ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CRIMINAL APPEALS NO.4 OF 2005

BETWEEN:

SHERFIELD BOWEN

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Sir Richard Cheltenham, QC, with him Mr. Trevor Kendall for the Appellant
Mr. Anthony Armstrong, Director of Public Prosecutions, for the Respondent

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2007: March 12;
June 20.

JUDGMENT

[1] RAWLINS, J.A.: The appellant, Bowen, a lawyer and accountant by profession, was charged for the murder of Tessa Barthley. Ms. Barthley was shot in her neck on 16th December 2003 outside Bowen's office at Nevis Street, St. John's. She died on 23rd December 2003. Bowen was convicted of manslaughter on 22nd February 2005 and sentenced to serve 5 years in prison. He appealed on grounds which seek to impeach the directions that the learned trial judge gave to the jury. The appeal alleges that the trial judge misdirected the jury on intention, accident, self defence, good character, provocation and manslaughter. The appellant insists that a reasonable jury properly directed on the law and the relevant issues of fact would have acquitted him rather than return a verdict of guilty of manslaughter.

[2] In relation to the alleged misdirections on manslaughter, Sir Richard Cheltenham, learned Queen's Counsel for Bowen, stated that the judge erred, first, when he failed to put to the jury an alternative verdict of manslaughter arising from an unlawful and dangerous act leading to death. According to senior counsel, the judge should have left this alternative open to the jury because it arose from Bowen's evidence that the shot which killed Ms. Barthley was unintentionally discharged from the gun when he hit her with the same hand in which he held it. Sir Richard contended that while the judge left manslaughter to the jury as an alternative to murder on the ground of provocation, he erred when he did not consider that R v Von Starck[1] and R v Coutts,[2] are authorities for the proposition that in a murder trial, a judge should leave all alternative defences reasonably available to an accused on the facts to the jury. Senior counsel said that this meant that the judge erred by failing to direct the jury on manslaughter arising from an unlawful and dangerous act in addition to the direction on the alternative of manslaughter on the basis of provocation.

[3] In relation to the directions on provocation, Sir Richard complained that the trial judge erred in that although he directed the jury on the verdict of manslaughter as a result of provocation, his directions on provocation were seriously defective. This, he said, was because the judge did not emphasise, sufficiently, that it was for the prosecution to negative provocation and that any doubt on the matter should be resolved in favour of Bowen.

[4] Bowen was convicted of manslaughter. In my view, therefore, the benefit which he could have received from good directions on an unlawful and dangerous act and on provocation would have been a conviction for manslaughter. I therefore think that it would be futile to insist, in the circumstances of this case, that the judge's failure to direct the jury on manslaughter as a result of an unlawful and dangerous act had any effect upon the verdict. If he had so directed, and the jury

[1] [2000] 1 WLR 1270 (P.C.).
[2] [2006] 4 All E.R. 353.

found that the defence operated in favour of the appellant, the verdict would have been no different than it was. No injustice has therefore resulted and I would accordingly dismiss the appeal on these grounds. I shall, however, proceed to consider the appeal on the grounds of misdirections on intention, accident, self defence and good character. This would be better appreciated from the factual circumstances of the case.

The Facts

[5] The gravamen of the case for the prosecution was that Bowen deliberately shot Ms. Barthley in response to an attack that she made upon him. The case for the defence was that the gun went off accidentally in the course of a struggle between Bowen and Ms. Barthley. I shall set out in more details the main aspects of the evidence for the prosecution, and, subsequently, the evidence that was tendered by and on behalf of Bowen.

Evidence for the prosecution

[6] The prosecution called 29 witnesses at the trial. According to their evidence, at about 6:15 on the evening of 16th December 2003, Ms. Barthley was speaking with one Moses Daniel in the yard of the Seventh-Day Adventist Church which is close to Bowen's law office. At the time, Bowen and one Keith Joseph were standing by Bowen's vehicle which was parked in the vicinity. The choir was rehearsing at the Church. Bowen went towards his office after Joseph left. This was at about 7:30 in the evening and the choir rehearsal had by then ended. In an incident, which then ensued, Ms. Barthley sustained the bullet wound in her neck from a licensed gun which Bowen was carrying.

[7] Police Constable Rae Charles, Eusi Kingston and other members of the choir were standing outside the gate of the Church at the time. They heard what sounded like a firecracker. Shortly thereafter, Constable Charles went towards his vehicle which was parked in the vicinity of Bowen's office. He saw Bowen sitting

on the steps of the building which housed his office. He saw Ms. Barthley lying on the ground not far from his motor car. Bowen had by then called the police and reported the incident to them. As a result of the report, Detectives Sergeant Arthur Edwards and Corporal Thomas Francis arrived at the scene outside of Bowen's office. Personnel from the Emergency Medical Services were there attending to Ms. Barthley. There was blood on her neck. The detectives spoke with Bowen. He handed over to Sergeant Edwards a black Pietro Beretta .25 pistol which contained 8 rounds of ammunition. The police recovered a spent shell and other items from the scene of the incident. Bowen was detained. He was later arrested and charged with wounding Ms. Barthley. The charge was upgraded to murder when she later died.

[8] Keith Joseph said in evidence that on 16th December 2003, he conversed with Bowen outside of Bowen's office for about 45 minutes. He then went to Joe Mike's and, on leaving, he was about to open the door of his car when Bowen called him by telephone and informed him that "the lady get shot". He returned to Bowen's office and saw Ms. Barthley lying motionless on the ground outside. Bowen told him that she attacked him, choked him with his tie and bit his finger and she got shot. In cross-examination, after he refreshed his memory from his statement, Joseph said that he had told the police that Bowen told him (Joseph) that he (Bowen) tried to hit Ms. Barthley with the gun butt and the gun fired.

[9] Constable Rae Charles was a member of the Seventh Day Adventists Church choir. His evidence was that at about 7:30 on the evening of 16th December 2003, he was in the churchyard with other choir members, including Eusi Kingston and Moses Daniel, when he heard what sounded like a firecracker. When he approached his motor car which was parked in the vicinity of Bowen's office building he saw Bowen sitting on the steps. He also saw a woman lying on the ground. Someone asked Bowen what happened and he replied: "she bite me and I shot she". Eusi Kingston who arrived on the scene with Constable Charles confirmed this.

[10] In his evidence, Police Constable Sean Wayne said that at about the time of the incident, he was driving in the vicinity of the Church when he saw the ambulance close to Bowen's office. He alighted from his car and saw a young woman lying on the street bleeding from the neck. He also saw Bowen who appeared to be worried. He asked Bowen what happened. Bowen said to him: "I was going to my office and felt someone grab me or hold me from behind and she got shot". Bowen pointed towards the woman who was lying on the ground and shook his head.

[11] Police Corporal Thomas Francis said that he received the report of the incident by telephone from Bowen at about 7:44pm on 16th December 2003. When he arrived at the scene the ambulance and emergency crew were there. Ms. Barthley was lying on the ground. Bowen handed over a pistol to him. Under cross-examination, he denied that Bowen told him that Ms. Barthley was shot "accidentally". Corporal Francis called Police Sergeant Arthur Edwards. Sergeant Edwards said that when he arrived on the scene, Bowen explained to him that he (Bowen) was walking towards his office when he felt a push from behind. He looked around and saw Ms. Barthley who said to him "me go kill you". He pushed her back and said to her "woman leave me alone". She then held on to his index finger and bit him. He took out his gun to strike her with it and a bullet went off and she was shot.

[12] Inspector of Police Fitzroy Anthony said that Bowen told him that he (Bowen) drove up to his office to work. He met Keith Joseph outside and they spoke for about 45 minutes. He then ran towards his office. As he approached the first landing, someone accosted him and pushed him onto a bus. The person pushed a hand in his face and bit him on his finger. He thereupon reached into his pocket and took out the gun which he was carrying. The gun fired accidentally.

[13] Assistant Superintendent of Police, Wilhelm Samuels, a qualified armourer, said he issued the gun and 25 rounds of ammunition to Bowen on 16th November 2002 on the instruction of the Commissioner of Police. He said that the weapon had no

safety features. He testified that if a bullet is chambered in the gun, the bullet could be discharged on impact but only with a considerable amount of force. If the spring was faulty and the gun was loaded, it could have exploded with direct force. Mr. John Fuller, a legal practitioner and the holder of a firearm license for some 30 years, testified that he had a conversation with Bowen some time before the shooting incident. As a result of the conversation he examined Bowen's firearm. The gun was in very bad condition then and only the first shot would have been discharged if someone pulled the trigger. He cleaned the gun and gave it back to Bowen.

[14] The medical evidence showed that Ms. Barthley died as a result of a firearm injury which she sustained to the upper part of her neck. The bullet entered one side of her neck and exited from the other.

Evidence for Bowen

[15] In his defence, Bowen, who was the Antigua Labour Party's representative for the constituency in which Ms. Barthley and her mother lived, testified that he had a friendly relationship with Ms. Barthley's mother. She asked him to assist Ms. Barthley to meet the tuition to pursue a computer course. He provided that assistance. His relationship with Ms. Barthley developed into an intimate one in early 2002. She sometimes drove from her home to work and returned with him. As a result of a letter he sent to the then Prime Minister in May 2002, he started to fear for his life. He told Ms. Barthley that he feared for her safety as well and suggested that they should only be friends. She was not happy with his decision. She wanted to resume the relationship.

[16] According to Bowen, around May 2003 Ms. Barthley started to harass him. She called him at all hours during the day or night in his office, on his cellular phone and at home. He also referred to specific incidents. In this regard he alleged that she broke into his house and ransacked it on one occasion. On another occasion, she broke his window, while he was in the house. The police found her in his

home under the bed. On another occasion she followed and attacked him at his office. He made reports at the Police Station. Notwithstanding his reports, she subsequently returned to his office on an occasion and only left when someone asked her to leave. Later that night she went into his apartment. He awoke to find her on top of him with a knife at his throat. She took the keys for his car and his cellular phone. He was about to take her to her home, but she jumped onto the bonnet of his car.

[17] Bowen said that at around 6:40 to 6:45 on the evening of the 16th December, 2003, he was speaking with Keith Joseph outside his office. He then headed to the office and had just walked past a bus that was parked in front of the building which housed his office when he heard a rushing sound behind him. He immediately felt fearful and instinctively placed his right hand on his gun. He then received a blow at the back of his head. He then heard Ms. Barthley's voice. She pushed him onto the bus and said "boy, me going kill you". She struck him on his face. She bit his finger. He was hitting her to get her to stop. He instinctively put his hand into his pocket and took out his gun and cocked it. When his hand came out of his pocket he hit her twice across the face while the gun was in his hand. He heard the gunfire and realized that Ms. Barthley was injured. He said he did not want to shoot Ms. Barthley. He insisted that his action was an instinctive reaction to pain and fear.

[18] According to Bowen, after the incident he called the police and told them that a young woman was accidentally shot outside of his office, and he needed an ambulance immediately. He then went downstairs and sat on the step of his office. He saw a number of persons, including Keith Joseph. He specifically disputed the police account, particularly the evidence of Corporal Thomas Francis, who said that Bowen did not tell him that Ms. Barthley was accidentally shot.

[19] Retired Assistant Commissioner of Police, Cardinal King, Senior Sergeant, Charles Edwards and Sergeant Sinclair Josiah testified that prior to the incident of 16th December 2003, Bowen had made a number of reports to the police that Ms.

Barthley had broken into his house and entered his office, assaulted him and threatened to kill him. Senior Sergeant Charles confirmed the incident that occurred when the police found Ms. Barthley under Bowen's bed.

The directions on Intention

[20] Sir Richard Cheltenham complained that the learned trial judge misdirected the jury on intention, and thereby deprived Bowen of a fair chance to be acquitted. He submitted that the judge erred by including in the directions on intention to the jury references to carelessness, recklessness and negligence. He said that the judge thereby imported the discredited concept of the death of the deceased being the natural and probable consequences of his acts. Counsel further complained that the judge erred by giving a direction which imported an objective rather than the required subjective test for intention when he asked the jury to consider whether Bowen did an act which another man in like circumstances, a prudent and reasonable person would not have done.

[21] Sir Richard referred to 2 aspects of the summation, among others. In one aspect, the learned trial judge gave the following directions:[3]

> "In law, … if a person does an act of such a kind or in such a manner that if he use (sic) reasonable caution and plain common sense he would realise that his action would probably cause or contribute to cause a particular event and there would be a greater risk of that event causing the particular event, then he [is] taken to cause that event."

Learned senior counsel submitted that this direction was confusing. He contended that the directions on intention were further confused on yet another occasion, when the learned judge misdirected the jury in much the same terms as he had done in this passage to which he added that, to put it another way, in law, a man is intended to cause or is taken to intend the natural consequences of his act.[4] Learned senior counsel said that while this was a direction on causation, it was

[3] See page 309, line 26 to page 310, line 4 of Volume 2 of the Record of Appeal.
[4] See page 315, lines 1-9 of Volume 2 of the Record of Appeal.

given in the context of the jury's need to decide Bowen's intentions. He submitted that if the direction was meant to convey that a person must be taken to intend that which he would reasonably foresee as the likely result of his action, then it was a clear misdirection. It was a serious misdirection in any event, he said, because it confused the issue of actual causation with intention.

[22] Mr. Armstrong, the learned Director of Public Prosecutions, quite properly and in the highest traditions of practice, conceded that the judge erred in the directions which he gave on intention because the judge couched the directions in objective rather than subjective terms.

[23] In the judgment in Henry Weekes and Others v The Queen[5] I observed[6] that there is now no constructive malice for murder in Antigua and Barbuda because it was abolished by section 10(1) of the Offences against the Person Act.[7] I noted, however, that this statute did not abolish the doctrine of malice aforethought. The result is that in order to render any person guilty of murder, the prosecution is required to prove an intention to kill or to cause grievous or really serious bodily harm or some other form of express or implied malice. This requires a subjective intention by the accused. It is sufficient for an accused to foresee that harm 'might' or 'may' occur, although it is not necessary that the accused foresees that it would definitely occur.[8]

[24] The trial judge therefore correctly directed the jury that they were entitled to consider whether the acts, which caused the death of Ms. Barthley, were such that death or serious bodily harm was the natural and probable result. He erred, however, when he failed to explain 'probability' to the jury or to direct them to Bowen's degree of probability and to his subjective foresight or belief.[9]

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[5] Antigua and Barbuda Criminal Appeal Nos. 13-18 of 2003 (26th March 2007.).
[6] At paragraphs 30 and 31.
[7] Chapter 300 of the Revised Laws of Antigua and Barbuda, 1991. The United Kingdom did so by Section 1 of the Homicide Act, 1957 (UK).
[8] See Rushworth (1992) Cr. App. R. 252; DDP v A [2001] Crim. L.R. 140. Also see, generally, Blackstone's Criminal Practice, 2005, at paragraph A2.7, pages 27 and 28.
[9] See paragraph 29 of the Henry Weekes judgment.

[25] The critical question, however, is whether these were material misdirections that would vitiate the verdict. In this regard, it is my view that Bowen's conviction for manslaughter could be taken as acknowledgment that, while there was an absence of intention to kill, he had committed an unlawful act. I think that a reasonable jury properly directed would have found manslaughter on the basis of Bowen's own evidence at the trial[10] that when Ms. Barthley bit his finger and he was hitting her to get her to stop, he then instinctively put his hand into his pocket, took out his gun and instinctively cocked it. His hand came out of his pocket and he hit Ms. Barthley twice across her face with the gun in his hand and the gun fired. This evidence speaks to an unlawful and dangerous act on which basis the manslaughter verdict could have been properly founded. The misdirection on intention would therefore have had no impact on this appeal against Bowen's conviction for manslaughter. I would therefore dismiss the appeal on this ground.

Accident

[26] The main thrust of Sir Richard's complaint in relation to the directions on accident was that those directions were bad in that they were tainted by the learned judge's misdirections on intention.

[27] The learned trial judge gave the following general directions on accident:[11]

> "…The accused is saying it was an accident. … Accident in the sphere of criminal law has a variety of meanings or rules. One rule is that killing which occurs in the course of a lawful act without negligence is an accident. Accident has also been held to mean that it is not willed - - the action is not willed, an action which is not deliberate or intended. Again, it is the Prosecution's duty to negative this defense beyond reasonable doubt. Upon being attacked by the deceased, the accused was entitled to seek to deal with his attacker, but was he lawful … was he careful and prudent? Or was the accused doing some[thing] which an ordinary, careful, prudent man ... in like circumstance would not do by reason of which another person is endangered in life or body? It will be

[10] Referred to at paragraph 17 of this judgment.
[11] At page 315 line 20 to page 316 line 18 of Volume 2 the Record of Appeal.

recalled that the accused said in cross examination:

> 'I pulled out my hand and started hitting her. The gun was in my hand. Both the firearm and my hand were hitting her. Upon reflection, I think I had the forward part of the firearm. She was biting me and it was painful'."

"You have to consider all these circumstances relating to [the] holding and the use of the firearm by the accused." (Emphasis added.).

[28] He continued:[12]

> "If you consider that it was an accident, well, then that's the end of the matter because accidental killing is not an offense. It is, however, a rule of law that an intent to kill negates the defense of accident. In other words, if you find that there is an intention to kill, well, then accident has no place in the scheme of things. So, Mr. Foreman, the question is, do the events fall within the definition of a killing occurring in the course of a lawful act? He heard a noise, he thought he was being attacked, he is entitled to respond, but was there negligence in the interim to render it an accident? Sorry - was without negligence - sorry - without negligence. In other words, as I told you it has a variety of shades of meaning. It means an act that is not willed, an act which is not deliberate or intended. If it's not intended, it's not deliberate, if he did the act and there was no negligence, well, then it's an accident. Outside of that, you have to consider all the circumstances to see whether there was an accident. But as I told you, if you find that there was intention to kill, that negates the defense of accident." (Emphasis added.).

[29] The judge concluded the summation on accident as follows:[13]

> "If you are satisfied that the Prosecution has proved all the elements of murder, beyond a reasonable doubt in accordance with the law as I have outlined it to you, and you are sure that the Prosecution has negative the defense of accident, you can convict the accused of murder after consideration of the other defences."

[30] Mr. Armstrong submitted, in effect, that accident was not a proper defence to be considered in this case. This, he said, was because, although Bowen said that Ms. Barthley was accidentally shot, there was no evidence to show that she was actually shot by accident. However, the defence's case was that the fatal injury to Ms. Barthley occurred when the gun which Bowen carried accidentally discharged during a struggle between them. In my view, the judge's reference to the relevant

[12] At page 316 line 19 to page 317 line 9 of Volume 2 the Record of Appeal.
[13] At page 323 lines 10-14 of Volume 2 the Record of Appeal.

evidence in his summation on accident supports this. The evidence raised accident in the context of the gun firing when Bowen hit Ms. Barthley with his hand in which he held the gun. It therefore fell into the first category of cases referred to in Ramlogan v The State[14] in which a defendant admits that he caused the injury but insists that it was not of his own volition. I therefore think that it was a matter for the jury and the trial judge correctly gave directions and asked the jury to consider accident. The question that arises is whether those directions were adequate.

[31] In my view the judge correctly stated the burden and standard of proof required for the defence of accident. He also correctly told the jury that an intention to kill negated accident and, further, that accident only arises where the actions of the accused person were not willed, deliberate or intended. I do not agree that the errors in the directions on intention to murder impacted the directions on accident. I think that it is important to recall that while directions on intention to murder focus on the intended consequences of the act of an accused, directions on accident are intended to focus more closely on the intended action of an accused person.

[32] My concern, however, is that the directions that relate to the effect and/or the degree of culpable negligence that would have negated accident was not adequately explained to the jury. The directions on this aspect of the case were also confusing. It is my view that the directions on accident were misdirections to this extent. It would have been open to the jury to find that there was or that there was no accident on Bowen's evidence. The critical issue is not intention, but rather, whether in the circumstances disclosed by the evidence, the gun was discharged by Bowen's own volition or otherwise. It cannot be said with certainty that it was not open to the jury to acquit Bowen, period, on the evidence if they were properly directed on the degree of culpable negligence that would have negated accident. In my view, the failure of the judge to direct the jury properly on this aspect of accident was a material misdirection, on which basis I would allow

[14] (2001) 58 WIR 374, at page 383c.

the appeal on the ground of misdirection on the defence of accident.

Self-Defence

[33] The matters which should be taken into account in directions on self-defence were conveniently adumbrated by Lord Morris in Palmer v R.[15] Lord Morris stated that while there is no required form of words, the judge should give a clear exposition of the concept of necessary self-defence relating this to the facts of the case. According to Lord Morris, the basic consideration is that it is good law and good sense that a man who is attacked may defend himself, but that in doing so he may only do what is reasonably necessary in the circumstances of the case. Where an attack is minor, it may be only sensible to take some avoiding action. It would not be self-defence, but rather an act of retaliation, if an accused takes steps, which are wholly out of proportion to what is necessary for self-defence in order to avert the danger. If the attack upon the accused was over and the peril was no longer present, the use of force would be retaliation and not self-defence.

[34] Whether an accused person acted in self-defence is a matter for the jury. They must decide, on the evidence, whether the attack was such that self-defence was reasonably necessary and whether the act by the accused was reasonably proportionate in the circumstances. The jury should be directed to note that a person who is defending himself cannot weigh to a nicety the exact measure of his defensive action. The test is subjective. The jury should decide whether an accused took what he honestly and instinctively thought was necessary reasonable defensive action in a moment of unexpected anguish.

[35] As far as the burden of proof is concerned, as long as there is evidence which raises self-defence, the prosecution must negative it beyond a reasonable doubt. The judge must direct the jury to acquit an accused if they find that the defence of self-defence succeeded or if they are left in reasonable doubt whether the accused

[15] [1971] AC 814 at pages 831-832.

was acting in self-defence.[16]

[36] Sir Richard complained that the learned trial judge erred in his directions to the jury on self-defence because the judge did not apply the statement of the law to the facts of the case, and relate it to the appellant's account that he struck a blow with the gun in self-defence without intending to discharge it. He said that the judge should have told the jury that if that blow was proportionate to the continued biting by Ms. Barthley, then all that Bowen did was an act of instinctive self-defence. Instead, said senior counsel, the judge presented the issue to the jury in these words:

> "If the prosecution has made you believe that the accused did not shoot Tessa Barthley in the belief that it was necessary to defend himself, then self-defence does not arise and he can be found guilty."

[37] Sir Richard further complained that the judge never explained to the jury that, if all that Bowen did was to strike Ms. Barthley with the gun without intending to shoot her, his act would have been lawful if the act of striking her was reasonable in the circumstances as he saw them to be. He could not be liable at all for the unintended consequences of the blow which caused the gun to discharge because it was never Bowen's case that he had deliberately shot Ms. Barthley in self-defence.

[38] With respect, I do not agree that the trial judge erred in his directions to the jury on self-defence. In his summation the learned judge stated:[17]

> "Now, if you accept that there was an accident, well, that's the end of the matter, as I told you. But if you reject it, you have to go on to consider the next defense that is self-defence. Now, let me tell you upfront, that self-defence is not revenge; self defence is here and now. Now, in several instances in testimony, the accused said that he had a fear. This is what he said on one occasion.
>
> > 'I passed near the bus and I heard a rush behind me. I immediately felt a fear. I put my hand in my pocket. As soon as I heard the rushing sound, I put my hand in my pocket with the gun

[16] See R. v Lobell [1957] 1 QB 547 and DPP (Jamaica) v Bailey [1995] 1 Cr. App.R. 257 (P.C.).
[17] From page 317 lines 10-23 of Volume 2 of the Record of Appeal.

and cocked it instinctively. Fear operated in my mind and I felt someone was going to get me.'

In cross-examination he said:

"I was fearful that somebody was coming at me, and I instinctively put my hand in my pocket."

[39] The learned trial judge then read a substantial part of the guidelines which Lord Morris stated in Palmer v R.[18] and continued:[19]

"What does the law of self-defense mean? The law is that a person acts in lawful self-defense if in all the circumstances he believes it is necessary for him to defend himself and the amount of force he uses is reasonable. This raises two questions: (i) Did the accused believe or may he have honestly believe[d] that it was necessary to defend himself? If the Prosecution has made you feel sure that the accused did not shoot Tessa Barthley in the belief that it was necessary to defend himself, then self-defense does not arise and he can be found guilty. But if he decide that it was - - or may have been acting in belief, you go on to consider the second question, which is, taking all the circumstances as the accused believed them to be, was the amount of force used reasonable? The law is that force in self-defense is unreason and unlawful if it is out of proportion to the nature of the attack or if it is in excess of what is really required of the accused to defend himself. So for example, if the accused began by defending himself and then he totally overreacted by turning an act of self-defense into a punitive attack and caused the death of Tessa Barthley in the course of attack, that would not be lawful. It is for you, Mr. Foreman and Members of the Jury, to decide whether the force used was reasonable, but let me remind you that the test that you apply is a subjective test. It is what the accused faced and what he did. It is not what the reasonable man [did], it's a subjective test."

[40] The leaned judge continued:[20]

"Consider all these circumstances. (i) The accused said he had an affair. Consider the nature of the attack. The accused said he saw the lady, Tessa, she had nothing in her hand. He said he felt a blow with a bag and he got two licks behind his head. He said he did not see anything in the deceased's hands. The deceased was 5′ 3", and one witness gave her weight as 120 pounds. In any event, Mr. Foreman, you have photograph 34, which shows the deceased lying in the hospital. And finally, she was alone. In deciding this, judge what the accused did in the background of what he honestly believe[d] the danger to be. You must also bear in mind

[18] See paragraph 30 of this judgment and from page 317 line 24 to page 319 line 2 of Volume 2 of the Record of Appeal..

[19] From page 319 line 3 to page 320 line 2 of Volume 2 of the Record of Appeal.

[20] From page 320 line 2 to page 321 line 2 of Volume 2 of the Record of Appeal.

> that a person who is defending himself cannot be expected in the heat of the moment to weigh precisely the exact amount of defensive action which is necessary. The [more] serious the attack or the threatened attack upon him, the more difficult his situation will be. If in your judgment the accused believed or may have believe that he had to defend himself against Tessa Barthley, and he did no more than what was - - he honestly and instinctively thought it was necessary to do, you may think that it .. would [be] strong evidence that the amount of force he used was reasonable. If you consider the force used was unreasonable, he could not be acting lawfully in self-defense and as such self-defense does not apply. If self-defense applies, in other words, if the defense - - if the Prosecution has failed to negative self-defense then that is the end of the matter because self-defense is a complete defense; just like accident, complete defense. But if you are satisfied that the Prosecution has negatived it, it doesn't arise, then you have to go on to consider the next defense, which is provocation."

[41] These were, in my view, adequate directions on self-defence in which the learned judge correctly stated the law in a manner which was designed to permit the jury to understand it. He assisted them with the relevant evidence. He did not misdirect them on self-defence. I would therefore dismiss the appeal on this ground.

Good character directions

[42] In Troy Simon,[21] for example, this court stated the principles that would inform a judge whether a good character direction is required in a case.[22] In the present case the learned trial judge accepted that Bowen was entitled to a good character direction and actually gave one. Counsel for the parties agreed that the circumstances existed which made such a direction necessary. As far as the requirements of the directions are concerned, I noted in Troy Simon, with reference to Rupert Yearwood v The Queen,[23] that the authorities underline the principle that the good character of an accused is relevant to his credibility and to his propensity to commit the offence in question. A good character direction should therefore take these 2 elements into consideration.

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[21] Grenada Criminal Appeal No. 16 of 2003 (22nd May 2006.).
[22] See from paragraph 4 of the judgment. See also Patrick Lovelace v The Queen, St. Vincent and the Grenadines Criminal Appeal No. 33 of 2004 (9th October 2006.), from paragraphs 35-40.
[23] St. Vincent and the Grenadines Criminal Appeal No. 13 of 2002 (29th September 2003).

[43] In the present case, the learned trial judge gave the following directions on good character:[24]

> "What I wish to tell you is that arising out of the evidence of the accused is that he said that except for the dangerous driving charge, he never had a brush with the law before. And then Sergeant Charles Edwards said that he never knew him to be a person of bad character. He said he was held in high esteem in St. Phillip in the constituency and he described him as a gentleman. Now, the deceased' mother said that he was kind to her. Now, what I'd want to tell you i[s] that in the circumstances you are entitled to take into account what was said about the accused in court, and what weight you will attach to that in deciding guilt or innocence. Now, I am not telling you that good character means not guilty, I am just telling you in your overall consideration of … this matter … is it likely that a person of this kind of character would commit an offense of this nature? That is a matter you can take into account."

[44] Sir Richard complained that the learned judge erred in that while he accepted that Bowen was entitled to a good character direction, he only gave that direction in relation to Bowen's propensity to commit the offence but not in relation to his credibility. I agree. There was, for example, some conflict between the evidence of Bowen and that of Corporal Francis as to what Bowen said to the Corporal immediately after the fatal shooting. In his evidence, Corporal Francis insisted that Bowen did not tell him that he had shot Ms. Barthley accidentally.[25] Bowen, on the other hand insisted that he did say this to the officer.[26] This put Bowen's credibility in issue. Once his credibility was put in issue at the trial, a direction on good character indicating the importance of the direction on credibility was necessary. The trial judge's failure to give a good character direction going to credibility was a material misdirection and it cannot be known with certainly whether the jury would have acquitted him of manslaughter also if the learned trial judge had given the full direction. I would therefore allow the appeal on this ground.

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[24] See from page 304 line 21 to page 305 line 10 of Volume 2 of the Record of Appeal.
[25] See Volume page 214 lines 16-24 of Volume 1 of the Record of Appeal.
[26] See from page 87 lines 10-12 and page 88 lines 5-6 of Volume 2 of the Record of Appeal.

Summary and order

[45] In summary, I would dismiss this appeal on the ground that the trial judge erred by failing to put to the jury an alternative verdict of manslaughter arising from an unlawful and dangerous act leading to death. I would also dismiss this appeal on the grounds of misdirection on provocation, intention and self-defence. However, I would allow the appeal on the ground that there was a miscarriage of justice in that the learned trial judge erred by misdirecting the jury on accident and good character. It is my view that the proviso is not applicable to override the misdirections inasmuch as there is a material issue of credibility in the case. In the premises, I would allow the appeal and quash Bowen's conviction and sentence.

[46] The question which arises is whether this case should be remitted to the High Court for a retrial. In Andre Bennett and Another v The Queen,[27] the Privy Council reiterated that the issue of a retrial order depends upon whether the interest of justice and the public interest would be served by such an order. The main consideration is whether in the interest of the community and the family of the victim, a person who is convicted of a serious crime should be brought to justice and not escape merely because of some technical shortcoming in the conduct of the trial or in the directions to the jury. Their Lordships said that a critical factor is the seriousness of the crime. A countervailing consideration is fairness to the accused.

[47] The question then is whether the interest of justice and the interest of the community and the family of Ms. Barthley would be effectively served by a retrial. Mr. Bowen has served less than a half of his 5 year sentence. However, he could be released from prison in early July 2008 for good behaviour. He may only be retried for manslaughter and could apply for bail pending a retrial. On the other hand this was a serious incident in which a young woman lost her life. In these circumstances, I think that a retrial would serve the interest of justice and the

[27] Privy Council Appeal No. 74 of 2000 (Delivered on 17th July 2001.). See particularly paragraphs 36 to 56 of the judgment.

interest of the public and the family of Ms. Barthley. I would therefore give permission to the prosecution to proceed with a new trial of Mr. Bowen, if the prosecution so decides, on the charge of manslaughter.

Hugh A. Rawlins
Justice of Appeal

[48] Barrow J.A.: I agree with the conclusion reached by my brother, Rawlins JA that the appeal should be allowed and I rely on his summary of the evidence to add my own observations on the directions given by the trial judge on accident. I would also add my own observations on whether this court should order a retrial.

[49] As the trial judge mentioned in his direction[28], the word accident is used in the criminal law in different ways. One way in which it is used, in a case of homicide, is to refer to a death that the defendant causes, in the course of performing a lawful act, without intending to kill. In this sense, accident is used to refer to an unintended consequence. Another way in which accident is used is to refer to a death that the defendant causes by doing an action that he did not intend to do. Used in this sense, accident refers to an involuntary or unintended action. It follows, in this latter situation, that the consequence was also unintended.

[50] In both senses accident is used to refer to the absence of intention. If the jury is satisfied that a killing was an accident in either of those senses, it must return a verdict of not guilty of murder. This is because murder is a crime of specific intent. The basic definition of murder is that the defendant unlawfully and intentionally killed a human being. The crime is not committed unless it is proved that the defendant possessed the intention to kill.

[51] A defendant who kills by accident, that is, without intending to kill, may be found not guilty of any crime at all or he may be found guilty of the lesser crime of manslaughter. For him to be found guilty of manslaughter the prosecution must

[28] Reproduced in paragraph [27], above

prove that the killing was unlawful. This is where the other element in the definition of murder comes in. If death was caused neither intentionally nor by an unlawful act the verdict must be not guilty -- of either murder or manslaughter. The appellant's ground of appeal, that the judge misdirected the jury in relation to accident, targets the judge's direction on the element of unlawful action.

[52] In his directions the judge raised the issue of the lawfulness of the appellant's actions by saying to the jury that upon being attacked the appellant "was entitled to seek to deal with his attacker, but was he lawful …?" In the second extract from the judge's directions reproduced above, the judge repeated that the appellant was "entitled to respond". The judge, therefore, presented the case to the jury on the basis that it was open to them to decide that the action of the appellant in drawing his gun was not in itself an unlawful act. The judge's directions recognized that the lawfulness or unlawfulness of the appellant's actions, after drawing the gun in responding to the attack, was a major issue for the jury to determine. Indeed, that determination was decisive of the issue of manslaughter.

[53] The full text of the judge's directions on accident and the lawfulness of the appellant's actions is reproduced above.[29] It is sufficient to reproduce the following portions in which, after directing on the meanings of accident, the judge stated:

> "Upon being attacked by the deceased, the accused was entitled to seek to deal with his attacker, but was he lawful … was he careful and prudent? Or was the accused doing some[thing] which an ordinary, careful, prudent man ... in like circumstance would not do by reason of which another person is endangered in life or body? It will be recalled that the accused said in cross- examination:
>
> > 'I pulled out my hand and started hitting her. The gun was in my hand. Both the firearm and my hand were hitting her. Upon reflection, I think I had the forward part of the firearm. She was biting me and it was painful'."
>
> "You have to consider all these circumstances relating to [the] holding and the use of the firearm by the accused." (Emphasis added).

[29] At paragraphs [27] and [28]

[54] Having so directed the jury the judge went on to direct the jury that if they found it was an accident then that is the end of the matter because an accidental killing is not an offence. Following on that direction, the judge directed the jury on what is an unlawful act. He said:

> "So, Mr. Foreman, the question is, do the events fall within the definition of a killing occurring in the course of a lawful act? He heard a noise, he thought he was being attacked, he is entitled to respond, but was there negligence in the interim to render it an accident? Sorry - was without negligence - sorry - without negligence. In other words, as I told you it has a variety of shades of meaning. It means an act that is not willed, an act which is not deliberate or intended. If it's not intended, it's not deliberate, if he did the act and there was no negligence, well, then it's an accident. Outside of that, you have to consider all the circumstances to see whether there was an accident." (Emphasis added.)

[55] It is fundamental and settled law that negligence sufficient to found liability in civil proceedings is not sufficient to make a person criminally liable. This principle finds familiar expression in the words of Lord Hewart CJ in Bateman[30]:

> "the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving of punishment."

In Adomako[31] Lord Mackay clarified that the negligence the prosecution must prove to establish criminal liability must be so serious as to reach the level of 'gross'. In directing a jury a judge may use the epithet 'reckless', in its ordinary as opposed to legal sense, to convey the degree of negligence that the law requires before they can be satisfied that the negligence alleged has reached the criminal standard.

[56] In Misra[32] the English Court of Appeal considered the issue of gross negligence in a case where a patient died as a result of negligent medical treatment. The following extract from the judgment in that case shows the emphasis that must be given to making clear to the jury the degree of negligence that must be proved to

[30] (1927) 19 Cr App R 8 at pp.11-12
[31] [1995] 1 AC 171 at 187-188.
[32] [2005] 1 Cr App R 328

establish criminal liability.

60. Looking at the authorities since Bateman, the purpose of referring to the differences between civil and criminal liability, whether in the passage in Lord Mackay's speech [in Adomako] to which we have just referred, or in directions to the jury, is to highlight that the burden on the prosecution goes beyond proof of negligence for which compensation would be payable. Negligence of that degree could not lead to a conviction for manslaughter. The negligence must be so bad, "gross", that if all the other ingredients of the offence are proved, then it amounts to a crime and is punishable as such.

61. This point was addressed by Lord Atkin in Andrews at p. 582, when he referred to Williamson (1807) 3 C&P 635:

> "....where a man who practiced as an accoucheur, owing to a mistake in his observation of the actual symptoms, inflicted on a patient terrible injuries from which she died." To substantiate that charge – namely, manslaughter – Lord Ellenborough said, "The prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention." The word "criminal" in any attempt to define a crime is perhaps not the most helpful: but it is plain that the Lord Chief Justice meant to indicate to the jury a high degree of negligence. So at a much later date in Bateman [1925] 18 Cr. App. R 8 (sic) a charge of manslaughter was made against a qualified medical practitioner in similar circumstances to those of Williamson's case .... I think with respect that the expressions used are not, indeed they were probably not intended to be, a precise definition of the crime."

62. Accordingly, the value of references to the criminal law in this context is that they avoid the danger that the jury may equate what we may describe as "simple" negligence, which in relation to manslaughter would not be a crime at all, with negligence which involves a criminal offence. In short, by bringing home to the jury the extent of the burden on the prosecution, they ensure that the defendant whose negligence does not fall within the ambit of the criminal law is not convicted of a crime. They do not alter the essential ingredients of this offence. A conviction cannot be returned if the negligent conduct is or may be less than gross. If however the defendant is found by the jury to have been grossly negligent, then, if the jury is to act in accordance with its duty, he must be convicted. This is precisely what Lord Mackay indicated when, in the passage already cited, he said, "…The jury must go on to consider whether that breach of duty should be characterised as gross negligence and *therefore* as a crime" (our emphasis). The decision whether the conduct was criminal is described

> not as "the" test, but as "a" test as to how far the conduct in question must depart from accepted standards to be "characterised as criminal". On proper analysis, therefore, the jury is not deciding whether the particular defendant ought to be convicted on some unprincipled basis. The question for the jury is not whether the defendant's negligence was gross, and whether, *additionally*, it was a crime, but whether his behaviour was grossly negligent and *consequently* criminal. This is not a question of law, but one of fact, for decision in the individual case.

[57] The direction that the trial judge gave to the jury in the instant case entirely failed to convey to the jury that mere negligence was not sufficient to make the appellant criminally liable for causing the death of Ms. Barthley. The judge directed the jury, firstly:

> "Upon being attacked by the deceased, the accused was entitled to seek to deal with his attacker, but was he lawful … was he careful and prudent? Or was the accused doing some[thing] which an ordinary, careful, prudent man ... in like circumstance would not do by reason of which another person is endangered in life or body?"

Having so directed, when the judge directed, secondly,

> "if he did the act and there was no negligence, well, then it's an accident",

the unmistakable effect was to convey to the jury that the element of an unlawful act, required to satisfy the definition of manslaughter, was met by proof of negligence. The direction that negligence of the degree that the judge twice identified as being a failure to be "careful and prudent," was sufficient to make the appellant's action unlawful and make him criminally liable, was a fatal misdirection.

[58] The misdirection was only compounded by the judge telling the jury, "if he did the act and there was no negligence, well, then it's an accident". In the context of the judge's directions this meant, if one considers the converse of what the judge said, that if there was negligence (even if sufficient only to found civil liability) the 'defence' of accident could not succeed. This seems directly contrary to common understanding and could only have confused the jury. As ordinary persons understand it, "an act that is not willed, an act which is not deliberate or intended", as the judge put it, which results in injury or death, is frequently an act that is done negligently. The ordinary person is familiar with the idea that an unintended act, an

accident, is the result of negligence. A common example is a collision resulting from the negligent driving of a motor vehicle. But as the judge directed the jury, he equated accident with the absence of negligence. In effect the judge was directing the jury that they could only uphold the defence of accident if there was no negligence. This made worse the already fatally flawed misdirection to the jury.

[59] I would allow the appeal on the basis that the judge's misdirections to the jury on the defence of accident constituted serious errors in law and made the trial unfair. Because this homicide attracted great public attention I consider whether to order a retrial.

[60] It makes a fundamental difference to the question, should the court order a retrial, to appreciate that the jury has acquitted the appellant of the crime of murder. The jury's verdict is that the appellant did not intend to cause the death of Ms. Barthley. The appellant cannot be retried for the crime of murder: he is conclusively not guilty of murder. By appealing against his conviction for manslaughter the appellant did not reopen his acquittal for murder, so as to make him liable to be retried for that offence.

[61] When their Lordships stated, in Andre Bennett v The Queen[33], that a critical factor in considering whether to order a retrial is the seriousness of the crime, their Lordships were undoubtedly referring to the seriousness of the crime for which the appellant may be retried. Their Lordships could not have been referring to the seriousness of the crime with which the appellant had originally been charged, since he cannot be retried for that crime.

[62] The offence for which the appellant may be retried is involuntary manslaughter. On the facts of this case and as reflected in the jury's verdict, the degree of criminality that could be alleged against the appellant is of a far lesser degree than is contained in another type of manslaughter, such as causing death in the course of

[33] Privy Council Appeal No. 74 of 2000

a robbery. The sentence of the appellant upon his conviction to a term of imprisonment for five years may properly be taken as further indication of the lesser seriousness of this particular instance of the crime when it is considered that the maximum punishment that could have been imposed on the appellant on his conviction for manslaughter was life imprisonment.

[63] Another aspect of sentencing that impacts the consideration of whether to order a retrial is that if the appellant were convicted upon a retrial, a similar sentence of 5 years' imprisonment, which would presumably be considered appropriate, would be only the starting point. The sentencing judge would have to consider reducing the nominal sentence of 5 years' imprisonment to take account of the fact that the homicide occurred on 23rd December 2003 and the appellant has been in prison since his conviction on 22nd February 2005: almost two and a half calendar years. The appellant, if retried and convicted, would possibly be sentenced to imprisonment for not more than 2 ½ calendar years.

[64] It seems to me that the public interest would not be served by ordering a retrial in a case where the appellant has been acquitted of murder and cannot be retried for that offence and on a retrial for manslaughter, if convicted, would probably not be sentenced to more than 2 ½ years' imprisonment.

[65] Further, the strength of the prosecution's case is not overwhelming: the appellant's testimony that his gun accidentally discharged would be the only evidence as to how the deceased was killed. Even if, properly directed, a jury was to conclude that the appellant was grossly negligent, a sentencing judge would be entitled, especially on a trial limited to manslaughter without the taint of murder, to view this as a borderline case of criminality. In such a situation it would be open to the judge to impose a non-custodial sentence in view of the ordeal of two trials that the appellant would have undergone and the time he has already spent in prison.

[66] In considering whether to order a retrial – which is a misleading expression since the substance of the order is not that the court is ordering that the accused be

retried but rather that the prosecution is given permission to proceed with a new trial against the accused - an appellate tribunal must also consider fairness to the accused. I have already stated my view that this is not a case in which the evidence of guilt is overwhelming so, on that view, there is a good likelihood of an acquittal on a retrial. On such a scenario greater weight must be given to the potential injustice of putting an accused through another trial after he has already been through one trial and an appeal. The present form is different from the forms of trial that once prevailed, such as trial by battle and trial by ordeal, but a trial is still an ordeal. To permit the prosecution to bring another prosecution, to put the appellant through another ordeal, is a departure from the basic rule that a man may only be tried once for the same offence. To order a retrial is an exceptional order; it is not the usual order. The usual order, upon a successful appeal against a conviction, is to quash the conviction and discharge the accused.[34] The factors present in this case do not justify the exceptional order.

[67] In my view there can be no significant public interest in ordering a retrial.

Denys Barrow, SC
Justice of Appeal

[68] ALLEYNE, C.J.: I have read the judgments of my brothers and agree with the decision of Rawlins JA and the order which he proposes to make. Accordingly, the order in this appeal is that Mr. Bowen's conviction for manslaughter is quashed and the sentence set aside. It is further ordered that the Director of Public

[34] See the discussion in Blackstone's Criminal Practice 2007 at D24.53 and D 24.54, which begins with the statement "The normal consequence of a successful appeal is that the conviction is quashed, and the Crown Court is directed to enter a verdict of acquittal in place of the record of conviction (Criminal Appeal Act 1968, s. 2(2). It follows that the successful appellant cannot be retried either for the offence in respect of which the appeal was brought or for any other offence of which he could have been convicted by way of alternative verdict."
In Andre Bennett Lord Steyn stated in his dissenting judgment, at paragraph 48, on the authority of the relevant statutory provision in Grenada, that "An order for a retrial may only be made if the interests of justice so require …" The majority opinion in Bennett, at paragraph 36, relied on a similar principle expressed by Lord Diplock in Reid v The Queen [1980] AC 343 at 350B that " … any criminal trial is to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so."

Prosecutions be at liberty to initiate a retrial on a fresh indictment on the charge of manslaughter.

Brian Alleyne, SC
Chief Justice [Ag.]