`EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCRAP 2010/006

BETWEEN:

SHONOVIA THOMAS

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Don Mitchell — Justice of Appeal [Ag.]
The Hon. Mr. Mario Michel — Justice of Appeal [Ag.]

Appearances:

Ms. Tana'ania Small, with her, Ms. Tamara Cameron and
Ms. Akilah Anderson for the Appellant
Mr. Valston S. Graham, Senior Crown Counsel for the Respondent

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2012: January 20;
August 27.

Criminal appeal – Self-defence – Provocation – Whether judge ought to have left the defence of provocation to the jury when the defence was one of self-defence –Time spent on remand ought to be taken into account during sentencing

The appellant, Shonovia Thomas, was charged for the offence of murder of Archie Todman, with whom she had a tumultuous romantic relationship. The prosecution's case was that on 2nd October 2008 Shonovia went to Todman's house, undressed and got into bed beside him but he was unreceptive to her presence. She felt rejected and got dressed but before she left Todman's house she pulled out a rat tail comb from her bag and stabbed him in the chest with moderate to strong force when he was lying in bed. As a result of the stabbing Todman pursued Shonovia outside the apartment where an altercation ensued. He eventually collapsed and was found by Vincent Wattley, a neighbor, whom he told that Shonovia was the one who stabbed him.

The defence case was one of self defence. Shonovia denied that she stabbed Todman while he was in his apartment but claimed that the stabbing took place outside the apartment when Todman pursued her after she left the apartment and violently attacked her. In an effort to defend herself, she reached into her handbag, pulled out a rat tail comb and swung it at Todman. She did not know what part of Todman's body it came into contact with; she only wanted to get Todman off her.

At trial, Shonovia was acquitted of murder but unanimously convicted of manslaughter by reason of provocation and sentenced to ten years imprisonment. Shonovia appealed her conviction and sentence on various grounds which included that the learned trial judge should not have left the partial defence of provocation to the jury; the verdict of manslaughter by reason of provocation cannot be sustained having regard to the evidence and as such the conviction is unsafe; the judge did not give any directions or adequate directions on the law pertaining to self-defence and that the sentence imposed was unduly harsh in all the circumstances.

Held: dismissing the appeal against conviction and allowing the appeal against sentence to the extent that the period of 14 months and 15 days is deducted from the sentence that was imposed, that:

1. The evidence presented at trial by both the prosecution and the defence was left before the jury and it was open to the jury to decide which version they would accept and which version they would reject. There was sufficient evidence placed before them to negate self-defence. The mere fact that they rejected Shonovia's version of the events does not render the conviction unsafe and unsound.

2. If on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to the jury, and whether or not the issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked. The trial judge identified the evidence from the Crown's case and the defence case that could have amounted to provocation. As such, the learned trial judge was correct in leaving the partial defence of provocation to the jury.

   Mancini v Director of Public Prosecutions [1942] AC 1 applied; Joseph Bullard v the Queen [1957] AC 635 applied; Kwaku Mensah v The King [1946] AC 83 applied; Tabeel Lewis v The State [2011] UKPC 15 applied.

3. Evidence of provocation and the loss of self-control are two closely connected aspects of the same limb of the provocation defence and are usually combined as a single composite. In the circumstances of this case, having identified the evidence that could amount to provocation, that same evidence would go to support the conclusion that Shonovia had lost her self-control. The learned judge specifically indicated to the jury the evidence that could go towards loss of self-

control. Accordingly, it cannot be said that there was no evidence on which the jury could reasonably find that Shonovia had a sudden loss of self-control.

Tabeel Lewis v The State [2011] UKPC 15 applied; R v Van Dongen (Anthony Gerrard) [2005] EWCA Crim 1728 applied.

4. Where a summation is criticised on the grounds that it lacks fairness and balance, the criticisms have to be considered in the context of the summation as a whole and the various issues which arose for decision. An appellate court is enjoined to look at the thrust of the directions and consider whether they have adequately put the several issues before the jury and given them a proper explanation of their task in relation to those which they have to decide. The learned trial judge did set out the salient issues during the course of the summation and directed the jury accordingly. She put Shonovia's defence to the jury at all material times so that they were aware of what her defence was. In addition, she gave detailed instructions on the law of self-defence. Consequently it cannot be said that the direction from the judge could have caused any unfairness to Shonovia.

   Daniel Dick Trimmingham v The Queen [2009] UKPC 25 followed.

5. The judge directed the jury that they must feel sure of the intention of the accused before the accused can be guilty of murder and that they cannot convict of murder unless they feel sure that the accused had the specific intent to kill or the specific intent to cause grievous bodily harm to Todman. In the circumstances of this case, the jury would have found that there was a virtual certainty that at the very least Shonovia had an intention to cause serious bodily harm to Todman when she stabbed him and that she appreciated that this was the case. Having found that Shonovia was provoked the jury returned a verdict of manslaughter by reason of provocation. This verdict is not unfair or unsafe in all the circumstances.

   R v Woollin [1999] 1 Cr App R 8 applied; R v Nedrick [1986] 1 WLR 1025 applied;

6. The primary rule is that in the absence of unusual circumstances a judge should fully credit a prisoner for pre-sentence custody not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing. The judge should state with emphasis and clarity, what he or she considers to be the appropriate sentence taking into account the gravity of the offence and mitigating and aggravating factors, that being the sentence he or she would have passed but for the time spent by the prisoner on remand. In the absence of exceptional circumstances real credit has to be given to the time spent on remand. The sentencing exercise must demonstrate how the time spent on remand is taken into account in order to give efficacy to it, thus redounding to the actual benefit of the prisoner. This conduces to transparency, avoids uncertainty or ambiguity and eliminates or reduces the risk of injustice occasioned by an error in principle. Although the leaned judge stated that the time spent on remand was taken into

account, it is evident that no credit was given to Shonovia for the time spent on remand. The judge accordingly erred in principle. As a result, the sentence imposed must be adjusted taking into account the time Shonovia spent on remand.

Callachand & Anor v State of Mauritius (Mauritius) [2008] UKPC 49 applied; Romeo Da Costa Hall v The Queen CR1 of 2010, [2011] CCJ 6 applied.

JUDGMENT

[1] BAPTISTE, JA: Shonovia Thomas and Archie Todman were involved in a four year old tumultuous romantic relationship. The relationship came to a tragic end in the early hours of 2nd October 2008 when Shonovia fatally stabbed Todman in the chest with a rat-tail comb. Shonovia was tried before a judge and jury for the offence of murder. On 15th June 2010, following a two week trial, Shonovia was acquitted of murder but unanimously convicted of manslaughter by reason of provocation and sentenced to ten years imprisonment. Shonovia has appealed her conviction and sentence.

Case of the parties

[2] On the Crown's case, the stabbing took place at Todman's home at Huntum's Ghut, Tortola, between 2 and 3 a.m. on 2nd October 2008. It was the Crown's case that Shonovia, having left a social function, went to Todman's home, - to which she had a key, - undressed and got into bed besides him but he was unreceptive to her presence. Todman sucked his teeth and muttered to himself. Shonovia felt rejected but did not handle the rejection very well. She got dressed and decided to leave but before leaving she pulled out a rat tail comb from her bag and stabbed Todman in the chest with moderate to strong force when he was lying in bed, then left the apartment. As a result of the stabbing Todman pursued Shonovia outside the apartment where an altercation ensued. Todman collapsed and was found by Vincent Wattley, a neighbour.

[3] Wattley gave evidence that he was in bed watching television with his girlfriend when he heard a loud noise outside as if someone or something had fallen.

Before hearing that noise, he did not hear any other noise. He muted the television so that he could hear more keenly. Then he heard a sound as if someone was groaning. He looked out and saw Todman lying on the ground. Wattley inquired of Todman what had happened. Todman stated that Shonovia stabbed him with something pointy and proceeded to hold his chest indicating where he had been stabbed. Wattley observed a little hole on the right side of Todman's chest. Todman stated "why she do me this, why she do me this". Todman continued saying "Shonovia, Shonovia, why she do me this. I was there in my bed, why Shonovia do me this". According to Kimana Walsh, Wattley's girlfriend, Todman said "I laid down in bed to sleep and she just prick me with something pointed". The Crown's case is that Shonovia had the intention to kill or at the very least to cause Todman grievous bodily harm. Todman was unarmed when Shonovia stabbed him and she was not provoked.

[4] Shonovia's case is that she was defending herself from a violent attack from Todman and did not intend to kill him or cause grievous bodily harm. Shonovia's evidence is that she went into Todman's apartment and let herself in with a key and got into bed with him. Todman did not speak to her, but sucked his teeth and was grumbling. Shonovia concluded from Todman's behavior that she was not wanted although he never spoke to her. In her audio interview Shonovia said that about two or three minutes into her lying down, Todman started to stupes and grumble so she caught the drift. She knew that she wasn't wanted so she got dressed, took her bag and headed for the door. While trying to close the door, Todman came out and attacked her. Todman followed her outside. Todman shoved her around, pushed her into parked vehicles and against the concrete pavement in the parking lot. The physical assault intensified with her head and upper body being pushed into the ground as he stood over her. In an effort to defend herself, she reached into her handbag, pulled out a rat tail comb and swung it at Todman. She did not know what part of Todman's body it came into contact with. Shonovia said that she only wanted to get Todman off her. She thought the comb would "chook" (prick) his hand so she could get off and run.

That's what she thought would have happened. Shonovia also gave evidence that she was the victim of domestic abuse at the hands of Todman for several years.

[5] Shonovia's counsel, Ms. Small, contends that there was physical evidence to support Shonovia's account of events. In addition to the debris outside the building (the broken concrete block, the dropped keys, the broken ear-ring and the pointed piece of metal that was the tail of the comb) Shonovia bore signs of injury that were documented by the police photographer within hours of the incident. Ms. Small points out that a crown witness, Dr. Balogun, confirmed that Shonovia had injuries which were consistent with being scratched against a brick wall. The pathologist confirmed that it was possible for the fatal injury to have occurred in the manner depicted by Shonovia.

[6] Given the absence of any significant injury to Shonovia (the only injury seen on Shonovia was a minor abrasion to her lower left leg) pitted against the level of violence she claimed to have been subjected to, the Crown invited the jury to reject her account of events. The learned judge left the defence of self defence as advanced by Shonovia to the jury and provocation as arising on the evidence. Shonovia did not rely on provocation. As stated, Shonovia was found guilty of manslaughter by reason of provocation. Shonovia advanced several grounds of appeal against conviction and sentence. With respect to the conviction, the grounds concern non-directions and misdirections in the summation.

Unsafe verdict

[7] Ms. Small, Shonovia's counsel, contends that the verdict of manslaughter by reason of provocation cannot be sustained having regard to the evidence and as such the conviction is unsafe. Ms. Small argues that the Crown's case was that Shonovia stabbed Todman while he lay in bed and that the act was unprovoked. The Crown provided no explanation for the evidence of a struggle having occurred outside the apartment and the injuries sustained by Shonovia, which were consistent with a fall or being in a fight. Ms. Small posits that if the jury were led to their verdict in the belief that the stabbing took place while Todman was lying in

bed, such a finding cannot be sustained as it is completely against the weight of the evidence.

[8] Ms. Small also posits that if the jury arrived at the verdict on the basis that Todman's physical assault outside the building provoked Shonovia to swing at him with the comb with the intention to kill him or cause him serious bodily harm and that her actions were unlawful, the verdict is unsustainable in law in that they were led into error by the unsatisfactory directions given on the proof of provocation and what constitutes an unlawful act. Ms. Small contends that the learned judge's direction as to the basis on which the jury could return a verdict of manslaughter was not clear. The distinction between voluntary and involuntary manslaughter was not made clear. The judge stressed that if the jury could not find the intention to kill then they must return a verdict of manslaughter. Ms. Small contends that it was never made clear to the jury that there were two distinct manslaughter verdicts that were possible: manslaughter by reason of provocation or manslaughter simpliciter.

[9] Ms. Small further argues that the jury ought to have been properly directed that as a starting point they had to determine whether they were satisfied that the stabbing took place as the Crown presented it. If they were so satisfied they would have returned a verdict of guilty of murder. Ms. Small submits that no reasonable jury could have accepted that the stabbing took place inside the apartment as the deceased lay in bed. The evidence pointed in one direction only, that is, there was an altercation outside the apartment between Shonovia and Todman. Ms. Small contends that once the jury found as a fact that the altercation took place outside the building they were required to consider whether Shonovia was provoked by the physical assault and temporarily lost her self-control when she swung at the deceased with the comb.

[10] Ms. Small also takes issue with the judge's treatment of the medical evidence. Ms. Small complains that the learned judge dealt extensively and exclusively with the medical evidence solely as it related to Todman thereby undermining the

medical evidence as to the injuries as it related to Shonovia and Shonovia's version of how the fatal injuries occurred. In that regard Ms. Small refers to the evidence of Dr. Balogun that Shonovia had injuries that were consistent with being scratched against a brick wall and also to the evidence of the pathologist that it was possible for the fatal injury to have occurred in the manner depicted by Shonovia. Ms. Small contends that the learned judge completely neglected to highlight the above evidence to the jury which was relevant to their consideration as to whether the attack by Todman was real and whether Shonovia's reaction by the use of force and the amount of force used was lawful.

[11] As Mr. Graham, counsel for the Crown, correctly points out, the jury had the benefit of the evidence of Wattley and Walsh of the utterances of Todman that he was in his bed and Shonovia stabbed him. The fact that Todman's words were said in approximate contemporaneity and where his grave condition would have dominated his thoughts made the cogency of his evidence high as the possibilities of concoction or distortion could be disregarded. It was certainly open to the jury to accept the res gestae evidence as true. Apart from the res gestae evidence, the learned judge left with the jury as a possible provocative act, the evidence that when Shonovia undressed and got into bed with Todman, he sucked his teeth and rejected her. It was again left to the jury to decide whether that amounted to provocation.

[12] The Crown sought to counteract Shonovia's contention that there was a physical confrontation outside by inviting the jury to find that Todman followed Shonovia outside not as an aggressor but as a consequence of her stabbing him inside the house. The Crown also invited the jury to reject Shonovia's account citing the absence of any noise or argument that morning and the absence of any significant injury to Shonovia given the level of violence she claimed to have been subjected to. The jury's verdict clearly showed that they rejected Shonovia's account. If the jury had accepted self defence, they would have acquitted Shonovia. The contention that the jury must have rejected the Crown's case and that the Crown failed to provide explanation to negate that a physical encounter occurred outside

the apartment is ill-founded. It was open to the jury to accept the Crown's case and there was sufficient placed before them to negate self-defence. In the circumstance, it cannot be said that a reasonable jury could not have arrived at the verdict they did.

[13] The learned judge directed the jury that if they found that all the elements that make up the crime of murder have been proved except the element of intention to cause death or grievous bodily harm then it reduces murder to manslaughter. The learned judge also directed the jury that if they found that all the elements of murder have been proved but there is evidence of provocation, the verdict would be manslaughter. From these directions, the jury could not have been left in any doubt that there were two distinct manslaughter verdicts available to them. I am not of the view that there was any misdirection by the trial judge. In the circumstances, the complaints made against the trial judge are not valid. In any event, assuming that the distinction between voluntary and involuntary manslaughter were not made clear, Shonovia would not have been prejudiced, as she would have received no additional benefit or suffered no detriment.

[14] The evidence presented the jury with three central issues to consider: (i) whether the stabbing was unprovoked, (ii) whether Shonovia was acting in self defence and (iii) whether Shonovia was provoked. The jury by their verdict rejected the first two issues and decided that Shonovia was provoked. I do not consider the verdict to be unsafe.

Provocation

[15] Ms. Small complains that the learned judge should not have left the partial defence of provocation to the jury. The pith of the complaint is that there was no evidence of a sudden loss of self-control. Before addressing the nub of the complaint it would be useful to address the circumstances under which a trial judge is obliged to leave the alternative verdict of manslaughter to the jury. The question whether on a charge of murder a trial judge needs to put the alternative verdict of manslaughter to the jury has long been settled. The obligation to do so is

engaged if a jury might reasonably return such a verdict on the whole of the evidence, whether led by the Crown or the defence and is independent of the tactics or strategy employed by counsel. Thus in Joseph Bullard v the Queen[1] the Board held that it had:

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

In Kwaku Mensah v The King[2] Lord Goddard said, "But if on the whole of the evidence there arises a question whether or not the offence might be manslaughter only, on the ground of provocation as well as on any other ground, the judge must put that question to the jury." This would also be the case even if the line of defence was self-defence and no attempt was made at the trial to rely on provocation. In The King v Hopper[3] Lord Reading CJ stated that whatever the line of defence adopted by counsel at a trial, the judge has to put such question as appear to him to properly arise on the evidence even though counsel may not have raised the question.

[16] In Mancini v Director of Public Prosecutions[4] Viscount Simon LC said:

> "Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence – a defence which, if it had been accepted by the jury, would have resulted in his complete acquittal - it was undoubtedly the duty of the judge, in summing up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter. The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the judge from the duty of directing the jury to consider the alternative, if there

[1] [1957] AC 635, 642,
[2] [1946] AC 83, 91-92.
[3] [1915] 2 KB 431.
[4] [1942] AC 1, 7.

> is material before the jury which justify a direction that they should consider it … Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence, even although counsel may not have raised some question himself."

[17] Consistent with the authorities, the learned judge was right in leaving provocation to the jury. The learned judge left the issue of provocation to the jury on two bases. The first basis arose on the Crown's case. It concerned Shonovia undressing and getting into bed with Todman and Todman sucking his teeth and letting her know by his actions that she was not wanted although he did not speak a word. The second basis which arose on the defence case concerned the physical altercation occurring outside the building after Shonovia got dressed and left the apartment. This altercation, on Shonovia's case, involved Todman continuously pushing her around and into the wall and unto parked vehicles and pushing her to the ground.

[18] On the issue of provocation, the central plank of Ms. Small submission is that there was nothing in the evidence, – whichever version was open to the jury, - that could have amounted in law to "a sudden loss of self-control". Ms. Small contends that the judge was obliged to indicate to the jury what evidence might support the conclusion that Shonovia had lost her self-control. Ms. Small cites R v Benjamin James Stewart[5] as authority. In R v Benjamin James Stewart, it was held that where a judge was required as a matter of law to leave the issue of provocation to the jury, he should indicate to them, unless it was obvious, what evidence might support the conclusion that the accused had lost his self-control, because without such guidance, the jury would find it difficult to answer the relevant questions as to whether the defendant had lost his self-control as a result of things done or said and whether a reasonable man would have been provoked by those things. Ms. Small asserts that there was no direct evidence of a loss of self–control and the learned judge did not point to any evidence from which a loss of self-control could be inferred. There was therefore no evidence on which a jury could

[5] [1996] 1 Cr App R 229.

reasonably find that Shonovia had lost self-control when she stabbed Todman. Ms. Small contends that the circumstances were far more consistent with self defence.

[19] I now address Ms. Small's complaints. Section 151(3) of the Criminal Code, 1997[6] of the Virgin Islands defines provocation as "any wrongful act or insult which is of such a nature as to be likely, when done to an ordinary person … to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered." In Lee Chun-Chuen alias Lee Wing-Cheuk v The Queen[7] the Privy Council observed that loss of self-control can be shown by inference instead of by direct evidence. Section 3 of the Homicide Act 1957 of England and Wales provided that where on a charge of murder there is evidence on which the jury can find that the person charged was provoked to lose his self-control, the question whether the provocation was enough to make a reasonable person do as he did shall be left to be determined by the jury. In determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

[20] In Attorney General for Jersey v Holley[8] Lord Nicholls stated that section 3 envisages that the defence of provocation has two ingredients. The first ingredient, (the subjective or factual ingredient) is that the defendant was provoked into losing his self-control. The second ingredient is the objective or evaluative ingredient. Lord Nicholls pointed out that while the fist element calls for an assessment of the gravity of the provocation, the second element calls for application of an external standard of self-control: whether the provocation was enough to make a reasonable man do as he did. In Tabeel Lewis v The State,[9] the Privy Council thought it unhelpful in these cases to try to separate out the evidence of provocation from that of loss of self-control. The Board recognized that realistically, they are two closely connected aspects of the same (first) limb of

[6] Act No. 1 of 1997.
[7] [1963] AC 220.
[8] [2005] UKPC 23, [2005] 2 AC 580, para. 5.
[9] [2011] UKPC 15.

the provocation defence. The point that the first limb of the defence is properly to be considered as a whole was also made by May LJ in R v Van Dongen (Anthony Gerrard).[10] Having referred to section 3 of the Homicide Act 1957 and the need for evidence on which the jury could find that (i) the person charged was provoked; (ii) that he lost his self-control and (iii) the provocation has to be enough to make a reasonable man do as he did, May LJ observed that, "The first two [elements] are usually in the authorities combined as a single composite".[11]

[21] Evidence of provocation and the loss of self-control are two closely connected aspects of the same (first) limb of the provocation defence. They are usually combined as a single composite. In the circumstances of this case, having identified the evidence of provocation, that same evidence would go to support the conclusion that Shonovia had lost her self-control. In fact the learned judge specifically indicated to the jury the evidence that could go towards a loss of self-control. Accordingly, it cannot be concluded that there was no evidence on which the jury could reasonably find that Shonovia had lost her self-control when she stabbed Todman. The learned judge told the jury the case is that Shonovia went to Todman's home to spend the night and was refused by him. Todman was annoyed by her presence and began sucking his teeth. The judge then asked, "Was that enough to cause this accused to suddenly and temporarily lose her self control? A matter for you, Members of the Jury."[12] The judge told the jury that if they are sure that Shonovia was not provoked in that sense, the defence of provocation does not arise. The judge then turned to Shonovia's version of events and told the jury that if they reject self defence, they would have to consider Shonovia's evidence as to whether what took place by her account could also be that she was provoked. In the premises, it is incorrect to say that the learned judge did not indicate to the jury what evidence might support the conclusion that Shonovia had lost her self-control nor point to any evidence from which a loss of self-control could be inferred. This ground of appeal accordingly fails.

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[10] [2005] EWCA Crim 1728.
[11] At para. 35.
[12] See Record of Appeal Volume 4, Tab 11 p. 82, lines 6-8.

[22] Ms. Small takes exception to the following passage in the directions from the learned judge:

> "Finally, having regard to the actual provocation and to your views of how serious that provocation was for this Accused, you must ask yourself whether a person having the powers of self control to be expected of an ordinary, sober person of the Accused's age and sex, would have been provoked to lose her self control and do as this Accused did."[13] (Emphasis mine.)

Ms. Small complains that the learned judge used language that might appear to suggest that the appellant was in fact provoked. Ms. Small submits that this was inappropriate and effectively confined the jury to a verdict that reflected a finding of provocation. Ms. Small contends that the matter- of- fact way in which the learned judge's statements were made led the jury to no other conclusion that there was in fact a provoking event or series of events and in so doing, infringed on the jury's role as arbiters of fact.

[23] The directions on provocation have to be considered as a whole. In looking at those directions in the round, the complaints made against the trial judge are not justified. The impugned direction begins with the word "Finally"; this immediately alerts one to the need for context. In the preceding paragraphs, the learned judge directed on self defence and told the jury that if they rejected self defence, they must go on to look at provocation. The judge further directed the jury that if they concluded that Shonovia was provoked in the legal sense then they must go on to weigh how serious the provocation was to her. The judge then went on to the impugned paragraph. The impugned paragraph does not exist in a vacuum. It takes its colour and derives significance and meaning from its context. The context includes the preceding directions to the jury on self-defence, the need for the jury to consider provocation if they rejected self-defence, and the need for the jury to weigh the seriousness of the provocation if they concluded that Shonovia was provoked. The jury's role of arbiters of fact was not infringed or compromised;

[13] See Record of Appeal Volume 4, Tab 11 p. 84, lines 18-24.

it remained unadulterated. Further, from a proper reading of the directions, it could not be advanced that the jury were led to no other conclusion that there was in fact a provoking incident or provoking incidents.

Misdirection on elements of murder - intent

[24] Ms. Small complains that the learned trial judge did not give clear and unambiguous directions on the elements of the offence of murder in accordance with section 148 of the Criminal Code, 1997 of the Virgin Islands. The section in issue here is subsection 3 of section 148. The section states one of the two ways in which malice aforethought is deemed to be established. It provides that malice aforethought shall be deemed to be established by evidence proving (a) an intention to cause death or grievous bodily harm to any person or (b) knowledge that the act or omission causing death will probably cause the death of or grievous bodily harm to some person, although such knowledge is accompanied by indifference whether or not death or grievous bodily harm is caused, or by a wish that it may not be caused. The specific complaint is that the learned judge addressed section 148 (3) (a) but failed to address (3)(b) which concerns knowledge. In view of the disjunctive nature of the formulation I am not of the view that Shonovia was prejudiced.

[25] Ms. Small takes issue with the learned judge's directions on intent and unlawful act. With respect to intent, Ms. Small states that in directing the jury on the requisite intent the learned judge ought to have made it plain that for a finding of guilt nothing less than the specific intent to kill or cause grievous bodily harm would suffice. Ms. Small submits that the learned judge erred in failing to direct the jury that in assessing the ingredient of intent they were entitled to look at whether the accused foresaw the probability of death or grievous bodily harm being caused by her act and to explain the various degrees of probability.[14] Ms. Small argues that given the facts of the case and in particular the history between the parties, simply leaving the jury without guidance on what they might

[14] R v Hancock et al [1986] AC 455.

use to draw a direct inference of intention was an error. Ms. Small contends that the jury ought to have been directed that they are not entitled to infer the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty as a result of Shonovia's action and that she appreciated that such was the case.[15]

[26] Ms. Small contends that the case called out for a direction as to probability and foreseeability and it was a serious omission not to direct the jury on those matters. Ms Small argues that although the trial judge touched briefly on the type of instrument used, the judge failed to explain to the jury that they could infer the absence or existence of intent from the type of instrument that was used, that is whether Shonovia foresaw that the probability of death or grievous bodily harm was likely when she swung the comb at Todman. Ms. Small asserts that the type of weapon used was a very important aid in drawing an inference of Shonovia's intention, particularly in light of the fact that other more obviously lethal weapons were available and she did not use them. Ms. Small submits that the failure to address the jury and bring home to them with sufficient clarity the important issues of foresight and probability in determining intent resulted in a conviction which was unsafe since a properly directed jury could have found that the accused did not have the requisite intent to kill or cause grievous bodily harm and would not be guilty of either murder or manslaughter by reason of provocation.

[27] Mr. Graham contends that the learned judge correctly directed the jury in accordance with the approved directions in R v Woollin,[16] that to convict Shonovia of murder they must be satisfied that she intended to kill or to cause grievous bodily harm. The judge made it clear that this required a subjective intent on Shonovia's part. Mr. Graham also states that in R v Hancock et al[17] Lord Scarman opined that it is not always necessary to give directions on foresight and probability. If such a direction is given, it is sufficient if the jury is told that foresight

[15] R v Nedrick [1986] 1 WLR 1025 at pp. 1027-1028.
[16] [1999] 1 Cr App R 8.
[17] [1986] AC 455.

of consequences is not intention, but merely evidence from which they are entitled to infer intent. Mr. Graham contends that the learned judge gave detailed directions on intent which covered probability and foresight.

[28] The complaints raised by Ms. Small regarding the issues of intent, probability of consequence and foreseeability of consequence may best analysed with reference to Lord Lane's model direction in Nedrick as reviewed by the House of Lords in Woollin. In Woollin, Lord Steyn stated that Lord Lane's judgment in Nedrick provided valuable assistance to trial judges and that the model direction is by now a tried-and-tested formula which trial judges ought to continue to use. Lord Steyn said that on matters of detail he had three observations. (I will indicate the nature of these observations momentarily). His Lordship then set out the relevant part of Lord Lane's judgment as follows:

> ["(A)] When determining whether the defendant had the necessary intent, it may therefore be helpful for a jury to ask themselves two questions: (1) How probable was the consequence which resulted from the defendant's voluntary act? (2) Did he foresee that consequence?
> If he did not appreciate that death or serious harm was likely to result from his act, he cannot have intended to bring it about. If he did, but thought that the risk to which he was exposing the person killed was only slight, then it may be easy for the jury to conclude that he did not intend to bring about that result. On the other hand, if the jury are satisfied that at the material time the defendant recognized that death or serious harm would be virtually certain (barring some unforeseen intervention) to result from his voluntary act, then that is a fact from which they may find it easy to infer that he intended to kill or do serious bodily harm, even though he may not have had any desire to achieve that result…
>
> [(B)] Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.
>
> [(C)] Where a man realizes that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended the result, however little he may have desired

> or wished it to happen. The decision is one for the jury to be reached upon a consideration of all the evidence."[18] (Lettering added).

[29] I now address the three observations of Lord Steyn in Woollin with respect to Nedrick. Lord Steyn observed firstly, that he was persuaded by Lord Hope's speech that it is unlikely, if ever, to be helpful to direct the jury in terms of the two questions set out in (A) as the questions may detract from the clarity of the critical question in (B). Secondly, Lord Steyn agreed that the use of the words "to infer" in (B) may detract from the clarity of the model direction and substituted the words "to find". Thirdly, the first sentence of (C) does not form part of the model direction. It would, however, always be right for the judge to say, as Lord Hope put it, that the decision is for the jury upon a consideration of all the evidence in the case. In Woollin, Lord Hope stated:

> "… I regard the questions in (A), which are derived from Lord Scarman's speech in Reg. v. Hancock [1986] A.C. 455, 473f, as detracting from the clarity of the critical direction. I would prefer to say therefore that it is unlikely, if ever, to be helpful to tell the jury that they should ask themselves these questions. I think that it would be better to give them the critical direction, and then to tell them that the decision was theirs upon a consideration of all the evidence."[19]

Lord Lane, like Lord Hope agreed that the use of the words "to infer" in (B) may detract from the clarity of the model direction and substituted the words "to find". The other members of the House of Lords agreed with the judgments of Lord Steyn and Lord Hope.

[30] In light of the guidance in Woollin, where the charge is murder, and the defendant's foresight of death or serious bodily harm is in issue, the following direction would be appropriate:

> "You are not entitled to find that the defendant had the necessary intent to commit murder unless you are satisfied beyond reasonable doubt that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions, and that the defendant appreciated that such was the case."

[18] Ibid p. 93.
[19] Ibid p. 97.

[31] In dealing with the issue of intent, the judge directed the jury that they must feel sure of the intention of the accused before the accused can be guilty of murder and that they cannot convict of murder unless they feel sure that the accused had the specific intent to kill or the specific intent to cause grievous bodily harm to Todman. With respect to the instrument that was used, the rat tail comb, the judge invited the jury to consider whether Shonovia could have possibly envisaged that death or serious bodily harm would have occurred as a result of its use.

[32] The judge stated that the accused's criminal intent or intention in relation to his voluntary act or a consequence thereof is basically, subjective to the accused. The judge directed the jury that in determining the intent of the accused they had to look at all the surrounding facts and circumstances including the weapon which was used, the injury inflicted, where on the body it was inflicted and the amount of force which was used to cause the injury. The judge also stated that the surrounding circumstances include, the accused's subjective foresight or foreseeability of or subjective belief in the degree of probability of the consequence which degree may range from a bare possibility to a certainty or near certainty. Although the judge did not follow the wording of the direction in Nedrick as modified in Woollin, it appears to me that the verdict of the jury would have been the same. In the circumstances of this case, the jury would have found that there was a virtual certainty that at the very least Shonovia had an intention to cause serious bodily harm to Todman when she stabbed him in the manner and circumstances contended by the Crown and she appreciated that this was the case. Having found that Shonovia was provoked the jury returned a verdict of manslaughter by reason of provocation. Looking at the directions on intent as a whole, I am not of the view that the conviction was unsafe.

Unlawful act

[33] Ms. Small complains that the treatment given to the nature and definition of an unlawful act was insufficient. Instead of drawing the jury's attention specifically to

those aspects of the evidence on which they could have made factual findings (and then decide whether those acts were unlawful) the trial judge went into a discourse on provocation. Ms. Small further argues that it was critical for the trial judge to give a clear explanation of what may be an unlawful act as well as what would justify what would appear to be an unlawful act. Further, the jury ought to have been directed that Shonovia's action would not have been unlawful if it were done to protect herself.

[34] The trial judge directed the jury as follows:

> "Now the fourth and final ingredient that the prosecution will also have to establish is that Mr. Todman was killed as a result of an unlawful act or omission of the Accused. An unlawful act simply means that there was no lawful excuse or justification for killing Mr. Todman. In law, the most obvious justifications are self defence and accident. The defence is not raising accident but they are raising self-defence."[20]

Mr. Graham submits, and I agree, that the judge properly directed the jury with respect to the ingredient of unlawful act. The judge directed the jury that to convict of murder, they must be satisfied that Todman was killed by an unlawful act committed by Shonovia. The judge explained that an unlawful act means that there was no lawful justification or excuse for the killing. The judge directed that an act done in self-defence would be lawful and that if the jury found that Shonovia was acting in lawful self-defence, they should acquit her. In the circumstances the complaint made against the trial judge is not justified.

Failure to direct on the defence of accident

[35] Ms. Small complains that Shonovia should have had the benefit of a direction on accident. Ms. Small argues that the learned judge raised the defence of accident but erred in failing to give any directions thereon resulting in prejudice to Shonovia. I agree with Mr. Graham's contention that the learned judge did not raise accident as a defence. What the learned judge did was to refer to accident contemporaneously with self-defence as justification defences. Thereafter the

[20] See Record of Appeal Volume 4, Tab 11 p. 31, lines 1-9.

judge specifically told the jury "the defence is not raising accident, but they are raising self-defence".

[36] Ms. Small also contends that accident arose on Shonovia's evidence. Shonovia's evidence was that when she swung the comb backwards at Todman, she did not see where it caught him but she thought the comb would prick his hand and he would have reflexively let her go to hold onto his hand and then she would run away. Ms. Small submits that putting the defence of accident in that way, the failure to give directions on it amounts to a material omission. Ms. Small argues that the learned judge ought to have explained to the jury in legal terms what constituted accident and ought to have directed the jury that if they found that the harm was caused by accident it was not unlawful and therefore no offence at all.

[37] Was there evidence to found the defence of accident? In my view there was no evidential basis upon which it would have been appropriate for the trial judge to leave the defence of accident to the jury. An examination of the case shows that Shonovia gave evidence of a single stab wound. Dr. Dupuis, the pathologist, gave evidence of more than one wound. Dr. Dupuis stated that wounds A and B which were in close proximity could have been inflicted with the same instrument. Furthermore, Dr. Dupuis stated that the fatal injury was inflicted with moderate to strong force. The injury was about 10 centimeters deep and the steel tip of the comb was recovered about 9.5 centimeters. There is no hint of any evidence that the moderate to strong force which Shonovia deployed in inflicting the fatal injury was or may have been unintended. I find no merit in this complaint.

[38] Ms. Small asserts that the judge failed to comply with the statutory directions in accordance with section 7 of the Criminal Code, 1997 of the Virgin Islands. Ms. Small submits that in failing to do so, the trial judge deprived Shonovia of the opportunity for the jury to properly consider the defence of accident on the evidence and return a verdict of not guilty. Section 7(1) states:

> "Subject to the express provisions of this Code or any other law, a person is not criminally responsible for an act or omission which occurs

independently of the exercise of his will, or for an event which occurs by accident."

[39] The absolution from criminal responsibility ordained by section 7 (1) is premised upon the act or omission of a defendant occurring independently of her or his will or an event occurring by accident. The evidence does not show that Shonovia's act of stabbing occurred independently of the exercise of her will or by an accident. On the contrary, Shonovia's own evidence shows that the act could not have occurred independently of the exercise of her will. Further, there was no evidential basis to support accident. In the circumstances, this ground of appeal is misconceived.

Fairness of summing up – self-defence

[40] Ms. Small complains that the trial judge did not present Shonovia's case fairly to the jury in the same way as she did the prosecution's case in that she did not give any directions or adequate directions on the law pertaining to self-defence in the segment of the summing up in which legal principles were being explained to the jury. This exposition of the legal principles occurred early in the summation when the jury was decidedly more attentive. The effect of this was that the jury likely did not pay as close attention to the directions on self-defence coming as they did after some two and a half hours thereby diminishing the importance of the defence. It appears to me that apart from being a highly speculative conclusion, looking at the summation in the round, the timing of the direction did not render the summation unbalanced or unfair.

[41] Ms. Small contends that the timing of the directions with respect to self-defence meant that the relationship between self-defence and intention was lost on the jury or significantly diminished. I can find no basis for that complaint. Ms. Small contends that the judge ought properly at that point to have warned the jury that in assessing whether Shonovia had the intention to kill if they found that she had honestly acted in self-defence then the requisite intention to find her guilty of murder was absent and she should be acquitted. This contention seems to ignore

the fact that the finding of an intention to kill is not inconsistent with self-defence. In any event the jury would have been left in no doubt from the summation that if they found that Shonovia acted in self-defence she should be acquitted. Ms. Small also complains that the trial judge repeatedly directed the jury that if they found that the intention was not proved or were in doubt about intent they should find Shonovia guilty of manslaughter. I do not find that direction of the trial judge to be objectionable.

[42] Ms. Small asserts that it was imperative for the learned judge to give directions to the jury on how to treat the evidence of the physical assault by Todman which was relied on by Shonovia to establish self-defence but which was also highlighted to the jury by the judge in connection with there being provoking actions by Todman. Ms. Small argues that the jury were left in state of confusion as to how the same matters could be relied upon to establish self-defence entitling an acquittal yet also explaining the reason for Shonovia's action thus reducing her culpability to manslaughter.

[43] After reviewing the relevant evidence, the judge directed the jury several times that if they found that Shonovia acted in lawful self-defence then she will not be guilty of murder. In that circumstance there will be no need to consider provocation as the defence of provocation would not arise. The judge further directed the jury that:

> "If you come to the conclusion that there was self defence then it's a complete acquittal, you don't even have to consider provocation. So I hope you get that straight. You must consider self defence first. If you find that she was justified in doing what she did and she did not use more force than was reasonably necessary, it's self defence, then you have to acquit her… if you reject self defence then you go on to look at provocation. And this same bit of evidence as to the rejection in the house, him following her, she is telling him Basha stop it, don't play with me, words to that effect, whether all of that could have provoked her to doing what she did on the day in question."[21]

[21] See Record of Appeal Volume 4, Tab 11 p. 83, lines 17-25 and p. 84 lines 1-5.

Later, the judge reminded the jury that provocation is a partial defence and only arises if Shonovia did not act in lawful self-defence. The judge repeated that if they found that Shonovia acted in lawful self-defence, then she will not be guilty of murder; there will be no need to consider provocation. If however they found that she was not acting in self-defence then they should consider provocation. In my judgment, the learned judge clearly and adequately (if not repeatedly) directed the jury on the defence of self-defence and the partial defence of provocation and the jury, by their verdict, clearly demonstrated that they appreciated the difference. The clarity of the directions meant that there could have been no confusion in the jury's mind as to how to approach their task.

[44] Ms. Small takes issue with the failure of the trial judge to identify the evidence from which it could be inferred that Shonovia was retreating and therefore could not be seen to be the aggressor and also that the use of force was therefore reasonable in the circumstances. In my judgment, although it may have been better for the trial judge to identify that evidence, the omission to so do in the circumstances of the case was not fatal. Failure to retreat when attacked and when it is possible and safe to do so, is not conclusive. It is simply a factor to be taken into account in deciding whether it was necessary for the defendant to use force and whether the force used was reasonable. In R v Bird,[22] the Court of Appeal indicated that a defendant's demonstration by his conduct that he did not want to fight is the best evidence that he was acting reasonably and in good faith in self-defence but is no more than that. The judge explained to the jury that there was no duty to retreat and instructed that whether Shonovia retreated is an element to be considered in determining whether the force used was reasonably necessary. This was followed by reference to Shonovia's evidence that she left the apartment and Todman followed her and physically assaulted her.

[45] Where a summation is criticised on the grounds that it lacks fairness and balance one has to consider the criticisms in the context of the summation as a whole and the several issues which arose for decision. An appellate court is enjoined to look

[22] [1985] 1 WLR 816.

at the thrust of the directions and consider whether they have adequately put the several issues before the jury and given them a proper explanation of their task in relation to those which they have to decide.[23] The judge set out the salient issues during the course of the summation and directed the jury accordingly. It seems to me that the way in which the judge approached the directions could not have caused any unfairness to Shonovia. The fact that the judge did not give any directions on self-defence at the outset when she gave directions on the law does not give rise to an arguable ground of complaint or render the summation unfair. I have considered the summation as a whole and do not think that there is a proper basis on which it can be said to be unfair or unbalanced. The summing-up as a whole fairly set out the defence case. At the outset the judge alerted the jury that Shonovia's case was one of self-defence. During discussion of Shonovia's case the judge gave detailed instructions on the law of self-defence. The judge summed up the case properly on the evidence before her and the issues which arose and there is no basis upon which it can be concluded that the summing up was unfair or unbalanced.

Imminent danger

[46] Ms. Small submits that the learned judge misdirected the jury and placed the standard too high by directing that they were entitled to acquit if they found that Shonovia honestly believed that she was in imminent danger for her life. Ms. Small contends that this direction erroneously led the jury to believe that defending oneself was only lawfully justified where there was a threat of being killed. The jury therefore could not have properly considered whether Shonovia honestly believed that it was necessary to use force to defend herself.

[47] Shonovia's case, which the jury rejected, is that the killing took place in circumstances in which it was necessary for her to defend herself, that is, it happened in lawful self-defence. The law is that if someone kills another whilst acting in lawful self-defence against an attack or threatened attack, he commits no

[23] See Daniel Dick Trimmingham v The Queen [2009] UKPC 25.

criminal offence. A person acts in self-defence if it is necessary for him to defend himself and the amount of force used in self defence is reasonable. Self-defence comes into play if the jury concludes that a defendant in fact was defending himself. This would only be the case if the defendant was being attacked or threatened with an attack and it was necessary for him to defend himself against that attack or threatened attacked and uses reasonable force in self-defence.

[48] Mr. Graham conceded that self-defence is justified in instances of lethal as well as non-lethal force. In this case, Shonovia's evidence is that she was being attacked by Todman. She described the nature of the attack. Shonovia gave evidence of Todman pushing her right under the stairs, pushing her, causing her head and back to make contact with the wall and pushing her so hard that her head, neck and shoulder dropped on the front grill of a vehicle. Shonovia gave evidence of being in total shock and frightened. Shonovia also gave evidence of falling on the ground, and covering her head and Todman was still pushing her in her face like her face was going down in the ground. Shonovia stated: "So that's when I put down my left hand now to stop like my face from going into the concrete. That's how hard he was pushing me. And then I put my hand in my purse because it's a shoulder bag. I put my hand in my purse and I just pull out my comb and I swing around at him."[24]

[49] If the jury had accepted Shonovia's evidence it would surely have been open to them to find that she was in imminent danger for her life. When one considers Shonovia's evidence pertaining to the nature and extent of Todman's attack on her, the judge's direction to the jury that they were entitled to acquit if they found that Shonovia honestly believed that she was in imminent danger for her life, was unremarkable and no objection can properly be taken in respect thereof. I am not of the view that the direction had the effect contended for by Ms. Small, that is, the jury were led to believe that defending oneself was only lawfully justified where there was a threat of being killed or that the jury could not have properly

[24] See Record of Appeal Volume 3, Tab 9 p. 47, lines 23-25 and p. 48, lines1-3.

considered whether Shonovia honestly believed that it was necessary to use force to defend herself.

[50] Ms. Small complains that the judge did not address the issue of mistaken belief and proposed a direction which the judge should have given the jury in accordance with the case of R v Gaynor Oatridge.[25] As Mr. Graham correctly pointed out, the Oatridge directions concerned a case where a defendant was not under actual or threatened attack, but honestly believed that she was. The Court of Appeal held that provided the accused had acted under an honest mistake of fact a trial judge should direct the jury on whether her response was commensurate with the attack which she believed she faced.

[51] The law recognises that where a plea of self-defence is engaged, if the defendant may have been honestly mistaken as to the facts, he must be judged according to his mistaken belief of the facts, whether the mistake was, on an objective view a reasonable mistake or not.[26] No issue of mistaken belief of facts arises in this case. As indicated earlier, Shonovia's evidence is that she was under serious attack from Todman; accordingly, a direction in accordance with Oatridge was unnecessary. In the circumstances of this case the learned judge cannot be faulted for not directing the jury on mistaken belief as such a direction apart from being unnecessary would also be confusing.

[52] On the issue of self-defence, the learned judge also directed the jury that:

> "'First, you must ask yourself whether this Accused honestly believed that it was necessary to use force to defend herself at all. This would not be the case if the Accused was the aggressor or she acted in revenge or she knew that she did not need to resort to violence. So you will consider the evidence also. Who on this day was the aggressor?"[27] (Emphasis added).

The judge then invited the jury to analyse the evidence to see whether Shonovia was the aggressor on the day in question. Ms Small submits that the learned

[25] (1992) 94 Cr App R 367.
[26] R v Gladstone Williams (1984) 78 Cr App R 276; Solomon Beckford v The Queen [1987] 3 WLR 611.
[27] See Record of Appeal Volume 4, Tab 11 p. 73, lines 5-11.

judge erred in directing the jury that if Shonovia were the aggressor she could not honestly believe that it was necessary to use force to defend herself.

[53] The issue of whether an original aggressor can avail himself of the partial defence of self-defence has received judicial resolution. In R v Daniel Keane and R v Katherine Rosa McGrath,[28] Lord Justice Hughes stated:

> "… it is certainly true that it is not the law that the fact that a defendant either started the fight or entered it willingly is *always and inevitably* a bar to self-defence arising … the law is the proposition that self-defence may arise in the case of an original aggressor but only where the violence offered by the victim was so out of proportion to what the original aggressor did that in effect the roles were reversed."

Lord Justice Hughes extracted that proposition of law from the Scottish case of Burns (Craig John) v HM Advocate (Self Defence)[29] where Lord Hope (then the Lord Advocate General) stated the law as follows:

> "It is not accurate to say that a person who kills someone in a quarrel which he himself started, by provoking it or entering into it willingly, cannot plead self defence if his victim then retaliates. The question whether the plea of self defence is available depends, in a case of that kind, on whether the retaliation is such that the accused is entitled then to defend himself. That depends upon whether the violence offered by the victim was so out of proportion to the accused's own actings as to give rise to the reasonable apprehension that he was in an immediate danger from which he had no other means of escape, and whether the violence which he then used was no more than was necessary to preserve his own life or protect himself from serious injury."

[54] Burns was also applied in R v Nicholas Rashford[30] where, Lord Justice Dyson in giving the judgment of the court said:

> "There may be a temptation whenever it is open to a jury to conclude that the defendant went to an incident out of revenge or was the aggressor to direct the jury that if they reach that conclusion then self-defence cannot avail the defendant. But if the judge wishes to give a direction along these lines the facts will usually require something rather more sophisticated where the possibility exists that the initial aggression may have resulted in a response by the victim which is so out of proportion to that aggression

[28] [2010] EWCA Crim 2514, para. 17.
[29] 1995 SLT 1090 at 1093H.
[30] [2005] EWCA Crim 3377, para. 19.

> as to give rise to an honest belief in the aggressor that it was necessary for him to defend himself and the amount of force that he used was reasonable."

[55] As a proposition of law, the judge erred in directing the jury that if Shonovia were the aggressor she could not honestly believe that it was necessary to use force to defend herself. In an appropriate factual situation the judge could have directed the jury that even if Shonovia were the initial aggressor, if Todman's response was out of proportion so that it was necessary for Shonovia to defend herself then she may be acting in self defence. In any event a direction along that line was unnecessary given the factual matrix. On the Crown's case Shonovia stabbed Todman while he was lying in bed unarmed. There was only one aggressor, Shonovia. There was no reversing of roles. On Shonovia's case, Todman was attacking her and she acted in self-defence. Here again, there was no reversing of roles. It is not Shonovia's case that she started any quarrel or provoked any quarrel or was the initial aggressor. In the circumstances the error of the learned judge did not affect the safety of the conviction.

Res gestae

[56] Ms. Small's contends that the judge failed to properly direct the jury on how to treat the statements which were admitted as part of the res gestae. Specifically, Ms. Small complains that the learned judge misdirected the jury by stating that the issues of whether the statements were made spontaneously and the possibility of concoction being excluded were not their concern. The judge directed the jury that the statements were admitted into evidence and they should consider them as part of the evidence. Ms. Small submits that the proper direction would have been to direct the jury that notwithstanding the admission of the statements into evidence the jury were still required to consider the weight to be given to such evidence and that they were not bound to accept these statements were true.[31]

[31] R v Donald Joseph Andrews [1987] AC 281.

[57] Ms. Small further contends that it was necessary for the judge to direct the jury that an assessment of the credibility of the statements necessarily involves a determination of the circumstances in which they were made. Ms. Small argues that the learned judge failed to assist the jury in understanding why Todman may have distorted the facts or concocted the statements. Ms. Small suggests that in the instant case it would have been to deflect from the fact that Todman was himself the aggressor that night and initiated the events that resulted in his stabbing. Ms. Small argues that the overall effect was that Todman's statements were given undue weight which went toward the requisite intention to find Shonovia guilty of manslaughter by reason of provocation.

[58] It is necessary to consider the learned judge's direction on res gestae in its entirety and the circumstances under which the judge said "that's not your concern"[32]. The judge referred to the res gestae evidence and told the jury that it was part of the evidence for them to consider. Immediately thereafter the judge referred to the closing speech of defence counsel in respect of the res gestae statements. In that regard the judge told the jury that in the closing speech defence counsel stated that the statements allegedly made by Todman were in relation to questions posed by Wattley and there were times that Todman did not answer spontaneously and in circumstances such that the possibility of concoction may be excluded. The judge then remarked "That's not your concern."

[59] That statement of the judge has to be viewed in its proper context. The judge's remark was made while commenting on a comment in the closing speech of the defence and may well be viewed in the context of Leith McDonald Ratten v The Queen[33] where Lord Wilberforce stated:

> "As regards statements after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded."

[32] See Record of Appeal Volume 4, Tab 11 p. 45, lines 13-14.
[33] [1972] AC 378, p. 389.

Following upon the remark "that's not your concern", the judge again stated that the statements were admitted into evidence and are there for the jury to consider as part of the evidence. To my mind, viewed contextually, the statement "that's not your concern" can hardly be regarded as a general invitation to the jury to be unconcerned with spontaneity and the possibility of concoction. If it were, the learned judge would not have told the jury that the statements were admitted into evidence and are there for them to consider as part of the evidence. Further fortification for that position is obtained from the learned judge's guidance to the jury as to how they should approach the evidence of Walsh and Wattley.

[60] Following upon the statement "that's not your concern," the judge immediately proceeded to guide the jury as to how to approach the evidence of Wattley and Walsh. To my mind the judge's subsequent directions would have cured any misdirection on the judge's part. The judge said:

> "First of all, you will have to decide whether or not you believe what those two witnesses said they heard the deceased said. If you believe that these two witnesses are speaking the truth, then you move on to decide what was said and you must also be satisfied that one, there was no possibility of mistake and two, that the deceased Archie Todman did not concoct, meaning he did not make up, he did not fabricate or distort the statement and that he was not motivated by malice or by ill will."[34]

The judge repeated this guidance by saying:

> "The test that you have to apply is (a) for you to decide what was said and (b) you must be satisfied that (1) there is no possibility of mistake and (2) that Archie Todman did not concoct or distort the statement or those statements and that he was not activated by malice."[35]

[61] The learned judge's directions were in sync with the directions enunciated in R v Donald Joseph Andrews approving Leith McDonald Ratten v The Queen. In R v Donald Joseph Andrews Lord Ackner said:

> "Of course, having ruled the statement admissible the judge must … make it clear to the jury that it is for them to decide what was said and to be sure that the witnesses were not mistaken in what they believed had been said to them. Further, they must be satisfied that the declarant did not distort or

[34] See Record of Appeal Volume 4, Tab 11 p. 45, lines 19-25 and p. 46, lines 1-3.
[35] See Record of Appeal Volume 4, Tab 11 p. 46 lines 15-20.

> concoct to his advantage or to the disadvantage of the accused the statement relied upon and where there is material to raise the issue, that he was not activated by malice or ill-will. Further, where there are special features that bear on the possibility of mistake then the juries' attention must be invited to those matters."[36]

The judge further directed the jury:

> "I ask you in this regard to approach the evidence with extreme caution, that's the evidence that Wattley and his girlfriend said to you, because what the deceased is alleged to have said was not tested in cross-examination in this Court."[37]

[62] With respect to the contention that Todman had a motive to concoct the statements and the judge failed to assist the jury with such evidence, Mr. Graham correctly pointed out that the judge directed the jury to consider whether Todman was the aggressor. Further, there was evidence before the jury capable of negating fabrication and concoction. For example, when Wattley asked Todman whether Shonovia struck him with the concrete blocks, Todman denied that she did. In the circumstances the ground of appeal relating to res gestae fails.

Sentence

(15 Year Benchmark)

[63] The maximum penalty for manslaughter is life imprisonment. The judge used a benchmark of 15 years and imposed a sentence of ten years imprisonment. Ms. Small contends that the sentence is unduly harsh in all the circumstances of the case having regard to all the mitigating factors. Ms. Small complains that the judge erred in using a 15 year benchmark as in doing so she disregarded the United Kingdom Sentencing Guidelines; further, there was no legal basis for such a benchmark. Ms. Small posits that these guidelines, which were relied upon by both parties and expressly adopted by Hariprashad-Charles J in R v Brian Walters,[38] would have resulted in a substantial reduction in the sentencing range

[36] [1987] AC 281, p. 302.
[37] See Record of Appeal Volume 4, Tab 11 p. 47, lines 1-5.
[38] Territory of the British Virgin Islands Case No. 3 of 2008 (delivered 27th May 2008).

based on the degree of provocation. Ms. Small also asserts that the trial judge paid little or no regard to the authorities on sentencing cited by the appellant in which sentences of 5 to 7 years were imposed for manslaughter depending on the circumstances of the case.

[64] I do not regard the challenge to the 15 year benchmark to be a serious one. As Mr. Graham points out, this Court has, in many instances imposed or affirmed sentences with a benchmark of 15 years for manslaughter. For example in Kenneth Samuel v The Queen,[39] Barrow JA stated that the judge erred in premising his sentencing exercise on a starting sentence of life imprisonment but should have started with a sentence of 15 years. The judge's decision to decline to follow the United Kingdom Sentencing Guidelines did not constitute an error. The judge was not obliged to follow these guidelines. The learned judge followed what she considered to be guidelines established in cases decided by this Court. I see no proper basis to fault the decision of the learned judge.

Previous convictions and Social Inquiry Report

[65] Ms. Small contends that the judge fell into error in taking into account Shonovia's high school disciplinary report and previous convictions which were for entirely different and less grave offences. Ms. Small asserts that too much weight was placed on reports of Shonovia's infractions in High School and reports of other anti-social behavior during her early life. Ms. Small submits that the previous convictions and high school reports were irrelevant and were not aggravating factors and relying on them was unfair to Shonovia. Mr. Graham submits that a defendant's previous convictions and a social inquiry report into background and lifestyle are important matters for a sentencing court to consider and cannot be said to be irrelevant. The learned judge was justified in taking them into account.

[66] It cannot be doubted that the previous convictions of a prisoner and a social inquiry report are important and relevant matters in assisting a sentencer in

[39] St. Vincent and the Grenadines Criminal Appeal No. 7 of 2005 (delivered 28th November 2005).

arriving at an appropriate sentence. It would therefore be wrong to assert that the judge erred in taking them into account. Having taken them into account it then becomes a matter of what weight the sentencing judge would ascribe to these matters in the circumstances of any particular case. The learned judge recognized that in determining the appropriate sentence the court must pay regard to all the circumstances of the case. The judge paid regard to the Social Inquiry Report and to all that was said on behalf of Shonovia by her counsel and acquaintances. The judge stated that she was obliged to take into account Shonovia's circumstances and in particular, her difficult childhood. Taking into account the judge's comments, I do not find any substance in the assertion that too much weight was placed on reports of Shonovia's infractions in High School and reports of other anti- social behavior in her early life. In fact the learned judge did not list these matters as aggravating factors.

[67] In her sentencing judgment, the learned judge identified two aggravating factors: the seriousness of the offence and four previous summary convictions involving resisting arrest and disorderly behavior, indicating a propensity to be aggressive. The judge found the following mitigating factors: provocation, the fact that Shonovia was only 22 years old at the time of the offence, Shonovia's full co-operation with the police, remorse shown by Shonovia, the history of abuse over the years and the choice of weapon – a rat tail comb which was in her bag as opposed to carrying a weapon. The complaint that the previous convictions were irrelevant and were not aggravating factors hence relying on them was unfair to Shonovia, has to be viewed from the perspective of what weight or importance the judge attached to the previous convictions in conducting the sentencing exercise. While it is true that the judge regarded the convictions as aggravating factors it is important to note that the judge weighed the mitigating factors against the aggravating factors and correctly concluded that the mitigating factors far outweighed the aggravating factors. In the premises I cannot discern any unfairness to Shonovia.

[68] The learned judge having used a benchmark of 15 years, went on to take into account the mitigating and aggravating factors, the circumstances of the case and Shonovia's personal circumstances and imposed a 10 year term of imprisonment. In the circumstances a sentence of 10 years was not unduly severe. This is subject to what I am about to say with respect to the period Shonovia spent on remand.

Time spent on remand

[69] The position regarding time spent on remand has been addressed by the Privy Council in Callachand & Anor v State of Mauritius (Mauritius)[40] and the Caribbean Court of Justice in Romeo Da Costa Hall v The Queen.[41] Useful guidance has been given in these cases. The primary rule is that in the absence of unusual circumstances a judge should fully credit a prisoner for pre-sentence custody. If the judge seeks to depart from the primary rule, he must state reasons for not granting a full deduction or no deduction at all. In Callachand, the Board stated at paragraph 9:

> "It seems to be clear too that any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing."[42]

At paragraph 10 the Board recognized that there may be unusual circumstances which could lead to a prisoner not getting credit for time spent on remand. The Board gave as an example a case where a defendant deliberately delayed proceedings so as to ensure that a larger proportion of his sentence is spent as a prisoner on remand. In such a case it might be appropriate to make what would otherwise be the usual order. Likewise, a prisoner who is in custody for more than one offence should not expect to be able to take advantage of time spent in custody more than once.

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[40] [2008] UKPC 49.
[41] CR1 of 2010, [2011] CCJ 6.
[42] [2008] UKPC 49, para. 9.

[70] In Romeo Da Costa the Caribbean Court of Justice recognized a residual discretion in a sentencing judge not to apply the primary rule. Examples given were: (1) where the defendant has deliberately contrived to enlarge the amount of time spent on remand, (2) where the defendant is or was on remand for some other offence unconnected with the one for which he is being sentenced, (3) where the period of pre–sentence custody is less than a day or the post-conviction sentence is less than 2 or 3 days, (4) where the defendant was serving a term of imprisonment during the whole or part of the period spent on remand and (5) generally where the same period of remand in custody would be credited to more than one offence. I must point out that none of these matters are pertinent to the present appeal. Therefore there would be no reason not to apply the primary rule.

[71] In Romeo Da Costa the Caribbean Court of Justice stated at paragraph 26 that:

> "The judge should state with emphasis and clarity, what he or she considers to be the appropriate sentence taking into account the gravity of the offence and mitigating and aggravating factors, that being the sentence he would have passed but for the time spent by the prisoner on remand."

At paragraph 27 the Court stated:

> "In the interests of transparency in sentencing and in keeping with the principles relating to the imposition of custodial sentences in the Penal System Reform Act, Cap. 139 a sentencing judge should explain how he or she has dealt with time spent on remand in the sentencing process."

At paragraph 28 the Court deprecated any suggestion that time spent on remand could be treated as "prison years" and grossed up to calendar years, applying the formula that 9 prison months equates to a calendar year. The Court noted that remissions of sentence must be earned and are normally effected by administrative action during the prisoner's incarceration. Accordingly the Court did not consider it correct to "gross up" the time spent on remand to calendar years in order to calculate credit for time served.

[72] In the present case, at paragraphs 57 to 59 of her sentencing judgment, the learned judge listed the mitigating and aggravating factors. The judge observed at

paragraph 77 that in determining the appropriate sentence the Court must pay regard to all the circumstances of the case. The judge then referred to the Social Inquiry Report. The judge, at paragraph 78, recognised the obligation to weigh the mitigating factors identified, against the aggravating factors identified and was in no doubt that the mitigating factors far outweighed the aggravating ones. The judge then stated:

> "Starting at a benchmark of 15 years for manslaughter by provocation, and taking all of the mitigating factors and weighing them against the aggravating factors, a sentence of 10 years imprisonment is justified in the circumstances.
>
> In the premises, I hereby sentence you, Shonovia Thomas to 10 years imprisonment to commence from 15th June 2010. The time of 14 months and 15 days which was spent on remand was taken into consideration."

I note that at the time the judge concluded that a 10 year term of imprisonment was justified in the circumstances; absolutely no reference was made to the time spent on remand. So when the judge later said that the time of 14 months and 15 days spent on remand was taken into account, it begs the question as to how was it taken into account? What mechanism was used to take the remand time into account? Did it redound to the benefit of Shonovia?

[73] I am driven to the conclusion that the time spent on remand was not properly taken into account and real effect was not given to it. I therefore agree with Ms. Small that Shonovia was not credited for the time spent on remand. I am of the view that in the absence of exceptional circumstances, real credit has to be given to the time spent on remand. There can be no ambiguity or uncertainty about it. Real credit is not necessarily obtained by the judge saying that the time spent on remand is taken into account in arriving at the sentence, even if the judge goes on to state the period spent on remand. The sentencing exercise must demonstrate how the time spent on remand is taken into account in order to give efficacy to it thus redounding to the actual benefit of the prisoner. This conduces to transparency, avoids uncertainty or ambiguity and importantly, eliminates or reduces the risk of injustice occasioned by an error in principle.

[74] In the present case, having started from the benchmark of 15 years and making the requisite adjustments for the mitigating and aggravating factors, thus arriving at 10 years, it would have been appropriate for the judge to deduct the 14 months and 15 days spent on remand, from the 10 years to arrive at the actual sentence to be served by the prisoner. That approach, which would have given real credit to the prisoner for the time spent on remand, was not adopted. The Court accordingly deducts from the 10 years imposed, the 14 months and 15 days Shonovia spent on remand. To that extent the appeal against sentence is allowed and the sentence is varied accordingly.

Disposition

[75] The appeal against conviction is dismissed and the appeal against sentence is allowed to the extent that the period of 14 months and 15 days spent on remand is deducted from the 10 years imprisonment that was imposed.

[76] I must thank both counsel for their very helpful submissions and authorities.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Don Mitchell
Justice of Appeal [Ag.]

I concur.

Mario Michel
Justice of Appeal [Ag.]