ANTIGUA & BARBUDA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.1 of 1986

BETWEEN:

ADRIAN NICHOLAS - Appellant

and

THE QUEEN - Respondent

Before: The Honourable Mr. Justice Bishop - Chief Justice (Acting)
The Honourable Mr. Justice Moe
The Honourable Mr. Justice Williams (Acting)

Appearances: Mr. C. Watt for Appellant
Director of Public Prosecutions and G. Collins for Respondent.

1986: June 2
Nov. 17

JUDGMENT

BISHOP C.J. (Acting) delivered the Judgment of the Court

At 12.05 p.m. on the 22nd April 1985 Elton Browne, also known as Ladoo, wasproonounced dead.

On the 23rd April, 1985, the Government Pathologist performed a post mortem examination on the body and he concluded that Elton Browne died as a result of haemorhage and shock from the traumatic injuries suffered. In the light of the Crown's case and of the defence put forward by Adrian Nicholas, who was charged with the murder of Elton Browne, it is helpful to recall the evidence of the pathologist, insofar as it concerned the wounds suffered by the deceased.

"There were signs and effects of trauma:

1. On the forearm there was a 1.2 cm by 1 cm penetrating entry wound at 6 cm below the right elbow and 5 cm lateral to the anterior midline of the forearm. There was also a 1.3 cm by 1 cm exit wound at 5.5 cm below the right elbow in the anterior midline.

/On the.....

> 2. On the posterior there was a 0.9 by 0.8 cm entry wound in the posterior midline located 18 cm above the termination of the lumbar vertebra above where the spine ends. This wound led towards a bullet stuck in the fourth lumbar vertebra-bones in the spine..... This bullet was removed. This bullet was deeply embedded in the vertebra itself."

Dr. Simon formed the opinion that the latter wound was the result of "a direct straight hit." Then he continued with the evidence of wounds thus:-

> 3. The hip - there was a 2 cm by 1.3 cm exit wound at 4 cm below the right anterior superior iliac spine that is about 1 cm medial to the lateral line. This wound led to a fragment of metal. Also there was an entry wound at 11 cm below the midline and 1 cm below the right iliac crest in the area of the superior aspects of the right buttock.....
>
> The bullet that went through the elbow made the entry through the hip.
>
> There was 1.5 by 1 cm entry wound over the posterior aspect of the right iliac crest at 15 cm from the posterior midline of the body. This wound penetrated the right hip bone injuring the pelvic blood vessels. A bullet was found lying free in the pelvis. I removed that bullet."

Two spent bullets and fragments of metal removed from the body were produced at the trial, and Dr. Simon said that the wounds he found were consistent with having been caused by gunshots. It was never disputed that Adrian Nicholas shot Elton Browne, using a .38 revolver that he had in his possession, at least from March 1985.

On the 7th February 1986 Adrian Nicholas was convicted of murder and sentenced according to the law. He has appealed against his conviction.

At the hearing of the appeal on the 2nd June, 1986, learned Counsel applied to this Court for an order that Dave Jackson a police constable, attend Court to be examined on behalf of the appellant. The reasons stated in the application were that the witness was not examined at the trial because he was out of the island on vacation leave until the end of March 1986. Then there was the following:-

/I wish.....

"I wish this witness to be examined on a statement made to him by the deceased Elton Browne immediately before the incident and his reaction and feelings as a result of the statement.

The witness was dispatched on duty to the Point area by Senior Sergeant Corbert to warn Elton Browne after a report to the St. John's Police Station by Cathleen Phillip. Having found him I am informed that the deceased told the Constable that he intended to kill me. The Constable duly reported this threat to the said Sergeant Smith."

After hearing learned Counsel for the appellant and for the respondent the application was refused because there were no good or sufficient reasons advanced to justify granting it. The Court stated then that it would set out its decision fully, in writing, at a later date. That we now do.

Mr. Watt submitted that - (i) this Court ought not to be influenced against granting the application simply because there was no request made at the trial to call Dave Jackson as a witness; (ii) good cause for examining the witness had to be shown in this Court and not in the Court below; (iii) the evidence which the witness would give to this court was relevant, since it would establish that the deceased demonstrated hostility towards the appellant and used threats to the witness concerning the appellant, earlier the same day that he was shot.

Mr. Cenac submitted that - (i) the principles by which this Court ought to be guided were contained in the case - R v PARKS 46 Cr. App. R. 29; (ii) the evidence referred to by Counsel for the appellant was neither relevant nor credible.

Learned Counsel pointed out the sequence of events on the morning of the 22nd April and asked the Court to find as a fact, that the deceased could not have made a statement to Dave Jackson immediately before the incident in which he was shot. The evidence showed that the deceased was already shot when Carleen Phillip reported to the police station at 10.10 a.m., and that she knew, when she went to the police station, that the deceased had been shot already. So that when

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Sergeant Smith despatched P.C. Jackson to the Point Area following Carleen Phillip's report at the station, Jackson could not have been told anything by Elton Browne because he had been shot by Adrian Nicholas and was in no condition to demonstrate hostility or to utter threats - if he was in the Point Area when Jackson reached there.

Mr. Watt raised no objection to the sequence as told by the Director of Public Prosecutions and indeed there was no evidence to the contrary.

The application which was filed in this Court on the 18th February 1986 was not accompanied by a statement from Dave Jackson of the facts to which he was expected and willing to testify. So that this Court was not in a position to analyse fully any proferred facts from the witness in order to evaluate their relevance or weight in the light of the Crown's case and of the appellant's defence.

Even assuming that Elton Browne made a statement to P.C. Dave Jackson, the reaction and feelings of Jackson to what Browne said could not be evidence pertinent to the real issues in the case.

Further, the facts provided in the pplication and in the address of learned Counsel for the appellant were not well capable of belief in the light of the unchallenged sequence of events.

The final reason for exercising our discretion as we did was that there would not have been a reasonable doubt raised in the minds of the Jury on the guilt of Adrian Nicholas if the facts which were brought to our notice had been added to those actually brought for the consideration of the Jury at his trial.

This Court therefore denied the appellant the order which he sought. Now to the relevant facts of the case.

About three years before April 1985, Elton Browne and Carleen Phillip lived together as man and wife. He was the father of one of her children. Their intimate relationship ceased in 1982, although they

/remained.....

remained friends. From some time in 1983 Adrian Nicholas took the place of Elton Browne in that he and Carleen Phillip enjoyed the relationship of man and wife; and she bore him a child, who, at the time of the incident in April, 1985, was about nine months old.

As might be expected, there was no love lost - there was bad blood - between Elton Browne and Adrian Nicholas. The evidence which was led - some generously admitted in cross-examination and without objection - dealt in detail and at length with incidents that occurred in June 1984, at Carnival 1984, in January and February 1985. They included threats allegedly uttered by Browne to Phillip or Nicholas or to both of them. There was alleged damage to property belonging to Phillip and to Nicholas. There was a fight between the two men that led to a criminal charge against Nicholas which was never decided by the Court.

On the 22nd April, 1985 around 2.00 a.m. Carleen Phillip saw Elton Browne throw part of a cement block through her bedroom window. It broke the glass but it did not hit anybody. Phillip and Nicholas reported this incident to the police who took steps to warn Browne.

Shortly before 9.00 a.m. Carleen Phillip was in her yard, about to go to the stand pipe, when Elton Browne walked past her gate, in a westerly directioin. While passing he said something to her. Within five minutes he walked past the gate in the opposite direction. Again he spoke to her. Whatever it was that he said to her, Carleen Phillip did not go to the stand pipe. She remained at home.

Around 9.00 a.m. Adrian Nicholas came home and Carleen Phillip reported to him that Elton Browne had uttered threats to her to the effect that he would kill them.

Ten minutes or so later, Nicholas was in the yard repairing a clothes line. He had a hammer and a pair of pliers. Phillip was also

/in the.....

in the yard. She was sweeping. Browne walked past and as he had done earlier, he made remarks that included a threat to kill all of them.

The events that occurred subsequently were described in a version from Carleen Phillip, who did not see the whole incident, and in versions from Adrian Nicholas, given at different times. As stated at the trial the third member of the triangle could never give his version.

THE VERSION OF CARLEEN PHILLIP.

She said this:

> "The accused put down the hammer and pliers, went outside in a westward direction on St. George Street. This was in the same direction the deceased had gone. I heard something like one shot fire. I stood up at the gate. I looked east, then west. I could not see nothing. I came out of the gate. I saw Browne lying down in the street on his face..... I saw accused with a gun in his hand. The accused left..... I noticed blood on Browne's right hand."

It is undisputed that Nicholas fired more than one shot at Browne. It is not clear whether Carleen Phillip heard the first or the last shot but under cross-examination she told learned Counsel for the appellant, who also appeared on his behalf at the trial, that imediately upon Browne uttering the threat, Nicholas put down the hammer and pliers. She also said that it was about twenty minutes after Nicholas left the yard that she heard the shot.

Clearly this version must be analysed not only per se, but also alongside the other versions and in the light of the testimony of the pathologist, to which I have referred. The logical inference from his findings was that Browne was hit by shots fired from behind and at a distance greater than 3 to 5 feet. This version from Carleen Phillip did not assist with details of what occurred after the two men were outside the gate; and it did not put Elton Browne inside the yard at anytime.

THE FIRST VERSION OF ADRIAN NICHOLAS.

Around 9.11 a.m. on the 22nd April, 1985, Nicholas told his friend Clifton Shaw that he had shot Ladoo, and between 11.00 a.m. and 1.00 p.m.

/Nicholas.....

Nicholas made an oral statement to the police in which he explained in these words:

> "He came at the yard this morning to make a fight with me. He grabbed me and me get away and run in the house for the gun; and when me run back outside he rushed me again and me shot him."

This description was related after Nicholas had been told of a report made at the police station in which it was alleged that he had shot Elton Browne earlier and that Browne had since died. Nicholas was also cautioned before he made this statement which remained undenied and unchallenged. Now in any analysis of this version the question must spring to mind; why did Nicholas not remain in his house after getting away from a man of whom he was supposed to be afraid? The answer may be found in his own statement; and it is this: He did not do so because he ran for his gun. There was no suggestion whatever that Browne was armed or that he pursued Nicholas into his house. Having armed himself, Nicholas ran back outside. Browne rushed him and he shot Browne. Could the bullets have been found where the pathologist found them if Browne was facing Nicholas when Nicholas shot him - especially the bullet which was embedded in the lumbar vertebra? Bearing in mind the defence which was advanced, then the questions to be answered would include - (a) What was the intention of Nicholas when he shot Browne? (b) Was he retaliating, seeking revenge, or protecting himself? (c) Was it reasonably necessary in all the prevailing circumstances, for Nicholas to use the force he used? (d) Was it his intention to kill? (e) Did Nicholas suddenly and temporarily lose his self control by an act on the part of Browne? (f) Did he have time, before shooting, for his passion to cool, if indeed he became subject to it?

THE SECOND VERSION OF ADRIAN NICHOLAS.

This was dictated at 1.20 p.m. on the 22nd April 1985 not long after Nicholas had taken the police to recover the gun and some live bullets. When A.S.P. Smith examined the gun it contained two live rounds and three spent cartridges, The statement was not denied. After explaining that

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he was about to erect a clothes line when Elton Browne entered the yard and uttered a threat to kill all or either of the three of them then living there, Nicholas described to A.S.P. Smith three aspects of the incident. Firstly,

> "He approached me to make a fight. He grabbed me around my neck and we began to struggle and I got away. I ran inside the house and picked up my gun and ran back outside. When I got back outside he was still in the yard. I rushed him while he was facing me and I fired a shot at him."

Here Nicholas has added to and varied the first version he gave. He added where he was grabbed by Browne. He added that Browne was in the yard, when he came back outside. He varied from saying that Browne rushed him again to saying that he rushed Browne, and he added that Browne was facing him when he fired a shot at him. The questioins mentioned earlier when the first version was described, must - with others - also arise at this stage, in analysing the situation.

The second aspect of the incident, which really occurred as a continuing event, showed what happened next. In other words, there was no significant, if any, interval of time between the aspects, but it is for convenience of analysis that I so refer to it. Nicholas said:

> "After I fired that shot he ran out of the yard and I ran behind him and fired two more at him while he was running away."

Again similar questions must spring to mind to those already stated in respect of the other versions, and in the light of the findings and opinions of the pathologist. For example, why did Nicholas pursue Browne after Browne left the yard? Why did he fire two more shots at Browne when he was trying to escape? Was it reasonably necessary for Nicholas to use such force as he used in the circumstances then existing? Did he at the time he fired the two shots act under provocation as it is known to the law of Antigua and Barbuda?

/The third.....

The third aspect of the dictated statement explained that Browne fell to the ground after the third shot was fired while Nicholas ran inside his house, remained there for about 5 minutes before going to his friend Clifton Shaw to whom he handed the gun and bullets for safe keeping. Nicholas said he then went by the bayside to cool out because he was afraid.

The three versions described formed part of the evidence led by the Crown. There was another description of the incident. It was contained in the statement from the dock given at his trial on the 5th February, 1986, or nearly ten months after the other versions were given.

THE STATEMENT FROM THE DOCK.

Adrian Nicholas gave, in detail, accounts of a number of incidents that had occurred involving himself, Carleen Phillip and Elton Browne. These incidents covered a period between May or June 1984 and the 22nd April, 1985. There was reference to them earlier; and there can be no doubt that Nicholas was determined to show thereby that for a full year he had been persecuted and threatened by Browne, an ill-tempered man. The details of each incident need not be repeated since learned Counsel for the appellant relied only upon what occurred in January and February 1985 to support his submissions before us.

In his statement from the dock Adrian Nicholas explained that when he returned home around 8.30 a.m. on the 22nd April, 1985 Carleen Phillip reported to him that Ladoo had entered the yard and threatened to kill all of them. He then began to fix a clothes line and while loosening some wire, Elton Browne came into the yard. He threatened Adrian Nicholas that he would kill all of them and -

> "Carleen went inside putting on some clean clothes to go to the station. Elton rushed me grabbed me around the neck, squeeze me very tightly, have something in his other hand, but I wasn't sure what it was but I was afraid. I struggled and I got away. I ran inside came back out, then he rushed me. I pointed the gun. I fire one shot he did not appear to be hit. He then ran outside."

/It is.....

It is immediately clear that Adrian Nicholas again added to what he had stated earlier and varied some of the facts already stated. From the haven of the dock he added that he was squeezed very tightly and that Browne had something in his hand. He added that Browne did not appear to be hit by the one shot he fired then. After Browne ran outside following the first shot, Nicholas explained what occurred, in these words:-

> "I ease out behind him which I believe he was coming again. I see him standing halfway down the fence in an angle like he was coming again. As he turn I fired two quick shot. Then he ran. I see that he appear to be hit. He was runing in a weak position through an alley. I followed. Then he fell."

Whereas in his second version related on the afternoon of the shooting Nicholas said that he ran behind Browne, in the statement from the dock he varied it to - "I ease out behind him." His reason for going out behind Browne, which he did not give before, was that he believed that Browne was returning. Then there was further addition, in which Nicholas explained the position that Browne was in when he (Nicholas), fired two quick shots.

Now if the uncontradicted evidence of the pathologist is accepted, two live bullets and fragments of metal were recovered from Browne's body. How many times was he hit? Bearing in mind where the pathologist found these things, was Browne turning towards or away from Nicholas?

The version related from the dock must be analysed in the light of the law regarding the assessment of statements on oath and of unsworn statements from the dock, always bearing in mind that the defence was that Adrian Nicholas acted either in self defence or under provocation.

In the STATE v MITCHELL (1977) 29 W.I.R. 381 Hyatali C.J. referred to the value of an unsworn statement from the dock which, according to him, "has not only been the subject of much debate in Commonwealth Countries, but has become a popular method of answering cases founded upon sworn and tested evidence from the witness box." In the judgment delivered in the Court of

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Appeal of Trinidad and Tobago, the question was considered - whether or not an unsworn statement from the dock could be said to be evidence in the case from which the guilt or otherwise of the accused could be decided. It was held that "in assessing the weight and value of the unsworn statement..., it was essential to take into account that the unsworn statement - (a) could not be tested by cross-examination; (b) could not, in cogency and weight, vie with the sworn testimony placed before the Jury; (c) was at odds with the appellant's written statement to the police; and (d) was at variance in a material respect with what his Counsel put to the witness."

Except for (d) these factors would have been applicable to the assessment of Nicholas' version of the shooting which he related from the dock.

The grounds of appeal in the case before us concerned the directions given by the learned trial Judge to the Jury on the defences of self defence and of provocation.

SELF DEFENCE

Learned Counsel for the appellant submitted that the learned trial Judge erred in law in that he failed to direct the jury's attention "with sufficient particularity to the uncontroverted evidence of Carleen Phillip, Inspector Lucien Edwards, Corporal Raymond Jones, Sergeant Dane Hodge and Senior Sergeant Corbett Smith given at the trial, which said evidence could support a finding of self-defence." Counsel complained that when the learned Judge was directing the Jury on the meaning of self-defence, he ought to have gone further than - (i) using the language which was used by Lord Morris of Borth-y-Gest in the PrivyCouncil, in PALMER v R (1971) 55 Cr. App. R. 223 (at p. 242), and (ii) mentioning only some of the facts contained in the evidence.

Mr. Watt contended that having correctly explained self-defence the

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learned trial Judge ought to have referred to the fact that there was uncontradicted evidence that Elton Browne was the owner of a firearm and he ought to have dealt with the evidence of the threats by Browne to kill Carleen Phillip and Adrian Nicholas and to leave the child fatherless. Counsel contended that these facts ought to have been left with the Jury for them to decide whether Adrian Nicholas was acting in self defence; and, according to Counsel, the threats referred to ought to have been put at a specific point in the summing up, namely, immediately after the direction to the Jury that it would be for them to decide whether there was an attack by Browne on Nicholas and whether the attack was all over as indicated in the statement of Nicholas that he fired two more shots at Browne while Browne was running away. To remind the Jury that Browne owned a firearm at the specific place in the summing-up, as Counsel contended, would have been inviting speculation.

In the case before us the trial Judge didnot withdraw any facts from the consideration and analysis of the Jury. Nor has learned Counsel pointed to facts whose omission in the summing-up must have affected the verdict on self-defence. The learned trial Judge did assist the Jury with those parts of the testimony to which Counsel referred, and it is with respect that this Court expresses the view that on the totality of the evidence the learned trial Judge acted with caution, if not generosity, in leaving self-defence as an isue for the decision of the Jury.

PROVOCATION

The five grounds remaining in the notice of appeal were argued together by Counsel for the appellant. This was the proper course to adopt as some of the grounds overlapped while others were difficult to distinguish.

/Mr. Watt submitted...

Mr. Watt submitted that - (a) the direction to the Jury was based on old law which had been changed by recent Caribbean cases; and (b) there was abundant evidence on which the Jury ought to have found that there had been provocation by the deceased.

It was accepted by learned Counsel for the appellant that it would appear that Jamaica, Trinidad and Barbados have laws similar to that contained in section 3 of the Homicide Act 1957 of England; and that the territories served by this Court have not enacted similar law. (See also case Crim. App. 6/83 (St.Vincent) April 1984 HAMILTON v R) . So then, the law on provocation in the three territories cited will be different from that in this case.

Mr. Watt complained about the following passages in the summing-up of Redhead J. - a passage quoted substantially from R v DUFFY (1949) 1 All E.R. 932: "Provocation again, Members of the Jury, is some act or series of acts - note some act or series of acts - done by the dead man to the accused, which would cause in any reasonable person and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him for the moment not master of his mind. As to make him for the moment to lose self-control." The last sentence was not part of the passage in Duffy's case and it may be that, in adding it as he did, the learned trial Judge was seeking to explain or to correct the expression "not master of his mind." It was the only part of the direction on the law of which there was complaint and I shall refer later to other directions on the law of provocation which, looked at as a whole and alongside the passage above, would not have led to confusion because of the use of the expression "not master of his mind."

In R v BUNTING (1965) 8 W.I.R. 276 at p. 279 (referred to in JULIEN v R (1970) 16 W.I.R. 395 and FREELAND v R (1981) 28 W.I.R. 378 cited by Counsel) Lewis J.A. said

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> ".....in the light of recent authorities it is desirable that the phrase 'for the moment not master of his mind' should be omitted in directing Juries on the lawe of provocation."

It was there advised that it is desirable to omit the phrase. The phrase was replaced, as Counsel for the appellant pointed out, by the word "retaliate".

It must not be forgotten that in giving the definition of provocation, Julien's case from Trinidad and Tobago where there was, at the time, a law similar to that contained in section 3 of the Homicide Act 1957. By that section evidence of things said or things done or things said and done could be analysed to decide whether or not a person charged was sufficiently provoked to lose self-control. Mr. Watt agreed that section 3 was not applicable in Antigua and Barbuda and that sofar as concerned this type of case it was things done by the deceased to the accused viewed in the light of all the relevant circumstances. In DIRECTOR OF PUBLIC PROSECUTIOINS v CAMPLIN (1978) 64 Cr. App. R. 14 a House of Lords opinion, Lord Diplock pointed out in a brief survey of the historical development of the doctrine of provocation at common law, that "with two exceptions actual violence offered by the deceased to the accused remained the badge of provocation right up to the passing of the Homicide Act 1957." The exceptions were the discovery by a husband of his wife in the act of committing adultery and the discovery by a father of someone committing sodomy on his son.

Apart from the use of the phrase to which there was objection, Counsel had no quarrel with the direction given. Thus, the direction which he said ought to have been given to the jury was that:

> "Provocation is some act or series of acts done by the dead man to the accused which would cause in any reasonable person and actually causes in the accused, a sudden and temporary loss of self-control rendering the accused so subject to passion as to cause him to retaliate."

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The passage quoted substantially from Duffy's case was not the only direction given in the summing-up. Redhead J. also used in his direction part of the judgment of Lord Devlin in LEE CHUN-CHUEN v REGINAM (1963) 1 All E.R. 73. He told the Jury:-

> "Provocation in law consists mainly of three elements: The act of provocation, the loss of self-control,both actual and reasonable, and retaliation proportionate to the provocation .....these three elements must be present before you can find that the accused acted under provocation,"

This was emphasised by repetition and then the trial Judge explained that in Antigua and Barbuda mere words alone could not, in this case, amount to provocation in law. He referred to part of the evidence of the accused statement from the dock and pointed out that Carleen Phillip had not testified to his being squeezed around the neck. He reminded the Jury that they must consider all the circumstances and by way of explanation he quoted extensively from the summing-up mentioned in Duffy's case.

There was no real or serious complaint about the directions with respect to cooling time and retaliation and it is unnecessary to deal with them. On the questioin of intention to kill the direction was:

> "If you find tht the accused was provoked it does not matter that he had the intention to kill or cause grievous bodily harm he would still be entitled to the defence of provocation."

We do not agree with the first submission of Counsel for the appellant. The direction on provocation taken as a whole could not be said to be erroneous in law in this jurisdiction.

In support of his second submission learned Counsel referred to parts of the evidence of Carleen Phillip and to the version given by the appellant in his statement from the Dock. As was pointed out before, none of the evidence adduced at the trial with withdrawn from consideration

by the Jury, and those parts of it to which Counsel referred were brought to the attention of the Jury during the summing-up. The trial Judge also assisted the Jury with the statement from the dock and with the manner in which they should deal with it when analysing the facts and circumstances. We find that the submission is without merit.

We turn now to the submission of the learned Director of Public Prosecutions that provocation ought not to have been left to the Jury. The test to be applied was stated by Viscount Simon in Holmes v D.P.P. (1946) 2 All E.R. 124, and approved in LEE CHUN CHUEN v REGINAM, seventeen years later:

> "If there is no sufficient material, even on a view of the evidence most favourable to the accused, for the jury (which means a reasonably 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 matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken - (a) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict."

The Privy Council in the Lee Chun-Chuen case observed that there is a practical difference between the approach of a trial Judge and that of an appellate court to this question. While the former may be very reluctant to withdraw from a jury any issue that should properly be left to them and therefore he may be likely to tilt the balance in favour of the defence, "an appellate court must apply the test with as much exactitude as the circumstances permit."

The versions of the incident have already been related. Using the test and bearing in mind- (i) that a statement from the dock cannot prove facts not otherwise proved by the evidence before the Jury, though it might

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cause the Jury to view the proved facts and the logical conclusions therefrom in a different light, and (ii) that the defence cannot require the issue to be left to the Jury unless there has been produced a credible narrative of events suggesting that there were:- an act of provocation, loss of self-control (actual and reasonable), and retaliation proportionate to the provocation; and (iii) that these elements must all be present together, our analysis of the facts and circumstances has led to a finding that there was not sufficient material to go to the Jury on the issue of provocation. If it could be successfully contended that the directions of the learned trial Judge on the law of provocation, amounted to a misdirection, no miscarriage of justice would have resulted. Consequently this appeal stands dismissed.

E.H.A. BISHOP,
Chief Justice (Acting)

G.C.R. MOE,
Justice of Appeal

L. WILLIAMS,
Justice of Appeal (Acting)