

REPUBLIC OF TRINIDAD AND TOBAGO
IN THE COURT OF APPEAL

Cr. App. No. 32 of 2009

BETWEEN

FABIEN LA ROCHE

APPELLANT

AND

THE STATE

RESPONDENT

PANEL

P. Weekes, J.A.

A. Yorke Soo – Hon, J.A.

R. Narine, J.A

APPEARANCES

Mr. J. Singh and Mr. L. Lalla for the Appellant

Mrs. J. Honore – Paul for the Respondent

DATE OF DELIVERY: April 20th 2011

JUDGMENT

Delivered by PM Weekes, JA

1. The appellant Fabien La Roche was convicted of murder at the Port of Spain Assizes on 15th October 2009. He was sentenced to death by hanging and has appealed his conviction.

The Prosecution Case

2. The prosecution's case was founded principally on the appellant's caution statement of 31st July 2003 and the post mortem examination report dated 25th July 2003.

3. In the early morning hours of 25th July 2003, the appellant was at a yard in Temple Street Arima selling marijuana. While there, he was approached by the deceased, Gary Irish, otherwise called "Scarra", who had continually robbed and bullied the appellant over a period of years. The deceased demanded money from the appellant and when he was refused, quarreled with him. After this encounter, the deceased left the appellant alone.

4. Later, while the appellant was checking his parcels of marijuana, the deceased returned, snatched them and refused to return them to the appellant. The deceased then drew the attention of some men nearby, inciting them to run the appellant out of the yard they were all occupying. The men in the yard armed themselves with pieces of wood, rocks and bottles, and the appellant did likewise. However, when the deceased was in an unguarded moment, the appellant caught him "unawares" and stabbed him four to five times in the back.

5. After stabbing the deceased, the appellant walked away from the scene. No injuries were inflicted on the appellant by the deceased or the other men. Anslem

Rojas, a Temple Street resident, discovered the body of the deceased later that morning and, with the help of a neighbor, transported the body to the Arima Hospital. A post mortem examination determined that the deceased died from multiple stab wounds.

6. On 27th July 2003, police officers were conducting enquiries at Temple Street and there discovered the appellant staggering along the street. He appeared to be bleeding and the officers were unable to interview him in that condition. He was taken to the Arima Health Facility where he was treated and transferred to the Port of Spain General Hospital.

7. The following day, the appellant was interviewed at the Port of Spain General Hospital by the investigating officers. They identified themselves and told the appellant that they were investigating the stabbing of Gary Irish. They informed him that it was alleged that he had stabbed the deceased. After being cautioned, the appellant's replied "*I never stab nobody*".

8. Investigations continued and on 31st July 2003 the appellant was arrested and taken to the Arima Police Station. At the station the appellant recanted his earlier statement to the police. He told the investigating officer "*I will give all yuh a statement, ah go write it for myself, ah does do poetry*". In his statement he admitted that he had stabbed the deceased four to five times in the back in the circumstances outlined above.

The Defence Case

9. The appellant did not give evidence nor call any witnesses. As can be gleaned from the cross-examination of prosecution witnesses, the defence asserted that the appellant perceived he was in imminent danger from the deceased and other men in

the yard, and this is why he armed himself and in a pre-emptive strike he stabbed the deceased in the back.

10. The trial judge left the issues of self-defence and provocation to the jury.

The Appeal

11. The Appellant appeals against conviction on three grounds each of which will be considered in turn.

Ground 1 Intention direction on the issue of self-defence

The Learned trial Judge erred in law when he failed to properly direct the Jury on the issue of self-defence.

12. Mr. Singh, for the appellant, complained that the judge effectively directed that the plea of self-defence would not succeed where there was an intention to kill. He submitted 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. The judge directed the jury in the following terms:

*“The State is also relying on the Caution Statement given by the accused in which he, the accused, outlines his history between himself and the deceased, where he says that the deceased effectively menaced him for a number of years, and the State is saying to you, effectively, that when you interpret that in the context of what the accused said he did, **that is indicative of a man who intended to kill, and there was no lawful self-defence.**” [Emphasis ours]*

It is the highlighted words that are the nub of the appellant’s complaint.

13. Mr. Singh referred the Court to the oft-cited dicta of Morris LJ in **Palmer v The Queen [1971] AC 814** at 831 – 832, which we do not find it necessary to rehearse here. He submitted that the direction given by Morris LJ was not exhaustive and that a line of cases had developed in the Caribbean that dictated that trial judges must

direct the jury that the special plea of self-defence was not inconsistent with an accused forming an intention to kill. Mr. Singh referred to two of this Court's earlier decisions, **Baptiste v The State 34 WIR 253** and **Sinanan and Others v The State 44 WIR 383**.

14. In **Baptiste v The State**, the issues of self-defence, accident, and provocation were left to the jury. The trial judge did not make it clear to the jury 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 in cases where accident, self-defence and provocation are pleaded, a trial judge must direct the jury that while an intention to kill negated a plea of accident; a plea of self-defence or provocation might succeed even though the accused had formed an intention to kill. Affirming this principle a few years later in **Sinanan and others v The State**, this Court held that a miscarriage of justice occurred where a trial judge failed to direct that an intention to kill is not inconsistent with self-defence or provocation.

15. Counsel for the State in reply submitted that although the judge did not specifically state that self-defence was not inconsistent with an intention to kill, the summation as a whole would have conveyed this proposition to the jury. She referred the court to pg 19 of the judge's summation, lines 31 - 40:

“The second element is that the killing must have been unlawful. The term “unlawful” means without legal justification or excuse, for example, self-defence. The burden is on the State to prove that the killing was unlawful.”

Counsel also referred to the judge's summation from pg 21 line 45:

“So is Counsel asking you to believe that the only time he armed himself was when he perceived these other persons were arming themselves, if you accept that there was, in fact, an attack or an impending attack. He maintains, therefore, that at the time in question he only stabbed the deceased because he perceived the deceased and the other men had armed themselves to, in his words “run me.” His counsel further argued that when the accused said that he “caught him unawares” what

he means or what he meant was that in the heat of the moment he caught the deceased offguard, and thus was lucky enough to get in the first strike. Therefore when he reacted like that he was acting in lawful self-defence. It is a matter for you, Mr. Foreman, Ladies and Gentlemen of the jury what you make of those arguments based on the evidence.”

16. Counsel relied on the learning in **Palmer v The Queen** that no set words or formula need be employed in order to direct a jury on self-defence.

17. The classic exposition of the law of self-defence is contained in the dictum of Morris LJ in **Palmer v The Queen**. This court in **Stephen Robinson a/c Psycho a/c Tony v The State Cr. App. No 12 of 2009**, synthesized the essential principles to be extracted from **Palmer**. They are as follows:

- “1. A person who is attacked is entitled to defend himself.**
- 2. In defending himself he is entitled to do what is reasonably necessary.**
- 3. The defensive action must not be out of proportion to the attack.**
- 4. In a moment of crisis a person may not be able to weigh to a nicety the exact measure of his necessary defensive action.**
- 5. In a moment of anguish a person may do what he honestly and instinctively thought was necessary**
- 6. If there has been no attack then the issue of self-defence does not arise.**

18. Lord Morris in **Palmer** approved the trial judge’s self-defence direction at pg 823:

“In the course of his direction the judge said:

*‘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 that he is entitled to protect.’” [Emphasis ours]

19. It is noteworthy that while **Palmer** is not advanced as authority for the proposition that in a case of self-defence a judge must direct a jury that an intent to kill is not inconsistent with the defence such a direction was approved by the court. This Court in **Baptiste** and **Sinanan** was more direct and ruled, that trial judges must direct the jury that an intention to kill is not inconsistent with self-defence. Mr. Singh’s observation that this particular direction is a development in Caribbean jurisprudence is not entirely veracious. Directions to this effect can be found in case law from other Commonwealth jurisdictions, and many predate **Baptiste** and **Sinanan**.

20. In **John DeFreitas v R (1960) 2 WIR 523**, Marnan J, in delivering the judgment of the former Federal Supreme Court, made reference to the decision of **R v Howe [1959] 100 C.L.R 448**. This decision of the High Court of Australia was once considered the leading authority on the doctrine of excessive self-defence. While the Federal Supreme Court rejected that doctrine, Marnan J was in agreement with the self-defence direction given by Menzies J. Marnan J stated at pg 530:

“Menzies J, gives 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. He said (32 ALJ at p 219):

*‘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.** In deciding in a particular case whether it was reasonably necessary to have used as much force as in fact was used, regard must be had to all the circumstances, including the possibility of retreating without danger or yielding anything that a man is entitled to protect.’*

This is a perfectly clear and, in our view, a correct direction.” [Emphasis ours]

This particular portion of Marnan J’s judgment was expressly approved by this Court in **Anthony Williams v Regina Cr. App. No 59 of 1972**. At page 11 of the judgment

Rees JA, approved the direction of Marnan J, referring to it as being “perfectly clear” and “correct”.

21. The High Court of Australia again considered the principle of self-defence in **Zecevic v Director of Public Prosecutions 162 (Vic) (1987) CLR 645**. In this case the Court made the following observations about directions to the jury when self-defence is pleaded in cases of homicide:

*“It is apparent, we think, from the difficulties which appear to have been experienced in the application of **Viro**, that there is wisdom in the observation of the Privy Council in **Palmer** that an explanation of the law of self-defence requires no set words or formula. The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. Stated in that form, the question is one of general application and is not limited to cases of homicide. Where homicide is involved some elaboration may be necessary.*

*Murder consists of an unlawful killing done with intent to kill or to do grievous bodily harm. Recklessness may be put to one side as having no apparent relevance in the context of self-defence. Manslaughter also consists of an unlawful killing, but without such an intent. **A killing which is done in self-defence is done with justification or excuse and is not unlawful, though it be done with intent to kill or do grievous bodily harm.**” [Emphasis ours]*

22. In **Drury (Stuart) v HM Advocate 2001 S.L.T. 1013**, Scotland’s High Court of Justiciary stated obiter that an intention to kill, if implemented, does not necessarily amount to murder. Johnston LJ at pg 1029 stated:

*“The task facing the Crown, in bringing a murder charge, is the establishment to the jury’s satisfaction, ie beyond reasonable doubt, of a sufficient degree of wickedness either in the context of intentional killing or wicked recklessness from which the jury may reasonably infer that the accused cared not whether his victim lived or died. **It is therefore in my opinion erroneous if not dangerous to assume that merely because there is an intent to kill in any particular case, that will amount to murder if implemented. There are a number of cases where intent to***

kill would yield completely the opposite inference, for example, in relation to self defence.” [Emphasis ours]

23. The cases examined above disclose that various courts have thought it necessary to address specifically the issue of an intention to kill when self-defence is an issue. However, this court has held that a judge need not specifically say that an intention to kill is not inconsistent with self-defence as long as that idea is conveyed to the jury.

24. In **Hans Noel v The State Cr. App. No 29 of 1990**, it was noted that an accused who acted in self defence but had the requisite intention for murder was to be found not guilty. The court noted however, that the direction need not be in those precise terms. The complaint in this case was that there was a material non-direction when the learned trial judge omitted to direct the jury that self-defence was available to the accused when he may have had the intention to kill or cause grievous bodily harm. Hamel-Smith JA at pg 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 negated. The learned judge said at page 31:

*“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 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.”
[Emphasis ours]

25. 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.”

The Court held that this explanation of self-defence coupled with the portion of the summation quoted earlier was a sufficient direction on intention and self-defence.

26. In the instant case, the judge did not specifically direct the jury that an intention to kill was not inconsistent with self-defence. The judge defined murder at pg 19, line 17 of his summation:

“The crime of murder is committed when a person of sound mind and discretion, unlawfully kills any reasonable creature in being under the State’s peace with intent to kill or cause grievous bodily harm, death ensuing within a year and a day.”

Later at line 31 he further explained:

“The second element is that the killing must have been unlawful. The term “unlawful” means without legal justification or excuse, for example self-defence.”

At pg 20, line 45 he continued

*“Now, **the main issue** of contention, Mr. Foreman, Ladies and Gentlemen of the jury, between the parties **in this case is whether the killing of Gary Irish** on the 25th of July, 2003, **was unlawful or not**. 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 defence of others, defence of property, as force, for the purpose of preventing a crime.” [Emphasis ours]*

27. The judge explained intention at pg 20, line 17 of the summation

“Sixthly, the expression “with intent to kill or cause grievous bodily harm. Now, intent to kill is straightforward, it means exactly what it says, intent to kill. Intent to cause grievous bodily harm is something slightly different. Grievous bodily harm means injury which is really serious, but not necessarily dangerous to life.” and went on to contextualize the definition with respect to the evidence in the case.

The judge said at pg 20 line 23:

“In this regard, the evidence before you is that the accused stabbed the deceased some four to five times in the back, one of those wounds penetrating the lung. You may think ... that a person who stabs another repeatedly about the back with a sharp object could well have demonstrated, thereby, a clear intention either to kill or cause such other person grievous or really serious bodily harm.”

28. The judge then gave detailed directions on self-defence pg 22 – 23:

“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.”

29. Later on at pg 27 line 35, he directed the jury as follows: (this is the impugned passage)

*“The State is also relying on the Caution Statement given by the accused in which he, the accused, outlines his history between himself and the deceased, where he says that the deceased effectively menaced him for a number of years, and the State is saying to you, effectively, that when you interpret that in the context of what the accused said he did, **that is indicative of a man who intended to kill, and there was no lawful self-defence.**” [Emphasis ours]*

30. It is clear that the judge was here summarising the State’s position, as distinct from telling the jury what the law was. This would have been obvious to the jury since twice in the above quoted passage he emphasizes it is the State’s position.

31. We are fortified in this view from a reading of the entire summation. The judge outlined the State’s case and in particular the state’s interpretation of the appellant’s statement:

“In this case the Prosecution is saying this: Not only did the accused fatally stab the deceased, Gary Irish five times during the wee hours of the morning on July 25, 2003, but that he, the accused, had a motive for so doing. Which was the fact that the deceased had continuously robbed and bullied the accused in the past. That he had taken from him on that night in question his stash of marijuana; and on that night, in circumstances when the accused needed money. That is the picture that the state has painted for you. They say that despite what has been said by the accused and his counsel, there was no fight. And that when the accused inflicted these fatal wounds on the deceased he was not acting in lawful self-defence, since, as they say, the accused was an aggressor and this was an ambush. Mr. Irish having been caught unawares by the accused, and the deceased was, in any event, stabbed five times in the back at different angles, in various degrees. And then, according to the State, and the statement of the accused himself, then the accused walked away, rather than, escaped from the scene. Inherent, also, in what the State is saying to you, therefore, is that there was no attack, perceived or otherwise, on the accused that night. It is a matter for you, Mr. Foreman, Ladies

and Gentlemen of the jury when you assess all of the evidence for you to determine where the truth lies.” Summation dated 15th October 2009 pg 21 lines 4 – 31

32. The judge then juxtaposed the State’s case with the case for the appellant, that there was an impending attack by the deceased and others, and the appellant armed himself when he saw others arming themselves, and further, in the heat of the moment, he managed to get in the first strike and stab the deceased. Therefore the appellant was acting in lawful self-defence.

33. Addressing Mr. Singh’s stated concern, we are of the view that the judge was doing nothing more than rehashing the State’s position. When we consider all the judge said on self-defence, we are sure the jury would have understood the context in which the impugned statement was made.

34. In accordance with the law quoted above, we acknowledge that it is within a trial judge’s discretion how he approaches his summation. There are no precise words that need be used, and a formulaic expression of principle will unduly restrict trial judges in giving directions on self-defence. What is essential however, is that whatever the form of words, it must be clearly conveyed to the jury that even if an intention to kill was formed by an attacker, that did not deprive him of the defence and we are satisfied that this was clearly and unequivocally conveyed to the jurors in this case.

Accordingly, this ground of appeal is without merit.

Ground 2 Intention direction on the issue of provocation

The Learned trial Judge erred in law when he failed to properly direct the Jury on the issue of provocation.

35. The judge, in his discretion, directed the jury on the issue of provocation. Mr. Singh submitted that the judge erred in law when he failed to direct the jury that the plea of provocation could succeed even though the accused had formed an intention to kill. The State conceded that the judge did not give that direction. We have perused the judge's summation and think it necessary to lay out his directions on the issue in full. He directed the jury in the following terms at pg 24 line 46:

*“Now, another matter arises for your consideration in this case. If you are sure that the accused acted unlawfully, and that he unlawfully killed Gary Irish, intending to kill him or to cause him really serious injury, **then the accused is guilty of Murder, unless you conclude that this was or may have been a case of provocation.** Now provocation is not a complete defence leading to a verdict of not guilty. It is a partial defence, reducing what would otherwise be Murder to the lesser offence of Manslaughter. Because the prosecution must prove the accused's guilt it is for the Prosecution to make you sure that this was not a case of provocation and not for the accused to establish that it was. Provocation has a special legal meaning in the following way: First of all, you must ask yourself whether the accused was provoked in the legal sense at all. Now a person is provoked if he is caused suddenly and temporarily to lose his self-control by things that have been said and/or done by the deceased and/or other persons, rather than just by his, the accused man's own bad temper. In other words, a person is provoked if he is caused suddenly and temporarily to lose his self-control as a result of these things said or done by the deceased, and not merely as a result of his own bad temper. Here, the accused has said through the statement that he gave to the police on July 31st 2003 and I emphasise to you the important parts as far as the accused is concerned:*

‘I had been continuously bullied and robbed by the deceased of my possessions for a number of years. I was in his sight, fair game. I was owing my landlord a month's rent, and being unemployed made out a few parcels of marijuana valued at sixty dollars. I had already paid him forty dollars, thus, I came down to Temple Street to peddle my goods. The deceased, Scarra approached me, demanding I give him something. I refused him explaining that this money was securing a roof over my head. He quarreled and gesticulated, then walked away. I went to check on my stash placing it in an empty carton by a heap of rubbish. He passed as if not on me then snatched the carton saying ‘I seize this.’ I begged him for it, but he refused to pass it back. He gambled and smoked all night. I went as far as to ask him for

twenty dollars but he refused. This being the morning of the 25th of July 2003.'

Now, that is the bit of relevant evidence that you may wish to consider in dealing with this issue of provocation whether or not you think he was provoked. If you are sure the accused was not provoked, and you can come to that conclusion if you look at all the evidence, if you are sure that the accused was not provoked, in that sense the sense I have described to you, the defence of provocation does not arise and the accused is guilty of Murder. But if you conclude that the accused was or might have been provoked in the sense, which I have explained, you must then go on to weigh up how serious the provocation was for this defendant. Is there anything about this defendant which may have made what was said and/or done affect him more than it might have affected other people? Finally, having regard to the actual provocation and to your view of how serious that provocation was for the accused man, 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 his self-control and do as the accused did. If you are sure that such a person would not have done so, the Prosecution would have disproved provocation. And the accused is guilty of Murder. If, however you conclude that such a person would or might have reacted and done as the accused did, your verdict would be not guilty of Murder but guilty of Manslaughter by reason of provocation." [Emphasis ours]

36. The jury retired but returned seeking further guidance on the limited issue of provocation. The judge repeated his direction in identical terms.

37. Counsel for the State submitted, relying on the portion emboldened above, that the jury could not have been misled by the judge failing to give such a direction. She submitted that taken as a whole, implicit in his direction, was the concept that forming or holding an intent to kill or cause grievous bodily harm is not inconsistent with a finding of provocation.

38. The law of provocation is governed by Section 4B of the Offences Against the Person Act Chap. 11:08 which provides:

"Where on a charge of murder there is evidence on which the jury can find that a person charged was provoked (whether by things done or said by things said or by both together) to lose his self-control, the question whether the provocation was

enough to make a reasonable man do as he did shall be left to be determined by the jury; and 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.”

39. In **Attorney General for Ceylon v Perera [1953] AC 200**, the Privy Council had to consider the principles governing the law of provocation in Ceylon. During that exercise their Lordships pronounced the correct position in England with respect to intention and provocation, which had been inaccurately stated by Ceylon’s Court of Criminal Appeal.. Goddard LJ, at pg 206; 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.”

Goddard LJ’s statement was subsequently affirmed by the Privy Council in **Lee Chun Chuen v Attorney General of Hong Kong [1963] AC 220**.

40. In **R v Bunting (1965) 8 WIR 276**, the Jamaican Court of Appeal considered whether an intention to kill was inconsistent with provocation. Lewis JA stated:

“The principal ground of appeal, and the only one with which this court thinks it necessary to deal, is that the learned judge did not direct the jury that the defence of provocation may succeed where the accused at the time he struck the blow which caused death intended to kill or to do grievous bodily harm to the deceased, but his intention so to do arose from sudden passion involving loss of self-control by reason of provocation.”

After examining the judge’s summation, Lewis JA stated the following:

“In this passage the learned judge after giving a general direction as to the intention necessary to establish murder, went on in unmistakable terms to relate that direction to the particular facts of the instant case and indicate to the jury his own view that the applicant must have intended by what he did to inflict an injury

likely to cause death, and to tell them that if they were satisfied as to that then the applicant was guilty of murder. This categorical direction, unqualified by any reference to intention resulting solely from provocation, in our opinion went too far and amounted to a misdirection.

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. See A G of Ceylon v Perera ([1953] AC 200, 97 Sol Jo 78, PC, 15 Digest (Repl) 941, 5769) per Lord Goddard [1953] AC at p 206; Lee Chun-Chuen v R ([1963] 1 All ER 73, [1963] AC 220, [1962] 3 WLR 1461, 106 Sol Jo 1008, PC, Digest Cont Vol A, 153, 788a). Nowhere in his summing up did the learned judge point this out to the jury. [Emphasis ours]

41. Lewis, JA then went on to state that the phrase “for the moment not master of his mind” should be avoided when directing juries on provocation. He stated at pg 278:

“The court observes that in each of these passages the learned judge used the phrase “and for the moment not master of his mind”. Having regard to the earlier categorical directions as to intention the use of this phrase was in our opinion likely to lead the jury to believe that 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. These directions tended therefore to emphasise rather than to modify the earlier misdirection.

We consider that 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 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.”

42. We wholeheartedly agree that the subject phrase should be omitted and note that in the instant case the judge did not use it. When this phrase “for the moment not master of his mind” is used, it may be difficult for a jury to reconcile a man being not

master of his mind and yet being able to form the specific intention to kill or cause grievous bodily harm.

43. Lewis JA's dictum represented a marked departure from the classic statement of Devlin J in **R v Duffy [1949] 1 All ER 932n**. This statement has been accepted as the classic test for provocation at common law. **Blackstone's Criminal Practice 2011 para. B1.26** provides:

"The classic test of provocation at common law was that given by Devlin J in *Duffy [1949] 1 All ER 932n* and approved by the Court of Criminal Appeal in that case:

*Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her **for the moment not master of his mind**. [Emphasis ours]*

Although this passage has been approved again since 1957 in *Ibrahams (1981) 74 Cr App R 154*, it has to be read in light of the Homicide Act 1957, s.3 which does not provide a complete definition of provocation [...]."

44. Similarly the **Halsbury Laws of England 5th Edn. Volume 25 (2010) para.100** refers to the phrase "not master of his mind":

"Provocation may reduce a charge of murder to one of manslaughter. The test of whether the defence of provocation is entitled to succeed is a dual one. The alleged provocative conduct, which may consist of things said or done or both together, must:

*(1) actually cause in the defendant a sudden and temporary loss of self-control, making him so subject to passion that **he is not the master of his mind** (the subjective test); and*

(2) taking into account its gravity to the defendant in all the circumstances, be such that a person having the power of self-control to be expected of a reasonable person of the defendant's sex and age would have done as the defendant did (the objective test)." [Emphasis ours]

45. In the Commonwealth Caribbean this aspect of the definition has been abandoned. Two principles emerged from **Bunting**, firstly that judges were to avoid using the phrase “for the moment not master of his mind” and secondly that judges should direct the jury that intention to kill or do grievous bodily harm may arise from loss of self-control induced by provocation.

46. This Court expressly approved these principles in **Antoine and Bass v R (1968) 13 WIR 289**. Fraser, JA at pg 289 stated:

“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 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 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.’”

47. In **Julien v R (1970) 16 WIR 395** this Court stated the correct definition of provocation at pg 398:

“What, therefore, is provocation in law? It may seem trite to repeat the definition so frequently cited from Archbold, Criminal Pleading Evidence and Practice (37th Edn), para 2498:

‘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 make him for the moment not master of his mind.’

That definition, given by Devlin J, as he then was, in the case of *R v Duffy* [1949] 1 All ER 932, n, CCA) has been applied for many years; but in our judgment it has suffered some amendment as a consequence of the judgment of the Court of Appeal of Jamaica in **R v Bunting** That principle was applied by the Court of Appeal of Jamaica in **R v Plinton (1965) 9 WIR 44** and approved by this court in **Antoine and Bass v R (1968) 13 WIR 289** and in other cases. It follows, therefore, that the presence of an intention to kill or to do grievous bodily harm is contrary to the expression that the accused was “*for the moment not master of his*

mind” and the *dictum* of Lewis JA, clearly gives effect to the new thinking on the subject. Because we accept his *dictum* as sound it is necessary for us to state what we now consider to be the proper definition of provocation arising as it does from *R v Duffy* [1949] 1 All ER 932, n, CCA), elaborated in *Lee Chun-Chuen v R* [1963] 1 All ER 73, [1963] AC 220, [1962] 3 WLR 1461, 106 Sol Jo 1008, PC and amended by *R v Bunting* (1965), 8 WIR 276. This, in our view, is the correct definition of provocation:

‘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.’”

48. The second principle, that an intention to kill may arise because of a loss of self control induced by provocation, was also approved in **Antoine and Bass v R**. Fraser, JA at pg 289:

“The first ground of appeal is that the trial judge misdirected the jury on the question of provocation. Specifically, objection was taken to the direction that—“you may well feel that accused No 1 inflicted those wounds with the intention to kill Rupert Bass, or seriously to injure him, and if you so find then accused No 1 will be guilty of murder”. Other directions on this issue were also questioned; but while none went so far wrong in dealing with intent, none clearly admitted the possibility of an actual intention to kill or inflict grievous injury in a defence of provocation. For some years it has been accepted that an intention to kill or inflict grievous bodily harm does not necessarily satisfy the requirement of malice in cases of murder. A clear statement of this view is to be found in the oft-cited judgment of Lord Goddard in *A-G of Ceylon v Perera* [1953] AC 200, [1953] 2 WLR 238, 97 Sol Jo 78, PC) (1953) AC 200 where he said [1953] AC 200 at p 206:

‘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.’

This *dictum* was followed in *Lee Chun Chuen v R* [1963] 1 All ER 73, [1963] AC 220, [1962] 3 WLR 1461, 106 Sol Jo 1008, PC and a similar statement was made by Lewis JA in **R v Bunting (1965) 8 WIR 276** at p 278 where, citing Lord Goddard’s *dictum*, he stated:

‘... 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 cause grievous bodily harm results not from premeditation but solely from the loss of self-control induced by provocation the accused is not guilty of murder but of manslaughter.’”

49. A few years later, this Court again held that in cases where provocation is pleaded, a trial judge must direct the jury that an intention to kill is not inconsistent with it if such intention had sprung from the provocation: **Sinanan and Others v The State 44 WIR 383**. In that case this Court referred to its earlier decision in **Baptiste v The State** at pg 395:

“In *Baptiste’s* case (1983) 34 WIR 253 the accused had been charged with murder. The pleas of self-defence, or alternatively provocation, were live issues in the case. The trial judge omitted in his charge to the jury to direct them as to the effect of intention to kill in the mind of the accused at the time. This was held to constitute a grave omission and the conviction was quashed for these and other reasons. The court said this (at pages 262, 263):

*‘Another important direction that the 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. Expression was given to that principle as far back as 1965 by Lewis JA in **R v Bunting (1965) 8 WIR 276** at page 278: “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 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.*

*In **R v Plinton (1965) 9 WIR 44** at page 48 Sir Herbert Duffus P criticised the trial judge for not telling the jury that, even if they found that there was an intention to kill or to cause grievous bodily harm the offence might be manslaughter if the intention arose by means of provocation.*

‘In his directions to the jury the trial judge omitted to point out to them that the plea of provocation may still have arisen if the appellant had formed an intention to kill or inflict grievous bodily harm which resulted in death, but his intention to do so arose from sudden passion induced by the provocation. In our view this was a grave omission.’”

The Court expressly approved and applied the principles enunciated in **Baptiste**. It was held that the trial judge's omission to explain that that an intent to kill was not inconsistent with provocation occasioned a miscarriage of justice.

50. The essence of the judge's direction in the instant case was that if the jury were sure the accused unlawfully killed the deceased, intending to kill him or do grievous bodily harm, then he was guilty of murder unless they accepted that it was a case of provocation. It is undisputed that the trial judge did not explicitly say to the jury that an intention to kill was not inconsistent with provocation. The question for this Court is whether the limited direction relied on by the state, which the trial judge employed twice, can be said to have conveyed this necessary direction. We are of the opinion that in the context of the cases advanced by prosecution and defence and the evidence in this case, such a direction was critical and needed to be unequivocal if the jury were to fully and properly understand the issue with which they had to grapple.

51. This direction was of paramount importance since the jury may have easily found the accused had formed an intention to kill on the evidence. It was critical that they understood that, had such an intention sprung from provocation, the appellant would have been entitled to the lesser verdict.

52. While the judge did not explicitly tell the jury that they should only consider provocation if they rejected self-defence, once they were following the judge's directions, they would have understood that this was the order in which they had to consider self-defence and provocation. The fact that the jury returned seeking further guidance on provocation is perhaps indicative that first they had rejected self-defence and further they did not fully grasp the directions on provocation. It would have been less than helpful to them for the judge to have repeated almost verbatim his earlier direction. We pause to note that while we are alert to the fact that straying from prepared directions on an issue sometimes causes trial judges to fall into grievous

error, that cannot be justification for repeating word for word an earlier direction that clearly did not resound with the jury. The judge should have found another formula which correctly, but perhaps more directly or simply, conveyed the law.

53. Even on the most generous interpretation of the judge's direction, we are unable to satisfy ourselves that the jury clearly understood that if the appellant had an intention to kill, had it sprung from a loss of self-control, it was not inconsistent with a finding of provocation.

54. In **Cyrus Braithwaite v The State Cr. App No. 57 of 2002**, the appellant was convicted of the murder of two children. One ground of appeal was that the judge failed to direct the jury properly on the issue of provocation. In dealing with the burden of proof, the judge said:

“Now, members of the jury, the prosecution must make you sure that the accused was not provoked to do as he did. It is incumbent on the prosecution to disprove or negative provocation so that you feel sure as an essential and integral part of their case. No burden rests on the accused to prove provocation. ***And the issue of provocation is not inconsistent with an intent to kill or to cause grievous bodily harm.***” [Emphasis ours]

The Court stated at para. 80, that the above direction could not be impeached on any ground. We are in complete agreement with Nelson JA on this issue.

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.

56. There is the risk that failure to convey this to the jury might have deprived the appellant of a verdict of not guilty of murder but guilty of manslaughter and occasioned a miscarriage of justice.

Accordingly this ground of appeal succeeds.

Ground 3 *When Lucas direction appropriate*

The Learned trial Judge erred in law when he gave inadequate and improper direction on the issue of lies told to the police by the Appellant when first confronted about the incident.

57. On 28th July 2003, Sergeant Eric Parke informed the appellant of the report against him and cautioned him. The appellant replied “I never stab nobody”. On 31st July 2003, the appellant was again informed of the report against him and cautioned. He then gave the statement admitting to stabbing the deceased. It was never put to Sergeant Parke that the appellant never made this utterance; in any event the appellant did not testify.

58. The judge directed the jury on the appellant’s lie at pgs 38 – 39 of his summation:

“Now, I mentioned to you earlier that I will give you specific directions as to how you treat this bit of evidence, because if you accept that during the evidence as Sergeant Parke told you, that when he met the accused on the 28th, when the accused was first taxed with the allegation, he said “I never stab nobody”. If you accept that, and it has not been denied, you will also recall that the accused subsequently recanted that statement to the police on the 31st July in which he states clearly that he did, in fact, stab the deceased roughly four to five times in the back; although in that statement he gives an explanation as to how it took place. But the issue of the stabbing and not stabbing has now been what the accused relies upon, and he says he does it in self-defence. It follows therefore that what he told the police before was not true. He has effectively, therefore, admitted that he lied to the police about the issue of whether he did stab the deceased. And in that regard you are entitled to consider whether that supports the case against him. In this regard you should consider two questions, you must decide whether the accused did, in fact deliberately tell this lie. If you are not sure he did, then ignore the matter. But if you are sure he did then consider why would the accused? The mere fact that an accused person tells a lie is not in itself evidence of guilt. An accused man, a defendant, a person may lie for many reasons, and there may be possible innocent ones in the sense that they do not denote guilt. For example lies to bolster a true

defence, to protect somebody else, to conceal some disgraceful conduct, and the commission of an offence, or out of panic or distress, or confusion. Now in this case you have not heard any explanation for the lie, and if you indeed find that he did lie, but if you think that there is or was an innocent explanation for his lie, then you should take no notice of it. It is only if you are sure that he did not lie for an innocent reason, that his lies can be regarded by you as evidence going to prove his guilt and supporting the prosecution's case against him. So you will bear in mind what I have told you, and consider how you treat this lie that the accused told the police, if, in fact you accept that he did lie. But ultimately, it is a matter for you how you treat that part of the evidence.” [Emphasis ours]

59. Mr. Singh submitted that the judge's direction on lies was generic and not tailored to suit the facts since provocation and self-defence were live issues. Counsel referred to **R v Miah [2003] EWCA 3713** in which the English Court of Appeal stated:

“In a murder case when there are issues on whether the defendant killed the victim and also on provocation, then it seems to us that lies could be relevant at two stages. First the Crown may rely on lies to support its case that the defendant committed the homicide at all. Secondly the Crown may rely on lies in support of its case that it can disprove provocation - the burden of doing so always being on the Crown. It is possible that the same lies will be relied on by the Crown for both purposes; but it is also possible that certain lies could be more useful to the Crown in relation to provocation, eg. to show that either the defendant did not kill as a result of having lost his self control or to show that what he did was not justifiable ... If the Crown only relies on the lies to disprove provocation, then, once again, we think that the judge must say so clearly to the jury. He must tell the jury that the lie is of no use to it in deciding the question of whether (if it is in issue) the defendant committed the homicide.”

60. Counsel then referred the court to **R v Davies (Richard) 2004 EWCA Crim 1914**, a case that reviewed a series of decisions on this point. Keene LJ stated:

“The reasoning in this series of decisions seems to us to be obvious. Where provocation is an issue and the Crown relies upon lies or alleged lies by the defendant for any part of its case, the jury needs clear guidance as to whether the lies are capable of having a probative value on the issue of provocation. If in particular the Crown only relies on those lies to help prove that the defendant killed the deceased, that needs to be made clear to

the jury, so that there is no real risk that they may think that the lies point towards the defendant's guilt of murder as opposed to manslaughter. Sometimes, as in the present case, such lies may have no material probative value on the issue of provocation. They should therefore not be taken into account on that issue.

*We have considered whether such a direction is required where the defendant does not himself give evidence that he was provoked but maintains that he was not responsible for the victim's death. In such cases provocation will not be the sole issue. But, if the evidence is such that the judge considers it necessary to leave the issue of provocation to the jury, then it seems to this court that the jury should be properly directed on that issue and, where a lies direction is called for, that direction should indicate what relevance if any the defendant's lies may have to the issue of provocation. Otherwise there is a danger that the jury may treat those lies as going to negate the defence of provocation when in truth they are not capable of so doing. We can see no distinction in this respect between a case where provocation is expressly raised by a defendant in evidence and where it is left to the jury only by the judge. That seems to us to accord with the view of this court in **Miah** and others at paragraph 50.*

61. In response, counsel for the State submitted that the judge's direction on lies was in keeping with the learning in **Burge v Pegg (1996) 1 Cr. App. R. 163** and **R v Lucas (1981) Cr. App. R. 159**. She submitted that he gave a general direction on lies; therefore the jury would not have considered the lie was evidence disproving provocation. Consequently, the judge's directions were adequate.

62. The judge in the instant matter gave what could be termed a **Lucas** direction. The jury was be instructed that a lie told by a defendant can only strengthen or support evidence against him if the lie was deliberate, related to a material issue and there was no innocent explanation for it. Where they are satisfied the **Lucas** preconditions are met, they are entitled to infer guilt therefrom.

63. We are of the view that a **Lucas** direction was wholly inappropriate in the instant case. While the appellant initially denied inflicting the fatal wounds, he subsequently gave a statement admitting to the stabbing, a statement on which the prosecution

relied in proving its case, and importantly, the only evidence the prosecution had against the appellant. The distinction in the cases for the prosecution and the defence was in the interpretation of that statement since the appellant neither testified nor called witnesses.

64. While the prosecution may have sought to bring the credibility of the accused into issue via his lies in order that the jury would interpret the statement in a manner least favorable to the appellant, the issue of his guilt in the limited sense of inflicting the fatal wounds was not in issue. In the circumstances of this case a *Lucas* direction would have been at best confusing to the jury and at worst prejudicial to the appellant. The jury may have erroneously included the fact that he told the lie as a factor in deciding whether the appellant was guilty of murder or manslaughter. Without specific directions to assist them on how to approach the issue of lies as it pertained to provocation/manslaughter the danger was patent.

65. We note that at the *Ensor* hearing, the prosecutor expressly said that the State was not relying on the lie the appellant initially told:

“...we are not relying, per se, on the fact that he has lied on a previous occasion in proof of his guilt; in fact, what we are relying on is the second version which we say is the truth.” Transcript dated 13th October 2009 pg 6 line 43.

66. The, perhaps unintended, effect of a *Lucas* direction is to raise the profile of lies told by an accused. There are occasions on which such lies can only really go to the issue of the accused’s credibility and where this is so to erroneously give a *Lucas* direction gives the jury the false impression that such lies as they find are possibly capable of supporting the prosecution’s case in the sense of being proof of guilt. The jurors may put the fact that the accused has told a lie into the mix in deciding the ultimate question. As seen in *Miah* the issue becomes even more critical where provocation is left to the jury since the issue joined between State and Defence would

be a very narrow one and any factor that unfairly tips the scale against the accused is to be avoided.

67. We urge judges to carefully consider whether lies of the accused arising on the evidence warrant a *Lucas* direction or a more general direction on credibility arising from inconsistencies and where one is warranted and the issue of provocation is live to tailor the direction to conform with that in *Miah* as cited above.

We find merit in the appellant's submissions on his ground

ORDER

68. Having regard to our conclusion in relation to grounds two and three, we allow this appeal, quash the conviction and sentence and order a retrial of the appellant.

Paula-Mae Weekes,
Justice of Appeal

Alice Yorke-Soo Hon
Justice of Appeal

Rajendra Narine
Justice of Appeal