

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal Nos. 30 and 31 of 2000

BETWEEN:

OLIVER JEFFERSON PAUL

DAMIEN LON ALFAY

Appellants

AND

THE QUEEN

Respondent

BEFORE: The Hon. Mr. Justice Errol DaC. Chase, The Hon. Mr. Justice Colin A. Williams and The Hon. Mr. Justice Frederick L.A. Waterman, Justices of Appeal.

2002: January 10, 11

2006: March 1

Mr. Tyrone Estwick in association with Mr. Andrew Pilgrim and Miss Kim Marshall for the appellant Paul

Mr. Randall Worrell in association with Mrs. Sally Comissiong for the appellant Alfay

Mr. Delroy Saddler for the Respondent

DECISION

INTRODUCTION

[1] The appellants, Oliver Paul and Damien Alfay, were jointly charged with murdering Ricardo Drakes on 27 May 1999. On that charge they were both convicted on 25 October 2000 and sentenced to death by **MacCormack J.** The appellants have appealed against their conviction and a number of grounds have been filed on their behalf.

Summary of the Facts

[2] The facts are that on the night of 27 May 1999, the appellants went to the home of the deceased's girlfriend Annette Phillips at 3rd Avenue, Lennox Road, Goodland, St. Michael, to question the deceased in connection with the disappearance of \$21,000 and a quantity of marijuana, which were allegedly taken from their stash house by the deceased and another man. While they were at the residence, there was a verbal altercation between Paul and the deceased. The deceased was armed with a knife and a struggle ensued between them. The appellant Alfay stood off at a distance observing the struggle. The appellant Paul was stabbed in the struggle. During the course of the continuing struggle, Paul took out a firearm, which was concealed in his back pocket and discharged it twice. The deceased fell to the ground and the appellants fled the scene on a motorcycle. The deceased was fatally wounded and died on the spot.

[3] The prosecution case rested mainly on the evidence of the deceased's girlfriend, Annette Phillips. As Phillips was not an eyewitness to the entire incident the prosecution also relied upon circumstantial evidence and the oral and written statements of the appellants, some of which were challenged at the trial.

[4] In her evidence-in-chief Phillips stated that on the night of 27 May 1999, the deceased and herself returned home at about 9 o'clock. A short while after entering her house she lay down on the carpet and dozed off. She was awoken by the noise of a dog which appeared to be barking at someone. It was at this time that the deceased stepped over her with a knife in his hand, burst open the door and made his way outside followed by their son. She then heard the deceased say to someone "Rambo, what you come at my woman house for, me and my woman ain't know anything about your thing". Upon hearing these words Phillips said that she went to the door. She saw Paul and the deceased walking towards each other and then she heard an explosion. She immediately took up her son and retreated inside her home. She testified that she could not recall the length of time she spent in the house but said that when she returned outside she saw the deceased falling to the ground. She also saw Paul leaving on his motorcycle. She said she could not say what happened while she was inside the house, neither could she recall hearing any explosions while inside. She gave evidence that she was not an eyewitness to the shooting nor did she see the appellant Paul with a gun.

[5] Under cross-examination, Phillips explained that she was able positively to identify the appellants because the lighting in the area was good, coupled with the fact that she had known them for a number of years. She said that she attended an identification parade and was able to identify the appellants as the persons who came to her home on the night of 27 May 1999.

[6] Sergeant Emmerson Scantlebury testified that at about 10.00 p.m. on 27 May 1999, he and other police officers responded to a report made to the Black Rock Police Station. He conducted police investigations at the scene of the crime and had a conversation with Annette Phillips. Inspector Samuel Roach gave evidence that he

conducted investigations at the scene, took command of the body and the scene was restricted. Police Constables Stephen Adamson and Walter Boyce, police photographers from the Scenes of Crime Unit, gave evidence that they arrived on the scene on the night of 27 May and took photographs.

- [7] Dr. Andrew Murray gave evidence that he visited the scene on 27 May, around 11.15 p.m. He examined the body of the deceased, Ricardo Drakes, and pronounced him dead. Under cross-examination he said that he also examined the appellant Paul on 10 June 1999. He found two healing wounds on Paul's left forearm and a minor wound on his left index finger. When asked for an opinion as to the possible cause of the wounds he found on Paul, the doctor said that the wounds could have been caused by an attempt by Paul to block a blow with his left hand or could have been obtained in a struggle.
- [8] The appellants made various oral statements to the investigating officers which the officers recorded in their official notebooks. In the case of the appellant Paul, the evidence was that on 9 June 1999, he gave an oral statement under caution to Sergeant Dennis Small (page 34 of the record) "I safe, we plan to give up we selves". When told of his right to consult an attorney, he said: (page 34) "I ain't want no lawyer".
- [9] Sergeant Dennis Small testified that when he interviewed Paul in the presence of PC David Rouse at the District "A" Police Station in connection with the shooting death of the deceased, Paul said "I shoot he cause he carry away my weed". But, under cross-examination, Paul denied that he made any such statements to Sergeant Small.
- [10] The appellant Paul gave a written statement to the police officers to the admissibility of which no objection was taken. However, in his evidence he said that he was subjected to violence from the police but accepted that the statement was freely and voluntarily given. It was in his written statement that Paul raised the issue of self-defence. The written statement is as follows (pages 109-112):

"Sometime in the second week in May this year about ninety pounds of weed was sent to me from St. Vincent. I put this weed in Wendell Gibbs' house at Farnum's Road 'cause he does normally stash my weed for me.

About the 25th of May I went by Wendell house and I realised that the weed was missing along with twenty-one grand that did with the weed. I search the place up and down but I didn't find the weed. My heart start beating fast. I left the door open and went out 'pon the block and tell the fellas that did out there that de weed missing. I went back out by the stash house and look around. I see a ... foreigner woman looking through the paling. This was the Wednesday morning 'cause de weed get carry away de Tuesday night. I asked she if she see anything and she tell me she see de man son and rasta man with freckles in he face that got the cows, she tell me dat she see he lifting two short blue barrels over the paling. When she tell me so, Cookie run through my mind but I tell myself I want to see the little man first to see what is what.

I asked the tyre man for rims to fit a Peugeot and he tell me that he ain't got nothing to fit a Peugeot and he tell me that he shutting at ten and if I could get back the rims there before a certain time he would fix dem up for me.

I left from there and went down by Biscuit and collect he and went back up by the car and jack it up and tek off the two back rims and carry dem back by the tyre shop, get the rims fixed and pay \$20 and went back by the car and put on the two rims and then me and Biscuits went back home after I paid the taxi man \$20. I just breeze out for the rest of the night.

I forgot to tell you dat Red Rose and lmeon ride a Motorcycle back down by the car and help me put on the wheels and de two of dem then get on the motorcycle and went along. I park the car under the tamarind tree and breeze out on the block for a while. I am not sure what time I left and went home.

The next day was Thursday. I went on the block about eight and did just breezing off. When we did there Rene pass down and say anybody that want to borrow he gun got to give him weed. I know that when he said that he was referring to Cookie.

About eleven o'clock I went to Julie' N, Haggatt Hall and buy five hundred and somebody dollars in goods and went home and pack two big boxes and then carry them in the Port and from dey I come back out. I did just breezing again.

When it come 'round to evening I went and talk to de stash man and he tell me he didn't know what going on, all he know dat he see it missing and he had to ask me about it.

I then tell lmeon dat I gine move my car and me and he get in de car and I park it out Parris Gap. After we park the car me and lmeon pass back on de block walking and from there we walk and went through the back and walk past Cookie house and went out by Dorian and somebody at Damien house tell we that he gone in the Orleans. We then start walking up de road and we see the bike by the Rose Family in Richmond Gap. I tell Rose give me de bike and hold my car so Rose ride de bike and I get on 'pon the back and carry he and show he where de car was and give he de key to the car and I rode back up the bike.

I collect lmeon from at Richmond Gap and we get on 'pon de bike and went by Darian. Me and Damien then get on pon the bike and ride away. We then ride back down Goodland and we pull up in front lfrey, Ann and Bark who did on a step at Bridgegap. I asked them if they see Cookie. All of dem say that dem ain't see he.

We then ride off and went by Cookie. We cut out the motorcycle and park it and get off. I went and knock on Cookie girlfriend's door and shout for Cookie. I then step back in the road. Annette look out and say that Cookie ain't here. I tell she that she telling lies, that all I want to do is to talk to him. When I say so Cookie jucked he head at the window and did talking. Annette then opened the door and Cookie asked she what she opened the door for. He say so twice. From dey Cookie then come through de door and say I don't know nothing about your weed, wunnah got to kill me. When he did saying so he did stabbing at me wid a knife. The first stab went in my left hand cause I put it up by my chest to stop it from gine in my chest. He then stab again and the knife stick in my hand and he couldn't get it out. By backing back I fall down 'pon the ground.

When I fall 'pon the ground, de man did over me and I kick he off and I then draw for my gun which did in my right back pocket. When I juck my hand in my back pocket the man was still jucking at me. I

then pull out de gun out of my pocket. I pulled the trigger twice. I was still on de ground at this time. I know that the two shots hit he in he belly. The man just keep coming and at this time he was about to stab me in my back and I scramble way on my knees and pelt two more shots and then I see he fall to the ground. Me and lmeon then get back on de motorcycle and ride way. I just ride de bike down by the flour mill and pelt the gun in de sea. I left de motorcycle dey and me and lmeon walk away from dey.”

[11] Sergeant Small further testified that when asked by the police to point out the area where he said he shot the deceased the appellant Paul directed them to 3rd Avenue, Lennox Road, Goodland, St. Michael, to an area in front of the home of Annette Phillips and said, “the scene play here”.

[12] In respect of the appellant Alfay, the evidence was that on 9 June 1999 the police went to his home at Hilton Road armed with a warrant. They told him that they were investigating the murder of Drakes who was murdered on 27 May 1999, that he was a suspect in the matter and cautioned him. When told of his right to an attorney-at-law he said: “I don’t want no lawyer”.

[13] When interviewed by PC Edward Gibson in the presence of PC Winston Goddard at the District “A” Police Station in connection with the shooting death of Drakes, Alfay said under caution: (page 65) “me and Rambo went down there and Rambo shoot he”. When asked if he wanted to give a written statement about what he had earlier said the appellant Alfay said under caution “yes, I will” and further said “you write it for me”.

[14] The appellant Alfay gave a written statement to the police, which was admitted into evidence notwithstanding his claim that he was beaten and forced to give the statement. The statement is as follows: (pages 123- 126)

“Last month me and Rambo was on the block in Goodland and some weed come there for we. Me and Rambo take it by Owl house for he to stash for we. It was

about 87 pounds of weed worth \$123,000.

Later in the month Rambo went by Owl to get three pounds of the weed. I was on the block in Farnum Road waiting until he come back. He come back about five minutes after and he appeared to be very vex and he tell me to bring he gun. I had the gun stashed in the yard where we use to sell the weed so I went and dig it up and give Rambo. Rambo then tek up his motorcycle which was parked on the block and ride off with the gun in his pocket.

I ain't know where he went but he come back on the motorcycle crying and acting crazy like because he was really piss off. Me and he then went by we self on the block and we talk about what we was going to do late that night. Later the night me and Rambo went by Owl and we opened the door because we had the keys. We sit down and wait til he come. When he get home we ask he which part de weed and money is that he had stashed for me. He said that he went work and he left his son inside sleeping and he don't know if he son and Cookie carry 'way the weed. We don't want to do Owl nothing at that time so we went at the house alongside of Owl and asked the lady what kind of man Owl is. The woman told us that we don't know who we dealing with. She tell us Owl is a thief. We left and went by Owl next neighbour and she tell us that she see Cookie and Owl son Ryan Benn with two blue drums and bags. The woman tell us -- tell we this is either from St. Vincent or St. Lucia.

Me and Rambo went looking for Ryan Benn because we could not find Cookie. This time we was in Rambo car but Adrian who does call Biscuit was driving. It was me, Rambo and Biscuit in the car. We

mek some rounds and we ain't find Ryan so we start to look for Cookie. We went all in Hillaby, St. Andrew by one of Cookie friends who them does call Rover but Rover say that Cookie ain't there. We left Hillaby and went by Cookie partner Darian. This was Wednesday evening and Darian mother tell us that Cookie and Darian gone looking for work. Thursday morning me and Rambo and Biscuit start looking for Cookie in de car. We see men on some blocks and we ask them which part them get de weed from and them say that them get it from Cookie. We then tell each other that Cookie had to be de one who carry 'way the weed. About 6:30 p.m. me and Rambo was on the motorcycle and we see Cookie and Darian in front of Darian's mother house and we asked them about de weed and the money and they say that -- they say they went looking for work. I pick up that it was a trick. I know that carry 'way de weed and money and play that they went looking for work. We don't really -- we didn't really want to do nothing until we hear from Owl. We ride back to Farnum Road and park the motorcycle 'pon de block and we walk down by Owl. When we get by Owl we ask he about de weed again and he said that he ain't sleep home and that he son was in de house. He was trying to blame his son. Me and Rambo done had it in we head that Owl set up he son Ryan and Cookie to carry 'way the weed. I went back by the Vincentian woman and she tell me that Owl was home when Ryan and Cookie left there with the drums and bags. Rambo had left and gone back up 'pon de block. I then see Owl come out of de house and was coming towards me by the Vincentian woman. I ask he where he going. I tell he that the woman tell me that he was inside when the money and weed get carry 'way. I left and went back 'pon de block and me and Rambo get on 'pon de motorcycle and went by Darian. We ride off on de motorcycle and we went through Alkins and we went down by Cookie girlfriend Annette in Lennox Avenue. Rambo parked the motorcycle in front of Annette neighbour house and we get off. Rambo had the gun in he back pocket.

Me and Rambo done had it plan that if Cookie didn't produce the weed and money we was going to shoot he. Rambo went and knock on Annette house and I went at the side of the house and listen. Annette shouted and say that Cookie is not there. I hear Cookie ask Annette who it is out there. I aint hear what Annette tell he but I went to the front and tell Rambo that Annette telling lies. I tell he Cookie in the house. Cookie then come by de front window and ask me and Rambo what the fuck you doing around the people place. We tell Cookie that all we want is the money and the weed. Cookie say that he ain't got no weed nor no fucking money and he say that we gine got to kill he.

Annette then open the door and Cookie asked Annette why she open the door. Cookie then step outside and say that we got to kill he and he mek a stab at Rambo with a knife and Rambo put up he hand and get a stab. Rambo back off and pull he gun from he pocket. Cookie was coming at Rambo and Rambo shoot he. He stab Rambo again and Rambo shoot he again and then Rambo and Cookie start to struggle. I went to kick he off Rambo but I see Rambo get he off and Rambo get up and start to run. Rambo then get chance and look back and let go two more shots at he. We run and get on 'pon de motorcycle and Rambo drop me off in Goodland and he tell me that the gun and the motorcycle is murder weapons so he gine and get rid of them. Rambo ride off and left me. About half an hour after Rambo meet me on the pasture in Goodland and he was walking. We start deciding what to do. We then think some more and we went by Rambo brother Glen Paul and Glen Paul put we up in Haynesville and that is the same place that the police come and hold we."

- [15] PC Edward Gibson testified that, when told that the police wanted him to point out certain areas to them which he had mentioned in his written statement, Alfay said: "let we go". The appellant Alfay later directed them to Farnum Land, Deacon's Road, to the back yard of a house, pointed to an area with loose soil and said: "I dig up the gun from there". He later directed them to 3rd Avenue, Lennox Road, St. Michael, to the dwelling house of Annette Phillips and said "he fly off the step there and start running". The appellant then pointed out an area to the left side and said: "there was a scuffle here and he get shoot here". He then pointed to an area in the centre of the road and said: "Cookie fall down here". The appellant then pointed to a galvanized paling on the northern side of the

dwelling house of Annette Phillips and said: "we then got on pon the bike that did park there".

- [16] The case for the prosecution was that the appellants were acting in a joint enterprise pursuant to a plan to exact revenge on the deceased for taking their money and marijuana. The prosecution alleged that it was the appellants' common intention to murder the deceased and on the night of 27 May they went to 3rd Avenue, Lennox Road, Goodland, St. Michael, to carry out that intention. They contended that the appellant Alfay was the silent partner while appellant Paul was the one who did the shooting.
- [17] At the trial the appellant Paul elected to give evidence on oath. He admitted going to 3rd Avenue, Lennox Road, Goodland, St. Michael, on the evening of 27 May 1999. He testified that when the deceased came out of the house the first thing he did was to make threats to him. He gave evidence that, when questioned about the weed, the deceased said that he had made up his mind so he (Paul) better kill him and then the deceased started to stab at him. He raised his left hand in defence of himself and the knife entered into his arm. He gave evidence of receiving other wounds. He said that when the deceased was waving the knife he started to step back and fell backward to the ground. By this time the deceased was over him stabbing at him. He said that he then took out his firearm and discharged it "long side of he". After that discharge the deceased started to dodge but once again came at him with his hands raised. It was then that he discharged the firearm for the second time. He testified that he saw the deceased making a falling motion and said that it was at this time that he got up, went to his motorcycle and left the scene.
- [18] Under cross-examination, he said that he did not go to the house to exact revenge because the deceased stole his marijuana and money. He never went there to shoot the deceased and that he was acting in self-defence. He denied giving the oral statement to the police: "I shoot he because he carry way my weed". Further, he never told the police that he gave the gun to a Rasta man.
- [19] The appellant Alfay made an unsworn statement from the dock in which he gave this version of the events (pages 76- 78):

"My name is Damien Alfay. I am 22 years old. I know Oliver Paul for 8 to 10 years. I also know Ricardo Drakes. On 27 May Paul asked me to go to Drakes with he to ask about \$21,000 that was between some marijuana. When we approached Drake's residence Paul parked the motorcycle 7 feet away from the house and got off. I was wearing a black pants, blue shirt and a pair of brown shoes.

Paul went and knocked on Annette's door and stepped back in the road. I never went and knocked. I see Annette come to the window. Asked Paul what he want. Paul say he want to talk to Ricardo Drakes. She say Drakes is not there. Paul say stop telling lies, he just want to talk to Drakes. Drakes push his head by the window. Drakes say that he don't know anything about the \$21,000 or the weed. Annette open the front door. He asked her what she open the door for, twice. Drakes step out in the gallery. Came down the steps. This time I was keeping a distance off. I never told Ricardo Drakes anything. Ricardo Drakes never tell me anything, never threaten me. Ricardo Drakes start to threaten Paul and say that he mek up his mind to kill Paul or Paul got to kill he. I never spoke to him. He never spoke to me that night. I saw Drakes start walking towards Paul. Then I see Drakes make a stabbing motion to Paul. I see Paul put up his hand. I was a distance off so I do not know if Paul got stabbed at that time. I see Drakes make another stab and start to shake he hand like. I hear Paul making little funny noises. Then I see Paul fall down and Drakes on top of him. He and Drakes started to scuffle. They scuffled for about one and a half minutes. I never said that I went to kick Drakes off of Paul. I see

Paul kick Drakes off of him. Then I heard something like an explosion. Then I see Drakes going to Paul, hand raised. He looked like he going to stab Paul in he back. Then I hear two more explosions. I see Paul scramble off the ground. Paul tell me that Drakes going to kill him. His left hand was bleeding. Paul start to tell me he getting dizzy. Paul went for the motorcycle and start the bike. Paul get on to the bike and Paul ride off and stop at the next road. Paul take off his shirt and tie his hand because there was a lot of blood. Paul dropped me off in Goodland and tell me he coming back. Paul never tell me he getting rid of any murder weapons. A friend of ours put we up in a house in Haynesville that same night. A couple days after the house was surrounded by Task Force, undressed policemen. I looked out through the window and saw the police with something in their hand like they want to break down the door. I said it was no cause breaking down the door, we give up ourselves. I came downstairs. I opened the front door, Sergeant Small greeted me at the front door. Say he was looking for drugs. Never showed me any search warrant or anything like that. He started asking me a lot of questions. I can't remember them. I was handcuffed. Officer went and bring Paul from upstairs in a room. After that we were taken to District A Police station. They took me and Paul to a room. I can't remember the time. We were put in different rooms. Mr. Gibson and Mr. Goddard were in the said room. Mr. Gibson tell me he would like me to give him a statement and I refused. He tell me to stop playing the fool, that Paul done tell him everything that happened. I said I am not giving any statement.

I was handcuffed behind my back. I see Sergeant Goddard went to a drawer, receive a plastic bag. His words was "you ain't giving me any statement?" I said "no". The plastic bag was placed over my head. I had difficulty breathing. I was asthmatic. I get five to six ear bangs. I don't know who did it. Officer Goddard take the plastic bag from over my head and said "you ready to talk?" I said "yes". The statement I give Mr. Gibson and the statement I give today is not accurate. I never told the police me and Paul had a plan to do anything. I never told the police that me and Paul were going to shoot Drakes if he didn't pass the weed or money. I didn't say such things. We never had any plan to do Drakes anything. Me and Drakes never had any complication, any quarrelling or fretting. We just went to ask Drakes a question. That is all have I to say."

- [20] The evidence of the forensic pathologist, Dr. K. Sree Ramulu, revealed that there were two entry wounds in the body of the deceased. These entry wounds appeared to be gunshot wounds which traversed through his body. The first of these wounds was located 13 cm below the outer third of the left collarbone of the deceased. It penetrated the left lung upper lobe, part of the right lung and all structures in its pathway in the left and right chest cavities and exited at the back of the chest. The second wound was located 9 cm below the outer third of the left collar bone. Death was attributed to blood and air in the chest cavity as a result of the first firearm wound.

[21] **GROUNDS OF APPEAL**

We have summarised the amended grounds of appeal and renumbered them in the order in which we can best dispose of them, as follows:

- (i) that the learned trial judge erred in law in not giving a warning to the jury that it was unsafe to convict on an oral statement alone, in accordance with section 136 of the Evidence Act, Cap. 121;
- (ii) that the learned trial judge failed to adequately direct the jury on self-defence;

(iii) that the learned trial judge failed to adequately direct the jury on the defence of provocation.

Ground (i)

[22] Mr. Pilgrim for appellant Paul in his submissions pointed out that the prosecution sought to rely on oral statements allegedly made by Paul. He submitted that the appellant Paul's written statement is not a confession to murder so that the only evidence of murder against him is the alleged oral statements and as such there was a duty on the trial Judge to give a warning as provided for in **section 136** of the **Evidence Act**. Her failure to give this warning amounted to a non-direction on the part of the trial Judge.

[23] Mr. Worrell for the appellant Alfay contended that both appellants were not afforded the protection of the **Evidence Act** in respect of their oral statements. He submitted that it was not sufficient for the trial Judge to say to the jury that they had to decide if the statements were in fact made by the accused and then to interpret their meaning.

[24] This Court recently considered **section 136** of the **Evidence Act** in *Ian McClaren Gill v. R. (Criminal Appeal No. 18 of 1998 unreported decision of 30 January 2003)* and held that the requirement for a warning under **section 136** is directory and not mandatory. In the instant case, although the trial Judge did direct the jury that they must be satisfied that the oral statements attributed to the appellants were in fact made, she did not give them a **section 136** warning. Nevertheless, we are satisfied that in light of the evidence against the appellants, other than their oral statements, they suffered no injustice or prejudice by the failure of the trial Judge to give the **section 136** warning.

Ground (ii)

SELF-DEFENCE

[25] During the early part of her summation (pages 86-88) the trial Judge directed the jury as follows in relation to self-defence:

"I will now explain to you, Mr. Foreman and your members, the defence known to law as self-defence. The law is and has always been that a person is entitled to use reasonable force for the protection of his own life or limb. If the force used for the purpose of defending himself results in the killing of the attacker, that killing will be justified in law. Now, before the defence of self-defence can succeed, can successfully be proved, certain conditions must be satisfied.

The first condition is the person doing the killing at the time when he inflicted the injuries or injury which caused the death of the attacker must honestly believe that he is in danger of life and limb. And, secondly, the force used to repeal the attack must be reasonable in all the circumstances of the case for the purpose of repelling the attack which he apprehends. Mr. Foreman and your members, the common law has always recognised the right of a person to defend himself from attack and if necessary to inflict violence on another. In doing so, if no more force is used than is reasonable to repeal the attack such force is not unlawful and no crime is committed; furthermore, a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot. Circumstances may exist which justify a pre-emptive strike. Mr. Foreman and your members, it is the

duty of the prosecution, the Crown, to prove beyond reasonable doubt that the killing was not done in self-defence. Self-defence must be negated by the prosecution. There is no duty on the accused to prove that he was acting in his necessary self-defence. If you, the jury, are satisfied that the killing was done by the accused in defence of himself, the accused is entitled to be acquitted. If the jury is in doubt about the matter as to whether the accused was acting in his necessary self-defence, the accused is likewise entitled to be acquitted. If that defence is rejected by the jury, all the other issues will remain and must be negated by the prosecution.”

[26] The learned trial Judge then went on to cite the following passage on self-defence given by **Lord Morris of Borth-y-Gest** in **Palmer v R 16 W.I.R. 499** at **510** where his Lordship said:

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do but may only do what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous, others may not be. If there is some relatively minor attack it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an 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 immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score and may be pure aggression. There may be no longer any link with a necessity of defence. Of all these matters the good sense of the jury will be the arbiter. There are no prescribed words which must be employed in, or adopted in, the 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. If there has been no attack then clearly there would have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognized that the person defending himself cannot weigh to a nicety the measure of his necessary defensive action. If a jury thought that in a moment of an unexpected anguish a person attacked has only done what he honestly and instinctively thought was necessary, that would be the most potent evidence that only reasonable defensive action had been taken.”

She continued:

Mr. Foreman and your members, those are matters entirely for you to consider. The case for the Crown is that the accused Paul was not acting in self-defence. In considering the question of his defence raised by counsel, Mr. Foreman and your members, you will have to ask yourselves whether accused Paul believed he was in imminent danger and if that belief was based on reasonable grounds at the time when he, Paul, participated with another in inflicting the injuries on Ricardo Drakes from which he died.”

[27] Shortly before the jury retired the learned trial Judge directed the jury as follows (pages 140-141):

“So Mr. Foreman and members of the jury, what are the issues in the case in relation to Paul? If you reject his defence of self-defence you must consider the Prosecution’s case. Has the Crown proved beyond a reasonable doubt that the accused Paul made those oral statements and written the statement as the officers said he made them. This is very crucial in relation to Paul. When you retire you should seek to determine whether the defence of self-defence has been successfully raised. If you find that the defence of self-defence has been successfully raised, if you find on the evidence that this is established, your verdict should be not guilty of any charge. If you are in doubt, your verdict should be not guilty of any offence.”

[28] Mr. Worrell in his submissions contended that in the latter part of her summation the trial Judge misdirected the jury on the issue of self-defence. He submitted that the effect of her words was to confuse the jury by shifting the burden to the defence to successfully prove self-defence when the burden is placed on the prosecution to negative any plea of self-defence. He continued that the trial Judge left the jury with the idea that there is a duty on the defence to prove self-defence to their satisfaction when that is not the case. In addition, Mr. Worrell contended that the jury would have been left confused by these directions because they would have to find that self-defence was successfully raised and they were left unsure as to whether or not the burden in relation to self-defence rested on the Crown or the defence. It was Counsel's contention that as the trial judge muddled the explanation of the burden of proof there is now a lurking doubt surrounding the convictions of the appellants since they were not afforded a clear and unambiguous outline of the issue of self-defence.

[29] Mr. Saddler for the Prosecution submitted that when the appellant Paul went to the deceased's residence that night he went there with one intention. He submitted Paul's intention was borne out when one considers the circumstantial evidence given by Alvin Haynes, Phil Grant and Annette Phillips. These pieces of evidence prove conclusively that the appellants had gone to the deceased's residence that night with the intention to kill him. In light of this evidence, Mr. Saddler submitted, the formal directions on self-defence are clear and lucid. He contended that any shortcoming subsequent to these directions must be balanced against the overall direction given by the trial Judge. When one balances these directions against the later direction, the trial Judge is still saying that the Crown must negative self-defence. In his opinion, the later direction (at paragraph 27) was not a misdirection but a mis-characterisation which did not take away from the substance of the formal directions, that is to say, the burden is on the prosecution to negative self-defence. There was no prejudice suffered in the circumstances and, given the previous umbrella warning, the jury could not have been confused.

[30] In *Jason Anthony Jones v. R. Criminal Appeal No. 3 of 2002* (unreported decision of the Court of Appeal), this Court proffered guidelines for the use of trial judges when directing juries on the issue of self-defence. We need not, in this case, restate those guidelines. The relevant cases are also set out in the *Jones* case.

[31] It is accepted law that a defendant does not assume any burden of proving self-defence. It is for the prosecution to negative self-defence. We are therefore satisfied that, against the background of the summation taken as a whole, the directions of the trial Judge to the jury on self-defence were sufficiently clear to avoid any confusion in their minds. As we see it, the appellants would not have been disadvantaged or prejudiced in any way. This ground therefore fails.

Ground (iii)

PROVOCATION

[32] The trial Judge gave the following direction on the issue of provocation (page 88 of the record):

"Next, the Prosecution must prove and make you feel sure that the act was unprovoked. That is to say that at the time of the killing the accused were not labouring under provocation and provocation is

understood by law as involving a sudden and temporary loss of self-control.

Now remember, Mr. Foreman and your members, that the counsel for the accused men did not entertain provocation but when it comes to the question of provocation you need to know whether the deceased by the accused was provoked – the killing of the deceased by the accused was provoked by the things he said and did. It is the evidence of the accused Paul, if you accept it, that the deceased rushed at him using abusive language and denying that he had his missing money or marijuana. You have to consider whether the words and the actions at that time couldn't have constituted provocation and could involve a sudden and temporary loss of self-control.

Again there is no duty on the accused to prove anything, it is for the Crown to prove beyond reasonable doubt that the accused was not acting under provocation. If you are satisfied that the accused was provoked in law, your verdict should be not guilty of murder but guilty of manslaughter. But if you are in doubt as to whether the accused was provoked or not, your verdict will be not guilty of murder but guilty of manslaughter.”

[33] Mr. Worrell submitted that this direction did not adequately deal with the issue of provocation which in turn merits that the lesser offence of manslaughter would not have been properly left to the jury. Mr. Worrell contended that in this direction the Judge failed to point out the actions of the deceased that could have amounted to provocation. The trial Judge only pointed out to the jury that the deceased man rushed at the appellant Paul using abusive language and denying that he had his (Paul's) missing money and marijuana. She failed to point out to the jury that the deceased was coming at the appellant Paul with a knife and stabbed him and this could have provoked the appellant. Further, she failed to direct the jury that this could have been enough to cause a reasonable man to lose his self-control. In effect, the jury was not given the opportunity to deliberate on the effect it would have had on the appellant when the deceased came at him with a knife.

[34] Mr. Worrell contended further that, since it is the trial Judge's role to assist the jury, she should have pointed out to the jury the words or acts which could have caused the appellant to lose self-control since this would have afforded the appellant the opportunity of a verdict of manslaughter.

[35] Mr. Saddler for the Crown conceded that there was not a proper direction by the trial Judge in relation to provocation. The fact that the deceased had a knife and used it to inflict injuries on the appellant Paul should have been highlighted as a part of the acts of provocation. In the circumstances, Mr. Saddler conceded that the convictions of murder should be reduced to manslaughter.

[36] **Section 5** of the **Offences Against the Person Act, Cap. 141** deals with provocation thus:

“Where on a charge of murder there is evidence on which the jury can find that the accused was provoked (*whether by things done or by things said or by both together*) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and *in determining that question the jury shall take into account everything both done and said* according to the effect which, in their opinion, it would have on a reasonable man.” (Emphasis supplied).

[37] Mr. Worrell contended that since this was a capital case, the appellants were entitled to receive the most favourable verdict after the jury had been properly directed on all the issues in the case. He further submitted that it is incumbent on a trial Judge in such cases to leave all issues to the jury upon which there is evidence fit for their consideration. See **Joseph Bullard v. R. [1957] AC 635 at 642** where **Lord Tucker** said:

"It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused had said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked."

[38] We are not satisfied that the trial Judge gave an adequate direction on the defence of provocation. There is merit in this ground.

DISPOSAL

[39] While it is the primary responsibility of the jury to determine the issue of innocence or guilt, the Court of Appeal has a responsibility to decide in terms of **section 4** of the **Criminal Appeal Act, Cap. 113A** whether the verdict of the jury should be set aside on the ground that in all the circumstances of the case the conviction was unsafe or unsatisfactory.

[40] We cannot be certain that the jury would have inevitably convicted the appellants of murder, even if they had been fully and properly directed on the defence of provocation. However, as the jury did return a verdict of guilty of murder, they would have been satisfied that the appellants acting together in a joint enterprise had unlawfully killed Drakes. As the interests of justice do not require that we order a retrial, we invoke **section 5** of the **Criminal Appeal Act** and replace the verdict of murder found by the jury with a verdict of guilty of manslaughter.

[41] The evidence and the circumstances giving rise to this case would suggest that the appellants and the deceased belong to a culture of drugs, and the use of unlicensed firearms and of violence - a culture which the Court is determined to eliminate. This case falls within the guidelines set out in **Romain Bend and Rodney Murray v. R. (Criminal Appeals Nos. 19 and 20 of 2001, unreported decision of 27 March 2002)**.

[42] In the result, the appeal succeeds, the convictions of murder are quashed and convictions for manslaughter are substituted therefor. The sentence of this Court is 15 years' imprisonment in respect of each appellant and the sentences will run from the date of conviction.

Justice of Appeal

Justice of Appeal.