C.A.C. No. 108228

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Clair, 1995 NSCA 138
Hallett, Chipman and Flinn, JJ.A.

BETWEEN:

GERTRUDE MADELINE CLAIR	)	Mark T. Knox
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Robert C. Hagell
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	May 29, 1995
	)	
	)	
	)	Judgment Delivered:
	)	July 11th, 1995
	)	
	)	
	)	
	)	
	)	
	)	
	)	
	)	

THE COURT: Appeal dismissed per reasons for judgment of Hallett, J.A.; Chipman and Flinn JJ.A. concurring.

HALLETT, J.A.:

The appellant was convicted by a jury of second degree murder. She shot her common-law husband in the head at close range with a 12 gauge shot gun. She testified that her husband, Mr. Bernard Peters, after an evening of drinking and using drugs, was holding the gun in a manner she considered threatening, based on his previous abusive conduct towards her. She attempted to wrestle the gun from him. Each of them had one hand on the barrel and one in the area of the stock. She was trying to pull the gun away from him. Suddenly his hands let go of the gun. She fell backward and the gun's stock hit the door of the small bedroom in which the confrontation was taking place. She testified that the gun accidentally discharged killing her husband.

Apart from the children who were asleep in another room in their small home, the only persons in the home were the appellant and Mr. Peters. The Crown adduced as part of its case two photographs showing the body of Mr. Peters lying on the bed with his right arm under the pillow on which his head rested with his brains blown out. He was lying on his right side with his head towards the wall; the wound was on the left side of his head above his left ear. The Crown prosecutor stressed before the jury that these photographs plus the expert evidence adduced by the Crown that the gun barrel was at Mr. Peters' head when he was shot was proof beyond a reasonable doubt that the appellant shot him while he was either asleep or resting. The photographs are very persuasive evidence in support of the Crown's position.

This conviction arose out of a retrial following a successful appeal by Miss Clair against her conviction by a jury at her first trial.

The main focus of this appeal is the ruling of the trial judge to allow the Crown to present rebuttal evidence to the jury with respect to an incident that had taken place near the Town of Oxford some three months prior to the shooting of Mr. Peters. The appellant

and her husband, as well as her baby and others, had been tenting near blueberry fields in that area. Her direct testimony respecting the Oxford incident was as follows:

> " Q. ... what do you recall, Gertrude, happened in Oxford?
>
> A. We went up there for blueberry raking. We didn't want to go all the way up the States, it was too far to take my son with us. And we always stayed up there three weeks. We stayed in a tent and one week we made $1,500.00 between the two of us. And I do remember he bought a gun up there. I can't remember what kind of gun he bought. There was me, Bernie, Junior Stephens and Vincent Basque and Vincent's wife.
>
> Q. Um hum.
>
> A. And my son, J.R. That evening we all sat around drank beer. And a little while after, a few hours maybe . . . I don't know if . . . all of a sudden me and Bernie just arguing. For what I don't know. It's just . . . he always had something to argue about. When he starts arguing with me, then I start arguing. Then he started hollering at Junior Stephens. I don't know what was going on. It was just like he was arguing to this person, then he jumps to another one, and it seems like he wasn't getting no where. He came back to me and . . . my son was sleeping in the tent.
>
> Then . . . that's when I seen him go on. . . in the station wagon and I knew where the gun was and I was scared and went in of the tent and tried to sneak away with my son. I got ahold of my son and like I didn't even put his jacket on, I just grabbed the blanket, covered him with a blanket.
>
> And it was kind of a big field. Up . . . where at the edge there was a store there and a house. I . . . it seems like I got to . . . halfway through the field and like while I was running I was holding my son. I looked back, it seems like Bernie wasn't too far away from me and I seen him pointing the gun towards us.
>
> That's the only time I looked back when I seen him and I just . . . I was hiding my son like, I don't know, so he wouldn't . . . so he won't hit my son.
>
> Q. Um hum.
>
> A. So I was banging . . . I was banging at the house. I don't know how long I was knocking at the door but somebody came at the door. It was a woman and there was a man, and like they were hollering at me, "what are you doing banging at our door". And I told him, "call the cops, my husband is out there shooting a gun, out in the field". And I said, "here hold . . . hide my baby". So they took my son and

> I went to hide behind the house and I told those people, "don't let my husband have my baby". And I stood behind the house till the cops came by.
>
> Q. Um hum.
>
> A. And I asked Vincent and his wife, "where's . . . ". I said, "what happened, where did Bernie go".
>
> Q. Where did Bernie go? Um hum.
>
> A. And Vincent said, "he went back down". Then I just stayed around their house till the cops came. After that I went down with the cops down to where our tent is." **(AB 661)**

Over a defence objection the learned trial judge allowed the Crown to call rebuttal evidence of three witnesses, Rita Parsons and Robert Harrison, the couple to whose house the appellant had come with her baby and Staff Sergeant Stephen J. O'Handley, the R.C.M.P. officer who had responded to the call from Ms. Parsons. Their evidence of her coming to their house differed substantially from that of the appellant. Ms. Parsons and Mr. Harrison testified that between 11 and 12 at night they were awakened by their dogs barking. Someone was banging at their door. They went downstairs. It was the appellant with her baby. Ms. Parsons was asked if the appellant told them why she was there. Ms. Parsons answered as follows:

> "A. Yes, she said that she had heard a noise and that someone was shooting a gun in the air.
>
> Q. In the air, yes.
>
> A. And she asked us if we would keep her baby for her." **(AB 921)**

The couple was not interested in taking the baby and offered to call the R.C.M.P. which they did. The appellant left with the baby and appeared to be going back down to the tents. It would appear from this evidence that the appellant did not stay behind the Parson/Harrison home as she testified nor did she express any concern about her own safety.

The couple went back to bed; ten minutes later the dog began to bark again. They went downstairs and this time there was a young fellow at the shed door with the baby. The couple brought them into the house and again called the R.C.M.P. Shortly thereafter the appellant returned and for about a half an hour was loudly banging on the doors and windows demanding her baby. At this time, while on the phone to the R.C.M.P., Ms. Parsons testified she heard a shot. The R.C.M.P. dispatcher told her that under no circumstances was she to give the baby to the appellant. Ms. Parsons and Mr. Harrison tried to talk the appellant into going back to the tent but she was very agitated. Eventually the appellant punched her fist through the plexiglass in their door. The R.C.M.P. had not yet arrived. This took place while Ms. Parsons was still on the phone to the dispatcher who then told her to give the baby to the appellant which Ms. Parsons did. The appellant left and went back towards the tent area with the baby. About ten minutes later the R.C.M.P. arrived at the couple's home, then went to the tent area and returned to the couple's residence with the appellant and Mr. Peters. Ms. Parsons described Mr. Peters as calm and apologetic. She could smell liquor on his breath and his eyes were glazed. She described the appellant as "still quite agitated" at the young fellow for taking the baby.

Ms. Parsons testified that the young fellow said the appellant, while at their residence, had threatened him by stating that he had better not come back to the tents. Ms. Parsons testified that at no time did the appellant say anything about Mr. Peters doing anything to her that night.

Mr. Harrison testified that when the appellant first arrived at the door she told him that "someone was down around her camp" and she wanted them to take the baby. He testified that her speech was slurred and her eyes "a little glazy". When she returned to the home demanding the child Mr. Harrison described her demeanour "as almost a rage". She wanted the child. His evidence essentially confirmed that of Ms. Parsons. He heard the

appellant state to the young fellow who had brought the baby to the door "wait until you get back on the Reserve". On cross-examination Mr. Harrison testified he was "scared for my own family" because of the racket the appellant was creating.

Staff Sergeant O'Handley testified to being called out of bed about 1:30 in the morning and going to Bob Harrison's residence. He and Constable Smith then left the residence and went down to the tent village about 300-400 metres from the residence for the purpose of interviewing the appellant and Mr. Peters. The appellant made no complaint against Mr. Peters and both Mr. Peters and the appellant denied a firearm was used or fired that evening. Mr. Peters gave Staff Sergeant O'Handley a 22 rifle. He described Mr. Peters as helpful, friendly and apologetic. He described the appellant as follows:

> "A. She had been drinking. She was angry, she was to me in a controlled range, all her actions were accelerated. When asked a question, she would respond with a cold look, very brief conversation. She lashed out at some people in a foreign tongue to me, I believe it's mc ma, volatile personality." (**AB p. 960**)

Staff Sergeant O'Handley then testified they left the tent area and went to the Harrison's residence taking with them the appellant and Mr. Peters. On cross-examination he was asked the following questions and gave the following responses:

> "Q. She didn't tell you, for instance, "my husband was chasing me with a gun?
>
> A. No, absolutely not.
>
> Q. She didn't tell you that "my husband had hit me earlier".
>
> A. No she did not." (**A.B. 964**)

Staff Sergeant O'Handley explained that when he said in direct evidence that she had a volatile personality he meant "that night she seemed to have a volatile disposition". He had not known her previous to that evening.

At the completion of the rebuttal evidence the learned trial judge stated:

> "THE COURT: Just in regard to this rebuttal, quite frankly, it is pretty close to being a collateral issue, although it does to some degree go. I quite frankly, assume that you are going to tie it in in your summation, Mr. MacDonald, because I might have had some doubts about allowing it had I heard it before, but in any event, it is pretty close to collateral, although I understand what you're saying, you find it is in regard to her fear or concern about the gun." (**AB p. 966**)

Counsel for the appellant argues that the evidence related solely to a collateral issue, should not have been admitted and that the prejudice of the evidence outweighed its probative value.

The question whether to allow rebuttal evidence is very often a difficult one for a trial judge. The law is straight forward enough; its application is not. In **Aalders v. The Queen**, [1993] 2 S.C.R. 482 Cory J., writing for the majority, stated at p. 498:

> "In my view, the crucial question with regard to the admission of rebuttal evidence is not whether the evidence which the Crown seeks to adduce is determinative of an essential issue, but rather whether it is related to an essential issue which may be determinative of the case."

To be proper rebuttal evidence the proposed evidence must:

(i) Be relevant to a fact in issue.

(ii) Must become relevant only at the close of the defence case.

(iii) The evidence cannot simply relate to a collateral issue.

(iv) The prejudicial effect of the rebuttal evidence must not outweigh its relevancy.

As a prefix to admissibility of rebuttal evidence the Crown must present to the trial judge a full and accurate picture of the evidence to be called and the purpose of calling it so that the trial judge can properly determine if the evidence should be permitted (**R. v.**

Crane (1992), 69 C.C.C. (3d) 300 (Sask. C.A.)).

To summarize the evidence of the three rebuttal witnesses, their evidence shows not only that the appellant's testimony is substantially at odds with their testimony as to what took place that evening but is evidence from which the jury might infer that the appellant was not fearful of Mr. Peters as she did not hide out at the Parsons/Harrison residence as she testified.

The evidence of the Oxford incident was brought out by defence counsel's direct examination of the appellant. It was an essential component of the defence that on the evening that Mr. Peters was shot, the appellant, because of Mr. Peters past assaults on her, and in particular the incident at Oxford with the gun, had every reason to fear Mr. Peters when in possession of a gun while drinking. Her evidence respecting the Oxford incident was essential to her defence that she was defending herself when the gun accidentally discharged as she was trying to wrestle it from Mr. Peters. Her evidence of the Oxford incident had Mr. Peters pointing the gun at her as she ran with the baby towards the Parsons/Harrison home and hid behind the house until the police came. As noted, the disinterested rebuttal witnesses tell a substantially different story including the fact that it was not Mr. Peters who was angry but rather the appellant and the fact that after the couple refused to take her baby she went back towards the tents.

As there does not appear to have been any motive for the appellant to have intentionally shot her husband, the evidence was clearly relevant to an essential issue in the case, whether or not the shooting was accidental as she attempted to wrestle the gun from Mr. Peters. The appellant raised this issue to show her husband had been abusive towards her and likely to have confronted her with a gun as she asserted in her evidence. Therefore, it supports her evidence that she had reason to fear him and that she was justified in her response to being confronted by Mr. Peters holding a gun. It was not a collateral matter that

the Crown raised. It was relevant evidence to enable the jury to assess whether or not the Crown had proven beyond a reasonable doubt that the appellant intentionally shot Mr. Peters without justification.

It is equally clear that the Crown could not have adduced the evidence of the Oxford incident as part of the Crown's case. It did not become relevant until the appellant testified. The words of Cory J. in **Aalders**, supra, at p. 498 put this issue in proper perspective. He stated:

> "It is true that the Crown cannot split its case to obtain an unfair advantage. Nor should the Crown be able to put in evidence in reply on a purely collateral issue. However, it is fit and proper that reply evidence be called which relates to an integral and essential issue of the case. In such circumstances, it would be wrong to deprive the trier of fact of important evidence relating to an essential element of the case. The course of a trial, particularly a criminal trial, must be based upon rules of fairness so as to ensure the protection of the individual accused. However, the rules should not go so far as to deprive the trier of fact of important evidence, that can be helpful in resolving an essential element of the case."

The most troubling aspect of this issue of admissibility is whether the prejudicial effect of the rebuttal evidence outweighed its relevancy. Counsel for the appellant has argued that the evidence of the Oxford incident, as adduced through the rebuttal witnesses, was not timely as it was in **Aalders** as the Oxford incident has occurred three months before the shooting of Mr. Peters. He also argues that:

> "263. In addition, a substantial amount of evidence had already been led, both in the Crown and Defence case, regarding the abuse of the deceased upon the Appellant. The Oxford incident was merely another example of menacing behaviour of the deceased towards the Appellant, and the fundamentals of the Appellant's evidence: Mr. Peters had a gun; he had been shooting it, it was discharged, even while the Appellant was trying to get her child back from Mrs. Parsons; he had been chasing her while in possession of the gun; she was concerned for the safety of her young child. These facts were not disputed in the rebuttal evidence.
>
> 264. Instead, highly prejudicial and condemning evidence as to the Appellant's demeanour was elicited by the reply witnesses, and

> unfortunately permitted by the trial judge. **The learned trial judge, in his charge to the jury, basically permitted the jury to decide if it was proper reply evidence, and to utilize this evidence in the jury's assessment of the credibility of Ms. Clair in determining her guilt or innocence on the charges left for consideration to the jury**. The demeanour of the Appellant, three (3) months prior to an incident with a weapon involving her husband, is not relevant reply evidence."

What facts counsel asserts are substantially correct. Mr. Peters did have a gun and shots were fired. There is no evidence who fired the shots. The only other evidence that Mr. Peters was chasing her towards the Parsons/Harrison home was that of Vincent Basque who was tenting with them. He testified that there had been arguments between Peters and the appellant and then between Mr. Peters and young Stephens. Mr. Basque testified that the appellant left to go to the house [across the field] to call the R.C.M.P. He testified that Mr. Peters then got the gun and ran after her up the field but threw the gun in the field. On cross-examination he agreed that Mr. Peters only ran a short distance before throwing the gun away. He testified that Peters had bought the gun because there were deer in the fields in the mornings. The evidence of the rebuttal witnesses was prejudicial in the sense that it portrayed Ms. Clair as being rather violent on that occasion.

The trial judge's instructions to the jury on the use of rebuttal evidence was as follows:

> "Rebuttal evidence. In this case I allowed the Crown to put in rebuttal evidence regarding the Oxford incident. Normally the Crown is not allowed to split its case and that is to present one part at the beginning and one part later after the defence has put on its case. But where the defence has raised some new matter or a defence which the Crown has had no opportunity to deal with in presenting its case and which the Crown could not have reasonably anticipated, then rebuttal evidence will be permitted, provided that evidence is related to an essential issue which may be determinative of the case. Now essential issue is rather difficult and hard to define, but here I would relate it to the use of a firearm in the hands of Peters' and Miss Clair's fear of Mr. Peters. The evidence of Mr. Harrison and Miss Parsons did to some degree contradict some of the evidence of Miss Clair as

> to exactly what took part that night, but I must indicate that it did not contradict the testimony of Mr. Basque and Miss Clair about Peters having the gun or the presence of a gun that evening.
>
> In my opinion, the rebuttal evidence would only have effect on the credibility of the witness Clair and remember you may accept all or a part of the evidence of any witness, including the accused. Also, remember, memories fade over the years and witnesses sometimes remember differently. So it was for this reason that I allowed in the rebuttal evidence." (**AB p. 1111**)

I agree with Crown counsel that the trial judge's instruction, having allowed the evidence in, made as favourable a direction to the appellant as he could have under the circumstances. The learned trial judge clearly played down the contradiction between her evidence and that of the rebuttal witnesses.

I am satisfied that the learned trial judge did not err in allowing the Crown to adduce the rebuttal evidence; it was relevant to the essential issue in the case, that is, the defence that the appellant was acting out of fear of Mr. Peters the night he was shot and that the shooting was accidental. The Oxford incident was not a collateral issue injected in to the trial by the Crown but rather an essential component of the defence theory that the appellant feared Mr. Peters when he had been drinking and had a gun. Therefore, her demeanour that night was relevant in considering whether she was fearful of Mr. Peters on the night he was shot. There was no one present other than the appellant when Mr. Peters was shot. The rebuttal evidence became relevant only after the close of the defence case. It could not have been introduced as part of the Crown's case in chief. The prejudicial effect does not outweigh its relevancy given that the Oxford incident was the main structural beam in support of the defence that according to the appellant's testimony she accidentally shot Mr. Peters while trying to protect herself when he appeared at the bedroom door with the rifle in his hand. The jury must have rejected her evidence as untruthful.

The learned trial judge did not err in failing to hold a *voir dire* to determine the

admissibility of the rebuttal evidence; that is not a requirement. His instruction to the jury was not in error; if anything, it was favourable to Ms. Clair. He was not required to advise the jury that the evidence could not be used in determining guilt. He clearly told the jury the evidence could only be used in consideration of the credibility of Ms. Clair's testimony; her credibility, given the absence of witnesses to the shooting, was a critical factor in the case.

Having dealt with the first three grounds of appeal, all of which related to the rebuttal evidence issue, I will now move to the fourth ground of appeal which is as follows:

> "That the learned trial judge erred in describing to the jury the use of evidence previously given under oath."

The learned trial judge's instructions to the jury were as follows:

> "There are a number of matters I would like to deal with. Prior inconsistent statements is the first matter and I am just going to discuss with you the rules of evidence with respect to prior inconsistent statements made by the accused at another court hearing in this matter, made under oath.
>
> You may recall that on cross examination, Mr. MacDonald referred to several statements made under oath by Miss Clair at the other hearing. The Crown submits that these statements were inconsistent with the testimony at this trial. In most cases it is fair to say that Miss Clair did not remember the questions asked or the answers given, nor did she accept the prior statements as being true. No explanation was given for the prior statements or the apparent inconsistencies, but I think we have to be very, very careful about this because there is a question of a language problem. However, it is something that you will have to weigh yourselves in your own mind. Normally in a case of any witness who does not accept a prior statement, these statements can only be used in assessing that witness's credibility. In the case of an accused there is a procedure which could be used, which means that a prior inconsistent statement is just not restricted to the issue of credibility, but it can also be used by you as evidence of guilt or innocence. This procedure was not used in this case and I must hold that the only issue you may make of any inconsistent statement is in assessing the credibility of the accused. It is for you to decide whether those statements made were really inconsistent with the testimony given by Miss Clair at this trial and whether she had given any explanation. If you decided that the prior statement is inconsistent with what Miss Clair said here under oath then you will use that statement to decide whether or not you believe her testimony."

The argument of counsel for the appellant is succinctly stated at paragraph 268 of his factum as follows:

> "268. Nowhere in the charge concerning this issue (prior inconsistent statements) does the learned trial judge direct the jury that the prior statements, given under oath, might not be used for their truth."

In **R. v. Kuldip et al** (1991), 61 C.C.C. (3d) 385 the accused was charged with failure to stop at the scene of an accident. He testified at both his first and second trial. At the first trial he testified that Constable Brown was the officer to whom he reported the car accident. The evidence indicated that just prior to the commencement of the second trial he discovered that Constable Brown was not on duty on the date in question and the accused therefore changed his testimony at the second trial. The Supreme Court of Canada ruled that the cross-examination of the respondent at the second trial was clearly for the purpose of undermining his credibility and not for the purpose of incriminating him and, therefore, the cross-examination did not offend s. 13 of the **Charter**.

The issue before us is whether the cross-examination on what the Crown alleges were prior inconsistent statements made by the appellant was for the purpose of incriminating the appellant or whether it was for the purpose of discrediting her.

Lamer C.J.C., in writing for the majority in **Kuldip**, supra, after reviewing the decisions of the lower courts in that case, the s. 13 **Charter** right and the decisions of the Supreme Court of Canada in **R. v. Dubois** (1986), 22 C.C.C. (3d) 513 and **R. v. Mannion** (1987), 28 C.C.C. (3d) 544 stated at p. 395:

> "Thus, in *Mannion* this court partially answered the question left open by its judgment in *Dubois*: the use of previous testimony in a subsequent trial during cross-examination, for the purpose of establishing consciousness of guilt, violates the right against self-incrimination guaranteed by s. 13 of the Charter. The question left open by *Mannion* to be decided in this case is whether previous

> testimony may be used during cross-examination in a subsequent proceeding for some other purpose, namely, for the purpose of challenging the credibility of the witness."

After reviewing several decisions of provincial courts of appeal, Lamer C.J.C. concluded at pp. 397-398:

> "Using a prior inconsistent statement from a former proceeding during cross-examination in order to impugn the credibility of an accused does not, in my view, incriminate that accused person. The previous statement is not tendered as evidence to establish the proof of its contents, but rather is tendered for the purpose of unveiling a contradiction between what the accused is saying now and what he or she has said on a previous occasion. For example, a situation could arise where A. is charged with murder and B. gives testimony at A.'s trial that B. was with A. in Montreal on the day of the alleged murder committing a bank robbery. B. may subsequently become the accused in a trial for robbery and choose to take the stand in his defence. If B. then testifies that he was in Ottawa on the day of the alleged robbery, the Crown is entitled to cross-examine B. with respect to the discrepancy between his current testimony and his previous testimony. The previous statement is used only to impeach the accused's credibility with respect to his current testimony that he was in Ottawa on the day of the alleged robbery. The previous statement may not be used, however, to establish the truth of its contents; it may not be used to establish that the accused was, in fact, in Montreal on the day of the alleged bank robbery nor can it be used to establish that the accused did, in fact, commit the alleged bank robbery. In the situation just described, it would be incumbent upon the trial judge to give a warning to the jury that it would not be open to it to conclude, on the basis of his previous statement, that the accused was in Montreal on the day of the alleged bank robbery nor to conclude that the accused did, in fact, commit the bank robbery. The jury would have to be warned that the only possible conclusion open to it from such cross-examination would be that the accused was not telling the truth when he said that he was in Ottawa on the day of the robbery and that he was not, in fact, in Ottawa on that day. Of course, this in turn might well enable it to conclude, beyond a reasonable doubt that B. *was* in Montreal committing the robbery; but this conclusion could only be reached as a result of *other* evidence which will have become uncontradicted evidence as a result of the cross-examination which has impeached the credibility of the accused and thereby caused the jury to disbelieve the accused's current testimony."

I would infer that it was from this paragraph of the Chief Justice's opinion that

counsel for the appellant draws support for his argument that the learned trial judge was required to direct the jury that prior statements given under oath could not be used by the jury for their truth. The learned trial judge did not give such a direction in the exact words suggested by counsel for the appellant but he clearly instructed the jury that the prior evidence showing any inconsistency with the appellant's evidence given at the trial could only be used in assessing the credibility of her trial testimony. The example given by Chief Justice Lamer in the above quoted passage would require a sharp direction as to the use of the evidence would be of such a critical nature given the defence.

In the appeal we have under consideration it is apparent from a review of the relevant portions of the trial transcript that there was a language problem relevant not only to the answers she gave at the first trial but also in relation to her evidence at the second trial when she was cross-examined by the Crown counsel on what the Crown perceived as evidence given at the second trial that was inconsistent with her evidence at the first trial. The appellant's first language is Mi'kmaq. At the first trial all questions to her were interpreted from English into Mi'kmaq and she answered in English. At the second trial a different procedure was used as well as a different interpreter. At the second trial questions on cross-examination of the appellant were only interpreted when the interpreter or the appellant thought it was necessary.

The most critical of the statements that the Crown considered to be inconsistent with her testimony at the first trial involved the direction the deceased was looking when the gun discharged and whether or not his hands were on the gun at that time. I have reviewed the first trial questions and answers put to the appellant in cross-examination at the second trial and her responses at the respective trials. At the first trial she testified that the gun went off "when I pulled it right fast and when I hit the door". That evidence is consistent with her evidence at the second trial. At the first trial she answered yes when asked "When the gun

went off were both his hands on the gun?" At the second trial after an extensive exchange between both counsel, the court and the interpreter, interspersed with questions to the appellant, she restated her evidence that when the gun went off Peters was not holding it as she had just pulled it away from him. She further stated that she did not remember having said at the first trial that his hands were on the gun when it went off.

On further cross-examination Crown counsel again revisited her first trial testimony that Mr. Peters' hands were on the gun when it went off. She responded that at the first trial she was having a hard time answering and explained:

> "**THE COURT**: Perhaps we can have that translated.
>
> (**INTERPRETER/WITNESS IN MI'KMAQ**)
>
> **A.** Well, I kind of have a hard time answering . . . I had a hard time answering them a couple of years ago too. I just, I don't remember saying that.
>
> **MR. MACDONALD**: The last time that you gave evidence, in fact, every question was translated and then you . . . before you answer it. Isn't that correct?
>
> **A.** Yes.
>
> **Q.** Mr. Bernard Francis was there and he translated every question indeed, before you answered it, right?
>
> **A.** Yes.
>
> **Q.** So you couldn't have had any trouble understanding it. It was given to you in Mi'kMaq by Mr. Francis?
>
> **A.** Yes, but I don't know how to explain it -
>
> **Q.** Can I -
>
> **THE COURT**: Just wait a minute. She wishes to explain.
>
> (**INTERPRETER/WITNESS IN MI'KMAQ**)
>
> **INTERPRETER**: Bernie Francis would ask her a question and then what she meant, like when she said it in English she'd have a hard time expressing herself." **(A.F. p. 87)**

Counsel for the appellant argues that to the extent there are inconsistencies, given that a different interpreter and a different interpretation process was used, it is critical to consider whether the jury was properly apprised that they would have to assess whether the appellant accepted her first trial evidence, disputed it or explained it sufficiently. Counsel for the appellant argues that the learned trial judge in his instructions to the jury, which I have previously quoted, over simplified the appellant's responses at her second trial. In his opinion the appellant was largely able to clarify the apparent inconsistencies in that she was having difficulty answering in English. Counsel argues "that the learned trial judge should have instructed the jury that they could not automatically use the prior, apparent or possible inconsistent statements for their truth." In his opinion, the learned trial judge's instruction was inadequate and amounted to a non direction.

I have set out the learned trial judge's instruction on the use of previous inconsistent statements. The learned trial judge directed the jury's attention to the obvious fact that there was a language problem. He told the jury "the previous inconsistent statements could not be used by the jury as evidence of guilt or innocence". He concluded:

> "the only issue you may make of any inconsistent statement is in assessing the credibility of the accused. It is for you to decide whether those statements made were really inconsistent with the testimony given by Miss Clair at this trial and whether she had given any explanation. If you decide that the prior statement is inconsistent with what Miss Clair said here under oath then you will use that statement to decide whether or not you believe her testimony."

He clearly left it to the jury to determine whether there were any inconsistencies and he instructed the jury that they could use any evidence of inconsistency only in assessing her credibility. As is clear from the passages quoted from his instructions to the jury, he did not fail to instruct the jury that inconsistent statements, if any, could not be used to determine the issue of guilt or innocence. I reject this ground of appeal.

Counsel for the appellant abandoned the fifth ground of appeal. I will now deal with the sixth ground of appeal "that the learned trial judge erred by permitting the jury to have the use of a tape measure during the deliberations by the jury".

About 45 minutes after the jury began their deliberations they requested a tape measure. The trial judge agreed and a tape measure was provided. The appellant's counsel argues that the jury should have been given nothing but the exhibits. He relies on a passage from **Stewart and Sappleton** (1989), 89 Cr. App. R. 273 (C.A.). In that case the charges involved importation of marihuana; the jury asked for scales which were provided. In that case the critical issue was whether the two females charged with importation knew of the presence of almost two kilos of cannabis hidden in false compartments in identical pieces of luggage (hold-alls) which each had when they returned to England. Their defence was that their male friends, who had supplied the hold-alls, must have put the cannabis in them while they were visiting in Jamaica. The Crown had stressed before the jury that the two female accused would have noticed the difference in weight of the flimsy hold-alls if the cannabis had been added without their knowledge. Both appellants denied they were aware of any change in the weight of the hold-alls. On appeal, McKinnon J. for the court, referred to a decision in a case he referred to as **Thomas** delivered on February 3, 1987, in which a map of South Hampton was allowed to go into the jury room after the jury had retired. In **Thomas**, Watkins L.J. is quoted to have said:

> "It is hardly necessary to say that an action of this kind runs counter to all the guidance which this Court has given from time to time as to how a request from the jury should be met and dealt with by a trial judge. It can never be right for a jury to be provided with something which has not been part of the evidence in the trial."

McKinnon J. went on to state in **Stewart and Sappleton**, supra, that it is critical to know for what purpose the jury would have wanted the scales in that case and that the

failure to determine this was a material irregularity. He concluded in that case "there was a real danger that the jury sought to resolve in a thoroughly unsatisfactory way a crucial issue by using new material which had not been introduced in evidence at the trial. If experiments are to be conducted they should take place in open court in the presence of the accused". There can be no quarrel with this decision considering the facts of the case.

In the course of the decision McKinnon J. made the following *obiter* remarks at p. 277:

> "To provide the jury with a ruler or magnifying glass for the purpose of reading a scale on a map or document already in evidence would be giving them something new. The better and safer course, as it seems to us, would be for the judge to ask the jury for what purpose they wanted the ruler or magnifying glass. Once that purpose was known, then the information sought by the jury, if it was already in evidence, could be given to them without difficulty. That approach seems to us to avoid difficulties that could well arise from the jury advancing new theories and then seeking to resolve them in the absence of the accused and without any assistance from the judge or counsel."

In the case we have under consideration a sketch of the home with measurements had been presented in evidence including measurements of the bedroom where the shooting took place, the bed in that room and the doorway. There was also *viva voce* evidence adduced at trial as to the distances between the open door and the bed. Corporal Fraser testified that the room measured 8 feet in width by 7 feet 8 inches in depth; it is obviously a very small room. The appellant testified that it was only three feet from the bed to the door which she testified she hit when Mr. Peters who suddenly let go of the gun, fell back on the bed as she pulled it away from him. The sketch shows how little space there was between the bed and the door. The photographs confirm these minimal distances. The open door is opposite the head of the bed where the deceased's head was located on the pillow. The gun is close to 4 feet in length although it had not been measured by any of the witnesses. The bed is 4 feet 7 inches wide. Mr. Peters' position in the bed would appear to be about 5 feet

from the door.

In my opinion there cannot be any real fear of the jury conducting so-called experiments with the tape measure. I agree with counsel for the respondent that allowing the jury to have a tape measure did not affect the fairness of the trial. The measuring tape merely allowed the jury to do precisely what they could have done without a tape. The jury would be allowed to make estimations of distances, including the estimation of the length of the gun, based on their own views and judgments on the evidence. The presence of the measuring tape simply allowed the jury to do what they already could do without a tape measure but do it accurately.

Providing a measuring tape to the jury in this case is far different from the problem of providing the jury with scales in **Stewart and Sappleton** and far different from the situation in **R. v. R.A. MacDonald** (1988), 83 N.S.R. (2d) 293 where the learned summary conviction appeal court judge carried out his own experiments and as a result made judicial findings of fact on issues beyond the scope of judicial notice.

In my opinion the sixth ground of appeal must fail.

The seventh ground of appeal is that the learned trial judge misinstructed the jury on the defence of self defence. The trial judge's instruction took up 12 pages of the transcript; it was given after the instruction on the primary defence of accident. The instruction was wrapped around the standard instruction as contained in **Crimji** at that time. The learned trial judge instructed on the defences under both ss. 34(1) and 34(2) of the **Criminal Code**, R.S.C. 1985, c. C-46.

Insofar as the appellant's evidence was that the gun accidentally discharged when she was wrestling it from Mr. Peters, there is some question in my mind whether the defence of self-defence, which implicitly involves an intentional shooting to repel the attack by Mr. Peters, was compatible with a defence of accident. However, counsel for the defence was

obviously relying to some extent on self-defence. I say so for the following reasons. In his opening address to the jury defence counsel stated:

> "And as you may expect, and as I can indicate to yourselves now, there isn't an issue in this trial about Mr. Peters' death. There's no issue about what day he was killed. There's no doubt that it's him. There's no doubt that Ms. Clair had something to do with it. But as you will hear from her, I would expect you will hear from her that she did not intend to cause her husband's death.
>
> She will advise you, she will testify something quite different from that. She will advise you that she did what she thought she had to do on that occasion and her account I don't expect will be very different at all from what was explained to the Laffords, what was explained in those phone calls to the R.C.M.P. She said on those occasions, she will say something quite similar I expect, "it was either him or me".
>
> You will hear from her. You will also hear from several people of the community that knew both ... both Gertrude and Bernard Charles Peters.
>
> Thank you very much, My Lord. I'd like to call my first witness, Sharlene Pictou." (**AB p. 581**)

In the appellant's direct evidence she testified to other incidents of abusive behaviour by Mr. Peters towards her. She testified as follows:

> "Q. More. Mrs. Lafford described what she saw when she testified in that seat on Tuesday. Did you ... did you hear her give evidence?
>
> A. Yes, I did.
>
> Q. Um hum. Was that the only time that Bernie had ever hit you on those two times that she told us? I guess ...I guess she told us she saw him hit you once with a shovel and she said as well she ...she saw him throw you out of the house. Do you recall hearing her say that?
>
> A. Yes.
>
> Q. Okay. Was she correct when she said that?
>
> A. Yes, she was.

Q. Um hum. Did ...did your husband ever do anything else to you? Did he ever hurt you on other times?

A. Yes.

Q. Um hum. Are you able to tell the jury about the other times?

A. I... it's been so many, I just ...I don't know when and ...in a year like I can't really .... I ... I didn't count them. It's just...

Q. Okay. Well ...

A. ...just kept on repeating, like that." (**AB p. 660**)

The appellant had stated to the R.C.M.P. telecom operator on the night of the shooting, "We were fighting. I had to protect myself from the gun. If it wasn't for him, it would have been me." The tapes of this call were introduced into evidence at the trial. The defence position, which was put in writing by defence counsel to be read to the jury, focused on the ingredients of self-defence. The position of the Crown and of the defence were put to the jury by the trial judge in the following language:

> "Now I have asked Crown and defence to give me written summaries of their respective positions. They have done so and so that they will be fresh in your memory I will read them to you and they are both thankfully fairly brief.
>
> The theory of the Crown. The theory of the Crown is that on the early morning hours of November 9th, 1990, several people left the home of Bernard Peters and Gertrude Clair on the Afton Reserve in Antigonish County. A period of time after the party Mr. Peters went off to bed and fell asleep. The accused remained awake. Due to her violent nature and for some reason likely involving a disagreement, Mr. Peters and the accused had prior to his going to bed. The accused was very angry at Mr. Peters. She took the shotgun, went into the bedroom where Peters lay asleep with his arm under a pillow. She pressed the muzzle of the gun to his head and pulled the trigger, killing him. That's the theory of the Crown.
>
> The position of the defence. The defence states that not the direct evidence, the circumstantial evidence, nor the physical evidence point inescapably to a conclusion beyond a reasonable doubt that the accused intended to commit murder upon Bernard Peters.

> He frightened her with the gun, he was unresponsive, she tried to get the gun away. She did not know it was loaded and she knew what he would do when he was drinking. He would not relinquish the firearm. The accused went to the extent of doing what she felt she had to do. She was not required to retreat, nor was she required to only defend herself equally to the threats she experienced, nor was she required to defuse or avoid the situation. Conjecture, speculation or suspicion do not constitute proof beyond a reasonable doubt. The Crown's case does not constitute proof beyond a reasonable doubt of an intent to kill or an intent to cause serious bodily harm to Mr. Peters."

As is often the case the defence position straddles more than one argument and, presumably, that is why the learned trial judge instructed on self-defence despite the trial evidence of the appellant that she accidentally shot Mr. Peters.

The trial judge commenced his instruction to the jury on self-defence as follows:

> "Now the defence of self-defence may arise from the evidence you have heard. If a reasonable doubt arises and exists in your mind as to whether this defence is made out on the evidence you must return a verdict of not guilty. I will just review the law on this and as Mr. MacDonald quite properly indicated to you, that self-defence is really an intentional act to defend one's self. You are aware, of course, that Miss Clair testified that it was an accident, that it was not an intentional act, to defend herself. However, there is some evidence that could raise this defence and that is why I must deal with it with you and you should consider it." (**AB p. 1133**)

Counsel for the appellant argues that the trial judge's instruction as to what constitutes an assault was deficient when instructing on self-defence. I disagree with counsel. The learned trial judge read s. 265 of the **Code** to the jury. After reading the section he went on to state:

> "As you can see, a person commits an assault when he or she intentionally applies force to another person without the consent of that person. An assault can occur by means of threats, acts or gestures, so long as a person who makes them or does them indicates that he or she has the present ability to carry out the assault."

Counsel for the appellant argues that the learned trial judge should have referred

to the fact that an assault is caused, not only when the perpetrator has a present ability to carry out the assault but as well, a situation where he causes the victim to believe upon reasonable grounds that the person has the present ability to effect his purpose.

I agree that the learned trial judge's comments on the section defining "assault" were not complete as to how an assault could occur but a reading of his instruction as a whole shows that he clearly put to the jury that the belief of Miss Clair was a relevant consideration at the time she was confronted by Mr. Peters. The learned trial judge stated:

> "Now the evidence indicating that a possibility of self-defence in this particular case. All of the evidence which might relate to self-defence was basically adduced by the accused. We have the actions of Peters, if believed, that entering the bedroom with the rifle in front, although not necessarily pointing at Miss Clair. That would have been an assault under the **Criminal Code**, accosting a person with a firearm. We have the past actions of Peters against Clair, which raise reasonable apprehension on the part of Miss Clair if they are believed. The abuse. The rifle before. Everything that Miss Clair has said to you. The alleged fight over the gun. Peters holding the gun in the position could and would constitute an assault under **Section 265(1)(c)** of the **Criminal Code**.
>
> You may infer that Miss Clair felt that the only way to eventually get away from Peters was to shoot him to protect himself. There is no direct evidence of that. You would have to adduce it from the proven facts.
>
> And again, the relationship of the gun to the deceased, the evidence that we've heard, measurements of the room as I've indicated to you before, that certainly would be taken into consideration in any possible defence of self-defence."

And further in his instructions he stated:

> "There is evidence before you that when or before Miss Clair shot Peters she believed that she was about to be attacked by Peters. You may find that that belief was mistaken, but even though it was mistaken, if you find it was reasonable, Miss Clair is entitled to be found not guilty so long as the force she used met the conditions described in **Section 34(1)** of **Section 34(2)**."

In my opinion, reading the instruction on self-defence as a whole, it is clear that

the jury would have been aware that if Miss Clair believed that she was about to be attacked by Mr. Peters and if that belief was reasonable she was entitled to be found not guilty so long as the force she used met the conditions described in ss. 34(1) or 34(2). In my opinion the jury could not have been confused by this instruction. Any confusion would have arisen from the fact that the instruction on self-defence was given at all but that was the position taken by the defence at the trial and there was some evidence (albeit conflicting with the trial evidence) that the appellant may have shot Mr. Peters intentionally. I am referring to the statement she made on the telephone to the R.C.M.P. telecom operator, "We were fighting. I had to protect myself from the gun. If it wasn't for him, it would have been me." That statement is ambiguous but apparently concerned defence counsel enough that he wanted self-defence put to the jury.

With respect to the instruction on self-defence, counsel for the appellant also asserts that the learned trial judge misinstructed the jury on the burden of proof. He points to two passages from the trial judge's instruction on s. 34(2) of the **Code**. They are as follows:

> "You must decide two things in favour of the accused for this section to apply. One, that Gertrude Clair caused death or grievous bodily harm to Peters under a reasonable apprehension of death or grievous bodily harm to herself and two, that she believed on reasonable grounds that she could not otherwise preserve herself from death or grievous bodily harm at the hands of Peters." {Emphasis Mine}(**AB1141**)

And at **AB1142-43**, after reviewing relevant facts, the learned trial judge stated:

> "So to assist you I'll just indicate that **34(2)** applies to the evidence you've heard. If you want it to apply you must be satisfied first that Gertrude Clair was involved in repelling the assault of Peters. Two, that death or grievous bodily harm caused to Peters was caused by Miss Clair under reason of apprehension of death or grievous bodily harm to herself and three, she believed on reasonable grounds that she could not otherwise preserve herself from death or grievous bodily harm." {Emphasis Mine} (**AB 1142-43**)

These instructions are not couched in the language of reasonable doubt as are the most current instructions (12/94) in **Crimji**. I would surmise that the standard instruction was amended subsequent to the learned trial judge's instruction to the jury as he seemed to follow the **Crimji** format.

The law is clear that in assessing a trial judge's instruction to a jury for error the instruction must be read as a whole. In my opinion the learned trial judge made it abundantly clear that the burden of proof on all issues respecting self-defence was on the Crown. His concluding remarks on self-defence, which are so important, were as follows:

> "The Crown must prove beyond a reasonable doubt that the defence of self-defence cannot succeed. The accused does not have to prove anything. Keep in mind three things:
>
> If you accept the evidence in support of the defence of self-defence you must return a verdict of not guilty.
>
> If you do not accept the evidence in support of the defence of self-defence, but you are left in reasonable doubt by it, you must also return a verdict of not guilty.
>
> Even if you are not left in reasonable doubt by the evidence in support of the defence of self-defence, you must still go on to determine whether or not on the basis of all of the evidence Miss Clair is guilty."

Any question the jury may have had as to the burden of proof would have been answered by this clear instruction. Furthermore, there was an air of unreality to the defence, given the appellant's evidence that she accidentally shot Mr. Peters while wrestling the gun from him. Reading the instruction on self-defence as a whole, the learned trial judge stated the law of self-defence with sufficient clarity and related the facts to the defence in a manner that was fair to the appellant given the difficult task imposed upon him in having to instruct on self-defence when the appellant's evidence was that the gun accidentally discharged.

I will now consider the eighth ground of appeal that the learned trial judge erred in describing the defence of accident to the jury. Counsel for the appellant says that the

language used by the learned trial judge misstated the law. The transcript of the trial proceedings shows that the trial judge instructed the jury on accident as follows:

> "An accident is the foremost defence submitted by counsel. When I am reviewing the law and the evidence relating to this defence, keep in mind that the accused does not have to prove that her conduct was accidental. The burden of proof is on the Crown to prove beyond a reasonable doubt that the defence of accident cannot succeed. In this case, it is suggested that the conduct of Miss Clair should be excused and that she should be found not guilty of the offence of second degree murder because the harm allegedly caused to her by Peters was a pure accident for which she is not criminally responsible. What that means is that if you find accident you must find Miss Clair not guilty of any offence.
>
> The defence of accident may succeed in these circumstances if at the time of the offence of second degree murder allegedly occurred, Miss Clair was not engaged in an unlawful act. If you accept the evidence of Miss Clair as a question of law, I can tell you that what she was doing immediately prior to the alleged offence was not an unlawful act. She was trying to get the gun away from Mr. Peters and she testified that she was trying to open the gun.
>
> It is for you to decide whether the alleged offence of shooting Mr. Peters occurred as a result of an accident or if there was some careless or intentional conduct on the part of Miss Clair which caused harm to Peters. As you can see in this case, the claim of accident is a claim by Miss Clair that she did not have the specific intent for murder that I described earlier. For these purposes, an accident is an unintentional and unexpected occurrence that produces hurt or loss. You must determine from the evidence whether the harm to Peters came about unintentionally and unexpectedly as a result of the conduct of Miss Clair. If it did, she is entitled to be found not guilty. Should you decide that the conduct of Miss Clair was unintentional or unexpected you should find her not guilty. On the other hand, you decide that the evidence indicates that her conduct was intentional or tended to show wanton or reckless disregard for the lives and safety of others then you should go on to determine if she is guilty of the offence of second degree murder.
>
> Now it is for me to indicate to you what evidence has been adduced which might tend to support or corroborate the contention of the accused that this was an accident. This list is by no means exhaustive. However, I will just list the matters which come to mind.
>
> First, Miss Clair testified that it was accident. Two, testimony by Lewis Clair that Miss Clair was not familiar with guns. Testimony of Miss Clair that she was not familiar with guns and the gun in question which had only been owned for a short time. Testimony of

the expert, Harvey, about the somewhat unique operation of the Baikal or Baikal shotgun. Even the difficulties of Corporate Fraser, the RCMP IDENT person who had difficulty opening the gun on the stand the first day. Evidence of the gun being on the gun rack, fairly high up. The height of Miss Peters, 5'1". Mr. Peters, 5'9". You will recall the evidence of Corporal Murray, 6' tall. He had to reach to some degree to get the other two guns. Absence of an actual motive for killing Peters. Although it is clear that the Crown does not have to prove a motive certainly a lack of motive can be taken into consideration in accepting or rejecting the defence.

Now it's submitted by the Crown that accident could not have happened because the muzzle of the gun . . . that accident couldn't happen because the muzzle of the gun was against or close to the skull of Mr. Peters. But in assessing this, when you look at picture 9, the doorway to the bedroom and the sketch of the room which was submitted as exhibit 10, the door was open to the left as you enter the bedroom. The bed was flush with the door opening. The door was thirty-four and one quarter inches wide. The gun was forty-four and one half inches long. In looking at the pictures, I find that the head of the deceased was found lying somewhere in the first third of the bed which was fifty-five inches wide. Now if you believe the evidence of Miss Clair or have some reasonable doubt, when the gun fired, her back would have been against the door shown in picture 9. Then there would have been the depth of her body. Then the length of the gun, which she was holding out in front of her after having pulled it away from Peters. And in this scenario it is very possible that the muzzle of the gun could have been fairly close to the skull of the victim. No evidence as to the width of Miss Clair from front to back, but that was a very, very small room. So it is not inconceivable that something of that nature might happen. But it is for you to weigh that testimony and it is for you to look at the exhibits. It is for you to determine and make the necessary findings.

Evidence of the prior acts of violence by Peters against Miss Clair, including the gun incident which might cause Clair to believe she had to get the gun away from Peters as she would be injured.

No need for me to list the acts of violence against her. She testified about them. They may not have been as numerous as she testified. However, there is no question that there were acts. There is no question that the doctor was suspicious and what would she think? How would she react?

Consider the evidence of the love of Miss Clair for her children and why she would deliberately shoot Peters with her children in the next bedroom.

The evidence of Miss Dittmar, the expert on the use of alcohol. She talks about mixing alcohol and hashish or THC. That would

> make a person, "emotionally unstable", to use her words. This could be a reason for the action of Peters as described by Miss Clair.
>
> Evidence of the plans to remain with Mr. Peters and to marry, plans for to marry. Her comments made after to people regarding there was a struggle for the gun. Her comments to Earl Lafford when asked who loaded the gun and she said, Bernie loaded the gun.
>
> I am not saying these are definitive of anything, but what I am saying to you is that the defence of accident has been raised. There is evidence which if believed could support the story of Miss Peters, or excuse me, of Miss Clair. This is the evidence that would relate to her defence.
>
> The Crown must prove beyond a reasonable doubt that the defence of accident cannot succeed. The accused does not have to prove anything. Keep in mind three things. If you accept the evidence in support of the defence of accident you must return a verdict of not guilty. If you do not accept the evidence in support of the defence of accident, but are left in a reasonable doubt by it, you must also return a verdict of not guilty. Even if you are not left in a reasonable doubt by the evidence in support of the defence of accident, you must still go on to determine whether or not on the basis of the evidence Miss Clair is guilty.
>
> I think it might be appropriate to take an interim break now." {Emphasis mine}

In arguing that the instruction was deficient the appellant relies on a decision of this Court in **R. v. Fraser** (1990) , 96 N.S.R. (2d) 129. In that case the defence was self-defence. While instructing the jury the learned trial judge lapsed into language at particular points of instructions, as did the learned trial judge in the case we have under appeal, from which a jury might imply there was some burden on the accused to make out the defence. In that case the trial judge concluded his remarks to the jury on the defence of self-defence with words similar to the concluding words of the trial judge in this case in his instruction on both self-defence and accident but with one fatal omission; he omitted the word "not" from the concluding sentence of his instruction which, with the word "not" omitted between the words 'are' and 'left' reads as follows: "and when at the end of it all if you are left in a

reasonable doubt by the evidence in support of the defence of self-defence you must still go on to determine whether or not on the basis of all the evidence the accused is guilty". This led Chipman J.A. to conclude that he was not satisfied that the confusion that may have been created as to the burden of proof was dispelled in the final statement to the jury but, in fact, that that statement only appeared to have made matters worse. I agree with him in that case. I would also note that a review of the decision of this Court in **Fraser** shows that the Court had, prior to making the above determination with respect to instruction on the burden of proof, concluded that the learned trial judge had failed to relate the evidence relevant to the defence to the jury. The conviction was set aside and a new trial ordered.

I have set out the learned trial judge's instruction on the defence of accident in its entirety. It would appear that the learned trial judge made a slip of the tongue when he stated in his instruction on accident:

> " Should you decide that the conduct of Miss Clair was unintentional or unexpected you should find her not guilty. On the other hand, you decide that the evidence indicates that her conduct was intentional or tended to show wanton or reckless disregard for the lives and safety of others then you should go on to determine if she is guilty of the offence of second degree murder."

The learned trial judge must have intended to say criminal negligence rather than second degree murder. This issue was not raised on appeal. In reading the whole instruction it is my opinion that the slip is inconsequential. The defence of accident was fairly put to the jury and the jury could not, despite the unfortunate language used at several points in the instruction, have been unaware that the appellant to be found not guilty had only to raise a reasonable doubt that the shooting was accidental while, according to her trial testimony, she was lawfully attempting to prevent an assault on herself. The vital word "not" that was omitted from the instruction in **Fraser** was not omitted by the trial judge in the instruction we have under consideration.

It is not unusual for a trial judge in instructing a jury to lapse into the sort of language from which it can be suggested that he has implied some burden of proof on the defence but in virtually all the standard charges when read as a whole it is made abundantly clear to the jury that the burden of proof is on the Crown and the defence need only raise a reasonable doubt. That was done by the learned trial judge in this case in his final instruction on the defence of accident; his instruction on this defence was satisfactory.

For the reasons given in this decision respecting the various grounds of appeal raised by the appellant I would dismiss the appeal.

Hallett, J.A.

Concurring in:

Chipman, J.A.

Flinn, J.A.

C.A.C. No. 108228

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

GERTRUDE MADELINE CLAIR

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT BY:

HALLETT, J.A.