitting him in his back, and the punch in his face and that he lost his self-control, then you must now go on to do this. You must now put a reasonable person in that position in which

> "the accused was and ask yourselves, whether a reasonable man in those circumstances would have retaliated in the way the accused did; whether a reasonable man in those circumstances, who had a knife in his pocket, would draw out the knife and stab his attacker in the way that this accused man did. And if you find that a reasonable man, in those circumstances, would have done that, then you can say that legal provocation has been proven in this case.
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> When you are dealing with provocation, Mr. Foreman and members of the jury, you must bear in mind that a person who is acting out of motive of revenge, or what we call in Jamaica, 'badmanship', must be distinguished from a person acting under legal provocation. If you find that the accused was acting in revenge or out of badmanship because of what was done to him, then that would not be provocation. A person who does an act in revenge, has time to think about the matter and come to the decision to take revenge. The essence of provocation, is a sudden and temporary loss of self-control followed by acts done in retaliation while in that state. You see, a person acting under legal provocation, Mr. Foreman and members of the jury, may even intend to kill. But if he intends to kill while acting under legal provocation, the proper verdict would be guilty of manslaughter, once you believe that he was acting under legal provocation. But if you think that the action was in revenge, or for some other improper motive, then that would not be provocation".

Further references are made to provocation but these are no more than repetitions more briefly stated of the matters set out above.

In dealing with the issue of provocation, we think it important that a summing-up should do more than enumerate relevant factors, for although the determination of the issue is for the jury, it is incumbent on the trial judge to assist the jury in interpreting those factors. It is in this regard that we felt there was the lacking which we mentioned earlier. It is important to bear in mind that the impact of conduct may vary according to the surrounding circumstances, so that where it is evident that this is an important feature of a case it will be the duty of the trial judge to alert the jury thereto and assist them in a proper assessment of the situation.

It is clear from the evidence that this was a bread-and-butter situation in which a number of raftsmen were vying for patronage but until this lone car arrived it appears there had been no potential customers. Accordingly, the spirit of competition was understandably keen. Added to this, the applicant was the minor on the scene in that those with whom he was competing were licensed captains and he a mere apprentice. In that context, to be reminded that he, in contrast to Gaye who was a licensed captain, was only an apprentice and further, even if his conduct justified it to be rebuked for the lack of manners are matters which must have influenced the conduct of the appellant and should have, accordingly, been included in the directions to the jury. The nearest approach to what we think desirable, in the circumstances of the case, is to be found at page 84 of the record near the end of the summing-up when the jury was being directed as to the verdicts which were open to them:

> "So what are the verdicts then that you can return in this case. If you believe the prosecution's case, if you believe Mr. McFarlane and Mr. Johnson and the other witnesses for the prosecution, and you reject what the defence has said, what the accused has said, you don't believe he has spoken the truth, you don't believe he was provoked, you don't believe he was attacked, you don't believe he was acting in self-defence, if you don't believe he was acting under any provocation; if you believe that he went to those men that morning vexed because he thought that they were trying to take away his customers, and started pointing his finger into people's faces, if you believe that Mr. Norman told him, 'you have no manners, go away, go back where you came from', if you believe that is all that happened, and acting just out of badmanship he drew that knife and stabbed Mr. Norman, then that is murder and you would be entitled to return a verdict of guilty of murder".
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> (Emphasis supplied).

It is because we could not say with any degree of certainty that had the jury been directed as we have indicated, that they, nevertheless, would have inevitably returned a verdict of guilty of murder that we resolved that doubt in favour of the appellant, quashed the conviction

for murder, substituted a conviction for manslaughter and a sentence of ten (10) years imprisonment at hard labour.