IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

CRIMINAL APPEAL NO. 1 of 1977

BETWEEN: SYLVESTER GASTON Appellant

Vs.

THE QUEEN Respondent

Before: The Hon. Sir Maurice Davis, Q.C. - Chief Justice
The Honourable Mr. Justice Peterkin
The Honourable Mr. Justice Berridge (Acting)

Appearances: Mr. K. Foster for appellant
Mr. E.A.C. Hewlett with him.

Mr. J.S. Archibald for respondent
Mr. G. Farara with him.

1977, January 11, 12 and 16

J U D G M E N T

DAVIS C. J. delivered the Judgment of the Court:

The appellant Sylvester Gaston was, on the 11th day of October, 1977, convicted of the murder of Evelyn Rabsatt and sentenced to death by hanging. He has appealed against his conviction on the following grounds:-

1. That the learned trial judge in error failed properly to appreciate and/or to consider

(a) That the Territory of Tortola does not have a Common Law for itself in its Criminal Jurisdiction and therefore the Indictment was bad in Law and should be quashed, there being no definition in Law of what constitutes the offence of Murder.

/(b).....

(b) That the Common Law Definition of Murder cannot be imported in this Territory unless Legislated for by imperial or local enactments: There being no such enactments, the appellant was wrongly convicted in violation of the Rules of Natural Justice.

2. As regards the Defences of Insanity, Automatism, Diminished Responsibility, the learned trial judge fell into error and wrongfully usurped the function of the jury by making material findings of fact on the Mental Condition of the Accused, as follows to wit:-

(a) "That the accused is no idiot."

(b) "The accused is a reasonable man."

In effect, the learned trial judge had wrongfully withdrawn from the jury defences of Insanity, Automatism, and Diminished Responsibility, whereby the accused suffered a serious and grave miscarriage of Justice.

3. As regards the defences of Insanity and Automatism the learned trial judge erred in Law in directing the jury that the proof required to estabish the defence of Insanity is the same as is required to establish the defence of Automatism.

4. That the Committal proceedings by the Learned Magistrate were a nullity and therefore void, in that

(a) The said proceedings were not held in Open Court. Section 41 of the Cap. 45 Vol.1 of page 406 has a casus omissus, leaving the Learned Magistrate no alternative but to apply Section 5 of Cap.45

(b) The accused was not informed of his right to call witnesses in the manner required by law. It is respectfully submitted that the said Preliminary Proceedings were therefore incomplete, the said Committal Proceedings and the said Trial were all null and void, contrary to the auditer alteram partem Rule.

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5. That the learned trial judge in error,

(a) Failed properly and/or adequately and/or correctly to direct the Jury on the Burden of Proof required for the Defence of Automatism, and did further erroneously refer to the said Defences of Insanity and Automatism, as one and the same .....
Page 115. L. 26, to page 116. L. 1-2.

ON BURDEN OF PROOF

(b) P. 113 - Line 31 to P. 114, Line 1 to 26
That again in error, the Jury were confused by the said directions on Automatism and Insanity by equating the Burden of Proof for Insanity as the same Burden and standard required for Automatism, whereby the Appellant suffered a grave and serious Miscarriage of Justice.
P. 114, Line 27, to P. 115, Line 1 to Line 25.

6. That the Learned Trial Judge failed properly and/or correctly to put the case of the Defence to the jury in that,

(i) No directions were given as to what verdict should be returned on a finding of

(a) Automatism; or
(b) Insanity; or
(c) Diminished Responsibility; or
(d) If in doubt on provocation;

(ii) On provocation, in the light of (a) the force used in the circumstances of the case, (b) the question of cooling off time, in relation to the facts.

(iii) For the reasons above at 5(c)

7. That the verdict was unreasonable and unsafe and cannot be supported by the evidence, in that

(a) The evidence of the Medical Expert Dr. Mahey was not contradicted or challenged by the Crown.

/(b).....

(b) The jury had no alternative but to accept the said Expert's Evidence (uncontradicted), otherwise, the said verdict was cogently bias and therefore unsafe.

The appellant, aged 28, a native of Saint Lucia, arrived in Tortola in September, 1976, and stayed at the premises of his sister, Julietta Gaston, at Major Bay, East End.

The deceased, Evelyn Rabsatt, age 67, lived near to the home of the appellant's sister on premises near to a grocery shop which she owned and which comprised a pool room and a kitchen on the bottom floor. The appellant was in the habit of going to the shop to look at television and to play pool and the deceased kept her money in a wooden safe on her premises.

On 19th January, 1977, at about 7.10 a.m. the witnesses Edward Wheatley and Ethleen Thomas saw the appellant and the deceased speaking to each other; at the time he was on the main road and she was in her garden.

The appellant was seen to return in the direction of his sister's home. Wheatley heard the deceased ask the appellant "Is there anything I can help you with my dear?" to which he replied "No thanks". At about 8.15 a.m. Betty Adams saw the appellant running from the main road towards his home. He was wearing a blue short sleeved shirt and brown pants.

At about 8.35 a.m. Ethleen Thomas entered her mother's shop by the pool room where she noticed two fresh drops of blood by the door. She rushed into the grocery where she heard someone groaning. She then looked into the kitchen where she saw her mother sitting

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on the floor with blood all over her. There was a bit of string tied through her mouth at the back of the neck and her tongue was hanging out.

At about 9.30 a.m. she was seen by Dr. Smith. There were several cuts over her body and she was dead. The body was removed to the hospital and on the 20th January, 1977 Dr. Smith performed a post mortem examination on the body of the deceased. He stated that in his opinion death was due to acute blood loss from the wounds.

The doctor observed the following injuries:-

(1) On the left hand, there was a cut over the fourth metacarpel about ½ inch in length.

(2) There was a cut over the fifth metacarpel.

(3) There was a "V" shaped cut on the edge of the hand about 1 inch deep.

(4) There was a cut on the palm about 1 inch in length and ¼ inch deep. There were a cut on the left hand.

(5) There was a cut by the right temple about 1½ inches long and ½ inch deep.

(6) There was a cut behind the lobe of the right ear about ½ inch and 1 inch deep.

(7) There was a cut about and behind the left ear about ½ inch long and ½ inch deep.

(8) There was another cut above the left ear ½ inch long and ½ inch deep.

(9) At the back of the head there was cut ½ inch long and ¼ inch deep.

(10) There was a transverse laceration at the base to the neck on the right side ½ inch and 2 inches deep.

(11) There was a vertical laceration on the back between the shoulder blades ½ inch long and 1 inch deep.

(12) There was another laceration on the back (in the middle) 1½ inches long and 2 inches deep.

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He gave as his opinion the time of death to be 9.15 a.m. In the opinion of the doctor the deceased was attacked from behind and a fair amount of force had to be used in causing the injuries which were all clean cut and caused by a sharp instrument.

At the shop of the deceased there was blood on the floor and papers were strewn on it, the wooden safe was ramsacked and there were coins in the hat of the deceased which was on the floor. A bottle of stout and dentures belonging to the deceased were found under the kitchen window outside.

Later that day a blue jersey and brown trousers which the appellant had been seen wearing earlier were found behind the latrine of one Allan Brown, a neighbour of Julietta Gaston. A kitchen knife was found in one of the trouser pockets.

The police went in search of the appellant whom it was known had previously attempted to board a Prinair aircraft without baggage at about 10.15 a.m.

At about 4 p.m. he was found by the Police hiding in a tree at Beef Island and escorted to the Police Station.

On the following day he made a voluntary statement in writing to the Police.

In his statement to the Police, he said inter alia -

> "I am now saying that it was on Thursday, the day after we had looked at television, that she asked me who was the last person I saw went into the shop, and not the 17th January, 1977 as I stated above. She told me that she had served someone and gave the same person change from the bag that had the missing money, before I had reached to

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watch television. She said the only person she believed took the money was me and I told her I was not crazy enough to do such a thing. On Monday 17th January, 1977, I was again watching a game of Basket Ball at the Major Bay Primary School and Miss EVELYN was standing at her gate leading to her shop. She called me and I went. She told me in a loud voice that the money was a mystery to disappear. She also said that if I had the money I must gave it to her because she worked hard on the peanuts for that money. I told her that I did not take her money and I did not have it. She then told me that she was going to put obeah on me and then put me in the hands of police. I told her to go ahead and I returned to watch my game, and she went home. Other people told me that if I had Miss EVELYN'S money I must gave it to her. I do not know the names of the people who told me so. I was annoyed that she was saying that I had taken her money. It was on Tuesday 18th January, 1977 that an old man, name unknown, told me that I must gave Miss EVELYN her money, if I took it. I told the old man that I did not know why Miss EVELYN has to be scandalizing my name like that.

At about 9.00 a.m. on 19.1.77 I took up my sister's kitchen knife which is a folding steel knife and I put it in my RIGHT FRONT pants pocket with the intention to go down to Miss EVELYN shop to to buy a stout and then to go up the hill to cut a bush broom. I took a piece of white rope from my clothes line in the house to tie the broom. I used my sister's knife to cut the piece of rope from my clothes line in my room. I walked down to the shop. I did not meet anyone on my way. I met Miss EVELYN in the shop at the back room. I took a stout from the frigerator in the pool room as I normally do and I stayed at the door facing the room that she was in. I stretched out my hand and gave her a dollar for the s tout and I told her to keep the change and that I would return for another drink. Her stout cost 70¢. She then asked me if I had brought

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back her money and I asked her what money she was talking about. I asked her if she saw me took her money and she said NO, and I then asked her how she was expecting me to bring it back. She then said that she did not see me take it but she believed that I took it and that she was going to put obeah on me and then the Police-man. I then told her that she was determined to do me wrong things when I did not take up her money. She was then standing in the same room I met her in with my dollar in her hand and I was standing in the same bar-room that I was in all the time. She then said that Tomorrow I was going to find out. I had the rope in my "Left TROUSER POCKET" and I took it out and put it around her neck. I was holding the ends of the rope at the back of her neck. Miss EVELYN said, "wait, wait, what are you doing". I then said, "STOP SCANDALIZING my name". I then pulled it tight. I was standing behind her. She tried to grab me from behind but I ducked. I pushed her inside the room, then pulled the knife and I stabbed her in her head. I used my RIGHT hand to stab her. I had then tied the rope around her neck at the back. I do not re-member which side of her head I stabbed her. I do not remember how many times I stabbed her, but I think it is twice. She did not say any-thing when I stabbed her, but she fell down. She was bleeding. I took the knife and left it on her table in the same room that I stabbed her in. I then searched through a cupboard in the other room where she keeps her "special". I was looking in this cupboard for the dollar I had given her for the stout because I was leaving the stout. The STOUT was not open. I did not find the dollar. I then left the shop through the front door and I walked home through the same place which I came through."

At the trial he gave evidence on oath and repeated sub-stantially what he had said in his statement to the Police.

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In addition, he stated that he was backward at school and had previously suffered from headaches, giddiness and vomiting and that he had been treated previously by a doctor in St. Lucia. He also mentioned that he smoked marijuana.

In relation to the incident of the 19th January, 1977, he said this:-

> "After reaching there, I met Mrs. Evelyn standing in the grocery room. She was bagging some peanuts. I asked her for a stout. She send me to take it as I normally do. Then she stopped bagging her nuts and accused me again of stealing her money. I remember she asked me where is her money. Did I bring it back. I told her how could she expect me to bring back something I did not take. Then she kept accusing me saying she had a feeling I took her money. Then I felt something rush towards my head which I was trying to identify when the hearing was on. From then I did not know what took place. Afterwards I heard this voice of my sister calling me Robert. When I looked I was standing on a piece of wall facing the hillside with a cut on my right middle finger. Then what took place started coming back to my memory. I realised that I was in trouble."

His sister who gave evidence for the Crown confirmed in cross-examination that he was backward at school. She also said that he would spend hours at the beach and that sometimes he would be sitting in a boat doing nothing with his hands under his chin. She further stated that it appeared to her as if he was in another world.

At the trial the appellant called Dr. George Mahey as a witness. He is a consultant psychiatrist and the Medical Supervisor of the Mental Hospital in Barbados.

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He stated that he examined him on two occasions - Sunday 9th and Monday 10th October 1977 in order to make an assessment of his personality by the method of a psychiatric interview, to get an account of his early childhood and to do a specific psychological test.

He stated that he showed no gross disorientation but seemed vague and mixed up as far as dates for certain events, and gave a history of having had bouts of auditory and visual halucinations. His psychological tests revealed that his intelligent quotient fell into the range of mental retardation that is to say his mental development had either been arrested or had regressed. He continued as follows:-

> "I would say the mentally retarded do not have the same powers of control as the ordinary person if provoked.
>
> It is possible for a man to be involved in a violent act and pass out and recollect afterwards. This is an amnesia for an event. That is not necessarily a disease of the mind.
>
> From the fact that he was mentally retarded, it is possible that accused had brain damage."

In regard to the effect that marijuana has on the brain he stated that this depended more on the personality of the individual than any other single factor, and that while it made some passive it made others irritable and aggressive.

He concluded his evidence by stating in answer to the Court "Accused is not mentally ill. He has a disease of the mind and that is mental retardation."

The appellant was also examined by Dr. Robert Thomas the Acting

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Chief Medical Officer who has been a doctor for 25 years in the United Kingdom, Canada and other countries.

He saw him on the 19th and 20th January, 1977 and frequently thereafter when he examined him and talked with him. He kept a record of his visits to the appellant and stated that he never discovered anything peculiar about him and that he appeared to him to be a normal person and further that he had assessed him for any mental abnormalities during his conversations and visits. He found no evidence of any mental abnormality in the accused. Dr. Thomas is not a Specialist in Psychiatry but stated that he had done a general psychiatric course in his training as a general practitioner. He concluded by saying to the Court that he saw no need to have the appellant referred to a psychiatrist.

On ground 1 Counsel submitted that the territory of Tortola does not have and never did have a common law for itself in its Criminal Jurisdiction and therefore there could be no offence of murder in this Colony there being no enactment to the contrary.

On the history of the Colony he referred to a number of books from which he read passages to the Court to the effect that the territory was not acquired by settlement but rather was annexed by the Crown in 1672 at a time when it was occupied not by British but by Dutch settlers. He further submitted that Act No. 31 of 1705, the Common Law (Declaration of Application)Act, Cap. 14 of the Laws of the Virgin Islands, does not extend to the Criminal Law. He argued that the Leeward Islands Act, No. 16 of 1902 made no mention of the Common Law. By way of contrast he referred to the Laws of

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Trinidad and Tobago. Volume 1 page 417 sections 3 and 4 passed in the year 1925 specifically providing for the offence of murder.

We were referred by Counsel for the Respondent to the following legislation:-

(i) Leewards Islands Act 1871 (34 & 35 Victoria) Cap.107 of the Laws of the Virgin Islands, sections 10 & 11

(ii) The Criminal Procedure Act, Cap. 20 of the Laws of the Virgin Islands, sections 7, 8 and 14

(iii) The Offences against the Person Act Cap. 54 of the Laws of the Virgin Islands.

(iv) The Magistrates Code of Procedure Act, Cap. 45 of the Laws of the Virgin Islands.

(v) The Interpretation and General Clauses Act, Cap.35 of the Laws of the Virgin Islands, section 2.

(vi) The West Indies Associated States Supreme Court Order (S.I. No.223 of 1967) section 10.

(vii) The West Indies Associated States (Supreme Court) Virgin Islands Ordinance 1968, No.6 of 1968, section 10.

(viii) The Indictments Act Cap. 33 of the Laws of the Virgin Islands. Rules 5 and 14 of the schedule thereto.

At page 864 of Sir Kenneth Roberts-Wray's "Commonwealth and Colonial Law" (a book referred to by Counsel for the appellant) the author refers to the constitutional status of the Virgin Islands as a Colony acquired by settlement in which event, as the learned author has stated at page 540, the English Law taken by the settlers is both the unwritten law (common law and equity) and the statute law in force at the time of the settlement - not that subsequently enacted, unless it is specifically extended to them. We are of the view that murder is an offence in the British Virgin Islands under

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the Common Law and also by virtue of statute law, vide Cap. 54 of the Laws of the Virgin Islands. Perhaps Act No. 31 of 1705 also applies.

Counsel next argued ground 4. It is difficult to understand what is being complained of here.

Section 41 of Cap. 45 reads -

> "41. The room or place in which a Magistrate shall hold a preliminary inquiry shall not be deemed an open court for that purpose. It shall be lawful for the Magistrate in his discretion to order that no person shall have access to or be or remain in such room or place, the counsel or solicitor of any person then being in Court as a prisoner only excepted, without the consent of the Magistrate if it appears to him that the ends of justice will be best answered by so doing."

We are of the opinion that there is no evidence that the Magistrate was in error by either doing something that he ought not to have done or by leaving something undone that he ought to have done. Further, the point was not taken at the trial which began on 3rd October 1977 and the appellant pleaded to the indictment which was based on the committal proceedings.

Counsel for the appellant argued grounds 2, 3 and 5 together. These grounds deal with the defences raised at the trial of Insanity, Automatism and Diminished Responsibility.

In our view the defence of Diminished Responsibility is not available to the appellant. It was first introduced in the United Kingdom by the Homicide Act of 1957 which has not been received and enacted in the Laws of the Virgin Islands. As such it has no application to this Colony.

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The defence of Automatism was available to the appellant. What falls to be considered is whether or not on the facts and circumstances of the instant case there was any evidence of Automatism which was fit to be left to the jury.

Once a proper foundation is laid for Automatism the matter becomes at large and must be left to the jury but when the only cause that is assigned for it is a disease of the mind then it is only necessary to leave Insanity to the jury and not Automatism.

The evidence of Dr. Mahey called by the defence was that the appellant had a disease of the mind which was mental retardation. He went on to say that from the fact that he was mentally retarded it is possible that he had brain damage.

In the case of Bratty v. Attorney General for Northern Ireland (1961) 3 All E.R. 523 the Lord Chancellor, Viscount Kilmuir, stated as follows at page 528

> "Where the possibility of an unconscious act depends on, and only on, the existence of a defect of reason from disease of the mind within the McNaughten Rules a rejection by the jury of this defence of Insanity necessarily implies that they reject the possibility."

In our view there was no room for the alternative defence of Automatism to be left to the jury as there was no other evidence on which a foundation could have been laid. That foundation, in our view, is not forthcoming merely from unaccepted evidence of a defect of reason from disease of the mind. There would need to be other evidence on which a jury could find non-insane Automatism. In our view there was none.

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We readily agree that the onus is on the Crown to negative Automatism and that the judge had misdirected the jury in this regard but, having regard to our finding above, in our view there was no miscarriage of justice.

On the issue of Insanity the burden of the complaint made by Counsel for the appellant was that the trial judge fell into error and wrongfully usurped the function of the jury by making material findings of fact on the mental condition of the accused as follows:-

(a) That the accused is no idiot, and

(b) That accused is a reasonable man.

In dealing with the defence of Insanity, the learned trial judge after referring to the evidence of Dr. Mahey said this:

> "Now mental retardation Members of the Jury, you will have seen many a person in your life time who is mentally retarded, and you have seen different conditions of mental retardation. Some people who are mentally retarded are mainly idiots. In this case I think it is safe to say that the accused is not an idiot, because he gave sensible evidence, he could recall everything, so he is not an idiot, he is not that class of mentally retarded, but the psychiatrist tells you that in his assessment the accused suffered from mental retardation which means that he is not as bright as he should be. His I.Q. is below standard."

but he also went on to say, "Members of the Jury, you will have to say how far there is any defect in the accused person. You will have to say how far his mind is abnormal."

In our view he was clearly leaving the question of the mental condition of the accused to the jury.

In regard to the complaint that the judge referred to the

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accused as being a reasonable man and thereby withdrew that finding from the jury Counsel referred to the passage of the summing up at page 118 which reads as follows:

> "Is the accused a reasonable person? The psychiatrist said that he has mental retardation. But you have seen him here and he has acquitted himself very well in the witness box. I should think he is a reasonable person but you have to decide and as I said my observations you can throw aside."

We find no merit in this complaint. The burden of proof in Insanity rested upon the appellant and he failed, in our view, to discharge that burden. The jury were right to reject the defence.

On ground 7 Counsel submitted that the evidence of the defence expert, Dr. Mahey, stood uncontroverted, and that the weight of evidence was in favour of the accused and that the jury had no alternative but to accept it. He referred to the case of Walton v The Queen (1977) 3 WLR, 902 in which reference was made to Regina v Bailey (1961) C.L.R., 828.

The answer to Counsel's submission is that in the instant case Dr. Mahey's evidence was not the only expert evidence which dealt with the mental condition of the appellant. There was, in addition, the evidence of Dr. Thomas which the jury were entitled to take into account. They had also seen and heard the appellant himself testify and therefore were entitled not to accept as conclusive the expression of opinion of Dr. Mahey.

We come now to perhaps, the most difficult point in the appeal. This deals with the question of provocation and whether the learned trial judge dealt adequately with this issue in his summing up and,

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more particularly whether he erred in not directing the jury that if upon consideration of all the evidence they were left in doubt as to whether there was sufficient provocation they ought to find the accused not guilty of murder but guilty of manslaughter only.

Counsel for the appellant has conceded that the judge did leave the issue of provocation to the jury, that he did tell them that if they found provocation that the verdict should be one of manslaughter but he complains that he should have gone on to direct them that if they were in doubt as to whether there was sufficient provocation they must also return a verdict of guilty of manslaughter.

Counsel for the respondent, in answer to this submission has contended that there was no evidence of provocation fit to be left with the jury and although the learned trial judge may have left it out of abundant caution, he invited the Court to find that the killing of the deceased was not due to any provocation resulting in loss of self-control.

In his summing up upon the issue of provocation the judge had this to say,

> "If it happened all of a sudden down in the pool room when she spoke to him, if you find that his story is true, that she accused him once again when he went to get his stout, if you accept that part of the story, then he lost his control suddenly. But if you find that there was no loss of any control but he went down there all prepared to do just that, then you can't say that he was provoked. The crown will say that there is no provocation. But the aspect that you have finally to consider is the question of the necessary retaliatory measure taken by the accused if you find that he was suddenly provoked by the lady

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when he got into the shop. You have to consider whether the retaliation that he took is proportionate to the provocation. You see Members of the Jury, if a person provokes you and he has nothing, no instrument, no weapon and he provokes you and you cuff him, slap him down that may not be an unreasonable type of retaliation. So you have got to look at the instrument that is used to effect the retaliation. You have to ask yourself, assuming that there was this provocation, and that he lost his contrdlall of a sudden, is the knife a proper instrument? Was that a measure of retaliation proportionate to the provocation? The lady had accused him by words, so you have to consider the instrument by which this killing was done and say if you think it was a proportionate amount of force if the measure of retaliation was proportionate to the provocation. Where the instrument is a deadly instrument Members of the Jury, the provocation should be more than normal, should be greater than if the instrument is not a deadly instrument. And the Crown also asks was that provocation sufficient to deprive the accused, or to deprive a reasonable man of his self control? Counsel addressed you on that. Is that how a reasonable person would react to a provocation where someone has accused you of stealing her peanut money. The Crown is asking you to say that that could not deprive a reasonable man, and that couldn't deprive the accused. Defence says I sometimes get giddy, I am mentally retarded, and the psychiatrist tells you that such a person may be more apt to lose his self control than a normal person. So Defence is saying under those circumstances you can see why he lost his self control, but it is for you Members of the Jury to decide if that is so, if the provocation was sufficient to deprive a reasonable person of his self control. If you find then Members of the Jury there is this provocation, that he lost his self control, that any reasonable person would have lost his self control and that this accused in fact lost his self

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> control, and if you think that the instrument was not an unreasonable instrument in the circumstances, Members of the Jury, that provocation will reduce the charge from murder and you will have to convict him of manslaughter and not of murder. The burden as I say remains with the Crown to prove that absence of provocation."

At a later stage he went on to say this,

> "If you entertain doubt and you don't feel sure as to the voluntariness or involuntariness of the act, the reasonableness of the instrument used, as to the mental capacity, his abnormality of mind, Members of the Jury, if you entertain a reasonable doubt you will have to give the benefit of that doubt to the accused person."

The question whether there is any evidence capable of amounting to provocation is one of law for the judge to decide and where he has left the issue to the jury but has done so inadequately as contended for by Counsel for the appellant can this Court upon a review of all the evidence come to a conclusion that the issue of provocation ought not to have been left to the jury? We think that the answer is in the affirmative.

In this case the only evidence of the nature of the provocative incident was the accused's own story. He said in his statement to the police that on the morning of the 19th the deceased had repeated the accusation she had made before, that he had stolen the money and that she would put obeah on him and then the police. He stated further that after she had said this he took the rope from his trouser pocket and, standing behind her, he put it around her neck and when the deceased said "wait, wait, what are you doing?" he replied "stop scandalizing my name" and he pulled the rope tight.

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In his evidence on oath he said that when the deceased kept accusing him of stealing her money "I feel something rush towards my head which I was trying to identify when the hearing was on." From then on he said he did not know what took place but under cross-examination he admitted putting the rope around the neck of the deceased and that the deceased had said "wait, wait what are you doing?" He also said that the deceased had not injured him in any way and that the scratches on his body were not done by her but by the bushes. He did not know how his finger got cut.

In our view the appellant could and should have desisted when the deceased called out "wait, wait what are you doing?" but it is clear that he must have found that this method of destruction was ineffective and resorted to the use of the knife. It was the stab wounds which caused the death of the deceased.

The only point of time when a loss of self control might possibly be inferred is immediately after the deceased had made the accusation but the injuries which caused her death were inflicted sometime after and at the time when the deceased had been pleading with him "wait, wait what are you doing?" In the accused's own words "I then said stop scandalizing my name. I then pulled it tight. I was standing behind her. She tried to grab me from behind but I ducked I pushed her Inside the room then pulled a knife and I stabbed her in her head. I used my right had to stab her. I had then tied the rope round her neck at the back. I do not remember which side of the head I stabbed her, I do not remember how many times I stabbed her."

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While it is true that the trial judge did not direct the jury that if they were in doubt as to whether the facts showed sufficient provocation to reduce the killing to manslaughter they should determine the issue in favour of the accused and return a verdict of manslaughter we do not think that his omission to do so was a misdirection for the reason that provocation did not sufficiently arise in the evidence so as to make it incumbent on the trial judge to give such a direction. He need not have done so because in our view there was no evidence of any provocation from which on a proper direction the jury may have been left in doubt.

In Holmes v D.P.P. (1946) 2 All E.R. at 126 Viscount Simon said "If there is no sufficient material even on a view of the evidence most favourable to the accused for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven through transport of passion and loss of self control to the degree and method and continuance of violence which produces the death it is the duty of the judge as a matter of law to direct the jury that the evidence does not support a verdict of manslaughter."

In Lee Chun-Chuen v Reginam (1963) 1 All E.R. Lord Devlin said as follows at page 79:-

> "Provocation in law consists mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other - particularly in point of time, whether there was

/time.....

time for passion to cool - is of the first importance. The point that their Lordships wish to emphasise is that provocation in law means something more than a provocative incident. That is only one of the constituent elements. The appellant's submission that if there is evidence of an act of provocation, that of itself raises a jury question, is not correct. It cannot stand with the statement of the law which their their Lordships have quoted from Holmes v. Director of Public Prosecutions. In Mancini v. Director of Public Prosecutions the House of Lords proceeded on the basis that there was an act of provocation - the aiming of a blow with the fist-but held that it was right not to leave the issue to the jury because the use of a dagger in reply was disproportionate."

The state of the law in the Virgin Islands is the same as it was when the case of Holmes v. D.P.P. was decided by the House of Lords and in that case it was held that words alone save in circumstances of a most extreme and exceptional character would not reduce the crime of murder to manslaughter.

In our view the savage attack made on the deceased by the appellant in the instant case was totally disproportionate to the provocative words alleged by the appellant. On the whole matter we are satisfied that there has been no miscarriage of justice and had we thought it necessary would have applied the proviso to section 37(1) of Act No. 5/73. Accordingly, the appeal must be dismissed, and the conviction and sentence affirmed.

(Sir Maurice Davis)
CHIEF JUSTICE

(N.A. Peterkin)
JUSTICE OF APPEAL

(N.A. Berridge) (Ag.)
JUSTICE OF APPEAL