IN THE SEYCHELLES COURT OF APPEAL

CRIMINAL APPEAL NOS 4, 5 & 6 OF 1994

JEAN JOSE ANTAT	FIRST APPELLANT
ALLAIN LEON	SECOND APPELLANT
JIMMY CADEAU	THIRD APPELLANT
v	
THE REPUBLIC	RESPONDENT

Before : Silungwe, Ayoola & Adam JJA

Mrs. N. Tirant-Gherardi for the First Appellant
Mr. A. Juliette for the Second and Third Appellants
Mr. S. Fernando for the Respondent

REASONS FOR JUDGMENT OF THE COURT DELIVERED BY ADAM, J.A.

We dismissed the appeals against conviction on November 25, 1994 and reserved our reasons for that dismissal which we said would be given later. These are our reasons.

On July 7, 1994 the Appellants were convicted of murder by Alleear CJ when the jury entered a majority verdict of 8 in favour of guilty and 1 not guilty against the First and Second Appellants and a majority verdict of 7 in favour of guilty and 2 not guilty against the Third Appellant. On behalf of the First Appellant Mrs. Tirant-Gherardi pursued five of the grounds filed in her Memorandum of Appeal. These were as follows:

(a) that the verdict is unreasonable and cannot be supported by the weight of the evidence; in particular having regard to the weight which ought to be attached to the evidence of common intention and aiding and abetting;

(b) that the learned Chief Justice misdirected the jury as to the approach to the evidence of the various witnesses and confused the jury by his long summary of each witness' evidence;

(c) that the prosecution failed to establish conspiracy to murder or common intention of the First Appellant to commit the murder or the role played by him in aiding and abetting in the murder;
(d) that no evidence was adduced as to the presence of the First Appellant at the scene of the crime and there was no evidence of identification of the First Appellant as the driver of the vehicle seen at the scene of the commission of the crime;
(e) that the learned Chief Justice failed to address himself to the need to request a unanimous verdict from the jury and failed todirect the jury to retire for further consideration of their verdict.

Mr. Juliette lodged ten grounds on behalf of the Second and Third Appellants in his Memorandum of Appeal. These were as follows:
(a) that the learned Chief Justice erred in his ruling that there was no duty on the prosecution to make available to the defence a statement taken from a witness that it did not wish to call;
(b) that he erred in his directions on common intention in that he failed to direct the jury specifically on the facts of the case and wrongly directed them by giving examples that were prejudicial to the defence;
(c) that he erred in directing the jury on self-defence when it was not pleaded by the defence and by so doing he wrongly directed them that the Appellants had committed the offence;
(d) that he erred in failing to direct the jury that the prosecution had failed to establish conspiracy to murder or common intention of the First and Second Appellants to commit murder or the role played by them in aiding and abetting in the murder;

(e) that he erred in failing to direct the jury to properly consider the evidence surrounding the alleged identification of the Third Appellant by the one of the prosecution witnesses;

(f) that he erred in failing to direct the jury to properly consider the evidence surrounding the conduct of the identification parade and the application of the relevant rules concerning identification parades;

(g) that he erred in failing to direct the jury on the material inconsistencies in the evidence of various prosecution witnesses and the books tendered as exhibits such that they could not be relied upon;

(h) that he erred in failing to address himself to the need to request a unanimous verdict from the jury and failed to direct them to retire for further consideration of their verdict;

(i) that he erred in failing to direct the jury on the material inconsistencies in the prosecution's case;

(j) that the verdict is unsafe and unsatisfactory in all the circumstances of the case.

In arguing together the second and fourth grounds relating to common intention, aiding and abetting and the prosecution's failure to establish conspiracy by the First Appellant to commit murder, Mrs. Tirant-Gherardi submitted that in the evidence of prosecution witnesses there was no mention of the Third Appellant leaving with the First Appellant in the borrowed car. In order to be a party in the commission of the crime, two or more persons have to embark on a joint enterprise and so each is liable for acts done in pursuance of that joint enterprise. She said that Adelbert Esparon testified that the First Appellant came alone at 5.15 p.m. to borrow the red Datsun car with the registration number S 6429 and he expected him back at

6.30 p.m. but he did not come back until 9.15 p.m. Hetelle Larue testified that at 7.45 or 7.50 p.m. she left and was at the Bus Terminal at which time she saw the red car going past her with some registration numbers with 6 and 9 but she could not remember their sequence. From this Mrs. Tirant-Gherandi argued that an occupant was not seen, the driver was not seen and there was no evidence from the prosecution that the First Appellant was seen in Victoria. It is true that Thomas Banane testified that after the police received the report from Ralph Rose about the attack on the security person and about the gunshots when he was approaching in his private car near Meat Corner he saw a vehicle with lights coming from Meat Corner towards him and that when he was close to the drive into the car park of SMB Supermarket, a red Datsun car, with registration number 6429 (which he noted at first in the front and then in the rear but without any lights) go past him travelling at 10 to 15 miles per hour. Nilsey Morel identified the Third Appellant whom he knew as the person that he had seen running from the Meat Corner and in fact had bumped into him and who told him that the security guard had shot at him so he shot back, and that the Third Appellant had a gun and got into the red car that had no lights, with a rack on the roof and that it was a Datsun. He also had picked the Third Appellant the next morning at a police identification parade. It was submitted by Mrs. Tirant-Gherardi that the issue for the jury as far as the First Appellant was concerned was the weight that should be attached to that circumstantial evidence. She believed that this left certain room for doubt when all the evidence was taken together with the discrepancies that existed. She maintained that although the learned Chief Justice did go through and summarized every witnesses' evidence he did not indicate how the jury should approach the evidence, bearing in mind that there were

three accused persons. She argued that the common intention that the State set out to prove concerned robbery of SPTC's money. But outside the bank only one person was seen struggling with the security guard, while the person with the money bags was running to the Police Station. Therefore, the question was whether their common intention was to carry out a robbery and that the death of the security guard was a continuation of that robbery. Had the Accused followed the person with the money bags then Mrs. Tirant-Gherardi argued one could have maintained it was all part of the robbery. She submitted the act resulting in death was not a continuation of the attempted robbery. She criticised the learned Chief Justice for merely dealing with each witnesses' evidence and without anything further leaving the jury entirely on their own.

For the Second and Third Appellant Mr Juliette submitted that the learned Chief Justice erred that there was no duty on the prosecution to make available to the defence statements made by a person that the State did not wish to call. He cited Camille v The Republic 1978 SLR3 where Sauzier J (as he then was) held that it is the duty of the Prosecution to lay before the Court all the relevant and material fact, except that the prosecution need not call a witness it believed to be untruthful, but must then make the statement available to the defence. He also referred to Loizeau v The Queen (1966)S.C.AR.1 where the principal prosecution witness had given previous inconsistent statements to the police which were not disclosed by the prosecution to the defence or the trial court. This Court set aside the conviction and sentence because of the duty of the prosecution in relation to statements made by prosecution witnesses and relied on R v Knox (1927) 20 Cr.App.R 96. Also, Mr Juliette made

reference to Archbold CRIMINAL PLEADING EVIDENCE & PRACTICE, 1992, vol.1 at para 4-276 which stated:

> "Where the prosecution have taken a statement from a person whom they know can give material evidence but decide not to call him as a witness, they are under a duty to make that person available as a witness for the defence and should supply the defence with the witness' name and address. The prosecution are not under the further duty of supplying the defence with a copy of the statement which they have taken : R v Bryant and Dickson (1946)31 Cr.Appl.R 146."

He also referred to Amisi & Ors v Uganda (1970) E.A.C.A. 662 where the East African Court Appeal held that the prosecution in Uganda (where statements have been taken from a person who can give material evidence but decide not to call him as a witness) is under a duty to make that person available as a witness to the defence but they suggested that, except when there are some exceptional circumstances against this, the prosecution should also at the same time make the witness's statement available to the defence.

Mr Juliette in arguing grounds two and four about common intention submitted that in the learned Chief Justice's direction to the jury he merely gave them illustrations and did not direct them about the prosecution's failure to establish a conspiracy to murder or common intention to commit murder and the roles played by the Appellants in aiding and abetting in the murder. When the prosecution opened its case it stated that evidence of common design would be led and so the learned Chief Justice should have informed the jury that the prosecution had not done this instead of providing the jury with examples of what constituted common intention. It was incumbent upon him to assist the jury by dealing with the salient features of the evidence. He pointed out that an appellate court will quash a conviction where the jury did not get assistance from a judge's

direction upon a material aspect - R v Finch (1917)12 Cr.App.R.77. He also cited R v Lawrence (1981)73 Cr.App.R.1 at 5. He submitted that this non-direction by the learned Chief Justice amounted to misdirection.

He argued that where there are more than one accused the jury should be directed to give separate consideration to the position of each accused. He asserted that the learned Chief Justice did not direct the jury at all that during their deliberation they should give separate consideration to each accused. He argued that the examples he gave meant that the jury must look whether the three acted in concert.

He also submitted that the learned Chief Justice erred in directing the jury to consider self-defence because the issue of self-defence did not arise. By so directing them the learned Chief Justice was in effect telling them that the accused had done it.

He argued that the learned Chief Justice erred in failing to direct the jury to properly consider the evidence surrounding the alleged identification. The learned Chief Justice just repeated what was said in R v Turnbull (1976)63 Cr.App.R.132 and left it to the jury and did not direct the jury to consider the evidence. Again the learned Chief Justice merely read out part of the rules laid down in the 1978 Home Office Circular known as Identification Parade Rules and did not go into the evidence. He just told the jury if you believe the witnesses called by the prosecution, convict and if not, acquit. With regard to the evidence of the National Guards and the books concerning the recording of weapons Mr Juliette submitted that the

learned Chief Justice merely summarised their evidence and did not give sufficient directions to the jury. He also submitted that there were inconsistencies in the evidence of the prosecution which the learned Chief Justice did not direct the jury to consider. He said that the clothes worn by the alleged assailant of the deceased was a raincoat and a beret, that after a search of that area no clothing was found, that a witness called by the defence saw a person walking fast wearing something long blackish in colour near the Music Stadium and another prosecution witness talked to the Third Appellant with a gun in a track suit in the field. According to him the issue was whether the person who was involved in the struggle with the deceased was the Third Appellant which was not put to the jury by the learned Chief Justice.

Mr. Fernando for the Respondent submitted that as far as the cases of Camille v The Republic, supra, and Loizeau v The Queen, supra, cited by Mr. Juliette, these could be distinguished. Also, he pointed out that section 241(1) of the Criminal Procedure Code deals with the prosecution's duty of providing before the trial the names and addresses of all their witnesses along with the substance of the evidence they are expected to give. Since this statutory provision adequately covered the position there was no necessity of looking at the law in Britain. In any case, in R v Bryant and Dickson, supra, it was clearly stated that the prosecution was not under the further duty of supplying copies of the witness' statement. It is true that in Dallision v Caffery [1964]2 All ER 610 (CA) Lord Denning indicated that where a credible witness could testify to material facts which tend to show the innocence of the accused the prosecutions' duty was either to call the witness or to make his statement available to the defence.

But Diplock LJ (as he then was) did not go that far but merely spoke of the prosecutor's duty as being to make the witness available to the defence.

Mr. Fernando agreed that the issue of self-defence was not raised in the trial. But he referred to Palmer v R (1971) 55 Cr.App.R.227 and asserted that the learned Chief Justice correctly left that question to the jury whether it was raised or not by the defence.

Mr. Fernando submitted that the subject of identification was adequately dealt with and that the principles expounded in R v Turnbull, supra, had to be explained to the jury. He pointed out that at the locus in quo the learned Chief Justice specifically asked Nilsey Morel about the lamp post light and whether it was lit the same as on the night in question. He could find no fault with the learned Chief Justice leaving it to the jury to ask themselves whether Nilsey Morel's identification was reliable. He further argued that there is no requirement in law for the evidence of a single witness as to identity to be corroborated - Guy Agathe v R (1974) S.C.A.R 10.

As for the identification parade Mr. Fernando correctly pointed out that the learned Chief Justice initially placed the law before the jury, then briefly highlighted the material parts of each witness' evidence and at the same time gave examples. Finally he applied the case to the rules concerning the identification parade.

Mr. Fernando observed that the learned Chief Justice in his summing up pointed out to the jury 110 instances where the books had been corrected. Mr. Fernando stressed that there was direct evidence

prosecution witness that he was given a gun numbered 2933 and that no one took it from him. The prosecution witness who issued guns that night testified that he gave a gun numbered 3896 to the Second Appellant but the following day the Second Appellant handed in the deceased's gun to him numbered 2813. He was not shaken under cross-examination. Further, he argued the corrections in the book which disclosed the gun issued to the Second Appellant was not a mistake as the defence tried to put to the prosecution witness but a deliberate alteration. He emphasized that that particular witness had a remarkable memory which was tested in court by the counsel for the First and Second Appellants. Another prosecution witness corrobrated the evidence of the witness who issued the gun by testifying that the Second Appellant was given the gun at his post. The evidence disclosed that the deceased's gun was missing when the police got to the scene where the body was found.

Mr. Fernando submitted that the learned Chief Justice had a discretion in the matter and there was nothing procedurally improper about him not asking the jury to go back to consider a unanimous verdict. He referred to R v Georgiou (1969)53 Cr.App.R.428.

Mr. Fernando argued that on the one hand the defence complained that the learned Chief Justice in his summing up to the jury did not apply the facts in the case to the law and on the other hand they say that when the learned Chief Justice gave examples they were too close to the facts of this case. He maintained that the learned Chief Justice was entitled in law to give examples in order to explain things to the jury and in the examples he placed before them

he clearly pointed out what had been proved and what had not been proved.

Mr. Fernando submitted that it was not the prosecution's case that the Appellants entered into a conspiracy to murder. The prosecution relied upon common intention. This was that the Appellants had a common intention to carry out an unlawful purpose and that during its perpetration the probable consequence of that unlawful purpose was that murder could result. The prosecutions' allegation was that the principal and those who aided and abetted all shared that common intention. The learned Chief Justice in his summing up very clearly put the defence and prosecution case by the example he gave to the jury. Mr. Fernando also cited Padayachy and Hoareau v The Republic, Criminal Appeal Nos 9 and 10 of 1988.

As for the inconsistencies Mr. Fernando said that it was not the prosecution's case that the person who struggled with the deceased was the Third Appellant. The Third Appellant, according to Mr. Fernando, was convicted by the jury because they accepted the evidence of Nilsey Morel. It was Nilsey Morel's evidence that he saw the Third Appellant running from the Meet Corner towards the Complex getting into the gutter, subsequently identified him. Later the deceased's body was found near the junction at the Meet Corner. Mr. Fernando argued that the learned Chief Justice put to the jury all the evidence that was led, put the law adequately to the jury and asked the jury to come to their verdict applying the law to the evidence they heard. Generally a judge is entitled to comment on the evidence but this is not mandatory. He submitted that the learned Chief Justice did not err in his summing up to the jury and the examples he gave were

permissible and so there was no misdirection. In this connection he made reference to R v Stoddart (1909)2 Cr.App.R.217.

Mr. Fernando conceded that the prosecution did not lead any direct evidence of identification of the First Appellant as the driver of the vehicle seen at the scene after the commission of the offence and of the First Appellant being present at the scene of the crime. But the prosecution relied on the facts that he borrowed a vehicle at 5.15 p.m. with a promise to return it at 6.30 p.m. (when it was actually returned at 9.15 p.m.); that the Third Appellant was picked up at a place where he waited for a red Datsun described by Nilsey Morel; and a vehicle was identified by Thomas Banane as a red Datsun by its registration number and description. From this evidence, it was urged by Mr. Fernando, a reasonable inference could be drawn by the jury that the First Appellant aided and abetted in the commission of the crime by going to a particular spot where he picked up the Third Appellant and thereby providing the get-away vehicle.

Mr. Fernando reiterated that the prosecutions' case was that there was a plan to commit an unlawful act of robbery in which a weapon was going to be used and the commission of murder was a probable consequence of that unlawful act of robbery. Therefore anyone who aided and abetted in the unlawful act of robbery shared the requisite common intention.

Mr. Fernando maintained that the learned Chief Justice did not confuse the jury by summarizing the evidence of each witness and by giving them examples. He argued that the learned Chief Justice did not make any undue comment on the evidence of the prosecution or

defence witnesses. He cited R v Attfield (1961)45 Cr.App.R.309 at 313 where it was said that it is not necessarily a fatal defect to a summing up that the evidence given during the trial has not been discussed. He referred to Antoine v The Republic, Criminal Appeal No.1 of 1978 where the accused had in in his statement and evidence denied any participation in the murder, but the strength of the prosecution case lay in the combination of the fact that the three of them were found on the deceased's yacht drifting on the open sea and his statement and evidence put him at the scene when the deceased was attacked in circumstances from which the jury could properly infer his participation in the murder.

In this case the following evidence was led. Nilsey Morel said that he heard gun shots which came from the direction of Meat Corner, that thereafter he came face to face with the Third Appellant wearing some sort of track suit who had an AK47, that he asked him what had happened and the Third Appellant replied that a National Guard was shooting at him and he shot back, that he saw a red Datsun car with a luggage rack without lights come from Oceangate House direction along Fifth Avenue and stop by the gate near the cricket field, that he saw the Third Appellant get into the red Datsun with his weapon, that the red Datsun had driven away towards the Meat Corner, and that the next day at an identification parade he identified the Third Appellant whom he had seen several times before and had known by his surname only. The evidence of Adelbert Esparon confirmed by Joseph Allisop was that the First Appellant took the red Datsun car with registration number S 6429 on April 26th 1994 at 5.15 p.m., that he promised to return it at 6.30 p.m., that he wanted the car to help some one carry his fish who had come back from fishing, that the First

Appellant eventually came to Anse Boileau Police Station at 9.15 p.m. where Adelbert Esparon and Joseph Allisop were, and that on April 27th 1994 in Adelbert Esparon's presence the red Datsun was searched by the police who checked the lights but the rear and back number plate lights were not working. The evidence of Thomas Banane was that Ralph Rose around 8.30 p.m. made a report (that Ralph Rose was going to bank money when the National Guard had been attacked, gun shots were heard and he ran to the police station), that as he, (Thomas Banane) was approaching towards that direction he saw a red Datsun car with registration number 6429 without any rear lights coming from Meat Corner at 10 to 15 miles per hour, that at the junction of Manglier Road and Huteau Lane opposite Meat Corner he saw the body of the deceased, an empty cartridge, a plastic glove, blood on the road and almost opposite the deceased's body on the standing fencing wall there were small holes that looked like bullet holes. Florida Louise testified that at 10 p.m. at Anse Boaleau Police Station there was a telephone call from an unidentified caller asking for the First Appellant and a message was left for him that he should take his pigs to the slaughter house. The evidence of Norbett Isnard was that on April 24th, 1994 he issued the deceased with an AK 47 numbered 2813 with 90 bullets in three magazines. Philip Toussaint testified that on April 26th 1994 he issued at Oceangate House the Second Appellant with a gun an AK 47 numbered 3896 with ammunition and he wrote this in the book, that when looking at the book (in Court) he did not cross out 3896 and put 2933, that he found the Second Appellant missing from his post at around 9.30 p.m., that he received a telephone message from him at around 10 p.m. about him having arrived at his post and that the next day the Second Appellant returned a gun numbered 2813. Mirena Labrosse confirmed that the Second Appellant

was issued with an AK 47 by Philip Toussant at Oceangate House, that around 8.30 p.m. she heard gun shots, that about 20 minutes later she saw the Second Appellant who had come running and enquired whether the Social Security Bus Driver had come,that she then asked him where he was all the time the gun shots were being fired and he replied that he was having a deal with a woman when he heard the gun shots, that he asked to go and see; that he left; that he came back at around 10 p.m. and asked to use the telephone to call the Headquarters and in a loud voice told them he had returned to his post and after that he again asked to use the telephone because he had forgotten to call his mother at Anse Boileau but this time he spoke in a soft tone so she could not hear. Daniel Dogley who testified that after receiving the report from Ralph Rose he arrived with Andy Kilendo where the deceased's body was, that Thomas Banane came at the same time, that the Second Appellant arrived 2 or 3 minutes later, that the Second Appellant accompanied them to the hospital, and that the Second Appellant removed a pack at the waist of the deceased which had two magazines, one was empty and one had 27 live bullets. Gracia Bethew testified that the Second Appellant at the Central Police Station at around 9.05 p.m. asked her if she knew the telephone number of Anse Boileau Police Station, that she told him he could use the telephone but he preferred not to use it but asked her to write that telephone number on a piece of paper for her. Ralph Rose testified that he went to bank the money at Barclays Bank around 8.30 p.m. accompanied in the bus by the deceased who was armed, that the deceased asked him to come out of the bus, that he saw someone standing at the bank with military type raincoat and green beret worn by the National Guard and it seemed he had something at the back like a gun, that the deceased went and stood close to this person as if he knew him, that

he got hold of the deceased from the back and also got hold of the deceased's gun and they were struggling, that whilst they were struggling Ralph Rose ran to the police station, that on reaching Premiere Building he stopped and turned when he heard a gun shot, that he ran again and turned once more when he heard two gun shots that he saw the bus coming and that he made a report to the police. Albert Simeon testified that he was the bus driver, that he parked the bus near the bank, that the deceased went and spoke to a person standing with a green beret on his head, that the person had grabbed the deceased's gun, that they were struggling and the deceased fell down, that Ralph Rose ran and that he reversed the bus and left as well. David Dubignon testified that on April 26th 1990 at around 9.40 p.m. he arrived at Albert Street and Huteau Lane where searching near Space Shop on the road he found a live bullet and a bit further down he found two empty cartridges.

Turning to Mr Juliette's submission pertaining to the prosecution duty concerning witnesses they do not intend to call. With due deference to Saucier J (as he then was) in Camille v The Republic, supra he put the duty on the prosecution too high about the statement having to be made available to the defence. Also, in Amisi and Ors v Uganda, supra, while accepting R v Bryant and Dickson, supra, as applying to Uganda, the East African Court of Appeal merely suggested that the prosecution also make the witness' statement available to the defence. In our view the position as far as this country is concerned is as set out by Diplock LJ (as he then was) in Dallison v Caffery, supra, when he said at 622:

> "This contention seems to me to be based on the erroneous proposition that it is the duty of a prosecutor to place before the court all the evidence known to him, whether or not it is

> probative of the guilt of the accused person. A prosecutor is under no such duty. His duty is to prosecute, not to defend. If he happens to have information from a credible witness which is inconsistant with the guilt of the accused, or although not inconsistent with his guilt is helpful to the accused the prosecutor should make such witness available to the defence (see R. v. Bryant and Dixon)".

In approving R. v Bryant and Dixon, supra, Diplock LJ did not go as far as Lord Denning by saying that the prosecutor must make the witness' statement available. We are in agreement with what was laid down in R. v Bryant and Dixon, supra, as it relates to the prosecutor's duty.

It is true that in R. v Finch, supra, the Court of Criminal Appeal did state that failure by the Assistant-Recorder to put the facts proved by evidence on both sides made that trial unsatisfactory because the case was not put to the jury in a way to ensure their proper appreciation of the value of the evidence. The same can hardly be said of the learned Chief Justice's summing up in this case.

In R. v Lawrence, supra, at 5 Lord Hailsham observed:

> "It has been said before but obviously requires to be said again. The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's notebook. A direction from the jury should be custom-built to make the jury understand their task in relation to a particular case. Of course it must include reference to the burden of proof and the respective roles of judge and jury. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides and a correct statement of the inferences which a jury are entitled to draw from their particular conclusions about the primary facts".

It is clear to us from the foregoing that the judge must direct the jury on the burden of proof, his function and that of the jury. He

must obviously deal with the salient features of the evidence and what inference the jury can draw from any circumstantial evidence. There are no prescribed words that should be adopted in a summing up. In brief what is of major importance is that the summing up must be fair. Looking at the learned Chief Justice's summing up as a whole we find that he gave the jury a careful and thorough direction on the facts and on the law which we see no reason to criticise.

Mr. Fernando referred to Palmer v R, supra, where at 229 Lord Morris in the Privy Council said:

> "The learned judge gave directions to the jury on the basis that the evidence of the two Wilsons was the evidence of accomplices. He left the question of self-defence to the jury even though it was never suggested by or on behalf of the appellant that he had killed the deceased man in self-defence. It was his case that he was not responsible for the firing that killed the deceased. As however there was evidence that made possible the view that whoever it was who fired might have done so in self-defence, the learned judge very fairly left the matter to the jury. It is always the duty of a judge to leave to the jury any issue (whether raised by the defence or not) which on the evidence in the case is an issue fit to be left to them. There was a very clear direction that the onus remained upon the prosecution to satisfy the jury beyond doubt that the killing was not done in self-defence". (My emphasis).

Also, it is worth repeating what Lord Morris had to say at 241-2 about self-defence:

> "In their Lordship's view, the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances".

Turning to the question of unanimous verdict, in his direction the learned Chief Justice mentioned twice to the jury that their verdict should be unanimous. Section 263(1) of the Criminal Procedure Code

provides that where the jury are not unanimous the judge may direct them to retire for further consideration. In our view this is a matter of discretion. In Georgiou v R, supra, where there was no direction to the jury that their verdict ought to be unanimous, the Court of Appeal refused to interfere with the verdict. This was in the face of the Lord Chief Justice's PRACTICE DIRECTION of 1967 which set out the procedure which should be followed (because juries could find verdicts by a majority of not less than ten to two) that of telling them to reach a verdict upon which all are agreed. Reference was made by the Court of Appeal to Kalinski v R (1967)51 Cr.App.R, 343 where it was held that omission to tell the jury that their verdict must be unanimous did not amount to a non-direction.

in terms of section 265(1) of the Criminal Procedure Code there must be a clear majority in favour of a verdict and if one half of the jury find the accused not guilty he must be acquitted. In light of this, depending upon the particular facts and circumstances, this Court will not hold generally that a failure to instruct a jury in terms of section 263(1) constituted a non-direction amounting to a mis-direction.

In Abrath v The North Eastern Railway Co. (1886)11 App.Cas.20, Lord Esher at 233 observed:

> "It is no misdirection to tell the jury everything which might have been told them ... Non-direction merely is not misdirection, and those who allege misdirection must show that something wrong was said or that something was said which would make that which was left to be understood".

I can do no better than to repeat what was said a very long time ago by the Court of Criminal Appeal in Stoddart v R (1909)2 Cr.App.R.217 at 246:

> "Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice. Its work would become well-nigh impossible if it is to be supposed that, regardless of their real merits or of their effect upon the result, objections are to be raised and argued at great length which were never suggested at the trial and which are only the result of criticism directed to discover some possible ground for argument".

In this case the address on behalf of the prosecution lasted approximately 6 hours, that on behalf of the First and Second Appellants about 2¼ hours and that on behalf of the Third Appellant about 2 hours. Evidence was heard over 11 days and the learned Chief Justice's summing up lasted 4 hours 25 minutes. In our judgment the arguments advanced on behalf of the Appellants are groundless. Further no case that lasted such a lengthy period can be said to be free from complete criticism. What is significant is that in this case the learned Chief Justice most explicitly told the jury that the prosecution relied entirely for proof of the charge of murder on circumstantial evidence. He warned them particularly that before convicting the Appellants they must find that all the inculpatory facts were incompatible with the accused's innocence and incapable of explanation upon any other reasonable hypothesis than guilt. Further, he admonished them that they must be satisfied that all the circumstantial evidence taken together led them to only one conclusion that of the guilt of the Appellants.

For the above reasons the appeals must be dismissed.

Dated this day of 1995

A.M.Silungwe JA

E.O.Ayoola JA

A.Adam JA

Read and delivered by me on this 13th day of June 1995

Hon. C. A. Hamerman