JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT APPEAL NO. 198/1979

BEFORE: THE HONOURABLE MR. JUSTICE CARBERRY, J.A.
THE HONOURABLE MR. JUSTICE CAREY, J.A.
THE HONOURABLE MR. JUSTICE WHITE, J.A.

DERRICK WILSON v. REGINAM

Mr. Berthan Macaulay, Q.C. Mr. Enoch Blake and Dr. R. Williams for the appellant.

Mr. Lennox Campbell for the Crown.

July 1, 2, 5 and 30, 1982

Carberry, J.A.:

This is an appeal from a conviction of murder in the Home Circuit Court before The Honourable Mr. Justice Wright, and a jury, the appellant having been convicted on the 15th November, 1979, for the murder of Glenroy Williams on the 23rd January, 1979.

The case for the Crown depended upon the testimony of a single eye witness, Avis Hall. A sidewalk vendor of roast yam, her pitch was at the corner of Tewari Crescent and Spanish Town Road. She knew the accused Derrick Wilson, as the mother of his baby lived in the same yard that she did, in White Street, nearby. The accused often slept there with his baby's mother Verona Salmon, though he had his own room elsewhere. The baby in question, Stephanie, who was to figure in this story, was at that time some three months old. She also knew the deceased Glenroy Williams, sometimes called "Youth" or "Big Youth". She knew him as a person who had a daytime job and went to evening classes at Kingston Technical School. He, and other students, were regular customers of hers. He lived in the area, she was accustomed to see him passing by her yard, but according to her, he never came in.

On the evening of Tuesday the 23rd January, 1979 Ms. Hall was at her accustomed pitch, at about 7:00 p.m. The accused Derrick passed by with a grip and the baby in his arms. On the way he stopped and spoke to another sidewalk vendor, Sonia, who asked him where he was going with the

baby. She over heard him reply "Him going home with his baby. He will take care of his baby because him don't want him and his baby mother to be in no war." She did not hear him say "A going where nobody can shoot me." She described him as looking vexed. He crossed the street and went to a bus stop some distance away.

It is fair to say that the accused's reported comment appears to be ambiguous: it could be interpreted to mean that the accused had quarrelled with his baby's mother and was taking away the baby as he did not wish to be in any "war' (contention?) with her; but in view of the defence story, referred to hereafter it could also have meant that he did not wish himself and the baby's mother to be involved in any "war" with third parties, who had threatened them, or him.

According to Ms. Hall, sometime after the accused had passed with the grip and the baby, the deceased Glenroy Williams passed by, and seems to have patronized her roast yam. While he was in the area, the baby's mother arrived on the scene, crying. She spoke to the deceased, who then crossed the road and walked in the direction of the accused and the baby. Ms. Hall, scenting trouble (though she said in cross-examination that she herself intended to speak to the accused to persuade him to give back the baby) says she followed the deceased at a distance as he crossed the road and went up to the bus stop. The accused was at the bus stop with his grip and the baby, and so were some other people, waiting for the bus.

According to Ms. Hall, the deceased said to the accused:

> "Give me the baby man because you can't give baby suck."

And he said that he would give it to the mother.

According to her, the accused handed over the baby to the deceased, who took the baby with both arms, and turned back towards <u>where she was selling.</u> She saw the accused coming behind the deceased ("Youth") talking, (she did not hear what he said), then:

> "I only see when him bend down and took up something out his shoes or socks, I don't know if it is out shoes or socks, but I saw when he rush up to Youth and do like this." (Apparently a stabbing downward motion from behind) .....
> I saw when Youth going down with the baby ..... and him run and take way the baby ....."

The deceased went down, and the accused ran away with his baby. The deceased was taken to hospital, but was pronounced dead on arrival, and the body was taken to the police station at Denham Town.

Ms. Hall did not see any knife in the hand of the accused. She also said that the deceased had nothing in his hands but the baby. She next saw the baby some three days later: nothing was wrong with it.

Ms. Hall's evidence was naturally challenged by the defence counsel. She denied the accused's story that was put to her and which is noted below. She also denied suggestions that she had not followed the deceased across the road and then to the bus stop as she had said but had remained at her stall across the street and some distance away and so had not really seen the incident as she described it: though it was conceded that she was in the area at the relevant time.

During her cross-examination two additional suggestions were made to her which she strongly denied: these were to the effect that earlier she had been party to an attempt made to exact information from the accused as to pay roll movements and security at his work place, and a further suggestion that she had been paid $10.00 by "friends" of the deceased to give her evidence. She also denied that the deceased, so far as she knew, was a member of any criminal or other gang in the area.

No other witness as to facts was called by the Crown, apart from the taxi driver who drove the deceased to hospital and then to the station; the mother of the deceased who identified the death; and the Doctor who performed the post mortem and described the injuries: a stab wound to the top of the right shoulder, some seven inches deep, which went in vertically. In view of its direction, the doctor thought the assailant was possibly behind the victim, though he said it could possibly have been struck from in front also, if the assailant were left handed, (the accused is right handed) or was to the right of the victim. The arresting constable also gave evidence.

For the defence, the accused gave evidence on oath, and was supported by two witnesses.

His evidence was to the effect that he worked as a security guard and was employed by an institution called the Windward Dog Training Kennel. He had his own room elsewhere, but had been "along with" his baby mother for some three years, and often stayed there. On the day of the 23rd January, 1979, he had been on night duty the previous evening apparently at a building site at Hellshire, and when he got off duty he had after some stops, gone to his baby's mother premises. While sleeping there he had been awakened by voices, and on looking found that some nine men, were talking to his baby's mother and asking for him. They were armed with knives and two had guns. They took him, by fear or force, to premises in nearby Trench Town, which he termed "interrogation chambers", and there they and others questioned him about the security arrangements at his work place, whether the guards were armed, whether the workers were paid by cheque or cash, and with regard to the time and movements of the pay-roll. Finally his captors dissatisfied with his answers told him that if he did not give them any good "argument" (i.e. information) by Friday, they were going to kill him, his baby's mother, and the baby. After further questions he was released, and returned to his baby's mother's premises. He then went elsewhere, to a friend of the baby's mother, told her what had happened, then returned to the premises, spoke to the baby's mother, packed a small suit case and a bag, took up the baby and left, apparently to go to his own room. (In cross-examination he stated that he had the consent of his baby's mother (Verona Salmon) to his taking away the baby; and later on, that he had told her he was leaving and asked her if she would come and she said she was not coming: he had had no quarrel or "fuss" with her).

On the way to catch the bus along the Spanish Town Road he said that he was questioned by a street vendor (apparently the Sonia referred to by Ms. Hall), and that in response he had told her that he was going where every one love me, and where no one will shoot me. He was going home. Approaching his intended bus stop he claims that he saw some of the same men who had come for him earlier that day. At the bus stop he had spoken to Ms. Hall across the street also to the same effect as above. He then saw about seven or eight men, the same men who had taken him out

of his yard earlier that day coming towards him at the bus stop, and amongst them was the deceased, known to him as "Big Youth". He was one of the group that morning.

The men came and attacked him. Big Youth was drawing away the baby and thumped him on the mouth. The other men "draped" him up on three sides, and started to maltreat him, to kick and to box him and "knife come into play". He fell down, calling out for murder. He was then able to get up, and he rushed towards the one who had the baby, and took the baby back from him, and ran off with it. He denied that he had had any knife in his hand, or that he had stabbed the accused. He said in cross-examination by Crown Counsel that he had taken the baby to his sister's home, that he had not gone back to work that night, because of the threats he had got about his life, and the life of his child and baby-mother. That he did not fight like a tiger to get back his baby: "I didn't fight to get my baby back, but I fight to stay alive."

He did not see Ms. Hall among the group of persons who had come and "captured" him for interrogation about his workplace. He had not reported his "interrogation" to the police because "those men too serious: I could't do that." He denied the Crown's case, i.e. that the deceased had been taking the baby back quite peaceably to return it to its mother when he went and stabbed him from behind. The deceased had been the person who took away the baby, and "them did want to carry me and my youth that is what them wanted to do, take away me baby." Later on in the cross-examination he claimed that the deceased had not only thumped him on the mouth but also thumped the baby, who had then cried. When he ran with the baby no one had chased after him.

The first supporting witness called by the defence was a boy of eleven, Gary Reid, an older child of the "baby-mother" Verona, apparently by a different father, and who lived with Verona and the baby, and the accused when he stayed there. The learned Judge after some questions refused to allow him to be sworn, but permitted him to give unsworn evidence. Shortly put, he had been at home when the accused took the baby; his mother was crying and following accused to the bus stop, and he had followed her. He heard his mother speak to the deceased who

apparently volunteered to get back the child from the accused then at the bus stop and deceased seemed to have got some others to help him. He was sent by his mother across the street to see what would happen, and he saw a fight going on. He saw "them" kicking up Derrick, and thumping and box him." He saw deceased thump him and take away the baby, saw accused go down, then he next saw the deceased holding his chest, he had got stabbed, and he saw accused take the baby and run, meanwhile deceased had collapsed holding his chest. He had not seen the accused with a knife, nor did he see when deceased was stabbed. When accused first took the baby from home his mother had been frightened of the accused.

He had seen Ms. Hall on the scene, but denied that she left her yam stall and crossed over the road. His mother had stayed with her and sent him to report. He put the number of attackers at four. He did not see any with a knife.

The second supporting witness was Ms. Hermine White, who lived at the same premises as Ms. Hall and the baby's mother Verona. She lived in the room adjoining Verona. She knew both the accused and the deceased. She supported the accused's story of being taken away by a group of men earlier in the day, but she had not seen them with any weapons. She saw him return about an hour later. She puts him inside Verona's room from then till 6:00 p.m. when she saw him pack up his things and leave at about 7:30 p.m. with his things, the baby and a nipple bottle. She followed to the Spanish Town Road, with Verona and Gary; she confirms that Verona was crying, that deceased spoke to her and then went in the direction of the accused. She followed. According to her, deceased and another man went up to accused, she heard someone say to accused "where you going with the lady baby?" Accused replies' Is my baby too, so I have a right to take care of her too." This was apparently between accused and deceased. Her account of what follows is similar to that of Gary. Blows were exchanged, accused was held, by about four persons, who had followed the deceased. The baby was taken from him, there followed further kicking. Accused went down, there were further exchanges of blows, and then she saw accused go

towards deceased who had the baby. She did not see the stab or blow, but saw the deceased go down and accused snatched back the baby from him and run. She saw the deceased bleeding, put into a taxi and driven away. According to her the accused approached the deceased from the front, not from behind. She saw no one with a knife, and did not see accused with one, she does not know if he had one or not.

Pausing here to make a few comments on the evidence outlined above, it will be noted that neither of the two supporting defence witnesses saw the blow struck (unlike Ms. Hall; but like her, neither saw the deceased with a weapon). Further the two witnesses do not appear to doubt that if a blow was struck, as it was, it must have been struck by Derrick, the accused. They do not support his denial that he struck the blow, and they differ as to the number of persons engaged in the fight at the bus stop; but they do confirm that a fight did take place and that blows and kicks were exchanged, and that the baby was "grabbed" and not handed over peaceably as Ms. Hall alleged.

The allegation put in cross-examination that Ms. Hall was part of the group that "captured" the accused and pressed him for information about his workplace disappeared: accused said he did not see her then. Further the suggestion that money had passed between them, or friends of the deceased, and Ms. Hall also disappeared, as no such evidence was led by the defence. The suggestion that Ms. Hall did not leave her stall and go to watch the encounter remained.

Curiously enough neither side called the baby's mother, Verona, to give evidence. Apart from her tears there is nothing to set against the accused's story that he was taking the baby to a safer place, and wanted the mother to come but she refused. Certainly no suggestion was made on the Crown's evidence as to why a man who had peaceably transferred his baby to someone to return it to its mother should suddenly go berserk and stab that person with a knife, snatch back the baby and run. The only explanation offered came from the accused, i.e. that he was taking the

baby to a place of safety in view of the threats made to him earlier that day, and that the deceased was one of the persons who threatened him, and that he and others attacked him at the bus stop and snatched away the baby from him. The Crown is not obliged to prove motive, but its absence is surely a factor to be taken into consideration and one that required some comment and assistance to the jury in the summing up. None seems to have been made. The defence furnished an explanation, but nothing was offered on the Crown's side, to explain the irrational behaviour of the accused. Basically, apart from the accused's denial that he struck the fatal blow, the only real difference between the cases of the Crown and the defence lay in the one asserting that the baby was peacefully transferred and taken back following a sudden brutal stab of the deceased by the accused who ran off with the baby, while the defence asserts there was no such peaceful transfer, that the accused was attacked, the baby forcefully taken away by the deceased but retrieved by the accused following attack on the deceased, the details of which were too fast to be appreciated. As to the discrepancies that normally occur when eye-witnesses try to recount details of such an event these tended to occur to a greater extent on the defence side which offered three versions, as against that offered by the Crown's single witness. The defence's basic weakness was the accused refusal to admit that he stabbed the deceased: the Crown's weakness was a failure to account for the erratic behaviour of the deceased.

On this evidence the issues that arose centered on the accused's intent to kill, as against his defences of self-defence, defence of his baby and provocation that might reduce the murder of the deceased to manslaughter. On all of these it seems that the state of mind of the accused and his intent were crucial.

It is of course clear law that the onus lies on the Crown to prove the necessary intent to constitute murder, and that the Crown must disprove the possibility of self-defence, and of provocation: a long line of cases stemming from Woolmington v. Director of Public Prosecutions (1935) A.C. 462 establishes this: see R. v. Prince (1941) 3 All E.R. 37; 28 Cr. App. R. 60 (provocation) Chan[illegible] v. The Queen (1955) A.C. 206 (Pr. C.)

(self-defence and provocation):

> " .... in cases where the evidence discloses a possible defence of self defence the onus remains throughout upon the prosecution to establish that the accused is guilty of the crime of murder and the onus is never upon the accused to establish this defence any more than it is for him to establish provocation or any other defence apart from that of insanity. " (Lord Oaksey at p. 211).

See also R. v. McPherson (1957) 41 Cr. App. R. 213 (Provocation) and R. v. Lobell (1957) 1 Q.B. 547; 41 Cr. App. R. 100 where Lord Goddard C.J. at page 551 observed that the rule that the onus always remains on the prosecution does not mean that the Crown must give evidence in chief to rebut a suggestion of self-defence before that issue is raised, or indeed need give any evidence on the subject at all. He went on to observe that such evidence usually came from the defence and might have one of three effects: it might convince the jury of the accused's innocence, or it might cause them to doubt, in which case he was entitled to acquittal, or it might and sometimes does strengthened the case for the prosecution. He concluded by observing that nonetheless the onus remains on the prosecution, and that if in the result the jury were left in doubt where the truth lay, the verdict should be not guilty in the case of self-defence, or manslaughter in the case of provocation.

There is no complaint in the main about the learned Judge's directions on the onus of proof generally, though there are complaints as to related matters that will be examined later.

One particular point that arose in this case was of course the insistence of the accused that he struck no blow to the deceased. This led the learned judge to comment at some length on the apparent inconsistency of this assertion as against an accused setting up self-defence, defence of his child, or provocation, all of which imply an admission that the accused struck the blow. This situation is not new, and as several reported cases have dealt with it, the situation is worth examining. Such an inconsistency is not fatal, and it does not relieve the trial judge of the duty to put all defences that arise, regardless of the inconsistency and regardless of whether defence counsel have

canvassed them. The point arose in R. v. Hopper (1915) 2 K.B. 431; 11 Cr. App. R. 136. Here the substantive defence was accidental shooting but issues of provocation arose on the evidence. At p. 435 Lord Reading C.J. said:

> " We desire to add further that we do not accept the argument addressed to us by counsel for the Crown, and relied upon by the judge in his summing up, that because the appellant said that he was not angry at the time, that must be taken against him as negativing the provocation that the crime could be manslaughter. In saying that he was not angry the appellant was trying to shelter himself behind the plea of accident, and it was open to the jury to say that the statement he made was not true. Other views of the facts than those given by him in his evidence can not be excluded."

This passage was approved by Vicount Simon in the judgment in Mancini v. Director of Public Prosecution (1941) A.C. 1 at page 7, (a case where the main defence was self-defence but issues of provocation clearly arose). The point arose again in Kwaku Mensah v. The King (1946) A.C. 83, a Privy Council decision on an appeal from the Gold Coast (as it was then). There the accused was tried on a charge of murdering a member of a group of merchants or traders who were passing through his village in the darkness of night. While the traders were passing a fracas arose, the villagers thinking the intruders were thieves attacked them: (the Crown's theory was that the villagers tried to rob them), there was fighting and the appellant undoubtedly was wounded in the fight. Here the appellant shot the deceased trader as he was running out of a house and away from him. The defence was that the accused pointed his gun at the deceased to frighten him, did not know the gun was loaded, and that it was accidentally discharged. Delivering the Privy Council's judgment, Lord Goddard said at page 93:

> " Now it may be said with a great deal of force that the prisoner's own evidence was that he had not lost self control. So it might have been in Hopper's case (supra). In both cases it was inevitable that this should be so, seeing that the line of defence was accident. But if the jury reject that defence it yet may be that in truth the shooting was due to lack of self control caused by provocation. "

Lord Goddard went on to observe that the issue of provocation reducing

the murder to manslaughter should have been left.

Similar cases or situations occurred in Bullard v. The Queen (1957) A.C. 635 (Pr. C.) (manslaughter wrongly withdrawn from jury); R. v. Porritt (1961) 3 All E.R. 463 (self-defence or defence of near relative raised: manslaughter ought to have been left though not raised by the defence and accused did not say he was angry). In Lee Chun-Chuen v. R. (1963) 1 All E.R. 73 (Pr. C.), Lord Delvin giving the Privy Council's judgment observed at page 79 I:

> " Their Lordship agree that the failure by the accused to testify to loss of self-control is not fatal to his case, R. v. Hopper, Kwaku Mensah v. R, Bullard v. R, and R. v. Porritt were cited as authorities for that. These were all cases in which, as in the present case, the accused was putting forward accident or self defence as well as provocation. The admission of loss of self control is bound to weaken, if not to destroy, the alternative defence, and the law does not place the accused in a fatal dilemma. But this does not mean that the law dispenses with evidence of any material showing loss of self control. It means no more than that loss of self control can be shown by inference instead of by direct evidence. The facts can speak for themselves, and, if they suggest a possible loss of self control, a jury would be entitled to disregard even an express denial of loss of temper, especially when the nature of the main defence would account for the falsehood. An accused is not to be convicted because he has lied."

Lord Delvin continued:

> " A jury may reject, as well as an accused's denial of loss of self control, a part of the whole of his account of events. What is essential is that there should be produced, either from as much of the accused's evidence as is acceptable or from the evidence of other witnesses or from a reasonable combination of both, a credible narrative of events disclosing material that suggests provocation in law."

In this case the issue of provocation clearly arose, not only on the defence case, but even the Crown's case clearly suggested a sudden loss of self control. This issue however was put to the jury, and as we have said they were also correctly directed on the burden of proof. But one of the real difficulties however is whether in view of the judge's continued and insistent comments on the inconsistency of the accused's evidence that he never struck the blow and his

counsel's conduct of the defence raising issues of self-defence and provocation, the jury ever got a clear direction that, in terms of the cases above, the inconsistency was not fatal, and that it was open to them while rejecting the accused's denial of striking the blow, to find nevertheless that he had lost self-control, and then to address their mind to the second element in provocation, that is whether the provocation that he received "was enough to make a reasonable man do as he did?" to quote the words of section 6 of the Offences Against the Person Act. The judge's comments on this issue appear at page 203:

> "You might also have been thinking of the way in which the defence has been presented. The cross-examination on behalf of the defence was obviously presented on the basis that the accused man had stabbed in self defence. As a matter of fact I think Counsel, in his submission that there was no case to answer, was telling of the accused fighting like a tiger on behalf of his baby. But then you will remember that far from saying that he was fighting for his baby the accused said he was not fighting like a tiger and one thing he never said or did was to inflict any injury at all. So that you may ask yourself whether the defence is at variance with itself because the cross-examination assumes one posture that the accused man stabbed out of necessity to save whether his life of the life of his three month old baby, whereas out of the mouth of the man who is assumed to have stabbed he said he did not stab at all. So you have a defence of, 'I didn't do it' and apparently what he is saying, 'If you don't believe what I say when I said I did not do it, please consider the alternative that if I stabbed I did it in defence of my life. So you consider it when you come to deal with the evidence and the conclusion to be drawn therefrom."

After dealing with the defences of self-defence and provocation the Judge returned to the point again at pages 215 - 216 where he said:

> "The defence, well, it seems to be at some conflict with itself because the whole burden of the cross-examination is tuned into the accused actually striking the fatal blow, you may think, in circumstances where it was necessary for him to protect not himself but the life of his three-month old baby. But when the accused man gave evidence on oath he denied striking any blow at all. So that the defence has to be considered in the light of those two aspects.
>
> What the accused is saying is, 'I didn't do it.' Well, if you accept what he says, that he didn't do it, the verdict is not guilty of anything

> " at all. But if, from the totality of the evidence, you reject his evidence, that he didn't do it, then you will have to consider whether in the circumstances self defence arose, whether he did strike the blow in necessary defence of his infant child; or if you think that the evidence does not justify such a conviction, then you will have to consider whether, although it does not reach as high as qualifying as self defence, whether there were circumstances that provoked him and made him lose control of himself so that while he struck that fatal blow in the heat of the moment he was under provocation. In that case it would be manslaughter."

He again comments at page 218 briefly on this inconsistency:

> " You will bear in mind then, as you consider the evidence, that the brunt of the defence that was advanced is that the accused found it necessary, in the circumstances in which he found himself, to act in defence of his infant dhild. As a matter of fact, counsel at one time submitted that he had to 'fight like a tiger'. Accused said he didn't fight like a tiger. But it is for you to say from the evidence what you see as having taken place."

Looking at the summing up as a whole, while manslaughter was left to the jury and there were correct directions as to the onus of proof that lay on the Crown and as to how they (the jury) should act if they accepted the accused's defence, or per contra if they rejected it, the need to go back to the Crown's case and carefully consider it (see for example p. 242), there is nowhere presented to the jury, the possibility of rejecting that part of the accused's evidence that he did not strike the blow, while accepting the evidence of himself and his witness that he was attacked and the baby forcibly taken from him. What is put, along with the several comments on inconsistency, is total acceptance or total rejection of the accused's case.

The second point that arose on the issue of provocation in this case was whether the provocation must come from the deceased if it is to reduce murder to manslaughter, or whether account can be taken of the provocation offered by persons other than the deceased?

It appears that at common law the rule may have been that the provocation to reduce murder to manslaughter must have come from the deceased: see R. v. Davies (1975) 60 Cr. App. R. 253; though there are not lacking cases in which where groups of persons including the deceased have attacked an accused, and where the provocation offered as a whole has been taken into account, without "nice" considerations as to whether or how much of it came from the deceased himself personally: see for example Mead and Belt's case (1823) 1 Lew CC. 168 E.R. 1006: (crowd of angry workmen attacking accused house at night and threatening to burn it down, whereupon he fires to scare them, (he says), and one is hit: held manslaughter) and R. v. Porritt (1961) 3 All E.R. 463 (a case of a gang attacking accused's house:

defence raised of self defence and defence of near relative: held manslaughter through provocation ought to have been left). Whatever may have been the position at common law it is certainly now clear that under the provisions of section 6 of the Offences Against the Person Act (enacting for Jamaica the provisions of section 3 of the U.K. Homicide Act of 1957) that the provocation offered by others may be taken into account in considering whether murder may be reduced to manslaughter: See our cases of Fowler v. R. (1960) 2 W.I.R. 503 and R. v. George Thompson (1971) 18 W.I.R. 51, and see also the English decisions of R. v. Davies (supra) and Whitfield's case (1977) 63 Cr. App. R. 39.

In leaving provocation to the jury in this case, it would have been necessary to refer (a) the accused's evidence of the previous threats by persons, including the deceased, to harm himself, his baby, and the baby's mother if he failed to supply them with the information they wanted, and (b) the circumstances in which the baby was taken away from him, as deponed by the accused and his supporting witnesses, and for the jury to consider whether apart from anything that the deceased may have done, provocation was not also furnished by those involved in the incident at the bus stop and earlier. Reading the summing up carefully, while all of this evidence was left to the jury on the issue of self-defence and defence of the baby, it seems that (a) was never left specifically to them on the issue of provocation. What was left on that issue dealt solely with the incident at the bus stop amd at no stage was the previous incident of threats to the accused left to the jury on the issue of provocation: fear as well as anger is relevant on the issue of the state of mind of the accused and as to whether he lost self-control, and whether the provocation (taking into account everything both said and done) was enough to make a reasonable man do as he did. One of the factors that would have affected the reasonable man would, on the issue of provocation, have been the previous incident of abduction, interrogation and threats. In this connection those incidents were never put to the

jury. The standard, the objective standard by which the accused's conduct on the issue of provocation is to be judged is that of the reasonable man in the accused's situation, taking into account everything both said and done.

Those two broad issues, the inconsistency of the accused's evidence in denying he struck the blow with the defences of self-defence and provocation, and the question of whether the acts of others, i.e. the necessity to relate the earlier incident to the events that took place at the bus stop on the issue of provocation, having been considered, we turn now to the grounds of appeal argued before us.

Shortly put, the first ground argued concerned the way in which the issue of self-defence and defence of the baby were put to the jury by the learned trial judge. Both defence and Crown counsel relied upon the law on this issue as expresssed in the Privy Council decision in an appeal from Jamaica, Palmer v. The Queen (1971) A.C. 814; 12 J.L.R. 311; 55 Cr. App. R. 223, and in particular the passage appearing at page 831 et seq where at the end of the case their Lordships, through Lord Morris of Borth-y-Gest, gave general directions on this issue. The complaint made by the appellant's counsel was that though in general the law left to the jury on this point was impeccable, there had been in discussing the need to show that what was done was reasonably necessary a failure to point out that "in a moment of anguish there may be an instant reaction which cannot be balanced on the niceties of what is necessary or reasonable." This formulation appears to be founded on two short sentences in Palmer's case. They read thus:

> " If the attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction.....
>
> If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action ....."

The passages cited in Palmer's case do not in effect say that in a moment of anguish "anything goes". They do point out that in considering to what extent what was done was necessary to meet the attack a jury will take into consideration the difficulty faced by the accused in responding to it. The fact that one can not measure to a nicety the response necessary does not mean that all consideration of whether what was done was necessary is to be abandoned. It remains always a matter for the jury. After careful consideration of the passages in the summing up at pages 211-212 and again at 268 and elsewhere, we are unable to find any merit in this ground. As is also said in Palmer's case.

> "There are no prescribed words which must be employed in or adopted in a summing up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self defence."

The next complaint was that the learned judge "failed to assist the jury adequately by relating the law of self-defence to the actual evidence in the case." This was coupled with a suggestion that in discussing self-defence, the issue was confused with the defence of a near relative, i.e. the accused's baby.

The latter suggestion is not well founded. On the facts of this case the issues being raised were both the defence of the baby and self-defence. Both were interwined, and both involved the same considerations, was the attack established, was what was done reasonably necessary? The complaint that the learned judge did not relate the law on these issues of self-defence and defence of the baby to the evidence appears to be largely a consideration of the style and format of the summing up. The learned judge reviewed the evidence for the Crown, related it to those issues, unfavourably, and then reviewed the evidence for the defence. As far as we can see, he did in that review put the evidence as it related to self-defence and defence of the baby as a whole. What we have noted earlier however was that in discussing the issue of provocation the learned judge did not assist the jury by relating to this issue the effect of the earlier incident in which threats were made.

So far as provocation goes, the grounds of appeal complain that the two issues now arising under section 6 of the Offences Against the Person Act, did the accused loose his self-control as a result of provocation, and was the provocation sustained such as to make a reasonable man (loose his self control) and do as the accused had done, were put in the wrong order. As to this we do not think that the directions as to the law, which are not in themselves challenged, did say injustice to the accused's case.

The grounds of appeal themselves concede that "the implicit finding of the jury that it was the act of the appellant which caused the death of the deceased was not unreasonable, and can be supported by the evidence for the prosecution and the defence ..... But ...."

We think it is also clear that the jury rejected self-defence and defence of the accused's baby. As far as we can see there has been no mistake of law in putting those defences, or as to the onus of proof. We are less satisfied however as to the issue of provocation. The inconsistency of the accused stating that he did not strike the blow, with that of the defence of self-defence and provocation was commented on, and at some length and frequency, by the learned judge. But, as we have seen from the cases cited earlier, it is not a fatal inconsistency, and it is open to the jury to reject that part of the accused's evidence while nevertheless accepting his evidence and that of his witnesses that he was attacked at the bus stop. We do not think that this possibility was clearly brought home to the jury. The directions given amounted to this - if you accept the accused's story in full, acquit: if it causes you a doubt, acquit, or find manslaughter; if you reject it in toto still examine the Crown's case and see if it satisfies you. These are the customary directions, but in this case what was missing was a direction as to what they should do if they rejected only <u>part</u> of the defence case, or part of the accused's evidence. There was also missing a direction as to the extent to which the earlier incident in which the accused alleged he was threatened, and threats made against his baby's mother, might

have affected him on the issue of provocation at the bus stop.

The jury in this case were out for an hour and ten minutes in the first place, before they were recalled by the judge, and out for a further 22 minutes on being sent back for further consideration of their verdict.

There is one further factor to be mentioned. It has already been noted that the evidence of Ms. Hall, the only Crown witness as to facts, was challenged by the suggestion that she was a party to the earlier incident in which the accused was abducted, interrogated and threatened, and that she had been given money to testify as she did. It is to be presumed that counsel would not make these allegations unless he has received instructions to that effect. As has been noted, the accused in his evidence said that he did not see Ms. Hall at the earlier incident and no evidence was ever called on the second allegation.

This was certainly matter for comment by the learned judge, and one can understand his anger at what turned out to be two unfounded attacks upon the honesty and credibility of a witness. His strictures on that appellant's counsel went however far beyond that, and did amount to an attack on the integerity of counsel as being a "con" man. The passages appear at pages 194 - 195 of his summing up on the afternoon of the 14th November, and again at pages 205 and at page 221 and yet again at page 237 on the 15th November. It should not be forgotten that as Lord Radcliffe pointed out in a Privy Council decision in Fox v. General Medical Council (1960) 1 W.L.R. 1017 at 1023:

> " An advocate is entitled to use his discretion as to whether to put questions in the course of cross examination which are based on material which he is not in a position to prove directly. The penalty is that, if he gets a denial or some answer that does not suit him, the answer stands against him for what it is worth."

Despite the learned trial judge's observation at page 205 that his remarks were meant for counsel and not for the accused, "And so, you can't fry the accused in the fat of his

counsel." These remarks must have influenced the jury in considering the case for the accused, in so far as they suggested that his counsel might have been behaving like a "con" man: how measurable is the distance between inventing baseless attacks upon the Crown witnesses and inventing baseless defences for an accused?

In all of the circumstances of this case, one in which the issues were narrowly balanced, and the jury clearly had some difficulty in arriving at their decision, we do not think that we can say that they would inevitably have convicted as charged in the indictment had they been directed as to the possibility of rejecting part of the accused's evidence and accepting the rest, and also had the effect of the alleged previous threats been considered as operating on his mind at the time when the baby was taken from him at the bus stop. And had not these unfortunate attacks on the accused's counsel been made in the way they were made.

We therefore allow the appeal and set aside the conviction of murder and substitute a conviction for manslaughter and impose a sentence of 15 years imprisonment at hard labour.