JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 35 & 36/93

BEFORE: THE HON. MR. JUSTICE FORTE, J.A
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (Ag.)

REGINA
vs.
MICHAEL ADAMS
FREDERICK LAWRENCE

Arthur Kitchin for appellant Adams

Bert S. Samuels for applicant Lawrence

Kathy-Ann Pyke for Crown

November 28, 29, 30; December 2, 1994; February 13 and April 7, 1995

PATTERSON, J.A. (Ag.):

The appellant Adams and the applicant Lawrence were convicted by a jury on the 2nd April, 1993, in the Home Circuit Court of the non-capital murder of Dennis Williams. They were tried jointly, along with two other persons who were acquitted by the verdict of the jury. Each convict was sentenced to life imprisonment, and the court specified that each should serve ten years before becoming eligible for parole.

At the trial, which lasted several weeks, evidence was adduced to prove that Dennis Williams met his death at the hands of the appellant Adams and two other persons, and that the applicant Lawrence was present, aiding and abetting the killing. The prosecution contended that the killing was the result of a common design between four persons, the appellant and the applicant being two of them.

It appears on a broad outline of the prosecution's case, that the deceased had an altercation with one Claudia Matthews, the common law wife of the applicant Lawrence, and as a result, on the morning of the 26th May, 1990, Lawrence told Clifton Williams (the brother of the deceased) that he was going to "limb up Dennis." At about 8:30 p.m. that night, a gunshot rang out in the district of Princessfield near to where the deceased lived, and shortly thereafter both the appellant and the applicant were seen dragging the deceased by his feet on his back along his driveway towards his gate. Later on, the appellant Adams was seen chopping the deceased with a machete while the deceased kept rolling on the ground to the opposite side of the road from his gate. At that time, the applicant Lawrence stood quietly by with gun in hand, held down by his side. The applicant Lawrence was a policeman who had been issued with a firearm and twelve rounds of ammunition. After the chopping was over, the appellant Adams was heard to say, "Me kill that, that dead." By then, the other two men had left the scene and both the appellant and the applicant were also leaving when Lawrence said, "We can't leave him so, you know." The deceased's brother came along with a car, and the deceased was taken away in it to the Linstead Hospital, where he was pronounced dead. A post mortem examination revealed that the deceased had received six chops and eight stab wounds to his body, and the evidence is that the chops were consistent with infliction by a machete used with severe force, and the stab wounds were consistent with infliction by a knife or a machete. In fact, the left hand was completely severed at the wrist and the right forearm was severed at the elbow, and the left arm and forearm were partially

severed. The forensic pathologist, Dr. Clifford, who performed the post mortem examination, expressed the view that those injuries were all of the defensive type. There were other chops to the cheek, from the left back to the anterior chest, and to the left side of the abdomen. The stab wounds were mostly to the chest, one penetrating to the heart and two others to the right lung. Death would have occurred within five minutes of the infliction of these injuries.

The appellant Adams gave the police two written statements under caution; and both were admitted in evidence. In both statements he admitted using a machete to chop the deceased. In the first statement he alleged that he was acting in self defence, but in the second statement he alleged that it was Lawrence who did most of the chopping, then gave him the machete and he gave the deceased "two chop pon him foot".

At the trial, the appellant Adams testified on oath that the deceased attacked him with a machete as Claudia Matthews and himself were passing by the deceased's home. The deceased chopped at him with the machete and he used a bit of stick that he had in his hand to ward off the blow, and that caused the machete to fall from the hand of the deceased. The stick also fell from his hand. They both then "collared up", and he felt something in the deceased's waist like a gun. He then took out his knife from his pocket and stabbed the deceased in his back and his chest. He said he did so because he had felt the gun in the deceased's waist and that made him afraid and nervous that the deceased would shoot him. They moved around while holding each other and he said "it seemed like the gun dropped out of the man's waist." He said he got away from the deceased and he saw the deceased searching in the bushes on the side of the road opposite to where his house was, and, thinking that the deceased was searching for the gun, he "grabbed up the cutlass and aim for his hand." He did not know how many times he chopped the deceased, but it was while he was chopping that he heard a gunshot fired. He stopped chopping and the applicant Lawrence came up and spoke to him. His evidence is that he acted in self defence. The deceased

was taken away and the appellant and Lawrence walked to the Linstead Police Station where the appellant handed in the machete and knife.

The applicant Lawrence did not testify on oath. In an unsworn statement, he told the jury that his common law wife Claudia Matthews had reported to him that the deceased assaulted her on the morning of the 26th May, 1990, and that he had complained to the deceased's brother, Clifton Williams. He said Clifton told him to be careful as he had heard that the deceased had a gun. He explained that although he should have been on duty at the Norman Manley Airport from 2:30 p.m. that day, he remained at his station in Kingston until about 5:00 p.m. when he got news that his son was sick. He then went home to Linstead. At about 8:00 p.m., he was walking on the Princessfield main road when he heard sounds and later saw Adams "with a shiney object held up." He said he fired a shot in the air and called "police". Adams dropped the object, and on the ground he saw the deceased. Clifton, drove up in his car and, aided by its lights, he saw that the deceased was bleeding. Clifton assisted him to put the deceased into the car, and then Clifton drove off. He escorted the appellant Adams to the police station where the machete and knife were handed over. He said he returned to the scene of the incident that night and that he "witnessed when the home-made shotgun, which is the exhibit in this case, was found close to where I saw 'Neh-Nen' lying that night." (The deceased was called 'Neh-Nen')

The applicant Lawrence denied having the conversation which Clifton said they had on the morning of the 26th May, and he also denied speaking with Mrs. Williams, the mother of the deceased, and Clifton that night. He said, "All I did that night was to act as any police officer would do in the proper execution of my duty. I am innocent."

There is an important bit of evidence which came from Constable Derrick Addison and it has formed the basis for the principal grounds of appeal of both the appellant and the applicant. With respect to Adams, those grounds are 3 and 4 and they read as follows:

> "3. The Learned Trial Judge misdirected the Jury when he directed them that it was open to them on the evidence to find that the gun, Exhibit 6, was planted by Lawrence and, by necessary implication, as part of the common design between the Applicant and Lawrence (Pages 20-21, 203).
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> 4. The Learned Trial Judge misdirected the Jury on the evidence when he stated thus:
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> 'The prosecution is saying it was, asking you to draw the inference that it was planted. The Prosecution is asking you to say that, and this depends on whether you believe the evidence of Constable Addison that it could well have come from the Linstead Police Station. The Prosecution is saying that Constable Lawrence had an opportunity to get it from the station' (Pages 20-21, 127- 129)'."

With respect to Lawrence, the grounds are 1 and 2, and they read as follows:

> "1. The Learned Trial Judge misdirected the Jury when he directed them that it was open to them on the evidence to find that the gun, Exhibit 6, was planted by the Appellant (sic) (Pages 20-22).
>
> 2. The Learned Trial Judge misdirected the Jury on the evidence when he stated thus:
>
> > The prosecution is saying it was asking you to draw the inference it was planted. The prosecution is asking you to say that, and this depends on whether you believe the evidence of Constable Addison that it could well have come from the Linstead Police Station. The Prosecution is saying that Constable Lawrence had an opportunity to get it from the station. (Pages 20-21)"

Constable Addison testified that at about 8:30 p.m. on the 26th May, 1990, he was at the Linstead Police Station when a report was made to him. As a result, he went to the Linstead Public Hospital where he saw the dead body of a man with multiple wounds and the left hand missing. The body was partially clothed; a shirt was missing. Patrick Williams made a report to him and he went back to the police station. There he saw the appellant Adams who handed him a knife and a machete and told him that he was the one who had chopped up a man who jumped from behind a light post and had attacked him with a machete at Princessfield District. At that time, Claudia Matthews and the applicant Lawrence were also there at the station. Constable Addison then left the station and went to the scene of the killing, accompanied by District Constable Byfield, Special Constable Smith, other policemen and the applicant Lawrence. He said that on arrival at the scene, he saw what appeared to be blood in the middle of the road and in some "shrubs and grass" on the side of the road opposite to where the deceased lived. He was looking for the left hand that was missing from the body, but he did not find it. About five to six minutes after arriving on the scene he said District Constable Byfield alerted his attention to a red ganzie and a black shirt outside the gate to the house of the deceased, and on that side of the road. The black shirt was about seven feet from the gate and the red ganzie about fifteen feet. He picked up the black shirt and shook it, and a home-made shotgun fell from it. It had a shotgun cartridge in it. The gun was not visible while in the shirt on the ground. The gun was tendered and admitted in evidence as exhibit 6.

It is difficult to understand the relevance of that home-made gun to the case. A nexus was never established. It was never identified as belonging to or in the possession of the deceased or any of the persons on trial. Indeed, the shirt in which it was wrapped was not identified with anyone nor was it produced at the trial. There were no proven facts from which an inference could be drawn to place possession of the gun in anyone. Apart from mentioning Lawrence's gun, the

appellant Adams did not mention in his statements under caution, which were admitted in evidence, that any other person had a gun. Adams testified that while wrestling with the deceased, he felt "something in the deceased waist like a gun", and that they moved around and "it seemed like the gun dropped out of the man's waist." He so concluded because he said he saw the deceased searching in the bushes. Those bushes we know to be on the opposite side of the road to where Constable Addison said he saw the shirt which contained the home-made gun. Adams did not see the gun at anytime and no reasonable inference can be drawn that the gun found near to the deceased's gate wrapped in a shirt long after the incident ended could possibly be what the appellant referred to in his testimony.

It is clear that the learned judge was not satisfied that the home-made gun was properly identified with the case. This is reflected in the following passage from the transcript of the evidence of Constable Addison:

> "**HIS LORDSHIP**: You have Exhibit 6 there?
>
> **WITNESS**: The gun? Yes M'Lord.
>
> **HIS LORDSHIP**: You said you have never seen that Exhibit before the night?
>
> **WITNESS**: Yes M'Lord.
>
> **HIS LORDSHIP**: Had you ever seen one like that before that night?
>
> **WITNESS**: No M'Lord.
>
> **HIS LORDSHIP**: You had never seen one like that, Exhibit 6, before the night, anywhere?
>
> **WITNESS**: Like this, but different make.
>
> **HIS LORDSHIP**: I asked you had you ever seen anything like that anywhere in your six years before that night?

"**WITNESS**: Yes M'Lord, not with a board handle.

HIS LORDSHIP: Where had you seen something like that before, though not with a "board handle"?

WITNESS: At Linstead and at Spanish Town, in another case.

HIS LORDSHIP: At Linstead?

WITNESS: Yes.

HIS LORDSHIP: Where at Linstead?

WITNESS: At the C.I.B. Office.

HIS LORDSHIP: You said this one that you are speaking of was connected with another case?

WITNESS: Yes M'Lord.

HIS LORDSHIP: Did you see - you had seen something like this somewhere else?

WITNESS: Yes M'Lord, when I was stationed at Spanish Town.

HIS LORDSHIP: Where in Spanish Town?

WITNESS: Spanish Town C.I.B. Office.

HIS LORDSHIP: And when were you stationed at the Spanish Town C.I.B. Office?

WITNESS: In the year 1985 M'Lord.

HIS LORDSHIP: During that year, from 1985 to when, or just 1985?

WITNESS: Well, it was a period in 1985.

HIS LORDSHIP: Take the exhibit down, please."

In answer to a further question from prosecuting counsel, the witness said that potential exhibits in cases are normally kept in a safe at the police station. It was put to the witness that the weapon was found across the road from Mrs. Williams' home, near to where the blood was in the bushes, and that it was not "under a black shirt". The witness flatly denied that to be so. After a lengthy cross-examination, the judge saw it necessary to ask further questions about the home-made gun. The transcript reads as follows:

> "**HIS LORDSHIP**: Dealing with Exhibit 6, you see, you had said previously that you had seen a weapon similar to that before at the C.I.B. Office in Spanish Town.
>
> **WITNESS**: Yes, M'Lord.
>
> **HIS LORDSHIP**: How would a weapon like that come to be at the C.I.B. Office?
>
> **WITNESS**: Cases that were being dealt with by other police at the station, M'Lord.
>
> **HIS LORDSHIP**: What you mean by "cases that were", just explain if you can?
>
> **WITNESS**: Exhibits, home made firearms being recovered off the scene of other cases that are being prepared for the ballistics lab."

The appellant Adams testified that he told Constable Addison about the gun while they were both at the station on the 26th May, 1990, and before Constable Addison left for the scene of the incident, but when that was put to Constable Addison in cross-examination, he denied it and when pressed he said he did not recall it to be so.

The above evidence makes it plain that it was never established that the home-made gun - exhibit 6 - was at anytime at the police station at Linstead or Spanish Town, or that anyone took it to the scene of the killing. There is absolutely no evidence from which an inference could be drawn that the applicant Lawrence or any of the other policemen "planted" the firearm at the scene that

night. We have concluded, therefore, that the learned judge was in error and misdirected the jury in the manner set forth in the grounds of appeal.

Mr. Kitchin submitted that the effect of the misdirection was that it "eroded and emasculated the appellant's defence of self defence", and accordingly, the appeal should be allowed, the conviction quashed, and the appellant acquitted. He submitted that this is not a case in which the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act applies, neither would it be in the interest of justice to order a new trial.

Mr. Samuels for the applicant Lawrence adopted the submissions of Mr. Kitchin as to the effect that the misdirection had on the defence of Lawrence, which was that he happened on the incident and prevented it from continuing. He, too, submitted that the applicant ought to be acquitted.

Counsel for the Crown, while accepting the validity of the contention of the appellant and applicant in relation to the misdirection contended for by them, nevertheless submitted that not withstanding the misdirection, the defence of neither the appellant nor the applicant was eroded. Counsel contended that on the totality of the evidence, a reasonable jury, properly directed, would inevitably have convicted both the appellant and the applicant, so overwhelming was the evidence, and accordingly, no miscarriage of justice has actually occurred.

In our view, a misdirection may be on a point of law or it may be as a result of a mistake of fact or an omission on the part of the judge. But it does not necessarily follow that in any such event, a miscarriage of justice occurs, and consequently, that the appeal must be allowed and the conviction quashed. The court is guided by the provisions of section 14 of the Judicature (Appellate Jurisdiction) Act which is in these terms:

> "14(1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that

> "the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:"

What is commonly called the proviso follows, and it is this:

> "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

We are obliged to consider whether we should exercise the power under the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act to dismiss the appeal if we consider that no substantial miscarriage of justice has actually occurred.

We were referred to the case of **Rupert Anderson v. The Queen** [1972] A.C. 100 or [1971] 3 W.L.R. 718 - a Privy Council Appeal. In that case, Lord Guest, who delivered the opinion of the Board, clearly stated the test to be applied to the proviso. At page 724 (W.L.R.), he said:

> "The test which an appeal court is to apply to the proviso was recently referred to by Viscount Dilhorne in **Chung Kum Moey v. Public Prosecutor for Singapore** [1967] 2 A.C. 173, 185 quoting the classic passage by Lord Sankey in **Woolmington v. Director of Public Prosecutions**]1935] A.C. 462, 482-483, whether 'if the jury had been properly directed they would inevitably have come to the same conclusion'. Viscount Dilhorne also referred to **Stirland v. Director of Public Prosecutions** [1944] A.C. 315, 321, where Lord Simon said that the provision assumed 'a situation where a reasonable jury, after being properly directed would, on the evidence properly admissible, without doubt convict'.

Their Lordships concluded that there were "serious misdirections" in the summing-up, but the evidence was so overwhelming that, despite the "serious misdirections", no miscarriage of justice occurred and the appeal was dismissed. (See also ***Cedric Whittaker v. R.*** - Privy Council Appeal No. 36 of 1992 (unreported) - judgment delivered on the 18th October, 1993] where, despite misdirections, their Lordships concluded that the jury, if properly directed, would inevitably have come to the same conclusion and dismissed the appeal).

We will consider firstly, the prosecution's case against the appellant Adams. There can be no doubt that it was he who inflicted the injuries resulting in the death of the deceased. A witness, Fitzroy Brown, told the jury that he heard the sound of a gunshot coming from the direction of the deceased's home. He ran to the deceased's gate and he saw both Adams and Lawrence holding the deceased by his feet and dragging him on his back towards his gate along his driveway. Lawrence told the deceased to "drop the knife", and he did. One Howard Douglas took up the knife and used it to stab the deceased. The deceased's brother, Patrick Williams, held on to the appellant Adams, asking him, "What happen, man, what happen, tell me." At that time Horace Matthews had a machete, and he attacked Patrick Williams who then ran off towards his home. The appellant Adams then took the machete from Matthews, pushed away Douglas, and commenced chopping the deceased with the machete. The witness testified that "Bogie (the appellant) chopped Dennis (the deceased) all over his body, Dennis lay on his back and he rolled over and over until he reached the opposite bank of the road. While he was rolling over Dennis was holding up his hand like this" (the witness demonstrated). "Adams kept chopping all the time until Dennis reached the other side of the road, then Adams stopped chopping Dennis and said, "Mi kill that, that dead." The appellant Adams then stood with the applicant Lawrence until the deceased's brother Clifton came on the scene. This witness was shown the home-made gun and he said he had never seen it before.

The deposition of Patrick Williams was read to the jury, he being off the island. He, too, heard the gunshot and ran to his mother's gate. When he got there, he said he saw the appellant Adams with a machete held up in a chopping position. He held on to Adams, and asked him what was going on. This was because he saw Adams, Lawrence and Matthews holding his brother to the ground. He held on to Adams who had the machete and they both fell. He said Adams got away and chopped at him with the machete and went to where Lawrence and Matthews were holding the deceased by the gate. He said he saw the appellant Adams use a knife to stab the deceased, and he begged them not to kill his brother. He next saw the appellant grab a machete from Matthews and commenced chopping the deceased. He then ran off to call his mother, leaving Lawrence standing there with his gun in his hand.

Irene Williams, the mother of the deceased, said she went on the scene after Patrick had called her, and she saw both the appellant Adams and the applicant Lawrence. She spoke to Lawrence who told her that the deceased had chopped Adams on his knee with a machete, but Adams refused to show her the wound, and she did not see any blood on him.

Constable Addison said that before leaving for Princessfield that night, the appellant Adams handed him a knife and a machete at the police station, and told him that he (Adams) was the man who had chopped up a man who had jumped from behind a light post and had attacked him with a machete at Princessfield District. Constable Addison denied that Adams told him about a gun, and so did Detective Inspector Errol Grant, who took a statement under caution from the appellant that very night. This is what the appellant said in part in that statement:

> "...I see when Neh-Nen [the deceased] jump from behind one light post with a machete in his hand and said to Claudette, 'pussy hole a long time mi wah kill you.' I had a piece of plum stick in my right hand which me use to run dogs when they rush me on the road. Mi also had a knife in my left hand. Neh-Nen lift up the machete to chop mi and mi use the stick to block it. The machete hitch in the plum stick and me flash the stick and

> "the machete drop to the ground. Me then use the knife and stab him. Neh-Nen then run to his house, which is near, and call out 'Mama, Mama'...Mi pick up the machete which he drop, run up to where he was on the ground and chopped him up. Mi was still a chopping when mi hear a gun shot and get frighten and stop chop Neh-Nen." [Neh-Nen is the deceased]

Detective Assistant Superintendent of Police Reginald Grant said that on the 30th May, 1990, he spoke with the appellant who was in custody. The appellant told him, "Me a go tell you everything because me one can't bear it", and he gave another statement under caution. That statement reads:

> "When mi come from Church Saturday 26th May, 1990, dem tell mi sey Neh Nen run down Claudia with a knife and one scissors, and mi ask where dem is and dem sey him and Dawn gone town. Dem sey mi fi go meet dem. When mi go Linstead mi don't see dem, and then mi go round a Linden and tell him sey if Dawn dem come fi tell them sey fi mek the taxi drop dem a dem gate. And then mi sey mi a go up and him sey all right. And then when time mi go over mi ask dem if dem don't come as yet and dem sey no. Mi tell dem sey mi a go back go meet dem, and when mi go Linstead mi see Dawn and Claudia and dem ask mi if me nuh hear sey the Coolie bwoy lick dem, and mi sey no. And mi sey where him lick you and Claudia sey pon her hand. So dem sey all right we ready fi go over. When we reach a pass dem sey fi walk through the short cut. And mi tell them no, mi have one bag pon the bicycle. When mi a go round the road me buck up the policeman name Frederick. That time Dawn and Claudia gone through the short cut. And when mi a pass him sey who you and mi sey, mi. Him sey, mi who, and mi sey Bogey, and then mi and him tun back go up a Dawn and Claudia yard. The policeman a Claudia baby father.
>
> When we a go down the road the policeman sey him want fi see the bwoy, for him lick him girlfriend and him a go kill him. When we a go

> "dung the road we see Neh Nen a one light post below him gate. The policeman sey we fi ride go on. When we reach down little bottom side Neh Nen deh him sey we fi stop. Him did a ride pon mi bicycle and then we stop and him alone go on a front. Then him sey we fi come and mi sey no, for mi no have anything. And then same time Frederick tek out him gun and fire a shoot (sic) at Neh Nen and him drop. Then same time him go down pon him and hold him and dem a wrestle and then the policeman start to chop Neh Nen with a cutlass him tek from Neh Nen. Him draw him from in a a yard beside where some bamboo deh where some people did live but them get a Gilbert house and move.
>
> Frederick put Neh Nen in front a him Neh Nen yard and put him pon the banking, and same time Frederick give mi the machete and sey mi fi chop him. Mi tek the machete and give him two chop pon him foot and then Neh Nen brother run come. No, the one whey name Clifton drive come first, then Patrick, dem call him Barber. Patrick and the policeman put Neh Nen in a Clifton car and them drive off. Frederick sey him a police mi fi sey a mi do it and him will tek care of me. Only that.
>
> Boss, when mi find out sey the policeman wicked and a sic mi, a when mi lie down in a the cell and member sey him give mi the two knife fi carry go a the Linstead Police Station."

We have set forth the salient parts of the evidence which the prosecution presented against the appellant. In our view, the admissible evidence against the appellant was so overwhelming that a reasonable jury, properly directed, would have arrived at the verdict of guilty of murder. It was clearly the duty of the learned judge to exclude inadmissible evidence, and his directions to the jury should include, inter alia, "a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides and a correct statement of the inference which the jury is entitled to draw from their particular

conclusion about the primary facts." (per Lord Hailsham L.C. in ***R. v. Lawrence*** [1982] A.C. 510 at 519). However, in the instant case the introduction by the prosecution of the home-made gun in evidence was without any objection from the appellant or any of the other persons charged, and it could only have enured to the benefit of the appellant and could not in any way advance the case for the prosecution. The cardinal line of defence was that the appellant was acting in self defence, and with the overwhelming evidence to the contrary presented by the prosecution, and even on his own testimony, the jury inevitably rejected the contention that the deceased may have had a gun and that the appellant acted in self defence. There was no evidence that the gun "could well have come from the Linstead Police Station", and that was a misdirection which the learned judge wrongly left for the consideration of the jury. However, it paled into insignificance when viewed in the light of the overwhelming evidence put forward for the prosecution against the appellant, and, in our judgment, no substantial miscarriage of justice has actually occurred. We are satisfied that on the whole of the facts and with a correct direction, the only reasonable and proper verdict would have been one of guilty.

The evidence against the applicant Lawrence was just as overwhelming. There was ample evidence on the prosecution's case for the jury to find that there was a common design between the appellant Adams and himself to murder the deceased. There was clear evidence which established a motive on the part of the applicant, and direct evidence of the part played in the killing. The applicant, in his unsworn statement from the dock, admitted firing a shot from his firearm, but only to stop the appellant Adams from continuing to chop the deceased. There was ample evidence for the jury to find that the shot was fired before the chopping commenced, and not at the time that the applicant contended.

Mr. Samuels argued that the directions of the learned judge complained of were an attack on the defence of the applicant which bolstered the case for the prosecution. We do not agree. The

applicant's cardinal defence was that he arrived on the scene when the chopping was in progress, and he intervened as a policeman, to stop the chopping, albeit too late. The issue of fact which the jury had to decide was whether, as the prosecution contended, the applicant was part and parcel of a common design to kill the deceased, and was present from beginning to end actively aiding and abetting the killing. As we have said, the evidence presented by the prosecution was overwhelming. The learned judge correctly directed the jury as to the value of an unsworn statement in strict terms with the guidance given by the Privy Council in Director of Public Prosecutions v. Walker [1974] 1 W.L.R. 1090 at page 1096. It is apparent from their verdict that they did not attach any weight to the defence. We are of the view that the misdirection complained of, when looked at in the light of the overall evidence, could only have been an insignificant consideration in the deliberations, with the result that no substantial miscarriage of justice has actually occurred.

We turn now to the other grounds argued. Ground 2 of the appellant Adams' ground reads:

> "2. The verdict convicting the Applicant (sic) is manifestly inconsistent with the verdict acquitting Douglas and Matthews and/or was manifestly unreasonable and cannot be supported having regard to the evidence."

Mr. Kitchin did not persist in his argument after we reminded him that although the four accused were tried together, the jury was obliged to consider the case against each accused separately and return a verdict. The appellant's case deferred from that of the two who were acquitted in that he admitted being present and inflicted wounds on the deceased, albeit in self defence, while the other two denied being present. We find no merit in this ground.

Mr. Kitchin referred to ground 8 next, which was couched in these terms:

> "8. The Learned Trial Judge's comments on the facts in the case in his summing-up were so

> "unfair and unbalanced that they produced a miscarriage of justice in the case against the Applicant (sic)."

This ground did not particularise the comments but before us Counsel referred to the comments on the finding of the home-made gun, which were fully ventilated in the main argument in grounds 2 and 3. The learned judge, it is fair to say, made such comments as in his discretion, he thought fit. We have already expressed our views on the admittance of the home-made gun in evidence and, for completeness, we set out the area of the learned judge's summing-up to which we were referred and which appears at pages 19-22 of the transcript:

> "Another inference that you are being asked to draw, and you have to decide whether it is reasonable or not, has to do with the home-made gun, I believe Exhibit 6. The prosecution is saying, and to use the words of the Deputy Director of Public Prosecutions, 'That gun was a plant, it was planted on the scene'. The defence is saying, not so, Adams is saying that Dennis Williams was armed with that gun, he had it somewhere in his waist. Adams told you that as they grappled up in the road that night, he felt something like that gun in Dennis Williams' waist and Adams is saying in the struggle between them, the gun fell out of Dennis Williams' waist and laid where it was found by Constable Addison later on after the incident. So, you see, each side is saying something different about that gun, and that gun you may think is important, that home-made gun. The prosecution is saying and asking you to draw the inference that that was a plant, it was put there by somebody so as to make it appears as if Dennis Williams had had it. The prosecution is saying that after this incident was over Constable Lawrence left that scene and went to the Linstead Police Station and then returned to the scene some time after with Constable Addison and others.
>
> Constable Addison told you that when they got back to the scene he wasn't watching what Lawrence was doing, he wasn't paying attention

"to any of the others, he was searching for a missing left hand, bloodstains, a shirt, and to see, he wanted to see exactly where the scene was of the incident, that is what he was searching for, he wasn't watching any of the others. Until all of a sudden a D.C., District Constable who was in the party, called out to him, and when he went he saw a black shirt on the banking on the same side of the road where the Williams' premises was. And he took up the shirt, and he showed you, he held it up and shook it and out of it dropped the home-made gun.

The prosecution is saying that the evidence indicates that all the struggling took place on the other side of the road, and if you believe the evidence that it was on the other side of the road that the collaring up and the struggle took place, in the road or on the opposite side of the road, how could the gun reach into the bush on the Williams' side of the road? Not only reached into the bush, how was it wrapped up in this shirt so that the shirt had to be shaken? The prosecution is saying it was, asking you to draw the inference it was planted. The prosecution is asking you to say that, and this depends on whether you believe the evidence of Constable Addison that it could well have come from the Linstead Police Station. The prosecution is saying that Constable Lawrence had the opportunity to get it from the station.

Constable Addison told you that he had seen guns like that home-made gun. He had seen guns like that before. Where did he see them? At the Linstead Police Station. And he told you he also saw guns like that when he was stationed at Spanish Town Police Station. He told you sometime they got in those guns from criminals and they kept them in a safe at the station. That was his evidence. And the prosecution is asking you to draw the inference that Lawrence must have gone to the station and taken that gun back with him to the scene and put it, when nobody was watching him, put it carefully into the bush. That is a matter for you.

It's important, it's important for you to decide whether that is an inference that you are prepared

> "to draw in this case, that that gun was planted. The prosecution is saying it was, and that Lawrence is the man. He had the opportunity to do that. It is a matter for you to say whether he did do that. Is that a reasonable inference which you are prepared to draw in this case? That is entirely a matter for you to decide. But it is an important matter for you to decide. Because it changes, the whole complexion of the case changes depending on whether you believe that gun was planted or whether you believe Dennis Williams had that gun in his waist. Because it had a bullet in it, it was loaded."

It was the appellant who raised the issue of whether or not the deceased was armed with a gun, and, in our view, the comments of the learned judge, such as they were, were fair and balanced and were made to assist the jury on the issue raised and were well within the limits of permissible comments. However, as we have already pointed out, the admissible evidence against the appellant was so overwhelming that without the comments we are of the view that the jury would without doubt have convicted the appellant.

The only other ground argued by Mr. Kitchin was couched in this form:

> "9. The Learned Trial Judge erred in law when he found that no provocation arose and/or failed to direct the jury on the issue of provocation (Page 223)."

This is what the learned judge said:

> "A deliberate and intentional killing done as a result of legal provocation is not murder but manslaughter. You may deliberately and intentionally kill somebody because you are provoked. In those circumstances, the offence is one of manslaughter. In this case, I direct you that provocation does not arise. Provocation is not involved in this case. So you will not have to consider that."

Mr. Kitchin contended that the issue arose on the appellant's case. The appellant testified that as he walked along the road, the deceased jumped out on him from behind a light post and said, "Pussy hole, a long time me wah kill you", and then the deceased chopped at him with a machete. Mr. Kitchin contended that the words and action could give rise to provocation in law, and so the issue should have been left to the jury.

It is undoubtedly the duty of a judge to leave to the jury all defences to the charge arising from the evidence, even though the defending counsel does not rely on it or even refer to it. The case put forward by the appellant was that he was acting in self defence, and the learned judge's directions in this regard were impeccable. By their verdict, the jury rejected the defence of self defence, but that does not mean that the issue of provocation may not have been present and should have been left for the determination of the jury. The judge is obliged to consider two questions in deciding whether or not the issue of provocation should be left to the jury; first, was there any evidence of provocation of the accused, and, secondly, was there any evidence that the provocation caused him to lose his self control. If both questions can be answered in the affirmative, then the judge is under a duty to leave the issue to the jury. If there is evidence on which the jury can find the accused was provoked to lose his self control, the issue of provocation must be left to the jury. (See ***R. v. Gilbert*** [1978] 66 Cr. App. R. 237).

The provocation alleged consisted of the words used by the deceased and the attack made on the appellant by the deceased with a machete. In our view, the words alleged are no more than a vulgar threat commonly used without exciting any passion or loss of self control. In his first statement under caution, the appellant said the words were addressed to Claudia Matthews, but at the trial he said they were addressed to him. His cardinal line of defence was that he acted in self defence driven by an apprehension of imminent danger of being shot by the deceased. At no time did he allege that his action was the result of a loss of self control. We have carefully examined the

evidence, and even on a view most favourable to the appellant, there was nothing to suggest that he may have lost his self control and that at anytime he was not the master of his mind.

In our judgment, we are satisfied that the learned judge was right in not leaving as an issue the question of provocation to the jury as it did not arise on the evidence. Accordingly, the criticism levelled at the summing up in this regard is without merit.

Mr. Samuels, on his part, complained of what he said was yet another misdirection. The learned judge, in directing the jury on the question of inferences, said:

> "One of the inferences that the prosecution is inviting you to find in this case as reasonable inference is that that machete, Exhibit 7 I think it is, which was taken from the scene and handed over to the police was the machete which caused the chops to Dennis Williams' body. The prosecution is asking you to go further and say it is the same machete that Constable Lawrence was seen with at about 10 o'clock on the morning of the 26th May. The defence is saying that that machete had been in the possession of Dennis Williams;..."

Mr. Samuels rightly submitted that the prosecution did not lead any evidence to show that the machete, exhibit 7, was "the same machete that Constable Lawrence was seen with at about 10 o'clock on the morning of the 26th May." The applicant's contention was that he never had a machete at any time, and so counsel contended that the misdirection bolstered the prosecution's case as it went to show intention on the part of the applicant. We agree that the learned judge fell in error, because there was no primary evidence from which the jury could infer that the machete, exhibit 7, was the one that Clifton claimed he saw in the hand of the applicant.

Clifton was never shown the machete, and we do not think that, had it been shown to him, he would have been able to identify it positively as the one that he said he saw in the hand of the applicant that morning of the incident. However, on a close examination of the passage complained of, it does not appear to us that the learned judge was inviting the jury to draw the

inference that the machete, exhibit 7, was that of the applicant. It seems that it was the prosecution who had overstepped their bounds by inviting the jury to draw an untenable inference, which the learned judge pointed out without directions to ignore it. We do not consider that such a non-direction amounted to a misdirection of sufficient gravity to bring about a miscarriage of justice, having regard to the overwhelming evidence against the applicant and the otherwise careful and complete directions on such evidence.

It was contended, further, that the learned judge's directions on the issue of identification was inadequate, unhelpful and insufficient, having regard to the applicant's defence. We find no merit in this complaint. The learned judge gave adequate and fair directions of a general nature, and then he dealt specifically with the identification evidence as it related to this applicant and the two other persons who were acquitted, particularizing and stressing the strength and weakness in each case. There was ample evidence for the jury to find that the applicant was there from the very beginning of the incident and that he remained there throughout.

There were two other complaints. The first was that the verdict of guilty in respect of the applicant was inconsistent with that acquitting the other two persons who were charged jointly with the applicant. Mr. Samuels argued that the guilt of all three accused rested on evidence of identification by two witnesses for the prosecution, and since by their verdict the jury must have found those witnesses unreliable, then the verdict convicting the applicant must be inconsistent with that acquitting the other two. This is a fallacy, because the two accused acquitted contended that they were never there that night, but there was no question that the applicant was there, and the issue for the jury was whether he was there from the beginning, as the prosecution is saying, or only after the chopping was over, as he contended. In our view, the jury followed the directions to consider the evidence against each accused separately, and there is no inconsistency in their verdict.

Mr. Samuels' final thrust was in substance similar to that of Mr. Kitchin, in that he complained that the learned judge's comments on the facts were so unfair and unbalanced that they produced a miscarriage of justice. Counsel referred in his arguments to the comments on the "planting" of the gun and on the machete being in the possession of the applicant on the morning of the incident, and submitted that the cumulative effect of those comments made the summing-up unfair and unbalanced. He finally referred to a sentence from the police statement of the witness Brown which had been admitted in evidence as exhibit 9 as a previous inconsistent statement. That sentence is this: "Before the men started to stab and chop Dennis, the policeman was trying to prevent both Whiskey and Dennis (sic) from doing so, but he could not control them." In his testimony, however, the witness said that at no time did he see Constable Lawrence do anything to prevent the assault upon Dennis, and he could not remember telling the police what was in the statement.

The learned judge categorised that bit of evidence as a contradiction and pointed out a possible explanation, leaving it to the jury as a matter for them. At an earlier stage in the summing-up, the judge gave the jury careful directions as to how they should treat inconsistencies, contradictions and discrepancies which arose in the case, and reminded them that the witnesses were speaking then of an incident which took place just short of three years before. We do not find any merit in this ground.

As we have pointed out, this case was tried over a period of six weeks. Counsel for the prosecution and for each accused were meticulous in the presentation of their case, and at times, pedantic attitudes were openly displayed. The learned judge nevertheless, did not fail in his duty to ensure that a fair trial took place. When the summing up is viewed as a whole, he dealt with all the issues that fell to be resolved by the jury; he accurately presented the law applicable, the evidence adduced, the inferences that could be drawn and the arguments advanced. We have expressed our

views as to the misdirections complained of and reiterate that, in our view, notwithstanding such misdirections, the totality of the evidence against both the appellant and the applicant was so overwhelming, that no reasonable jury, properly directed, could have failed to convict. In our judgment, we consider that no substantial miscarriage of justice has actually occurred, and, accordingly, notwithstanding such misdirections, the appeal of the appellant Adams is dismissed, and we will treat the hearing of the application of Lawrence for leave to appeal as the hearing of the appeal and the appeal of Lawrence is dismissed also. The convictions and sentences are, therefore, affirmed.