JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 98/89

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Gordon, J.A. (Ag.)

R. v. FABIAN MOSES

Phillip Sutherland for Appellant

Lloyd Hibbert for Crown

May 7, 11 & June 18, 1990

CAMPBELL, J.A.:

This application for leave to appeal a conviction for murder was treated as the hearing of the appeal and by a majority the appeal was dismissed on May 11, 1990 on which date we promised to put our reasons in writing. This we have now done.

The case for the prosecution rests almost exclusively on the evidence of Constable Everton Laidley while the case put forward by the appellant is exclusively contained in his unsworn statement.

Constable Laidley said that on September 20, 1986 at about 2.30 p.m., he was on traffic duty. He was standing on the sidewalk in the vicinity of, but opposite to and facing the Traffic Court on Orange Street watching the flow of traffic. His purpose in standing there was to prevent buses parking in that vicinity to pick up and let off passengers thereby causing obstruction to the flow of traffic. He observed a Fargo

minibus which drove from the direction of West Parade up Orange Street which is a one way street going up. The minibus came to a stop in front of him but about five yards from the sidewalk. The engine of the bus was still running and it had not parked. It had not come to a stop for any appreciable time when he saw the appellant holding a man by his collar with his left hand and pulling him from the minibus on to the roadway. The appellant whom he knew as Romeo had a buck knife about eight to nine inches long in his right hand. The appellant pulled the man on to the roadway and they were facing each other. The man had nothing in his hand, Laidley shouted to the appellant to drop the knife. The appellant looked in the direction of Laidley and said:

"Officer this man is a b.... c.... tnief."

The appellant then, stabbed the man with the buck knife somewhere in the region of the left collar bone. He then let go of the man, dropped the knife and ran down Orange Street.

Laidley walked towards the injured man whom he saw staggering with blood gushing from the wound. The man swayed and fell on the roadway. Laidley who was only able to cushion the impact of the man on to the roadway, took up the knife, summoned a taxi and took the injured man to Kingston Public Hospital. Laidley remained there until a doctor was summoned. This doctor having examined the injured man told Laidley something. Laidley looked on the injured man and formed the impression that he was dead. This was about 2.45 p.m. barely 15 minutes after the incident on the roadway at Orange Street. This deceased was identified at the post mortem examination as Carl Brown aged 19 years. Medical evidence as to the cause of death was unavailable.

Under cross-examination, efforts were made to obtain evidence supportive of what the appellant subsequently said in his unsworn statement but without success.

Thus Laidley was asked if the bus had not been parked on Orange Street sometime before the incident. He said no. He was asked if in fact passengers were not embarking and disembarking. His answer was that apart from the appellant and the deceased who came off the bus, no other person disembarked and no person embarked. He was asked specifically if shortly before the appellant and the deceased came off the bus he had not seen at least two other people who came off the bus. He answered in the negative.

The cross-examination so far as is relevant is set out hereunder:

"Q. Before the incident took place, wasn't the bus parked at that spot for sometime?

A. No.

Q. Eh?

A. No.

Q. The engine was off, wasn't it?

A. No.

Q. No?

A. No, sir

Q. Weren't there passengers going on, coming off the bus?

A. No sir.

Q. No?

Q. Weren't there at least two other people who came off the bus apart from this accused man and the deceased?

A. No, sir

Q. Many more than that?

"A. Just the two people, sir.

Q. Just the two people?

A. The injured man and the accused man.

Q. Officer, let me suggest to you, you see, that the bus was parked by the side of the road?

A. No, sir

Q. And that while it was parked there the engine was off?

A. No, the engine was running.

Q. People were coming off the bus and some were going on?

A. No, sir

Q. In other words the bus would stop there taking up passengers and discharging passengers?

A. No sir.

Q. What were you doing there?

A. I was on traffic duty, I was observing the flow of traffic.

Q. What was your purpose in observing the traffic?

A. I was placed at that point so that no minibus should park there and pick up passengers, because we always have a problem there, minibus park, pick up and let off passengers, and obstruct the flow of traffic."

The appellant made an unsworn statement which is to the effect that on the day in question he was standing at Chancery Lane when he saw three men come from Orange Street side on to North Parade. They stood at the intersection of Chancery Lane and North Parade looking over the bus park and talking together. One of them left and went over to the bus park and grabbed a lady's chain. When he did this he and the other two men ran up Chancery Lane through an open lot and went on to Orange Street. They went into a van which was

parked on Orange Street waiting to pick up passengers. They seated themselves on the back seat. He went into the van and said "Give me the lady chain whey oono just grab a while ago." The man who had the chain threw it to one of his other two friends. The appellant turned to him and said:

> "Give me the lady chain, all the while oono thief the people chain and the police dem come and antagonise we."

one of the men said:

> "Come out de whats-it-not van, you a police? You a police?"

When the man said this, one of them whose name was Paul Dillon "back out" a knife at him. When Paul Dillon "back out" the knife, he the appellant held on to the two rails of the bus and kicked him and the knife dropped out of his hand on to the floor of the van. The three men ran out of the van, the appellant picked up the knife and ran behind them. He held on to one of them while running and "me and him 'wrastling' coming out of the bus, when we was 'wrastling' out on the road now, I hear a voice say, "Bwoy, wah dat?" So me let go off the man whey me hold on to while paying attention to the voice what me hear say Bwoy what dat? I let go the man. By the time me look round for the man, him try to run, so I stretch me hand to hold him. When I stretch me hand to hold him, him run off, so the knife must be catch him here so. I know two of the men but I don't know the next man. One name Paul Dillon and one name Popeye. The three of them was there. I dont know the next man."

Before us two supplemental grounds of appeal were argued. One related to the adequacy of the direction on the cause of death, that is to say whether it was the injury admittedly inflicted by the appellant that was the cause of death. There was clearly no merit in this ground and we did

not consider it necessary to call upon the Crown to respond. The court was unanimous that this ground of appeal failed.

The second ground of appeal was that -

> "The Learned Trial Judge erred in Law in holding that in all the circumstances of the case the issue of provocation did not arise."

The learned trial judge did not leave the issue of provocation for determination by the jury. He said at page 81 of the record:

> "A deliberate and intentional killing done as a result of legal provocation is not murder but manslaughter. You may deliberately and intentionally kill somebody if you are provoked, in those circumstances the offence is one of manslaughter, not murder. But provocation does not arise in this case, so you won't have to consider provocation. Mr. Foreman and members of the jury."

and in directing the jury on the elements which the prosecution had to prove to establish murder he said at page 86 -

> "The prosecution must prove that the killing was unprovoked. In this case, I have already directed you to the effect that provocation does not arise. So, you will have no difficulty in saying, in finding as a fact in this case that this killing was unprovoked."

Before us Mr. Sutherland submitted that there was evidence which in law was capable of amounting to provocation and the learned trial judge was therefore obliged to leave to the jury that issue. He submitted that the provocative acts which by their very nature would cause a reasonable man to lose his self control consisted in words and acts which must be considered against the background of the appellant having observed the commission by the deceased jointly with others of a felony namely larceny from the person of a chain. These words and acts which amount to provocation comprised -

(a) abuses by the men in the bus when the appellant followed them there and sought to recover the stolen lady's chain;

(b) being taunted by the man throwing the chain to the other two instead of handing it over to the appellant;

(c) Paul Dillon backing out a knife at him.

Mr. Hibbert in his response, submitted that the learned trial judge was correct in not leaving the issue of provocation to the jury because there was no credible narrative establishing as a matter of law the coalescence of the three elements namely provocative acts and or words, loss of self control, and reasonable retaliation thereby entitling the defence to have the issue of provocation left to the jury. He relied for his submission on Lee Chun Chuen v. R (1963) 1 All E.R. 73 wherein Lord Devlin at page 79 said:

> "Provocation in law consists mainly of three elements - the acts of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other particularly in point of time, whether there was time for passion to cool is of the first importance. The point that their lordships wish to emphasise is that provocation in law means something more than a provocative incident. That is only one of the constituent elements."

Dealing with the second element namely "loss of self control both actual and reasonable" Lord Devlin said:

> "Their Lordships agree that the failure by the accused to testify to loss of self control is not fatal to his case. R. v. Hopper (13) Kwaku Mensah v. R (14) Bullard v. R (15) and R. v. Porritt (16) were cited as authorities for that. These were all cases in which, as in the present case, the accused was putting forward accident or self defence as well as provocation. The admission of loss of self control is bound to weaken, if not to destroy, the alternative defence and the law does not place the accused in a fatal dilemma. But this does not mean that the law dispenses with evidence of any material showing loss of self control. It means no more than that loss of self control can be shown by inference instead of by direct evidence. The facts can speak for themselves, and, if they suggest a possible loss of self control, a jury would be entitled to disregard even an express denial of loss of temper."

In R. v. Hart (1978) 27 W.I.R. page 229 this court held that R. v. Lee Chun Chuen (supra) not having considered the modern law of provocation in Jamaica as set out in section 6 of the Offences against the Person Act was not wholly authoritative. The statement therein that there must in law be evidence of "retaliation proportionate to the provocation" before the issue can be left to the jury did not correctly state the law in and for Jamaica. In this regard Phillips v. R (1969) 53 Cr. App. Report 132 was to be preferred as stating the law on provocation. Though the question on appeal was whether the jury had been correctly directed on the issue of the retaliation of the appellant i.e. the third element in R. v. Lee Chun Chuen (supra) their Lordships of the Privy Council per Lord Diplock indicated the extent to which the principles relative to the law of provocation which were originally wholly derived from the common law had been changed. At page 134 he said:

> "In their Lordship's view the only changes in the common law doctrine of provocation which were effected by section 3c of the Jamaica Offences against the Person (Amendment) Act No. 43 of 1958 [which contains a provision identical with that in section 3 of the Homicide Act 1957] were (1) to abolish the common law rule that words unaccompanied by acts could not amount to provocation and (2) to leave exclusively to the jury the function of deciding whether or not a reasonable man would have reacted to the provocation in the way in which the defendant did. These two changes are inter-related."

Their Lordships then laid down the test of provocation in the law of homicide in these words -

> "The test of provocation in the law of homicide is two fold. The first, which has always been a question of fact for the jury, assuming that there is any evidence upon which they can so find, is, 'was the defendant provoked into losing his self-control? The second, which is one not of fact but of opinion, 'would a reasonable man have reacted to the same provocation in .the same way as the defendant did'?"

In R. v. Hart (supra) this court concluded on the effect on R. v. Lee Chun Chuen (supra) of the statutory provisions regulating the defence of provocation in these words at page 238:

> "Accordingly, the third element as defined in Lee Chun Chuen's case is essentially a matter for the jury. It is what Lord Diplock in Phillips categorised as 'one not of fact but opinion'. It cannot therefore be used by the trial judge as a basis for deciding whether or not the issue of provocation has been raised. What is required is evidence of a provocative conduct on the part of the deceased and evidence from which it may be inferred that as a result the killing was due to 'a sudden and temporary loss of self control.' If there is such evidence

> "then it is the duty of the judge to leave the issue to the jury for them to determine with due regard to the two fold test as laid down in Phillips v. R."

Lee Chun Chuen (supra) therefore continues to be good law so far as the need for a credible narrative of events suggesting a provocative act and loss of self control before a judge becomes obliged to leave the issue of provocation to the jury. This court has said as much in R. v. Hart (supra) without using the expression "credible narrative of events." Rather the word 'evidence' has been used. The word 'evidence' however underlines "credible narrative of events" as used in Lee Chun Chuen (supra) and 'evidence' is the word used in the statutory provision contained in section 6 of the Offences against the Person Act governing provocation which reads as follows:

> "Sec. 6 - where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or 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."

In R. v. Hart (supra) this court in effect construed the word 'evidence' in section 6 of the Offences against the Person Act, albeit not expressly adverting to the section, as covering an unsworn statement. Thus an unsworn statement especially where the facts stated therein are not challenged by evidence from the Crown may in our jurisdiction constitute

a "credible narrative of events." Be that as it may, in the present case, the unsworn statement, independently of whether the facts therein suggest provocation, would not appear to be credible because the setting within which the alleged provocative acts and words took place did not exist having regard to the sworn testimony of the prosecution witness. There was no bus which had parked on Orange Street which the three men who allegedly stole the lady's chain could have boarded and in which they could have seated themselves. The only bus which came on to Orange Street was seen from it was being driven on to Orange Street and it only stopped momentarily. No persons boarded this bus. No persons other than the appellant and the deceased came off it. The police officer who was positioned where he was for the very purpose of preventing buses from parking in the area could hardly have failed to observe men running into the bus if such had occurred. Plainly on this view of the matter the jury inevitably would have rejected the appellant's version of the incident as contained in his unsworn statement even if provocation had indulgently but erroneously been left to them based on what the appellant said therein.

Did the unsworn statement contain facts which can be described as provocative acts and words and if they can be so described were they capable in law of making the appellant lose his self control?

The appellant said in effect that he saw one of three men who were earlier standing together, approach a lady at a bus park and grab her chain. All three men then ran across an open space on to Orange Street where they entered a parked bus and seated themselves. He does not say that he pursued them muchless that this was with a view to arresting

them as persons who acting in common design had committed in his presence a felony namely larceny from the person. He said he went into the van and demanded that the chain be handed over to him. He had no legal authority to make the demand. He did not say why it should be handed over to him. It cannot be inferred that he intended to hand it over to the police. But even if this was a reasonable inference it would not legally justify the demand. The person who had the chain was entitled to retain and protect his possession thereof against the appellant and to pass it to his companions as the appellant said he did. Such conduct on the part of this man cannot be construed as a 'taunting' of the appellant and is not therefore a provocative act. It is reasonable conduct in relation to property over which the men knew the appellant had no claim.

The appellant said that when he addressed his demand to the man to whom the chain was thrown that it be handed over to him, one of these men said "come out de whats-it-not van, you a Police, you a Police." This Mr. Sutherland said constituted provocative words. Now, if on the statement it was revealed that the appellant was endeavouring to exercise his common law powers of arrest and was being abused and subjected to contempt, the words could probably in the circumstances be regarded as provocative and possibly make the appellant lose his self control. But he was not endeavouring to effect an arrest. If he were so doing he would certainly have surrendered his victim to the uniformed officer when he took his victim from the bus as he could not have failed to observe this officer's presence. He was rather seeking to obtain possession of the chain. His being told to get off the bus even accompanied with vulgar words and being told that he was not a police were not words amounting to

insult or abuse and so were not provocative words. He was being told by this man to leave them alone as he was not a police which in fact he was not and by inference they were telling him that only a police officer could order them to do that which he the appellant was trying to do. Even if the words could by some stretch of the imagination be said to be provocative they could not possibly cause a reasonable man to lose his self control, because he was not being insulted or belittled.

Finally, the appellant said that one of the men named Paul Dillon backed out a knife at him. Mr. Sutherland says this constituted a provocative act. Now the appellant did not say Paul Dillon got up and came towards him with the knife. All that can be gleaned from the unsworn statement is that the knife was backed out so that the appellant could see that if he attempted forcibly to take the chain, the knife would be used. This was at best a doubtful provocative act in that it manifested no more than a warning that Dillon would defend their possession of the chain, albeit stolen, by using the knife if necessary. But even if this act could be considered provocative, the appellant clearly showed no loss of self control. Rather he showed a cool composure, presence of mind and contempt for Dillon by kicking him, so causing the knife to fall to the floor of the van. His presence of mind is shown by his holding on to the rails of the bus no doubt to balance himself against falling when administering the kick to Dillon. Further, he was so much in control of himself that he picked up the knife before running after the men.

In sum there was no evidence of a provocative conduct on the part of any of the men, or if the backing out of the knife could be said to be provocative conduct there was no evidence from which it may be inferred that as a result the killing was due to a "sudden and temporary loss of self control" as laid down in R. v. Hart (supra)

It was for the above reasons that we concluded that Ground 2 of the appeal also failed and that the appeal ought to be dismissed.

ROWE P. (DISSENTING):

Nineteen year old Carl Brown died on September 20, 1986 between 2:30 p.m. and 3 p.m. The appellant Fabian Moses was charged with and convicted of his murder before Walker J. and a jury in the Home Circuit Court.

At trial the prosecution which opened to a straightforward case was presented with a difficulty in that the medical records of the post-mortem on the body of Carl Brown had been destroyed in a fire. Having regard to the evidence of Acting Corporal Everton Laidley, the trial judge, in our view, correctly over-ruled the no-case submission that the Crown had not proved the cause of death.

The scene of the incident was Orange Street in downtown Kingston. A/C Laidley was in uniform on traffic control duty. He saw a minibus drive northerly on Orange Street and come to a stop. He saw the appellant alight from the minibus pulling a man with him whom he was holding by the collar with his left hand and in his right hand the appellant had a buck-knife 6-9 inches long. A/C Laidley shouted to the appellant whom he knew before ordering him to drop the knife. The appellant turned and looked at the police officer and responded: "Officer this man is a blood cloth thief." With that, said the police officer, the appellant raised the knife and stabbed the man he was holding in the region of his left collar bone. Blood gushed from the wound. As the wounded man staggered to a fall, the appellant dropped the knife and ran away. A/C Laidley took possession of the weapon and produced it at trial. He summoned a taxi and transported Carl Brown to the Kingston Public Hospital. The wounded man

was placed on a stretcher and when examined by a doctor a few minutes later, A/C Laidley observed that the man was dead. Later that day in the company of another policeman A/C Laidley re-visited the Kingston Public Hospital and again observed the dead body of Carl Brown. A post-mortem examination was held, however, the result thereof was never made available to the jury.

Suggestions were put to A/C Laidley in cross-examination in an effort to lay a foundation for the defence of accident. The Acting Corporal firmly rejected the proposition that the appellant pushed his hand with the knife towards the deceased in an effort to re-capture him, and maintained that he was dressed in uniform and not in civilian clothes.

In an unsworn statement from the dock the appellant put forward the defence of accident. His counsel has submitted to us that in his statement he also raised the defence of provocation. The appellant said he witnessed an act of larceny from the person as one of three men grabbed a lady's chain at a bus stop and all three men ran and seated themselves in a minibus. He expressed his state of mind at this incident to be one of apprehension as on previous occasions the police had "antagonized" them on account of similar acts by other persons. Consequently he followed the men on to the minibus and demanded the return of the chain. One of the men ordered him to leave the van using indecent language and enquiring if he thought he was a policeman. In the words of the appellant, the man said: "Come out of the whats-it-not van, you a police? you a police?" Another of the men "back out a knife" at him. This phrase although not explained can only mean that a knife was drawn and pointed

at him. According to the appellant he kicked the man and the knife fell from that man's hand. Then the three men ran from the minibus. He picked up the knife and chased them, caught one and they began to wrestle. The impression the appellant wished to create was that at this moment, the person on to whom he was holding was attempting to break loose and he was restraining him for the purpose of handing the alleged thief over to the police.

The appellant further said that he heard a voice say:

"Bwoy, wah dat?"

He turned, momentarily released the man, and when he realized that the man was running off he stretched forth his hand to re-capture the man and in that manner the knife inflicted the injury. He was held by a policeman, who took the knife from him but he was later released. So he ran away. The appellant denied that A/C Laidley was in uniform.

During the cross-examination it was suggested to A/C Laidley, that although the appellant told him that the man he was holding was a thief, the appellant did not preface the statement with the word: "Officer". Significantly when the appellant gave his unsworn statement he omitted to make any reference to his reply to the challenge: "Bwoy, wah dat?"

The learned trial judge withdrew the defence of provocation from the jury. He directed them on the law relating to accident and to the lack of intent to kill or to cause serious bodily injury. We consider his directions on these two issues to be impeccable. Indeed counsel for the appellant raised no argument to the contrary.

Two grounds of appeal were filed and argued.

The first ground complained that the learned trial judge failed to direct the jury that they should be satisfied on the prosecution's case that the injury which resulted in the death of the deceased occurred in the manner described by the eye-witness. In Mr. Sutherland's view, there was a gap in the evidence for the prosecution as it did not bring evidence to show the exact nature of the wound which caused death, for example, its size, location, depth, and trajectory. Consequently the viva voce evidence of A/C Laidley could not be tested against the objective fact of the wound itself to discover whether that evidence was consistent with the injury suffered.

I do not think that the absence of medical evidence was fatal to the Crown's case. In structure and in presentation, the Crown was relying upon a situation where the appellant and the deceased were facing each other; the appellant was holding the deceased in the front of his collar, and in that position the appellant used the knife to stab the deceased. Blood gushed from the wound which the Acting Corporal described as being in the region of the left collar bone. There was no evidence to contradict this location of the injury. Walker J. specifically narrowed the issues as to how the injury was inflicted when at page 93 of the Record he directed the jury that:

> "So you have to make up your mind on the evidence whether you believe the crown's story, which is what Mr. Laidley says about the deliberate raising and lowering of the arm, which points to a deliberate act, and the prosecution is saying no man who does that can say 'I didn't mean to kill him or I didn't mean to cause him really serious bodily injury'."

Earlier the learned trial judge had dealt with the case for the defence. At page 93 he is recorded as saying:

> "But I remind you, his cardinal defence, of course, is accident. And, of course, if you believe that the act was done accidentally, the injury was sustained accidentally or may have been sustained accidentally, your verdict would be not guilty of murder, not guilty of manslaughter, because accident is, an accident is a complete defence."

The appellant did not give evidence and, I repeat there was nothing to contradict the evidence of Acting Corporal Laidley as to where the injury was inflicted. There was no gap in the Crown's case as contended for by the appellant.

There is no merit in the further argument of Mr. Sutherland that in the absence of the medical evidence the appellant's defence of accident could not be fairly tested for the simple reason that a forward lunge could not have produced an injury in the collar bone.

The second ground of complaint was that the learned trial judge erred in law in withdrawing the issue of provocation from the consideration of the jury. Mr. Sutherland submitted that in his unsworn statement the appellant fairly raised the issue of provocation when he recounted:

(a) that he had witnessed the commission of a felony, viz., larceny from the person and partly to protect his good name he had gone in pursuit of the thieves to recover the stolen property;

(b) that he was abused on the minibus by the thieves and ordered to leave;

(c) that the thieves taunted him by passing the stolen chain from one to another;

(d) that one of the men "back his knife" at the appellant.

It was submitted that these were acts of provocation which caused the appellant to lose his self-control and to act as he did.

These alleged events preceded the time when the attention of Acting Corporal Laidley was drawn to the appellant. As to their authenticity, therefore, the Crown could not usefully comment.

It is fair to assume that at trial the issue of provocation was not canvassed by either side. What amounts to provocation in law and what is the duty of a trial judge when the issue arises in a trial for murder has come in for much judicial attention in recent years.

Section 3 of Law 43/58, now Section 6 of the Offences Against the Person Act provides that:

> "Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or 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."

This legislative change in the law has achieved several major purposes. They are articulated by Lord Diplock in D.P.P. v. Camplin [1978] A.C. 705 at 716 when he said of the English provision of which the Jamaican Statute is identical:

> "My Lords, this section was intended to mitigate in some degree the harshness of the common law of provocation as it had been developed by recent decisions in this House. It recognises and retains the dual test: the provocation must not only have caused the accused to lose his self-control but must also be such as might cause a reasonable man to react to it as the accused did. Nevertheless it brings about two important changes in the law. The first is: it abolishes all previous rules of law as to what can or cannot amount to provocation and in particular the rule of law that, save in two exceptional cases I have mentioned, words unaccompanied by violence could not do so. Secondly it makes it clear that if there was any evidence that the accused himself at the time of the act which caused the death in fact lost his self-control in consequence of some provocation however slight it might appear to the judge, he was bound to leave to the jury the question, which is one of opinion not of law: whether a reasonable man might have reacted to that provocation as the accused did."

In the course of argument in this appeal the Crown referred to a decision of the Privy Council in 1963, Lee Chun-Chuen vs. Reginam [1963] 1 All E.R. 73 and to a passage in the judgment of Lord Devlin at page 79. There he is reported as saying:

> "Provocation in law consists mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other - particularly in point of time, whether there was time for passion to cool - is of the first importance. The point that their Lordships wish to emphasize is that provocation in law means something more than a provocative incident. That is only one of the constituent elements. The

> "appellant's submission that if there is evidence of an act of provocation, that of itself raises a jury question, is not correct. It cannot stand with the statement of the law which their Lordships have quoted from Holmes v. Director of Public Prosecutions (1946) 2 All E.R. 126. In Mancini v. Director of Public Prosecutions (1941) 3 All E.R. 272, the House of Lords proceeded on the basis that there was an act of provocation - the aiming of a blow with the fist - but held that it was right not to leave the issue to the jury because the use of a dagger in reply was disportionate."

I hasten to add that in D.P.P. v. Camplin (supra), the House of Lords departed from the passage relied upon by Lord Devlin from Holmes v. D.P.P. (supra). Of course the decision in Holmes v. D.P.P. (supra) preceded the amending legislation referred to above, and in the view of the House of Lords is no longer to be regarded as good law.

Lord Diplock said at p. 718:

> "In my view Bedder, like Mancini v. Director of Public Prosecutions (1942) A.C. 1 and Holmes v. Director of Public Prosecutions (1946) A.C. 588, ought no longer to be treated as an authority on the law of provocation."

It would seem that in the light of the decision in D.P.P. v. Camplin (supra) one cannot rely in Jamaica on the decision in Lee Chun-Chuen v. Reginam (supra) which did not proceed on an examination of the law of provocation based upon a legislative regime similar to Section 6 of the Offences Against the Person Act.

Glasford Phillips v. The Queen [1968] 13 W.I.R. 356 was one of the early cases in which Section 3 of Law 43/58 was considered. The appellant's defence at trial was automatism.

Evidence was led that he observed his mother and the deceased quarrelling during which they spat at each other. Then he drew a machete from a bag and inflicted six wounds upon the deceased from which she died. In his unsworn statement he said he intervened in the quarrel to give a blow with his hand to the deceased but instead he received a blow to the side of his head and for the next two minutes he had no recollection of what occurred. Smith J., (as he then was) left to the jury the issue of provocation and this action was approved by the Privy Council. In the course of its judgment, Lord Diplock said:

> "The test of provocation in the law of homicide is two-fold. The first which has always been a question of fact for the jury assuming that there is any evidence upon which they can so find, is 'Was the defendant provoked into losing his self-control?' The second, which is one not of fact but of opinion, 'Would a reasonable man have reacted to the same provocation in the same way as the defendant did'."

After stating the effect of Section 3 of Law 43/58 upon the law of provocation, Lord Diplock commented upon the summing-up of Smith J., thus:

> "In that part of his direction which the Court of Appeal held to be objectionable, the learned judge followed closely the actual words of the section and made it clear to the jury that it was their responsibility, not his, to decide whether a reasonable man would have reacted to the provocation in the way the appellant did. In their Lordships' view this was an impeccable direction."

The passage quoted above makes it clear beyond a peradventure that it is never for the trial judge to consider whether the retaliation to the provocative act was reasonable or not. To re-inforce this point I can do no better than to

quote from the judgment of Kerr J.A., in R. v. Hart [1978] 27 W.I.R. 229 at 238 when he said:

> "Accordingly, the third element as defined in Lee Chun-Chuen's case, is essentially a matter for the jury. It is what Lord Diplock in Phillips v. R. (supra) categorises as 'one not of fact but of opinion.' It cannot therefore be used by the trial judge as a basis for deciding whether or not the issue of provocation has been raised. What is required is evidence of a provocative conduct on the part of the deceased and evidence from which it may be inferred that as a result the killing was due to 'a sudden and temporary loss of self-control.' If there is such evidence then it is the duty of the judge to leave the issue to the jury for them to determine with due regard to the two-fold test as laid down in Phillips v. R."

Although Kerr J.A. referred to provocative conduct on the part of the deceased, he is not to be understood to be saying that only the acts or words of the deceased can be relied upon by the defence as provocative conduct. Section 6 of the Offences Against the Person Act provides no such limitation.

A person who witnesses a robbery might become so incensed that he intervenes even at his peril. Another person who witnesses the same incident might walk away without giving the matter a thought. In each case a Court must have regard to the reaction of the person to the particular activity so as to determine whether he was provoked or not. It is sometimes a simple matter to ascertain what are the provocative acts or words. In other cases one has to look at all the circumstances to be able to discern the individual acts which may be said to be provocative. In my view the theft of the chain from the lady's neck the refusal to return the stolen chain, the menacing of the appellant with the knife and the abusive words, were all

acts of provocation. The response of the appellant in chasing the thieves into the minibus and later accusing the deceased of theft in the presence of the police officer, his refusal to release the deceased when challenged by the police officer, and his stabbing of the deceased, is evidence from which a jury could infer that he had lost his self-control in consequence of the provocative acts enumerated above.

In my view the issue of provocation fairly arose in the case and ought to have been left to the jury. The learned trial judge stressed in his summing-up the issue of unintentional killing and invited the jury to return a verdict of manslaughter if they rejected accident. After retiring for forty-four minutes the jury were undecided as to whether their verdict should be guilty of murder or manslaughter. Upon further directions from the trial judge they finally returned the verdict of guilty of murder. Had it been open to the jury to find manslaughter on the ground of provocation, it is possible that they would have taken that route in all the circumstances. I would therefore allow the appeal, and substitute a verdict of guilty of manslaughter. In this I am in a minority. The facts are quite novel and therefore I have set out herein my conclusions in law.