

REPUBLIC OF TRINIDAD & TOBAGO

HIGH COURT OF JUSTICE

HCA # 93/05

BETWEEN

THE STATE

-v-

DAVE BURNETT

---

RULING ON LEAVING DEFENCE  
OF PROVOCATION TO JURY

---

BEFORE THE HONOURABLE MR. JUSTICE IAN STUART BROOK (Ag.)

PORT OF SPAIN 4<sup>th</sup> ASSIZE

MRS PAMELA ELDER S.C., *et al* for the DEFENDANT  
MR GEORGE BUSBY & MS. S. JAMUNAR for the STATE

IN THE REPUBLIC OF TRINIDAD & TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA # 93/05

BETWEEN

THE STATE

-v-

DAVE BURNETT

---

RULING ON PROSECUTION APPLICATION  
TO LEAVE PROVOCATION TO THE JURY

---

1. On the 14 February 2006, a jury was empanelled to try the Defendant on a charge of murder. He was placed in their charge, for reasons which I need not specify, only on the 17th February 2006.
2. On the 14 February 2006, his counsel, Mrs Pamela Elder, S. C., at my invitation, informed me that the sole issue in the case was self defence.
3. At the material time, the Defendant was one of a small group of 6 or so armed police officers who had been deployed to patrol the Outrageous in Red Fete, at Pier 1, Chaguaramas where there were approximately 20,000 patrons. He was armed with a firearm which he discharged against two members of a group of 13 friends who had attended the Fete, on the occasion of the birthday of one of their number.
4. On the 10th March 2006, Mrs Elder opened her case to the jury and made it plain, beyond a peradventure, that this was her only defence. The Defendant gave evidence to the effect that he had shot one Ryan Solomon, a principal witness in the case, when he approached him, whilst he was struggling with other members of his group, when he lunged towards him with a knife. Within seconds, the Defendant saw the deceased approaching him, holding, and lunging at him with, a knife in a similar manner. The deceased approached as close as one foot away from the Defendant who shot him, fatally, in fear for his life, when the knife became entangled in his clothing. Thereupon, the Defendant holstered his firearm, once he was certain that all the remaining members of the group had left the scene and picked up the knife, said to have

- been used by the deceased, which was lying close to his body, on the ground. He then proceeded, to the front of the Pier 1 facility, traversing a distance of some 60 metres and, effectively, made a report, to his superior officer, that he had been attacked by a group of knife wielding patrons, believed that he had shot one of them, and produced the knife to him.
5. According to the Defendant, he had seen one member of the group pointing at him, before the incident and it is noteworthy that this individual had a pretty good idea that the Defendant might be a plainclothes police officer, because of his "stiff" behaviour, in comparison to the behaviour being displayed by the throng of revellers. About a minute after this pointing, the Defendant was bounced, by certain members of the group, including that individual, Ryan Solomon and the deceased. He moved a short distance away, checked to see if his firearm was intact and gave them some room as they were having a good time. Within seconds, he was bounced into again by the same group which, by this time, had swelled in number. The Defendant believed that it was Ryan Solomon who he pushed off, and he made an attempt to retrieve his police identification card from his back pocket. However, before he was able to retrieve it, he received a thunderous slap, from Ryan Solomon, which he returned. Whereupon, Solomon held onto his shoulders, the Defendant felt like he was trying to choke him, and pushed Solomon off who drifted back. At that point, a group of persons started to hit him, including the men who had bounced him together with others. Some of these were said to be grabbing for his waist area where his firearm was secured and it was during the ensuing fight that he shot Ryan Solomon and the deceased, as described in the preceding paragraph.
  6. The prosecution case, on the other hand, was to the effect that the Defendant slapped Ryan Solomon twice, when he had been bumped into, and it was Solomon who slapped the Defendant, in retaliation. In so doing, Solomon went forwards, so that his hands ended up on top of the Defendant's shoulders. It was whilst he was in that position, and the deceased approached to within an arm's length away from them that, within seconds of each other, the Defendant shot both, whilst they were unarmed. It was denied, by each member of the group who gave evidence on behalf of the prosecution, that any of their number possessed a knife that evening. Thereafter, the Defendant stood there holding the gun and was heard to say "I's Police, I's Police, what yuh gonna do, what yuh gonna do?", before walking off, speaking to a man in an orange jersey, then proceeding to his superior officer, reporting that he had just been attacked by a group of knife wielding patrons, that he believed that he had shot one of them, and producing a knife.
  7. On the 15 March 2006, shortly before the Defence closed its case, during and conveniently towards the end of legal argument in the absence of the jury, it was agreed that Mrs Elder would formally indicate her position, for the purposes of the record, that she was declining to exercise her right to address the jury at the close of her case, that Mr Busby, who appears for the State, would indicate his position, in those circumstances, and, as no speeches were to be forthcoming, the usual meeting to discuss the relevant legal issues, for the purposes of my Summation, would be deferred until 9:15 a.m., yesterday morning, for logistical reasons which need not concern us. Whereupon, the

jury returned to court at 11:58 a.m., a few further questions were asked of the last witness, and Mrs Elder closed her case at 12:03 p.m.

8. At the meeting yesterday morning, to my great surprise, Mr Busby, requested that I leave the defence of **provocation** to the jury. My immediate reaction was that if I had been minded to leave this defence, then I should have discussed the same with Counsel, prior to the time at which, in the normal course of events, speeches would have occurred, see, Watkins, LJ *in R. v. Cristini*, cited at paragraph 4-378, *Archbold 2006*. It seemed, to me, that Mrs Elder, doubtless for quite permissible, tactical reasons, predicated upon the principles in *Director of Public Prosecutions' Reference Number 1 of 1980*, (1980) 29 WIR 94 and *Allie Mohammed v. the State*, (1996) 51 WIR 320 had exercised her statutory right to open her case, to the jury, but declined, to close. I was conscious of the fact that, if Mr Busby had made this request, of me, prior to Mrs Elder closing her case to the jury immediately followed by her formally stating that she was not exercising her right of address, if acceded to, *she may very well have had little choice other than to exercise it*, which would then have given Mr Busby a right of reply, pursuant to the principles found in these cases.
9. When I voiced these concerns to Mr Busby, with a comment as to how this sudden shift would appear to the jury if, on Monday, far from my commencing my Summation, as indicated, Mrs Elder addressed them on the issue of provocation, to which she had made no reference in her opening address and which she had not canvassed, at all, during her case, following which, doubtless, Mr Busby would then make a full reply, he indicated that no matter how unprofessional this appeared, if provocation arose on the evidence, then I was obliged to leave it to the jury. When I inquired, of him, why he had raised this, for the first time, yesterday, in the circumstances that I have described, he indicated that he had discussed the case with others, in his Chambers, whilst preparing for yesterday's meeting, stated that provocation had never crossed his mind, at all, beforehand, but had been suggested to him by colleagues, after leaving court, the day before yesterday.
10. I find this statement difficult to accept for the following reasons. On the 20th of February 2006, during the evidence of the prosecution's fifth witness, Lawrence Goddard (a member of the group of 13), I had occasion to have sight of his witness statement, with the consent of both sides. Upon a quick perusal thereof it was apparent, to me, that there were at least two areas where there were inconsistencies, one of considerable significance, between the evidence given, at the PI and, additionally, at trial. Quite frankly, I was astonished, to hear, from Mrs Elder S. C. that she was not already in possession of that document, by way of the prosecution's duty of disclosure at common law. I ordered immediate disclosure and, as Mrs Elder indicated that she had lost all faith in the integrity of the prosecution, suggested to Mr Busby that this might best be rectified by the disclosure, to Mrs Elder, of the entirety of the witness statements in the State's possession. The next day, both Counsel informed me that my suggestion had been acted upon. However, Mrs Elder indicated further grave concerns when she had read the statement of Alisa Valentine, so disclosed.
11. As a result of certain answers Mr Busby gave to questions posed that morning and the day previous, together with his refusal to answer another, the Director

of Public Prosecutions, Mr Geoffrey Henderson, appeared before me, with Mr Busby, the next day. For present purposes, I need not go into what was discussed. However, what is of importance is that, towards the conclusion of the session, Mrs Elder invited me to rise for 15 minutes so that she might have certain discussions with the Director, based upon what had, by now, been disclosed to her. When I returned, to court, both sides made an application, to me, to adjourn to the next day, so that those discussions might continue. Mr Henderson indicated that, overnight, he would "consider the continuance of the prosecution or whether it should go in another direction."

12. The only possible inference that I draw from the reference to whether the case should go in another direction was whether, if forthcoming, a plea to manslaughter, either voluntary or involuntary would be accepted. I note that the learned Magistrate had acceded to Mrs Elder's submissions and committed the Defendant for manslaughter, although he was indicted for murder, by the Director. I heard little more about the resultant discussions other than to be informed, informally, that the matter would be proceeding as indicted. Mr Busby was in court, with the Director, when he sought an adjournment, on this basis and, presumably, he was involved, in some way, shape or form, in the discussions between the Director and Mrs Elder S. C. Accordingly, I find it a bitter pill to swallow that Mr Busby had never considered (and rejected) provocation, at all, up until the day before yesterday.
13. The Court deprecates, in the strongest of terms, how Mr Busby, only raised this, for the first time, on behalf of the State, yesterday, after Mrs Elder had formally indicated her position, in respect of her closing address, both to Court and the jury. In my view, Mr Busby has had ample time to have discussed this issue, with senior colleagues, in his Chambers, if he was unsure of the stance that he should take. Moreover, he was a party to the agreement, to hold the meeting yesterday, *after* which formal notifications were to be given to the Court *and the jury*, by both sides, that neither would be making speeches. If he was in any doubt as to the State's position, vis-a-vis provocation, he ought to have communicated this, to the Court, before it timetabled yesterday's meeting, to be held after these notifications, with the agreement of both sides.
14. Moreover, Mr Busby was aware of the timetable that I had set for the preparation and delivery of my Summation. I had set aside the remainder of yesterday, after what I anticipated to be a meeting of half an hour's duration, or thereabouts, with the entirety of today and, of course the weekend, to complete the preparation of my Summation. As a result of this application, I lost the entirety of yesterday and already, half of today, dealing with it. This has placed an enormous amount of pressure on me, far over and above that which I am to expect, during the performance of my duties, when arguments are presented, at the proper time. It may very well, now, be the case that I shall have to reschedule my timetable for the presentation of my Summation, to the jury, which will cause me a degree of embarrassment, which would have been unnecessary, in the absence of this application.
15. I discussed the various issues freely and informally with both Counsel, at some considerable length, at yesterday's meeting. One of my concerns, which I indicated to Mr Busby, which he refuted, was that in cases such as these,

- whereas self defence either succeeds and results in an acquittal or fails and results in a conviction for murder, provocation can be seen, by the jury, as an easy escape route, which results in a conviction for manslaughter, in respect of which, usually, a significant term of imprisonment would be imposed (see, *Bimal Roy Paria v. the State*, Cr.A.No. 64 of 2000, and cases cited therein), and I was suspicious that it might be this that was operating on his mind.
16. Mrs Elder's most emphatic response when I asked her whether I ought to leave provocation to the jury was "most certainly not!". I remind myself that this is no bar to my leaving the defence, if it arises: *R. v. Dhillon* [1997] 2 Cr.App.R. 104.
  17. I have considered, *inter alia*, paragraphs 19-53 & 19-54 *Archbold* 2006, and the cases cited therein. I expressed a view, to Mr Busby, that there was no evidence of any loss of self-control, if one analyses the evidence of the Defendant, see paragraph 4, *supra*. Moreover, I referred Mr Busby to that part of his cross-examination of the Defendant, at which he asked him why he did not shoot any of the other persons who were "beating up on him", at the time he shot Solomon and the deceased. His explanation was that they did not have knives. In my view, the Defendant's evidence, far from revealing a lack of self control, demonstrated the opposite, and a marked degree of restraint in the use of his firearm. It is noteworthy that there were four live rounds remaining in the firearm which he surrendered, to his superior officer, within a short time of the incident.
  18. Mr Busby's initial response to this observation was that he conceded that there was not a shred of evidence of loss of self-control, but that it was for the jury to consider and that by leaving provocation to the jury, this was simply an exercise in telling them to look for something that would they would not find. When I pointed out, to him, that the consequences, upon conviction, of my failing to leave provocation, to the jury, in these circumstances, if that were to be my decision, might simply be the Court of Appeal substituting a conviction for manslaughter: *R. v. Dhillon, ibid*, he indicated that, nonetheless, my failure to leave provocation, would have deprived the State of a conviction for murder if, as he then seemed to believe, it was a foregone conclusion that the jury would be satisfied that the State had negated provocation which, in any event, had not arisen, on the evidence. In *Villaruel (Franklyn) v. the State*, (1998) 55 WIR 353, de la Bastide CJ (as he then was), referred to the case of *Cox*, for the proposition that, even if the trial judge wrongly fails to leave the issue of provocation to the jury, a conviction for murder can be saved by an application of the proviso if the appeal Court is satisfied that no reasonable jury properly directed could have concluded that a reasonable man would have been provoked to do what the appellant did. His Lordship pointed out the somewhat odd result of the decisions to be that a trial judge is under a duty to give a jury the opportunity of rendering a perverse verdict by leaving the issue of provocation to it, even though it is manifest that on the evidence no reasonable man similarly provoked would have acted in the way in which the accused did.
  19. However, it was not long before Mr Busby changed tack and sought to persuade me that my analysis of the evidence was erroneous, in so far as I was looking at self-control as demonstrated by the *defence case*. He submitted that I should focus only on the prosecution evidence and not visit the defence case, at all,

- when deciding whether there was evidence that the Defendant had lost his self-control. He now sought to argue that the prosecution evidence, as summarised at paragraph 6, hereof, demonstrated a marked degree of loss of self-control, when, for no other reason, the Defendant shot Ryan Solomon, in response to the latter's provocative act of slapping him.
20. Mr Busby appears, to me, to be arguing *res ipsa loquitur*, in other words, why would a trained Police Officer respond to a mere slap, by discharging his firearm, unless he was provoked. On the prosecution's case, I have, before me, evidence of a slap, from Ryan Solomon, of the Defendant, followed by a discharge of the Defendant's firearm. However, I ask myself the question: what is the evidence of loss of self-control and a shooting whilst out of control (see *Villaruel, supra*, p.360)?
21. Mrs Elder was quick to point out that no prosecution witness was able to describe the precise circumstances in which *the deceased* was shot. Marc Fermin's evidence was of most assistance, in that regard, but he merely described how he saw the deceased approach, to within an arm's length of the Defendant, prior to his hearing the second shot being discharged. However, Mr Busby developed his argument by submitting that, as the deceased was shot, within a second or two of the Defendant's shooting Ryan Solomon, he must still have been acting under the sudden and temporary loss of self-control, induced by Solomon, when he shot the deceased. Of course, I remind myself that things may be said or done by the deceased *or anyone else*, see *Archbold 2006*, paragraph 19-59, and cases cited therein.
22. I indicated to Counsel that I wished to reserve my ruling on this point, overnight and invited each of them to submit, to me, during the course of yesterday, any authorities upon which they relied. Mr Busby referred me, via my Clerk, to *Rampharry v. the State*, (1999) 54 WIR 376 and *Dennis John v. the State*<sup>1</sup>, Cr.A.No. 65 of 1992. In a similar way, Mrs Elder, S.C., referred me, most helpfully, to *Villaruel (Franklyn) v. the State, supra*.
23. In my judgement, Mr Busby is misguided in the submission that I am limited to the evidence of the prosecution when I am considering the question whether (a) is there any evidence of specific provoking conduct of the accused, and (b) is there any evidence that the provocation caused him to lose his self-control? See, principles in *R. v. Acott*, [1997] 1 All ER 706, *Villaruel (Franklyn) v. the State, ibid* and *R. v. Robert James Jones*, unreported, No. 9805235 Y2, CA (UK), 22nd October 1999, as analysed hereafter.
24. The following principles emerge from the leading case of *R. v. Acott, ibid*:
- In the absence of any evidence, *emerging from whatever source*, suggestive of the reasonable possibility that the defendant might have lost his self-control due to the provoking conduct of the deceased, the question of provocation does not arise, page 710;
  - it remain[s] the duty of the judge to decide whether there [is] evidence of

---

<sup>1</sup> Although possibly on another issue – “self-defence”

provoking conduct, which [results] in the defendant losing his self-control. If in the opinion of the judge, even on a view most favorable to the accused, there is insufficient material for a jury to find that it is a reasonable possibility that there was specific provoking conduct resulting in a loss of self-control, there is simply no issue of provocation, page 711;

- by implication, one may consider the cross-examination of the defendant when searching for evidence of provoking conduct or a loss of self-control, see page 712;
- there can only be an issue of provocation to be considered by the jury if the judge considers that there is some evidence of a specific act or words of provocation resulting in a loss of self-control. *It does not matter from what source that evidence emerges* or whether it is relied on at trial by the defendant or not. If there is such evidence, the judge must leave the issue to the jury. If there is no such evidence, but merely the speculative possibility that there [has] been an act of provocation, it is wrong for the judge to direct the jury to consider provocation. In such a case there is simply no triable issue of provocation, page 713.

25. In *R. v. Robert James Jones, ibid*, the two defendants, C & J., were charged with murder. C pleaded guilty and J. was convicted, at trial, running self defence. The defendants were said to have been walking home, somewhat inebriated, in the company of the vagrant, schizophrenic deceased. In his police interview, J. was said to have stopped to urinate when he heard a shout from C. He ran over to the deceased thinking that he was attacking C. He had punched the deceased "about six or seven times". Initially he had said, "a couple of times". He had seen that C had had an injury over his left eye and could not recall whether he or C had kicked the deceased. They had both left the scene, leaving the deceased there, but had returned, later, to check on him.

26. J. gave evidence and described how the deceased had latched onto them and had talked and acted strangely. J. had thought the deceased might have been armed with a knife or a gun because he kept putting his hands inside his trousers. He had not wanted the deceased to find out where he lived. He had gone off to urinate and then heard C shout. He returned and saw the deceased hold of C by his coat and was shaking him to and fro. J. then punched the deceased several times in an attempt to stop him attacking C. C also kicked the deceased a couple of times and stamped on his head.

27. After passing by the house of C's girlfriend, one Tomlinson, the men returned to where they had left the deceased and found him a short distance away lying on his side. J. walked away, intending to call the ambulance. 30 seconds or so later, C, who had remained behind with the deceased, caught up with J. and they went home. It was J.'s case and evidence that C must have caused the fatal injuries, during those 30 seconds.

28. It was argued on J.'s behalf on appeal that there was evidence on which the jury could have found that the appellant was provoked to lose his self-control. There was evidence of things done by the deceased, namely his weird behaviour, his attaching himself to these two men when he was not wanted, his suggestion that

they should go and cause trouble at a gypsy camp, the attack on C, by taking hold of C by his coat and shaking him. Secondly, there was evidence of a loss of self-control by the appellant, *namely his answer in cross-examination*, "I don't think it was necessary to hit him six or seven times. I don't know why I went over the top."

29. The Court of Appeal stated: that that answer laid a basis for a finding by the jury that the appellant had lost his self-control became apparent when the jury, during their retirement, sent a note asking the judge this question:

"Could you please define "intent" as in the context of intent to cause really serious injury. Must this be a conscious decision? If you carried on to injure after losing control, would this be intent to cause really serious injury?"

30. In *Villaruel (Franklyn) v. the State*, *ibid*, at p. 357/8, de la Bastide CJ (as he then was) stated:

"the evidence of provocation which requires the issue to be left to the jury may not even come from the defence; it may come from the prosecution's case or be a combination of evidence from both sides (*Lee Chung-Chuen v. R.* [1963] 1 All ER 73)..... it emerges from these authorities that it would be wrong, in determining whether the issue of provocation should be left to the jury, to look at the case for the prosecution and the case for the defence separately and in isolation from each other, and to ask oneself if on either of them an issue of provocation is raised and, if it is not, to withdraw the issue from the jury. For provocation may be established by a combination of evidence from both sides and may be a matter of inference rather than of direct evidence."

31. On the issue as to whether or not the learned trial Judge should have left provocation to the jury, Roch, LJ stated, in *R. v. Robert James Jones*, *ibid*:

" It is common ground between counsel that the issue of provocation has to be left to the jury - notwithstanding the fact that in the opinion of the judge no reasonable jury could conclude on the evidence that a reasonable person would have been provoked to lose his self-control in the circumstances described by the evidence in the case - if there is evidence of conduct on the part of deceased which was provocative and there is evidence that that conduct caused the defendant to lose his self-control. The dispute between counsel on this appeal is whether in this case there was evidence of these elements.

The trial judge, his Honour Judge Fawcus, decided that there was not the evidence in this case needed to justify the giving of a direction on provocation. The question whether he should give such a direction had been raised by the appellant's counsel at the end of the evidence for the judge's consideration, and, as we understand it, it was the submission of defence counsel that despite the fact that provocation was not a defence being run on the appellant's behalf, the judge should nevertheless have given such a direction.

The primary defence was that the fatal injuries had been inflicted by Mr Chard and had probably been inflicted in the 30 seconds or so between the time that the appellant had left the deceased lying on the ground and Mr Chard catching up with the appellant in the dirt lane at the very end of this fatal event. The appellant's case was that the blows he had struck had all been with his fist, and they had been struck *in defence of Mr Chard*<sup>2</sup>. They were not blows which could have caused the injuries from which the deceased had died. Indeed, it was the appellant's evidence that he could not say that he

---

<sup>2</sup> Emphasis mine, throughout

caused any injury to the deceased at all. It was his defence that he had not intended either to kill or to cause really serious physical injury to the deceased. He and Mr Chard had not been acting in concert.

*Trial judges are inevitably aware that the giving of a provocation direction must tend to undermine lines of defence such as those which were advanced on behalf of the appellant in this case. It is unlikely that a person who has lost control of himself is acting in defence of another. It is more likely that such a person will have intended to kill or to cause really serious physical harm. For that reason a judge should not give a direction on provocation where evidence of provoking conduct by the deceased, or evidence that such conduct caused a loss of self-control by a defendant, is minimal or fanciful. To repeat the words of Lord Steyn, there has to be evidence of "specific provoking conduct resulting in a loss of self-control".*

We would observe that the judge in this case was a particularly experienced judge. Trial judges, particularly judges of this experience, are far better placed than this Court to decide whether the evidence required for the giving of a provocation direction is present or not. The judge decided that such evidence was not present.

The conclusion that we have come to is not merely that we cannot interfere with the judge's conclusion, but on the material before us the judge's conclusion was the correct one. *The appellant's evidence was that what he saw led him to believe that the deceased was attacking Mr Chard and that caused him not to lose his self-control, but to go to Mr Chard's defence. In going to Mr Chard's defence, he was saying he struck the deceased six or seven times with his fist and that that number of blows was probably more than required to defend Mr Chard. The appellant describes that as "going over the top", but at no time did the appellant say that he had gone over the top because of something done or said by the deceased.*

If the fatal blows were, as the prosecution maintained, inflicted on the occasion when Chard and the appellant returned to the dirt lane after being to the Tomlinson house, then there was no evidence of provocative conduct by the deceased which could have led to an attack upon him at that time.

In those circumstances, despite the attractive submissions of Mr Carus for the appellant, we conclude that this was not a case where a provocation direction had to be given, and this appeal must be dismissed."

32. At the meeting, yesterday morning, when I asked Mrs Elder as to her view on whether I should leave provocation, or not, to the jury, as well as stating, as I have indicated, "most certainly not!", she went on to state that this would be apt to confuse the jury and be likely to deprive the defendant of his only defence in the case, the latter being precisely the point made by Roch LJ, *supra*.
33. I am fortified in my view that it is legitimate for me to consider the evidence of the Defendant, when considering whether or not there exists evidence of a loss of self-control on his part, from a consideration of the cases to which I have referred.
34. I hold that, on a totality of the evidence, the evidence of loss of self-control, by the Defendant, is nonexistent; on the contrary, there is, on the defence case, evidence of a measured response to an attack by two knife wielding patrons at the fete. At its highest, on the prosecution case, in my judgement, such evidence as may exist as to loss of self-control is minimal or fanciful and, in accordance with the authority of *Robert James Jones, supra*, I am specifically mandated not to give a direction on provocation.

35. Were I to do so, I am of the view that the defence advanced, on his behalf, by experienced Senior Counsel, Mrs Elder, would be undermined and that he would suffer serious prejudice in so far as the case, already swamped with a plethora of microscopic detail, in particular with regard to inconsistencies, would be rendered more confusing than it already is, by an otiose legal direction.
36. Further, it gives me no pleasure in saying it, but I remain unconvinced as to the sincerity of Mr. Busby's argument, bearing in mind his change of tack, as set out at paras 18 & 19 hereof, together with the timing of his first reference to provocation, viz., yesterday.
37. I regret to say that I suspect that the direction is sought, out of a fear that the Defendant may be fortunate enough to receive an outright acquittal, bearing in mind certain features as to the manner in which the Prosecution has conducted itself in this case, in more ways than one, of which Mr Busby is only too well aware, together with the serious inroads that Mrs Elder has made into the credibility of the principal, civilian, prosecution witnesses, deploying her formidable, forensic skills.
38. I note the comment of de la Bastide, CJ (as he then was), in *Villaruel, supra, p. 358*: "one has to note with some sympathy the dilemma of the trial judge who has to navigate between the Scylla of leaving provocation when he should not and the Charybdis of not leaving it when he should. In the latter case, a conviction for murder may be quashed while in the former a conviction for manslaughter may also be quashed, for by wrongly leaving the issue of provocation to the jury, the judge may have deprived the appellant of the chance of a complete acquittal, for example, *R. v. Moxam*(1973) 21 WIR 389.
39. For all the above reasons, the State's application that I leave provocation to the jury is rejected.

Brook J. (Ag)

17<sup>th</sup> March 2006