

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Criminal Appeal No. 1 of 2014

CHRIS JEROD JHARDAT

Appellant

AND

THE STATE

Respondent

PANEL:

A. Yorke-Soo Hon, J.A.

R. Narine, J.A.

M. Mohammed, J.A.

APPEARANCES:

Ms. S. Chote S.C., Mr. P. Carter and Mr. R. Rajah for the Appellant

Mrs. J. Honore-Paul, Deputy D.P.P. and Mrs. A. Teelucksingh-Ramoutar, Assistant D.P.P. for the Respondent

DATE DELIVERED: 6th December, 2016

JUDGMENT

Delivered by: M. Mohammed, J.A.

Introduction

- (1) The appellant, Chris Jerod Jhardat, was charged with the offence of murder arising from an incident involving a sixty-seven year old pensioner, Joseph Ameerali (the deceased) on the 23rd July, 2007. The appellant was subsequently tried and found guilty of the lesser offence of manslaughter on the basis of provocation. On the 24th January, 2014, he was sentenced to sixteen and a half years imprisonment with hard labour. After taking into account the six and a half years that he spent in pre-trial custody, the appellant was ordered to serve a term of ten years imprisonment with hard labour.

The appellant has appealed his conviction.

Facts

- (2) On the 23rd July, 2007, around midnight, the appellant went to the deceased's home at Bramble Alex Trace in Cumuto to drop off some money and to see his daughter. At the time, the appellant's daughter, Jade and common-law wife, Joan Ameerali, both lived with the deceased, who was Ameerali's father. The deceased refused the appellant entry into the house and armed himself with a cutlass. The appellant then went to a window located at the southern part of the house and began knocking on it, demanding entry. His knocking caused the window to collapse inside of the house and he jumped through the window and entered the house. There was a confrontation between the appellant and the deceased and they got into an altercation. During the altercation, the deceased was armed with a cutlass and the appellant was armed with a piece of wood, which he found outside of the house. There was an exchange of blows during which the appellant suffered a chop wound to his shoulder and the deceased suffered, *inter alia*, a substantial wound to his head. The appellant then took the deceased to the Mt. Hope Hospital to be treated for his wounds.

- (3) Police Officer Sookram went to the Mt. Hope Hospital where he met the family of the deceased and the appellant, who was receiving treatment for his wounds at the time. The officer arrested the appellant and took him to the Tunapuna Police Station. While there, the appellant experienced a pain in his shoulder and was taken to the Arima Health Facility where he was treated and discharged. He was then taken to the Arouca Police Station where he gave a written cautionary statement to the police.
- (4) In his statement, he said that he went to the deceased's house to drop off some money for his daughter. The appellant knocked on the door and the deceased answered. The appellant told him that he had something for his daughter, Jade and the deceased started cursing. The appellant called out to both Joan Ameeralli and Jade and told them to tell the deceased to open the door. During this time, the deceased continued to curse. When he was refused entry, he went to a window at the side of the house and pushed on it. The deceased started to threaten him, saying, "*Ah go chap yuh, yuh know, ah go chap yuh*" (sic). The appellant said that he ignored those threats as the deceased always behaved that way. He continued to push on the window and when it eventually opened inside, he saw the deceased standing by the window with a cutlass in his right hand. While standing outside, the appellant froze and the deceased, who was inside of the house, fired a chop at him, hitting him on his shoulder. The appellant picked up a piece of wood from outside of the house and when it appeared that the deceased was going to fire another chop at him, he hit him with the piece of wood.
- (5) The deceased died the following day and the post-mortem examination report revealed that he had sustained blunt force head injuries, including two "clean" edged lacerations ("*buss head*") (sic) of the right upper lateral (side) head and extensive skull fractures. The Pathologist opined that the deceased died due to blunt craniocerebral trauma. With respect to the appellant, a medical report showed that he suffered a superficial laceration over his left shoulder which was inflicted with mild force with the use of a cutlass.
- (6) At the trial, the main witness for the prosecution was Joan Ameeralli. She witnessed the offence and had given a statement to the police in relation to the incident. At the trial, she declined to give further evidence and was treated as a hostile witness. Ameeralli gave conflicting accounts in her examination-in-chief and cross-examination and indicated that there were certain things in her

statement that she could not recall saying.

- (7) In her examination-in-chief, she said that she remembered seeing the deceased with a cutlass and he appeared to be chopping the appellant. She also said that the appellant picked up a piece of wood from outside of the house and hit the deceased, causing him to fall on the bed. She was unable to say how many times the appellant struck the deceased. All of this was happening while the appellant was still outside and the deceased was inside of the house. Upon refreshing her memory, Ameerali said that she could not recall saying in her statement to the police that the appellant told the deceased, “*save your home and save your life*”. She also said that she could not recall saying in her statement, “*Now Chris inside the house and Chris hit my father with the piece of wood and my father fell down and Chris just started hitting my father over and over again with the piece of wood*” (sic). In cross-examination, Ameerali said that she could not remember saying, “*My father was waiting by the side with the cutlass*” or that “*My father fired chops at the accused, standing on the bed firing chops at the accused*” (sic).

Case for the Defence

- (8) The appellant declined to give evidence or to call witnesses and put his case through cross-examination. Through his statement and cross-examination, the issues of self-defence and provocation were raised.

The Appeal:

We find it more convenient to deal with Ground 2 first.

Ground 2: The learned trial judge erred in law by failing to give the jury adequate directions on the issue of self-defence. This evidence led to the possibility of a miscarriage of justice by depriving the Appellant of a complete acquittal.

The Appellant’s Submissions:

- (9) Ms. Chote argued that the judge was required to explain to the jury the legal ingredients of self-

defence and guide them on the essential evidence in the case and the inferences and conclusions which could be drawn from that evidence. She argued that the judge failed to identify the elements of self-defence to the jury and that the relevant legal concepts were referred to in a sporadic and incoherent manner.

- (10) She further submitted that where the issue of self-defence arose, the judge was required to go beyond the general direction on the burden and standard of proof. According to Ms. Chote, the judge must give a specific direction in relation to the disproof of self-defence and indicate what standard was required. She contended that the judge ought to have properly directed the jury on the issues of the burden of proof, the subjective element of self-defence, proportionality, and the making of allowances for the “*heat of the moment*”. She also submitted that the possibility of retreat was only one factor to be considered when the jury assessed the reasonableness of self-defence.

The case of **R v Abraham**¹ was relied on in support of these arguments. In that case, Edmund Davies, LJ said that the judge should:

“Give a clear, positive and unmistakable general direction as to onus and standard of proof; then immediately follow it with a direction that in the circumstances of the particular case there is a special reason for having in mind how the onus and standard of proof applies, and going on to deal in, for example, the present case with the issue of self-defence and to tell the jury something on these lines: ‘Members of the jury, the general direction which I have just given to you in relation to onus and standard of proof has a particularly important operation in the circumstances of the present case. Here the accused has raised the issue that he acted in self-defence. A person who acts reasonably in his self-defence commits no unlawful act. By his plea of self-defence the accused is raising in a special form the plea of not guilty. Since it is for the Crown to show that the general plea of not guilty is unacceptable, so the Crown must convince you beyond reasonable doubt that self-defence has no basis in the present case...The last thing we seek to do is to lend support to the misconception that any prescribed words have to be used in giving the direction.’”

¹ [1973] 3 All ER 694

In his summing up², the judge said:

“Now, the second issue for you to consider, depending on your understanding and interpretation and acceptance of the evidence, is the issue of self-defence. Now, a killing in lawful self-defence is no offence. Unlawful self-defence takes place where it is necessary for a person to use force to resist or defend himself against an actual attack, a threatened attack or an honest belief that an attack is imminent...”

If you think that the accused was or may have been acting in lawful self-defence, he is entitled to be found not guilty, because the prosecution must prove the accused’s guilt. It is for the prosecution to prove that the accused was not acting in lawful self-defence and not for the accused to establish that he was...” (sic)

Ms. Chote submitted that this direction was incorrect, self-contradictory and not in accordance with the direction in **R v Abraham**³. She argued that the judge failed to adequately direct the jury on the burden and standard of proof in relation to self-defence. It was further submitted that there was no link between the special direction on the burden of proof and the special direction which attempted to address the standard of proof and as a result, the jury would not have been able to properly assess the issue of self-defence.

- (11) It was submitted that the test of whether force used in self-defence was reasonable is not a purely objective one and there is no obligation on a person acting in self-defence to retreat, but whether the appellant did retreat was a factor to consider depending on the facts of the case. Ms. Chote referred to the dicta of Lord Morris of Borth-y-Gest in the case of **Palmer v R**⁴ at pages 832-833.
- (12) Ms. Chote also argued that the judge failed to marshal the facts of the case and failed to link it to the various components of self-defence. This would have assisted the jury in assessing some of the issues involved in self-defence. She further submitted that although the judge directed the jury on aspects of self-defence, he failed to refer to the most significant evidential item, the written

² see the Judge’s summing up dated the 24th January, 2014 at pages 23-24

³ Supra

⁴ [1971] AC 814

cautionary statement given by the appellant to the police.

In that statement, the appellant had said the following:

“...When ah push de window, ah push it a couple times an’ it open inside. She father was there by de window stand up with de cutlass in he hand. He had it in he right hand, ah freeze fuh ah second an’ he fire a chop at meh, ah move across tuh meh right an’ de blade hit meh on de back ah meh left shoulder. Ah didn’t know if ah get chop, all ah know is dat ah felt de blow. I was outside an’ he was inside. It had a piece of wood outside de window lying on de ground an’ ah take it up an’ when ah raise up, he was going tuh make ah second chop an’ ah hit him wid de wood.” (sic)

The Respondent’s Submissions:

- (13) The respondent contended that the judge’s directions with reference to the law on self-defence were unexceptionable and that the judge went on to relate the law to the written cautionary statement given by the appellant⁵. The judge also informed the jury that the onus or burden was on the prosecution to disprove self-defence⁶.

According to the respondent, in referring to “retreat”, the judge was distilling the evidence and assisting the jury with the factors which might have assisted them in deciding whether the appellant was, to begin with, actually acting in self-defence. The respondent argued that the judge was outlining the evidence of what was happening at the time, that is, the appellant was standing outside of the window and would have had to reach inside with the piece of wood to defend himself⁷. Counsel for the respondent also submitted that the judge was allowed to “*put his own view*” on the evidence and referred to the case of **R v Richardson**⁸.

⁵ see the Judge’s summing up dated the 24th January, 2014 at page 23, lines 38-50, page 24, lines 1-6 and page 25, lines 5-50

⁶ see the Judge’s summing up dated the 24th January, 2014 at page 24, lines 2-8.

⁷ see the Judge’s summing up dated the 24th January, 2014 at page 24, lines 22-25

⁸ (1993) 98 Cr. App. R. 174

The respondent also relied on the case of **Palmer v R**⁹ where Lord Morris of Borth-y-Gest said at page 832:

“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....A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence.”

- (14) Counsel for the respondent conceded that in the summing up, it appeared that the judge mistakenly referred to “*unlawful self-defence*”¹⁰ but argued that in the context of all the directions, that mistake would have had a minimal effect. It was also submitted that the judge adequately dealt with the issue of “honest belief”¹¹.

Analysis and Reasoning

- (15) In **Stephen Robinson a/c Psycho a/c Tony v The State**¹², this Court, after considering the decision in **Palmer v R**¹³, set out the essential features of self-defence as follows:

- (i) A person who is attacked is entitled to defend himself;
- (ii) In defending himself he is entitled to do what is reasonably necessary;
- (iii) The defensive action must not be out of proportion to the attack;
- (iv) In a moment of crisis, a person may not be able to weigh to a nicety the exact measure of his necessary defensive action;
- (v) In a moment of anguish, a person may do what he honestly and instinctively thought was necessary;
- (vi) If there has been no attack, then the issue of self-defence does not arise; and

⁹ (supra)

¹⁰ see the Judge’s summing up dated the 24th January, 2014 at page 23, line 34.

¹¹ see the Judge’s summing up dated the 24th January, 2014 at page 24, lines 17-50 and page 25, lines 1-42.

¹² CA Crim. No. 12 of 2009; [2015] UKPC 34

¹³ (supra)

- (vii) A trial judge ought not to make reference to ‘the defence of self-defence’ in self-defence cases as this may give the jury the impression that the accused has to prove his defence.

(16) The judge in this case properly directed the jury on the following aspects of self-defence:

- (i) “...*A killing in lawful self-defence is no offence*”¹⁴;
- (ii) “*Unlawful self-defence takes place where it is necessary for a person to use force to resist or defend himself against an actual attack, a threatened attack or an honest belief that an attack is imminent*” (sic)¹⁵;
- (iii) “*It is for the prosecution to prove that the accused was not acting in lawful self-defence and not for the accused to establish that he was*”¹⁶... “*If you are sure that the Accused did not honestly believe that it was necessary to use force to defend himself, he cannot have been acting in lawful self-defence*”¹⁷;
- (iv) “*...You must consider the matter of self-defence in light of the situation which the accused honestly believed he faced. ...In his police interview, he says he [the deceased] was cursing and he was threatening him*”¹⁸;
- (v) “*You must first ask whether the accused honestly believed that it was necessary to use force to defend himself at all*”¹⁹; and
- (vi) “*...If you are sure that the accused did not honestly believe that it was necessary to use force to defend himself, he cannot have been acting in lawful self-defence...If you think that he did honestly believe or may honestly have believed that it was necessary to use*

¹⁴ see the Judge’s summing up dated the 24th January, 2014 at page 23, lines 33-34.

¹⁵ see the Judge’s summing up dated the 24th January, 2014 at page 23, lines 34-37

¹⁶ see the Judge’s summing up dated the 24th January, 2014 at page 24, lines 6-8.

¹⁷ see the Judge’s summing up dated the 24th January, 2014 at page 25, lines 1-5

¹⁸ see the Judge’s summing up dated the 24th January, 2014 at page 24, lines 10-15.

¹⁹ see the Judge’s summing up dated the 24th January, 2014 at page 24, lines 17-19.

force to defend himself...You must then decide whether the type and amount of force he used was reasonable....Obviously, a person who is under attack may react on the spur of the moment and he cannot be expected to work out exactly how much force he needs to use to defend himself... On the other hand, if he goes over the top and uses force out of proportion to the attack on him or more force than is really necessary to defend himself, Members of the Jury, the force used would not be reasonable’’²⁰.

In dealing with the issue of the defensive action being in proportion to the attack, the judge highlighted a portion of the appellant’s written cautionary statement which recounted that after the deceased struck the appellant causing him to suffer an injury to his left shoulder, and he then received another blow, the appellant picked up the piece of wood and struck the deceased²¹. Further, the judge reminded the jury of Joan Ameeralli’s account, that when the window had collapsed and the deceased had fallen over, the appellant repeatedly hit him with the piece of wood²².

- (17) While the judge captured most of the technical aspects of the self-defence direction, there were three areas of deficiency. First, it was incumbent on the judge to remind the jury in reasonable detail of the contents of the exculpatory written cautionary statement given by the appellant, since the issue of self-defence was first raised there. This was particularly important so that the chronology of the events and an accurate description of their unfolding could be conveyed to the jury. The legal directions on self-defence would then have had to be further broken down and explained against the background of that account, in a manner which linked it to the integral elements of self-defence. Instead, the judge only made the briefest of references to the contents of the written statement, and although he accurately captured the gist of it at a late juncture of the narrative provided by the appellant, he omitted to refer to preceding details which gave it contextual flavor and which would have collectively impacted on issues involved in self-defence, for example, the situation which the appellant honestly believed he faced at the relevant time.

²⁰ see the Judge’s summing up dated the 24th January, 2014 at page 25, lines 1-19

²¹ see the Judge’s summing up dated the 24th January, 2014 at page 24, lines 26-29

²² see the Judge’s summing up dated the 24th January, 2014 at page 24, lines 30-37

- (18) In properly marshalling the evidence to the jury, the judge ought to have referred to the contents of the appellant's written cautionary statement in greater detail. Two examples will be given to demonstrate why this was necessary in order for the issue of self-defence to be properly articulated to the jury. In the statement, the appellant had explained the circumstances under which he went to the deceased's house, which was to drop off some money and to see his daughter. The second example is that according to the appellant in his statement, he ignored the deceased's threats to chop him as he knew the deceased always behaved in that manner, and notwithstanding those threats, he persisted in getting the attention of Joan Ameerli and his daughter so that they could open the door for him. It was incumbent on the judge to explain the potential significance of these pieces of evidence to the issue of self-defence, namely, that the appellant did not go to the house as the aggressor, that they showed his state of mind at the time of the incident, and that he persisted in trying to get the attention of Ameerli and his daughter, ignoring the initial threats of the deceased, because he was used to the deceased behaving in that manner. All of these matters would in turn have been relevant to whether the appellant had an honest belief that he needed to defend himself.

In the final analysis, the judge provided no real guidance to the jury on the issue of self-defence in accordance with the factual matrix in which it arose. A mere recitation of pertinent legal principles, coupled with only thread-bare references to the major material in the case which triggered the issue of self-defence, was inadequate.

- (19) Secondly, when the judge directed the jury that the burden was on the prosecution to disprove self-defence²³, this was the optimal and most logical point at which to give the affiliated direction on the standard of proof required of the prosecution to disprove self-defence. While the judge referred to the accurate standard slightly later on in the summing up, where he said that, "*If you are **sure** that the Accused did not honestly believe that it was necessary to use force to defend himself, he cannot have been acting in lawful self-defence*"²⁴ (emphasis ours), this direction was disassociated from the special direction on the negating burden being on the prosecution. As a result of this disassociation, the direction on the standard of proof required to negative self-defence was diluted.

²³ see the Judge's summing up dated the 24th January, 2014 at page 24, lines 2-8

²⁴ see the Judge's summing up dated the 24th January, 2014 at page 25, lines 1-5

- (20) Thirdly, a major feature of the evidence was that on the account of both Ameer Ali and the appellant, the deceased at the relevant time was in his house armed with a cutlass while the appellant was at the side of the deceased's house, at a window, having arrived there earlier by car. The appellant picked up the piece of wood near the window and this was used to inflict the fatal injuries to the deceased. It would be reasonable to conclude that the question of why the appellant did not distance himself by walking away or driving away in those particular circumstances loomed large in this case. This may likely have been one of the determining factors in the case and accordingly, the jury required the most careful guidance on the issue of the “*so-called*” duty to retreat.

In **R v McInnes**²⁵, Edmund Davies, LJ, on the issue of self defence and the “*so called*” duty to retreat said:

“2. Self-defence

We turn to the two criticisms advanced in relation to the manner in which the learned judge treated the topic of self-defence. Before doing this, however, it should again be observed that, while both prosecuting and defence counsel (very understandably in all the circumstances) dealt at length with this plea, it was one never advanced by the appellant himself in evidence. On the contrary, he insisted throughout that he never thrust the knife forward and that the wounding and killing of the deceased was due to no aggressive action on his part.

The first criticism of the learned judge's treatment of self-defence is that he misdirected the jury in relation to the question of whether an attacked person must do all he reasonably can to retreat before he turns on his attacker.

The direction given was in these terms:

'In our law if two men fight and one of them after a while endeavours to avoid any further struggle and retreats as far as he can, and then when he can go no further turns and kills his assailant to avoid being killed himself, that homicide is excusable, but notice that to show that homicide arising from a fight was committed in self-defence it must be shown that the

²⁵ [1971] 3 All ER 295

party killing had retreated as far as he could, or as far as the fierceness of the assault would permit him.'

One does not have to seek far for the source of this direction. It was clearly quoted from Archbold's Criminal Pleading, Evidence and Practice, 1969, 37th Edition, para 2495, which is in turn based on a passage in Hale's Pleas of the Crown (1800) Vol 1, pp 481, 483.

*In our judgment, the direction was expressed in too inflexible terms and might, in certain circumstances, be regarded as significantly misleading. **We prefer the view expressed by the High Court of Australia in R v Howe (1958) 100 CLR 448 at 462, 464, 469, that a failure to retreat is only an element in the considerations on which the reasonableness of an accused's conduct is to be judged (see Palmer v Reginan ([1971] 1 All ER 1007 at 1085, [1971] 2 WLR 831 at 840)), or, as it is put in Smith and Hogan's Criminal Law 1969, 2nd Edn, p 231 '... simply a factor to be taken into account in deciding whether it was necessary to use force, and whether the force used was reasonable.'** ” (emphasis ours)*

The judge ought to have directed the jury that a failure to retreat, when it is possible to do so, was one of several factors that they had to consider in determining whether the appellant honestly believed that he had to defend himself. Language should be scrupulously avoided which had the potential to suggest that the appellant was under any sort of positive obligation to retreat and that a failure to do so in and of itself negated self-defence.

On the issue of retreat, the judge directed the jury as follows:

“Could he have walked away at that point when the deceased had the cutlass in his hand and was propping up the window while he was knocking it down, if that’s what you find happened? After he was struck with the cutlass and suffered a superficial laceration to his left shoulder and then he received another blow, he picked up the piece of wood and struck the deceased?”²⁶” (emphasis ours)

²⁶ see the Judge’s summing up dated the 24th January, 2014 at page 24, lines 22-29

The question which appears above, and which is emphasised, is a perfectly legitimate one, especially so when the appellant's statement implied the availability of other options. However, the jury was left wholly bereft of appropriate guidance on one of the core, live issues of the case, that of "*retreat*", in the context of self-defence. The prosecution may have had at its disposal the availability of several *prima facie*, strong arguments as to viable options open to the appellant, but once the issue was not framed in a legally correct and adequate manner, a material defect occurred. Because of the three matters identified above, we are of the view that there were material deficiencies in the judge's directions on self-defence. The main deficiency out of the three identified was the judge's failure to direct the jury on the issue of retreat and how the law regards it in the context of a self-defence direction.

While most of the judge's legal directions on self-defence were technically correct, the judge did not adequately direct the jury on the core issue of retreat, and in addition, he did not properly marshal the evidence in the case and he did not link it to the various components of the directions on self-defence.

Accordingly, we find merit in this ground of appeal.

Ground 1: The learned trial Judge failed in his duty to put the case for the defence properly and fairly and to make such proper and structured reference to the material in the Appellant's statement which was the backbone of the case for the defence. This failure renders the conviction unsafe.

The Appellant's Submissions:

- (21) Ms. Chote submitted that in a criminal trial, due process required a defendant's case to be placed before the jury in a manner which is fair, adequate and properly structured. She relied on the case of **R v Clarke**²⁷.

²⁷ [2010] EWCA Crim. 684

(22) Ms. Chote argued that the judge spent a considerable amount of time summarising the case for the prosecution but did not do so for the defence. She argued that the judge merely recited a portion of the facts relied on by the appellant in his defence and this did not meet the threshold of putting the defence case fairly and adequately to the jury. It was further submitted that the judge failed to refer in a coherent manner to other material which was capable of supporting the defence case, including:

- (i) The fact that the appellant was unarmed when he arrived on the scene and the deceased was seen armed with a cutlass shortly after;
- (ii) The deceased struck the appellant with the cutlass causing him to sustain an injury to his shoulder; and
- (iii) The appellant himself drove the deceased to the hospital and may thereby have exhibited some level of remorse.

(23) Additionally, it was submitted that since the defence case was based on self-defence, it was incumbent on the judge to first give proper legal directions to the jury as to what constituted self-defence in law and then direct them on how they may use the evidence in the case in evaluating the issue. According to Ms. Chote, unless this was done, the jury would have been left with a “roving brief”.

The Respondent’s Submissions:

(24) In response, counsel for the respondent submitted that the judge, in a clear, logical and structured manner, directed the jury on the three possible defences that arose in the case, namely, accident, self-defence and provocation. It was further submitted that the judge adequately dealt with the law relating to those defences and then proceeded to refer to the evidence in support of each.²⁸

²⁸ See the Judge’s summing up dated the 24th January, 2014 at page 22, line 30 to page 28, line 28.

- (25) The respondent argued that the judge reviewed in a fair manner the essential features of the evidence and submitted that the summing up should not be criticized simply because the defence would have preferred a different format. The case of **R v Richardson**²⁹ was referred to in support of this argument. In that case, the court said:

“In our judgment, the pattern of the summing up, in what order and under what headings the evidence is marshalled, are matters wholly within the trial judge’s discretion. Providing that he fairly reviews the essential features of the evidence, the structure of his summing up cannot be impugned simply because the defence would have preferred a different format.”

- (26) Counsel for the respondent also submitted that the judge’s directions in his summing up were sufficient to emphasize that the jurors’ opinions on the facts were their sole responsibility. Those directions allowed the jury to accept or reject the judge’s opinions expressed in the course of his summing up. According to the respondent, the judge properly directed the jury that the assessment of facts were exclusively their domain as the judges of facts³⁰.

Analysis and Reasoning:

- (27) A number of cases exemplify that a judge in his summing up is under no duty to remind the jury of all the evidence in the case: see **Chris Singh v The State**³¹, **R v Hall**³² and **R v Sargent**³³. What the judge is required to do, is to remind the jury of the evidence which goes to the core of both the prosecution case and the defence case. The judge did not remind the jury of the significant pieces of evidence which may materially have supported the defence case. The judge ought to have reminded them that when the appellant arrived at the deceased’s house, he was unarmed and the deceased was seen armed with a cutlass shortly after, that it was the deceased who first struck the appellant on his shoulder, and the appellant himself drove the deceased to the hospital and may thereby have exhibited some sign of contrition.

²⁹ Supra

³⁰ see the Judge’s summing up dated the 24th January, 2014 at page 2, lines 33-41.

³¹ Cr. App. No. 18 of 2009

³² [1987] 1 NZLR 616

³³ (1983) 22 Sask. R. 230

- (28) With respect to the directions on self-defence, as explained in Ground 2 above, there were three material deficiencies in the judge's directions, namely, the failure to refer to in greater detail the written exculpatory statement given under caution by the appellant, the diffuse directions on the standard of proof required to negative self-defence and the inadequate directions on the duty to retreat.

The inadequate directions to the jury on the issue of self-defence, coupled with the judge's omission to refer to certain material in the appellant's cautionary statement which was capable of supporting the defence case resulted in prejudice to the appellant in that the defence case was not put fairly and properly before the jury. This has the effect of rendering the conviction unsafe.

There is merit in this ground of appeal.

Ground 3: The learned trial Judge erred in law in his directions on the issue of good character by failing to link the Appellant's good character with the issues raised in his defence.

The Appellant's Submission:

- (29) Ms. Chote submitted that when an accused person does not give evidence at trial but relies on exculpatory statements made to the police, the judge should direct the jury that regard must be had to the accused's good character when considering the credibility of such a statement. She indicated that a direction on the relevance of the accused's good character to propensity should also be given in such circumstances. It was submitted that the judge gave a brief good character direction which was made in isolation or in a "*silo*", with no clear and direct reference to its importance to the issue of self-defence.

The Respondent's Submission:

- (30) The respondent contended that the judge adequately linked the issue of the appellant's good character to all the possible defences raised in the case. It was argued that the tenor of the summing up was such as to direct the jury to the possible defences, namely, accident, provocation and self-defence. According to the respondent, at each stage, the judge outlined the evidence and then turned to an explanation of the use that could be made of the appellant's good character³⁴. The respondent further submitted that the importance of the directions on good character would have been emphasized in the minds of the jury by the fact that those directions were given last.

Analysis and Reasoning:

- (31) In his summing up, the judge said:

*"So, you have heard that the accused is a man of good character, no previous convictions. Of course, good character cannot by itself, provide a defence to a criminal charge, **but it is evidence which you should take into account in his favour in the following ways: In the first place, the accused has given a statement to the police, and as with any man of good character it supports his credibility. This means this is a factor which you should take into account when deciding whether you believe his statement, and the second place, the fact that he is of good character may mean that he is less likely than otherwise might be the case to commit this offence. And I have said that these are matters to which you should have regard to in the accused's favour, it is for you to decide what weight you should give to them in this case. In doing this, you are entitled to take into account everything you have heard about the accused, including that he is without any blemishes on his character.**"*³⁵

(emphasis ours)

³⁴ see the Judge's summing up dated the 24th January, 2014 at page 28, lines 35-50 and page 29, lines 1-5

³⁵ see the Judge's summing up dated the 24th January, 2014 at pages 28-29.

- (32) With respect to the issue of good character, the judge correctly and adequately directed the jury on its two-fold relevance as to credibility and the likelihood of committing the alleged offence. The judge was not required to go any further and to explicitly link the good character direction to the issue of self-defence and more specifically, to the contents of the exculpatory statement that the appellant gave to the police. It was made clear to the jury that the appellant's good character should be taken into account by them as a factor in favour of his credibility when assessing the statement and that ultimately, the weight to be accorded to his good character was a matter entirely for them to evaluate: see **R v Miah**³⁶.

This ground of appeal is without merit.

Ground 4: The learned trial judge erred in law by leaving the issue of accident to the jury and may thereby have confused them as to the priority and significance of the issues which they were required to consider in relation to the defence.

The Appellant's Submissions:

- (33) Ms. Chote submitted that a trial judge may leave a legal issue to a jury if it logically arises on the evidence of the case and impacts upon the case for the defence. She argued that in this case, the judge gave directions to the jury on the issue of accident even though it neither formed part of the prosecution case nor the defence case.
- (34) The main prosecution witness was treated as hostile. At the preliminary enquiry, she had suggested that her father had fallen off the bed and had hit his head. At the trial however, she accepted that she did not say this. Ms. Chote submitted that having regard to the case as a whole, this piece of evidence found no resonance in the trial and ought not to have been elevated to such significance as to attract a legal direction. She argued that it could only have served to distract the jury from what were the more important issues and that it caused a potential miscarriage of justice.

³⁶ [1997] 2 Cr App R 12

The Respondent's Submissions:

- (35) In response, Ms. Honore-Paul submitted that accident was a live issue and was properly put before the jury. According to the respondent, the evidential basis of accident could be found in the cross-examination of Ameerali where she admitted that she had said on an earlier occasion that her father fell off the bed and hit his head³⁷.
- (36) The respondent submitted that the judge had a duty to leave the defence of accident to the jury even if it was not specifically raised by the appellant. It was further submitted that it was open to the jury to accept that evidence even though it was neither accepted as true by the witness nor formed part of the cases for the prosecution and the defence.

In support of this argument, the respondent referred to section **15H of the Evidence (Amendment) Act Chapter 7:02** which provides that:

15H. (1) Where in criminal proceedings a person gives oral evidence and - (a) he admits making a previous inconsistent statement; or (b) a previous inconsistent statement made by him is proved by virtue of section 5, 6 or 7, the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible.

(2) Where in criminal proceedings evidence of an inconsistent statement made by a person is given under section 15D(1)(c), the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible

The case of **R v Winston Anthony Williams**³⁸ was also referred to in support of that argument. In that case, Neill, LJ said:

“There are also cases where the evidence will impose a duty on the judge to leave the issue of self-defence or the issue of accident to the jury even though these issues are not raised

³⁷ see the Judge's summing up dated the 24th January, 2014 at page 22, lines 30-33 and the Notes of Evidence at page 27; see also the Notes of Evidence at page 27.

³⁸ (1994) 99 Cr. App. R. 163

directly by the way in which the defence has been conducted on behalf of the accused. But whether the duty arises or not will depend on the facts of the case and on the evidence before the court.”

- (37) It was further submitted that leaving the defence of accident did not confuse the jury as the judge’s directions were clear and followed a pattern in which he referred to each defence, explained the defence and highlighted the evidential basis for the defence³⁹.

Analysis and Reasoning:

- (38) The judge was entirely correct in directing the jury on the issue of accident. He had a positive obligation to do so: see **R v Winston Anthony Williams**⁴⁰. On the evidence of Joan Ameerali, the issue of accident arose, when she agreed that on a previous occasion, she said that her father had fallen off the bed. Under the terms of **section 15H of the Evidence (Amendment) Act**, this previous statement opened the evidential doorway for the jury to consider the issue of accident. The previous statement was admissible as evidence of any matter stated therein and it was open to the jury to treat that particular assertion as being a truthful one. If the judge had left the issue of accident in suspension and had not addressed it, this would have been open to legitimate complaint.
- (39) Additionally, in the context of the summing up as a whole, leaving the issue of accident to the jury would not have served as a distraction from the other issues in the case. Directing the jury on the issue of accident provided a route to an acquittal which the judge correctly left to them⁴¹.

This ground of appeal is dismissed.

³⁹ see the Judge’s summing up dated the 24th January, 2014 at page 22, lines 27-50 and page 23, lines 1-10.

⁴⁰ (supra)

⁴¹ see the Judge’s summing up dated the 24th January, 2014 at page 22, line 49 to page 23, line 1.

Disposition:

(40) By reason of the foregoing, the appeal is allowed.

The conviction is quashed and the sentence of the judge is set aside.

We proceed to consider whether a retrial can be ordered in this matter. The appellant was found not guilty of murder, but guilty of manslaughter by virtue of provocation. There was no complaint made about the adequacy of the judge's directions on the issue of provocation. The complaints centered around the judge's omissions in directing the jury on self-defence. As a result of these material omissions in the directions on self-defence, the appellant was deprived of the benefit of an outright acquittal. In these circumstances, the issue of a retrial does not arise.

A. Yorke-Soo Hon, J.A.

R. Narine, J.A.

M. Mohammed, J.A.