[1988–90 Gib LR 52]

INTERNATIONAL PROPERTIES (GIBRALTAR) LIMITED v. RENT TRIBUNAL

SUPREME COURT (Kneller, C.J.): June 30th, 1988

Landlord and Tenant—rent—rent control—residential tenancy—word "may" in Landlord and Tenant Ordinance, s.22(1) confers discretion on Rent Tribunal to lift rent control if structural alterations enlarge or divide property—contains no requirement that alterations be "substantial" but suffices that more than minimal or decorative and carried out with bona fide intention of increasing housing stock—incentive for landlords to fulfil Ordinance's aim of increasing housing stock, so discretion not unfettered

The appellant appealed against the decision of the Rent Tribunal not to lift rent control from two flats to which structural alterations had been, or were to be, carried out.

The appellant owned the freehold of the premises, the top two floors of which were divided into flats to be let to tenants. It was given permission to convert one floor into two self-contained flats, and the other into a self-contained flat and a bed-sitter; each floor had previously been let as one flat. It applied to the Rent Tribunal for an order declaring that Part III of the Landlord and Tenant Ordinance no longer applied to the floors; the Tribunal refused to grant an order on the basis that the works effected had been minimal, and were insufficient to bring the premises within the provisions of the Landlord and Tenant Ordinance, s.22.

On appeal, the appellant submitted that (a) the works were within the provisions of s.22(1) of the Ordinance, as their *bona fide* effect was to reconstruct the dwellinghouses into two separate self-contained flats; (b) there was no requirement in s.22 that the works carried out be "substantial" for rent controls to be lifted, and that in any case the works carried out were, in fact, more substantial than those that had been held to surmount the more demanding barrier present in the equivalent English legislation; (c) the structural alterations caused neither a decrease in the overall housing stock nor undue hardship to any tenant, and that in fact they achieved the opposite, which was to be encouraged given the state of Gibraltar's housing stock, and (d) the use of the word "may" in s.22 did not necessarily mean that the decision whether to lift rent control was entirely at the discretion of the Rent Tribunal.

The Tribunal submitted in reply that (a) although the flats were to be, or had been, converted into two separate dwellinghouses, the alterations that had taken place to achieve this had been minimal, with the result that the

provisions of s.22 did not apply; (b) the character of the dwellinghouses had not been changed, and that it was not the appellant's *bona fide* intention to reconstruct them; and (c) that, even if the provisions of s.22 had been met by the appellant in carrying out the alterations, the Tribunal had a discretion whether it should lift the rent control.

Held, allowing the appeal:

(1) Both decisions of the Tribunal not to lift the rent controls on the flats would be set aside, and the controls would be lifted. In looking for "substantial" alterations to the premises, the Tribunal had erred in law as substantiality was not a requirement stated in s.22 of the Ordinance. It was enough that the alterations should be more than minimal or decorative when combined with a *bona fide* intention to increase the housing stock (para. 22; para. 27).

(2) One of the objects of the Landlord and Tenant Ordinance was to secure an increase in the quantity and quality of Gibraltar's housing stock. Social policy, as well as the spirit of the Ordinance, dictated that landlords should be encouraged to increase the stock of housing available for occupation. Without the incentive of the lifting of rent controls where renovations had been carried out with a view to increasing the housing stock, landlords would have little incentive to make such alterations (paras. 24–26).

(3) It was unnecessary for the purposes of the present appeal to determine whether the word "may" in s.22(1) conferred discretion on the Tribunal as to whether to lift the rent control, or whether it should be read as "must." However, if the discretion of the Tribunal in this regard were unfettered, it would provide little incentive for landlords to reconstruct premises, an outcome that would frustrate one of the objects of the Ordinance (para. 31).

Cases cited:

(1) *ACT Constr. Ltd.* v. *Customs & Excise Commrs.*, [1981] 1 W.L.R. 1542; [1982] 1 All E.R. 84; [1982] S.T.C. 25; [1981] T.R. 489, applied.

(2) *Bickmore* v. *Dimmer*, [1903] 1 Ch. 158; (1903), 72 L.J.Ch. 96; 15 W.R. 180; 47 Sol. Jo. 129, applied.

(3) *Brooklands Selangor Holdings Ltd.* v. *Inland Rev. Commrs.*, [1970] 1 W.L.R. 429; [1970] 2 All E.R. 76; [1969] T.R. 485; (1969), 114 Sol. Jo. 170, referred to.

(4) *Cadle (Percy E.) & Co. Ltd.* v. *Jacmarch Properties Ltd.*, [1957] 1 Q.B. 323; [1957] 2 W.L.R. 80; [1957] 1 All E.R. 148; (1956), 101 Sol. Jo. 62, distinguished.

(5) *Eyre* v. *Haynes*, [1946] 1 All E.R. 225; (1945), 90 Sol. Jo. 55; 62 T.L.R. 63, distinguished.

(6) *Granada Theatres Ltd.* v. *Freehold Inv. (Leytonstone) Ltd.*, [1958] 1 W.L.R. 845; [1958] 2 All E.R. 551; (1958), 102 Sol. Jo. 563; on

appeal, [1959] Ch. 592; [1959] 1 W.L.R. 570; [1959] 2 All E.R. 176; (1959), 103 Sol. Jo. 392, applied.

(7) *Hemns* v. *Wheeler*, [1948] 2 K.B. 61; [1948] L.J.R. 1024; (1948), 92 Sol. Jo. 194; 64 T.L.R. 236, distinguished.

(8) *Joel* v. *Swaddle*, [1957] 1 W.L.R. 1094; [1957] 3 All E.R. 325; (1957), 101 Sol. Jo. 850, distinguished.

(9) *Khiani* v. *Rent Tribunal* (1987), Supreme Ct., January 29th, 1988, unreported, observations of Alcantara, A.J. applied.

(10) *Langford Property Co. Ltd.* v. *Batten*, English C.A., *The Times*, July 22nd, 1949, distinguished.

(11) *Langford Property Co. Ltd.* v. *Sommerfeld*, [1948] W.N. 287; (1948), 92 Sol. Jo. 408, distinguished.

(12) *Marchbank* v. *Campbell*, [1923] 1 K.B. 245; [1922] All E.R. Rep. 358; (1922), 21 L.G.R. 90; 92 L.J.K.B. 137; 67 Sol. Jo. 184, *dicta* of Salter, J. applied.

(13) *Palser* v. *Grinling*, [1946] K.B. 631; [1946] 2 All E.R. 287; [1947] L.J.R. 97; on appeal, [1948] A.C. 291; [1948] 1 All E.R. 1; [1948] L.J.R. 600; (1947), 92 Sol. Jo. 53, distinguished.

(14) *Pearlman* v. *Harrow School (Keepers & Governors)*, [1979] Q.B. 56; [1978] 3 W.L.R. 736; [1979] 1 All E.R. 365; (1978), 38 P. & C.R. 136; 122 Sol. Jo. 524, applied.

(15) *Peterborough Corp.* v. *Holdich*, [1956] 1 Q.B. 124; [1955] 3 W.L.R. 626; [1955] 3 All E.R. 424; (1955), 54 L.G.R. 31; 99 Sol. Jo. 798, referred to.

(16) *Phillips* v. *Barnett*, [1922] 1 K.B. 222; [1921] All E.R. Rep. 385; (1921), 20 L.G.R. 1; 91 L.J.K.B. 198; 66 Sol. Jo. 124, not followed.

(17) *Shuter (No. 2)*, *Re*, [1960] 1 Q.B. 142; [1959] 3 W.L.R. 652; [1959] 3 All E.R. 481; (1959), 103 Sol. Jo. 855, referred to.

(18) *Sinclair* v. *Powell*, [1922] 1 K.B. 393; [1921] All E.R. Rep. 379; (1921), 20 L.G.R. 73; 91 L.J.K.B. 220; 66 Sol. Jo. 235; 126 L.T. 210, applied.

(19) *Smith* v. *Portsmouth JJ.*, [1906] 2 K.B. 229; (1906), 75 L.J.K.B. 851; 50 Sol. Jo. 575; 70 J.P. 497; 54 W.R. 598, applied.

(20) *Solle* v. *Butcher*, [1950] 1 K.B. 671; [1949] 2 All E.R. 1107, referred to.

(21) *Thorneloe & Clarkson Ltd.* v. *Board of Trade*, [1950] 2 All E.R. 245; (1950), 1 P. & C.R. 139, distinguished.

(22) *Woodward* v. *Samuels*, [1920] All E.R. Rep. 659; (1920), 84 J.P. 105; 89 L.J.K.B. 689; 122 L.T. 681, not followed.

Legislation construed:

Landlord and Tenant Ordinance, s.22(1): The relevant terms of this sub-section are set out at para. 11.

Landlord and Tenant (Miscellaneous Provisions) Ordinance (Laws of Gibraltar, 1965–69, *cap*. 83, s.7(2): The relevant terms of this section are set out at para. 14.

Landlord and Tenant Act 1954, s.30(1)(a): The relevant terms of this paragraph are set out at para. 22.

L.W.G.J. Culatto for the appellant landlord;
D. Robinson, *Crown Counsel*, for the respondent Tribunal;
The tenants did not appear and were not represented.

1 **KNELLER, C.J.:** The freehold premises No. 99 at 13 Parliament Lane are owned by International Properties (Gib.) Ltd. (the appellant). On the top floor there are two tenants: Catalan Enterprises Ltd. in Suite 1 and the family Gracias in Suite 1A. They were served but have not appeared or been represented in the appeals. The other floor is unoccupied. The Catalan Enterprises and Gracias suites are the subject of one appeal and the vacant floor the other. The appeals have been consolidated.

2 On August 26th, 1986, the Development and Planning Commission received plans and specifications from the appellant for the conversion of each of these floors into two separate units, and a month later gave the appellant Permit No. 2999, authorizing it to execute the building work. Work has only been done, so far, on the top floor.

3 The appellant's solicitors applied, on January 8th, 1987, to the Rent Tribunal for an order declaring that Part III of the Landlord and Tenant Ordinance no longer applied to these floors.

4 Each floor used to be let as one flat but both were empty when the application was made. One floor would be turned into two self-contained flats, and the other had become a self-contained flat and a bed-sitter.

5 At the Tribunal's hearing on July 7th, 1987, Mr. Peter Isola represented the appellant. Catalan Enterprises Ltd. was not present or represented, but the Gracias couple appeared in person and Mr. Isola did not object, though he pointed out that they had become tenants of Suite 1A after the work had been done.

6 Mr. Isola explained that the structural alterations had been made in accordance with the plans supplied. A new bathroom, kitchen and entrances had been put in, at a total cost of £6,000. One flat had now become a self-contained flat and a self-contained bed-sitter.

7 The Tribunal considered all this and decided on July 14th, 1987 that the self-contained flat and self-contained bed-sitter should not be decontrolled because the works effected had been minimal, with the result that s.22 of the Ordinance did not apply. The appellant was told this a month later.

8 That was the result for the top floor. The application for the floor below was heard on November 12th, 1987. The same Mr. Isola told the Tribunal that this floor was one flat which was now vacant, and that the

proposed works on it would cost (in November 1987) £15,000. An extra bathroom, kitchen, partitions, a fire-resistant door and the refurbishment of the existing kitchen would make it into two self-contained flats.

9 Again, the Tribunal decided that the application failed. It found that, from the plans and information put before them, the proposed works did not suffice to warrant decontrol. The chairman of the Tribunal told the appellant this on December 10th, 1987.

10 The memorandum of appeal in each appeal has four grounds, namely that—

(a) the Rent Tribunal erred in law and on the facts in holding that it would not grant an order for decontrol on the ground that the provisions of s.22 of the Landlord and Tenant Ordinance had not been complied with;

(b) the Rent Tribunal erred in law and on the facts in holding that the appellant, in making its application under s.22 of the Landlord and Tenant Ordinance, had not satisfied the Tribunal under sub-ss. 22(1)(a), (b), (c) and (d);

(c) the Rent Tribunal failed to give sufficient weight or any weight to the evidence of the appellant on the structural alterations that were to be carried out to its property resulting in the reconstruction of one dwelling-house into two separate self-contained flats; and

(d) the Rent Tribunal misdirected itself in law and in fact and failed to exercise its discretion in favour of the appellant as it was obliged to do once the appellant had shown that structural alterations were to be or had been carried out which satisfied the conditions set out in sub-ss. 22(1)(a), (b), (c) and (d).

11 When a landlord of a dwellinghouse to which Part III of the Ordinance applies asks the Rent Tribunal to decontrol it, if the Rent Tribunal is satisfied, under s.22(1) of the Landlord and Tenant Ordinance, that—

> "(a) structural alterations have been carried out, or are to be carried out, to the dwellinghouse on or after the commencement of this Ordinance; and
>
> (b) the bona fida [*sic*] effect of the structural alterations is or will be, when carried out, to reconstruct the dwellinghouse either—
>
> (i) into a unit that is substantially a larger unit than it was before the alterations; or
>
> (ii) into 2 or more separate, self-contained flats; and
>
> (c) the structural alterations do not or will not, when they are

carried out, have the effect of decreasing the overall housing stock; and

(d) no undue hardship will be caused to any tenant of the dwellinghouse by the structural alterations—

[it] may make an order declaring that [Part III] shall not apply to the dwellinghouse or to any separate and self-contained units resulting from the structural alterations."

12 It is clear that these building works that turned or will turn one unit on each floor into two separate self-contained units have not decreased or will not decrease the overall housing stock, and have caused or will cause no undue hardship to any tenant of the dwellinghouse.

13 The Tribunal found, however, that because the structural alterations were minimal or did not suffice, their *bona fide* effect was not to reconstruct these dwellinghouses.

14 Earlier English legislation had the phrase "being *bonâ fide* reconstructed by way of conversion into two or more separate and self-contained flats or tenements": Increase of Rent and Mortgage Interest (Restrictions) Act 1920, s.12(9), which was echoed in Gibraltar's Landlord and Tenant (Miscellaneous Provisions) Ordinance, s.7(2).

15 In reported decisions interpreting that phrase in the English Act, there emerged the principle or doctrine that the alterations have to be substantial enough to change the previous identity of the dwellinghouse into something different, namely, a new and separate dwellinghouse. A bomb-damaged house which was repaired was held not to have been so substantially changed in reconstruction as to become a new dwelling-house: *Hemns* v. *Wheeler* (7); *Eyre* v. *Haynes* (5); and nor did adding a garage to a protected dwellinghouse: *Langford Property Co. Ltd.* v. *Batten* (10). Reconstruction of some flats, however, was held to have made them new flats: *Langford Property Co. Ltd.* v. *Sommerfeld* (11). See, generally, the note to para. 1790 of *13 Halsbury's Statutes*, 2nd ed., at 1015: a dwellinghouse within the ambit of that Act that was "subject to such substantial structural alteration that it [lost] its former identity . . . became a new and separate dwelling-house" and therefore was not protected by the Act in any event, so the statutory provision was unnecessary.

16 "Structural repairs" have been defined as repairs of, or to, a structure by Vaisey, J. in *Granada Theatres Ltd*. v. *Freehold Investment (Leytonstone) Ltd*. (6), a definition adopted in the Court of Appeal by Jenkins, L.J. ([1959] 2 All E.R. at 181). The learned authors of *Woodfall on Landlord & Tenant*, 25th ed., para. 1732, at 770 (1954) submit that they are "those which involve *interference* with or alteration to the framework of the house . . ." [Emphasis supplied].

17 "Substantial" means "considerable" according to the circumstances in each case. See *Palser* v. *Grinling* (13) and *Thorneloe & Clarkson Ltd.* v. *Board of Trade* (21) which are decisions on what was a "substantial portion" of the rent.

18 "Alteration to premises" in a covenant was construed by Vaughan Williams and Cozens-Hardy, L.JJ. to mean alterations that affect the form or structure of the premises in *Bickmore* v. *Dimmer* (2) ([1903] 1 Ch. at 167 and 169). And for the purposes of the Licensing Act 1902, s.11(4), the Court of Appeal said that the term meant alterations of a permanent physical character to the structure of the premises which can be indicated on a plan, and not merely to their user which might involve only the shutting or opening of a door: *Smith* v. *Portsmouth JJ.* (19).

19 "Structural alteration . . . or addition" includes the installation of central heating for the purposes of the Housing Act 1974, Schedule 8: *Pearlman* v. *Harrow School (Keepers & Governors)* (14), applied in *ACT Constr. Ltd.* v. *Customs & Excise Commrs.* (1). This was an alteration to or addition to the structure or fabric of a house, and involved more than providing equipment.

20 So much for "structural alterations." What does "reconstruction" mean? Pennycuick, J. thought that in ordinary speech it meant refurbishing something in such a way as to leave its basic character unchanged: *Brooklands Selangor Holdings Ltd*. v. *Inland Rev. Commrs.* (3), but when it was used in the Rent Restriction Acts it was interpreted to mean "loss of identity": *Woodward* v. *Samuels* (22); *Phillips* v. *Barnett* (16); *Sinclair* v. *Powell* (18) ([1921] All E.R. Rep. at 381). It was a question of fact: *Marchbank* v. *Campbell* (12); *Solle* v. *Butcher* (20) ([1949] 2 All E.R. at 1112).

21 Here in Gibraltar, Alcantara, A.J. has held that it means "a substantial interference with the structure of the premises and then a rebuilding, in probably a different form, of such part of the premises as has been demolished by reason of interference with the structure." That is also how Ormerod, J. defined it in *Percy E. Cadle & Co Ltd.* v. *Jacmarch Properties Ltd.* (4), a definition which was adopted in *Joel* v. *Swaddle* (8). Alcantara, A.J. added to it the word "rehabilitation": *Khiani* v. *Rent Tribunal* (9).

22 Section 30(1) of the Landlord and Tenant Act 1954 set out, amongst other things, the grounds on which a landlord might oppose a tenant's application for a new tenancy of business premises. These included the ground, in s.30(1)(a)—

> "that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding."

Hodson, L.J. noticed that "reconstruct" followed the word "demolish" in the section, and Omerod, L.J. has included "demolished" in his exposition of the word "reconstruct." It will be recalled, however, that s.22 of the Gibraltar Landlord and Tenant Ordinance does not mention "demolish" or "demolished."

23 Supposing that the Tribunal was satisfied that the conditions laid down in s.22 had been met, would it have to make an order decontrolling the dwellinghouse or units? The word used is "may," but that does not always confer a discretion, and "may" can mean "shall": *Peterborough Corp.* v. *Holdich* (15); *Re Shuter (No. 2)* (17). Alcantara, A.J. left the issue open in *Khiani* v. *Rent Tribunal* (9) because it was not essential to answer it for the purpose of that appeal.

24 Generally, however, Part III of the Landlord and Tenant Ordinance applies to dwellinghouses that were erected on or before January 1st, 1945. Here in Gibraltar, some of those are in a poor state of repair. The Ordinance restricts the amount of rent that landlords can get for them, so there is little incentive to improve them.

25 There is also a severe shortage of housing in Gibraltar and not much space on which to build new dwellinghouses. So the Ordinance, in s.22, provides a means by which landlords can have the restrictions on the rent that they get for them lifted. They must carry out structural alterations on them which will reconstruct them into units that are the same size as, or larger than, before the alterations or into two or more separate self-contained flats; the Rent Tribunal may then make an order declaring that Part III of the Ordinance does not apply to them. Mere decoration and cosmetic repairs are not structural alterations, and nor is a simple sub-division of the tenancy.

26 Salter, J., in an appeal from a county court judge's dismissal of an application by a tenant for apportionment under s.12(3) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920, said, in *Marchbank* v. *Campbell* (12) ([1923] 1 K.B. at 251), that—

> "one of the objects of the Act, so far as it deals with tenancy, is to promote the provision of dwellings. When a landlord, by enterprise and expenditure in altering and adapting a large house, has provided two or three decent and separate homes where only one existed before, it seems reasonable that he should be allowed to get what rent he can for the new dwelling houses thus created."

and Darling, J. agreed. And, in my judgment, so it should be and is here under the Ordinance.

27 The alterations need not be, in my respectful view, substantial. The section does not mention the word "substantial." *Cadle* v. *Jacmarch* (4) and *Joel* v. *Swaddle* (8) are decisions on the meaning of "reconstruction"

in s.30(1) of the Landlord and Tenant Act 1954 and there, it has been seen, "reconstruction" follows the word "demolish." It does not do so in s.22 of the Landlord and Tenant Ordinance.

28 Here in these appeals, the alterations are set out in plans, and have been—or will be—carried out. They alter the physical character of the premises or its structure. They are not minimal or merely decorative improvements. The *bona fides* of the effect of these structural alterations was never in doubt. They reconstruct each of the two dwellinghouses into two separate self-contained flats. They do not, as a matter of simple arithmetic, decrease the overall housing stock. Their tenants will be caused no undue hardship by these structural alterations.

29 So, with respect, the Tribunal erred in finding that the alterations to the top floor were minimal and did not merit an order under s.22 of the Landlord and Tenant Ordinance declaring that Part III of the Ordinance shall not apply to the separate and self-contained units resulting from the structural alterations. And the same goes for its decision that the proposed structural alterations to the dwellinghouse on the other floor were insufficient to warrant such a declaration. The Tribunal has looked for substantial alterations to the structure of each dwellinghouse, which is in my view an error of law.

30 The appeal must therefore be allowed, the decision of the Tribunal on each application set aside and an order substituted under s.22 of the Landlord and Tenant Ordinance declaring that Part III of the Landlord and Tenant Ordinance shall not apply to the separate and self-contained units resulting from the structural alterations from the date on which they were or are completed as certified by the Director of Crown Lands.

31 I, too, will not decide if "may" in that section means "shall" because, again, there is no need to do so; for the moment, though, I am inclined to agree with Mr. Culatto that, if it does not mean "shall," very few landlords will attempt to make one dwellinghouse into two or more separate decent ones because of uncertainty over the Rent Tribunal's decision on an application for decontrol and thus one of the objects of the Ordinance will be frustrated.

Appeals allowed.

[1988–90 Gib LR 61]

RECIO v. R.

COURT OF APPEAL (Spry, P., Briggs and Fieldsend, JJ.A.): April 13th, 1988

Criminal law—provocation—elements of defence—unwelcome physical approach of homosexual nature can constitute provocation—reaction of accused must be proportionate to provocation—proportionality to be assessed by reference to reasonable man of defendant's age and background—onus on prosecution to disprove justification once raised

Criminal procedure—judge's summing-up—accurate statement of law—summing-up to be read as whole—description of self-defence or provocation as "defence" rather than "justification" or "excuse" has no effect on onus of proof—not misleading when coupled with general unequivocal direction that prosecution must prove defendant's guilt—common to refer to justifications as "defences"—onus rests on prosecution to disprove justification once raised

Evidence—burden of proof—defences to crime—no change in burden of proof by description of self-defence or provocation as "defence" rather than "justification" or "excuse"—not misleading when coupled with general unequivocal direction that prosecution must prove defendant's guilt—common to refer to justifications as "defences"—onus rests on prosecution to disprove justification once raised

The appellant was charged in the Supreme Court with murder.

The appellant met the deceased on two occasions when the appellant visited Gibraltar from Spain. On the second occasion, the deceased invited the appellant to stay the night at his house. While he was there, the deceased made unwanted sexual advances to him. The appellant, trying to escape, attempted to leave the house, but was unable to open the door, and was chased around the house by the deceased, eventually taking refuge in a utility room. Upon being approached again by the deceased, the appellant stabbed him twice, once in the neck and once in the chest (resulting in wounds that, according to expert evidence, would have been fatal without medical treatment), and, later, strangled him with his bare hands, causing his death. At the appellant's trial for murder, the defence raised the two justifications of self-defence and provocation. The appellant was convicted of murder and sentenced to imprisonment for life.

He submitted that (a) the trial judge did not adequately direct the jury

on the onus of proof in provocation cases: some of his remarks (including the description of provocation and self-defence as "defences" rather than as "justifications" or "excuses"), which had the effect of reversing the onus, had been misleading, and had not been remedied by the general direction that the prosecution had to prove its case; (b) the trial judge did not sufficiently direct the jury on the nature of self-defence, and the onus of proof when self-defence was raised; (c) the trial judge did not sufficiently analyse the evidence presented; and (d) given the atmosphere of strong feeling against the appellant, it was especially important that an accurate summing-up and directions on law be given to the jury; the judge had focused unduly on self-defence to the detriment of provocation.

The Crown submitted in reply that (a) the directions on the nature of provocation, and on the burden of proof when it was raised as an excuse, were clear and not misleading when read as a whole, including the direction at the beginning that the prosecution had to prove the guilt of the accused; (b) it was common usage for self-defence and provocation to be referred to as "defences," although this was not strictly correct as a matter of law, and that this did not have the effect of reversing the onus of disproving their existence; (c) the evidence had been summarized accurately by the judge, which sufficed to remind the jury of what they had heard; and (d) the local feeling against the appellant at the time of the trial did not warrant extra attention to be given to the summing-up given by the judge.

Held, dismissing the appeal:

(1) The judge's summing-up in relation to provocation had not been misleading. Although some of the his remarks regarding the onus of disproving the excuse of provocation might have left the jury with the impression that there was not as heavy a burden on the prosecution to disprove provocation once it had been raised as there was for self-defence, when read together with the judge's unequivocal direction that it was always for the prosecution to prove the guilt of the defendant, his summing-up was not misleading in this regard (para. 19; paras. 21–22; para. 40).

(2) The trial judge was correct in leaving the issue of provocation to the jury, as evidence of a total loss of self-control had unquestionably been adduced; it was for the jury to decide whether there was enough evidence to make provocation an issue, and, if so, whether the prosecution had disproved it. An unwelcome physical approach of a homosexual nature could constitute provocation; however, no reasonable jury, properly directed, could have reached a conclusion other than that the reaction of the appellant to the deceased's advances was out of all proportion to any provocation, which had not been sufficient to make a reasonable man of his age and background do as he did (para. 31; para. 35; paras. 40–44).

(3) There was no possible way that the strangulation, which resulted in the death of the deceased, could have been in self-defence; the Crown therefore did not need to make any submissions in relation to this ground of appeal. No violence was used against the appellant at any stage by the deceased, nor was a threat of violence made. However much danger the

appellant had perceived himself as having been in earlier, the strangulation took place while the deceased was gravely wounded and posed no danger whatever to the appellant. Given the emphasis placed by the defence on the issue of self-defence at trial, the judge's focus on this was understandable (para. 13; para. 21; paras. 33–34).

(4) While the judge's presentation of the evidence to the jury may have been inadequate, he did remind the jury of all the main evidence; judges should do more than simply reading over notes of evidence, as an analytical summary of both parties' evidence relating to each issue was much more helpful for juries (para. 27; para. 45).

(5) While the description of self-defence and provocation as "defences" rather than as "justifications" or "excuses" was unfortunate, it did not have the effect alleged by the appellant of implying a reversal of the onus of proof relating to them. It was common to refer to these justifications as "defences" (para. 24; para. 45).

Cases cited:

(1) *D.P.P.* v. *Camplin*, [1978] A.C. 705; [1978] 2 W.L.R. 679; [1978] 2 All E.R. 168; (1978), 67 Cr. App. R. 14; 122 Sol. Jo. 280, *dictum* of Lord Diplock applied.
(2) *Mancini* v. *D.P.P.*, [1942] A.C. 1; [1941] 3 All E.R. 272; (1941), 28 Cr. App. R. 65; 111 L.J.K.B. 84; 165 L.T. 353, applied.
(3) *R.* v. *Duffy*, [1949] 1 All E.R. 932, *dictum* of Devlin, J. applied.
(4) *R.* v. *Palmer*, [1971] A.C. 814; [1971] 2 W.L.R. 831; [1971] 1 All E.R. 1077; (1970), 55 Cr. App. R. 223, applied.
(5) *R.* v. *Wheeler*, [1967] 3 All E.R. 829; [1967] 1 W.L.R. 1531; (1967), 52 Cr. App. R. 28, not followed.
(6) *R.* v. *Whitfield*, (1976), 63 Cr. App. R. 39; [1976] Crim L.R. 443, referred to.
(7) *Richards* v. *R.*, 1978 Gib LR 46, referred to.

Legislation construed:

Court of Appeal Ordinance (1984 Edition), s.14(1): ". . . the court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred."

Criminal Offences Ordinance (1984 Edition), s.62:

> "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 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."

J.J. Neish for the appellant;
K.W. Harris, *Senior Crown Counsel*, for the Crown.

1 **SPRY, P.,** delivering the judgment of the court: This is an appeal from a decision of the Supreme Court in which the appellant was convicted of murder and sentenced to imprisonment for life. Much of the evidence is of no significance in relation to the appeal, and we propose only to set out the bare facts according to the appellant as they were given in his evidence.

2 The appellant, Joaquin Mari Recio, is a Spaniard who was 23 years old at the time of the alleged murder. He is a student of music. He came to Gibraltar for the first time on November 17th, 1986 to meet two friends, and they had supper at a restaurant called the Cabin Bar. There the appellant met the deceased, Manuel Nelson.

3 The appellant returned to Gibraltar on November 20th, again with the intention of meeting friends, and he went first to the Cabin Bar, thinking that they might be there. He met the deceased there, and they had two or three drinks at the bar. The appellant left a little before closing time to go to another bar, the Penelope, in search of his friends. Before he left, he asked the manager of the Cabin Bar if he could suggest an hotel where he might stay the night, but it seems that prices were too high and he decided to spend the night in La Linea.

4 The appellant never reached the Penelope. He stopped on the way for refreshment and then encountered the deceased, who persuaded him to go to another bar for a drink. While they were there, the deceased suggested to the appellant that he should return home with him to watch a film. According to the appellant, he pretended not to hear this invitation, but, when it was repeated later, he accepted. They walked towards the deceased's house but, as they approached it, the appellant had second thoughts and told the deceased that he was going to make a further attempt to find his friends. However, after walking around for perhaps half an hour or a little more, he changed his mind again and decided that he would go to watch the film and have a chat. He found his way back without difficulty, enquiring of a stranger which was the deceased's house. He rang the bell and the deceased welcomed him in.

5 The only evidence of what followed was that of the appellant. He said that he was offered drinks and had two whiskies and, finally, a beer. They talked about films, the theatre and such subjects. Then the deceased invited the appellant to stay the night, and he accepted. There were two adjoining bedrooms, the one opening out of the other. The inner room was the deceased's bedroom, and the appellant was to sleep in the outer bedroom.

6 The appellant had gone to bed and was dozing when he became

conscious of the deceased getting into the bed and touching his body. He told the deceased to desist and then jumped out of bed. Leaving his clothes, he went to the entrance but found the door locked. It was a Yale type lock, but he was unable to open it. The deceased followed him, talking and laughing. He turned and saw the deceased approaching him, walking with a stick. The deceased did not menace him with the stick but prodded him playfully, treating the appellant's attitude as all part of a game. The appellant brushed past the deceased and went into the living room, which was dark. He groped on the table and found a knife. He said that at the time he did not know what he had picked up, but he must soon have realized what it was because, when the deceased entered the room, the appellant threatened to stab him "with the knife" if he were not allowed to pass. There was some manoeuvering before the appellant escaped from the room, when he again attempted to leave the house. Again he could not open the door and this time he sought refuge in a small room, described as a utility room, near the outer bedroom. He shut the door, but could not lock it. The deceased pushed the door open and tried to embrace the appellant, who had fallen back, knocking over some boxes. The appellant pushed the defendant off, stabbing him twice with the knife, once in the neck and once in the chest. It would seem that the deceased must have staggered a few steps, because he fell inside the outer bedroom. The appellant either fell with the deceased or threw himself on the deceased, whom he then strangled.

7 The appellant recovered his senses and realized what he had done. He washed off the blood that was on him, re-made the bed in which he had been lying, and washed the glasses from which they had been drinking. He then set about simulating a burglary, putting some articles in a bag and disarranging the contents of drawers. He wrote on a mirror, in toilet cream, the words RED RUM (that is, MURDER in reverse), a swastika and the letters GNN; this, he said, was to confuse the police. He left the house with the bag, crossed the frontier on foot, and threw the bag away. He still had with him a pair of sunglasses which he had thoughtlessly picked up, and which were conclusively proved to have been the property of the deceased. It should be added, to the credit of the appellant, that when interviewed in Spain he voluntarily returned to Gibraltar.

8 The cause of death, in the opinion of Professor Watson, a forensic expert, was manual strangulation, in which considerable force was used. The professor was of the opinion, though he conceded that it might have been otherwise, that the deceased had been lying face downwards at the time when he was strangled. This is consistent with the fact that a considerable quantity of blood was found under the body. It is also consistent with the evidence of two witnesses, Edward Tavares and Robert Tavares, cousins of the deceased, who found the body. It is inconsistent

with the evidence of the appellant, who said that the deceased fell face upwards.

9 The professor gave it as his opinion that had the deceased not been strangled, he would have died of the stab wound in the chest, unless he had received urgent medical treatment.

10 The two issues raised by the defence at the trial were self-defence and provocation, with the emphasis, apparently, on self-defence. These were also the issues at the hearing of the appeal, when Mr. Neish appeared for the appellant and Mr. Harris for the Crown.

11 There were 6 grounds of appeal, the first sub-divided into 10 parts, not all of which were pursued. We think that the grounds of appeal, as argued, may be reduced to 3: (a) that the learned judge did not sufficiently direct the jury on the nature of self-defence and the onus of proof when self-defence is raised; (b) that he did not sufficiently direct the jury on the nature of provocation and the onus of proof when provocation is alleged; and (c) that he did not analyse the evidence, particularly that of Professor Watson.

12 Mr. Neish argued that the trial had been held in an atmosphere of strong local feeling, and that this called for a particularly accurate summing-up and directions on law. Mr. Harris took issue on this. In the absence of any evidence on the matter, we have disregarded it but we have, in considering the grounds of appeal, given the summing-up close examination.

13 Before Mr. Harris began his submissions, we indicated to him that we did not wish to hear him on the subject of self-defence, unless there was anything he wished to say in favour of the appeal. Our reason was this: whatever the position may have been at an earlier stage, there was a time, which the forensic expert put at two to three minutes, after the stabbing and before the strangulation, when the deceased was lying helpless on the bedroom floor. He was gravely wounded, almost certainly incapable of getting up. At that moment, the appellant was in no danger whatsoever from the deceased, and it could not possibly be held that the strangulation was in self-defence.

14 The matter of provocation is not so simple. Mr. Neish did not pursue that part of the ground of appeal that alleged a failure to direct the jury adequately on the nature of provocation, but relied on the alleged failure adequately to direct the jury on the onus of proof in relation to provocation.

15 In the first place, Mr. Neish complained of two passages fairly early in the summing-up. After reading s.62 of the Criminal Offences Ordinance, and explaining it by reference to the judgment in *Richards* v. *R.* (7), the learned judge went on to say:

> "if you come to the conclusion that a man, a reasonable man of that type was provoked, then provocation is open to you . . . If you are satisfied that the provocation was such that the defendant lost his self-control then your verdict is not guilty of murder but guilty of manslaughter."

Mr. Neish complained that this had the effect of reversing the onus and he argued that an observation that followed shortly afterwards that "it is up to the prosecution to prove everything and for the defence to prove nothing" was too general to cover the defect. A remark soon after that what the prosecution must prove "is that there was an intentional killing and that the killing was not in self-defence or provoked" was dismissed by Mr. Neish as incidental and again insufficient to cure the earlier defect.

16 Mr. Neish also drew attention to a remark much later in the summing-up, when, after saying that a person on the borderline between homosexuality and heterosexuality might be more easily enraged than a normal person, the judge went on: "If that is so you might feel that there was provocation."

17 Mr. Neish complained that the misdirections had a cumulative effect, especially when compared with the corresponding and clear directions relating to self-defence. First, dealing with the definition of "murder," the judge had said: "The prosecution must prove that the act of killing was unlawful." A little later, this time specifically in relation to self-defence, he said:

> "Because it is for the prosecution to prove the defendant's guilt, it is for them to satisfy you so that you feel sure that the defendant was not acting in self-defence. If you conclude that he was or that he might have been acting in necessary self-defence, you must acquit him."

18 Again, dealing with the question of whether the degree of force used was reasonable, he said: "[I]t is up to the prosecution to satisfy you that he was not justified." Finally, after the jury had retired and then returned so that they could put a question to the judge, he said:

> "If you find that the prosecution has not satisfied you that this was not a case of self-defence, then the ingredients of the offence of murder have been proved. The ingredients. But if you reach that stage, then you go to the question of provocation. Was there provocation? Was a man of that age and those characteristics provoked to the extent that it was reasonable for him to act as he acted?"

The first "not" was obviously a slip of the tongue, as was the use of the word "murder."

19 The effect of all these passages, taken together, might well have left the jury with the impression that there was not the same onus to disprove provocation as there was to disprove self-defence.

20 The various passages to which Mr. Neish referred us must be read in the light of a general direction early in the summing-up that—

> "it is for the prosecution to prove the guilt of the defendant and not for the defendant to prove his innocence. And the standard of proof is that you must not find any man guilty of the offence with which he is charged unless you are sure and satisfied that his guilt has been proved. Another way of saying it is that in order to reach a proper verdict you must answer the question: has the prosecution satisfied us so that we are sure that the guilt of the appellant has been proved? And that is the test you apply in all cases."

21 A little later, going back to the definition of murder, the judge said:

> "[F]inally it must be 'an unlawful act or omission.' This means 'without justification or excuse,' *e.g.* self-defence, and the onus is always on the Crown to prove beyond any reasonable doubt that the killing was unlawful."

It is true that the judge dealt at much greater length with self-defence than with provocation, but that was natural and not improper since the defence at the trial placed greater reliance on the former. It is a matter of inadequacy of direction rather than of misdirection. The judge nowhere said anything to suggest that the onus was anywhere but on the prosecution, and his initial direction is unequivocal that the onus is on the prosecution and that the standard of proof is proof beyond all reasonable doubt. As was said in *Mancini* v. *D.P.P.* (2), there is no reason to repeat to the jury the warning as to reasonable doubt again and again, provided that the direction is plainly given.

22 Some passages are a little unfortunate. The passage we have quoted from the transcript—"if you come to the conclusion that a man was provoked"—might in isolation be misleading. What we think was in the judge's mind when he said that is that an accused who relies on provocation must, as a matter of fact, have lost his self-control (*R.* v. *Whitfield* (6)); he went on, almost immediately, to remind the jury of the onus of proof. Taken as a whole, we do not regard this as a misdirection.

23 What we think more unfortunate is that, when the jury had been recalled and the judge gave them his final reminder, he should have said in relation to self-defence: "[I]f you find that the prosecution has not satisfied you" and then, in relation to provocation, merely "Has there [been] provocation?" We think that either this should have been expressed differently or there should have been added a final reminder as to the onus.

24 Incidentally, both in relation to self-defence and to provocation, Mr. Neish complained of the repeated use by the learned judge of the word "defence." He relied on the judgment of the Court of Appeal in *R.* v. *Wheeler* (5), in which Winn, L.J. deplored the use of the word in relation

to issues of justification. He was concerned that it might imply an onus on an accused. This may strictly be correct, but the fact remains that it is common usage to refer to these "justifications" as "defences." The Privy Council did so in *R.* v. *Palmer* (4), in the speech given by Lord Morris of Borth-y-Gest, where the expression "the defence of self-defence" ([1971] A.C. at 831) appears more than once, and Lord Diplock in the House of Lords referred to "the defence of provocation" in *D.P.P.* v. *Camplin* (1) ([1978] A.C. at 712). We see no merit in this point.

25 The other main ground of appeal argued by Mr. Neish was that the learned judge failed to analyse the evidence of witnesses in relation to the issues. For example, the evidence of a witness, Musgrove, appeared inconsistent with that of two other witnesses, Brooks and Professor Watson. The judge did not think it necessary to go into these matters and told the jury that the only question was whether they believed Musgrove "on the timing of the meeting." Mr. Neish also complained of the treatment of evidence of noises heard in the night, some of which might have been regarded by the jury as corroborating the evidence of the appellant.

26 Mr. Neish was particularly critical of the way in which the learned judge dealt with the evidence of Professor Watson. In his main summing-up, the judge merely read his notes of the evidence; when the jury was recalled, upon being asked what, according to the professor's evidence, was the lapse of time between the stabbing and the strangulation, the judge re-read his notes and caused the relevant parts of the tape to be replayed. Mr. Neish submitted that the proper course was to give the jury a concise answer and to go on to explain to the jury that the professor had first given his expert opinion, to which he adhered, but had then, most fairly, conceded that the version of the events suggested by the defence was possible, although he thought it unlikely.

27 We think that reading over notes of evidence does not greatly assist juries. What is much more helpful is for the judge to determine the issues and then to summarize, analytically, under each issue, the relevant evidence of both prosecution and defence witnesses.

28 Assuming that there was some inadequacy in the summing-up regarding the onus of disproving provocation and that the evidence was not analysed for the benefit of the jury, we think that we must ourselves examine the evidence relating to provocation, so as to see whether it would be right and proper to apply the proviso in the Court of Appeal Ordinance, s.14(1).

29 We shall first consider whether there was or might have been provocation and whether any such provocation was by words or deeds, or both, and what those words and deeds were. We shall then turn to the second issue, whether what the appellant admittedly did might have been

the reaction in similar circumstances of a reasonable person of the appellant's age and background, so provoked.

30 We shall begin with the relationship between the appellant and the deceased, according to the appellant's evidence, from the time when they first met until the killing. The appellant said that at their first meeting, he found the deceased "a charming man." He was told that the deceased was a homosexual but this was a matter of indifference to him; he was a tolerant young man and had other homosexual friends. He said the deceased constantly made suggestive remarks, which he ignored. These did not amount to propositions; they were more in the nature of hints. The appellant was not unduly concerned because he thought that he could look after himself. In examination-in-chief, he said that, prior to his going to the deceased's house: "I thought he wouldn't try anything on me but if he did, I thought I could stop him . . . To stop him, just tell him where his limitations were"; and again: "If he had made any advances, I could stop him." In cross-examination, asked if he thought that the deceased had had sexual designs on him, he said that he might have had, but that it did not worry him because he thought that he was physically stronger than the deceased.

31 A note of apprehension appeared in the appellant's evidence when he spoke of visiting the unidentified bar late in the evening, and of pretending not to have heard the deceased's invitation. Even after he accepted the second invitation, he was reluctant to go, and at the last moment made an excuse to leave the deceased. The appellant's evidence leaves no doubt that he was apprehensive when he went to the deceased's house, and that that apprehension was heightened when, after he had accepted the deceased's invitation to stay the night and gone to bed, the deceased went in and out of the bedroom with offers of milk and slippers and other attentions.

32 The importance of this is that it can have come as no surprise to the appellant when the deceased made his direct approach. He may have found the approach repulsive, but this is not a case of sudden shock. We may add in passing that the discovery in the deceased's house of a large quantity of pornographic homosexual literature tends to corroborate the appellant's evidence.

33 Next, it must be emphasized that the deceased never at any stage used or threatened violence or any use of force. The appellant did say that he was threatened with the stick but he conceded that the deceased never raised it above his head. The prodding with the stick left no mark and caused no pain. It seems quite clear that the deceased was not a man of violence, and he seems to have believed that the appellant welcomed his advances but was playing hard to get.

34 Even when the deceased burst into the utility room, the appellant was in fact in no real physical danger. The deceased was a man with chronic

bronchitis who easily became out of breath, and he no longer had the stick. The appellant said that the deceased was going to rape him but there is nothing in his own evidence to support this; seduce, certainly, but not rape. This is not to say that the appellant may not honestly have believed that he was in danger. He seems to have been in a state of panic. He described himself as having no strength to react and he suggested that some drug had been put in his drink. This seems to have been thought up at the last moment, as he made no mention of it to the police or, apparently, to his own counsel. He had, it would seem, had a good deal to drink.

35 This leads us to the question whether the conduct of the deceased was capable in law of amounting to provocation. Provocation may be things done, or things said, or both together, that cause a person temporarily to lose the power of self-control.

36 The first incident that needs to be considered is the action of the deceased in slipping into the appellant's bed and touching his body. We think that an unwelcome physical approach of a homosexual nature might constitute provocation, but the appellant does not suggest that he lost his self-control at that stage. He said, in evidence-in-chief:

> "I told him to let me be. That I wasn't what he thought I was and I didn't like what he was getting into. I started getting up. I was angry, confused. My first thought was getting out of there . . . I just wanted to leave."

Clearly, he had not at that time been provoked within the meaning of s.62 of the Criminal Offences Ordinance.

37 The prodding with a stick similarly did not provoke the appellant, because his reaction was to try to escape. There followed the incident in the sitting-room, when the appellant picked up the knife and told the deceased that he would stab him with it, unless allowed to pass. This was still a defensive, not an aggressive, attitude and, if his evidence is to be believed, the appellant then again attempted to leave the house. When this failed, he tried to shut himself within the utility room.

38 We have set this out in some detail, because we wish to make it clear that up to the moment when the deceased entered the utility room, there had been no provocation. It was, we think, open to the jury to take those earlier events into consideration when, if they found a later act which constituted provocation, they considered what would have been the reaction to that act of any reasonable man.

39 We have already set out what happened in the utility room, with the deceased attempting to embrace the appellant, saying things such as "I've got you now," and "This is it, at last." This is the moment when the appellant says he lost his self-control. He said: "[S]omething inside me burst, exploded. I just couldn't take any more." He pushed the deceased

away, stabbing him twice. Then, after an interval which may have been brief, but may have been as long as two or three minutes, he threw himself on the deceased and strangled him.

40 If this evidence might possibly be true, we think that it was open to the jury to find that the behaviour of the deceased constituted provocation. There was unquestionably evidence of a total loss of self-control. It was a matter for the jury to decide whether, as matters of fact, there was enough evidence to make provocation and loss of self-control issues in the trial and whether the prosecution had disproved them. The learned judge was right to leave these matters to the jury.

41 We turn to the other issue, whether the reaction to the provocation—if there was provocation—bore "some proper and reasonable relationship to the sort of provocation that [had] been given," to use the words of Devlin, J., as cited with approval by Lord Goddard in *R.* v. *Duffy* (3) ([1949] 1 All E.R. at 932). We propose to consider this on the basis of assuming the events to have been as the appellant said in his evidence. The fact that the appellant may honestly have believed that the danger was greater than it was in reality is relevant in deciding whether the appellant was provoked, but it is irrelevant when considering the objective question of whether the retaliation was reasonably proportionate to the provocation, or, in the words of the statute, whether the provocation was "enough to make a reasonable man [of the appellant's age and background] do as he did."

42 The conduct of the deceased, while it may have been repulsive to the appellant, involved no sudden shock and no physical pain or injury, and the words that he uttered were insulting only so far as they showed that the deceased believed the appellant to have homosexual inclinations.

43 Against that measure of provocation there has to be weighed the ferocity of the retaliation. First, there were the two stab wounds, one in the neck and the other in the chest, both vulnerable parts of the body, from which the deceased would probably soon have died. Then, after a short interval, the appellant threw himself on the defendant and strangled him, using considerable force.

44 We think that any reasonable jury, properly directed, could have come to no other conclusion than that the retaliation—the stabbing followed by the strangulation—was out of all proportion to the provocation and must have returned a verdict of guilty. That is on the view of the evidence most favourable to the appellant.

45 As we said earlier, there was no misdirection by the learned judge on the onus of proof; only an inadequacy at the critical stage when the jury was brought back. And, while we have criticized the judge's presentation of the evidence to the jury, he did remind the jury of all the main evidence.

We do not think that the verdict is unsafe or unsatisfactory. We think that this is a case where we may, and should, apply the proviso. Accordingly, we dismiss the appeal.

Appeal dismissed.
