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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

In The

SUPREME COURT OF VIRGINIA

At Richmond

761048

FILMORE B. MARTIN, JR.

V.

COMMONWEALTH OF VIRGINIA

APPENDIX

BENJAMIN B. CUMMINGS, JR., Petersburg (Cummings and Levinson, Petersburg), for plaintiff in error.

ALAN KATZ, Asst. Atty. Gen. (Anthony Troy, Atty Gen.), for defendant in error.

APPENDIX

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CITY OF PETERSBURG,)
COMMONWEALTH OF VIRGINIA) To-Wit

IN THE CIRCUIT COURT OF SAID CITY

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the City of Petersburg and now attending the said Court, upon their oaths present that Fillmore Martin, on or about the 7th day of February, in the year 1976, in the said City and within the jurisdiction of the said Court, feloniously did kill and murder one, Martin D. Taylor, against the peace and dignity of the Commonwealth of Virginia, Virginia Code Sections 18.2-30, 18.2-31, and 18.2-32.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PETERSBURG,

APRIL 13, 1976

Commonwealth

v. Felony - Murder (Second Degree)

Fillmore Martin (DOB 3/7/52), Defendant

This day came the Attorney for the Commonwealth, and Fillmore Martin who stands indicted for a felony, to-wit: feloniously did kill and murder one Marty Taylor, was led to the bar in the custody of the Sheriff of this Court, and came also Benjamin B. Cummings, Jr., his attorney.

Whereupon the accused was arraigned and after private consultation with his said attorney, pleaded not guilty to the indictment, which plea was tendered by the accused in person.

The Court then impanelled twenty qualified jurors, free from exception for the trial of the defendant, in the manner provided by law. Whereupon the attorney for the Commonwealth and the attorney for the defendant exercised their rights to strike names from the panel, as provided by law, and the remaining twelve jurors, constituting the jury for the trial of the defendant, were duly sworn.

After opening statements, the court and jury heard the evidence presented by the Commonwealth and the defendant. At the conclusion of the Commonwealth's evidence, the attorney for the defendant moved the court to strike the Commonwealth's evidence, which motion was overruled; at the conclusion of all the evidence, the attorney for the defendant renewed his motion to strike the Commonwealth's evidence, which motion was overruled.

After hearing the evidence, the instructions of the court and argument of counsel, the jurors were sent to the jury room to consider their verdict. They subsequently returned their verdict in open court, reading:

"We, the Jury, find the accused Fillmore Martin, Jr. guilty of murder in the second degree.

And affix his punishment to be 20 yrs confinement in the penitentiary. 4/13/76

ROBERT H. BELLE

R. H. Belle"

The Clerk polled each juror who stated that was his verdict.

The attorney for the defendant then moved the court to set aside the verdict, which motion was overruled.

The Court then asked the defendant whether he desired to make a statement or to advance any reason why judgment should not be pronounced against him. The defendant having declined, the Court finds the defendant guilty of murder in the second degree, as charged in the indictment and sentences the defendant to confinement in the penitentiary of this Commonwealth for the term of twenty (20) years.

And it is further ordered that as soon as possible after the entry of this Order the defendant be removed and safely conveyed according to law from the jail of this Court to the said penitentiary, therein to be kept, confined and treated in the manner provided by law.

At all times during the trial of this case the defendant and his counsel were present.

The Court orders that the defendant be allowed credit for the time spent in jail awaiting trial.

It is adjudged that the Commonwealth recover from the defendant the costs assessed in this proceeding.

The defendant is remanded to jail to await transfer to the penitentiary.

* * * *

A Copy, TESTE:

/s/ WALTER L. PARRISH, CLERK

Enter this:

April 13, 1976

/s/ Oliver A. Pollard, Jr.
Judge

Entered: Common Law Order Book
Vol. , Page

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF PETERSBURG

COMMONWEALTH OF VIRGINIA Plaintiff

v.

FILMORE B. MARTIN, JR. Defendant

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

The defendant, Filmore B. Martin, Jr., gives notice of appeal from the judgment of the Court rendered herein on April 13, 1976, and assigns the following error as required by Rule of Court 5:6.

* * *

7. The trial court erred in refusing to give defendant's instruction "A", being an instruction on accidental killing, as amended, in that there was sufficient evidence to support such instruction.

* * *

/s/ F. Buchanan Martin, Jr.
Filmore B. Martin, Jr.

I certify that a copy of the foregoing notice of appeal and assignment of error has been mailed to J. Thompson Wyatt, Esquire, Commonwealth's Attorney for the City of Petersburg, Union Trust Building, Petersburg, Virginia, 23803 this 4 day of May, 1976.

/s/ Benjamin B. Cummings, Jr.
Benjamin B. Cummings, Jr.
Counsel for Defendant

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 28th day of December, 1976.

Fillmore Martin, Plaintiff in error,

against Record No. 761048

Commonwealth of Virginia, Defendant in error.

From the Circuit Court of the City of Petersburg

Upon the petition of Fillmore Martin, sometimes known as Filmore B. Martin, Jr., a writ of error and supersedeas is awarded him to a judgment rendered by the Circuit Court of the City of Petersburg on the 13th day of April, 1976, in a prosecution by the Commonwealth against the said petitioner for a felony; but said supersedeas, however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

This writ of error, however, is limited to the consideration of assignment of error No. 7 as follows:

7. The trial court erred in refusing to give defendant's instruction "A", being an instruction on accidental killing, as amended, in that there was sufficient evidence to support such instruction.

On further consideration whereof, it is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to assignment of error No. 7, and the briefs to be filed shall be

limited to such discussion as is relevant to the assignment of error upon which this writ of error is awarded.

The petition for writ of error is refused as to the remaining assignments of error.

A Copy,

Teste:

/s/ H. G. Turner, Clerk

INSTRUCTION NO.1

The defendant, Filmore Martin, Jr., is presumed to be innocent of the offense with which he is charged and this presumption of innocence goes with him through the entire case and applies at every stage thereof and is sufficient to require you to find him not guilty unless and until the Commonwealth, upon whom the burden rests, proves his guilt beyond a reasonable doubt; and the Court further tells you that it is not sufficient that facts and circumstances proved be consistent with the guilt of the defendant, but they must be inconsistent with every reasonable hypothesis consistent with the innocence of the defendant.

INSTRUCTION NO. 2

The Court instructs the Jury that (a) the burden is upon the Commonwealth to prove by the evidence beyond a reasonable doubt every material and necessary element of the offense charged against the Defendant. It is not sufficient that the Jury may believe his guilt probable, or more probable than his innocence. Suspicion or probability of guilt, however strong, will not authorize a conviction, but the evidence must prove his guilt beyond a reasonable doubt. The Jury shall not speculate or go outside of the evidence to consider what they think might have taken place, but you are to confine your consideration to the evidence introduced by the Commonwealth and the Defense, and unless you believe, upon a consideration of all the evidence before you, that guilt of the Defendant has been proved beyond a reasonable doubt as to every material and necessary element of the offense charged against him, then you shall find the defendant not guilty and The court instructs the Jury that (b) the burden resting upon the Commonwealth to prove guilt of the defendant beyond a reasonable doubt does not require that such guilt be proven beyond every imaginable, conceivable or possible doubt, but only beyond a reasonable doubt. The Jury must limit its consideration to the evidence introduced, and you are not to go outside the evidence to hunt up doubts, nor must you entertain doubts which are speculative or conjectural. And if, upon a consideration of all the evidence you are satisfied of the guilt of the defendant beyond a reasonable doubt, then you shall find him guilty.

INSTRUCTION NO. 3

The Court instructs the Jury that the Jury are the sole judges of weight to be given the evidence, and of the credibility of the witnesses who testified, and in determining the weight to be given the evidence of the witnesses, and the credibility of the witnesses, the Jury may take into consideration the witnesses' demeanor on the witness stand, their manner of testifying, their motive, if any shown, for testifying as they do, and their interest, if any is shown, in the result of this trial. And the Jury may take into consideration anything else in the evidence affecting the credibility of the witnesses, and give such weight to their testimony as the Jury believe it is entitled to.

INSTRUCTION NO.4

Proof of Filmore Martin's prior conviction of a felony may be considered by the jury as affecting his credibility, but it does not render him incompetent to testify, nor shall it be considered by the jury as evidence of his guilt of the offense for which he is now on trial.

INSTRUCTION NO. 5

The Court instructs the Jury that circumstantial evidence is legal and competent, and a person charged with a crime may be convicted upon circumstantial evidence alone, or upon circumstantial evidence connected with other evidence, if the Jury believe beyond a reasonable doubt from such circumstantial evidence that the person so charged is guilty; therefore, the Jury have the right to convict the defendant upon circumstantial evidence alone, or upon circumstantial evidence coupled with other evidence, if from all the evidence the Jury believe that guilt of the defendant has been proven beyond a reasonable doubt.

INSTRUCTION NO. 6

Where the Commonwealth undertakes to prove the guilt of the defendant by circumstantial evidence, it must not only prove the circumstances relied upon, but it must overcome the presumption of innocence of the defendant and establish his guilt beyond a reasonable doubt. All necessary circumstances proved must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt, however strong, or even a probability of guilt, but they must exclude every reasonable hypothesis except that of guilt. The chain of circumstances must be unbroken and the evidence as a whole must be sufficient to satisfy the jury that guilt of the defendant has been proven to the exclusion of any other reasonable hypothesis.

INSTRUCTION NO. 7

The Court instructs the jury that every unlawful homicide is presumed to be murder in the second degree.

In order to elevate an unlawful homicide to murder in the first degree, the burden of proving the elements thereof is upon the Commonwealth.

In order to reduce an unlawful homicide from murder in the second degree to manslaughter or excusable homicide, the burden is upon the defendant.

INSTRUCTION NO. 7 (a)

The Court instructs the Jury that in order to establish the charge of murder against the defendant, it is not necessary for the Commonwealth to prove the motive of such murder.

While it is not necessary for the Commonwealth to prove a motive for the killing, nevertheless the presence or absence of a motive is a question for consideration by you as bearing on the guilt or innocence of the defendant.

INSTRUCTION NO. 8

The Court instructs the Jury that murder in the first degree is the wilful, deliberate, premeditated and malicious killing of a human being, and if you believe from the evidence, beyond a reasonable doubt, that the defendant wilfully, deliberately, premeditatedly and maliciously killed the deceased, then you shall find him guilty of murder in the first degree.

INSTRUCTION NO. 9

The Court instructs the Jury that to constitute a wilful, deliberate and premeditated killing, it is not necessary that the intention to kill should exist any particular length of time prior to the actual killing. It is only necessary that such intention should come into existence for the first time at the time of the killing or at any time previously.

INSTRUCTION NO. 10

The Court instructs the Jury that murder in the first degree shall be punished by confinement in the penitentiary for life, or for any term not less than twenty years.

INSTRUCTION NO. 11

The Court instructs the Jury that murder in the second degree is the unlawful killing of a human being with malice and without premeditation and deliberation, and if you believe from the evidence, beyond a reasonable doubt, that the defendant unlawfully killed the deceased with malice but without premeditation and deliberation, you shall find him guilty of murder in the second degree and fix his punishment by confinement in the penitentiary not less than five nor more than twenty years.

INSTRUCTION NO. 12

The Court instructs the Jury that involuntary manslaughter is the killing of one accidentally, contrary to the intention of the defendant, while in the prosecution of some unlawful, but not felonious act; or in the performance of a lawful act, accompanied by such carelessness or recklessness on the part of the defendant as is incompatible with a proper regard for human life.

INSTRUCTION NO. 12(a)

The gist of the crime of involuntary manslaughter is criminal negligence; it must be shown that the negligence of the defendant was gross or culpable negligence; culpable or gross negligence is that which indicates a callous disregard of human life and of the probable consequences of his act; criminal liability cannot be predicated upon every act carelessly performed merely because such carelessness results in the death of another, but in order for criminal liability to result from negligence, it must necessarily be reckless or wanton and of such a character as to show disregard of the safety of others under circumstances likely to cause injury or death; and unless you believe from the evidence beyond a reasonable doubt that the defendant, Filmore Martin, Jr., was guilty of negligence so culpable or gross as to indicate a callous disregard of human life and of the probable consequences of his act, you cannot find him guilty of involuntary manslaughter.

INSTRUCTION NO. 13

The Court instructs the Jury that involuntary manslaughter shall be punished by confinement in the penitentiary for not less than one nor more than five years, or in the discretion of the Jury, by a fine not exceeding One Thousand Dollars, or confinement in jail not exceeding twelve months, either or both.

INSTRUCTION NO. 14

The Commonwealth must prove from the evidence beyond a reasonable doubt every material fact, and if the jury have a reasonable doubt as to the grade of the offense, then they must resolve the doubt in favor of the defendant, Filmore Martin, Jr., and find him guilty of the lower grade; to illustrate, if you have reasonable doubt as to whether he is guilty of murder in the first degree or second degree, you should find him guilty in the second degree; if you have reasonable doubt as to whether he is guilty or murder in the second degree or manslaughter, you should find him guilty of manslaughter; if you have a reasonable doubt as to whether he is guilty at all, you must resolve that doubt in favor of the defendant, Filmore Martin, Jr., and acquit him.

INSTRUCTION NO. 15

The Court instructs the Jury that in this case, they can find only one of the following verdicts:

(1) We, the Jury, find the accused guilty of Murder in the first degree as charged in the indictment and do ascertain his punishment to be confinement in the penitentiary for _____ years; or,

(2) We, the Jury, find the accused guilty of Murder in the second degree as charged in the indictment and do ascertain his punishment to be confinement in the penitentiary for _____years; or,

(3) We, the Jury, find the accused guilty of involuntary manslaughter, and do ascertain his punishment to be:

(a) confinement in the penitentiary for _____ years; or,

(b) confinement in jail for _____months; or,

(c) A fine of $_____; or,

(d) confinement in jail for _____months and a fine of $_____; or,

(4) We, the Jury, find the accused not guilty.

The verdict must be agreed upon by each and every member of the Jury, and if so arrived at and unanimously agreed upon, should be written upon the back of the indictment and signed by your Foreman.

INSTRUCTION NO. A

Where, as in the case at bar, the defense is that the killing was an accident, the defendant is not required to prove this fact, beyond a reasonable doubt, or by a preponderance of the evidence, but the burden is upon the Commonwealth to prove beyond a reasonable doubt that said killing was not accidental; therefore, if, after hearing all the evidence, you have a reasonable doubt whether said killing was accidental, or that it ~~was intentional~~ was not accidental, then you should find the defendant, Filmore Martin, Jr., not guilty.

Refused

O. A. P., Jr.

MATERIAL EXCERPTS FROM TRANSCRIPT

[Tr. 7, L. 8 - Tr. 10, L. 21] (Lydia Quick, witness)

Q. Would the witness state her name, please, for the record?
A. Lydia Quick.
Q. I direct your attention to February the 7th of 1976, where were you living on that date?
A. 400 Mars Street, Apartment 18-B.
Q. Would that be some apartment complex?
A. Yes.
Q. What would that apartment complex be known as?
A. (unintelligible) Court.
Q. And that's within the City limits of Petersburg, Virginia?
A. Yes.
Q. Do you know, or did you know the deceased, Martin D. Taylor?
A. Just to see him in the neighborhood he was a neighborhood helper.
Q. Now, tell me, on February the 7th, 1976, was Martin D. Taylor helping you in any way, or doing any errands for you?
A. Yes, I was moving and he was helping me put the things in my car.
Q. How far was your car parked from your apartment, approximately?
A. It was parked right in front of my apartment door, about -- about twenty feet.
Q. And what time was he helping you move?
A. About 7:20 -- well, he had been helping me all day, but -- he had been helping me about four hours, you know, we were putting things in the car.
Q. Were you in the process of moving most of the day?
A. Yea, the whole day.
Q. And what was happening, was things being moved from your house to your car?
A. Yea, my house to my car.
Q. And around 7:20 did you hear what you thought was a shot?
A. Yes.
THE COURT: Was this a.m., or p.m.?
A. P.M., 7:20 p.m.
Q. So you did hear a noise?
A. I heard a noise, yes.
Q. Was it just one noise, or like one shot or was it more than one?

A. Just one.
Q. Did you -- were you in your apartment at that time when you heard the noise?
A. Yes.
Q. And was the deceased, Martin D. Taylor, was he outside the apartment?
A. Yes.
Q. Was he -- do you know whether at that time he was carrying anything out for you or had anything in his hands when he left your apartment?
A. He had a box of dishes in his hands.
Q. And when you heard the noise did you come outside to see what the noise was?
A. Yes.
Q. And what did you see, if anything?
A. I just saw Marty laying -- laying beside my car door with the dishes.
Q. Was he still holding the dishes?
A. Well, the box was just laying up against him but most of the dishes were broken, the door was open to the car.
Q. And the box was still in his hand, or do you know?
A. Not really, no, because they dropped, and he was just laying there, I went outdoors and he was just laying there and dishes were scattered all over.
Q. All right, but tell us what, if anything, you saw or did at this time?
A. Well, I had been walking to the car myself taking dishes and Marty came in and he was taking a box of dishes and I just heard a big sound -- really I thought it was the dishes, you know, and I went outdoors and he was laying there and he said he was shot, and I asked him who shot him, and --
Q. Did he tell you, or did he make any comment?
A. He said Angel shot him, and that was all.

[Tr. 12, L. 21 - Tr. 13, L. 5] (Lydia Quick, witness)

Q. Now, Miss Quick, do you know how well Martin Taylor and Fillmore Martin knew each other?
A. No.
Q. Do you know of any reason why Fillmore Martin would want to kill Martin Taylor?
A. No, I don't know any.
Q. Do you know of any argument or dispute they had had before the -- before this occurred?
A. Not any.

[Tr. 21, L. 9 - Tr. 23, L. 13] (Donald R. Farren, Junior, witness)

Q. Would the witness state his name, please?

A. Officer Donald R. Farren, Junior.
Q. And what is your occupation, Officer Farren?
A. Patrolman, City of Petersburg.
Q. And were you so employed in that capacity on or about February the 7th of this year?
A. Yes, sir, I was.
Q. In connection with your employment did you receive a call on February the 7th to go to Webster Court Apartments?
A. Yes, sir, I did.
Q. And do you recall when you received this call?
A. It was approximately 7:20 in the morning.
Q. Seven what?
A. Seven twenty -- or in the evening, I'm sorry, not in the morning, it was in the evening.
Q. Seven twenty in the evening?
A. Yes, sir.
Q. Do you know when you arrived at the scene?
A. I have it in my records -- no, sir, I don't -- I don't recall, I -- if I can go back out there I can get the information, it's on my police report.
THE COURT: I don't think that's important, Mr. Dance, go ahead.
Q. When you arrived what did you find, Officer Farren?
A. Well, I found the deceased, Mr. Taylor, was lying on the ground on -- on his left side with his head partially under a brown vehicle and his feet right at the base of a blue Volkswagen, there were dishes and other types of kitchen equipment, I guess you would say, strung about the area. I arrived approximately the same time as the emergency crew and assisted the crew in trying to find the nature of the wound, and I asked the deceased who had shot him, I was being -- wanted to find out that mainly and, of course, the crew was there to help him, so my main concern was who had shot him, and he said Angel had shot him, and I asked him again, I said, "Who shot you?" because I didn't know whether he completely understood what I had asked him, and he said, "Angel shot me, shot me for no reason, and he shot me with a shotgun," and --
Q. And then he was moved to the hospital?
A. Yes, and I asked him one more time, I said, "Angel who, what's his real name?" And he said, "I don't know." And at that time he was -- they were continuously working on him and eventually took him to the -- to the hospital, where he was treated there.

[Tr. 42, L. 5 - Tr. 22, L. 3] (Robert H. Carmichael, III, witness)

The following is a statement given by Fillmore Martin,

Junior, also known as Angel, in reference to the murder of Marty Taylor at Webster Court Apartments on February the 7th, 1976, after Fillmore Martin was fully advised of his rights and that no promises were made.

Question: Tell me what you know of the murder of Marty Taylor?

Answer: Me and my kid, were riding to Richmond that day, we went to the park and rode around and parked the car. There's a water fountain there; we went to the fountain and got some water, this is Byrd Park. When me and my kid got some water I found a sawed-off shotgun, nobody could see it so I picked up the shotgun and put it in my car and drove off, then we just rode around in Richmond and then went on Route 10 to Hopewell and then back to Petersburg.

After I came back to Petersburg I went to Willie Hall's house in Webster Court Apartments, this was about dusty -- dustky dark, I don't know the exact time, my kid was still with me. I parked in front of Willie Hall's apartment, I told Willie about finding the shotgun and asked him would he keep it until I could find somebody that wanted to buy a shotgun. Then he said, okay, so I told him that I would bring it back later.

Then me and my kid went riding until about seven p.m., or seven-thirty p.m. I dropped my kid off at 111 North Dunlop Street, then I left there and called Regina, my girlfriend, at work, at Canton's Restaurant. After I talked to her I went back in there, speaking of Webster Court Apartments, to be cool I parked on Webster Street in back of the apartments so nobody could see me with the shotgun, so then I walked through the alleyway that leads to the parking lot where Marty was shot, so I tried to hide the gun so Marty wouldn't see it, so then Marty said, "Hey, man, what's happening?" So I said, "It ain't nothing to it." So I tried to keep on walking and he wanted to give me some. . . . . which means hit hands. Then Marty saw the shotgun and said, "Whoa, man, let me see that," referring to the shotgun, so I tried to break the gun down to see if there was a slug in it or not.

Question: You didn't know if it was loaded or not before?

Answer: No, it was in the trunk all the time, the gun was sort of old and I didn't know how to break it down. The next thing I know the gun went off, Marty then said, "Ow, ow, ow, ow." I stood there for a second, then I ran and got into my car and rode around thinking, I didn't know what to do, I knew I was in trouble.

preserving it, we were required to write a term paper, or a thesis as you would call it, on a specific function in the laboratory and I chose firearms examination in the three months I -- the three months I was up there I was -- wrote it and worked in the firearms -- helped with the firearms identification, and we worked on weapons up there.

Q. Now, tell me, for my own information because I'm a novice when it comes to guns, but tell me, if a man was holding that gun would that gun have what you would call a hair trigger on it, or --

A. No, sir, it did not.

Q. Now, tell me this, if a man had this gun and wanted to break it down as it would be referred to in previous -- in the previous statement that's been entered here, how would he break it down and how -- what would be necessary for this gun to be discharged during a breaking down operation?

THE COURT: I would agree as to the total question as posed, I would think he would be permitted to demonstrate to the Jury how the gun is broken down.

Q. All right, would you demonstrate to the Jury just how you would break down a gun of this nature?

A. Assume that the gun was closed like that when the -- when the weapon was being handled, press -- breaking down just move this thumb lever right here, which would drop the barrel down. Okay, this is a single action shotgun; in order for it to be fired the hammer has to be cocked and the trigger has to be pulled in order for it to go off. If the hammer was cocked, in -- in breaking the thumb brace to open the shotgun, the shotgun won't necessarily discharge, but some -- it will -- it will open with the -- with it cocked -- like that, and that -- and it won't necessarily go off, but you can always say there is a possibility a weapon might go off but in test firing it, you know, according to the lab examination and also my looking at it, I couldn't get it to go off at all from the cocked position, from breaking it open, and it -- it had quite a bit of trigger pull on it, in other words, you couldn't accidentally just squeeze it off, it takes -- takes a little bit of power behind the trigger -- on your finger to pull the trigger.

Q. Tell me, Detective Eilert, what color would you say -- describe that gun to be?

A. All right, sir, what color it is?

Q. Uh huh?

A. It's black in color, it's painted with an enamel paint and the length of this barrel was longer than it is now, you can see from the barrel, the front of the barrel, that it had been roughly cut off with a item such as a hacksaw or something like that, it didn't appear to be smoothed down, say like a emery cloth or something like that.

filed in the case and designated as Instruction A dealing with accidental killing on the grounds that the instruction tendered to the Court was proper with regard to a statement of accidental killing and that the evidence supported an instruction of an accidental killing.