[2016] JMCA Crim 7

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 4/2012

BEFORE: THE HON MR JUSTICE MORRISON P (AG)
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

ANDRE MINOTT v R

Ms Jacqueline Cummings instructed by Archer, Cummings and Company for the applicant

Mrs Natalie Ebanks-Miller and Miss Theresa Hanley for the Crown

23, 28 September 2015 and 19 February 2016

P WILLIAMS JA (AG)

[1] On 28 November 2011, after a trial before Lawrence-Beswick J, and a jury in the Home Circuit Court, the applicant was convicted of the murder of Latino Williams aka Tino (the deceased) on 25 September 2008. On 1 December 2011, the applicant was sentenced to a term of imprisonment of 20 years with the stipulation that he should not be eligible for parole until he served 10 years. By notice dated 20 December 2011, the applicant applied for leave to appeal against his conviction and sentence. This application was considered and refused by a single judge of this court on 7 November 2014.

[2] However, as was the applicant's right, he renewed his application before us. At the conclusion of the hearing on 28 September 2015, the court refused the application. The conviction and sentence were affirmed and the court ordered that the applicant's sentence should run from 1 December 2011. We promised to put our reasons in writing and now fulfil that promise.

The prosecution's case

[3] The prosecution relied primarily on the evidence of Dwayne Lovemore, who was the sole eyewitness able to give an account of seeing the applicant shoot the deceased. His account started with him being seated under a "Julie" mango tree in the Orange Villa area of Kingston at about 1:50 pm on 25 September 2008, which he remembered to be a Thursday afternoon.

[4] Mr Lovemore described how this tree was on premises close to the York Park Fire Station and also a bar called "Mama U" bar. He was eventually joined by the deceased at this location and, after speaking for a while, the deceased left him and entered the bar. From his vantage point Mr Lovemore did not have a clear view of everything taking place in the bar, neither could he hear what was happening. He saw the bartender place a "Guinness" on the counter and saw the deceased move as if he was going to take up the "Guinness" but he turned back and exited the bar.

[5] Mr Lovemore noticed that as the deceased stepped out of the bar, "him face did mek up" – he was biting his lip and looking down on the ground. The deceased was heard to say "Dem youth yah nuh know when fi done enu". The deceased did not have

anything in his hands. Somebody behind Mr Lovemore shouted "Look out, him have a gun".

[6] At this time, the deceased was on the walkway leading from the bar. He looked behind him but kept moving away. The appellant was then seen stepping out of the bar and pulling a gun from his waist. Mr Lovemore shouted "Minott wha dat? Dat nuh call fah". He then heard "bow" which he described as the sound of one shot being fired. This shot "pitch or move" the deceased from off the walkway and he fell under a sweetsop tree. The deceased struggled to get up while holding on to his chest where a lot of blood was observed.

[7] Mr Lovemore said he then tried to hold on to the applicant who pointed the gun in his direction. Upon hearing sounds of 'click click' coming from the gun, Mr Lovemore ran off. When he returned, he saw the deceased lying on the ground and the applicant was nowhere in sight.

[8] Under cross-examination, Mr Lovemore was confronted with suggestions that the deceased had actually returned to the bar with a firearm and that he and the applicant were struggling for the firearm at which time the deceased was killed. Mr Lovemore was insistent that this was not what happened.

[9] Detective Sergeant Phillip Dodd gave evidence that he was at the Kingston Central Police Station when the applicant arrived there sometime after 4:00 pm on that afternoon of 25 September. The officer said the applicant made a report to him and at

the time of the making of this verbal report, the applicant was viewed as a victim or complainant in a matter.

[10] The applicant's report was reduced into writing. This was done by his dictating to the officer an account of what he said had transpired at Orange Villa earlier that afternoon. His recorded statement was admitted into evidence with no objection from the defence. In this statement he detailed his knowledge of and previous dealings with the deceased.

[11] He described how he had seen the deceased that afternoon at a shop in Orange Villa. The deceased had asked him for money and he had responded that he had none. There was a brief exchange of words and the applicant then left and went to the nearby fire station where he worked.

[12] Later that afternoon, he said, he returned to the area but this time he went to a bar beside the shop he had been to earlier. While inside the bar, he saw the deceased and another man known as "Reds" at the bar door talking to each other and then the deceased entered the bar. The applicant described how, upon entering the bar, the deceased engaged him in a brief heated argument. He was accused of "dissing" the deceased who eventually left after telling the applicant to "stay till mi come".

[13] The applicant then described what he said occurred thereafter as follows:

> "About two or three minutes after, I was still sitting in the bar on a stool when I saw 'Tino' entering the bar. At the time he had one of his hand behind him. I think it was the right hand. On seening [sic] this, I became suspicious of

> 'Tino'. I jumped up off the stool. By this time, he was now within arm's length of me. So I jumped on to him and held on to his right hand and a struggle developed between the both of us. During the struggle, I realised that 'Tino' had a gun in his hand, and I wanted to disarm him and take the gun away. 'Reds' and the other persons were now standing outside of the shop and bar. During the struggle which lasted for about a minute, I managed to disarm 'Tino' by taking away the gun from him which I realised was a revolver. I could not say what calibre it was or the make. But just as I relieve him of the weapon, I fired one shot in 'Tino's direction, I could not say if the shot caught 'Tino' but by then I saw several of his friends running towards me. I was now scared and I ran along Orange Street, but due to fright I even ran pass the fire station. At that time, I flung the firearm inside Orange Villa prior to running through a little gate which leads into the scheme as I didn't want to run with it in my hand."

[14] The applicant went on to describe how he then ran until he ended up at the Kingston Central Police Station where he made a report. At that time, he could not say if the deceased had got shot and it was whilst there that he learnt of his death. The applicant then spoke of how he had accompanied the police to the Kingston Public Hospital Morgue where he was shown the lifeless body of "Tino" and identified him "as the person who had attacked me earlier on Orange Street near the fire station with a gun and who I shot".

[15] The applicant went on to explain that during his basic training upon joining the fire brigade service, he did not receive training in the use, care and handling of firearms. However, in 2004, he had received such training during a course which had been conducted at the Jamaica Defence Force Coastguard which had dealt with the

firing of revolvers and an introduction to 5th calibre machine guns. He was not the holder of a firearm user's licence or permit nor did he own a gun.

[16] The officer charged with the responsibility of investigating this matter was Detective Sergeant Dwayne McDonald. It was on Monday, 29 September that he said he received information relative to the matter and commenced his investigations. He visited the Central Police Station before visiting the crime scene to make observations. He returned to the Central Police Station where he was introduced to the applicant, who, having been advised of the investigations, was cautioned and responded, "Officer, mi wi tell you everyting when my lawyer is present". The officer then proceeded to the Madden's Funeral Home, located along North Street in Kingston. There he saw and made observations of a body of a man who was not known to him at the time.

[17] On 3 October, at about 2:15 pm, a question and answer interview with the applicant was conducted in the presence of his attorney-at-law by the investigating officer. The record of the questions asked, with their responses, was admitted into evidence, again with no objection taken. The applicant again outlined his knowledge of and previous dealings with the deceased before being asked specifically about what had happened between them on the afternoon of 25 September. He again asserted that the deceased had asked him for money which he refused to give him and this led to an argument between them.

[18] He spoke of what happened thereafter whilst he was in the bar. He described how the deceased had returned with his right hand behind him. He described what happened thereafter in the following terms:

> "I jumped off the chair and sprung at him because I thought he had a gun. I held on to him and I realize that he had a gun in his hand. At that point we ended up back through the door. I'm sorry – at that point we ended up back through the back door into the 'villa'. During the struggle, the gun went off and he was shot. At that time the youths under the tree started to come to me and I drop the gun and ran."

[19] The forensic pathologist, Dr Persad Kadiyala, testified that his examination of the body of the deceased revealed one gunshot wound on the body. This wound measured 0.8cm in diameter on lateral aspect of right arm, 33cm below top of the head and 20cm away from the midline without gun powder deposition. He explained that the bullet would have travelled downwards, forwards and to the left before exiting on the mid anterior chest 45cm below the top of the head and 14cm away from the midline.

[20] The doctor was asked to explain the significance of the absence of gunpowder deposition. He and indicated that if the distance between the muzzle end of the gun and the victim is below 24 inches, then it is expected that there would be gunpowder deposition. He was also asked to give an opinion as to the likely position of the shooter at the time the deceased received the injuries. He opined that "the bullet would be to the back of the victim to the right at the time of the discharge of the firearm". He also opined that the deceased would have had to have been either standing, sitting or

bending forward when he received the injuries but could not have been lying on the back.

The case for the defence

[21] The applicant made a very brief statement from the dock. He said:

> "My name is Andre Minott. I have been a fire-fighter for the past nine years. On the day in question, I was attacked by Latino Williams who is an extortionist at Orange Villa area. I actually defend myself because he was going to kill me. I went straight to the Central Police Station and told the police everything that happened."

[22] There were three witnesses called in the presentation of the case for the defence but only two were considered relevant. These two were members of the Jamaica Fire Brigade who had served with the applicant and who testified as to his character. They both also knew the deceased and gave evidence as to this knowledge. In effect they spoke to the good character of the applicant and the bad character of the deceased.

Grounds of appeal

[23] With the leave of the court, Miss Cummings abandoned one of the three original grounds filed with this application for leave to appeal. She was also permitted to argue two supplemental grounds. Thus the grounds argued read as follows:

> "1. That based on the evidence the learned trial judge failed to direct the jury about action of provocation and self defence.
>
> 2. The court wrongly convicted me of the offence although the evidence support the offence of manslaughter due to the action of self-defence.

3. The learned trial judge ought not to have given any direction of lies of the applicant as this may have had an adverse effect on how the jury view his defence.

4. The trial judge erred when she said the applicant was saying that he deliberately shot the deceased."

Ground 1 – The submissions

[24] Miss Cummings had four complaints in this ground. First, she complained that the trial judge failed to advise the jury of conduct that could constitute provocation and the evidence that could amount to provocation. She noted that in her summation, the learned trial judge had told the jury that Mr Lovemore, the sole eyewitness, had been unable to assist with the details of any words spoken inside the bar. Further, the learned trial judge had pointed out that there was on the Crown's case, a statement from the applicant purporting to explain what had occurred in the bar. The learned trial judge reminded the jury that Mr Lovemore had spoken of seeing the deceased exit the bar with his face made. She then left two questions for the jury's determination:

> "What was occurring? Was it something that caused Mr Minott to suddenly and temporarily lose [sic] his self control?"

[25] Miss Cummings' contention was that this was not sufficient. She submitted that the learned trial judge ought to have said more about what could have taken place inside the bar. Miss Cummings, however, could not say that the learned trial judge did not accurately or adequately sum up the evidence given about what had happened in the bar. The circumstance was indeed that the sole eyewitness relied on by the Crown was unable to speak to what went on inside the bar. He was not in a position to see or

hear anything occurring in the bar. The only evidence of the events in the bar did come in the statement voluntarily given by the applicant after the incident which had been admitted as a part of the Crown's case. The learned trial judge did remind the jury of this but stopped short of reminding the jury of the contents of this exhibit.

[26] In response to this limb of first ground, Mrs Ebanks-Miller reminded the court of the classic test for provocation at common law as was given by Devlin J (as he then was) in **R v Duffy** [1949] 1 All ER 932. She then went on to note the actual words used by the learned trial judge in summing up the law on provocation, which were as follows:

> "Now I am going to tell you now about provocation and this is why I do that because before you can convict Mr Minott of murder, the prosecution must make you sure that he was not provoked to do as he did. Provocation has a special meaning in this context, which I will explain to you. If the Prosecution makes you sure that he was not provoked to do as he did, then he will be guilty of murder.
>
> If, on the other hand, you conclude either that he was provoked or may have been provoked, then he would not be guilty of murder but guilty of the lesser offence of manslaughter. So how do you determine Mr Minott was or may have been provoked to do what he did. There are two questions again which you will have to consider before you are entitled to conclude that Mr Minott was provoked or may have been provoked.
>
> The first one is this. Mr Tino Williams' conduct, that is, the things that Tino did or the things that Tino said or both.
>
> Would that conduct have provoked Mr Minott that is caused Mr Minott to suddenly lose his self control? You have to consider what things were said or what things were done and decide if it was such that Mr Minott suddenly and temporarily lost his self control."

[27] Mrs Ebanks-Miller submitted that the learned trial judge, in giving those directions, had sufficiently dealt with the subjective limb of the defence. She noted that the learned trial judge then directed on the objective limb of the defence, that is, what a reasonable man would have done. The learned trial judge had gone on to say:

> "If you are sure that the answer to the question is no, then the prosecution would have disproved provocation and as long as they have made you sure of the ingredients of the offence of murder, you will have to find him guilty of murder. If your answer is yes, that happened, then you have to consider the second question which is, may be that conduct have been such as to cause a reasonable and a sober person of the defendants age and sex to do so as he did . Would a reasonable and sober person of Mr Minott's age and sex do as Mr Minott did? A reasonable person is simply a person who has that degree of self control which is to be expected of the ordinary citizen who is sober and who is of Mr Minott's age and sex.
>
> So as you consider the question you must take into account everything which was done and everything which was said and determine if it would have had that effect on a reasonable and sober person of Mr Minott's age and sex. If you are sure that what was done and what was said would not have caused a man of sober age and sex to do what he did, then it means that the prosecution has disproved provocation and so long as the prosecution has made you sure of the evidence of murder then your verdict would have to be guilty of murder, if they have disproved provocation. If, on the other hand, your answer is what was done or said might have caused a man of ordinary age and sex to do as he did, then your verdict would be not guilty of murder but guilty of manslaughter because of provocation."

[28] Mrs Ebanks-Miller, in concluding her submissions on the matter, submitted that the directions of the learned trial judge were clear in this regard and allowed the jurors to properly address their minds to the issue of provocation.

[29] The second area of complaint by Miss Cummings, under this ground, was that the learned trial judge ought to have explained the elements of manslaughter and dealt with the issue of provocation when the jury asked for it and when it was most prominent in their minds. The complaint arose out of the fact that the learned trial judge had commenced her summation on the Friday afternoon at about 12:19 pm. The learned counsel in the matter had both completed their closing addresses that morning. At about 12:45 pm the learned trial judge indicated that she would continue her summation on the following Monday morning. The foreman at that time indicated the following:

> "We would like you to explain a section where you repeated the manslaughter area, so to …"

The learned trial judge responded:

> "Manslaughter arises in an incident of provocation. What I said to you today is just an overview to open your minds to the fact that there is a possibility. There is specific law concerning the provocation. I will take you through step by step. I am definitely going back there. So … and I am sure that by the time we are finished, you will know everything there is to know about provocation and manslaughter, but manslaughter – right – it is just to alert you to what you are going to get on Monday.
>
> It is like a movie trailer. It is like a teaser."

[30] Miss Cummings submitted that the learned trial judge should have given more ample directions at the point when the foreman had requested it despite the fact that the matter was being adjourned for the weekend.

[31] In response, Mrs Ebanks-Miller submitted that the learned trial judge having made an assessment of the time of day, and the point where she was in the summation, thought it prudent to end the day's proceeding and it was not fatal that the question was not answered in its entirety at the time of asking. Mrs Ebanks-Miller further submitted that the directions on manslaughter which were very important in this case were given correctly and clearly at a more appropriate time.

[32] The third complaint under this ground was that the trial judge suggested to the jury, that if they were sure that what happened inside the bar was such "to allow the applicant to lose self-control which suggested to them that they had to be sure he was provoked to find him not guilty of murder but guilty of manslaughter rather than be sure he was not provoked find manslaughter instead of murder". This complaint was in relation to the directions already noted at paragraph [27] above. In effect, it was Miss Cummings' submission that the judge had failed to give the right directions as to what decision the jury should arrive at if they were not sure the applicant was provoked.

[33] Miss Cummings relied on **Kirk Manning v R** SCCA No 112/1999 delivered 18 June 2001, **Lumumbo Rankine v R** SCCA No 61/2000 delivered 31 July 2001 and **Richards v R** (1967) 10 JLR 102 in support of her submission. In **Kirk Manning**, Walker JA, had this to say:

> "In the instant case the trial judge clearly confused the first, subjective test with the second, objective test when he said:
>
> > 'Whether in fact the words amount to provocation it is for you to determine. You

> must ask yourselves what effect would these words on a reasonable man'.
>
> Furthermore, the trial judge fell again into error, albeit in favour of the appellant, when he directed the jury:
>
> > 'But if you have any doubts on this point, question of provocation, as on any other point, then, any reasonable doubt, you return a verdict of not guilty'."
>
> He should properly have told the jury that if they were in doubt that the appellant was acting under provocation they should find he was so acting and return a verdict of manslaughter: See **George Stewart v R**, unreported Supreme Court Criminal Appeal No 36/95 delivered 20 May 1996. Frankly, we think that the trial judge also erred in failing to direct the jury that if they were satisfied that the appellant had committed a criminal offence, but were not sure whether the offence amounted to murder or manslaughter, they should convict of the lesser offence of manslaughter. See **George Stewart v R** [supra]."

This pronouncement by Walker JA was noted as having been in keeping with the position in **R v Richards** where it had been held:

> "… following **R v McPherson** (2) the jury should have been told that if they were left in doubt as to whether or not there was provocation they should resolve that doubt in favour of the accused and find him guilty not of murder but of manslaughter."

[34] In **Lumumbo Rankine**, Bingham JA stated:

> "On more than one occasion, the learned judge directed the jury that if the accused was provoked they should find him guilty of Manslaughter. Those directions did not go far enough. An examination of the summation revealed that the learned judge did not tell the jury that if they were in doubt as to whether the accused was provoked or not they should find that provocation in law was made out and return a

> verdict of Manslaughter. His failure to so direct the jury was a fatal omission and amounted to a non-direction of a material nature rendering the conviction bad."
>
> For guidance **R v McPherson** [1957] 41 Cr. App. R. 213 cited by learned counsel for the appellant following **Woolmington v D.P.P.** [1935] 25 Cr. App. R. 72 and applying **Lobell** [1957] 41 Cr. App. R. 100 is sufficient authority for this contention. The headnote is sufficient for the purposes of this judgment. It reads:
>
> > 'Where on a charge of Murder provocation is relied on by the defence, the jury should be directed that the onus of proving absence of provocation remains throughout on the prosecution, and that, if the jury are left in doubt whether the facts show sufficient provocation to reduce the killing to manslaughter, that issue must be determined in favour of the prisoner'."

[35] In response, Mrs Ebanks-Miller relied on **R v Maharaj** [1960] 2 WIR 428 where she noted the Federal Supreme Court of Trinidad and Tobago held:

> "On the trial of a person charged with murder the duty of the judge to deal adequately with any view of the evidence which might show that the crime committed was manslaughter and not murder does not require him to invite the jury to speculate on incidents which, if they occurred, would have been admissible in evidence when, in fact, there had been no evidence of such incidents."

[36] She submitted that the learned trial judge had adequately reminded the jury of the evidence relating to the incidents which may have occurred in the bar which could have given rise to the question of provocation. Further, Mrs Ebanks-Miller submitted that the learned trial judge could not have made up the possible conduct that could have constituted provocation. In conclusion, Mrs Ebanks-Miller submitted that there

could be no fault with the learned trial judge's summation in this regard as the jurors would have to believe one way or another, that the applicant was provoked to act as he did, or he was not provoked, and to so render a verdict to reflect what they found as judges of the facts. She referred to **Dwight Wright v R** [2010] JMCA Crim 17 delivered 23 April 2010 in support of her submission.

[37] The final complaint of Miss Cummings under this ground was that the trial judge mentioned that the reasonable man is sober, yet made no mention of the fact that this incident took place in a bar where alcoholic beverages are served and the fact that the applicant was sober has to be disproved.

[38] Mrs Ebanks-Miller again relied on **R v Maharaj** in support of her submission that there was no evidence that the applicant or the deceased was affected by alcoholic beverages. Therefore, she further submitted, the learned trial judge was correct in not making an issue in respect of the incident taking place in a bar where alcoholic beverages were served as this would amount to an invitation to speculate.

Analysis and conclusion

[39] The learned trial judge assessed the evidence and properly identified the issues which arose requiring her giving directions in law. She then went on and gave full and careful directions on self defence, provocation, as well as accident. From early in the summation the learned trial judge had adequately defined the ingredients required to be proved in a case of murder. While reviewing the evidence, the learned trial judge gave more detailed directions on the specific areas as the need arose. In effect, she

carefully juxtaposed the cases for the prosecution and for the defence as she explained the law which applied.

[40] In relation to the complaint that the learned trial judge failed to advise the jury specifically of the conduct that could constitute provocation, it is noted that the learned trial judge did indicate to the jury where the evidence of the defence as to what happened in the bar could be found. She had also stated from early in her summation the following:

> "You will have the exhibits and you may want to go through the statements, everything, because you are entitled to do that. You should do that so that you get a full grasp of everything….
>
> So you have those with you, exhibits to go through in detail, and of course, you have the evidence to go through and discuss, give and take so you can try and come to a unanimous verdict."

It is apparent that the jury was alerted to where the evidence related to the issue complained of could be found. Although the contents of the statement were not reviewed, the learned trial judge had quite properly encouraged them to consider it in their deliberations.

[41] The second complaint was directed at the failure of the judge to have explained the elements of manslaughter and dealt with the issue of provocation when it was most prominent in their minds. The query from the foreman had been made at the time the court was about to be adjourned for the weekend. It is safe to say that even though it was prominent in the jurors' minds at that time, any explanation which may have been

made then would not remain foremost in their minds throughout the intervening weekend. The learned trial judge made an assessment and chose to give the directions at a time closer to when the jury was to retire for their deliberations. Her decision to do so was plainly correct in these circumstances and ought not to be faulted.

[42] The third complaint in this ground is understood to be about the failure of the learned trial judge to properly direct the jury that if they were in doubt as to whether or not there was provocation they should resolve that doubt in favour of the accused and find him not guilty of murder but of manslaughter. An examination of this summing-up does in fact reveal that the learned trial judge did not use those precise words in directing the jury as to the verdicts open to them.

[43] The authorities relied on by Miss Cummings ground the need for such a direction in the decision of **R v McPherson** and it would prove useful to consider what actually was said by the Lord Chief Justice in that case. At page 215 to 216 he stated:

> "The cases have left the matter in some difficulty, though perhaps not in doubt. We know that since **Woolmington v Director of Public Prosecutions** (25 Cr. App. R. 72; [1935] A.C. 462) the onus in a murder case is on the prosecution throughout, that is to say, the prosecution must prove that the prisoner killed the victim with malice aforethought. There are cases in which the prosecution open facts which of themselves would show provocation, and then it would be clearly for the prosecution to destroy those facts or prove other facts which would show a jury that there was not provocation in the case to reduce the offence from murder to manslaughter. But in the great majority of cases in which provocation is relied on as reducing the case to manslaughter, it is the prisoner who brings evidence to show that he was provoked, and that he acted under the influence of that provocation.

> But, as I said in giving the judgment of the court in Lobell, 41 Cr. App. R. 100, at p. 104; [1957] 1 Q.B. 547, at p. 551, dealing with self-defence – and for the purpose we are now discussing there is no difference between the burden of proof in self-defence and provocation - "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. But there is a difference between leading evidence which would enable a jury to find an issue in favour of a defendant and in putting the onus upon him. The truth is that the jury must come to a verdict on the whole of the evidence that has been laid before them….
>
> 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, though of course the latter plea goes only to a mitigation of the offence."

He then went on to state at page 217:

> "The case to which I have just referred shows what the position is where the defendant is setting up a plea of self-defence or provocation, but the jury must be reminded that the onus remains throughout on the prosecution, and therefore if they are left in doubt whether or not the facts show sufficient provocation to reduce the killing to manslaughter, that issue must be determined in favour of the prisoner."

[44] It is settled law that once there is any evidence of provocation fit to be left to a jury, whether it arises in the case for prosecution or defence, a trial judge is obliged to leave it to the jury. This is so even in circumstances where the issue was not specifically raised or relied on by the defence. It is then the duty of the trial judge to give a proper direction leaving it open to the jury to return a verdict of manslaughter if

they are not satisfied beyond reasonable doubt that the killing was unprovoked. If the issue arises in circumstances where it is relied on only in the case for the defence, the jury should be directed that if they have any doubt as to whether he could have been provoked then it must be resolved in his favour and he should be found guilty of manslaughter.

[45] In the instant case, the issue of provocation arose from the possibility of something happening in the bar which could have provoked the applicant. The sole eye-witness for the prosecution clearly could not provide that evidence. The applicant in his statement to the police, at a time when he was not a suspect, gave some evidence that could give rise to the assertion that he was provoked and this statement was relied on by the prosecution. Hence, the learned trial judge quite properly identified the evidence and left it for the jury's consideration in the proper terms. Since the issue of provocation arose solely on the case for the prosecution, it remained for them to disprove it, if the jury was to find the applicant guilty of murder. If there were any doubts that he may have been provoked, they could have found him guilty of manslaughter. The learned trial judge in her careful and balanced directions dealt adequately with these issues and left them properly for the jury's consideration.

[46] The fourth and final complaint in the ground was that the judge had failed to mention the fact that this incident took place in a bar where alcoholic beverages are served and the fact that the applicant was sober had to be disproved. This complaint is in effect saying that the jury should be invited to speculate as to whether or not the applicant had consumed anything that could have caused him to be intoxicated in the

absence of any evidence that he was. Contrary to the submission that the fact that he was sober had to be disproved, it would be expected that if he was intoxicated, the applicant himself would have raised it. He gave a detailed statement to the police where the matter was not raised. The prosecution's eye-witness was not even aware that the applicant was in the bar prior to seeing him leave it and therefore could not have given evidence of it. There was no evidence from which the reasonable inference could be drawn that the applicant was intoxicated. The mere fact that the incident had its genesis in the bar would certainly not be sufficient to lead to the conclusion that the applicant must have been consuming any of the usual contents of such an establishment. In the circumstances, the learned trial judge cannot be faulted for not raising this matter for the jury's consideration.

[47] The learned trial judge gave adequate and fair directions in law relative to the issues of provocation and self-defence. Accordingly, we are of the view that ground one must fail.

Ground two – the submissions

[48] Miss Cummings submitted that this ground amounted to saying that the verdict was unreasonable having regard to the evidence led in the case.

[49] Mrs Ebanks-Miller in response noted that the applicant has the burden of proving that this court shall allow the appeal if it thinks the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported by the evidence (section 14(1) of the Judicature (Appellate Jurisdiction) Act).

[50] Mrs Ebanks-Miller relied on the oft-cited and well known authority of **R v Joseph Lao** (1973) 12 JLR 1238 where it was held that an appellant must show the verdict is so against the weight of the evidence to be unreasonable and insupportable.

[51] Miss Cummings opted not to expand on this general ground and did not demonstrate in what way the evidence led could not support the verdict. In the circumstances, this ground is left without substance or merit and must fail.

Ground three - the submissions

[52] Miss Cummings had two specific areas of complaint under this ground. Firstly, she submitted that the learned trial judge ought not to have given any direction on lies but rather ought to have pointed them out as inconsistencies and/or discrepancies in the defence of the applicant. Secondly, she submitted that the trial judge had usurped the function of the jury when she determined that the previous statements of the applicant were lies, as it ought to have been left to the jury to determine what weight or effect they should give to these statements as opposed to the sole eyewitness for the prosecution and expert medical evidence given by the doctor and who they should believe.

[53] The learned trial judge had stated:

> "The prosecution's case is that the deceased was not attacking the accused, not provoking him, but that the deceased was killed while running away from the accused. They ask you to find support for their case from the mouth of the accused man himself because the prosecution is saying that the defendant, Mr Minott, lied to the police

> because he gave two different accounts as to what occurred in the bar.
>
> In the statement to the police, he says he acted in self-defence and in the question and answers, he is saying the gun went off accidentally. In fact, he says he doesn't know what happened. The gun went off. So, my interpretation is by accident. He doesn't say who fired the gun but that it went off whereas in the statement to the police, he says he actually had to use the gun to defend himself. So those, you may well find are two different accounts. So, it must mean the prosecution is saying, as I understand it, that is either one or the other, is a lie or both."

[54] Mrs Ebanks-Miller submitted that against that background, as outlined by the learned trial judge, this was a proper case for there to have been a **Lucas** direction. She further noted that the learned trial judge had advised how to view inconsistencies and discrepancies but went on to give directions on lies after being prompted by Crown counsel.

[55] Mrs Ebanks-Miller cited the seminal case of **R v Sean Gary Burge and David Graham Reginald Pegg** [1996] 1 Cr App R 163 where it was held that a **Lucas** direction is usually required in four situations. She also relied on **R v Gary Michael Goodway** [1994] 88 Cr App R 11 where Lord Taylor L J had this to say at page 17:

> "In our view, there is no reason in principle or logic for drawing a distinction between corroboration and identification cases and any other case in which lies may be relied upon in support of prosecution evidence. Accordingly, we consider Mr Marshall-Andrews' broader proposition is sound and that a **Lucas** direction should be given, save where it is otiose as indicated in **Dehar**, whenever lies are, or may be, relied upon as supporting evidence of the defendant's guilt."

[56] Mrs Ebanks-Miller submitted that the jurors heard directions on lies, inconsistencies, contradictions and discrepancies and formed the view that the applicant ought not to be believed and returned such a verdict. She submitted that the directions given were clear, leaving no room for confusion.

Analysis and conclusion

[57] The learned trial judge was faced with a situation which she determined warranted the giving of the **Lucas** direction. It is recognised that judges have to carefully consider whether lies told by an accused on the evidence warrant a **Lucas** direction, as a possible effect of such a direction can be to raise the profile of the lies and cause confusion to the jury and be prejudicial to the appellant. In the commentary of **R v Middleton** 2001 Criminal Law Review 251 at page 252, it was noted as being held:

> "The point of a '**Lucas**' direction, however was to warn the jury against adopting the "forbidden reasoning" that a defendant's lies necessarily demonstrates his guilt. Where there was no risk of the jury doing so, a **Lucas** direction was unnecessary and this would generally be so in relation to lies told by a defendant in evidence, because the position would be covered by the general directions on the burden and standard of proof."

[58] In the instant case, the prosecution was relying on the two inconsistent stories told to the police in circumstances where, as the learned trial judge had properly indicated, the jury was being invited to view one or both of the stories as a lie. The learned trial judge had stated:

> "Now, you are entitled to consider the situation and to consider whether it supports the case against Mr. Minott. And this regard [sic], you consider two questions again. First of all, you have to decide whether he did, in fact, tell those two different accounts and what they mean, in particular that account where he says the gun went off, just that it went off. What does that mean? If you are not sure that he lied, then you ignore the whole matter of the lies. If you are sure that he did lie, then you go on to consider, why did he lie?
>
> The mere fact that the accused person tells a lie is not itself evidence of guilt. An accused may lie for many reasons and they may possibly be in fact reasons in the sense that they do not mean that he is guilty. For example, a person may lie to bolster a good defence or to protect somebody else, or a person may lie to conceal some disgraceful conduct that he doesn't want to share with us, or a person may lie out of panic or confusion.
>
> Now, if you think that there is or there may be an innocent explanation for the difference in their accounts for the lies according to the Prosecution, then you take no notice of these lies. It is only if you are sure that he did not lie for an innocent reason, that his lies can be regarded by you as evidence supporting the Prosecution's case."

[59] We are of the view that a **Lucas** direction was wholly appropriate. The learned trial judge quite correctly directed the jury how then to deal with the issue and her directions were adequately tailored to the circumstances of the case. In the circumstances, this ground must also fail.

Ground 4 – the submissions

[60] Miss Cummings submitted that the learned trial judge ought not to have said the applicant deliberately shot the deceased as his statement to the police was that:

> "I fired a shot in 'Tino's [sic] direction. I could not say if the shot caught 'Tino'."

She contended that this did not amount to the same thing.

[61] Mrs Ebanks-Miller submitted that the learned trial judge had addressed her mind to the words spoken by the applicant and formed the view, and rightly so, that his actions were deliberate as he had stated that he was attacked by the deceased and he had to defend himself. As such, it was concluded that the words of the learned trial judge are not inconsistent with those spoken by the applicant and in any event the use of the word deliberate resulted in no miscarriage of justice.

Analysis and conclusion

[62] It is important to note the context in which the words being complained about were used by the learned trial judge. She was reviewing with the jury some of what the applicant had said in the statement first given voluntarily to the police. She said:

> "The struggle, he tells us in that statement, lasted for about a minute. He disarmed Tino of the gun and fired one shot in Tino's direction. He could not say if the shot caught him …"

She continued reviewing the statement and concluded:

> "So … as I understand that statement, he is saying that he deliberately shot the accused [sic] himself, not accidentally, deliberately, but that it was self-defence. You must consider all that is contained in the statement."

[63] It is clear that the learned trial judge fairly and adequately put to the jury the evidence from the applicant's statement. Her usage of the word "deliberate" was in distinguishing the shooting from being an accidental one and she made it clear that in

any event the applicant was saying it was in self-defence. In the circumstances, her manner of dealing with this issue was fair and cannot be faulted.

Conclusion

[64] Having considered the complaints raised by Miss Cummings concerning the directions given by the learned trial judge, we found that there was no basis for saying they were not adequate and fair. The issues concerning provocation, self-defence and lies were fairly placed for the jury's consideration, and having deliberated on them, they arrived at the verdict that the applicant was guilty of the offence charged on the indictment. It is for these reasons that the court concluded the application should be refused.