EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS

SKBHCRAP 2009/013A

BETWEEN:

CHE GREGORY SPENCER

Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

BEFORE:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal

Appearances:

Dr. Henry Browne, QC with him Mr. Hesketh Benjamin, for the Appellant
Dr. Dennis Merchant with Ms. Rhonda Nisbett-Browne, Mr. Garth Wilkin and Ms. Greatess Gordon, for the Respondent

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2013: March 12;
2014: February 10.

Criminal appeal – Murder – Provocation – Self-defence – Accident – Whether the learned trial judge erred in his directions to the jury on the issues of provocation, self-defence and accident

The appellant was convicted for the murder of the deceased, Jason Marsham, and sentenced to 18 years imprisonment. The prosecution's case was based on the evidence of three eye-witnesses who all gave testimony to the effect that the appellant deliberately shot the deceased twice; firstly a grazing shot to the head and then the fatal shot to the chest.

The appellant's version was that the deceased threw bottles at him, advanced towards him and began throwing punches. They started to wrestle. The deceased's girlfriend then brought a gun to the deceased. Both the appellant and the deceased held onto the gun.

In wrestling for the gun the appellant got struck in the mouth and the gun discharged in rapid succession striking the deceased. The issues of self-defence, provocation and accident arose from the defence's version of what transpired.

The jury accepted the prosecution's version of the events and found the appellant guilty. He has appealed against his conviction on the grounds that the learned trial judge erred in failing to properly direct the jury on the issues of (1) self-defence; (2) provocation; and (3) accident.

Held: allowing the appeal and ordering a retrial, that:

1. An important direction that a judge must give to a jury in appropriate cases is that an intention to kill is not inconsistent with the establishment of the plea, not only of self-defence but also of provocation. But that does not necessarily mean that the direction should be in such terms as there are no prescribed words which must be employed in or adopted in a summing up. It all depends on the way in which the issue is put to the jury. In the present case, it is clear that the learned trial judge did not specifically say to the jury that an intention to kill was not inconsistent with self-defence. However, this Court is satisfied that it was effectively conveyed to the jurors in clear and unequivocal terms that even if there was an intention to kill once the appellant was acting in lawful self-defence he ought to be found not guilty. There is no need to seek to restrict the form of words that a trial judge should use in giving directions on self-defence and the intention to kill or cause grievous bodily harm. It is within a trial judge's discretion how he approaches his summation. Accordingly, this ground of appeal is dismissed.

   Sigismund Palmer et al v The Queen [1971] AC 814 applied; Baptiste v The State (1983) 34 WIR 253 applied; Fabien LaRoche v The State Republic of Trinidad and Tobago, Court of Appeal No. 32 of 2009 (delivered 20th April 2011, unreported) applied.

2. It is proper and indeed necessary for a trial judge to tell a jury that murder is not established unless an intent to kill or to cause grievous bodily harm is proved, but the converse proposition, namely, that the accused is guilty of murder if such an intention is proved is not correct. For where the intention to kill or to cause grievous bodily harm results not from premeditation but solely from the loss of self-control induced by provocation the accused is guilty not of murder but of manslaughter. The learned trial judge failed to direct the jury that a plea of provocation may still arise even if the appellant had formed an intention to kill or inflict grievous bodily harm, with this intention arising from sudden passion induced by the provocation. Further, in his definition of provocation to the jury, the learned trial judge included the phrase "for the moment not master of his mind". This was a gross misdirection. This would have effectively conveyed to the jury that the appellant would not have been able to form the necessary intention to kill or cause grievous bodily harm. On the evidence presented the jury may have easily found that the appellant had formed an intention to kill. As a result, the appellant might

have been deprived of a verdict of not guilty of murder but guilty of manslaughter. In light of these misdirections, this ground of appeal accordingly succeeds.

R v Bunting (1965) 8 WIR 276 applied; Baptiste v The State (1983) 34 WIR 253 applied; Antoine and Bass v R (1968) 13 WIR 289 applied.

3. The learned trial judge did not give a clear exposition of the concept of accident. He failed to give a specific direction on the burden of proof paying particular regard to the issue of accident. He ought to have made it clear to the jury that it was not for the appellant to prove that the happenings resulting in the death of the deceased were an accident. In addition, he failed to specifically direct the jury that it was for the prosecution to negative accident so as to make them feel sure beyond all reasonable doubt that it was not an accident and was a wilful act. As such, this ground of appeal succeeds in so far as there was a miscarriage of justice.

Sherfield Bowen v The Queen Antigua and Barbuda, High Court Criminal Appeal HCRAP2005/0004 (delivered 20th June 2007, unreported) followed.

4. Taking into consideration the particular circumstances of this case, the interest of justice requires that a retrial be ordered. Accordingly, the Director of Public Prosecutions is at liberty to retry the appellant for the offence of murder.

JUDGMENT

[1] BLENMAN JA: The appellant, Mr. Che Gregory Spencer ("Mr. Spencer"), was convicted for the murder of the deceased, Jason Marsham ("Mr. Marsham"), on 3rd February 2009 and sentenced to 18 years imprisonment. He has appealed against his conviction on the following amended grounds of appeal:

> "(a) the appellant suffered a possible miscarriage of justice when the learned trial judge erred in law in his failure to properly direct the jury on the issue of self-defence;
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> (b) the appellant suffered a possible miscarriage of justice when the learned judge erred in law in his failure to properly direct the jury on the issue of provocation; and
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> (c) it is not for the accused to make out a prima facie case of accident. It is for the prosecution to prove that the killing was not by accident. And the prosecution failed to do so."

[2] Before considering the grounds of appeal, I propose to briefly encapsulate the prosecution's case and that of the defence.

Prosecution's Case

[3] Mr. Spencer along with 3 other persons went to the home of Jason Marsham at Godwin Ghaut on the morning of 6th December 2006. They got there by car and on arrival one of Mr. Spencer's companion left the car, went into the yard where Mr. Marsham lived and spoke with him. Sometime after, Mr. Spencer came out of the vehicle and spoke with Mr. Marsham and there was a sharp exchange of words between the two men. Mr. Marsham took up two bottles whereupon which Mr. Spencer used a gun and shot Mr. Marsham twice. The first bullet grazed Mr. Marsham's forehead, however the second shot was fatal.

[4] Three witnesses provided direct evidence on behalf of the Crown; they are Roseline Marsham who is Mr. Marsham's sister, Leon Thompson and Terrence Marsham. While there were some variations as to what transpired, all three of these witnesses indicated that it was Mr. Spencer who deliberately shot Mr. Marsham.

[5] The jury by their verdict must have accepted the Crown's version of the case.

Defence's case

[6] The gravamen of the defence's case was that Mr. Spencer travelled by car with three other persons to Godwin Ghaut. Upon reaching Godwin Ghaut he sat in the vehicle for about 25 minutes before exiting and requesting his belongings from Mr. Marsham's car. Mr. Marsham at that point took up two bottles and said "if you have anything in my car go and take them out if you bad". Mr. Spencer testified that Mr. Marsham then threw the bottles at him with the first bottle striking him on his upper arm. Mr. Marsham advanced towards him throwing punches and then he (Mr. Spencer) threw back some punches. They started to wrestle; Mr. Marsham's sister came at him (Mr. Spencer) striking him in his back and neck with Mr. Marsham's girlfriend passing a gun to Mr. Marsham. Both Mr. Spencer's

and Mr. Marsham's hands went to the gun. In wrestling for the gun, Mr. Spencer got struck in the mouth and the gun discharged in rapid succession striking Mr. Marsham, the latter who fell to the ground and succumbed to his injuries.

[7] Mr. Spencer further testified that he was unaware that Mr. Marsham was shot until his resistance started to wane. At that point, he backed away and ran from the scene. Upon leaving the area he heard another gunshot. Mr. Spencer's evidence was that he did not deliberately shoot Mr. Marsham. The issues of self-defence, provocation and accident arose from the evidence.

[8] I now propose to address Mr. Spencer's amended grounds of appeal in turn.

Grounds of appeal

a. Failure to properly direct the jury on intent in relation to self-defence

[9] Learned Queen's Counsel, Dr. Browne, submits that self-defence in St. Kitts and Nevis is governed by the common law and therefore the trial judge's direction must correctly reflect the common law as stated in Sigismund Palmer et al v The Queen[1].

[10] Dr. Browne, QC complains that the trial judge made a fatal error when he failed to direct the jury that an intent to kill or do grievous bodily harm is not inconsistent with a plea of self-defence and provocation. He submits that there was a clear danger that the jury would have been left with the impression that an intent to kill would negative self-defence. Queen's Counsel argues that as a result Mr. Spencer did not receive a fair trial. Dr. Browne, QC accepts that a judge need not specifically say that an intention to kill or do grievous bodily harm is not inconsistent with self-defence. However, this principle of law must be clearly conveyed to the jury. Dr. Browne, QC refers the Court to a number of cases including Sigismund Palmer et al v The Queen, Baptiste v The State,[2] and

[1] [1971] AC 814.
[2] (1983) 34 WIR 253.

Hans Noel v The State[3] all in support of his contention that it was incumbent on the trial judge to ensure it was clearly conveyed to the jury, that an intention to kill is not inconsistent with the establishment of the plea not only of self-defence, but also of provocation.[4]

[11] Dr. Browne, QC posits that there is no "magic formula of words" as to how the trial judge ought to have conveyed to the jury that an intention to kill or cause grievous bodily harm is not incompatible with the defence of self-defence. Once it is done with clarity that will suffice.

[12] Dr. Browne, QC asserts that nowhere in the entirety of the learned trial judge's summing up on the issue of self-defence did he clearly convey to the jury that the intention to kill or cause grievous bodily harm is not inconsistent with the plea of self-defence. This failure of the trial judge, Dr. Browne, QC complains, has effectively deprived Mr. Spencer of the jury's full consideration of the plea of self-defence. As a result, Mr. Spencer did not receive a fair trial. Dr. Browne, QC maintains that as a consequence there was a miscarriage of justice and that the appeal should be allowed.

[13] Dr. Browne, QC referred the Court to Palmer where Lord Morris, in quoting parts of the summing up of the learned trial judge, concluded that there was no room for criticism of same:

> "A man who is attacked in circumstances where he reasonably believes his life to be in danger or that he is in danger of serious bodily harm, may use such force as on reasonable grounds he believes is necessary to prevent and resist the attack. And if in using such force he kills his assailant he is not guilty of any crime even if the killing was intentional. And in deciding in a particular case whether it was reasonably necessary to have used such force as in fact was used regard must be had to all the circumstances of the case including the possibility of retreating without danger or yielding anything he is entitled to protect."[5]

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[3] Republic of Trinidad and Tobago, Court of Appeal No. 29 of 1990.
[4] See Baptiste v The State at p. 263.
[5] See Palmer at p. 823.

[14] Dr. Browne, QC submits that the trial judge's summing up on intention as it relates to self-defence was an effective direction that a plea of self-defence did not succeed where there was an intention to kill or do grievous bodily harm. From this summing up the jury would have been left with the clear impression that an intent to kill would negative self-defence.

[15] Learned counsel for the Crown argues that the trial judge properly and adequately directed the jury on self-defence. She says that the judge gave a detailed direction on the law of self-defence and repeated this direction on a number of occasions during the summation..

[16] Learned counsel for the Crown further argues that the jury could not have been in any doubt that they were obliged to seriously consider self-defence and in so doing determine whether Mr. Spencer had the intention to kill or cause grievous bodily harm to Mr. Marsham.

[17] Counsel refers the Court to the judge's summation at pages 162-167 of the record. Counsel maintains that the jury could not have been in any doubt that they were obliged to seriously consider self-defence.

Analysis

[18] According to Archbold Criminal Pleading, Evidence and Practice 2012,[6] the classic pronouncement upon the law relating to self-defence is that of the Privy Council in Palmer. It is salutary to repeat the oft-cited dicta of Lord Morris at pages 831-832:

> "In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is

[6] Sweet & Maxwell 60th ed., p. 1868, para. 19-41a.

> reasonably necessary. But everything will depend upon the particular facts and circumstances… It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have [to] avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken… The defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected." (Emphasis mine).

[19] Marman J in John DeFreitas v R[7] said that Menzies J in R v Howe,[8] an Australian High Court case,[9] gave a concise and lucid account of the law relating to self-defence which might usefully serve as a direction to a jury in cases where that defence is raised.[10] Menzies J at page 219 stated (as quoted in John DeFreitas):

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[7](1960) 2 WIR 523.

[8] [1959] 32 ALJ 212.

[9] The Board in Sigismund Palmer et al v The Queen, when referring to R v Howe was quoted as saying, "judgments of the High Court of Australia … judgments to which their Lordships pay the highest respect" – see note 1 at p. 827.

[10] It is to be noted that the Federal Supreme Court chose not to follow the development of the law propounded in Howe's case. They sought to avoid the necessity of requiring a jury to go through a complicated and difficult process and determined that an accused who has done no more than was in the opinion of the jury reasonably necessary in self-defence was entitled to be acquitted. If he went further then considerations as to provocation may reduce an offence so that the verdict should be one of manslaughter.

> "A man who is attacked may use such force as on reasonable grounds he believes is necessary to prevent and resist attack, and if in using such force, he kills his assailant, he is not guilty of any crime even if the killing is intentional." (My emphasis).

[20] Further, in Baptiste v The State, the appellant, on a trial for murder, pleaded self-defence, accident and provocation in reply to the charge. The trial judge failed to direct that a plea of self-defence or provocation might succeed even if the appellant had formed an intention to kill or to inflict grievous bodily harm. The court held that an important direction that a judge must give to a jury in appropriate cases is that an intention to kill is not inconsistent with the establishment of the plea, not only of self-defence, but also of provocation.[11]

[21] In Krishendath Sinanan et al v The State (No. 2),[12] Bernard CJ determined that the trial judge committed a grave error in failing to point out to the jury (far more, emphasise to them) that an intention to kill was not inconsistent with a self-defence plea.[13]

[22] In Fabien LaRoche v The State,[14] the case of Hans Noel v The State[15] was referred to and applied. Weekes JA delivering the judgment of the Court of Appeal of Trinidad and Tobago in Fabien gave a brief background of the Hans Noel case:

> "Hamel-Smith JA at page 21 said:
> "…attorney submitted that the learned trial judge failed to direct the jury that even if the accused had the requisite intention but had acted in self-defence, the intention would have been negatived. The learned judge said at page 31:
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> > "If you find that at the time the accused shot the deceased, on consideration of all the evidence, he was acting in necessary self-defence, then you have to acquit him. If you are in doubt that he was acting in self defence, equally you must acquit him. However, if on consideration of all the evidence you are satisfied

[11] At p. 261.
[12] (1992) 44 WIR 383.
[13] At p. 390.
[14] Republic of Trinidad and Tobago, Court of Appeal No. 32 of 2009 (delivered 20th April 2011, unreported).
[15] Republic of Trinidad and Tobago, Court of Appeal No. 29 of 1990 (delivered 9th December 1991, unreported).

so that you are sure the accused had the intention to kill or cause grievous bodily harm when he inflicted the injuries, and that he was not acting in necessary self-defence, then you ought to find him guilty as charged."

"The defect in this part of the summing up, attorney submitted, was that the judge left the alternative situation, ie if the accused had the requisite intention at the relevant time but was acting in self-defence he should be acquitted, to be implied. It cannot be doubted that if the accused had the requisite intention but was acting in self-defence at the material time, he was entitled to an acquittal. But that does not necessarily mean that the direction should be in such terms. It all depends on the way in which the issue is put to the jury. One cannot be allowed, in hindsight, to dissect every word in a summing up and conclude that, looked at in isolation, it did not convey the correct or proper meaning to a jury. A jury must be allowed a measure of common sense and a degree of intelligence in dealing with the directions given and the summing up must be looked at as a whole to see whether a wrong or improper impression was conveyed to them."[16] (Emphasis mine).

[23] At paragraph 25, Weekes JA went on to say that immediately before the above-quoted portion of the judge's summation, he had explained self-defence to the jury in the following terms:

"If a man is attacked the law is that he is entitled to defend himself by using such force as is reasonable, that is to say, force that is reasonably necessary in the circumstances of the attack, in defence of himself."

[24] Weekes JA further stated that a judge need not specifically say that an intent to kill is not inconsistent with self-defence as long as that idea is conveyed to the jury.

[25] The court in Hans Noel ultimately held that this explanation of self-defence coupled with the portion of the summation quoted at paragraph 23 was a sufficient direction on intention and self-defence.

[26] All of the above authorities clearly indicate that no precise words need to be used provided that the trial judge conveys to the jury clearly and unequivocally that even

[16] See Fabien La Roche at para. 24.

if an appellant, (in this case) Mr. Spencer had formed an intention to kill his attacker this did not deprive him of the defence of self-defence.

[27] I will now examine the relevant parts of the trial judge's summing up in order to determine whether there is any merit in the first ground of appeal.

[28] In the present case, the learned judge defined murder at page 154 of the record:

> "So murder is,… where a person of sound mind and memory and discretion unlawfully kills any reasonable creature in being and under the King's peace with malice aforethought either express or implied the death following within a year and a day."[17]

[29] Then on page 158 the learned judge again picks up on "malice aforethought" he said:

> "And then in malice aforethought the person [Che Gregory Spencer] must have formed the intention to kill, or do grievous bodily harm and that express and implied so you do not have to hear the person say I am going to kill you for you to understand that such malice was in their mind. It is a question of what they did before, during the act itself and after that you would look at to determine whether or not such malice aforethought existed which would be the intention to kill or do grievous bodily harm either express or implied."[18]

[30] Further, the learned judge had reminded the jury of some of the prosecution's witnesses (Rosaline Marsham, Leon Thompson and Terrance Marsham – these were eyewitnesses so called). Having done that, the learned trial judge, in his charge to the jury on the issue of self-defence, said:

> "You would have heard Dr. Browne speak to the possible defences. You must take the law from me, so I will tell you what the situation is. [See Volume 1 of the record as to what Dr. Browne said] You would have heard the Prosecution say the issue is whether Jason [the deceased] threw the bottle at the Accused. That in fact from the point view of the law is not the issue. The issue in relation to self defence is first of all you must ask yourself whether Che Gregory Spencer, the accused, held an honestly belief that he was defending himself against a lethal attack. And when I say lethal I mean just an attack that could cause him injury or

[17] See Transcript of Trial Proceedings, Volume I, p. 154, lines 11-16.
[18] See Transcript of Trial Proceedings, Volume I, p. 158, lines 4-12.

death, whether he held that belief and held it honestly. In other words, did he believe that it was necessary in the circumstances to defend himself.

"And then secondly looking at all the circumstances, do you believe that the defendant honestly believe that he needed to act in self defence? Was the amount of force that he used reasonable in the circumstances? Now, this goes to the question of whether or not you first of all believe that he acted out of an honest belief that he needed to defend himself in that way. So that if you think that the force that was used was clearly out of proportion with the kind of attack then you may want to ask whether or not there could have been an honest belief that the accused could have been acting on an honest belief that he needed to defend himself in the way that he did.

"Now, you must take into account that even if the accused was mistaken as to what he thought was about to happen you must still give him the doubt in relation to that mistake. So you mustn't say well he clearly couldn't have thought that a man would use these bottles on him, and it was a mistake for him to think that the bottles could be used on him therefore it is not self defence. It is a question of whether he honestly apprehended that he was under attack by an individual with two bottles and what I would refer to as a lethal attack. So he could be honestly mistaken about that, about the lethal attack and you would have to still accept that he had the honest belief that he was under attack even if it was mistaken."[19]

[31] The trial judge had initially and throughout the summing up reminded the jurors that "it is the Prosecution that must prove anything and anything that is raised by the accused the Prosecution must disprove that which he has raised."[20]

[32] Later on in the summation, after having given a detailed direction on self-defence and having created the necessary nexus between the facts and the evidence in the case, and having made it clear to the jury that (1) murder is an unlawful intentional killing; (2) the prosecution has to prove beyond all reasonable doubt that Mr. Spencer did not act in self-defence, the learned trial judge said:

"So self- defence is lawful, acting in self- defence or killing someone in self-defence is lawful and indeed it is common sense that one cannot wait to find out what an individual's true intention is before defending one self against a perceived attack. As I said you have to look at it from the

[19] See Volume I, Transcript of Trial Proceedings, p. 162, line 17 et seq.
[20] See Transcript of Trial Proceedings, Volume I, p. 142, lines 4-7.

> point of view of what you think he honestly believed even if you think it may have been a mistake. So if you for some reason feel that he was mistaken that Marsham [the deceased] was not going to use the bottles you still have to look at whether or not in the circumstances a reasonable person could have felt that he was going to use them and therefore use them in an attack on him, the accused, and therefore found it was necessary to defend himself. If you are in doubt about these things you would have to find the accused not guilty because it would mean the Prosecution hasn't proven the case. So that in a case of murder dealt with that way you either say guilty or not guilty."[21] (Emphasis mine).

[33] From the review of the summing up above, it is clear that the learned trial judge did not specifically say to the jury that an intention to kill was not inconsistent with self-defence. However as was held in Palmer and later applied in Baptiste, and as I have already stated, there are no prescribed words which must be employed in or adopted in a summing up. I have no doubt that the trial judge's indication to the jury that self-defence was a lawful killing and that the prosecution had to negate self-defence, would have effectively conveyed the idea to the jury that even if Mr. Spencer had the intention to kill Mr. Marsham once he was acting in self-defence, he ought to be acquitted. In addition, the learned trial judge later on in his summing up reinforced this point when he said, "so self-defence is lawful, acting in self-defence or killing someone in self-defence is lawful," this would have conveyed the idea to the jury that even if the killing was intentional, because Mr. Spencer would have been acting in self-defence it would have made it a lawful killing.

[34] In my view, that present summation is very similar to Fabien LaRoche v The State where the trial judge not did specifically say that an intention to kill was not inconsistent with self-defence. He however directed the jury that murder is an unlawful killing and that unlawful means "without legal justification or excuse, for example self-defence".[22] The learned judge further explained that the "law requires that the killing must be unlawful; thus the requirement that the killing must be unlawful means no more than that it was not done in either self-defence or

[21] See Transcript of Trial Proceedings, Volume I, p. 166, lines 9-24.
[22] See Fabien LaRoche at para. 26.

defence of others…" In addition the learned judge defined intention and gave detailed directions on self-defence at page 22-23 of the lower court judgment:

> "Now … the law says that a person who is attacked or who believes that he is about to be attacked may use such force as is reasonably necessary to defend himself. If that is the case, he is acting in lawful self-defence and he is entitled to be found not guilty. So if you think that the defendant was or may have been acting in lawful self-defence, he is entitled to be found not guilty, because the prosecution must prove the defendant's guilt. … Now, a person acts in lawful self-defence in all of the circumstances if he believes that it is necessary for him to defend himself and if the amount of force which he uses in doing so is reasonable. … So if you are sure that the defendant did not honestly believe that it was necessary to use force to himself, he cannot have been acting in lawful self-defence and you need not consider this matter of self-defence further. But what if you think that the defendant did honestly believe or may honestly have believed that it was necessary to use force to defend himself. If you arrive at that position … then you must decide whether the type of force and the amount of force the defendant used was reasonable. Now obviously a person who is under attack may react to the spur of the moment and he cannot be expected to work out how much force he needs to defend himself. … So … if you accept the accused statement that there was an impending attack on him that night, you must, then, take into account both the nature of the attack on the accused and what he then did. If therefore, you think, having considered all of the evidence that the force the accused used was or may have been reasonable, he is entitled to be found not guilty. If you accept the accused's explanation of this matter, then it would mean that the deceased and the other men in the yard at the time were all armed and he was out numbered, and, as such, he acted to defend himself."[23]

[35] The Court of Appeal in that case held that they were satisfied that it was clearly conveyed to the jurors that even if an intention to kill was formed by an attacker, that did not deprive him of the defence of self-defence.

[36] Fabien LaRoche v The State is very persuasive. I am of the view that it contains similar directions to this present case. The learned trial judge in this present case made it clear to the jury that self-defence was a lawful killing. I am satisfied that it was conveyed to the jury that even if there was an intention to kill once Mr. Spencer was acting in lawful self-defence he ought to be found not guilty. The

[23] See Fabien LaRoche at para. 28.

judge clearly told the jury that killing someone in self- defence is lawful. There is no need to seek to restrict the form of words that a trial judge should use in giving directions on self-defence and the intention to kill or cause grievous bodily harm.

[37] Having said all of this, it is also useful to refer to the pronouncements in Hans Noel where Hamel-Smith JA said:

> "It cannot be doubted that if the accused had the requisite intention but was acting in self-defence at the material time, he was entitled to an acquittal. But that does not necessarily mean that the direction should be in such terms. It all depends on the way in which the issue is put to the jury. One cannot be allowed, in hindsight, to dissect every word in a summing up and conclude that, looked at in isolation, it did not convey the correct or proper meaning to a jury. A jury must be allowed a measure of common sense and a degree of intelligence in dealing with the directions given and the summing up must be looked at as a whole to see whether a wrong or improper impression was conveyed to them."

[38] It is within a trial judge's discretion how he approaches his summation.

[39] I have carefully reviewed the trial judge's summation in its entirety and am of the opinion that it was clearly and unequivocally conveyed to the jury that if the defendant had the intention to kill or cause grievous bodily harm this does not undermine the defence of self-defence.

[40] There is therefore no force in the arguments advocated by Dr. Browne, QC when he said that Mr. Spencer suffered a possible miscarriage of justice when the learned trial judge failed to tell the jury that an intention to kill is not inconsistent with self-defence.

[41] Accordingly, this ground of appeal fails.

[42] I would now address the next ground of appeal.

b. Failure to properly direct on the issue of provocation

[43] The main thrust of Dr. Browne, QC's complaint in relation to the trial judge's directions on provocation was that the directions were seriously defective and amounted to a misdirection as it failed to convey to the jury in any manner, shape or form that a plea of provocation could succeed even though there exists an intention to kill. Queen's Counsel argues that where an intention to kill or to cause grievous bodily harm results not from premeditation but solely from the loss of self-control induced by provocation, the accused will be guilty of manslaughter. Dr. Browne, QC submits that nowhere in the summing up did the trial judge point this out to the jury. This was a grave omission, argues Queen's Counsel.

[44] Dr. Browne, QC also takes objection to the trial judge's use of the phrase, "for the moment, not master of his mind" in his summation. Dr. Browne, QC postulates that that expression should be avoided and ought not to have been included in the trial judge's definition of provocation in his summing up to the jury.

[45] Learned counsel on behalf of the Crown submits in response that the trial judge's directions to the jury on the issue of provocation were not as extensive as on self-defence. However, he gave a detailed summation and provided the necessary guidance to the jury as to how to treat the evidence and the application of the law.

Analysis

[46] In Joseph Bullard v The Queen[24] it was stated that:

> "It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to the jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused 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."[25]

[24] [1957] AC 635.
[25] At . 642.

[47] In the case at bar, provocation arose on the evidence in so far as Mr. Spencer alleged that Mr. Marsham threw bottles at him and said certain words to him. The learned trial judge rightfully left the issue of provocation to the jury with such directions:

> "Now, what is provocation? A provocation is some act or series or acts done by the dead man which would case in any reasonable person and actually causes in the accused a sudden and temporary loss of self control rendering the accused so subject to passion as to make him or her for the moment not master of his mind."[26]

[48] The Privy Council considered the applicable principles of provocation in the case of Attorney General for Ceylon v Kumarasinghege Don John Perera,[27] where Lord Goddard delivering the decision of the Board said:

> "The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation. An illustration is to be found in the case of a man finding his wife in the act of adultery who kills her or her paramour, and the law has always regarded that, although an intentional act, as amounting only to manslaughter by reason of the provocation received, although no doubt the accused person intended to cause death or grievous bodily harm."[28] (My emphasis).

This principle of law was reaffirmed in Lee Chun-Chuen alias Lee Wing-Cheuk v The Queen[29] and again approved in R v Plinton.[30]

[49] The Jamaican Court of Appeal also considered the applicable principles that govern provocation in R v Bunting.[31] In that case, at the trial of the appellant on a charge of murder, the defence of provocation arose and was left by the trial judge to the jury. In his directions to the jury the trial judge omitted to tell the jury that where an intention either to kill or to cause such an injury resulted not from premeditation but solely from the loss of self-control induced by provocation, the

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[26] See Transcript of Trial Proceedings, Volume I, p. 167, lines 5-10.
[27] [1953] AC 200.
[28] At p. 206.
[29] [1962] 3 WLR 1461.
[30] (1965) 9 WIR 44.
[31] (1965) 8 WIR 276.

accused was guilty not of murder but of manslaughter. It was held that in a case where provocation arises as a defence to a charge of murder it is proper and indeed necessary for the trial judge to tell the jury that murder is not established unless an intent to kill or to cause grievous bodily harm is proved, but the converse proposition, namely, that the accused is guilty of murder if such an intention is proved is not necessarily correct. For where the intention to kill or to cause grievous bodily harm results not from premeditation but solely from the loss of self-control induced by provocation the accused is guilty not of murder but of manslaughter.

[50] In that case, it was stated per curiam that the phrase "for the moment not master of his mind" should be omitted in directing juries on the law of provocation. Lewis JA explained that:

> "…this phrase was in our opinion likely to lead the jury to believe the provocation required to reduce murder to manslaughter must be such as to deprive the accused of his self-control to such an extent that at the time he struck the blow he was temporarily deprived of his mental capacity to form an intention and therefore to form the intention to kill or to do grievous bodily harm."[32]

[51] I can do no more than adopt those helpful pronouncements referred to above, which correctly reflects the legal position.

[52] Accordingly, I accept the contentions of Dr. Browne, QC in this regard.

[53] Moreover, in Antoine and Bass v R,[33] Fraser JA speaking on behalf of the Court of Appeal of Trinidad and Tobago on the issue of provocation said:

> "We think it would be helpful if, in future, attention is paid to the *dictum* of Lewis JA in *R v Bunting* ((1965), 8 WIR 276) which we cite with approval. He said ((1965) 8 WIR at p 279):
>
> '... in the light of recent authorities it is desirable that the phrase 'for the moment not master of his mind' should be omitted in directing juries on the law of provocation. Care should also be taken in a case where

[32] Ibid, p. 278.
[33] (1968) 13 WIR 289.

> provocation arises as a defence to avoid the use of expressions which suggest that the presence of intention in the mind of the accused must inevitably lead to a verdict of murder rather than manslaughter."[34]

[54] Turning once again to the direction on intention and provocation, in Trinidad & Tobago, the Court of Appeal in Baptiste v The State followed Antoine and Bass v R and applied R v Bunting and held that a plea of self-defence or provocation might succeed even though the accused had formed an intention to kill; further, in relation to a plea of provocation, the judge should avoid making any reference to the accused being or not being "master of his own mind". Baptiste v The State went further to hold that where the trial judge omitted to point out to the jury that a plea of provocation may still arise if the appellant had formed an intention to kill or inflict grievous bodily harm, with this intention arising from sudden passion induced by the provocation, that was a grave omission.

[55] The Court of Appeal of Trinidad and Tobago in Fabien LaRoche v The State gave what they thought was the correct definition of provocation having examined the cases of R v Duffy,[35] Lee Chun-Chuen alias Lee Wing-Cheuk and R v Bunting:

> "Provocation is some act or series of acts done or words spoken by the deceased to the accused which would cause in any reasonable person and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to cause him to retaliate."[36]

[56] I have carefully examined the trial judge's directions to the jury, in the case at bar, in relation to provocation and nowhere in the judgment can it be said that he conveyed or effectively conveyed that principle to the jury. As a matter of fact, the trial judge's directions seem to me to say the converse:

> "Now, in the case of the latter which is provocation if it is not disproved, if you have already dismissed self defence and you have considered provocation and you are in doubt about that and you are not satisfied that the Prosecution has disproved it then the matter would be reduced from

[34] At p. 290.
[35] [1949] 1 All ER 932.
[36] See Fabien LaRoche at para. 47.

> murder to manslaughter and that would be a verdict that you would be able to consider, … because you would be saying that it was an unlawful killing but it was not carried out in the circumstances of a murder with malice aforethought as required by the elements of the offence of murder. Because the accused would not have been a master of his mind as I said at the time when he acted as he did to inflict the shot that killed the deceased."[37] (My emphasis).

The learned judge later went on:

> "It is only if you think that the evidence shows that there was not self-defence but a wilful, an unlawful act which caused the death of the deceased, it was inflicted by the accused that you would consider provocation and manslaughter as an alternative verdict."[38]

He later continued:

> "If provocation succeeds because you are not satisfied that this kind of action that was taken was done in self-defence but at the same time you do not think that it was done with the malice aforethought then you can consider provocation…"[39]

[57] In my view, the above directions served to inform the jury that if Mr. Spencer had the necessary mens rea to kill or cause grievous bodily harm he would solely be guilty of murder and not manslaughter even where the intention arose from a sudden loss of control. Furthermore, the learned trial judge in the above highlighted portions directed the jury that only if they thought that there was no intention to kill or cause grievous bodily harm (as per the definition of malice aforethought) then that is when they can consider provocation, which effectively is saying that that is when murder would be reduced to manslaughter. This amounts to a gross misdirection. I am fortified in this view by the learned trial judge's own further words when he continued "the accused would not have been a master of his mind". That would essentially be saying to the jury that Mr. Spencer would not have been able to form the necessary intention to kill or cause grievous bodily harm. As outlined in the above cases, this view is incorrect and amounts to a serious misdirection. This failure by the trial judge might have deprived

[37] See Transcript of Trial Proceedings, Volume I, p. 168, lines 6-25 and p. 169, lines 1-4.
[38] See Transcript of Trial Proceedings, Volume I, p. 169, lines 14-18.
[39] See Transcript of Trial Proceedings, Volume I, p. 172, lines 16-20.

Mr. Spencer of a verdict of not guilty of murder but guilty of manslaughter, the latter being the lesser count.

[58] I do not subscribe to an approach that any prescribed words have to be used in giving directions; rather it must satisfactorily be conveyed to the jury that a plea of provocation might succeed even if the appellant had formed an intention to kill or to inflict grievous bodily harm. A reading of the entirety of the judgment, in my opinion, does not indicate that the jury had any such directions. The judge should have clearly conveyed to the jury that the intention to kill or do grievous bodily harm may arise from loss of self-control induced by provocation.

[59] I would recommend the sound advice given in Fabien LaRoche v The State at paragraph 55, "We advise that when dealing with the issue of provocation, trial judges specifically direct in clear and unequivocal language that an intention to kill is not inconsistent with provocation". I will go further and give credence to the words of Kelsick CJ [Ag.] in Baptiste v The State:

> "…when the issue is one of provocation, the judge should refrain from suggesting to the jury that for the "defence" to succeed the defendant must not have been "master of his mind", thus implying (i) that he was incapable of forming the intention to kill; and (ii) the corollary that if he was "master of his mind" and had formed the intention to kill, he must be found to be guilty of murder and not of manslaughter."[40]

[60] That particular direction was of paramount importance since the jury may have easily found, on the evidence presented, that Mr. Spencer had formed an intention to kill. It was critical that they understood that, had such an intention sprung not from premeditation but solely from the loss of self-control induced by provocation, Mr. Spencer would have been entitled to the lesser verdict, which is manslaughter.[41] The failure by the trial judge to convey to the jury in clear and unequivocal language that an intention to kill is not inconsistent with provocation is

[40] See Baptiste v The State at p. 264.
[41] See Fabien LaRoche v The State and Baptiste v The State.

fatal. This amounts to a miscarriage of justice. Accordingly, this ground of appeal succeeds.

c. Prosecution failed to prove that the killing was not by accident

[61] Dr. Browne, QC contends that it was essential for the learned trial judge to make it clear to the jury that Mr. Spencer was relying on a sudden mischance that had befallen him. Furthermore, that it was not for Mr. Spencer to establish that the mischance had actually taken place but for the prosecution to negative it. Queen's Counsel submits that the learned trial judge failed to offer a definition of accident and to relate the issues of fact giving rise to the defence of accident to the legal principles of the defence. This, Queen's Counsel submits, may have possibly resulted in an unfair trial.

[62] Learned counsel on behalf of the Crown essentially repeated their submissions in relation to the provocation issue in support of the Crown's position on the judge's direction on accident. Counsel maintains that the learned trial judge gave a detailed summation and that he provided the necessary guidance to the jury as to how to treat the evidence and the application of the law.

[63] In as so far as my conclusion in relation to ground 2 will not serve to dispose of the entire appeal, I will now examine ground 3.

Analysis

[64] The learned trial judge gave a brief direction on accident: He said:

> "Now, accident is also a complete defence. If indeed this thing happened accidentally it would mean that there was no intention to kill anyone, there was no intention to inflict grievous bodily harm, no mental element whatsoever on which malice aforethought could be established or intent to kill so he would be totally innocent of the charge of murder… If accident succeeds alternatively obviously then you must find the accused not guilty."[42]

[42] See Transcript of Trial Proceedings, Volume I, p. 172, lines 6-11 and lines 15-16.

[65] Earlier, the trial judge repeated Mr. Spencer's evidence to the jury:

> "So you remember the DPP was saying that that would be difficult to do … but he [Mr. Spencer] saying it's an accident so he really can't explain it; they were wrestling, both our hands were on the gun and they were wrestling for the gun and then the two shots went off in rapid succession. He did not recognise that Roller [Mr. Marsham] had got shot, there wasn't any blood or anything but then he realized that his resistance was waning, their hands came down, Roller started to lean forward on him and then he assumed that he got shot from one of the bullets."[43]

[66] In reference to the onus of proof, the trial judge had this to say earlier in his summing up:

> "It is the Prosecution that must prove anything and anything that is raised by the accused the Prosecution must disprove that which he has raised".

Further:

> "…the accused, of course, … doesn't have to prove anything."[44]

Later:

> "Before you can convict you have to feel sure that the Prosecution has disproved all of these defences."

[67] The statements that are quoted above are the extent of the trial judge's directions on accident. He did not give a clear exposition of the concept of accident. He went no further than his brief directions on accident. The jury were left to interpret and apply their own definition to the plea of accident. Furthermore, the learned trial judge did not make it clear to the jury that it was not for Mr. Spencer to prove that the happenings resulting in the death of Mr. Marsham were an accident. Also, the trial judge's direction on accident did not indicate to the jury that it was for the prosecution to negative the defence of accident. This is a fatal omission.

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[43] See Transcript of Trial Proceedings, Volume I, p. 170, lines 20-25 and p. 171, lines 1-4.
[44] See Transcript of Trial Proceedings, Volume I, p. 146, lines 20-21.

[68] The State v Jaigobin Bissessar[45] was referred to in the instructive case of The State v Guy Simmons.[46] Luckhoo JA in Simmons, at page 154, quoted the learned Chancellor:[47]

> "… he [the learned trial judge] should have directed the jury that the onus of establishing the defence of the burst tyre causing the car to turn turtle, death resulting to one of its occupants, was not on the defendant but on the prosecution to negative the defence, and if there was any doubt about it, then they were in duty bound to acquit."

Luckhoo JA went on to quote the learned Chancellor as having said:

> "while it may be desirable at the commencement of the early portion of a summing-up to give direction as to the burden of proof, it is absolutely essential when dealing with a defence of this nature, as raised in a case of this kind, for the judge to make it clear to the jury that as the defendant was relying on a sudden mischance that had befallen him, it was not on the defendant to establish that the mischance had actually taken place, but for the prosecution to negative that defence."

[69] I have no doubt that in relation to the defence of accident the learned trial judge's direction fell short of what is required and was fatally flawed. He failed to give the jury any proper direction on accident.

[70] In Sherfield Bowen v The Queen,[48] 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. Bowen's case at first instance was that he did not want to shoot Ms. Barthley and that it was an accident. He was however convicted of manslaughter on 22nd February 2005 and sentenced to serve 5 years in prison. He appealed against his conviction on various grounds which sought to impeach the directions that the learned trial judge gave to the jury. The one I am concerned here with however is the trial judge's direction on accident.

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[45] (1975) CA No. 19 of 1975, unreported.
[46] (1976) 24 WIR 149.
[47] The learned Chancellor was then speaking in relation to an issue of accident due to the bursting of a car tyre raised by the defence to a charge of causing death by dangerous driving.
[48] Antigua and Barbuda, High Court Criminal Appeal HCRAP2005/0004 (delivered 20th June 2007, unreported).

[71] In that case, Rawlins JA found that the judge correctly stated the burden and standard of proof required for the defence of accident. He found additionally that the jurors were correctly told that an intention to kill negated accident and, further, that accident only arise where the actions of the accused person were not willed, deliberate or intended. Rawlins JA was concerned that the critical issue was not intention, but rather, whether in the circumstances disclosed by the evidence, the gun was discharged by Bowen's own volition or otherwise. He said at paragraph 32:

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

[72] In The State v Guy Simmons at the trial of the appellant for murder, the learned trial judge in dealing with what he called the defence of an accident referred to it as a complete defence in law and stressed on more than one occasion that if the jury accepted that defence they would have to acquit; if they were in doubt about it, they would also have to acquit the deceased. The Court of Appeal of Guyana found that the trial judge did not err in that direction. However, he was required to go further and direct the jury that the onus was on the State to negative the issue or answer of accident. They found that the trial judge did not do this which resulted in an incomplete summing up to that extent. The Court had this to say:

> "The authorities are clear that an accused who puts forward an answer or explanation, or, put another way, raises an issue of accident to a charge of murder or manslaughter, does not assume any burden of proving that issue… In this appeal the learned judge did not fall into error of directing that the onus of establishing accident was on the accused; but there was an inadequacy or incompleteness in his directions in omitting to remind the jury when dealing with the issue of accident raised by the accused that the onus was on the State to negative accident."[49]

[49] See The State v Guy Simmons at p. 155.

[73] Kelsick CJ [Ag.] in Baptiste v The State put it this way:

> "In every case the judge must, in addition to the general directions as to the onus of proof being on the prosecution, give a special direction that a further burden rests on the prosecution to negative beyond reasonable doubt the existence of these answers. The jury must be reminded that, when the prosecution does not discharge the onus, the verdict in respect of self-defence or accident should be an acquittal, and, in respect of provocation, manslaughter."[50]

[74] In this present case, unlike in Sherfield Bowen v The Queen, the learned trial judge did not even go as far as giving directions as to the onus and burden of proof on accident. At the point where the trial judge said, "So you remember the DPP was saying that that would be difficult to do…" in rehashing the case for the jury, he ought to have reminded them that it was for the prosecution to negate accident beyond a reasonable doubt and not that Mr. Spencer's account of what took place, "would be difficult to do". Mr. Spencer had nothing to prove; he did not have to prove that his plea of accident was true.

[75] Earlier in his summation the trial judge had correctly directed the jury that accident was a complete defence and it related to absence of the intention to kill or cause grievous bodily harm. Later he however told the jury that if the incident happened accidentally then it would mean that there was no intention to kill or cause grievous bodily harm; this was a misdirection. What that direction did was to shift the burden of proof onto Mr. Spencer to prove that it was an accidental killing and that he did not intend to shoot Mr. Marsham. This was further compounded by his direction that, "if accident succeeds" which could have led to further confusion taking into account his previous misdirection. My concern is that the jury would have examined Mr. Spencer's case to look for an answer to determine if indeed the incident was an accident or not. This is most troubling. Even at one point the trial judge told the jury, "… if you accept [Mr. Spencer's] position then it would be an accident…" What the trial judge did not do is go further and say that even if they didn't accept that it was an accident the jury had to go back to the

[50] See Baptiste v The State at p. 264.

prosecution's case to ensure that the prosecution negated the plea of accident, beyond all reasonable doubt.

[76] Mr. Spencer said that he and Mr. Marsham wrestled for the gun and that he was unaware that the gun went off. Based on Mr. Spencer's version of events the defence of accident arose. The evidence of the doctor as to the abrasion on Mr. Marsham's head which the doctor could not conclusively say that it was from a gunshot wound lends some credibility to the plea of accident. The learned trial judge ought to have brought home this significance to the jury. His direction was not as helpful as it should have been particularly having regard to the evidence as a whole. As such, this ground of appeal succeeds in so far as there was a miscarriage of justice. I have no doubt that Mr. Spencer's conviction is unsafe. Mr. Spencer had a viable defence of accident which was not properly put to the jury.

Retrial

[77] The question in the case at bar is therefore whether the interest of justice and the interest of the community and the family of Mr. Marsham would be served by a retrial. Mr. Spencer was convicted of a serious offence in which a young man lost his life. The date of the conviction was 3rd February 2009; the evidence which the Crown deployed was overwhelming. Having been convicted for murder he was sentenced to 18 years in prison. The countervailing factor is to ensure that Mr. Spencer is treated fairly.

[78] In Reid v The Queen[51] at 350B Lord Diplock stated:

> "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."

[51] [1980] AC 343.

[79] The question of retrial 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, Mr. Marsham, a person who is convicted of serious crime should be brought to justice and not escape merely because of some technicality such as in the case at bar, the misdirections or non-directions to the jury. In Andre Bennett and Another v The Queen[52] their Lordships said that an actual factor in determining whether to order a retrial is the seriousness of the crime. A countervailing consideration is fairness to the accused. In the case at bar, since the jury convicted Mr. Spencer of murder he could be retried for murder. This is a major factor in the determination of whether or not a retrial should be ordered.

[80] In the above circumstances, I have no doubt that retrial would serve the interest of justice.

[81] Due to the misdirections and grave omissions in this case which have resulted in a substantial miscarriage of justice, I must allow the appeal, set aside the conviction and give permission to the Director of Public Prosecutions to proceed with a retrial under the powers conferred on me by section 44(2) of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act[53] which states that:

> "Subject to the provisions of this Act, the Court of Appeal shall, if it allows an appeal against conviction, either quash the conviction and direct a judgment and verdict of acquittal to be entered, or, if in the interests of justice so require, order a new trial."

Conclusion

[82] In the premises, I would order that Mr. Spencer's conviction for murder is quashed and the sentence is set aside. It is further ordered that the Director of Public Prosecutions be at liberty to initiate a retrial of Mr. Spencer.

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[52] Privy Council Appeal No. 74 of 2000 (delivered on 17th July, 2001). See particularly paragraphs 36 – 56 of the judgment.

[53] Cap. 3.11, Revised Laws of Saint Christopher and Nevis 2002.

[83] I gratefully acknowledge the assistance of all learned counsel.

Louise Esther Blenman
Justice of Appeal

[84] Baptiste, JA: I have read the judgment of Blenman JA and I agree with her reasoning and result.

Davidson Kelvin Baptiste
Justice of Appeal

[85] Michel, JA: I have had the benefit of reading the judgment of Blenman JA and I only wish to make some brief comments on her judgment.

[86] Like my learned sister, I too believe that the directions given by the trial judge on self-defence were adequate and that the first ground of appeal should be dismissed.

[87] I also take the view that the judge's directions on provocation were defective. In particular, I consider that his use of the phrase "not master of his mind" was egregious, considering how often its use in directions to the jury on provocation has been specifically disapproved by appeal courts in the last fifty years. A jury can no doubt be misled by the use of that phrase to believe that if the appellant was master of his mind so that he could form the intention to kill or cause grievous bodily harm to the deceased, then the defence of provocation should not avail him. This misdirection by the trial judge on the defence of provocation, in circumstances where the defence does arise on the facts of the case, was critical and the verdict of guilty of murder cannot be sustained. I accordingly agree that the appellant's second ground of appeal should be allowed.

[88] On the issue of accident, I do believe that the defence arose on the facts of this case and that the judge did leave this defence to the jury. I also believe that, although the trial judge did not specifically define accident as a defence to a criminal charge, he did highlight the evidence in the case which was capable of establishing the defence of accident. What the trial judge failed to do, however, was to expressly direct the jury that it was for the prosecution to prove that the death of the deceased was not the result of an accident but was the result of a wilful act by the appellant. Although he gave such a direction with respect to defences generally, he did not give a specific direction on the burden of proof on the issue of whether or not the killing of the deceased was accidental or intentional.

[89] I consider that the evidence that the deceased's death was not accidental was very strong, but I cannot say that the jury was bound to reach the same verdict that they did if they had been properly directed on the burden of proof with respect to the defence of accident. I too would therefore allow the appeal on the appellant's third ground of appeal and set aside the conviction of the appellant on the charge of murder.

[90] Like my sister, I too consider that the justice of the case would dictate that the appellant be retried and I would so order.

Mario Michel
Justice of Appeal