

Judgment 14/2008

**Craig Michael Rouget – Court of Appeal (Criminal Appeal
373) – 23 April 2008**

**Murder – appeal against conviction – grounds relied upon were significant and material
misdirection by the Lieutenant Bailiff on the issues of self defence and provocation –
held that the directions set out in the summing up could not be faulted – appeal
dismissed**

IN THE COURT OF APPEAL IN THE ISLAND OF GUERNSEY

Criminal 373

The 23rd day of April, 2008 before Sir Philip Bailhache, presiding, David Arthur John
Vaughan CBE, QC and Dame Heather Steel, DBE

THE LAW OFFICERS OF THE CROWN

v

CRAIG MICHAEL ROUGET

In the matter of the appeal by the Appellant from his conviction by the Royal Court on 27
July 2007 of the offence of murder;

Whereas THE COURT, having on 31 March 2008 heard Advocate P T R Ferbrache and
Crown Advocate Miss F M Russell thereon, DISMISSED the said appeal on 1 April 2008 and
RESERVED its reasons.

THE COURT this day ISSUED JUDGMENT in the terms attached hereto.

K H TOUGH

Registrar of the Court of Appeal

**Approved
Judgment
16 April 2008**

**IN THE COURT OF APPEAL OF THE ISLAND
OF GUERNSEY**

CRIMINAL DIVISION – APPEAL NO 373

Tuesday 1 April 2008

Before: **Sir Philip Bailhache, President
David Arthur John Vaughan, CBE QC
Dame Heather Steel, DBE**

Between: **THE LAW OFFICERS OF THE CROWN**

v

CRAIG MICHAEL ROUGET (Appellant)

**Advocate P T R Ferbrache appeared for the Appellant
Crown Advocate F Russell appeared for the Crown**

Authorities referred to:

Beckford v R [1988] 1AC 130
Burns v H M Advocate (1995) SLT 1090
Palmer v R [1971] A.C. 814
R v Owino [1996] 2 Cr. App. R. 128
Scarlett (1993) 4 A11 ER 629
R v Rashford (2006) EWCA 3377
R v Duffy [1949] 1 All ER 932
Lee Chun-Chuen v The Queen [1963] AC 220
R v Smith (Morgan James) [2001] AC 146
AG for Jersey v Holley [2005] 2AC 580
R v Karimi [2006] 1 All ER 759
R v Shannon 71 Crim App R 192
R v Armstrong-Braun 1999 CLR 416
R v Camplin [1978] AC 705
R v Gorman, R v Jarman CA Criminal Division 13th November 1998
R v Yohan Clarke [2006] EWCA Crim 3427

This is the Judgment of the Court

STEEL, JA

1. On 27th July 2007 following a trial in the Royal Court before Lieutenant-Bailiff John Russell Finch and eleven Jurats, Craig Michael Rouget was unanimously convicted of the murder of James Christopher Dean on 9th September 2006.
2. He appeals that conviction by leave of the single judge, Sir de Vic Carey, J.A.

3. The only ground on which this appeal is now pursued is that the “learned judge did not sum up appropriately and/or accurately on the matter of provocation and self defence”.
4. On 1st April 2008, this appeal was dismissed. The Court ruled that the verdict of the Jurats must stand, and that the Lieutenant-Bailiff’s summing up in relation to self defence, provocation and other matters cannot be faulted.
5. We set out the reasons for that decision.
6. The circumstances which give rise to the murder conviction relate to an incident which occurred shortly after ten minutes to nine on the evening of Saturday 9th September 2006 in the High Street in St Peter Port. The Appellant was involved in an altercation with James Christopher Dean (the deceased). The Appellant, who was carrying a knife, inflicted four stab wounds on the deceased, one of which was fatal.
7. The Crown case was that the fatal stab wound was deliberately and unlawfully inflicted on an unarmed man who, after an initial scuffle, was called back by the Appellant to continue a street fight.
8. The defence case was that James Dean, who was older and heavier than the Appellant, was the aggressor throughout, and that the Appellant, who was terrified and panicking, inflicted the wounds in self defence and/or because he was provoked. We are grateful to Advocate Ferbrache for his careful written and oral submissions and to Advocate Russell for the assistance she has given to the Court.
9. The Appellant, at the trial, raised various issues including self defence and provocation.
10. It was complained that the Lieutenant-Bailiff, in his summing up to the Jurats, misdirected them in a significant and material manner in relation to these two issues.
11. The Court of Appeal (Guernsey) Law 1961 Sections 25(1) and (2) and 26(2) reads as follows:

“25.(1)The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

PROVIDED that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

25.(2) Subject to the special provisions of this Part of this Law, the Court of Appeal shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

26.(2) *Where an appellant has been convicted of an offence and the court could on the indictment or summons have found him guilty of some other offence, and on the finding of the court it appears to the Court of Appeal that the court must have been satisfied of facts which proved him guilty of that other offence, the Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the verdict found by the court a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.”*

12. Under Section 25(1) and (2), the Court was invited to conclude that:

- (i) The judgment of the Royal Court before whom the Appellant was convicted should be set aside on the ground of a wrong decision on a question of law, or that there was a miscarriage of justice, and that the conviction be quashed and a verdict of acquittal be entered.
- (ii) The misdirections were so fundamental that the application of the proviso in Section 25(1) was not appropriate.
- (iii) If the Court concluded that the Jurats were misdirected in connection with self defence, the conviction should be set aside.
- (iv) If the Court were to conclude that there was a significant misdirection in relation to provocation, the proviso could not reasonably apply and the Court was invited to dismiss the submissions in relation to self defence, set aside the conviction for murder and impose a conviction for manslaughter.
- (v) The Court was invited to consider under Section 26(2), setting aside the conviction for murder on the facts and substituting a verdict of guilty to manslaughter.

The Facts

13. Much of the evidence which was heard over six days, was not challenged and came before the Court in the form of admissions and agreed facts and documents.
14. The incident, which lasted no more than one minute, was largely recorded on a CCTV camera situated outside a shop in the High Street. The Court had the benefit of expert evidence from two Imagery Interpreters in relation to that part of the evidence. The images were not continuous and were necessarily imperfect. From that evidence it was not clear when any of the stab wounds were inflicted; it showed only when the knife was first visible in the Appellant’s hand and when blood could be seen on James Dean’s shirt.
15. Evidence from eye witnesses varied as to what they saw and heard, but the evidence supported the following findings.
16. At about 8.45 pm on 9th September, the Appellant, who was 18 years old, was in the High Street with a group of friends who were celebrating Samantha Gillespie’s fifteenth birthday. The group included Callum Queripel, Wayne Bishop, Lydia Taylor, Beatrice Coates and Charlotte Byrom the Appellant’s girlfriend, who was fourteen years old. They were joined by Jonathon Welds and David Harvey. The

Appellant was wearing a striped top and had drunk two alcopops and two pints of lager. They had been out for a meal and planned to go to a coffee bar.

17. James Dean, who was 21 years old, was in the High Street with a group of friends which included John, Mark and David Rosamund and Glen Skillett. They had been to a public house to watch a football match on television and had been drinking. James Dean had at some earlier time taken an ecstasy tablet. Both groups were in good spirits.
18. The incident started when James Dean or one of his group called out vulgar abuse to Samantha Gillespie and to Charlotte Byrom. The Appellant responded rudely to James Dean who walked or marched up to the Appellant and head butted him.
19. There was then a scuffle or tussle between the Appellant and James Dean, each grabbing the other and swinging punches, some of which connected, some did not. There was no evidence that a knife was involved at this stage.
20. The Appellant and James Dean then separated and James Dean started to walk away. There was evidence that he said "*don't be so cocky, next time*".
21. The Appellant said, "*come on then, is that all you've got*" or "*you think you're hard*" and witnesses described seeing a knife in his right hand. James Dean, described as aggressive, returned to fight and witnesses described seeing the Appellant swing his right arm into James Dean's left armpit.
22. Thereafter, the fight continued and blood was seen on James Dean's shirt under the left armpit. James Dean kept on punching the Appellant and, the Appellant's top was torn. They both fell to the ground where the fight continued. At this stage, James Dean sustained three further stab wounds.
23. When he was on the ground, Mark Rosamund kicked the Appellant in the head.
24. As the fight ended and the Appellant and James Dean got up, according to Mark Rosamund, the Appellant said "*what did you do that for it was one to one*". Rosamund replied "*well that's my mate*".
25. The Appellant left and was seen to stick his middle finger up and was heard to say "*that's what you call being stabbed*". As he passed a witness in the High Street he was heard to say "*it's fucking funny being stabbed*".
26. He was chased by some of James Dean's group, and in Berthelot Street was seen to threaten John Rosamund with a knife.
27. The Appellant ran to the Albert Pier where he threw away the knife towards the harbour. It struck a lady on the face as she waited to hear a Last Night of the Proms Concert. She picked up the knife and wrapped it in a flag she was carrying. She handed it to the Police.
28. The Appellant was caught and punched by those who had chased him.
29. He then went to the bus terminus where he met up with Callum Queripel and Jonathon Welds.

30. The Appellant's account of the incident was that in the High Street he heard offensive language used towards Samantha and Charlotte and he used the words "*shut up you fat prick*" or words to that effect.
31. He was then head butted by James Dean and said "*we were just tussling with each other*", "*then it all stopped and he walked off*".
32. The Appellant told the Court he then said or called "*what's the point*" and James Dean resumed his attack.
33. He told the Court he did not remember getting the knife out at all. He recalled picking it up, half open, when he was later on the floor.
34. He said "*I saw it half open so I grabbed it and then opened it all the way and I was lashing out with the knife in an attempt to stop him attacking me*". He said he did not intend to kill or injure James Dean.
35. The knife recovered from the Albert Pier was photographed and later identified by the Appellant. It is described as a lock knife with a 7.5 cm blade.
36. The Appellant told the Court that he had had the knife about three months and that he carried it for his own protection. He kept it in his right hand jeans pocket. He said that he had perhaps practised opening it. He had not tried to open it with one hand. He said he had used two. He was sure if he tried hard enough, he could open it with one hand.
37. The Appellant telephoned a friend, Lloyd Wallbridge, and at about 9.00 pm he contacted the Police to report that he was being chased by three men. He was told to stay where he was.
38. He did not remain because he thought his pursuers were still to be seen.
39. He exchanged his torn and blood stained clothing with Queripel and Welds and contacted a friend, Kieran Saunders for a lift.
40. He went with Kieran and others to Vazon where he washed blood off his face. In the car he said "*I've done it this time, I've stabbed someone*".
41. He was returned to North Beach where he met up with others, tried to go to a party, then went to his house where he changed his clothes again.
42. The Appellant's brother Darren suggested that his clothes should be burned and this they did at Piquerel Bunker.
43. The Appellant was arrested at about 12.30 am on Sunday 10th September at Le Piquerel Estate, St Sampson.
44. In the meantime James Dean had collapsed into unconsciousness in the High Street soon after the Appellant had run away. The Police attended and at 8.59 pm the emergency ambulance team arrived and he was taken to the Princess Elizabeth Hospital.
45. He was pronounced dead at 10.37 pm on 9th September 2006.

46. A post mortem examination was carried out on 11th September by Dr White. He found four significant stab wounds. One to the left side of the chest had penetrated the chest cavity and into the heart causing internal bleeding. The wound was 11 cm deep approximately. This was found to be the cause of death. The other wounds were to the right side of the chest and an L-shaped slash to the nasal septum which had lifted a small plaque of bone and one which had penetrated the left scapula. The penetration to the bone of two of the wounds indicated that they had been inflicted with at least a moderate degree of force. A further post mortem examination conducted by Dr Rouse on behalf of the Appellant, confirmed these findings.
47. After his arrest the Appellant was taken to the Custody Suite at the White Rock in St Peter Port. Having been cautioned, on the journey in the Police van, he said "*these aren't the clothes I was wearing earlier. I can tell you where they are if you want*". He then told the Police he put them in the bunker behind Le Piquere Estate and that he was going to burn them, then thought "what am I doing."
48. He was interviewed under caution on two occasions on 11th September and on three occasions on 12th September. During the first two interviews, he read prepared statements which included the words:

"I was attacked by the man and subsequently by the man and his three friends. I believed that I was going to be killed. In the course of the attack I was able to and I did retaliate. Whatever I did was in self defence. I intend to make a complaint of assault."

Thereafter he answered "*no comment*" to all questions.

49. He was medically examined on 11th September by Dr Paluch and photographs of his injuries were before the Court.
50. The knife bore DNA from both the Appellant and James Dean.

The procedure at trial

51. At the conclusion of the evidence, the Lieutenant-Bailiff considered, with the Advocates, their written and oral submissions on the law, relevant to the legal directions required in the case.
52. He ruled on his proposed directions on intent for murder. This gives rise to no complaint.
53. He ruled on the appropriate direction to be given on self defence. He took into account the authorities *Palmer v The Queen*; *R v Shannon*; *Beckford v The Queen* and *R v Scarlett*, of *R v Owino* and *DPP v Armstrong Braun* and concluded with the words:

"I deduce that the force used by a defendant is to be assessed in an objective sense as to whether it was reasonably necessary in the circumstances as D subjectively believed then to be".

Advocate Ferbrache accepts that this correctly stated the law.

54. Provocation was discussed and the Lieutenant-Bailiff considered the situation in Guernsey where the Homicide and Suicide (Bailiwick of Guernsey) Law, 2006 had been approved by the States in November 2006 but still awaits the Royal Assent.

55. When this becomes law, the law in Guernsey regarding provocation will be in line with Section 3 of the Homicide Act 1957 in England and Article 4 of the Homicide (Jersey) Law 1986. This precisely reproduces Section 3 of the Homicide Act 1957 and reads:

Article 4

Provocation

“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 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.”

56. The Lieutenant-Bailiff considered the Privy Council authority of A G for Jersey v Holley (2005) 2AC; 2005 JLR 275 in which the minority judgments of Lord Hobhouse and Lord Millett in R v Smith (Morgan) [2001] AC 146 were adopted and approved. He further took into account the judgment in R v Karimi R v James 2006 EWCA Crim 14, in which a five judge Court of Appeal in England approved and followed Holley as also expressing the law of England and Wales.
57. The Lieutenant-Bailiff referred to the Jersey case of Prior (2002) JLR 11 in relation to the need for uniformity and certainty in the criminal law and quoted Vaughan JA: *“It would seem to us to be highly undesirable that the effect of insanity should be different in the two jurisdictions”*. He went on to conclude that the word provocation could usefully be substituted for *“insanity”*. He did not consider that the interests of justice would be served in having a different approach from that in England and Wales or Jersey. He indicated his intention to direct the Jurats regarding provocation in accordance with the majority view in Holley as endorsed in R v Karimi and R v James. Advocate Ferbrache does not criticise that approach.
58. The Lieutenant-Bailiff also raised with the Advocates the possible verdict of unlawful act manslaughter, to which no objection was taken.
59. In his summing up, the Lieutenant-Bailiff concisely and faithfully followed the specimen directions of the Judicial Studies Board.
60. The Jurats were given a standard direction regarding the respective functions of Judge and Jurats. He said *“the law is my area of responsibility”* and *“I will give you directions as to the law which applies in this case. When I do so, you will accept those directions and follow them”*. He went on to say *“it has always been your responsibility to decide the facts and it is for you and you alone to decide the facts”*.

The appeal

61. No complaint is made in relation to the directions given by the Lieutenant-Bailiff regarding the intent which must be proved for murder, nor in relation to unlawful act manslaughter.
62. The Appellant submits that in the directions given on self defence, the Lieutenant-Bailiff deviated from his conclusion when the issue had been discussed with counsel

before speeches and that he significantly misdirected the Jurats who were bound to follow this misdirection.

63. The Lieutenant-Bailiff directed the Jurats regarding self defence using the following words:

Self Defence

“If you are sure D had the necessary intent then you come to the issue of self-defence. If you are not sure then I shall direct you further in a moment.

If you think D was, or may have been, acting in lawful self-defence, his entitled to be found not guilty.

Because the Prosecution must prove D’s guilt, it is for the Prosecution to prove that D was not acting in lawful self-defence, not for D to establish that he was; and you must consider the matter of self-defence in the light of the situation which D honestly believed he faced.

You must first ask whether D honestly believed that it was necessary to use force to defend himself at all. This would not be the case if D was the aggressor, or acted in revenge, or knew he did not have to resort to violence.

If you are sure that D did not honestly believe that it was necessary to use force to defend himself, he cannot have been acting in lawful self-defence, and you need consider this matter no further.

But what if you think that D did honestly believe, or may honestly have believed, that it was necessary to use force to defend himself?

You must then decide whether the type and amount of force D used was reasonable.

Obviously a person who is under attack may react on the spur of the moment, and he cannot be expected to work out exactly how much force he needs to defend himself.

On the other hand, if he goes over the top and uses force out of all proportion to the attack on him, or more force than is really necessary to defend himself, the force used would not be reasonable.

So you must take into account both the nature of the attack on D and what he then did.

Here you may wish to consider the sequence and speed of what took place, the nature of what P did and the nature of D’s response. Your findings on the facts, bearing in mind the evidence you have before you are crucial here.

Failure to retreat when attacked and when it is possible and safe to do so, is not conclusive. It is simply a factor to be taken into account in deciding whether it was necessary for D to use force and whether the force used was reasonable. It is not necessary that a Defendant should demonstrate by his actions that he does not want to fight.

If you are sure the force used by D was unreasonable, then D cannot have been acting in lawful self-defence; but if you think the force used by D was, or may have been reasonable, he is entitled to be acquitted.

Whether or not the amount of force used was reasonable is a purely objective question.

64. Advocate Ferbrache submitted that the words in the fourth paragraph italicized above: *“this would not be the case if D was the aggressor, or acted in revenge or knew he did not have to resort to violence”* should not have been included. The JSB guidelines indicate that these words are to be added *“as appropriate”* and on the facts of the case he submitted the words were inappropriate and potentially misleading.
65. The Court was referred to *R v Rashford [2006] EWCA Crim 3377* and the judgment of Dyson LJ in which reference was made to the Scottish case of *Burns v HM Advocate (1995) SLT 1090*. Counsel quoted the words of the Lord Justice General at p1093 *“...it is now clear that the propositions in Hume and Macdonald that the accused must not have started the trouble or provoked the quarrel, are stated too broadly. It is not accurate to say that a person who kills someone in a quarrel which he himself started, by provoking it or entering into it willingly, cannot plead self defence if his victim then retaliates. The question whether the plea of self defence is available depends, in a case of that kind, on whether the retaliation is such that the accused is entitled then to defend himself. That depends upon whether the violence offered by the victim was so out of proportion to the accused’s own actings as to give rise to the reasonable apprehension that he was in an immediate danger from which he had no other means of escape, and whether the violence which he then used was no more than was necessary to preserve his own life_or protect himself from serious injury.”* and the words of Dyson LJ. *“In our judgment this passage in the Judgment of the Lord Justice General should be regarded as accurately representing English law as well.”* Relying on those two authorities Advocate Ferbrache submitted that the words complained of either should not have been included or not included without further explanation tailored to the facts of this case. The direction as given he submitted used absolute terms which without explanation were misleading to the Jurats.
66. Advocate Russell for the Crown submitted that on facts of this case it was entirely appropriate and necessary that the words should have been included. The words accurately represented the law in the context of the evidence. To add further explanations would only have served to confuse the Jurats. We agree that the direction was appropriate to the factual issues of this case without further explanation or qualification. It was not disputed that the Appellant had a knife and when James Dean was walking away, he called him back. There was evidence that James Dean had got the best of the first fight and there was evidence of abuse and vulgar remarks. On the evidence the issues of revenge and aggression were relevant and fell to be considered.
67. The second concern raised by Advocate Ferbrache related to the words *“you must decide whether the type and force noted was reasonable”*. He submitted that the words *“in the circumstances as the Defendant believed them to be”* should have been added. Without those additional words, the Jurats were misdirected. This misdirection was compounded by the concluding direction which emphasized that whether or not the amount of force used was reasonable is a purely objective question.
68. Advocate Russell submitted that this is not a misstatement of the law. To have added further words qualifying “reasonable” would be to invite confusion. The Jurats had been correctly directed in relation to the subjective nature of the first part of the test.

69. Throughout the summing up when reciting the facts, the Lieutenant-Bailiff referred to the need to consider Appellant's motivation and state of mind and the legal direction must be put into the context of the evidence and not taken in isolation.
70. We agree that there was no misdirection on self-defence. The Jurats would not have been misled by the directions that have been criticised for being insufficient and in too absolute terms. The directions were clear, easily understood and in accordance with well established principles of law.
71. Provocation was the subject of a direction in the following terms:

Provocation

"If you are sure that the Prosecution have disproved lawful self-defence on the basis just set out, you will turn to the question of Provocation.

- (1) *If you are sure D unlawfully killed P, intending to kill P, or to cause P really serious bodily harm, and the Prosecution here have disproved self-defence, D is guilty of murder unless you conclude this was, or may have been, a case of provocation.*

Provocation is not a complete defence, leading to a verdict of "Not Guilty". It is a partial defence, reducing what would otherwise be murder to the lesser offence of manslaughter. Because the Prosecution must prove D's guilt, it is for the Prosecution to make you sure that this was not a case of provocation, and not for D to establish that it was.

- (2) *Provocation has a special legal meaning, and you must consider it in the following way.*
- (3) *Firstly, you must ask yourselves whether D was provoked in the legal sense at all.*

A person is provoked if he is caused suddenly and temporarily to lose his self-control by things that have been said and/or done by P and/or other persons, rather than just by his own bad temper. You have heard the submissions of the defence on the evidence pointing to a loss of self-control. It is for you to assess on the facts. You will consider all the events; from the introduction – to the first fight. You will decide on what was actually said and/or done on a consideration of all the relevant evidence. Once you have come to a conclusion on the facts, you will deal with items 4, 5 and 6 which now follow.

- (4) *If you are sure that D was not provoked in that sense, the defence of provocation does not arise, and D is guilty of murder.*
- (5) *But, if you conclude that D was or might have been provoked, in the sense that I have explained, you must then go on to weigh up how serious the provocation was for this defendant. Is there anything about this defendant which may have made what was said and/or done affect him more than it might have affected other people?*

Here again a great deal depends on what your findings are on the facts, you must decide on the evidence you have before you. You will

note, for example, how D claims he was offended on behalf of the young girls he was with, especially his then girlfriend, Charlie Byrom by reason of the uncouth remark or remarks he heard. Also consider here everything you find was said and done to D and how D himself was affected.

- (6) *Finally, having regard to the actual provocation and to your view of how serious the provocation was for this defendant, you must ask yourselves whether a person having the powers of self-control of an ordinary, sober person of D's age and sex would have been provoked to lose his self control and do as this defendant did.*

What is to be expected of an ordinary person? The law expects people to exercise control over their emotions. If, for example, a person has an unusually volatile, excitable or violent nature, he cannot rely on that as an excuse. So the ordinary person in this context is a person who is not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today.

The question is not merely whether such a person would in like circumstances be provoked to lose his self-control, but also whether he would react to the provocation as D did."

72. Advocate Ferbrache submitted that the Lieutenant-Bailiff failed in accordance with the JSB directive on provocation to tailor his directions to the circumstances of the case to the extent that the directions were misleading. The JSB directive reads "*a direction on provocation is pre-eminently one which must be custom built to cater for the particular circumstances of the case*". It was contended that the Lieutenant-Bailiff failed to identify, as was mandatory, the parts of the evidence which were capable of pointing to a loss of self control, and that he simply referred to the "*submissions of the defence on the evidence*". This was said to be inadequate in that it failed to identify the gravity of provocation to the Appellant.
73. The Court was reminded of what Advocate Ferbrache had said to the Jurats in the closing speech on this part of the case. The words from the transcript read:

*"Mr Rouget was heard to shout, by Mr Queripel, words to the effect **"shut up you fat prick"** she said was that not provocation, is that not Craig provoking James Dean by saying that? It is, I would accept that that was provocation by saying that.*

*Is it also not provocation then on the same measure for Mr Dean to shout **"Get yer tits out"**? Let's say you're in doubt that Mr Dean actually shouted that, it was somebody else who said it, let's say you're in doubt. You're not in doubt that Mr Dean head-butted Mr Rouget. Is that not provocation? You're not in doubt that er Mr Dean threw haymaker punches or punch at Mr Rouget. Is that not provocation? When he's walking away and is heard by one of the Witnesses, and I've already been through that, and he turns back and says **"Don't be so cocky"** is that not provocation? When he runs up or marches up or walks up at a fast pace and he walks up, even if you're satisfied in your own mind that Rouget had the knife out at that second incident. It is Dean that approaches him, it's Dean that causes the second activity to take place. It's Dean that attacks Rouget. Is that not provocation?*

All of those are provocation. If saying to somebody, which I accept is, “shut up you fat prick” or words to that effect, is provocation, and that’s the Prosecution’s view, then it’s certainly the Defence view that all or any of these other matters would amount to provocation.”

74. Advocate Russell for the Crown indicated that the direction should not be considered in isolation from the evidence in the case and that the matters set out by Advocate Ferbrache and referred to in his closing speech would be firmly in the minds of the Jurats. She also referred to the very full and clear recital of the evidence and facts by the Lieutenant-Bailiff in his summing up with particular emphasis on the Appellant’s state of mind and motivation.
75. We do not conclude that the Jurats were in any way misdirected or misled by the way in which the Lieutenant-Bailiff directed the Jurats in this respect.
76. It was contended that the Jurats may have been misled by the inclusion of the word ‘sober’ when the Lieutenant –Bailiff set out the directions regarding how serious the provocation was to this defendant. He used the standard direction of “*whether a person having the power of control of an ordinary sober person of D’s age and sex would have been provoked to lose his self control and act as D did*”.
77. We found no merit in this point. The word ‘sober’ read in the context, could not have introduced a misleading or inappropriate test. All the evidence was before the Court including the recorded amount of alcohol consumed by the Appellant and the Jurats would have been in no doubt that the word ‘sober’ was not importing into the case a concept of a paragon or anyone other than an ordinary person of the Appellant’s age and sex. The standard set here was not too high for the objective element of the test for provocation.
78. Advocate Russell has indicated that none of the matters which later formed the basis of this appeal was raised with the Lieutenant-Bailiff at the conclusion of his summing up. We were referred to the case of *R v Gammans, R v Jarman CA Criminal Division 13th November 1998*. We do not consider this omission to be significant in the context of this case. Advocate Ferbrache fairly told the Court that it was only after careful consideration of the directions that he fully appreciated the alleged misdirections which founded his application for leave to appeal the conviction.
79. In conclusion, as the Court indicated on 1st April in dismissing the appeal against conviction, we find that the directions set out in the summing up cannot be faulted. It was for those reasons that the appeal was dismissed.