SHYAM BARAN

v.

REGINAM

[COURT OF APPEAL, 1978 (Gould V. P., Marsack J. A., Henry J. A.) 10th, 30th November]

Criminal Jurisdiction

Criminal law—principles of criminal liability—murder—self defence and provocation—summing up—circumstances in which issue of provocation is to be left to the Assessors—Penal Code (Cap. 11) ss. 228(1), 234.

Criminal law—evidence and proof—admissibility of evidence of previous conviction to establish motive.

Criminal law—determination of appeals—successful appeal—principles governing applicability of the proviso to s. 23(1) of the Court of Appeal Ordinance (Cap. 8).

The appellant was convicted of murder by the Supreme Court. On appeal—

Held:

1. Where there is sufficient evidence before the Assessors to ground a defence of provocation the issue must be left to them for their consideration following direction. This is so whether or not the defence of provocation was specifically raised by the accused.
2. In the particular circumstances in Fiji the outcome of a defence of self-defence may well differ from the outcome in other common law jurisdictions overseas.
3. A Judge has the discretion to admit evidence of a previous conviction recorded against an accused for the purpose of establishing motive.
4. Where there had been a failure to place before the Assessors a matter fit for their consideration the proviso to S.231(1) of the Court of Appeal Ordinance could seldom be applied.

Cases referred to:

Palmer v. R. [1971] A. C. 814

Bullard v. The Queen [1957] A.C. 635

Holmes v. D.P.P. [1946] A.C. 588

Lee Chun Chuen v. R [1963] 1 All E.R. 73

R. v. Hopper [1915] 2 K.B. 431

Kwaku Mensah v. R. [1946] A.C. 83

R. v. McInnes 55 Cr. App. R. 551

R. v. Biggin [1920] 1 K.B. 213

R. v. Howe [1958] 100 C.L.R. 448

Selamani v. Republic [1963] E.A. 442

Kesty Ta'afia v. R. [1967] 13 F.L.R. 151

R. v. Jai Chand [1972] 18 F.L.R. 101

R. v. Cascoe 54 Cr. App. R. 401

R. v. Sharmpal Singh [1962] A.C. 188

R. v. Plomp [1963] 110 C.L.R. 234

Makin v. A-G for New South Wales [1894] A.C. 57

R. v. Whitfield 63 Cr. App. R. 39

Bharat v. R. [1959] 3 All E.R. 292

Anderson v. The Queen [1971] 3 W.L.R. 718

Appeal against conviction and sentence in the Supreme Court.

S. R. Shankar for the appellant

M. Jennings for the respondent

Judgement of the Court (read by Gould V.P.):

The appellant was convicted in the Supreme Court of Fiji at Lautoka on the 15th February 1978, of the murder of Dhinesh Kumar. All five assessors at the trial gave as their opinions that the appellant was guilty of murder; the learned judge accepted their opinions and convicted the appellant, but in lieu of a sentence of death, imposed a sentence of imprisonment for life. The present appeal is against conviction.

Before going to the grounds of appeal it will be necessary to indicate, as concisely as possible, the cases for the prosecution and for the defence as presented at the trial.

The deceased, who was a young man, of approximately eighteen years, was killed by a single stab wound, on the 8th October 1977. The medical evidence showed it to be consistent with having been caused by a knife or dagger, which had penetrated the peritoneum and pancreas—to a total depth approaching three inches. Considerable force would have been required. Death was due to internal haemhorrage from the injury to the pancreas. It is common ground that the deceased had been engaged in helping to put out fires in the standing cane, of which there were more than one, on the night in question, when he received the wound, and that it was a knife in the hand of the appellant, which caused it.

The father of the deceased, Kishori Lal, gave evidence that the deceased and the appellant had been like brothers, but had fallen out—he had scolded them both for it. One or two weeks later his own house was burned and it was admitted by the appellant in evidence later that he was convicted and sent to gaol over that episode—he sought to put the blame upon a younger boy who was with him at the time. Kishori Lal also said that a week or two before the deceased's death, appellant shouted out abuse and threats from outside his house, as follows—

"Dhinesh fuck your mother, I have come back from gaol and I will finish you."

The existence of bad relations was confirmed by the appellant's own evidence in which he said that about a week before the 8th October, he was attacked on the road by Kishori Lal and the deceased, using a stick and a pipe. Kishori Lal, he said, swore and accused him of being the one who had set fire to his house.

A witness, Manasa Nasila, gave evidence for the prosecution that he met the appellant, whom he knew, on a bus at about 12.30 p.m. on the 8th October—the day the deceased met his death. They were the only two passengers and, on the witness' asking where the appellant was going, the appellant pulled up his shirt and showed him a dagger stuck in his trousers underneath. The appellant said first, that he was looking for a person and then, that he was looking for Dhinesh.

We come now to the prosecution witnesses of the actual events of the evening of the 8th October. First, Shanti Lal, a brother of the deceased who described how after he had worked with the deceased and others at an attempt to put out a fire in part of their own fields, they went to help at the scene of a fire in "Sirdar's" field. He named the sirdar as Beni but it seems that he is the gang sirdar, Ami Chand Prasad, who also gave evidence. According to Shanti Lal, he was working with the deceased, each with a small branch, attempting to extinguish the fire. Others were working in the vicinity about half a chain away. The appellant appeared, said nothing, approached Dhinesh, who did not appear to see him, lifted his shirt, took out a dagger and stabbed him on the side. Dhinesh, tired, was just standing with one hand on his hip. The witness tried to grab the appellant but was then himself stabbed on the left upper arm and in two places on his left side. (He was in hospital for 13 or 14 days). The knife was a small one, about seven inches long. The appellant ran away.

A witness, Chanka Prasad, who knew all the parties concerned, went to a fire at Arvind's field with the appellant, who had a cane spray tank, but they were not in time to help with the fire. The witness saw Dhinesh and Shanti Lal, but said that the appellant did not. They left, and as the witness was turning his car the appellant came to him, took off the spray tank and asked if Dhinesh was "there". On being told he was, the appellant said, "I will go along too, to that place where the others are. That is Ami Chand's canefield." They left in the but the witness got out to help with what appears to have been yet another fire. The appellant also got out but the witness did not know what had happened to him until, after he had ceased working, he heard a voice calling "Help! Help!" and saw the appellant running towards him pursued by Ami Chand. Ami Chand called to him to catch appellant and as he prepared to do so, the appellant said, "Chanka, if you grab me, I will stab you." He had a dagger in his hand. As to this particular incident the appellant in cross-examination admitted that he had said those words to Chanka Prasad—but that Chanka had thrown an iron bar at him which missed.

Ami Chand Prasad, gang sirdar, said that on the 8th October, he went to a cane fire which started at the border of Ram Kirpal's field and his own. He drove a firebelt with his tractor in the middle of the field. A number of people, including the deceased and Shanti Lal, came to help beat out the fire. He was seated on his tractor when Dhinesh cracked a joke with him and about a minute later he heard him say, "Look, help me." In the light of the blazing fire he saw the appellant pulling his hands from Dhinesh's body as if withdrawing something; either a penknife or a

blade about four inches long. Dhinesh said "Arc Ram" (My God) and began to fall. At this stage he saw Shanti Lal 2—3 yards away. Raj Kumar was about 3 or 4 yards away and others further away beating out the fire. Shanti Lal was retreating and crying, "Help me" as the appellant was hitting him with the same penknife. The witness got off the tractor and tried to grab the appellant but could not. He did not see Chanka Prasad. The witness in cross-examination denied throwing a spanner at the appellant.

Finally the prosecution called a cane farmer, Wardar Chandra Reddy, who knew both the families involved in this trouble. In the early hours of the 9th October, he was driving his truck along a feeder road when the appellant stopped him and said, "I have finished Dhinesh Kumar: take me to a lawyer." And: "Shanti Lal is injured. Dhinesh is injured even more." In reply to a question the appellant said he had thrown the dagger away. We would add here, on this question of the dagger or knife, that in cross-examination the appellant said he had told Corporal Raju that while he was being chased the penknife fell from his hand. As to its dimensions it seems probable that the only reliable evidence comes from the medical evidence as to the wounds it caused; witnesses who attempted to describe it for the prosecution were under difficulties from absence of light or, in the case of Manasa Nasila, did not see it properly. The Acting Government Pathologist, who carried out the post mortem, said the entry wound was 1″ long and D shaped. He thought the blade would be about an inch wide and that it would be unlikely to be a penknife. The depth of the wound from skin to pancreas was about 2½″ and the depth in total was "less than 3″"

We turn now to the case for the appellant. He gave evidence on oath. He first related two incidents the second of which we have already mentioned while dealing with Kishori Lal's evidence. The first incident was said to have taken place about two weeks before the death of the deceased. The latter was said to have seized the appellant's younger brother by the shirt and shaken him. The witness then came from behind and the deceased ran away. Suresh, aged 12, was called by the defence, and confirmed this story; some confirmation of the second incident was provided by the evidence of Jasoda Devi, the appellant's elder married sister.

The appellant's evidence as to the events of the 8th October, can now be summarised. After morning work, he did travel by bus at about 12.30 p.m. but denied knowing Manasa Nasila or having said or done anything that that witness alleged. The bus, he said, was half full. He only left his house that evening, he said, because Chanka Prasad had called him to come and help put out the fires. He agreed with Chanka Prasad's evidence that he rode with him in his car and about having the water spray, but made no mention of any inquiry as to the whereabouts of the deceased. He does not appear to have been cross-examined on this aspect of Chanka Prasad's evidence.

From this point, we quote from the record of the appellant's evidence in chief:

"Chanka parked his car 2 to 3 chains away from the fire and told me to go ahead and he came after me. As I went towards the fire I saw a tractor parked on the road, and as I reached it Dhinesh said 'So you have come, mother-fuck'. He was on the side of the road. As I turned and was about to walk away, Shantilal tripped me with his foot and I fell down. As I was about to rise Dhinesh gave me

a kick. As I got that kick I got up. Shantilal gave me a punch in the stomach (he demonstrates the right side of the chest). By then I took out a pen knife which I had in my front pocket (accused lifts his shirt and shows where it was). Ami Chand, Shiu Prasad, Kampta a brother of Dhinesh were also there. They came and completely surrounded me. Then I swung the penknife (swings it upwards from around his hip). Then I swung it back again and backwards and forwards thrice. Then Shantilal stepped away from me and said 'Look he is hitting me with a penknife.' Ami Chand said 'Step aside: let me hit him with a spanner and knock him down.' By then I turned and wanted to run away. As I was about to run, Shiu Prasad, Kanta and Dhinesh came in front of me. I then again swung the knife by bringing it across the front of my chest. By then I ran away from there. I did not like Dhinesh abusing my mother. I was not annoyed but I just wanted to run away. When they surrounded me I thought they were going to kill me and I was frightened. I was worried for my own safety when I was kicked and punched. The spanner was thrown at me, as well as a knife and a stick. When I took out the penknife I took it out to defend myself. If I had not been attacked I would not have taken out a penknife. I did not feel physically able to defend myself with bare hands. I had that penknife because when Chanka Prasad called me I was eating a pawpaw and I took the penknife along. When I left home I had not intention of hurting anyone. I did not feel that anyone was going to assault me. I heard Shiu Prasad give evidence in the lower Court."

.....

"As I was trying to run away from the scene someone tried to stop me. I had run about half-a-chain. That was Chanka. I heard someone calling out 'catch him'. Chanka was in the middle of the road. He stepped aside."

In brief, the appellant claimed that he was suddenly sworn at and tripped by the deceased; and then kicked by him. He was punched in the stomach by Shanti Lal, took out his penknife—three others came and he was surrounded. He swung the penknife. Ami Chand threatened him with a spanner. At some stage the spanner, a knife and a stick were thrown at him—he swung the knife again as he was being prevented from running away by Shiu Prasad, Kampta and Dhinesh. In cross-examination the appellant agreed that his knife caused wounds to the deceased and Shanti Lal.

We propose now to go directly to what we consider the main ground of appeal. The learned judge did not leave to the assessors the possibility of their returning an opinion of manslaughter on the basis of provocation; on the contrary he directed that there was no question of manslaughter. Grounds 1, 2 and 4 of the notice of appeal read:

"1. That the learned trial judge erred in law and in fact in withdrawing the issue of manslaughter from the gentlemen assessors and himself on the grounds that the appellant was not annoyed when the facts showed that any reasonable person under those circumstances would have lost his self control.

2. That the learned trial judge erred both in law and in fact in not directing himself and the gentlemen assessors on the question of manslaughter on the grounds that though the evidence did not justify a defence of self defence yet it was open to consider a verdict of manslaughter on the question of use of excessive force.

A 4. The learned trial judge misdirected himself on the question of manslaughter when he directed himself and the gentlemen assessors that if the force used was out of proportion then the appellant was guilty of murder."

The learned judge directed the assessors on the law as to self defence by quoting extensively from the summing up of the learned trial judge in the case of *Palmer v. Reginam* [1971] A.C. 814, dealt with by the Privy Council on appeal from Jamaica. The opening sentences contain the basic essentials:

B "A man who is attacked in circumstances where he reasonably believes his life to be in danger or that he is in danger or serious bodily harm, may use such force as on reasonable grounds he believes is necessary to prevent and resist the attack. And if in using such force he kills his assailant he not guilty of any crime even if the killing was intentional."

Lower down the direction included these words:—

C "If excessive force was used, the act might not have been done necessarily in self-defence and the plea would not be to any avail, but in all this you must bear in mind that the onus remains throughout on the prosecution to satisfy you that accused was not acting in self-defence and if after consideration of all the evidence you are left in doubt as to whether the killing may or may not have been done in self-defence the proper verdict would be one of not guilty."

D The final passage of the summing up reverts to this topic and leaves no doubt as to the learned judge's meaning; it reads:—

"If you come to the conclusion that he killed Dhinesh Kumar in self-defence and the means was not excessive in all the circumstances the accused is entitled to be acquitted. If you are satisfied the means used in repelling the attack that
E was made was excessive he would be guilty of murder. He is either guilty of murder or he is entitled to be acquitted."

This last passage becomes particularly significant in the light of the fact that the learned judge had, after explaining the law as to provocation to the assessors, told them that upon the appellant's own evidence no question of provocation arose. The case therefore was left to the assessors as one in which their options were either
F "guilty of murder", or "not guilty" if they found the appellant had acted in self-defence and the means used were not excessive.

The question now arises whether this approach is correct and in particular whether the decision to withdraw the provocation issue is to be sustained. It is plain law and common ground on the appeal that in a trial for murder, if there is any evidence upon which a verdict of manslaughter could be given, the accused has the
G right to have the issue left to the jury. *Bullard v. The Queen* [1957] A.C. 635. The test laid down in *Holmes v. Director of Public Prosecutions* [1946] A.C. at 597, and quoted by the Privy Council in *Lee Chun Chuen v. Reginam* [1963] 1 All E.R. 73 at 78 is—

H

"If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death, it is the duty of the judge as matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (a) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict."

The reason given by the judge for withdrawing manslaughter is expressed in the following passage from the summing up:

"Finally on this subject of provocation I remind you about what the accused said in his evidence: 'I did not like Dhinesh abusing my mother. I was not annoyed but I just wanted to run away.' Now if he was not annoyed then there is no question of provocation arising at all because there was not that sudden and overmastering which must have been present if he were suddenly provoked into killing Dhinesh Kumar. According to the accused's evidence that could not have possibly happened here so there is no question of manslaughter. I do not therefore propose to ask you to consider the question of provocation."

There is a lacuna there after the word "overmastering" and some such word as "passion" has clearly been omitted. In the first place we think that to accept the words quoted as used by the appellant, as indicating his state of mind throughout the incident, would be to run a risk that the assessors might well not consider acceptable. They might have considered the reference to relate to the outset when his mother was insulted. Secondly, and particularly where there has been an alternative defence such as self defence, the failure of the appellant to testify to loss of self-control is not fatal to his case. In *Lee Chun Chuen v. Reginam* (supra) at pp. 79—80 that statement is made and the Privy Council judgment continues, after citing *R. v. Hopper* [1915] 2 K.B. 431, *Kwaku Mensah v. R* [1946] A.C. 83 and other authorities:

"These were all cases in which, as in the present case, the accused was putting forward accident or self-defence as well as provocation. The admission of loss of self-control is bound to weaken, if not to destroy, the alternative defence and the law does not place the accused in a fatal dilemma. But this does not mean that the law dispenses with evidence of any material showing loss of self-control. It means no more than that loss of self-control can be shown by inference instead of by direct evidence. The facts can speak for themselves and, if they suggest a possible loss of self-control, a jury would be entitled to disregard even an express denial of loss of temper, especially when the nature of the main defence would account for the falsehood. An accused is not to be convicted because he has lied."

We are, with respect, unable to agree with the learned judge that the withdrawal of provocation from the assessors was justified on the basis that the statement quoted from the appellant's evidence was to be treated as a conclusive negation of

loss of self-control. In our opinion, taking the most favourable view of the evidence, his account of insult, assault, confrontation by a group, his own knife waving, the throwing of spanner, knife and stick, provide material fit to be left to the assessors for their consideration on this topic, and we say that having in mind the three elements of provocation listed by the Privy Council in *Lee Chun Chuen's* case, viz. the act of provocation, the loss of self-control, both actual and reasonable, and retaliation in proportion to the provocation.

The strength of the prosecution case, though marked, does not provide ground for the learned judge (nor for this court) to hold that it was not possible for the assessors to accept the appellant's version or some material part of it. Nor did the learned judge base his withdrawal of the issue upon any such reasoning. We therefore consider, with respect, that the learned judge erred in not leaving manslaughter on the basis of provocation to the consideration of the assessors and, subject to a submission of counsel for the Crown, which we shall consider below, that the proviso to section 23(1) of the Court of Appeal Ordinance (Cap. 8) should be applied, we consider that the appeal on this issue succeeds. We should mention that our task has been lightened by the concession of counsel for the Crown that in his view the possible option of manslaughter ought properly to have been left to the assessors.

As we are of the opinion we have expressed, it is not necessary for the decision of the appeal that we should go on to consider what might have been the situation had the learned judge, in lieu of leaving the manslaughter issue to the assessors on the ground of provocation, left it as a possible result of the use of excessive force in circumstances which would otherwise have supported a successful plea of self-defence. Before the decision of the Privy Council in *Palmer v. Reginam* (supra), since followed in England in *R. v. McInnes* 55 Cr. App. R 551, this court adopted an approach to this question in which it followed *R. v. Biggin* [1920] 1 K.B. 213, *R. v. Howe* [1958] 100 C.L.R. 448, and *Selamani v. Republic* [1963] E.A. 442. The case was *Kesty Ta'afia v. Reginam* [1967] 13 F.L.R. 151 and the judgment of the court implied approval of what we might call the Australian authorities (of which *R. v. Howe* is the principal) to the effect that where self-defence could successfully have been relied upon where it not for the fact that the force used by the appellant was excessive in the circumstances, the appropriate verdict may be one of manslaughter. On the facts of the *Kesty Ta'afia* case this court thought that position arose, and that it had been unnecessary for the judge to deal with provocation, as he had done.

In *Regina v Jai Chand* [1972] 18 F.L.R. 101 a ruling on the question of no case to answer the Chief Justice considered in detail the authorities on this question, though the matter was not directly in issue before him; by that time the cases of *Palmer v. Reginam* and *R. v. McInnes* had been heard and in *Palmer's* case the Privy Council did not follow the Australian authorities. The learned Chief Justice was clearly not persuaded that the Australian authorities' approach was not to be preferred at least in the circumstances of Fiji.

The question of whether the Privy Council's judgment is "binding" on the courts of Fiji was not argued before us. The Chief Justice thought it to be of only persuasive authority in view of section 17 of the Penal Code (Cap. 11) which provides that "criminal responsibility for the use of force in the defence of person ... shall be determined according to the principles of English common law". It appears to us that the

Privy Council was in fact basing its judgment in *Palmer's* case on the English common law and there is no sufficient reason why the Fiji courts should not be guided by the judgment, as the English Court of Appeal was in *R. v. McInnes* (supra).

That is not to say that particular considerations applicable to Fiji are to be disregarded. For example, at the end of his judgment in *Jai Chand's* case the Chief Justice said:

> "There is one additional comment I feel it necessary to make on *R. v. McInnes*. In the penultimate paragraph of the judgment of the Court of Criminal Appeal (page 1610) there occurs the following sentence:
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> 'Despite the high esteem in which we hold our Australian brethren, we respectfully reject as far as this country is concerned the refinement sought to be introduced that, if the accused, in defending himself during a fisticuffs encounter, drew out against his opponent (who he had no reason to think was armed) the deadly weapon which he had earlier unsheathed and then, 'let him have it,' the jury should have been directed that, even on those facts, it was open to them to convict of manslaughter.'
>
> That may well be the case in England, but in construing and applying the law a Court must have regard to local conditions. In a country where a large proportion of the population are men of extremely powerful physique capable with one blow of a fist of fracturing a person's jaw or of felling him to the ground with such brute force as to fracture his skull, and capable with a bare foot of delivering a kick of such power as to cause a person's death, a proposition that, in defending himself against such an attack a person must confine himself to 'fisticuffs' and that if he goes further and uses a deadly weapon resulting in the death of his assailant it is not open to convict of manslaughter in lieu of murder, does not commend itself to me; and I am not persuaded that it is the law in this country."

We respectfully agree, but this is not a question of what the common law is—only one of its application to a particular set of facts. The law is that only those steps which are reasonably necessary may be taken in self-defence. But whether they were in fact necessary falls to be decided as a matter of fact in the circumstances of each case. In Fiji the answer to that question, and the Chief Justice indicated, may be very different from an answer which might be reached in England or elsewhere.

The view we take of *Palmer's* case is that it is careful to emphasise the importance of the particular circumstances of every case. At page 832 the judgment says—

> "There are no prescribed words which must be employed in or adopted in a summing up."

The passage continues:—

> "All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person

attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken."

It seems that there the Privy Council is pointing to an appropriate avenue to cover the case where what might otherwise be thought to be excessive force had been used.

Important words are:—

"But their Lordships consider, in agreement with the approach in the *De Freitas* case (1960) 2 W.I.R. 523, that if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case. If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this then they will acquit. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then that matter would be left to the jury."

The learned judge in the present case endeavoured to follow these directions but, as we have indicated, failed to recognise the need for leaving the issue of provocation. The final sentence in the passage we have just quoted, which can be assumed to be intended to be more than a statement of the obvious, is not clear. It probably includes a refence to such cases as *R.v. Cascoe* 54 Cr. App. R 401 (referred to in *McInnes'* case (supra) at p. 563) in which a possible element of negligence was present, but may well have wider significance in view of the infinite variety of circumstances which fall to be considered by the courts.

We do not propose to comment further upon the *Palmer* case except to say that it could well have as one of its objects the negation of any idea that, once a man has embarked upon necessary defence, he has full licence to continue at his own will an attack upon the other party which has become clearly unnecessary. That aspect of the matter was emphasised in *McInnes* (supra) at p. 562 where the judgment reads:

"But where self-defence fails on the ground that the force used went clearly beyond that which was reasonable in the light of the circumstances as they reasonably appeared to the accused, is it the law that the inevitable result must be that he can be convicted of manslaughter only, and not of murder? It seems that in Australia that question is answered in the affirmative (see Professor Colin Howard, 'Two Problems in Excessive Defence' (1968) 84 L.Q.R. 343), but not, we think, in this country. On the contrary, if self-defence fails for the reason stated, it affords the accused no protection at all."

Reverting now to the grounds of appeal, and particularly in view of our opinion on the question of the issue of provocation, we need only say that we find no substance in any of them, and no necessity for discussion of any, except Ground 7, which reads:—

"That the learned trial judge erred in law in permitting the Prosecution to lead evidence of the previous conviction of Arson when the learned trial judge conceded that it was highly prejudicial."

This ground mis-states the situation. The learned judge in his ruling on the matter did not concede that the evidence was highly prejudicial but said that, repeating counsel's argument, "It is said that motive is immaterial and for that reason evidence of motive is extremely prejudicial to the accused." While it is not necessary for the prosecution to prove motive the presence or absence of motive may affect the strength of the case for the prosecution: *Sharmpal Singh* [1962] A.C. 188. As stated in *Adams' Criminal Law and Practice* in New Zealand, proof of a motive may be relevant not only to the state of mind accompanying an act, but also to the question of whether the accused did or did not do the act—*Plomp* (1963) 110 C.L.R. 234.

In admitting the evidence the learned judge based himself on *Makin v. Attorney General for New South Wales* [1894] A.C. 57. It is apparent that the evidence in question was not tendered to show a bad disposition on the part of the appellant. It was not a case of a crime being committed against other members of the public but was an intergral part of a series of events involving the appellant and the deceased. The evidence of enmity between them and its causes was very relevant to the question of intent and the actual conviction of arson was just a part, of no particular importance, of the whole series. We do not consider it to have been wrongly admitted and disagree that it ought to have been rejected in the exercise of the learned judge's discretion. It was in our estimation a matter of very appreciable probative value.

The result of the appeal must next be considered. Counsel for the appellant submitted that if the court arrived at the opinion we have done, it should quash the conviction of murder, and substitute one of manslaughter. Counsel for the Crown, on the other hand, invites us to apply the proviso to section 23(1) of the Court of Appeal Ordinance, and maintain the conviction of murder on the ground that "no substantial miscarriage of justice has occured". He relies upon the great strength of the Crown case; the evidence has been set out at some length and all we need say at this stage is that we agree it is a most formidable case. Counsel also relies upon the difference between countries having a jury system and Fiji, where there are assessors whose function is advisory only. The argument is that while it may be undesirable for a Court of Appeal, by application of the proviso, to determine the issues surrounding the question of provocation, as was held in *R.v. Whitfield* 63 Cr. App. R. 39, the same reasoning does not apply in the case of assessors.

In R. v. Whitfield the court was impressed by the fact that by section 3 of the Homicide Act, 1957, it is specifically provided that the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury. To apply the proviso would be to determine it otherwise, though the court was not prepared to say it could never be done. There is no such specific provision in Fiji but the assessors' views are invited on all questions of the fact so there is no essential difference. Counsel's point that the functions of juries and of assessors under the Fiji system differ was augmented by reliance upon the fact that in his judgment the learned judge said—"I do not believe that there was any melee as the accused suggests." That is a clear indication of his opinion that no question of manslaughter arose, and as he is the final arbiter at the trial there was no injustice.

An argument almost on all fours with this one was rejected by the Privy Council in *Bharat v. Reginam* [1959] 3 All E.R. 292. There the trial judge had not left provocation to the assessors and it was submitted that the misdirection did not matter, as the

trial judge disbelieved the appellant's story altogether. The Privy Council held that
A though a judge is not bound to conform to the assessors' opinions he must at least take them into account. The misdirection disabled the assessors from giving the aid they should, and in turn disabled the judge from taking their opinions into account. The Privy Council regarded that as a fatal flaw.

We have considered the authorities on the question of the application of the proviso in murder cases. In particular we have derived guidance from the following
B passage from the judgment of the Privy Council in *Anderson v. The Queen* [1971] 3 W.L.R 718, 725:—

> "It cannot be the case that the proviso is never applied in murder cases nor can it be the case that for the application of the proviso there cannot be any possible criticism of the summing up. Their Lordships realise that in cases of murder great care must be taken to see that there has been no miscarriage of justice.
C Further than that they do not consider it wise to lay down any principle."

Having given the matter our best consideration we are of opinion that the proviso should not be applied. It would, we think, render the court open to a charge of inconsistency, having held that there was material fit for the assessors' consideration on the question of provocation, if it then held that failure to afford them that opportunity could have resulted in no substantial miscarriage of justice.
D

For these reasons we allow the appeal, and set aside the conviction of murder and the sentence imposed. On a proper direction the least the appellant can have been convicted of is manslaughter and he is accordingly convicted of that offence, contrary to sections 227 and 234 of the Penal Code.

As to sentence, we agree entirely with the learned judge's opinion that this was a
E dastardly crime, and it remains so in spite of the alteration of the conviction from murder to manslaughter. Even considering the appellant's youth we can impose no more lenient sentence than ten years' imprisonment and it is so ordered, the sentence to run from the date of the original sentence.

Appeal allowed: conviction of manslaughter substituted and sentence of ten years imprisonment imposed.