JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 62/91

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

R. v. STANLEY McKENZIE

Ian Ramsay with Delroy Chuck instructed by Mrs. Valerie Neita-Wilson for Appellant

Hugh Wildman for Crown

January 27, 28, 29, 30, 31 &
March 11, 1992

FORTE, J.A.

The appellant who had been charged for the murder of Derron Sinclair was convicted in the Home Circuit Court on the 20th June, 1991 for the offence of manslaughter and sentenced to 3 years imprisonment at hard labour. The matter came before us, as an application for leave to appeal against the conviction, a single judge sitting in Chambers, having previously refused leave.

On the 31st January, 1992 having heard arguments of counsel, we granted leave to appeal, treated the hearing of the application as the hearing of the appeal, allowed the appeal quashed the conviction, set aside the sentence and entered a verdict and judgment of acquittal. As promised then, we now put our reasons in writing.

The appellant filed seven grounds of appeal but during the course of argument, the issues were confined to the following:

1. In the circumstances, such as existed in this case, where the defence advanced is one of accident, if there is material to support it, does the learned trial judge have a responsibility of leaving the defence of self-defence as a consideration for the jury?

2. Were the directions given by the learned trial judge in respect of the defence of Accident adequate?

The complaint in this regard reads as follows:

> "That the Trial Judge (a) failed to explain or to direct the Jury as to the meaning of Accident in law. (b) Analysed the evidence in favour of the prosecution and against the accused (Appellant) and failed to give a balanced direction to the Jury; Whereby the defence of **Accident** was undermined and the Appellant deprived of his chances of a complete acquittal."

3. Should the learned trial judge have left the defence of automatism for the jury's consideration?

In order to put the complaints of the appellant into context, a summary of the evidence is necessary.

The prosecution relied for proof of its case on three witnesses, the two sisters Ashman, and a Cons. Boothe all of whom had attended a dance on the night when the deceased met his death at the hands of the appellant. Common to their testimony was the fact that during the course of the dance policemen including the appellant, entered the dance and ordered the cessation of the music. The appellant, was at that time the sub-officer in charge of "Night Noises" and it is unchallenged that he was at the time of the incident acting in the lawful execution of his duties.

The two Ashman sisters said that when the music stopped, the deceased, who was also a policeman and who had been dancing with Doreen Ashman, approached the appellant who was then in the music room. He said to the appellant "Is cool, is cool, police inside a de dance" whereupon the appellant held him in the front

of his shirt and boxed him. The deceased retaliated, doing the same to the appellant. Then, the appellant pulled a gun from his waist, placed it on the belly of the deceased and fired a shot causing the deceased to fall to the ground.

Constable Boothe testified that he was present at the dance when the appellant and two other policemen entered, and at the time the music stopped. Although, he did not hear what they were saying, he saw the deceased speak to the appellant, after which the appellant held the deceased in his waist. The deceased then said "Me a police, me a police". He then took out his I.D. booklet from his pocket and showed it to the appellant. Some members of the crowd shouted "Look how police a do police," and then one of the civilians said something , whereupon the appellant used his right hand removed a gun from his left foot and hit that civilian in his face. The appellant then pointed the gun at the deceased, after which the witness heard an explosion and saw the deceased fall. He too, was shot by the same bullet, and realized this when he felt a 'burning to his belly," and observed blood on his fingers. As a result, he said to the appellant, "Me a police and you shoot me to." The appellant replied "You get shot to? Go in a the vehicle mek me carry you go a hospital". The appellant, he stated, held unto the deceased, assisted him to the ground, and then took the gun from his waist.

The deceased was subsequently taken to the hospital where he died a few days later.

The defence, however, through the appellant, and his witnesses portrayed a different picture as to the events as they occurred that night. In his sworn testimony, the appellant, disclosed that he was an Inspector of Police, he was stationed at the Traffic Division in Denham Town, but also had the specific duty of being the sub-officer in charge of "Night Noises". On

the night of the incident, he had received a report concerning the loud noises emanating from the dance at the Kamika Club, as a result of which he went there in the company of Cpl. Shaw and Sgt. Simpson for the purpose of directing the operators of the dance to reduce the volume of the music. As the three police officers entered the Club, they were seen by "Super Saint", the person playing the music, and from his experience knowing why they were there, he thereupon turned down the music. Nevertheless, the appellant approached him and entered into conversation with him. During this conversation, the appellant turned to his left and noticed Sgt. Simpson and the deceased engaged in a tussle. The deceased was holding Sgt. Simpson from behind and around his waist, and the Sergeant was trying to pull himself away. At this time Sgt. Simpson had a gun in his unfastened holster at his side. The appellant went to the Sergeant's assistance, and to secure the gun, removed it from the holster and held it in his right hand. He thereafter, using his left hand, pushed the deceased off the Sergeant. The deceased retaliated, pushing the appellant in his chest. The appellant pushed off the deceased and then he saw the deceased move his right hand to his waist. He used his left hand, held the right hand of the deceased unto his waist, and at that stage he realized that the deceased was holding unto a gun. The deceased, then grabbed him in the "chest section" of his uniform. He still had the firearm in his right hand holding it with the muzzle pointed upwards. At that stage, he felt severe blows to the back of his neck followed by one to his right shoulder blade, and in the words of the learned trial judge as recorded in the transcript of the summing-up - "simultaneously an explosion was heard and the man (the deceased) began to release his hold on him (the appellant)". It was then that he realized that the gun

he was holding in his right hand had been discharged and the bullet had hit the deceased.

In support of the defence Sgt. Simpson gave evidence which was consistent with that of the appellant, except that he was able to explain the reason why he was held by the deceased. He stated that after he had entered the dance, he did not go to the music room with the appellant, but remained standing some distance away. The deceased approached him indicating that he was a policeman, and handed his identification booklet to the Sergeant who in order to properly inspect it, stepped off with the intention of going to where there was light. It was in those circumstances, the Sergeant testified, that the deceased held him from behind, and commenced the 'tussle' about which the appellant had testified, and which resulted in the appellant's intervention.

We now turn to the determination of the issues raised by counsel.

1. **SELF-DEFENCE**

The appellant contends that there was clear evidence of self-defence disclosed, and maintained that though it was not raised specifically by the defence, nevertheless in the circumstances of the case the learned trial judge had a responsibility to leave it as an issue for the consideration of the jury. That the learned trial judge withdrew the issue from the jury is clear, for he stated:

> "A deliberate and intentional killing done while a person is acting in defence of himself or his property is in law no offence. I tell you as a matter of law that the question of self-defence does not arise in this case for your consideration. There can be no verdict in this case based upon the plea of self-defence. It does not arise."

In the trial of the case, the defence did not raise self-defence, and as the outlined facts demonstrates, the appellant denied that he deliberately and intentionally discharged the firearm. It has been settled for a long time that although an issue is not raised by the defence it is still incumbent on the trial judge to leave that issue to the jury if there is evidence in that regard.

The principle was reiterated in **R. v. Porritt** [1961] 3 All E.R. 463 per Ashworth, J., at page 468:

> "... As has already been said, the issue of manslaughter was not raised at the trial, but there is ample authority for the view that notwithstanding the fact that a particular issue is not raised by the defence, it is incumbent on the judge trying the case, if the evidence justifies it, to leave that issue to the jury. ..."

Ashworth, J., then went on to rely on the following passage taken from the judgment of Lord Tucker in **Bullard v. R** [1957] 42 Cr. App. R. 1 at page 7:

> "In the present case the fact that the jury rejected the defence of self-defence does not necessarily mean that the evidence for the defence was not of such kind that, even if not accepted in its entirety, it might not have left them in reasonable doubt whether the prosecution had discharged the onus which lay on them of proving that the killing was unprovoked. Their Lordships do not shrink from saying that such a result would have been improbable, but they cannot say that it would have been impossible."

And as Ashworth, J., continued:

> "The issue is whether there was on the evidence any material which made it incumbent on the learned judge to leave that issue."

This principle was also recognized by Goddard, C.J. in **R. v. Lobbell** [1957] 1 Q.B. 547, in delivering the judgment of the Court:

> "...If an issue relating to self-defence is to be left to the jury there must be some evidence from which a jury would be entitled to find that issue in favour of the accused, and ordinarily no doubt such evidence would be given by the defence. ..."

And later he said:

> "... It is perhaps a fine distinction to say that before a jury can find a particular issue in favour of an accused person he must give some evidence on which it can be found but none the less the onus remains on the prosecution; what it really amounts to is that if in the result the jury are left in doubt where the truth lies the verdict should be not guilty, and this is as true of an issue as to self-defence as it is to one of provocation, ..."

In **D.P.P. v. Leary Walker** [1974] 12 J.L.R. 1369, at page 1371 Lord Salmon in delivering the judgment of the Board, recognized and affirmed that in cases where self-defence is raised as a defence, but the evidence is such that provocation could have arisen, then the trial judge had a duty to leave that issue for the jury. He nevertheless continued:

> "There might be a case in which provocation is relied upon but not self-defence although there is evidence from which self-defence could possibly be inferred. This, however, is hardly more than a theoretical possibility because if there were even only the slimmest chance of self-defence succeeding, it is difficult to imagine any reason why counsel for the accused should fail to raise it and elect to rely solely on provocation. ..."

He however followed by stating:

> "... In this unlikely event, it would, no doubt, be the duty of the trial judge to leave self-defence to the jury and to give a careful direction on that defence."

In **R. v. Michael Bailey** S.C.C.A. 141/89 (unreported) dated 31st January, 1991 this Court per Carey, J.A., again reiterated the principle at page 3 as follows:

> "There can be no doubt that a duty which is placed on a trial judge is to leave any issue, i.e. defence which fairly arises on the facts of a case, to the jury irrespective of such issue being raised by the defence: **R. v. Porritt** 45 Cr. App. R.: **R. v. Albert Thorpe** S.C.C.A. 7/84 (unreported) dated 4th June, 1987."

Before the Bailey case this Court in **R. v. Albert Thorpe** (supra) decided in 1987, had already approved the principle. This was a case in which the defence was an alibi, and on appeal against the conviction for murder, after a thorough examination of the cases, this Court, in a reference to the facts of the case, specified clearly, the application of the principle. The following words fell from White, J.A. at page 18:

> "By their verdict it is undeniable that the jury found that the appellant was present on Quasi Road, on that morning. But the mere fact of his presence did not conclude the question that the jury had to decide: 'In what circumstances did Duhaney meet his death? The jury should have been told that if they found the applicant had lied when he said he was elsewhere, it would be inescapable that he was present on the scene. They should then go on to examine the facts disclosed by the evidence and to determine therefrom whether the appellant acted in self-defence or reacted as he did by reason of provocation. There was just enough evidence to raise these questions."

It is therefore plainly settled that where on the evidence in a case, a particular defence arises even though not relied on by the defence, the trial judge has a duty to leave that issue for the consideration of the jury.

However, Mr. Hugh Wildman for the Crown, maintained that the evidence in this case, did not give rise to the issue of self-defence, because where self-defence is relied on, there must be evidence that the accused did a voluntary act, and there was no such evidence in this case. That where the evidence does not arise on the Crown's case, as it did not in the instant case, the defence

has a duty to adduce evidence from which a prima facie case of self-defence is made out. He contended that this proposition is even more so, where the accused raises a defence contrary to self-defence, such as in the instant case where the defence was one of accident.

For support he relies on the dicta of Stephenson, L.J., in **R. v. Bonnick** [1978] 66 Cr. App. R. 266 at page 269 which states:

> "When is evidence sufficient to raise an issue, for example, self-defence, fit to be left to a jury? The question is one for the trial judge to answer by applying commonsense to the evidence in the particular case. We do not think it right to go further in this case than to state our view that self-defence should be left to the jury when there is evidence sufficiently strong to raise a prima facie case of self-defence if it is accepted. To invite the jury to consider self-defence upon evidence which does not reach this standard would be to invite speculation."

In coming to this conclusion, Stephenson, L.J., was obviously following the earlier case of **D.P.P. v. Walker** (supra) in which, the Privy Council had held:

> "... that where an accused has not relied on self-defence and the evidence before the jury is consistent only with the force used being far greater than could conceivably have been necessary, no appeal can succeed on the ground that the judge did not leave self-defence to the jury; ..."

The authorities including **Bonnick** (supra) and **Walker** (supra) establish in our view that once there is evidence in the case upon which a jury could properly acquit the accused on the basis of self-defence, then it is incumbent on the trial judge to leave that issue for their consideration, even where the issue is not relied on by the defence.

We now look on whether the issue of self-defence arose on the evidence.

In our view the evidence of the appellant clearly left the issue of self-defence open for consideration. Though he denied that he deliberately and intentionally shot the deceased he nevertheless described circumstances, which if believed could indicate that he was acting in defence of himself.

He testified that he was there in the lawful execution of his duties, when on seeing his colleague, (who was also on his lawful duties) under attack by the deceased, he went to his assistance and relieved the attack upon him by pushing away the deceased. Having done so, the deceased turned his aggression on him, and entered into a struggle with him. He then saw the deceased move his hand to his waist, and he held unto the hand, only to discover that the hand of the deceased rested on a gun. Although the appellant was holding the hand, the deceased nevertheless continued the struggle, by grabbing the appellant in the front of his shirt, and at the same time bottles were being flung at him from behind, some of them hitting him. In this regard the evidence of Cons. Boothe, a witness for the Crown, that the firearm was discharged after the appellant was hit would be of significance in relation to a consideration of the issue of self-defence. In addition Cons. Boothe also supports the evidence of the appellant that the bottles were in fact flung at the appellant, and that there was in fact a wrestling in progress between the deceased and the appellant when the firearm was discharged. Also supportive of the latter is the evidence of Crown witness Karen Ashman, who also testified that there was a struggle between the two men, with the appellant trying to relieve the deceased of his firearm. Sgt. Simpson's evidence also coincided with that of the appellant, that the deceased 'went to his waist', the appellant held unto his hand, and then the deceased held the appellant in his shirt after which bottles were thrown.

The totality of the evidence briefly summarised herein, plainly indicates that the issue of self-defence was raised. Mr. Wildman, contends however that it does not, because there was no admission by the appellant that he deliberately and voluntarily discharged the firearm.

In our view this point is clearly answered by the authorities. It would have been open to the jury to accept that the appellant spoke to the truth, in describing the circumstances that existed when the firearm was discharged, but nevertheless conclude that it was discharged deliberately. Indeed their verdict of manslaughter leaves it without doubt that they concluded that the appellant deliberately shot the deceased, as that verdict had to be based on provocation, which was left to the jury. The evidence capable of amounting to provocation in our view could only be the very evidence which indicated that the appellant may have been acting in self-defence. The dicta of Carey, J.A., in the case of **R. v. Michael Bailey** (supra) is very relevant to the facts as they unfolded in this case. In that case as in this, the defence of accident was put to the jury, and self-defence withdrawn from their consideration. These are the words of Carey, J.A.:

> "Indeed we venture to think that self defence as a concept embraces not only aggressive action such as a pre-emptive strike or aggressive reaction but equally to a wholly defensive posture which results in the death of an attacker. What the person attacked intends is not to kill but to defend himself. His action whether aggressive or defensive may result in death. The law stated by Foster [C.C. & C.L. 273] -

> " 'Was that a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation, or property. In these cases he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended, and if in conflict between them he happens to kill his attacker, such killing is justifiable.'
>
> We would emphasize the words 'resist the attack where he stands.' We also note that the trial judge left the issue of provocation and he did so on the basis of the appellant's statement....
>
> It seems to us absolutely illogical that the judge left to the jury the issue of provocation which has all the ingredients of self-defence in a murder case, but omitted to mention self defence. The actus remains the same in both situations."

The above words aptly describe the situation in the instant case.

Mr. Wildman also contended that in self-defence, where the defence is based on honest belief, then it is incumbent on the accused to give such evidence as the test is a subjective test (**R. v. Solomon Beckford** [1987] 3 All E.R. 425), and a jury can no longer determine the state of an accused's mind based on an objective view of the evidence. In our view this proposition is misconceived. If an accused kills where in circumstances, it can be presumed on the evidence that he must have apprehended that his life was in danger then that per se must be evidence upon which it can be concluded that he acted in necessary self-defence i.e. that he honestly believed that to be the case.

This was recognized in the **Beckford** case (supra) in which Lord Griffith in alleviating fears that the subjective test would result in many acquittals stated (page 432):

> "... In assisting the jury to determine whether or not the accused had a genuine belief the judge will of course direct their attention to those features

> "of the evidence that make such a belief more or less probable. Where there are no reasonable grounds to hold a belief it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held."

Indeed, the learned trial judge seems to have recognized that the subjective state of mind of the appellant could be inferred from the circumstances of the case, but somehow shifted the emphasis from a consideration of the merits of the defence to an irrelevant comment adverse to the appellant's case. He said:

> "Now, imagine - this is a comment I make: This man grabbed him up, Inspector pushes off the man, the man moves to his waist, now, as police officers, what you think would have been their state of mind to see a man going to his waist? You don't think it would be, the reasonable thing that would have operated in their minds that this man would have been going to his waist for a weapon and in that situation, Mr. Foreman and members of the jury, all Mr. Simpson do is to step aside and watch from the gallows, (sic) so to speak, watch from the grandstand, so to speak."

For these reasons we concluded that this was a case in which the evidence in its totality was such that it was incumbent on the trial judge to have left the issue of self-defence to the jury, and in not doing so he deprived the appellant of a chance of acquittal.

2. **ACCIDENT**

This ground makes a two-pronged attack on the manner in which the learned trial judge dealt with the defence. The appellant contends that there was no legal definition of accident given to the jury and instead the learned trial judge made several unfair comments which were such as to undermine the defence.

It is undisputed that the learned trial judge did not attempt to give a definition of accident. We would reiterate that in cases such as this the learned trial judge should tell the jury that "a killing which occurs in the course of a lawful act without negligence is accident" (**R. v. Michael Bailey** (supra)). Mr. Ramsay contended that the learned trial judge did not invite the jury to determine the following questions in considering the question of accident:

1. Was the appellant entitled in the course of his lawful duty to apprehend the deceased?

2. In such circumstances was he entitled to protect himself from an actual or apprehended attack?

3. Was he, in the circumstances entitled to seek to remove the gun which the deceased was apparently attempting to take from his waist?

4. If the deceased continued his attempt to draw his gun, and at the sametime others attacked the appellant from behind, and the gun went off without any negligence on the part of the appellant, would the appellant be absolved?

The learned trial judge did not approach the question of accident by way of the specific examination of the evidence for which Mr. Ramsay contends and which we feel would have been the ideal manner in which to approach the question. He did however in several passages direct the jury as to their duty if they accepted the account given by the appellant or if that account left them in reasonable doubt. In one such passage he stated:

> "If you believe what he told you, that the gun was in his hand and went off accidentally when he was hit by missiles thrown by an unruly crowd or that somebody actually held it and hit him and that was how the gun went off, then you must acquit him. ..."

In our view, these directions, in the circumstances of this case, covering in a global way, all the detailed questions which, given the defence, the jury would have had to determine, were adequate as to definition of accident, and actually would not have deprived the appellant of a proper consideration of the matters in his favour in that regard.

We must deal with the second limb of Mr. Ramsay's ground in relation to accident in which he complained that the trial judge analysed the evidence in favour of the prosecution and against the appellant and failed to give a balanced direction to the jury thereby undermining the defence of accident. The major complaint in this regard related to evidence concerning the showing of his identification booklet by the deceased. The prosecution,, had through Cons. Boothe alleged that it was to the appellant that the booklet was shown, whereas the defence alleged through Sgt. Simpson, that the booklet had been shown to him. The issue was a matter which was of great importance to the defence as it went to the core of the defence, the struggle between the deceased and Sgt. Simpson having commenced as a result, that struggle leading to the intervention of the appellant. The conflict between the Crown and defence was not as well defined as appears at first. The transcript of the evidence, provided during the course of the arguments before us, indicates that Crown Counsel in opening the case for the prosecution had stated that the prosecution's case would disclose that the identification booklet had been shown to Sgt. Simpson. In addition, in the cross-examination of the appellant, Crown Counsel appeared not to have been sure to whom the booklet had been shown. The notes at page 129 record as follows:

> "Q. I am suggesting to you, sir, that before the firearm in your hand was discharged, Constable Sinclair, the deceased, had used his identification booklet to identify nimself either to you or Sergeant Simpson?

"A. Not to me, madam.

MR. NICHOLSON: (Counsel for the Defence) Wait a minute. Please. M'Lord, I distinctly remember my friend opening her case to the constable identifying himself to Sergeant Simpson. That is her case. That is how she opened. May I just read it M'Lord?

HIS LORDSHIP: Mr. Nicholson, what is the evidence in the case?

MR. NICHOLSON: Very well. I thought ...

HIS LORDSHIP: You can't object because the evidence in the case is X, so the Crown can rely on that evidence.

MR. NICHOLSON: Very well. So I will address in a certain way. Very well.

In addition, in cross-examination of the witness Sgt. Simpson, Crown Counsel appeared to have been conceding that the booklet was shown to Sgt. Simpson. The notes reveal the following suggestion by Crown Counsel at page 198:

"Q. I am suggesting that after that man handed his identification booklet to you, at that stage you knew he was a police officer?

On that background, we examine the manner in which he learned trial judge dealt with the issue. The passage which as seriously criticised by counsel for the appellant and which e contends, the learned trial judge used to destroy the factual equence and credibility of the defence reads as follows:

"Now, Mr. Foreman and members of the jury, if it was to the accused that the booklet was shown, if you find that, then now, what is the effect of that? I proffer a comment, it gives a lie to the whole story about Simpson. Because, if the man showed the booklet to this accused man, all this thing about Mr. Simpson taking the booklet and walking to the light, and the man grabbing on to him, that would not have occurred. So it is very important. Did the deceased show his I.D. booklet to this accused man, or to Mr. Simpson? ... Now, if that were the case -

> "and this is a comment I make - that if this man had grabbed on to Simpson, when Simpson was going away with the booklet and was tussling with him, what would you have expected when the inspector intervened, that Simpson would go away? Wouldn't you expect him to assist the inspector? Inspector came to his aid, and having released the man, he goes by now and says, 'You have it all'. Did it happen? Was there any wrestling between this deceased man and Simpson? Or, is it as this man said, that the booklet was shown to the accused man? And I comment again. It is more than passing strange, the way Mr. Simpson behaved. This tussling with this man, inspector coming to his aid, his comrade coming to his aid, and when his comrade relieves his distress, he goes and he takes up a position of a disinterested bystander, so to speak. Does it make sense? Does it ring true?"

Given the background, already outlined, where the prosecution itself did not advocate in terms certain, to whom the identification booklet was shown, these comments which projected the evidence of an important defence witness on a point directly associated with the issue being dealt with, as "more than passing strange" and thereafter posed the questions "Does it make sense? Does it ring true? were to say the least unfair to the defence. On this issue which the learned trial judge recognized to be very important, he omitted to remind the jury of the uncertainties which emanated from the prosecution, and failed to invite the jury to consider the disclosure in the opening speech of Crown Counsel and the content of the questions of Crown Counsel (supra) together with the evidence from the defence, in their determination of where the truth on that issue lay. In addition, instead of criticizing as "passing strange" the conduct of Sgt. Simpson after he was allegedly released from the hold of the deceased by the appellant, he ought to have reminded them of the Sergeant's explanation that

he did not go to the assistance of the appellant because he thought he (the appellant) had things under control.

Another passage of which complaint has been made relates to another conflict between the case for the prosecution and that of the defence. It again occurs in relation to the evidence of Cons. Boothe who testified that the appellant had hit a civilian in his face, with a gun which he (the appellant) had removed from his left foot. The defence denied that this took place. In reviewing this evidence the learned trial judge stated:

> "... police and police business civilian not going into it; so if bottle and stone start to throw, why you think it start to throw? because police and police start to have something, or is it as this man says, a civilian by-stander was assaulted and people come? not no longer a police and police thing, is police and civilian, that is what happened, because the crowd would have remained uninvolved, but according to this man he hit a civilian man with his gun and the crowd says no man, this is no longer police and police now:..." (emphasis added)

Mr. Ramsay for the appellant contended that the content of the above passage, demonstrated that the learned trial judge was usurping the functions of the jury by himself coming to a conclusion of fact - that fact being that the appellant did hit a civilian with a gun, an act which would have run contrary to the evidence of the defence. The learned trial judge might not have intended to say categorically that the appellant had indeed hit a civilian with his firearm thus triggering the bottle throwing incident but the language employed admits of no other conclusion than that the trial judge having arrived at this interpretation of the facts was passing his opinion to the jury as a fact.

This Court in **R. v. Dave Robinson** S.C.C.A. 146/89 decided on the 29th April, 1991 reminded that a trial judge is entitled to make comments to the jury on the facts of the case. Indeed he

may make strong comments, so long as they are fair and the jury is informed that they may discard them if they do not coincide with their own thoughts on the issues in the case.

In reiterating what is indeed settled principles Carey, J.A., delivering the judgment of the Court emphasized:

> "Where ... the comment tends to ridicule the defence, or to suggest that there is some burden on the accused to prove his innocence, or erodes the defence, or is unwarranted on the facts, the judge would have over-stepped the lines of proper judicial comment. He would be failing most seriously to ensure the fair trial that the Constitution guarantees and would lead to a substantial miscarriage of justice. ..."

In our view, in the instant case, the two passages cited above, would as has been contended, have had the effect of eroding the defence, and are only two examples of other passages which could have been subjected to similar criticism. We find therefore that the learned trial judge in his comments went outside of the permitted sphere and we are therefore unable to say that the appellant's case was presented in a fair and balanced way to the jury.

Ground 3 - AUTOMATISM

Mr. Chuck who argued this ground on behalf of the appellant contends that automatism arose on the evidence and consequently that defence should have been left for the jury's consideration. In **Bratty v. Attorney-General for Northern Ireland** [1961] 3 All E.R. 523 Lord Denning at page 532 gave his definition of automatism as -

> "... an act which is done by the muscles without any control by the mind such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing such as an act done whilst suffering from concussion or whilst sleepwalking."

Later in his judgment Lord Denning at page 535 stated the criteria for the consideration of automatism as a defence in a case. He stated:

> "... So also it seems to me that a man's act is presumed to be a voluntary act unless there is evidence from which it can reasonably be inferred that it was involuntary. To use the words of Devlin, J., the defence of automatism 'ought not to be considered at all until the defence has produced at least prima facie evidence,' see **Hill v. Baxter** [1958] 1 All E.R. at p. 196; [1958] 1 Q.B. at p. 285; and the words of North, J., in New Zealand 'unless a proper foundation is laid,' see **R. v. Cottle** [1958] N.Z.L.R. at p. 1025. The necessity of laying this proper foundation is on the defence: and if it is not so laid, the defence of automatism need not be left to the jury, ..."

He then sets out what in his view is the proper foundation -

> "What, then, is a proper foundation? The presumption of mental capacity of which I have spoken is a provisional presumption only. It does not put the legal burden on the defence in the same way as the presumption of sanity does. It leaves the legal burden on the prosecution, but nevertheless, until it is displaced, it enables the prosecution to discharge the ultimate burden of proving that the act was voluntary. ... In order to displace the presumption of mental capacity, the defence must give sufficient evidence from which it may reasonably be inferred that the act was involuntary. The evidence of the man himself will rarely be sufficient unless it is supported my medical evidence which points to the cause of the mental incapacity. It is not sufficient for a man to say 'I had a black-out': for 'black-out' as Stable, J., said in **Cooper v. McKenna** [1960] Qd. R. at p. 419 'is one of the first refuges of a guilty conscience, and a popular excuse'. The words of Devlin, J., in **Hill v. Baxter** [1958] 1 All E.R. at p. 197; [1958] 1 Q.B. at p. 285 should be remembered:

> " 'I do not doubt that there are genuine cases of automatism and the like, but I do not see how the layman can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent'."

Applying the standard enunciated in the Bratty case, Mr. Chuck contended that there was in the instant case, sufficient evidence adduced by the defence to require the defence being left to the jury.

In support of this, he referred us to three passages in the summing-up, one of which related not to the appellant, but to a witness called by the defence. The two passages on which he can therefore rely are:

1. The evidence of the appellant, (page 63)

> "... He said he can't remember putting his hand on the trigger that night but if he did, it was an involuntary act. In other words he didn't deliberately pull the trigger,..."

2. The evidence of Dr. Henry a witness called by the defence (page 64)

> "He said depending on the severity of the blow at the back of the head you may fall forward or become unconscious or you may bend and fold, and he demonstrated. And then he told you about neuro muscular reflex, and he told you that it was somewhat similar to the patella reflex. He said that the reaction to the blow to the shoulder would be, if the gun was down it would come up like this. ..."

In our view this evidence fell short of creating the basis for leaving the defence of automatism. Indeed, the mere evidence of the appellant, that he could not remember putting his hand on the trigger was not evidence upon which the jury could have found automatism. Nor did the evidence of the doctor which speaks of neuro muscular reflex in such a general and unrelated way, help

in any way to raise the defence of automatism. On the contrary the evidence apparently sought to support the defence of accident by explaining how his hand with the gun would have reacted to the blows he allegedly received to his shoulder and neck.

For those reasons, we are of the view that the learned trial judge was correct in not leaving to the jury such a defence, which did not arise either expressly or impliedly on the evidence.

In conclusion, grounds one and two having been determined to be valid complaints, we allowed the appeal. We also considered whether in the interest of justice a new trial should be ordered but concluded that in the circumstances of this case the appellant, having been acquitted of the charge of murder, we should not allow him to face another trial on a charge of manslaughter. For these reasons we made the order already referred to earlier in this judgment.