COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCrApp No. 183 of 2018

BETWEEN

LAMAR ALBURY

Applicant

AND

THE ATTORNEY GENERAL

Respondent

BEFORE:	**The Honourable Sir Michael Barnett, P** **The Honourable Mr. Justice Isaacs, JA** **The Honourable Mr. Justice Evans, JA**
APPEARANCES:	**Ms. Marianne Cadet, Counsel for the Applicant** **Ms. Stephanie Pintard, Counsel for the Respondent**
DATES:	**19 May 2021; 14 July 2021; 8 September 2021; 7 October 2021**

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Criminal appeal – Appeal against conviction – Extension of time Application – Manslaughter - Whether there were defects in the summation – Penal Code Section 107 (4) - Retrial

The appellant was charged with the murder of Devince Smith. His defence was that the deceased had shown him pornography and when he objected and expressed distaste for the images, the deceased grabbed and held his penis and tried to strike him over the head with a vase. He stated that he believed that he would have been raped by the deceased and defended himself by stabbing the deceased. Smith was stabbed multiple times about the head, neck and chest. The appellant was found not guilty of murder but was convicted of manslaughter by provocation. He appeals his conviction on numerous grounds inter alia that "the learned judge failed to give an adequate direction to the jury in relation to the Appellant Defence of self defence, which affected the safety of the conviction and fairness of the trial." The court heard the parties and reserved its decision.

Held: appeal allowed; the conviction and sentence are quashed. We order that the appellant be retried for the offence of manslaughter and that the new trial is held as soon as is practicable.

Although the trial judge did give the required direction as to honest belief she failed to adequately make clear to the jury what the actual circumstances were as the Applicant perceived them to be. The learned Judge did not seem to focus her mind to the fact that the primary concern expressed by the Applicant at trial was that he was of the view that the deceased intended to rape him. The evidence from the Applicant was that the deceased grabbed and held the applicant's penis and attempted to hit him over the head with a vase. The Applicant then having an honest belief that the deceased was attempting to rape him, defended himself to prevent being raped**.** The implication being that the use of the vase was intended to subdue the Applicant to facilitate the rape by the deceased.

Section **107 (4) of the Penal Code** clearly list rape as one of the crimes against which a person may defend themselves by using force even to the extent of killing the attacker. It is unfortunate that the learned trial judge focused her attention to the crimes of causing dangerous/ grievous harm or death.

The learned judge was of the view that the jury could find the Applicant not guilty of murder by virtue of self defence but still proceed to consider and convict on a charge of manslaughter by provocation. This is consistent with the ambiguity of the judge's summation. This was clearly wrong. If the jury had found that the Applicant was justified in defending himself and that in doing so he used reasonable force he was entitled to be acquitted of all charges. If the jury was of the view that he was entitled to defend himself but he used more force than was necessary they ought to find him guilty of manslaughter. The issue of manslaughter due to provocation could only arise where the jury rejected the defence of self defence completely, that is to say, that the force used was not justified (which the judge said that the jury found was justified). It is only then that they could have properly considered whether the Applicant was motivated by provocation.

Arnold Livingston Kelly v. Regina [2007] 1 BHS J No. 60 followed
Doyle Amero Mackey v DPP SCCrApp 187 of 2019 followed
Alexander Williams v. Regina SCCrApp No. 155 of 2016 considered
Errol Knowles v Regina SCCrApp. No. 79 of 2017 considered
Garvin Adderley v Regina SCCrApp. No. 250 of 2017 considered
Rodriguez Jean Pierre v Regina SCCrApp. No. 110 of 2019 considered
Attorney General v. Omar Chisholm MCCrApp No. 303 of 2014 followed

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J U D G M E N T

Judgment by the Honourable Mr Justice Milton Evans JA,

1. The Applicant was charged with one (1) count of Murder contrary to section 291(1) (b) of The Penal Code, Chapter 84 of the Statute Law of The Bahamas. After a trial by jury he was on 8th March, 2017 convicted of the lesser offence of Manslaughter by Reason of Provocation. A sentencing hearing followed thereafter and the Applicant was sentenced to twenty (20) years

imprisonment at the Department of Correctional Services. The commencement date for the sentence was the 8th March, 2017. However, as the Applicant had been remanded to DCS without bail during the period 7th January, 2016 to 7th March, 2017 a period of one (1) year and Two (2) months was ordered to be deducted from the sentence of twenty (20) years.

2. The Applicant signed an appeal form in 2017 and inquired with the Records Department of the Bahamas Department of Correctional Services (BDOC) in relation to his appeal. On the 10th August, 2018, the Appellant wrote a letter to the Court of Appeal Registry inquiring also in reference to his appeal. On the 27th August 2020, the Appellant signed another Notice of Appeal form, which was received into the Court of Appeal registry on the 22nd January, 2021. He was later assigned counsel from the Office of the Public Defender and a Summons and Affidavit in support of leave to for extension of his application to appeal was filed on the 17th June, 2021. The same was served upon the Respondents on the 18 June, 2021.

3. Based on the aforesaid the extension of time Application for leave to Appeal was filed out of time, a difference of about 3 year, 8 months since the sentence was passed.

4. The principles which govern the consideration of applications for extension of time are not in dispute between the parties and are indeed well settled within this jurisdiction. In the case of **Attorney General v. Omar Chisholm** MCCrApp No. 303 of 2014 this Court differently constituted observed that when the court is called upon to consider whether to grant an extension of time in which to appeal, there are four factors which are relevant; namely: (a) Length of delay, (b) The reason for the delay, (c) The prospect of success on appeal, and (d) Prejudice, if any, to the Respondent. See also the cases of See also **Alexander Williams v. Regina** SCCrApp No. 155 of 2016, **Errol Knowles v Regina** SCCrApp. No. 79 of 2017, **Garvin Adderley v Regina** SCCrApp. No. 250 of 2017, and the more recent case of **Rodriguez Jean Pierre v Regina** SCCrApp. No. 110 of 2019.

5. The Applicant gave as his reason for the delay that the delay in signing his notice of appeal within the 21 days required to file his appeal was due to matters beyond his control, he indicates that he originally signed an appeal in 2017. He was without counsel and means and by his inquiries to the Records Department of BDOC and the Court of Appeal registry showed his interest and efforts in proceeding with his appeal. He however asserted that notwithstanding his delay his appeal had good prospects of success.

6. Ms. Pintard in her submissions contended that the application should be dismissed. She argued that the reasons given for the delay were inadequate and that in any event the extension of time ought not to be granted as there is no prospect of success on appeal.

7. The delay in this matter is significant but the reasons for the delay provided are not spurious. However, I am of the view that the resolution of this application will depend on the prospects of success of the proposed appeal.

THE EVIDENCE IN THE CASE

8. The case for the prosecution was that the Applicant intentionally caused the death of the deceased**.** Although there were several witnesses called by the Crown the material facts are

derived from a statement given to the Police by the Applicant in which he admitted stabbing the deceased together with his evidence before the Court. The evidence of Dr. Caryn Sands the pathologist formed the other material aspect of the crown's case.

9. The case for the Applicant was that the deceased showed him some pornography, he withdrew himself because he was not in agreement with what was being shown to him. The applicant indicated to the deceased his displeasure of what was being shown to him and backed away. However the deceased grabbed and held the applicant's penis and attempted to hit him over the head with a vase. The Applicant having an honest belief that the deceased was attempting to rape him, he defended himself to prevent being raped**.**

10. The evidence of the Pathologist Dr. Caryn Sands performed an autopsy on the deceased's body. She noted that he died of thirty-three sharp force injuries to his head, neck, torso and extremities. The sharp force injuries were as follows:

    • 7 sharp force injuries to the head ranging from 1 inch to 4-1/2 inches long

    • 3 injuries on the neck one of which cut through the neck and was 4-3/4 inches long

    • 13 wounds on the back one of which was a stab wound with a depth of 21/2 inches

    • 10 wounds to the arm and legs

11. The jury after receiving directions from the trial judge went into deliberations and returned later with a verdict of Not guilty for Murder but guilty for manslaughter by provocation. The Applicant's primary complaint is that those directions provided to the jury were inadequate and led to a verdict which was unsafe and unsatisfactory.

THE PROPOSED APPEAL

12. The Applicant in support of his application for leave to appeal proffered the following proposed grounds of Appeal:

> *"(I) That a material irregularity occurred in the trial, in that:*
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> *(i) The conviction is unsafe and unsatisfactory for reasons no reasonable tribunal, properly directed on the law and seized of the facts, could have come to the conclusion to convict. The learned judge failed to give an adequate direction to jury in relation to the Appellant Defence of self defence, which affected the safety of the conviction and fairness of the trial.*
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> *(ii) That the learned judge failed to give a good character direction.*
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> *(iii) That the learned judged erred by not factoring provocation as a mitigating factor.*
>
> *(iv) That the sentence is unduly harsh and severe.*

(v) Any other grounds that become apparent from the record".

13. As is readily evident from the proposed grounds the issue on the appeal relative to the conviction centered on the adequacy of the Judge's summation. The Applicant's defence was self-defence and the crown's position was that the circumstances of the case were not consistent with his claim and as such the jury were asked to reject his defence.

THE LAW

14. The relevant provision of the Penal Code which formed the basis of the judge's direction and the Jurys consideration was Section 107 (4) which is in the following terms:

> **"(4) For the prevention of, or for the defence of himself or any other person against, any of the following crimes, a person may justify any necessary force or harm, extending, in the case of extreme necessity, even to killing, namely —**
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> **(a) treason;**
>
> **(b) piracy;**
>
> **(c) murder;**
>
> **(d) manslaughter, except manslaughter by negligence;**
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> **(e) robbery;**
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> **(f) burglary;**
>
> **(g) house-breaking;**
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> **(h) arson of a dwelling-house or vessel;**
>
> **(i) <u>rape;</u>**
>
> **(j) <u>forcible unnatural crime;</u>**
>
> **(k) <u>Dangerous or grievous harm.</u>"** [Emphasis added]

15. The authorities are also clear as to how a trial judge should guide a jury in their consideration of a case where the defence of self defence has been raised. In **Doyle Amero Mackey v DPP** SCCrApp 187 of 2019, a case recently decided by this Court (differently constituted) after reviewing the leading authorities on the issue stated as follows:

> **"24. The effect of these highly persuasive authorities is that without prescribing a set formula for the directions which are to be given to the jury two fundamental points must be made clear. Firstly, the trial judge should make it clear to the Jury that the**

test for self defence is whether the Defendant had an honest belief that he or someone else was in immediate danger of unlawful harm. The importance of that is that the belief may be mistaken but yet honest. The issue of reasonableness is relevant to the determination of whether the belief was honest but it is not conclusive. The jury must consider all of the facts of the case and the evidence given. It follows that whereas the jury may look at the circumstances and determine that the belief was not reasonable that is not the end of the matter. <u>The Jury must go further and answer the question as to whether although the view of the circumstances taken by the defendant was not reasonable he nevertheless held an honest belief that his view was correct and acted accordingly.</u>

25. <u>The second point of importance is that the determination of whether excessive force was used by the defendant must depend on the danger as the defendant honestly perceived it to be.</u> As such the defendant may be mistaken as to the fact of the danger or alternately the severity of the danger which he faces. In either case the jury must consider whether his mistake was an honest one. The question is not whether the average man would make that mistake but whether the prosecution has satisfied them that the defendant was not honestly mistaken as he asserted." [Emphasis added]

16. Mr. Rolle submitted that although the trial judge did give the required direction as to honest belief she failed to adequately make clear to the jury what the actual circumstances were as the Applicant perceived them to be. In order to properly assess this submission it will be necessary to set out in some detail the directions given by the Judge. They are as follows:

> **"When considering the issue of self-defence, if you accept the evidence of the witnesses for the prosecution with regard to the circumstances that led up to the defendant coming into contact with the deceased and with respect to how the incident happened as being reliable and truthful, this means that you ought to consider whether, under the circumstances described by the defendant during the interview at CDU and also in the written statement purportedly made by him, as well as the evidence taken from the defendant at this trial, the defendant was entitled to defend himself so as to prevent the offence of murder, or Prevent the offence of manslaughter, or Prevent the offence of dangerous harm, or Prevent the offence of grievous harm or to put it another way you must consider whether the actions of the defendant were necessary for the prevention of or defence**

against one of the crimes mentioned in s.99 of the Penal Code as outlined by me earlier.

If you find that the defendant intended to kill Devince Smith when he inflicted injuries to his body, you must go on to examine all of the remaining evidence presented at this trial to determine whether there is sufficient evidence to satisfy you that the prosecution has proven that the defendant was not acting in self defence.

After carefully considering the evidence as a whole, including the defendant's evidence, you must decide if the defendant had a lawful right to defend himself on 19th December, 2015 and also whether, having regard to the defendant's account of the incident, the prosecution has satisfied you so that you feel sure that the defendant was not acting in lawful self-defence.

With regard to the case before you, if you find that it is necessary for you to consider the issue of self defence, there are two main questions for you to answer: -

(1) did the defendant Lamar Albury believe or may he honestly have believed that it was necessary to defend himself. If the prosecution has made you sure that the defendant did cause the death of Devince Smith but that he did not attack in the belief that it was necessary to defend himself, then self defence simply does not arise in this case.

If you decide that the defendant was or may have been acting in the belief that it was necessary to defend himself, then you must go on to answer the second question i.e.

(2) taking the circumstances as the defendant believed them to be, was the amount of force that he used reasonable? The law is that force used in self defence is unreasonable and unlawful if it is out of proportion to the nature of the attack or if it is in excess of what is really required of the defendant to defend himself or another.

With regard to the issue of whether the defendant honestly believed that it was necessary to defend himself, you must consider the circumstances from the perspective of the defendant at the time the events were happening.

The issue for you is not what the ordinary man would have done under those circumstances. The issue is not what you, the jury or what the ordinary person would have done under those

circumstances. The issue is whether the defendant honestly believed that it was necessary for him to defend himself at that time.

This means, members of the jury that you must put yourself in the mind or in the head of the defendant at the time that the incident was taking place. You must ask yourself what was the defendant thinking at the time.

You must ask yourself did the defendant honestly believe what he said during the Interview and recording of the written Statement taken from him? You will recall that during the interview the defendant said Vince came at him and tried to feel him up and rape him.

If you believe that the defendant was being truthful then it is up to you the jury to decide whether the defendant honestly believed that he had to defend himself at the time.

When considering the issue of whether the defendant honestly believed that it was necessary to defend himself, you may also consider the following:

1. What was the potential risk to the defendant if Devince Smith tried to feel up the defendant and if Devince Smith tried to hit the defendant in his head with a figurine? Could the actions of Devince Smith result in dangerous harm, grievous harm of death to the defendant?

2. The law provides for the lawful use of harm for the prevention of dangerous harm, grievous harm or death.

3. Did the defendant honestly believe or could the defendant have honestly believe that the actions of Devince Smith would cause him dangerous harm or grievous harm or result in his death?

4. Was the defendant justified in believing that he was preventing dangerous harm, grievous harm or death. Did he have an honest belief that he was preventing such?

5. Did the defendant honestly believe that he was defending himself against dangerous harm, grievous harm, or death?

These are all issues for you to decide on members of the jury. In the event, that you find that the defendant was acting in the honest belief that it was necessary for him to defend himself, it is for you, the jury to decide whether the force used by this

defendant, was unreasonable under the circumstances as they were presented in the evidence.

In deciding the question of whether the force used by the defendant was unreasonable or disproportionate under the circumstances outlined, you are to use your common sense, experience, knowledge of human nature and of course, your assessment of what actually happened at the time of the incident.

You must bear in mind that the law provides that self-defence is available to the defendant even if he kills the perpetrator of the attack provided that he was in imminent danger of harm and provided that he honestly believed that it was necessary for him to do so.

At this point, I again remind you that you are not to speculate. You are not allowed to fill in what you may perceive as gaps in the evidence. You are not allowed to fill in any gaps with your own suspicions or speculations as to what took place on 19th December, 2015. You are only allowed to take into consideration evidence that was presented at this trial.

When considering the evidence that is before you, if you find that Devince Smith physically attacked the defendant, you must move on to decide whether the defendant acted under a mistaken fact that Devince Smith was about to kill him or whether the defendant acted under a mistaken fact that Devince Smith was about to inflict dangerous or grievous harm on him.

If you find that the defendant was acting under a mistake as to the facts, you must judge him according to his mistaken belief of the facts regardless of whether, when viewed objectively, his mistake was not reasonable.

The test that you must apply to this case is whether the defendant held an HONEST belief, regardless of whether that belief was reasonable or not. You should bear in mind that a person who is defending himself, cannot be expected in the heat of the moment to weigh precisely the exact amount of defensive action that is necessary.

More often than not, self-defence arises in situations where the actions of the accused person are spontaneous. The more serious the attack upon the accused person, the more difficult his situation will be. If, after carefully considering all of the facts, you are sure that it was necessary for the defendant to defend

himself and if you find that the force used by the defendant was or may have been reasonable, then you must find him not guilty of murder.

Alternatively, if after considering the facts you find that it was necessary for the defendant to defend himself and if you find that the force used to prevent the threat or attack went beyond what could in all the circumstances be justified. Then the defendant cannot avail himself of self-defence.

In the event, that you find that it was not necessary for the defendant to defendant to defend himself then, provided that you are satisfied so that you feel sure that the prosecution has proven all of the essential elements of the offence of murder, i.e. provided that you find that the prosecution has satisfied you beyond a reasonable doubt that the defendant intentionally caused the death of Devince Smith by means of unlawful harm and that Devince Smith died within a year and a day of the unlawful harm being inflicted, then you must find the defendant guilty of murder.

Again, I remind you that it is the prosecution who must prove that the defendant was not acting in self-defence. I also remind you that the prosecution must prove its case to the extent that you feel sure that the defendant committed the offence of murder and this means that you must feel sure that the defendant was not acting in lawful self defence.

I also remind you that the prosecution does not have to prove its case beyond a shadow of a doubt.

Ladies and gentlemen of the jury, you will recall that I said earlier that s. 290 of the Penal Code states that whoever intentionally causes the death of another person by any unlawful harm is guilty of murder, unless. His crime is reduced to manslaughter by reason of such extreme provocation as outlined in the Penal Code. As I indicated earlier, in the event that you find that the defendant was acting in lawful self-defence then your verdict must be not guilty on the charge of murder.

However, if you find that the defendant was not acting in lawful self defence. And you find that the prosecution has proven all of the ingredients or elements of the offence of murder that were explained earlier, before you convict the defendant of murder you must make sure that the prosecution has satisfied you that the defendant was not provoked to do as he did.

As in the case of self-defence, just as it is the duty of the prosecution to prove its case so that you feel sure that the defendant was not acting in self-defence, it is the duty of the prosecution to prove to you that the defendant was not provoked by Devince Smith when he inflicted the harm on Devince Smith. If you find that the prosecution has satisfied you beyond a reasonable doubt that the defendant intentionally caused the death of Devince Smith by means of unlawful harm and if you are satisfied that in doing so the defendant was not provoked to do as he did, your verdict should be guilty of murder.

If on the other hand, you conclude that the defendant intentionally caused the death of Devince Smith and you find that he was provoked by Devince Smith immediately before doing so, then your verdict should be not be guilty of murder, but guilty of the less serious offence of manslaughter by reason of provocation.

In this regard, s299 of the Penal Code, as it relates to this case, states: "A person who intentionally causes the death of another person by unlawful harm shall be deemed to be guilty only of manslaughter, and not of murder, if any of the following matters of extenuation are proved on his behalf, namely:

1) That he was deprived of the power of self-control by such extreme provocation given by the other person as is mentioned in s300.

2) That he was justified in causing some harm to the other person, and that, in causing harm in excess of the harm which he was justified in causing, he acted from such terror of immediate death of grievous harm as in fact deprived him for the time being of self control."

S300 of the Penal Code, as it relates to this trial, states: The following matters may amount to extreme provocation to one person to cause the death of another person namely –

1) An unlawful assault and battery committed upon the accused person by the other person, either in an unlawful fight or otherwise, which is of such a kind, either in respect of its violence or by reason of accompanying words, gestures or other circumstances of insult or aggravation, as to be likely to deprive a person, being of ordinary character, and being in the circumstances in which the accused person was, of the power of self-control.

2) The assumption by the other person, at the commencement of an unlawful fight, of an attitude manifesting an intention of instantly attacking the accused person with deadly or dangerous means or in a deadly manner."

You should note members of the jury that s301 of the Penal Code provides: 301(1) "Notwithstanding proof on behalf of the accused person of such matter of extreme provocation... his crime shall not be deemed to be thereby reduced to manslaughter if it appears, either from the evidence given on his behalf or from evidence given on the part of the prosecution.

A. That he was not in fact deprived of the power of self control by the provocation.

B. That he acted solely or partly from a previous purpose to cause death or harm or to engage in an unlawful fight, whether or not he would have acted on that purpose at the time or in the manner in which he did act but for the provocation.

C. That after the provocation was given, and before he did the act which caused the harm, such a time elapsed or such circumstances occurred that a person of ordinary character might have recovered his self control.

D. That his act was, in respect either of the instrument or the means used or of the cruel or other manner in which it was used, greatly in excess of the measure in which a person of ordinary character would have been likely under the circumstances to be deprived of his self control by the provocation."

If you accept the evidence from the witnesses concerned and you find that the defendant intentionally caused harm to Devince Smith, how then do you determine whether the defendant was or may have been provoked to do as he did? There are two questions which you will have to consider before you are entitled to conclude that the defendant was or may have been provoked: 1) May the conduct of the deceased, that is the things Devince Smith did or said, or both, have provoked, that is, caused the defendant to suddenly and temporarily lose his self control. If you are sure that the answer to that question is "no" then the prosecution would have disproved provocation and providing that the prosecution has made you sure of all of the ingredients of the offence of murder to which I have referred, your verdict should be guilty of murder. If however, you find that the answer

to the question is "yes" then you must go on to consider the second question.

2) May the conduct of Devince Smith have been such as to cause a person of ordinary character to do as the defendant did? A person of ordinary character is simply a person who has that degree of self control which is to be expected of the ordinary citizen who is sober and is of the defendant's age and sex.

If you are sure that what was done and/or said would not have caused a person of ordinary character to do as the defendant did, the prosecution will have disproved provocation. Then, providing the prosecution has made you sure of the ingredients of the offence of murder, your verdict should be guilty of murder. If, on the other hand your answer is that what was done and/or said by Devince Smith would or might have caused a person of ordinary character, or a sober person of the defendant's sex and age, to do as he did, your verdict should be not guilty of murder but guilty of manslaughter (by reason of provocation).

You must bear in mind that in order to find the defendant guilty of manslaughter by reason of provocation, you must find that the defendant had the necessary intention to cause the death of Devince Smith. If you find that the defendant did not intend to kill Devince Smith, you cannot find him guilty of manslaughter by reason of provocation". [Emphasis added]

17. In my view there is merit in Mr. Rolle's submission. The learned Judge did not seem to focus her mind to the fact that the primary concern expressed by the Applicant at trial was that he was of the view that the deceased intended to rape him. The evidence from the Applicant was that the deceased grabbed and held the applicant's penis and attempted to hit him over the head with a vase. The Applicant then having an honest belief that the deceased was attempting to rape him, defended himself to prevent being raped**.** The implication being that the use of the vase was intended to subdue the Applicant to facilitate the rape by the deceased.

18. Section **107 (4) of the Penal Code** clearly list rape as one of the crimes against which a person may defend themselves by using force even to the extent of killing the attacker. It is unfortunate that the learned trial judge focused her attention to the crimes of causing dangerous/ grevious harm or death. This focus is seen in her direction where she specifically stated as follows:

"**If you believe that the defendant was being truthful then it is up to you the jury to decide whether the defendant honestly believed that he had to defend himself at the time.**

> **When considering the issue of whether the defendant honestly believed that it was necessary to defend himself, you may also consider the following:**
>
> **1. What was the potential risk to the defendant if Devince Smith tried to feel up the defendant and if Devince Smith tried to hit the defendant in his head with a figurine? Could the actions of Devince Smith result in dangerous harm, grievous harm of death to the defendant?**
>
> **2. The law provides for the lawful use of harm for the prevention of dangerous harm, grievous harm or death.**
>
> **3. Did the defendant honestly believe or could the defendant have honestly believe that the actions of Devince Smith would cause him dangerous harm or grievous harm or result in his death?**
>
> **4. Was the defendant justified in believing that he was preventing dangerous harm, grievous harm or death. Did he have an honest belief that he was preventing such?**
>
> **5. Did the defendant honestly believe that he was defending himself against dangerous harm, grievous harm, or death?**
>
> **These are all issues for you to decide on members of the jury. In the event, that you find that the defendant was acting in the honest belief that it was necessary for him to defend himself, it is for you, the jury to decide whether the force used by this defendant, was unreasonable under the circumstances as they were presented in the evidence.** [Emphasis added]

19. And later:

> "**When considering the evidence that is before you, if you find that Devince Smith physically attacked the defendant, you must move on to decide whether the defendant acted under a mistaken fact that Devince Smith was about to kill him or whether the defendant acted under a mistaken fact that Devince Smith was about to inflict dangerous or grievous harm on him**". [Emphasis added]

20. It is clear that a rape may not necessarily result in dangerous bodily harm or death but it leaves mental scars which are very difficult to heal. The law gives that person who is attacked or who has an honest belief that he will be so attacked the right to defend himself by the use of appropriate force. I will return later to whether this defect in the summation was sufficient to invalidate the conviction in this case.

21. The second aspect in which the learned trial judge's directions were challenged is with respect to the options available for possible verdicts in the case. In summing up the learned judge directed the jury as follows:

> **"I also remind you that, if you have any doubt and if that doubt is reasonable, you must give the defendant the benefit of that doubt. If you are satisfied so that you feel sure that the defendant caused harm to Devince Smith which resulted in the death of Devince within a year and a day and that the harm was not justified and that the defendant intended to kill Devince Smith at the time of inflicting the harm, you must find him guilty of murder.**
>
> **However, before you convict her (sic) of murder you must consider whether Devince Smith subjected the defendant to provocation. If you are satisfied that the defendant caused the death of Devince Smith by means of harm and that the harm was unlawful and that he was not acting in self defence but that he was provoked by Devince Smith and that the provocation was extreme, and that as a result of that extreme provocation, the defendant lost all self control, you must find him guilty of manslaughter by reason of provocation.**
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> **Not Guilty of Murder-Self Defence. If you are satisfied so that you feel sure that the defendant caused the death of Devince Smith but in doing so he acted in lawful self defence you must find him not guilty of murder.**
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> **In a nutshell there are three (3) options available to you:**
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> **(1) Guilty of Murder i.e., if you are satisfied so that you feel sure that the prosecution has proven all of the ingredients of the offence of murder.**
>
> **(2)Not Guilty of Murder i.e., if you are not satisfied so that you feel sure that the prosecution has proven all of the ingredients of the offence of murder or; If you are satisfied so that you feel sure that the prosecution has proven all of the ingredients of the offence of murder but you are also satisfied so that you feel sure that the defendant acted in lawful self defence.**
>
> **(3)Not guilty of murder but guilty of manslaughter by reason of provocation. I.e. if you find that prosecution has proven all of the ingredients of the offence of murder but you also find that the defendant was provoked into committing the acts that he did".**

22. Section 299 (1) and (2) of the Penal Code provides as follows:

> **"299. A person who intentionally causes the death of another person by unlawful harm shall be deemed to be guilty only of manslaughter, and not of murder, if any of the following matters of extenuation are proved on his behalf, namely —**
>
> **1) That he was deprived of the power of self-control by such extreme provocation given by the other person as is mentioned in section 300; or**
>
> **(2) <u>that he was justified in causing some harm to the other person, and that, in causing harm in excess of the harm which he was justified in causing, he acted from such terror of immediate death or grievous harm as in fact deprived him for the time being of the power of self control</u>".** [Emphasis added]

23. It is to be noted that although the trial judge referred the jury to this Section she did not raise with them Section 299(2) as an option for their consideration and determination. The authorities are clear that in order to put all relevant issues before the jury for their determination such a direction was necessary. In the case of **Arnold Livingston Kelly v. Regina** [2007] 1 BHS J No. 60, Dame Joan Sawyer P dealt expansively with the law relative to self defence and in doing so commented as follows:

> **"34<u>. It is important to note that nowhere in the summing-up did the learned judge tell the jury that if they found that while the use of some force by the appellant to defend himself from the attack by the deceased may have been justifiable, the force used by him was excessive, that they could then return a verdict of guilty of manslaughter bearing in mind the provisions of section 299(b) of the Penal Code...</u>**
>
> **…**
>
> **51. The law of The Bahamas includes several express provisions which allow a jury to return a verdict of not guilty of murder but guilty of manslaughter including, but not limited to, the well-known exceptions in the case of provocation and diminished responsibility. Among those provisions is one which specifies that where excessive force is used in cases where the use of some reasonable force may be justified, a killing resulting from the use of such excessive force will be reduced to manslaughter if the accused person acted from such terror of his own impending death or serious bodily harm as to lose his self-control.**

52. In Vasquez v The Queen [1994] 1 WLR, the Privy Council considered section 116(a) of the Criminal Code of Belize and although their Lordships accepted that the opening words of section 116 of that Code clearly intended to impose the burden on the defendant to establish any of the matters in (a) to (d) of that section on which he wished to rely, they nevertheless held that that subsection should be read as placing a burden on the prosecution to disprove provocation if the evidence in the case raised the question whether the defendant when performing the act complained of had been provoked to lose his self control and act as he did. I think the same reasoning applies to self-defence under s. 299(b) of the Penal Code.

53. The Privy Council reached a similar conclusion with regard to subsection 116(b) of the Criminal Code of Belize in Shaw's case. <u>In this case, while the learned judge did direct the jury on the issue of provocation, he did not direct them on the issue of excessive force used in the defence of oneself or another. In light of the number of stab wounds suffered by the deceased and on the other evidence in the case, the issue of excessive use of force in defence of himself clearly arose. It was therefore the learned judge's duty to have directed the jury on subsection 299(b) of the Penal Code no matter what the learned judge's opinion of the weight of the evidence was</u>." [Emphasis added]

24. The issue addressed in **Kelly** admittedly has more relevance in a murder Appeal. However in our particular case the issue on this aspect of the summing up is whether the learned judge made it sufficiently clear to the jury that the three possible verdicts identified by her were alternate verdicts and thus option 3 was not relevant if the jury arrived at a finding in accordance with the second option she provided to them. It is significant that the judge did not say to the jury that if they found the Applicant not guilty by virtue of self defence they were to acquit him. In this regard the jury could have been left with the understanding that they could lawfully proceed to option 3 and consider manslaughter by provocation notwithstanding a finding that the Applicant had acted in lawful self defence.

25. This concern is heightened by certain comments made by the trial judge in her sentencing decision dated the 16th August 2017. At para graph 21 the learned judge set out the mitigating factors as follows:

"21. In considering what sentence to impose on Albury I have noted the following mitigating factors:

• Albury has admitted that he caused Smith's death and as such he has accepted responsibility for his actions

• The jury determined that Albury had been provoked by Smith

> **• The jury determined that he was deprived of the power of self control**
>
> **• the jury determined that he was justified in causing excessive harm to Smith**
>
> **• Albury has one previous conviction for Possession of Dangerous Drugs**
>
> **• he has never been convicted of an offence that involves harm to the person or resulted in death • at 27 years of age, he is relatively young**
>
> **• he has not been involved in any major infractions of the Rules since his remand at DCS**
>
> **• by participating in the Alpha Male Programme and Parenting Classes at DCS he has demonstrated a willingness to be rehabilitated**
>
> **• he has expressed sympathy and/or empathy for Smith and his family".** [Emphasis added]

26. At paragraph 28 the learned judge made the following observation:

> **"28. As I indicated earlier, the jury has determined that Smith's actions caused Albury to lose his self-control. In his defence, Albury contends that Smith was trying to rape him and that Smith was "constantly" trying to hold him down and wrestle with him. He said Smith held his "private" and tried to hit him in his head with a vase. While I take note of the excessive amount of injuries inflicted on Smith, I am mindful of the fact that the jury found that the infliction of thirty-three wounds to Smith's head, neck, torso and upper extremities were justified."** [Emphasis added]

27. It is clear from these two passages that the learned judge was of the view that the jury could find the Applicant not guilty of murder by virtue of self defence but still proceed to consider and convict on a charge of manslaughter by provocation. This is consistent with the ambiguity of the judge's summation. This was clearly wrong. If the jury had found that the Applicant was justified in defending himself and that in doing so he used reasonable force he was entitled to be acquitted of all charges. If the jury was of the view that he was entitled to defend himself but he used more force than was necessary they ought to find him guilty of manslaughter. The issue of manslaughter due to provocation could only arise where the jury rejected the defence of self defence completely, that is to say, that the force used was not justified (which the judge said that the jury found was justified). It is only then that they could have properly considered whether the Applicant was motivated by provocation.

28. In my view the confusion relative to the verdict is the result of the learned trial judge failing to specifically leave the option of manslaughter by use of excessive force to the jury. There really were four options not three. This was compounded by the fact that the summation was devoid of a clear direction that a finding of justifiable use of reasonable force in self defence entitles a defendant to an outright acquittal. The judge being satisfied that the jury had accepted the Applicant's defence of self defence was in my view under an obligation to refuse to accept the verdict of guilty of Manslaughter by provocation.

29. I am of the view that it cannot safely be said as contended by the Respondent that the Jury rejected self defence before moving on to consider provocation. The trial Judge was clearly of a different view as seen from her sentencing remarks and no clarification was sought when the verdict was delivered. As a result coupled with the learned judge's failure to properly articulate the Applicant's assessment of the circumstances which led him to stab the deceased I am left with a lurking doubt as to the safety of the jury's verdict. I would therefore grant the extension of time to appeal and as we have heard full submissions in this matter proceed to determine the appeal in the Applicant's favour.

30. I am not satisfied that this is a case where the application of the proviso would be appropriate. In my view justice would be best served by a new trial being held. The errors which led to the conviction being quashed all relate to defects in the summation.

31. It is obvious that having regard to the not guilty verdict on the charge of murder a retrial would have to relate to the offence of manslaughter. I would therefore order that the conviction and sentence be quashed and a new trial held as soon as is practicable.

_____

The Honourable Mr. Justice Evans, JA

32. I agree.

_____

The Honourable Sir Michael Barnett, P

33. I also agree.

_____

The Honourable Mr. Justice Isaacs, JA