Privy Council Appeal No. 25 of 1995

Linsberth Logan *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF BELIZE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 21st February 1996

Present at the hearing:-

Lord Keith of Kinkel
Lord Browne-Wilkinson
Lord Mustill
Lord Steyn
Sir Brian Hutton

*[Delivered by **Lord Steyn**]*

This is an appeal by Linsberth Logan from the judgment of the Court of Appeal of Belize, given on 7th September 1993, which dismissed his appeal against his conviction for murder in the Supreme Court of Belize on 10th February 1993. Important questions of law arose. The first was whether the Privy Council had been deprived of jurisdiction, as the Chief Justice of Belize has held in an unrelated recent case, by virtue of the effluxion of time limits on the prosecution of criminal appeals imposed in Belize or by reason of the dismissal of the appellant's plea for mercy. After hearing submissions on behalf of the prosecution and the defence the Board ruled that it had jurisdiction to entertain this appeal. This judgment gives the reasons for that decision.

Jurisdiction having been established their Lordships heard submissions on the merits of the appeal. The appellant accepted at the trial that he intentionally and unlawfully killed Linda Vasquez. He relied on the defence of provocation. By their unanimous verdict the jury rejected that defence. The appellant

appealed as of right to the Court of Appeal. The Court of Appeal dismissed the appeal. On the appeal to the Privy Council the principal argument for the appellant was that the trial judge misconstrued relevant sections of the Criminal Code of Belize and accordingly misdirected the jury on the law of provocation. In particular this argument raised issues regarding the interaction of sections 116 to 119 of the Criminal Code. Those issues are of great importance for the criminal justice system in Belize and will have to be considered in some detail. In the light of the resolution of those issues it will then be necessary to consider the directions of the trial judge.

It will be convenient now to provide a narrative relevant to the issues which arise on this appeal both in regard to the jurisdiction of the Privy Council and the merits of the appeal.

The Narrative

The trial: February 1993.

The trial took place in February 1993. The appellant had previously lived together with Linda Vasquez. She was then aged 17 years. By July 1992 they had separated but they still continued to see one another. On 2nd July 1992 the appellant and Linda Vasquez met in Belize City. At the end of that meeting the appellant produced a knife and cut the throat of Linda Vasquez. She died almost immediately.

At the trial the only issue was provocation. The focus was therefore on why the appellant acted as he did. The prosecution put their case on the basis that it was a premeditated and unprovoked killing. The prosecution case can be summarised quite briefly. The mother of the deceased testified that the appellant had, in the past, beaten her daughter and threatened to kill her if she left him. Wilfred Martinez gave evidence about the earlier part of the meeting between the appellant and the deceased on 2nd July 1992. He said that he saw the appellant come up to the deceased and walk back with her in the direction of the Chateau Caribbean Hotel. He said the deceased was not resisting. Ronald Fraser testified to a later part of the incident. He said that at 2.00 p.m. on 2nd July 1992, and at the alley behind the Chateau Caribbean, he saw a man harassing a woman by trying to kiss her. He said that the man pushed the woman in the alley. He went to report the matter. When he returned he found the woman lying in the alley with her throat cut. Dennis and Linsford Reneau testified that they approached the alley and saw the appellant bending over a woman. The appellant appeared to pick up a knife. When the appellant saw the two witnesses he ran away.

It further emerged during the prosecution case that, after the killing, the appellant went straight to the nearest police station. He handed in the knife and admitted cutting the throat of the deceased. The police questioned him. He said:-

"I mean to do it. I love the girl and she abstract me."

Their Lordships were informed that "abstract" is a colloquial expression which means goad. The appellant made a statement under caution, which was produced as part of the prosecution case. In that statement he said that she refused to take him back. He said he threatened her with a knife. There was a struggle. She fell to the ground. He said that he got on top of her and cut her throat. Their Lordships observe that on the face of this statement read in isolation there was no evidence of provocation for the jury to consider.

The prosecution relied on two other facts as controverting the defence of provocation. First, a few hours before the killing the appellant had bought the knife and had it sharpened. Secondly, there were several knife wounds including a fatal one to the deceased's neck.

The defendant did not testify. Instead he made an unsworn statement. The appellant said that in May 1992 he left the house where he lived with the deceased. He continued to support the deceased and they continued a sexual relationship. About three weeks before the killing he saw the deceased meeting another man. She told him she was pregnant. He gave her money to go to a doctor. On 2nd July 1992 he bought a knife but without any intention of doing any harm. He described their meeting on that day. He said they kissed. He then pressed her for answers about the future of their relationship. He continued:-

> "At this moment she told me that she was not pregnant for me as to only keep me from going to the US where I normally go to buy my stuff that I bring and sell. She also told me that she had another boyfriend and if I want we could still have something on the side without her Mum knowing of this. At this moment I lost total control of myself, I then take out the knife and cut her."

No other evidence was adduced by the defence.

After closing speeches on behalf of the prosecution and the defence the judge summed up the case to the jury. The judge left the issue of provocation for the jury to consider and directed the jury that the verdict had to be either murder or manslaughter by reason of provocation. The jury retired to consider their verdict for almost three hours. The jury then returned to render a unanimous verdict of guilty of murder. The judge then passed the death sentence.

The proceedings in the Court of Appeal: September 1993.

Their Lordships were informed that the appellant appealed as of right to the Court of Appeal. The grounds of appeal were primarily directed at the trial judge's directions on provocation. The Court of Appeal dismissed the appeal. Their Lordships were informed that no reasons were given for the decision of the Court of Appeal.

Subsequent events.

On 17th January 1994 the prison authorities informed the appellant that his mercy petition had been dismissed by the Governor-General. In early December 1994 the appellant was notified that he was due to be executed on 9th December 1994. On 6th December the appellant applied to the Privy Council for a conservatory order prohibiting his execution pending the lodging of a petition for special leave to appeal. On the same day the Privy Council granted such a conservatory order. On 11th January 1995 the Privy Council granted special leave to appeal to the appellant.

The judgment of the Chief Justice in Lauriano.

On 20th September 1995 the Chief Justice of Belize gave a judgment in the case of *Lauriano v. The Attorney General of Belize and Another*. The Chief Justice acknowledged that he was not addressing any issue between the parties. Nobody had applied for any order. The Chief Justice granted a two-fold declaration, viz.

(a) that the Privy Council has no jurisdiction to grant special leave to appeal after the expiry of the periods of time stipulated in the Proclamation of the Governor of Belize contained in Statutory Instrument No. 62 of 1978;

(b) that, in any event, the Privy Council had no jurisdiction after a plea for mercy by a man sentenced to death had been rejected by the Advisory Committee.

The Chief Justice said that if the Privy Council acted contrary to his declaration it would be seeking to "arrogate" a power it did not have, and that it would amount to "rule by decree by Her Majesty in Council".

Subsequently, the Court of Appeal of Belize had to consider the merits of the appeal of Lauriano. His appeal was dismissed. Given that the declaration of the Chief Justice, which related to the jurisdiction of the Privy Council, was not an issue on the appeal before it, the Court of Appeal did not examine its validity. At the same time the Court of Appeal made clear that it was not endorsing the declaration of the Chief Justice.

It is the judgment, therefore, of the Chief Justice which was the basis of the argument that the Privy Council had no jurisdiction to entertain the appeal of the appellant.

Jurisdiction.

In making the two-fold declaration in *Lauriano*, the Chief Justice founded himself on a Proclamation (No. 62 of 1978) made by the Governor of Belize before Belize became fully independent in 1981 ("the Proclamation"). It was expressed to be made by the Governor "in exercise of my authority to respite sentences of death" and was headed "Rules for the prosecution by persons under sentence of death of petitions for special leave to appeal to the Judicial Committee of the Privy Council". So far as relevant the Proclamation provided as follows:-

> " 1.(1) If he intends to apply for Special Leave, the applicant should as soon as possible and in any case within the period prescribed in paragraph (2) of this Rule notify his intention to the Governor through his legal representative or if personally, through the officer in charge of the prison where he is confined.
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> (2) The period prescribed for notification under paragraph (1) of this Rule is ten clear days after notification that the Governor has not granted a pardon or respite, or, in the event of an appeal to the Court of Appeal, fourteen days after the dismissal of the appeal, if the latter should be longer.
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> 2. On receipt of a notification under Rule 1, the applicant will be informed that the execution will be postponed for twenty-one days, during which period the applicant must furnish the Governor with proof that the necessary instructions, papers and funds have been sent to a solicitor practising in London, the instructions and funds by air mail and the papers by registered ordinary mail; and also where the application is to be made in *forma pauperis* that the procedure relating to such applications as set out in Rule 3(c) has been complied with."

Rules 3 to 7 contain certain administrative particulars not directly relevant to this case. The Rules then proceeded:-

> " 8. If the proof required by the provisions of Rule 2 is not furnished to the Governor before the expiration of the period of twenty-one days referred to in that Rule, the execution will not be further postponed unless the Governor considers that there are special reasons that would justify exceptionally an extension of the date for

furnishing such proof. The applicant or his advisers will be informed by the Governor of the new date by which the required proof must be furnished.

9. If the proof required by the provisions of Rule 2 is furnished within the period of twenty-one days referred to in that Rule or on or before such date as the Governor may have fixed under the provisions of Rule 8, execution will be postponed.

10. ...

11. If the Governor is informed by the Foreign and Commonwealth Office -

(a) that the application for special leave has not been lodged by the date fixed;

(b) that the application has been dismissed by the Judicial Committee;

(c) that the appeal has been dismissed by the Judicial Committee;

the execution will not be further postponed, subject, however, to the power of the Governor to exercise the Prerogative of Mercy."

In effect, therefore, the Proclamation provided for a stay of execution of the death penalty pending an application to the Judicial Committee for special leave to appeal provided that a strict timetable was adhered to by the applicant in prosecuting his application for leave.

In reaching his conclusion, the Chief Justice first referred to section 104 of the Belize Constitution which, after providing in subsections (1) and (2) for appeals to the Privy Council as of right and with leave of the Court of Appeal, by subsection (3) provides that an appeal shall lie to Her Majesty in Council with the special leave of Her Majesty from any decision of the Court of Appeal in any civil, criminal or other matter. Then, after referring to the Proclamation, he stated that it regulates "the time within which application may be made for special leave" and that, despite the coming into force of the Constitution, the Proclamation was preserved in force by section 28(3) of the Interpretation Act which provides:-

"Where any Act authorising the making of any statutory instrument repeals a previous Act under which any statutory instrument was lawfully made and was in force at the commencement of the repealing Act, the statutory

> instrument made under the repealed Act shall, ... remain in operation so far as it is not inconsistent with the provisions of the repealing Act or of any statutory instrument made thereunder."

He therefore held that, after the coming into force of the Constitution in 1981, the provisions in the Proclamation laying down time limits for applications for special leave to appeal from decisions of the Court of Appeal were still in force. However, he held that the provisions providing for application for special leave after the refusal of a respite or pardon by the Belize Advisory Council were inconsistent with the Constitution and had to be severed. He therefore held that any right of appeal to the Privy Council after the Advisory Council had reached a decision whether or not to grant mercy was impossible and "would make mockery" of the Advisory Council's decision. He said:-

> "I say this on the basis that it is a fundamental principle of law in an Independence Constitution like that of Belize that the prerogative of mercy is at the end of Judicial Process only where there is certainty as to time and opportunity for the exhaustion of such redress so that the Belize Advisory Council can act after all legal process has been exhausted."

The Chief Justice accordingly held that the time limits in the Proclamation continued to apply to applications for special leave to appeal from the Court of Appeal but that there could be no application to the Privy Council for special leave after the Advisory Council have decided whether or not to exercise the prerogative of mercy. He concluded:-

> "Based upon my findings and observations I declare that the Belize Government is, therefore, not bound to abide by the terms of any special leave granted out of conformity with this Declaration. This case, and any other similar case, were therefore unlawfully before Her Majesty in Council having been all there after the Belize Advisory Council had acted and the grounds were never as to any unconstitutional proceedings of the Belize Advisory Council. The petitions were [in] relation to the Court of Appeal's decision. The Belize Advisory Council had already subsequently met in committee, after a reasonable time had elapsed, before any of the applications had been made to Her Majesty in Council. To hold otherwise would be sanctioning the ouster of our Constitutional provisions and the rule of law that goes with them and supporting what amounts to no more than rule by decree by Her Majesty in Council."

There is one factor that must be mentioned before turning to the substance of the Chief Justice's reasoning. As was common ground before their Lordships, the Chief Justice was in error in relying on section 28(3) of the Interpretation Act to preserve the Proclamation in force. In the Interpretation Act, the word "Act" is defined as "an Act of Parliament": section 3(1). Therefore the Interpretation Act has no impact on Proclamations made under the prerogative such as No. 62 of 1978. This factor, however, does not affect the reasoning of the Chief Justice since it was also common ground that section 134 of the Belize Constitution does operate so as to perpetuate the legal effect, whatever it may be, of the Proclamation. In that section, "existing law" is defined by subsection (6) as including *inter alia* any "rule, regulation, order or other instrument having effect as part of the law", a definition which must include the Proclamation. Section 134 provides that, notwithstanding the revocation of the Letters Patent and the Constitution Ordinance, the "existing laws" are to continue in force and effect as if they had been made in pursuance of this Constitution "but they shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution". Therefore the Proclamation remains in force, but must be so construed as to make it conform with the Constitution.

Turning then to the substance of the Chief Justice's reasons, there is no provision which can give the Proclamation any greater legal effect than it had when it was first made in 1978 i.e. before independence. The first question, therefore, is what was the original effect of the Proclamation. In 1978, appeals to the Privy Council were regulated by two Acts of the United Kingdom Parliament, the Judicial Committee Acts 1833 and 1844, and under the Royal Prerogative. Section 3 of the 1833 Act established the Judicial Committee to hear appeals and section 24 provided for the making of rules by the Privy Council "regulating the mode, form and time of appeal": see also section 1 of the 1844 Act. At all material times the only rule made under the statutory power which regulated the time for lodging a petition for special leave to appeal is that now contained in Rule 5 of the Judicial Committee (General Appellate Jurisdiction) Rules Order, 1982:-

> "5. A petition for special leave to appeal shall be lodged with the least possible delay after the date of the judgment from which special leave to appeal is sought."

Since the procedure and the time limits for making applications for special leave were regulated by those Acts, in 1978 the Governor of Belize, acting under his Letters Patent, had no power to curtail any right of the citizens of Belize to petition for special leave or in any other way to affect the jurisdiction of the Judicial Committee. Nor indeed did the Proclamation purport to do so.

The document sets out the way in which the Governor will exercise the prerogative to grant "a respite ... from the execution of any punishment" which was conferred on him by Article 26(1)(b) of the Letters Patent of 1964. The Proclamation does not provide time limits within which the right to petition the Privy Council is to be exercised: all it does is to provide that, so long as the petitioner complies with the timetable stated in the Proclamation, the Governor will not cause the death sentence to be carried out.

Accordingly, the Proclamation as it operated before the introduction of the Constitution of 1981 did not, and could not, limit the jurisdiction of the Judicial Committee in relation to the grant of special leave to appeal. There is nothing in the Constitution which can operate to give the Proclamation any greater effect after independence. Section 104(3) of the Constitution, by expressly conferring a right of appeal to the Judicial Committee with special leave, introduces into the law of Belize the existing procedures and rules of the Judicial Committee. It follows that the Proclamation can have no effect on the jurisdiction of the Judicial Committee to grant special leave to appeal where such right is conferred by the Constitution of any country.

Turning then to the right of appeal to the Privy Council at any time after the Advisory Council of Belize has determined whether or not to grant mercy, the Chief Justice did not base himself on the Proclamation: on the contrary in his view he had to strike out of the Proclamation those parts which expressly provided for an appeal after the Advisory Committee had come to its decision. On applications for special leave after such decision the reasoning of the Chief Justice is based on the proposition that, in an independent state, the decision as to the exercise of the prerogative of mercy is necessarily the last stage in the process and a subsequent appeal is therefore constitutionally irregular. The Chief Justice gives no examples of jurisdictions where his proposition holds sway nor were their Lordships referred by counsel for the Attorney General to any such jurisdiction. Although their Lordships were not referred to any specific case, it appears that in the United States of America such appeals are often brought.

There is no inconsistency between a refusal to grant a pardon and a subsequent appeal. All appellate courts are familiar with cases where the circumstances of the crime are so heinous that no authority would be inclined to exercise the prerogative of mercy. But if the trial leading to the conviction is legally unsatisfactory, the conviction cannot stand, however great the suspicion of guilt of the crime. It is for the court to rule on the legality of the

conviction, and for the Advisory Council to decide whether to exercise the prerogative of mercy in relation to a person lawfully convicted. There are two separate functions. If, for good reason, no appeal against conviction has been brought before the refusal to exercise the prerogative of mercy and it is shown that there may have been a wrongful conviction, it must be possible to set such conviction aside on legal grounds, whether or not the prerogative of mercy has been or will be exercised.

This confusion between the respective roles of the Advisory Council and of the Judicial Committee seems to lie at the root of the Chief Justice's decision. He speaks of the Privy Council arrogating to itself the power of final prerogative of mercy and, in the final paragraph quoted above, of the "ouster of our Constitutional provisions and the rule of law that goes with them and supporting what amounts to no more than rule by decree by Her Majesty in Council". The Judicial Committee has no function in relation to the prerogative of mercy. What it does have under the Constitution of Belize is the function of being the ultimate legal Court of Appeal. That function can be abolished or modified by the people of Belize by amending the Constitution. But so long as the Constitution remains unamended, no law of Belize (whether pre-dating or post-dating the Constitution) can validly curtail the constitutional right of the citizens of Belize to apply to the Judicial Committee, in compliance with the rules made under the Acts of 1833 and 1844, for special leave to appeal or the right of the Judicial Committee to grant such an application in a proper case.

For these reasons their Lordships conclude that the Chief Justice was in error in making the Declaration in his judgment in the *Lauriano* case and that the special leave to appeal granted in this and other cases was within the jurisdiction of the Judicial Committee.

The merits

A case for the jury to consider.

There was a strong prosecution case, notably because the appellant bought the knife a few hours before he used it in cutting the deceased's throat. On the other hand, a combination of the appellant's statement at the police station that the deceased had goaded him, being part of a "mixed" statement, and his explanation in his unsworn statement at the trial, amounted to evidence of provocation fit for the jury to consider. An unsworn statement, untested by cross-examination, is in principle evidence markedly inferior in quality to sworn evidence. And a trial judge is entitled to explain this fact to the jury in accordance with the

guidance given by the Board in *Director of Public Prosecutions v. Walker* [1974] 1 W.L.R. 1090, 1096B-E. Nevertheless, it is for the jury to consider what weight they should attach to such an unsworn statement. In these circumstances the judge rightly left the issue of provocation for the jury to consider.

The law of provocation in Belize.

It will be convenient first to consider the law of provocation in Belize before examining the judge's directions to the jury on provocation. On 20th September 1981 Belize became independent. On 1st October 1981 a new Criminal Code came into effect. It is necessary to refer *in extenso* to the provisions of the Criminal Code so far as it is relevant to provocation. Section 114 provides that every person who intentionally and unlawfully causes the death of another is guilty of murder unless his crime is reduced to manslaughter by reason of "such extreme provocation ... as in the next following sections mentioned". Section 115 then makes provision for a partial defence of diminished responsibility. Section 116 provides that intentional and unlawful homicide is reduced to manslaughter if it is proved on the defendant's behalf that he was deprived of the power of self-control "by such extreme provocation given by the other person as is mentioned in section 117". The next three sections then provide as follows:-

"Provocation defined

117. The following matters may amount to extreme provocation to one person to cause the death of another person, namely -

(a) an unlawful assault or 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 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;

(b) 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;

(c) an act of adultery committed in the view of the accused person with or by his or her

wife or husband, or the crime of unnatural carnal knowledge committed in his or her view upon his or her wife or child;

(d) a violent assault and battery committed in the view or presence of the accused person upon his or her wife, husband, child or parent, or upon any other person being in the presence and in the care or charge of the accused person.

Provocation to be left to jury

118. Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was extreme enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

When provocation shall not be admitted.

119.-(1) Notwithstanding proof on behalf of the accused person of such matter of extreme provocation as mentioned in section 117, his crime shall not be deemed to be thereby reduced to manslaughter if it appear, 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; or

(b) that he acted wholly 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; or

(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; or

(d) that his act was, in respect either of the instrument or 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. (Word in brackets inserted)

(2) ..."

It is necessary to describe the contextual scene of those provisions. First, sections 116, 117 and 119 are based on the common law of provocation in Victorian times and have formed part of the statute law of British Honduras and then Belize since 1888. But section 118 only became part of the law of Belize in 1981. Secondly, subject to one qualification section 118 reproduces *verbatim* the provisions of section 3 of the Homicide Act passed in England in 1957. The qualification is that in section 118 the word "extreme" was inserted in the Belize text in the phrase "the provocation was extreme enough". The word "extreme" does not appear in the English text. Thirdly, it is of some significance that what has been described as the old law (sections 116, 117 and 119) and the new law (section 118) were in 1981 respectively re-enacted and enacted at the same time to form part of the same legislative code. Fourthly, in 1994 the Privy Council held that sections 116(a) and 119(1) of the Code, by placing the burden of proof upon the defendant, are in conflict with section 6(3)(a) of the Constitution of Belize and should be modified to make clear that the burden of disproving provocation is on the prosecution: *Vasquez v. The Queen* [1994] 1 W.L.R. 1304.

The relationship between sections 116, 117 and 118.

Counsel for the appellant submitted that section 118 of the Criminal Code of Belize was a reforming measure intended to mitigate the harshness of earlier law. In particular he submitted that the words "by things done or by things said or by both together" in section 118 were intended to reverse the old rule which prescribed that words alone could never amount to provocation. Their Lordships accept this submission. No other interpretation of the plain words "by things done or by things said or by both together" is possible.

Counsel for the appellant then submitted that section 118 implicitly abrogated sections 116 and 117 in all material respects. He relied by analogy on the principle that where a later enactment is inconsistent with an earlier enactment the later enactment by implication amends the earlier enactment so far as it is necessary to remove the inconsistency. The difficulty is,

however, that sections 116, 117 and 118 were respectively re-enacted and enacted at the same time and by means of the same legislative text. In these circumstances invocation of the principle of implied abrogation must be a measure of last resort.

Their Lordships consider it of paramount importance first to consider whether the language of sections 116 and 117, on the one hand, can be reconciled with the language of section 118, on the other hand. The wording of these provisions sit together uncomfortably. Given the unambiguous provision that words alone may amount to provocation, which cannot be ignored, their Lordships consider that these sections can be reconciled. That course is possible since section 116 provides that provocation "as is mentioned in section 117" is a defence and section 117 lists four specific cases which may amount to provocation. It is not expressly made an exhaustive list. It is therefore possible to read the words "by things done or things said or by both together" as supplemental to the four specific categories in section 117. In other words, those words can be treated as if they constitute a category (e) immediately following paragraphs (a), (b), (c) and (d) of section 117. That is the basis on which their Lordships conclude that words alone may under the law of Belize amount to provocation.

The interaction between sections 118 and 119.

Counsel for the appellant next invited their Lordships' attention to what he described as the inconsistency between sections 118 and 119. He said that section 118 was intended to make clear that, in a case where there was evidence fit to go to the jury that the defendant had been provoked so as to lose his self-control, the judge was always obliged to leave the defence for the jury to consider. He said that section 119(b), (c) and (d) were inconsistent with section 118 because it allowed the judge to withdraw the case from the jury in circumstances falling in those categories. He argued that section 118 impliedly abrogated section 119(1)(b), (c) and (d). Given that sections 118 and 119 were respectively enacted and re-enacted at the same time and in the same code, their Lordships feel compelled to reject this argument.

That left a choice between two feasible solutions. One is to say that the categories listed in section 119(b), (c) and (d) are exceptions to the general provision in the second part of section 118. The second possible solution is that, by reason of the introduction of section 118, as a matter of interpretation the two sections should be reconciled on the basis that the matters mentioned in section 119(b), (c) and (d) are not rules of law but important circumstances relevant to the merits of the defence of provocation.

Their Lordships have found this a difficult question. The literal language of section 119 (even as modified in *Vasquez*) argues in favour of treating section 119(b), (c) and (d) as exceptions to the general rule spelt out in section 118. And their Lordships observe that in the process of statutory interpretation ultimate loyalty to the legislative text is of paramount importance. On the other hand, there are important factors pointing the other way.

Only if there is some evidence that the defendant lost his self-control by reason of provocation must the judge leave the defence to be determined by the jury. If there is no such evidence, the judge ought to refuse to leave the case to the jury. That has always been law, and there has never been anything controversial about it. On the other hand, and particularly after the adoption of the reasonable man test in the second half of the last century, judges withdrew cases where the defendant wished to rely on provocation on the basis of rules or supposed rules of law which were judicially developed. By converting common sense criteria into fixed rules of law judges empowered themselves to invoke those rules to withdraw cases from the jury. One such rule has already been mentioned: the judges held that words alone could not amount to provocation. That rule prevailed until it was reversed by statute in England and Belize. For present purposes three other rules, which in practice enabled judges to withdraw cases from the jury, must be considered. First, the rule was developed that the defence of provocation cannot apply if the act was "done pursuant to an intent to take life which was either formed previously to or was formed independently of the provocation": *Parker v. R.* [1964] A.C. 1369 at 1391. This common law rule formed the basis of the statutory rule in section 119(1)(b). Secondly, the rule was established that if a defendant who was provoked had a sufficient time to cool down the defence of provocation was not available to him: *Mancini v. Director of Public Prosecutions* [1942] A.C. 1; *R. v. Duffy* [1949] 1 All E.R. 932. This common law rule is mirrored by the rule in section 119(1)(c). Thirdly, the rule was laid down that disproportionate retaliation may bar the defence, or, as it was later put, that the retaliation must bear a reasonable relationship to the provocation received: *Mancini v. Director of Public Prosecutions supra; R. v. Duffy, supra.* That common law rule is reflected in section 119(1)(d). Plainly all three rules reflect common sense criteria which are highly relevant to the defence of provocation. And it has never been doubted that these matters, where relevant, ought to be placed before the jury.

The perceived mischief was that judges withdrew cases from the jury on the ground of fixed rules of law such as have been set out. In addressing this matter the English legislature in

section 3 of the Homicide Act 1957 provided that if there is some evidence of loss of self-control by reason of provocation "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". In *Director of Public Prosecutions v. Camplin* [1978] A.C. 705 the House of Lords held that section 3 abolished all previous rules as to what can or cannot amount to provocation: at page 716C, per Lord Diplock.

The question is now whether section 118 in the Criminal Code of Belize is to be given a different effect. There are two differences. First, as already observed, the legislature in Belize inserted the word "extreme" before "provocation" in section 118. That does not, however, touch on the point presently under consideration. Secondly, and more importantly, there is the fact that the legislature when it enacted section 118 simultaneously re-enacted section 119(1)(b), (c) and (d). This factor cannot be brushed aside. On the other hand, if one adopts the view that section 118 has no impact whatever on the specific rules of law enshrined in section 119, it follows that section 118 is fundamentally emasculated in a major purpose which appears on the face of section 118. That would fail to do justice to the words and manifest purpose of section 118.

Given the real difficulties of interpretation created by the introduction of section 118 while leaving section 119 intact, their Lordships conclude that the two sections can be reconciled by construing the three matters mentioned in section 119(1)(b), (c) and (d) as relevant circumstances for the jury to consider if there is evidence that the defendant lost his self-control as a result of provocation. This is the solution that makes the best sense. And their Lordships would observe that this conclusion ought to simplify the task of trial judges. It eliminates the need for directions of law under section 119 while leaving the judge free to place before the jury the common sense criteria enshrined in section 119(1). For these reasons their Lordships rule that properly construed section 119(b), (c) and (d) do not contain exceptions to rules contained in section 118.

The summing up on provocation.

It is important to bear in mind that the appellant's case, as explained in his unsworn statement, was that the deceased taunted him. He relied on provocation by words alone. Relying on sections 116 and 117 the counsel for the prosecution argued in her closing speech that words alone cannot in law amount to provocation. Counsel for the appellant made a contrary submission. When he came to sum up the judge read sections 117 and 118 to the jury. He left provocation as an issue to be considered by the jury. Logically, the jury ought to have realised

that the legal submission of the prosecution was wrong. But the judge never said to the jury that the prosecution was wrong. And the judge never said that words alone can amount to provocation. He referred somewhat loosely to "all the things said and all the things done". Indeed the judge read to the jury a definition of provocation formulated by Devlin J., and quoted by Lord Goddard in the Court of Appeal Criminal Division, which no longer represented the law: *R. v. Duffy* [1949] 1 All E.R. 932. The definition read as follows:-

> "provocation is some act or series of acts done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind." (Emphasis supplied)

The judge quoted Lord Goddard as saying that the direction of Devlin J. was "as good a definition of provocation as it has ever been my lot to read". At the end of his summing up the judge therefore left the jury with a definition of provocation which excluded provocation by words alone. At the very least the relevant passages in the judge's summing up could have left the jury in uncertainty as to whether words alone could or could not amount to provocation. The failure of the judge to provide a clear and correct direction to the jury on this central issue was a material misdirection.

Counsel for the appellant also argued that the judge misdirected the jury by reading section 119 to the jury and by presenting it as containing fixed rules of law. Read in context their Lordships are satisfied that the judge was simply drawing attention to section 119(1)(b), (c) and (d) as spelling out matters of common sense relevant to the defence of provocation. This argument is rejected.

Additional arguments.

Counsel for the appellant advanced certain other grounds of appeal of a less substantial nature. Their Lordships do not propose to discuss these additional grounds.

The correct disposal of the appeal.

Given that the judge misdirected the jury on the central issue in the case, the possibility that the jury might have returned a verdict of manslaughter if they had been correctly directed cannot be excluded. It is sufficient to say that a miscarriage of justice may have taken place.

Their Lordships have carefully considered whether the right disposal might be to remit the matter to the Court of Appeal in Belize to decide whether there should be a retrial. The prosecution case was strong. The delay since the killing and the trial is not unusually long. Moreover, the judge had dealt with the case in a very fair manner, and he had been confronted with a very difficult problem regarding the relevant sections of the Criminal Code of Belize. These factors afford a substantial basis for ordering a remission to the Court of Appeal in Belize to consider whether there should be a retrial. Ultimately, their Lordships have concluded that, in the light of the fact that the appellant has been under sentence of death for some three years, and very close to execution before the conservatory order was granted, such an order would be unjust. In the result their Lordships will humbly advise Her Majesty that the appeal ought to be allowed, the conviction of murder and sentence of death quashed and a verdict of manslaughter substituted, and that the matter should be remitted to the Court of Appeal of Belize to pass sentence.