

Act is concerned with the effect of registered instruments only, and equitable rights arising under contracts are not dealt with by the Act. In my opinion, the Fords must be left to pursue such remedies as they may have against Clayton, if they are able to pursue them with success. They have no claim against the Registrar.

There will be judgment for the plaintiff against the defendant Ryan with costs to be taxed. I direct that the register book be rectified by cancelling the entry therein of the defendant Ryan as registered proprietor of the land, and that the duplicate certificate of title be similarly rectified. The Registrar has, very properly, appeared and required proof of the forgery; but I think he should be ordered to pay the costs of the defendant Ryan which should include also the costs Ryan has to pay to plaintiff. Such costs can properly be regarded as damages suffered by Ryan by reason of the rectification. The Fords must be left to bear their own costs, but I make no order for costs against them.

Order accordingly.

Solicitor for the plaintiff: *C. J. McDonald.*

Solicitor for the defendant Ryan: *Cyril Brooks.*

Solicitors for the defendants Ford: *Weigall & Crowther.*

Solicitor for the defendant Registrar of Titles: *F. G. Menzies*, Crown Solicitor.

E.E.H.

R. v. SCRIVA (No. 1).

SHOLL J.

NOVEMBER 20-24, 27-30, 1950.

Criminal law—Evidence—Joint trial of two accused—Documents put in evidence by one accused which relate favourably to the defence of the second accused—Second accused not calling evidence other than himself—Right of final reply—Crimes Act 1928 (No. 3664), sec. 432.

The rule that, where several prisoners are presented together, if one prisoner calls evidence or puts a document in evidence which relates favourably to the defence of his fellow-prisoners the prosecution has, as a matter of general practice, a general right of reply, applies not only to the case where the presentment is for a joint offence but also to the case of a presentment for a joint offence or, alternatively, for separate offences.

TRIAL.

Michele Scriva and Antonio Romeo were charged at the Criminal Sittings at Melbourne upon a presentment for the murder of one Duffy. The presentment alternatively charged the accused Romeo with attempted murder. The accused Romeo gave evidence on oath in his own defence and called no other evidence. Further facts appear from the judgment.

Fazio, for the accused Romeo—The accused Romeo is entitled to the right of final reply. The order of addresses should be: firstly counsel for the accused Scriva, secondly counsel for the Crown, and finally counsel for the accused Romeo. Counsel for Romeo did not cross-examine any of Scriva's witnesses.

Winneke K.C. (with him, *Nelson*), for the Crown—The Crown has the right of reply. *R. v. Lee*, [1950] V.L.R. 413, governs the matter. [He referred also to *R. v. Canan*, [1918] V.L.R. 390; *R. v. Orton*, [1922] V.L.R. 469.] Although counsel for the accused Romeo has not put in evidence any depositions or other documents, counsel for the accused Scriva has put in evidence the depositions in the Court below of two Crown witnesses and also prior statements made to the police by one of those witnesses. Those depositions and statements were put in for the purpose of discrediting those witnesses and laying a foundation for saying to the jury that they were unreliable, but this affects both the accused. Both these witnesses give important evidence against the accused Romeo. Counsel for Romeo is entitled to suggest to the jury that the depositions and prior statements in evidence discredit the witnesses and show they are unreliable and that their evidence should not be accepted as against his client. His case is materially assisted by the evidence put in by the accused Scriva.

Fazio—The right of reply is a matter for the discretion of the Court—*R. v. Lee (supra)*. Where evidence is called by an accused who is jointly charged with others, the Crown has a right of reply, subject to the discretion of the Court for special reason to alter the general rule. The present case, however, does not involve a joint offence. The case opened by the Crown is that the fatal wound was caused by Scriva at a time when Romeo was not present and that later Romeo was seen to inflict some wounds which accelerated the death.

[Sholl J. referred to *R. v. Trevalli* (1882), 15 Cox C.C. 289. The question is whether the principle of *R. v. Lee (supra)* should be extended to the case of separate offences in the same indictment.]

Even though the Crown at the end of the Crown case puts its case in three ways, two of those ways do not strictly charge a joint crime. The depositions and other documents put in by counsel for Scriva do not clearly assist the case of Romeo and are not equally of benefit to him as they are to Scriva—*R. v. Lee (supra)*. The whole of the depositions of the witnesses are not in evidence. The Court cannot find that the evidence put in on behalf of one accused assists the case of the other accused unless there is real assistance in the sense of deliberate assistance. It is not sufficient that such evidence happens in a general way to assist the defence of the other accused.

Cullity, for the accused Scriva (by leave)—The granting of the application by the Crown on the material relied on would be contrary to the general practice. Such an application can only succeed if evidence which materially helps a fellow accused is led by another accused, as where one accused calls all the evidence which is material to the cases of both accused. Cross-examination of Crown witnesses by one accused may always have the effect of showing those witnesses to be unreliable, and the second accused is entitled to this benefit without losing the right of final reply. The matter must be regarded broadly. The mere putting in of documents in the course of cross-examination can make no difference. If the whole of the depositions of one of the Crown witnesses had been put in, counsel for the accused Romeo would be in a stronger

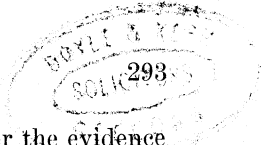
position than he is with only part of the deposition having been put in evidence. The Court has a discretion to refuse the Crown the right of reply—*R. v. Canan* (*supra*); *Crimes Act* 1928, sec. 432. *R. v. Lee* (*supra*) is distinguishable, as there the evidence called by one accused was equally applicable to the case of all accused.

Winneke K.C.—The application raises a very important point of criminal practice. The principle stated in *R. v. Lee* is not limited to a presentment for a joint offence, but applies to any case where accused persons are jointly presented. [He referred to *R. v. Trevalli* (*supra*).] The Crown has made clear the way in which the case against Romeo is being put, and therefore the discretion of the Court should not be exercised against the Crown. There must be sound grounds for the exercise of the discretion against the Crown.

SHOLL J.: In this case a debate has taken place as to the order which addresses of counsel should follow. In point of fact, this debate perhaps ought to have taken place after Romeo had given his evidence on oath, as his counsel has indicated he intends to do. But, as a matter of convenience, having regard to the time of the adjournment last night, the point has been argued at this stage. Mr. Fazio contends that as his client alone is being called to give evidence on oath and is calling no other witnesses, the position ought to be that he should follow Mr. Winneke. There is no dispute that Mr. Cullity addresses first, as he has called the accused Scriva and other witnesses. Mr. Winneke, on the other hand, has contended on behalf of the Attorney-General that he is entitled to a general right of reply and has relied on the three Victorian authorities of *R. v. Canan*, [1918] V.L.R. 390, *R. v. Orton*, [1922] V.L.R. 469, and *R. v. Lee*, [1950] V.L.R. 413. The first two of those authorities were decisions of Cussen J., but the last is a decision of the Full Court and, of course, clearly binds me in this jurisdiction, even if I were not otherwise disposed to follow the decisions of Cussen J. In *R. v. Canan*, [1918] V.L.R. 390, there were two persons jointly charged with shop-breaking, and counsel for one accused elicited in cross-examination of the other accused evidence which might have been said to assist the case of counsel's client. A debate took place on the order of addresses. Cussen J. took occasion to go into the history of the law on the question and to state the general rules. At p. 392, first of all, he quoted with approval—I think that is of importance in this case—the decision of *R. v. Trevalli* (1882), 15 Cox C.C. 289, in which Hawkins J. gave judgment. He quoted Hawkins J.'s words to this effect:

So where, as in the present case, one prisoner is separately charged in the same indictment with an offence altogether distinct and unconnected with the offence charged against another or others of the prisoners, the calling of witnesses by that one prisoner to rebut the charge made against him does not entitle the counsel for the prosecution to a general reply upon the whole case as against all the prisoners. If, however, from the witnesses called for one prisoner evidence is elicited in favour of others indicted with him, then I think the right to reply should be extended to the cases of such other prisoners as far as such evidence affects their cases.

His Honour then went on to hold that the evidence elicited by one of the accused was not sufficiently material to bring into operation the principle that the Crown should have a general right of reply. His Honour went on, at p. 394, to state that the rule relating to prisoners tried together as outlined by him in his decision was consistent with sec. 432 of the Crimes Act, that is to say the provision which is now sec. 432 (i), and he referred also to a decision of Hodges J. in *R. v. Franklin* (*unreported*)



in 1916. Hodges J. had said that he would consider whether the evidence of the witnesses called by one prisoner really affected the cases of both prisoners, and that if he was satisfied that it did he would allow the Crown a general reply. Cussen J. added, "I think that is the right view and that an inflexible rule should not be laid down." So far as that decision went, it was a decision that on an indictment for a joint offence the Crown would normally be entitled to a general right of reply if evidence by one accused materially assisted the case of the other, but that in the particular circumstances of that case there had not been such material assistance. But the decision also seems to me to adopt with approval the observations of Hawkins J., which, as I construe them, mean that the same principle is in general terms applicable to separate charges in the same indictment.

I therefore turn to the case of *R. v. Trevalli (supra)*. That was a case where eleven defendants were charged in the same indictment on 94 counts made up of various distinct misdemeanours alleged to have been committed on different days, some by several of the defendants jointly, others by most of the defendants separately, and as to which a question of order of addresses arose. It was in relation to that case that Hawkins J. made the remarks which I have already quoted from the judgment in *R. v. Canan*. It was in the setting of that trial that His Lordship made the remark,

If, however, from the witnesses called for one prisoner evidence is elicited in favour of others indicted with him, then I think the right to reply should be extended to the cases of such other prisoners so far as such evidence affects their cases.

That, of course, appears to be common sense in that the same kind of considerations as are outlined in *Canan's Case* and *Orton's Case* and *Lee's Case* are capable of being applied to the case of two prisoners charged on the one presentment; that is to say, the arguments in favour of the general principle, and, for that matter, in favour of the discretionary exceptions to it, are logically just as applicable, it seems to me, to the case of prisoners jointly presented though in respect of separate offences as to the case of prisoners jointly presented for a joint offence.

One case, however, raises some difficulty, I think, and that is the case of *R. v. Hayes* (1838), 2 Mood. & R. 155. In that case there was an indictment of two persons for stealing a sheep—that was the joint indictment—and of two others separately on distinct receiving counts; that was for receiving parts of the mutton of the sheep. Parke B., after conferring with Coltman J., limited the reply of the Crown in that case to a reply to the case for the receivers, as counsel for the receivers had put in the depositions to contradict the case against the receivers by showing a variation between the testimony of the principal witness and the depositions. It does not appear from the report whether the contradiction of the case against the receivers was also a contradiction of the case against the alleged stealers of the sheep, nor does it appear whether the principal witness was a witness at all to the larceny, and Parke B. said he did not wish to lay down a general rule that in no case where several were indicted together would witnesses called by one entitle the prosecutor to reply against all; but in that case, he said, the offences were distinct, as the receivers might have been indicted separately from the principal. I have felt some doubt how far that case is intended to state what might be called a principle distinct from the principle referred to in *Canan's Case*, *Orton's Case*, and *Lee's Case*.

But *Hayes' Case* was referred to in *Trevalli's Case*. Hawkins J., in *Trevalli's Case*, stated the proposition he there adopted without observing any apparent inconsistency with *Hayes' Case*, and *Hayes' Case* is

treated in the 32nd edition of *Archbold's Criminal Pleading, Evidence & Practice*, p. 191, as consistent with the law there stated. The law there stated in *Archbold* is in these terms:

Where on an indictment against several prisoners one of them calls evidence which is applicable to all, the prosecution has a general right of reply, although the others call no witnesses.

He cites *R. v. Hayes* and *R. v. Davis* (1900), 17 T.L.R. 164.

In view of those authorities I should be disposed to take *Canan's Case* as stating a principle which is not limited to a charge of a joint offence but which extends in a proper case to charges on a joint presentment. *Orton's Case* was another decision of Cussen J. There the charge was for the joint offence of conspiracy. Again, His Honour, at p. 471, adopted the view of Hawkins J., quoting there, I think, from *R. v. Burns* (1886), 16 Cox C.C. 195, but in that case, although he reiterated his view that his decision in *Canan's Case* was correct, he allowed a discretionary exception from the general principle, covering the case where counsel for one or more of the accused were in a difficulty as to how the Crown case would be presented against the accused concerned. His Honour, at p. 472, adopted the statement of the law from the then current edition of *Phipson*, although that statement of the law made reference only to a case where the offence was joint. That was the state of affairs when the matter came before our Full Court this year in *R. v. Lee*. The leading judgment in the Full Court on the matter is that of O'Bryan J., at pp. 417, 418. Smith J., at p. 441, concurred in that part of the judgment, and Barry J., at p. 433, adopted the judgment of Smith J., so I must take this as a uniform decision of our Full Court. In that case counsel for one accused called evidence which was applicable to the cases of all three, and also in the course of the Crown case put in depositions at an inquest with a view to showing that they were inconsistent with the evidence of two Crown witnesses. Gavan Duffy J., at the trial, was reluctant to deprive counsel for the other two accused of the right of reply merely on the basis of the evidence which he called, the substantive evidence which the first accused had called, but did so primarily on the ground of the putting in of the depositions and on the view that the contradictions and discrepancies in the evidence of the witnesses before the coroner and at the trial were likely to be the basis of a substantial argument for all three applicants. On that basis His Honour allowed counsel for the Crown to address the jury last, and that view was unanimously upheld by the Full Court. O'Bryan J. stated the rule in these terms:

Where several prisoners are presented together for a joint offence if one prisoner calls evidence or puts in a document which relates favourably to the defence of his fellow-prisoners, the prosecution has, as a matter of general practice, a general right of reply. The rule is not inflexible, and, in exceptional circumstances, the trial Judge may exercise a discretion to vary the order of addresses. In this case the offence charged was plainly a joint offence. The evidence called by Clayton and the depositions put in by him clearly affected the case of all the defendants. It was equally of benefit for one as for the others. The prosecution, therefore, *primâ facie*, had a right to reply generally, unless, for good reason, the learned trial Judge thought fit to vary the order of addresses.

His Honour then went on to hold the learned trial Judge had rightly refused to exercise a discretion against the Crown. Now that is clearly a case of a joint offence and, if this were a case of a joint offence only, that case would clearly bind me completely. The question I have to

decide is whether the reasoning of that case and the principles stated in it are applicable to a case where, as here, there is on one view of the facts a joint offence charged and on another view of the facts what may be in reality separate offences. That is to say it has emerged here in the course of argument that the Crown puts the case against the accused Scriva in one of two ways and against the accused Romeo in one of three ways. Against Scriva it is put that he committed murder by delivering a blow with a knife near the motor car, or alternatively that he did so at a spot south of the Permax factory. As against Romeo it is put that he committed murder on the basis of the first alternative allegation against Scriva by accelerating the death of the deceased through the administration of separate blows south of the Permax factory; secondly, it is put against him, on the hypothesis of the second way of putting the Crown case against Scriva, that Romeo jointly murdered Duffy by acting in concert with Scriva in an attack south of the Permax factory; and thirdly, it is put against Romeo that at all events he was guilty of an attempt to murder Duffy by the administration of knife blows south of the Permax factory. It seems to me that that state of affairs very much resembles in that respect the position in *Trevalli's Case*, where some of the counts were joint and some were separate. I can see no logical basis on which I can say that the considerations which appealed to the Full Court in *Lee's Case* in inducing it to lay down the propositions which it there laid down are inapplicable to the situation here. Therefore, in my judgment I should proceed to deal with this case on the basis that that principle laid down in *Lee's Case* is not limited to the case of presentment for a joint offence alone, but extends at least as far as the circumstances of the present case which I have just endeavoured to outline. This case, it might be said, is a case which partakes partly of the character of a presentment for a joint offence and partly of the character of a presentment in the alternative for what might be separate offences; but, forming the best view I can of the logical considerations which apply to the problem, I think the proper view is that the rule in *Lee's Case* is applicable to the circumstances of this case, and so in my opinion are the principles as to discretionary exceptions from the rule.

I therefore turn to consider the position in the present case. In the statement of the law in *Phipson on Evidence* which, as I said, was cited with approval in *Canan's Case*, it was pointed out that where separate defences were relied upon by two accused, for example alibis, in general the adducing of evidence of an alibi by one accused did not entitle the Crown to a general right of reply if the other accused were otherwise entitled to that right. Mr. Fazio has pointed out in discussion that logically evidence of an alibi called by one accused tends in favour of the other accused, at all events where they are charged with joint presence at the scene of the crime, because the subtraction of A from the joint company of participators in the crime tends against the Crown account of the joint offence, but, however that may be, it seems to have been settled that the mere calling of an alibi by one accused is not the calling of evidence which materially assists the other accused. But that statement of the principle says nothing as to the position which obtains when the accused who calls the evidence of an alibi also adduces evidence, for example, of a documentary character, in cross-examination of the Crown witnesses, and it seems to me that there is nothing in the statement of the principle in *Phipson* as to the alibi cases which in any way bears upon the problem which arises in a case such as the present where depositions are put in in cross-examination of a Crown witness by counsel for an accused who also calls evidence of an alibi.

In my opinion the question which I should formulate for myself is this: Has Scriva here adduced evidence from his own witnesses (apart from his alibi evidence), or by documents put in by cross-examination of the Crown case, of material assistance to Romeo, so that it may be anticipated that counsel for Romeo in his address will be likely to deal with that evidence in support of his client's defence? If so, the Crown should have the general right of reply even though that, incidentally, may involve giving the Crown the right of reply also on Romeo's alibi or partial alibi if he proposes to set up such a defence by his own evidence without witnesses. And that view, I think, is consistent with sec. 432 (i) of the Crimes Act, having regard to what Cussen J. said in *Canan's Case*, [1918] V.L.R. 390, at p. 394. That, as I say, is the question which I should formulate for myself, and if it is answered in the affirmative the Crown have the general right of reply unless there exists a reason for exercising a discretion in favour of Romeo so as to exclude that rule. If I may say so, the tendency of any Judge, I think, would be to exercise a discretion in favour of giving the accused Romeo the right of reply if a sound ground could be found for the exercise of such a discretion, because I agree with Mr. Cullity's observation that the Court should not be astute to find any ground upon which to deprive him of such right, but I do not agree with Mr. Fazio's submission that the discretion should be exercised in favour of Romeo unless the Court is satisfied that the assistance derived by Romeo from Scriva's evidence was deliberate. I think that would involve an impossible problem for the Court. I think the test must be whether assistance to Romeo's case has in fact been derived or is in fact likely to have been derived. But, I do think that the discretion may, and perhaps should, be exercised in favour of an accused's right of reply if (a) the evidence in question is not really material, or the materiality is doubtful (see *Canan's Case*), or (b) if counsel for the second accused is really in doubt how the case is to be put against his client (see *Orton's Case*).

I therefore turn to consider how those principles are applicable here. Now, statements have been put in by Mr. Cullity—exhibits "4S" and "5S"—which were made by Lyle to the police before the inquest, and he has put in also the depositions of Mrs. Duffy and her statement to the police before the inquest—exhibit "10S". So far as exhibit "4S" is concerned, that describes an incident between Duffy and Romeo, but without alleging the actual delivery of any blows. In that statement Lyle said that Romeo was trying to inflict blows. In exhibit "5S", Lyle omits a description of that incident altogether. Having regard to the fact that Lyle is one of the only two persons who positively identify Romeo as an attacker of Duffy, it seems to me obvious that that is evidence adduced by Scriva which is of material assistance to Romeo, and that it may be anticipated that counsel for Romeo will be likely to deal with it in support of his client's defence. Mr. Fazio answers that by saying that incidentally Mr. Cullity has taken away from him the benefit that he might get for Romeo if Lyle's evidence were accepted. By that, he means that if Lyle's evidence is accepted *in toto* as to the first blow being delivered near the car, then the second way of putting the case against Romeo would fall to the ground, and that is true. But, it seems to me that the evidence must also affect the credibility of Lyle as to his account of the actual delivery of the blows by Romeo on the person of Duffy. So that, even on that hypothesis, it is still open to Mr. Fazio to use that material as part of an attack on the credibility of Lyle, in so far as Lyle alleges any attack by Romeo on Duffy, and an attack by Romeo on Duffy is part of the Crown case, in all its three forms against Romeo. That being so, it seems to me that it is impossible

to suppose that the evidence so tendered by Mr. Cullity in exhibits "4S" and "5S" is not of the most material assistance to Romeo, even though in one respect it may tend against him.

But, in case I am wrong on that view, and in case Mr. Fazio's answer is right, I should next deal with the case of the statements of Mrs. Duffy. Mrs. Duffy, in her depositions, identified Scriva as attacking Duffy with Romeo. In her statement, exhibit "10S", she identified Romeo as an attacker of Duffy, but did not positively identify Scriva as a co-attacker. That inconsistency seems to me of great importance in Romeo's answer to the second way in which the Crown puts its case against him, and it seems impossible to me to conceive of an address by counsel for Romeo which does not draw attention to those defects in the evidence of Mrs. Duffy. Indeed, I should think that is a matter which must already have presented itself to the minds of the jury. Lastly, Mr. Cullity, in leading evidence from Mrs. Scriva, led from her direct evidence as to Romeo's absence from No. 204 Peel Street immediately before these incidents at 6.30 p.m. on the night of 23rd September. It seems to me, again, impossible to say that that is of slight importance from the point of view of Romeo's case, because it is directly corroborative of what Romeo told the police; namely, that he had been away and that although he lived at 204, he was only returning in the direction of his home at ten to seven or shortly before that time. I entirely agree with Mr. Cullity's view that the Court should, if possible, not exercise a discretion against the second accused merely because counsel may, for the sake of sparing Mrs. Duffy's feelings, or in the case of Mrs. Scriva's evidence by momentary inadvertence, have led some evidence or tendered some evidence which might have been done without. But, I think I cannot decide the case on a basis such as that. I think I have to deal with what is *prima facie* a Crown right, where the circumstances give rise to it, and that I must decide whether my discretion should be exercised against the invocation of that right by a consideration of what has, in fact, happened, and not of the motives which may have induced counsel to act as they did. That being so, it seems to me that I cannot exercise my discretion here—cannot properly exercise it—against the Crown's right of reply either on the basis that the evidence that I have mentioned—the statements of Lyle, the statements of Mrs. Duffy, or the evidence of Mrs. Scriva—are immaterial, or that their materiality is doubtful. It seems to me that it would be impossible judicially to say that.

I have given anxious consideration to the other ground on which the discretion can be exercised, and that is the ground that counsel for Romeo might be in doubt as to how the Crown case is really put against his client. Had it not been for the lengthy discussion which took place at the end of the case for Scriva as to how the Crown case against Romeo is put, I should have been disposed to give effect to Mr. Fazio's argument and to Mr. Cullity's argument, and to give Mr. Fazio the general right of reply, on the ground that the Crown case had started off as a case of acceleration of death; had started off, as it were, in the first of the three forms which it has now assumed. But, having regard to the very full argument on the matter and the detailed way in which Mr. Winneke outlined the way in which he put his case against Romeo, and to my own judgment delivered on Mr. Fazio's submission, again, I think it is impossible for me to say, judicially, that I can find any sound ground on which I can exercise my discretion in favour of Romeo's right of reply, by reason of any view that counsel does not now understand fully the way in which the case is put against his client.

That being so, I think, forming the best judgment I can in the matter, that the Crown has, in the circumstances of this case, the general right of reply and that, while I have a discretion in proper circumstances to alter the order of addresses, there is no ground on which I can, with propriety, exercise my discretion in that manner. I should like to add that I am much indebted to counsel for their helpful addresses in the matter, especially to Mr. Cullity, who has had very long experience in these Courts, and if I may say so, my own recollection rather agrees with his, that over a long period the strict view in relation to the right of reply may not have been insisted on. Mr. Winneke may, however, be right in saying that there are many cases where the circumstances have not given rise to the present problem, and I have no reason to doubt what he tells me that since *Lee's Case* the matter has had more attention and the practice as laid down in *Lee's Case* has been more readily observed.

For these reasons, I think I must hold that the order of addresses here will be Mr. Cullity, Mr. Fazio, and Mr. Winneke.

[The jury returned a verdict of guilty of murder against Scriva and a verdict of guilty of attempted murder against Romeo.]

Solicitor for the accused: *R. H. Dunn*.

Solicitor for the Crown: *F. G. Menzies*, Crown Solicitor.

P.E.J.

R. v. SCRIVA (No. 2).

FULL COURT. (Lowe A.-C.J., O'Bryan and Smith JJ.). FEBRUARY 6-9, 12, 20, 1951.

Criminal law—Murder—Provocation—Direction to jury—Failure to direct—Newspaper publications—Photographs—Whether rendering fair trial impossible—Whether miscarriage of justice—Crimes Act 1928 (No. 3664), secs. 593, 594 (1).

The accused was charged with the murder of D. The accused had attacked a passenger in a motor car with a knife and when D., a bystander, attempted to prevent the attack, had struck D. with the knife and killed him. It was submitted on behalf of the accused that the evidence showed that he had just seen his young child knocked down by the motor car and killed owing to the negligence of the driver thereof, and that the provocation he thereby received was such as to reduce the killing of D. from murder to manslaughter.

Held, per Lowe A.-C.J. and O'Bryan J.: that the suggested provocation was not sufficient to lead an ordinary person to do what the accused did in respect of D., and that the question of manslaughter based on provocation was properly withdrawn from the jury—*Holmes v. Director of Public Prosecutions*, [1946] A.C. 588, applied; per Smith J.: that as the accused must have been aware that D. was restraining him from attacking the passenger in the car, the case was one of constructive murder to which the doctrine of provocation was irrelevant.

If a defence, though not taken by the accused, is open on the evidence, it is the duty of the trial Judge so to direct the jury, and if he fails to do so, it is the duty of an appellate Court to put him right. *Kwaku Mensah v. The King*, [1946] A.C. 83, followed.

A new trial will not be granted on the ground that newspaper publications of photographs and articles have prejudiced and made impossible the fair trial of an accused person unless it appears that a miscarriage of justice, within the meaning of the *Crimes Act* 1928, secs. 593, 594 (1), has occurred. *Ross v. The King*, [1922] V.L.R. 329, followed.