JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 41/85

BEFORE: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.

SOLOMON BECKFORD v. REGINA

Frank Phipps, Q.C., and D. Chuck for appellant

M. Dukharan for Crown

July 24 & October 10, 1985

CAREY, J.A.:

Solomon Beckford, a police constable attached to the C.I.B. section of the Mandeville Police Station in the parish of Manchester, was convicted in the Manchester Circuit Court on 28th March last before Wolfe, J., and a jury and sentenced to death for the fatal shooting of one Chester Barnes, in March 1983. He now applies to this Court for leave to appeal against this conviction.

We propose to treat his application for leave to appeal as the appeal itself, as the grounds of appeal filed, raise in the main, issues of law. We must, however, give the facts in a little detail as the omnibus ground, viz., that the verdict was unreasonable and cannot be supported having regard to the evidence, was also advanced

before us.

The facts are as follows:

Just about mid-day on Tuesday, 8th March, 1983, a number of policemen, including the appellant, were despatched to a district called Greenvale Park, Manchester, to investigate a report that one Chester Barnes (the slain man) had arrived in the district armed with a gun and was terrorising his sister, Heather Barnes. She was one of the principal witnesses for the Crown although not actually on the scene at the time he was shot. She herself denied making any calls summoning the police. In her evidence, she said that after the arrival of the police, she spoke with the appellant whom she knew before, but his reaction was threatening; "Move before I shoot you": he was armed with a shot-gun and he it was who pointed out her brother whom she saw running off after a shot was fired by the appellant. Her brother had no weapon. In his bid to escape, he hurdled a wall and was hotly pursued by some of the police party. While she was making her way around the wall, she heard several gun shots. At that time pursuers and pursued were out of her sight. When finally she got into the premises whither her brother had fled, she saw him lying under a tree with bullet wounds to his head, chest and neck; he was dead. The police in their search of his person, removed a bill-fold, a rag and a receipt from his pocket. They also searched the bush in the area around him. The witness who testified as to the actual shooting of Chester Barnes was Everton Peart. He confirmed that when Barnes jumped the wall, he was unarmed. Peart said two policemen also scaled the wall, one armed with a long gun and the other had a 'short gun'. Peart identified the appellant as the

police officer with 'the long gun' and another police officer, Reckord, as being in possession of the 'short gun'. Peart said that Barnes made for a common and hid by a pig sty. While there, Barnes had his hands in the air; his hands were empty. Barnes said - "Do officer, don't shoot me because me a cook". According to Peart, Reckord fired first at Barnes and then the appellant discharged his weapon. Barnes appeared to struggle. The appellant went up over Barnes and fired again into his belly.

Another witness Victor Ricketts who was in the company of Everton Peart, gave evidence for the Crown but he was treated as hostile and the learned trial judge directed the jury not to take any account of his evidence in arriving at their verdict. As this direction was made the basis of one of the grounds of appeal, we will at a later stage rehearse his evidence when we come to deal with that ground.

This brings us to the medical evidence. The significant injuries were as follows:

> 1. A firearm entry wound to the mid-frontal region of the head, slightly to the right and 1½" above the bridge of the nose. The wound was circular and ½" in diameter. There were no signs of burning, blackening or tatooing in the skin surrounding the site of the wound. Dissection showed that the bullet passed through the frontal bone, the base of the skull lower surface of the brain, the occipital bone on the left side and lodged in the scalp over the left side of the head in the back of the neck.
>
> 2. Shot gun entry wounds involving the front of the left shoulder, left side of chest close to the collar bone and lower third of the neck. The skin surrounding the entry wounds showed no signs that the weapon was fired within 18 inches of the site of the injury. The pellets entered the muscle of the chest and neck, the breast-bone, the wind-pipe and the lungs, some eleven pellets were recovered from the body.

3. Shot-gun entry wounds to the inner side of the left forearm at its middle. The pellets entered through the muscles and made their exit on the front side of the forearm at the same level. The doctor thought that this injury was inflicted while the arm was held away from the body.

Death was due to shock and haemorrhage as a result of shot-gun and rifle weapon injuries to the neck, chest and head.

There was evidence that the appellant had been issued a shot-gun and nine (9) rounds of cartridges on that day. He returned seven (7) rounds to one of the sub-officers at the Mandeville Police Station after the incident.

The appellant made a statement from the dock, the gist of which was, that he and other men from Mandeville Police Station were ordered to a house in Greenvale Park where, he was told, a gunman was menacing the occupant. He was informed, he said, that Heather Barnes had reported that her brother Chester Barnes who had arrived from Kingston that morning armed with a firearm, was terrorising her. He said further that the Deputy Superintendent who had despatched them, cautioned that Barnes was a dangerous gunman. On arrival at the house, they took up positions as instructed. The appellant said he saw a man run from the back door with an object which appeared to be a firearm. This man first hid behind a wall and took aim as if to fire. The appellant fired in his direction, whereupon the man ran off, jumped a wall and went into a common where the appellant lost sight of him. The police party went in the direction the man had taken. He heard gunshots and as he neared the location from which the shots were being fired, he saw the same man firing at the police. He returned the fire as did other police officers. The man ran off and was pursued. He continued by saying:

> "We went in trace of him and still hear shots coming from a tree root in the common. Other policemen went in that direction, and I saw when Constable Reckord discharged three rounds at the man that morning, and he fell. We were looking around for the gun that we saw the man with in the bushes - searching and looking for the gun but we didn't find it. I went and searched the man and took from his pockets a kerchief and two live rounds of .38 cartridges was wrapped into a kerchief".

Finally the appellant said that later that day when other policemen and himself returned to the scene, they were informed that relatives of the slain man recovered the gun but had thrown it away.

On the Crown's case, this amounted to a callous killing, an execution of Barnes by the appellant and another police officer, for the slain man had his hands raised in surrender but was nevertheless cut down. On the defence side, this was a plain case of self defence. Policemen who were instructed to investigate a report of a dangerous gunman in their neighbourhood allegedly commiting a breach of the Peace, were fired upon and had returned the fire resulting in his death.

A ground of appeal which may be dealt with shortly, challenged the learned trial judge's directions to the jury with respect to self defence. Mr. Phipps submitted that the learned trial judge's direction that -

> "A man who is attacked in circumstances where he reasonably believes his life to be in danger or that is in danger of serious bodily injury may use such force as on reasonable grounds he thinks necessary in order to resist the attack and if in using such force he kills his assailant he is not guilty of any crime even if the killing is intentional".

was wrong in law as being against the weight of current authorities in the United Kingdom. The test suggested in

the extract was the reasonable man's assessment of circumstances that would make defensive action necessary. He submitted that the true principle of law is that the test is the appellant's assessment of all the circumstances and the question of what is reasonable is merely to be used in determining whether the appellant's assertion as to the belief he holds is honest or not.

We accept that there appears to be two schools - the "reasonable belief" on the one hand and the "honest belief" on the other. Be that as it may, in our judgment this point is concluded by a recent decision of this Court R. v. Arthur Barrett (unreported) SCCA 133/84 delivered on 31st May, 1985, in which the same point was canvassed by the same counsel. We can see no warrant whatever to depart from that decision or to amplify or alter the reasons on which it is based. We are content to say that the directions of the learned trial judge on this aspect of the case are in keeping with the law as we conceive it to be in this jurisdiction. This ground of appeal therefore fails.

It was also argued that the learned trial judge failed to direct the jury adequately, or at all, on the issue of common design. The essential fault identified in those directions which the trial judge gave on this aspect of the case, lay in a failure to indicate the significance of a lawful common purpose as distinct from a common unlawful purpose. When the appellant lawfully exercised his duty as a policeman in the company of other policemen who were lawfully in possession of firearms, a fatal injury inflicted by other policemen in these circumstances, would not necessarily embrace the appellant in criminal responsibility, that is to say, a common design to kill. The

factual basis for this attack is derived, it was suggested, from the medical and ballistic evidence which showed that the fatal bullet was fired not by the appellant, but by another police officer who died subsequent to these events, and could not therefore be charged.

We think a useful point to begin is with the actual directions of the learned trial judge. These appear at pages 182-183 and we quote:

> "Now then, you will recall Mr. Chuck in his address dealt with the question of whether or not the lead pellets had anything to do with the death of the deceased man. Now, let me tell you this as a matter of law, that where persons are pursuing a common purpose and that purpose involves the use of violence and death results from the use of violence, then such persons as are actively pursuing that active purpose and using violence are equally liable for whatever result that may flow".

We indicated at an early stage of this judgment that on the prosecution case, the facts were plain that this was a virtual execution of Barnes by the two police officers who shot him. There was, so the prosecution alleged, no warrant for the resort to extreme violence; the policemen could not conceive that their duty in apprehending an unarmed man, was to shoot him. These singularly uncomplicated facts in our opinion, did not call for any academic excursus with respect to common lawful purpose vis-a-vis common unlawful purpose because on the Crown's case both the appellant and the other police officer fired at a man whom they could see, was not only unarmed, but not offering the slightest resistance. On the defence case, the appellant had acted in self defence. In those circumstances, it cannot matter in point of law which of the two police officers fired the fatal shot. See Mohan v. R. [1966] 11 W.I.R. 29.

Where the evidence of common design or general enterprise was equivocal, in the sense that one of the parties may have been mistaken as to his duties in the factual situation with which he was presented then, we agree entirely that a careful direction as to an original common lawful purpose and a supervening unlawful common purpose, would be called for. Such a situation arose in R. v. Porter & Williams [1965] 9 W.L.R. 1. In that case, both appellants were members of the constabulary. While on patrol duty, they accosted a man whom they alleged was riding his bicycle without a light. The prosecution case was that Porter shot the cyclist twice while Williams' role was to block his path to prevent his escape. In the course of that endeavour he used his baton to inflict injuries on the slain man's head. Death was caused from haemorrhage into the chest from one of the bullet wounds and from head injuries which the deceased also sustained. Three of the grounds of appeal put forward, are set out hereunder and they are, of course, consistent with the arguments put forward by this appellant:

> "(a) That the learned trial judge made no sufficient distinction between an ab initio lawful purpose contemplated by the defendant and an ab initio unlawful purpose.
>
> (b) that there was no direction as to what view the jury should take of Williams' responsibility if there was an initial lawful purpose which escalated into illegality by reason of Porter's actions alone.
>
> (c) that there was no direction that if,as regards Williams, he commenced what he did with an ab initio lawful purpose, then overt evidence of a change to an unlawful purpose on his part would be required before such unlawful purpose could be found".

These grounds were succintly stated by this Court at page 13; thus:

> "We understood from the argument that the gravamen of the complaint was that the learned judge dealt inadequately in his summing-up with the legal situation which would arise with reference to Williams if the jury accepted that the applicants initially assaulted the deceased in circumstances which they bona fide believed entitled them to arrest him in the lawful execution of their duty and Porter in the course of his assault shot and killed the deceased".

Their Lordships held that:

> "It would be a question for the jury whether although Williams' acts in fact facilitated Porter, they were done by him with the intention of aiding and abetting Porter in the performance of his illegal acts or merely with the intention of performing what he conceived to be his own lawful duty to apprehend the deceased. If the jury took the latter view then Williams, even though he may have been mistaken in believing the deceased to be a thief, would be entitled to be acquitted. With respect to this situation, the trial judge had left the following question to the jury: 'Was the evidence of the general enterprise and common design equivocal in the sense that it was as consistent with the performance of Williams' duty as a district constable as with his being involved in a concerted plan with Porter? If yes, acquit'. This question may be wide enough to comprise the situation but was quite inadequate to bring to the jury's mind the matters, and especially the importance of Williams' intention at the critical period when Porter was shooting, which they ought to consider". (see headnote)

The facts in the present appeal, as we have had occasion to remark, were stark and altogether distinguishable from R. v. Porter & Williams. The directions of the learned trial judge we conclude, were correct, commendably clear and succinctly stated; they called for no elaboration. Any addition on his part would serve only to confuse and deflect the jury's attention from the principle of law which they were called upon to apply to the facts before

them. The appellant, on the Crown's evidence had done a physical act which was an essential ingredient of the offence charged. The appellant had inflicted injuries upon the slain man, which had contributed to his death. It follows from what we have said, that this ground of appeal must also fail.

The last of the grounds of appeal argued by Mr. Phipps on behalf of the appellant was stated in the following way:

> "4. (a) The learned trial judge misdirected the jury by telling them that the evidence of the witness, Victor Ricketts was of such that they would have to treat him '... as if he never came ... to testify', and further that Ricketts '... cannot assist (the jury) in arriving at (their) verdict".
>
> "4. (b) The learned trial judge failed to fully direct the jury of the possible legal effects of the testimony of the witness, Victor Ricketts.
>
> It is submitted that the jury should have been told that if they accepted the explanation given by Ricketts for the difference between his evidence at trial and the evidence at the preliminary enquiry, then his evidence at the trial supported the defence. It is only if they did not accept his explanation for the difference between the testimony at the trial and the testimony at the preliminary enquiry that they would be entitled to reject his evidence at trial in its entirety, despite the fact that in neither event could the crown rely on Ricketts as a witness in support of their case. (Pages 167 to 168) Vide - R. v. Headlam 13 J.L.R. p. 113".

It is necessary in order to appreciate this ground to rehearse the relevant evidence of the witness Ricketts. Before doing so, however, we would observe that the learned trial judge had acceded to an application by the learned counsel for the Crown to treat the witness as hostile.

The witness testified that, at the time the police arrived, he was working on a truck with Everton Peart. He observed four police officers none of whom he had known before. Chester Barnes ran off after the police came to the premises. He did not know Barnes before either. Barnes ran into a common where he was shot by Constable Reckord who went up to him and shot him again. He was asked if he saw Reckord in Court and replied that since the incident he had not seen that officer again. It was at this stage that the application was made to treat him as hostile and this was granted. Various excerpts from his deposition were put to him to demonstrate that he had made statements inconsistent with his story at trial before the jury. We give a few examples:

> "Q. Did you tell the Resident Magistrate...?
>
> HIS LORDSHIP: One moment, before you say that, when you told the Resident Magistrate that the accused say, 'see the boy there', who you call the accused?
>
> WITNESS: The Policeman.
>
> HIS LORDSHIP: Which policeman you were talking about at the time? Or - all right, let me tell you this way. Who was the accused man at the preliminary enquiry?
>
> WITNESS: I don't understand you.
>
> HIS LORDSHIP: You say the accused was the policeman?
>
> WITNESS: Yes.
>
> HIS LORDSHIP: All right. So at the Resident Magistrate's court when the R.M. was taking this evidence from you, who was the accused man in the court?
>
> WITNESS: You mean the man that they accused?

"HIS LORDSHIP: Yes, of doing the shooting. Who was the man who was the accused at the court?

WITNESS: Mr. Beckford.

HIS LORDSHIP: Mr. Beckford. Which Mr. Beckford?

WITNESS: See him there. (points)".

Then again -

"Q. And did you say, 'Beckford pointed the gun at Chester and I heard one shot coming from the direction of Mr. Beckford's gun'?

A. No, sir.

Q. Mmm?

A. No, sir.

Q. Just show him again for me please. You have seen that?

A. Yes, sir.

Q. What are you saying now? You tell me a while ago that you didn't say that.

A. Yes, sir.

Q. Now, having seen that - pass it Mr. Registrar - what are you saying about it? You see your signature?

A. Yes, sir.

HIS LORDSHIP: You said it or you didn't say it?

WITNESS: I said it".

He was asked to give an explanation for the discrepancies in his evidence before the Resident Magistrate at the preliminary enquiry and at trial. From page 51 we take the following extract:

"Q. Why you come here today to tell us something different?

A. Well, I mean, through this happen so long I couldn't have everything".

He proferred another explanation at page 53:

> "Q. Well, you - why you never tell the court that down at Mandeville? How you just remember two years after - now?
>
> A. You see, is through you start remind me now".

He admitted telling lies to the Resident Magistrate. At page 53 he made the responses set out below to the questions put to him as follows:

> "HIS LORDSHIP: So when you told the Magistrate at Mandeville that is Mr. Beckford who fired that is a lie, then?
>
> WITNESS. It's not Mr. Beckford, is Mr. Reckord.
>
> HIS LORDSHIP: So you tell a lie on Mr. Beckford at Mandeville, is that so? Yes or no?
>
> WITNESS Yes, sir".

In dealing with this witness, the learned trial judge at pages 167-168, had this to say:

> "HIS LORDSHIP:
>
> Then came Mr. Victor Ricketts. Well, Mr. Ricketts says he is a mechanic, resides at Cedar Ground, Manchester, at Mr. Linton's house. At about mid-day on the 8th March he was there with one Everton and then he saw some policemen, and remembered what transpired with Mr. Ricketts.
>
> Mr. Ricketts testified before you that he did not see the accused man and that it was one Mr. Reckord who fired all the shots that day. Then the Crown applied to me to treat him as a hostile witness and in the exercise of a discretion which is vested in me I allowed the application. It transpired that Mr. Ricketts had gone before the Resident Magistrate in the Preliminary Enquiry and testified that this man, Beckford was the man who was there and fired shots, and it was put to him, 'When you told the Preliminary Enquiry that it was Mr. Beckford who was firing the shots, you lied on Mr. Beckford'? and he said 'Yes'. So there you have a witness called by the Prosecution, the Preliminary Enquiry implicated this man

> "and when he comes before you now he implicates another man and he offers some explanation that it is because Mr. Pantry was reminding him of the case that he remembers the whole thing. When a witness is called by a party and that party treats him as being hostile then the effect of that - because one of the rules of Law is that you are not allowed to impeach the testimony of a witness that you call. But when the Prosecution is allowed to impeach it the effect of that is that his evidence is negligible, of no worth. The fact that he admitted that he said certain things at the Preliminary Enquiry which implicated Beckford, you cannot rely on it to come to a verdict, I want you to understand that. The fact that he admitted that at the Preliminary Enquiry, he told the Court that it was Mr. Beckford who was firing shots, you cannot rely on that to assist you in arriving at your verdict, you must treat it as if it was never said. But the circumstances of Mr. Ricketts, you will have to treat him as if he never came here to testify before you and as being totally unreliable, not a person worthy of belief, that is how you have to treat him, very well. So then, I might say briefly, Mr. Ricketts cannot assist you in arriving at your verdict, totally worthless, totally unreliable".

The gravamen of Ground 4(a) was that the learned trial judge had effectively withdrawn the question of credit of the witness from the jury, and that nothing in sections 15 and 16 of the Evidence Act which deal with impeaching credit of a witness by previous inconsistent statement, permits a trial judge to do so. It was said that on the basis of R. v. Headlam [1975] 13 J.L.R. 113, the evidence should nonetheless be left to the jury especially where it supports the defence, and that what had been done amounted to a misdirection which deprived the appellant of a real chance of acquittal because the evidence of this witness in some measure supported the defence.

We think that the precise question which calls for determination is this - Can a trial judge in a criminal case ever withdraw the issue of the credit of a witness

from the jury's consideration, more particularly when that witness is deemed hostile? Is it a misdirection for a trial judge to tell a jury that the evidence of a witness treated as hostile, is of no worth?

The authority to treat a witness as hostile is to be found in section 15 of the Evidence Act, which provides as follows:

> "15. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the Judge, prove adverse, contradict him by other evidence, or by leave of the Judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement".

These words are the ipsissima verba of section 3 of the Criminal Procedure Act 1865 of the United Kingdom. When a witness has been treated as hostile under the section, it allows in evidence the previous inconsistent statement made by the witness. The learned treatises do not reveal a deal of authority with regard to the effect of the evidence of a hostile witness. What is clear, however, is that previous statements inconsistent with those made at trial, do not constitute evidence on which the jury may act. In R. v. Golder, R. v. Jones, R. v. Porritt [1960] 3 All E.R. 457, Lord Parker, C.J., who delivered the judgment of the Court of Criminal Appeal in England, said this at page 459:

> "In the judgment of this court, when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial

> "should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence on which they can act".

The importance of this case is that it demonstrates that the previous evidence is not to be regarded as material on which the jury can rely, and the jury should be so directed. There can be little doubt that the purpose of putting previous statements to an adverse witness, or indeed any witness, is to destroy his credit and render the worth of his evidence of the order of zero. But the question is whether there is an obligation on the part of the trial judge to direct the jury that such evidence is unreliable. This question was considered by the High Court of Australia in Driscoll v. The Queen 51 A.L.J.R. 731. There, as in the present case, a witness was adjudged to be an adverse witness by the trial judge and at trial the summing-up contained no directions that the jury should regard the evidence of the witness as unreliable. Barwick, C.J., had this to say on the point at page 734:

> "The applicant submitted that the learned trial judge's summing-up was inadequate because his Honour did not expressly inform the jury that they should regard the evidence of Mrs. Dauroff as unreliable. In my opinion, there is no principle of law or of practice which require the trial judge to do so. The remarks of the Court of Criminal Appeal in R. v. Golder, Jones and Porritt [1960], 45 Cr. App. R. 5, at p. 11, are not merely obiter but, in my opinion, unwarranted in law where they say that a jury must be told that a person who is shown to have made a prior unsworn inconsistent statement should be regarded by them as unreliable in relation to the sworn evidence which has been given. I agree in this respect with what my brother Gibbs has written".

The rationalisation of Gibbs, J., is, we think with respect, cogent. He dealt with the matter thus, at page 740:

> "The next ground taken on behalf of the applicant is that the learned trial judge failed to give a proper direction to the jury in respect of the evidence of two witnesses each of whom was declared by the judge to be adverse and was cross-examined as to a statement previously made and inconsistent with the testimony given by the witness in the witness box. Counsel for the applicant addressed argument to us only in relation to the evidence of one of those witnesses, Mrs. Dauroff. Her evidence showed that she had made a statement to the police in the course of which she had said that on the day of Maloney's murder the applicant had said to her (amongst other things), 'You would be too stupid to know about Jake' (Maloney). 'Don't you know he could have killed your sister and the children when the bomb was put in my car'? In her evidence she denied that she had made that statement to the police and did not admit that the applicant had made those remarks to her: There were some other inconsistencies between her evidence and the statement which she had made to the police.
>
> The learned trial judge in the course of his summing up told the jury that they could act only on evidence given in court, and that a previous inconsistent statement was not evidence in the trial, but could only be used to weaken the effect of the evidence given by the witness in court. He did not however tell them that they should regard the evidence of Mrs. Dauroff as unreliable. Counsel for the applicant, in submitting that there was a misdirection, relied on the judgment of the Court of Criminal Appeal in Reg. v. Golder, Jones and Porritt [1960], 45 Cr. App. R. 5, at p. 11 .....".

The learned judge then cited the passage which we have quoted earlier in this judgment and continued:

> "In that passage the Court of Criminal Appeal was dealing succinctly with the proper direction to be given in relation to the two different questions that arise when a witness is shown to have made a previous statement inconsistent with the evidence given by that witness at the

trial. The first is as to the use to which the statement previously made out of court may be put, and the second is as to the effect of the previous statement on the value of the testimony given by the witness in court. As to the first of these questions it is clearly settled that the previous statement is admitted merely on the issue of credibility, and is not evidence of the truth of the matters stated in it: Taylor v. The King (1918), 25 C.L.R. 573; Deacon v. The King, [1947] 3 D.L.R. 772; and Reg. v. Pearson, [1964] Qd. R. 471. Since the jury, if uninstructed, are not likely to be aware of the limited use to which the previous statement may be put, it is essential that this should be made clear to them by the trial judge. As to the second question, the whole purpose of contradicting the witness by proof of the inconsistent statement is to show that the witness is unreliable. In some cases the circumstances might be such that it would be highly desirable, if not necessary, for the judge to warn the jury against accepting the evidence of the witness. From the point of view of the accused this warning would be particularly necessary when the testimony of the witness was more damaging to the accused than the previous statement. In some cases the unreliability of the witness might be so obvious as to make a warning on the subject almost superfluous. It is possible to conceive other cases in which the evidence given by a witness might be regarded as reliable notwithstanding that he had made an earlier statement inconsistent with his testimony. For these reasons I cannot accept that it is always necessary or even appropriate to direct a jury that the evidence of a witness who has made a previous inconsistent statement should be treated as unreliable. The statement to that effect in Reg. v. Golder, Jones and Porritt was obiter, because in that case the trial judge had in fact warned the jury that the evidence was unreliable and the Court of Criminal Appeal was concerned only with the judge's failure to direct the jury that they could not act on the unsworn statement. Although what was said in Reg. v. Golder, Jones and Porritt has since been cited with approval (see Reg. v. Oliva, [1965] 1 W.L.R. 1028, at pp. 1036-1037), it cannot be accepted that in cases where a witness has made a previous inconsistent statement there is an inflexible rule of law or practice that the jury should be directed that the evidence should be regarded as unreliable. I agree with the observations made on this point by Stanley J. and Lucas A.J. in Reg. v. Jackson, [1964] Qd. R. 26,

> "at pp. 29, 40. A similar view has been expressed in Canada: Deacon v. The King, at p. 776".

We think that this case makes it abundantly clear that the circumstances in which a witness gives inconsistent statements, vary considerably and consequently the directions required will vary from a careful caution to disregard the evidence to the complete absence of any direction or to a direction that the weight of the evidence is a matter for the jury or tribunal of fact in the event that the explanations given by the witness for the inconsistency is accepted.

In Deacon v. The King [1947] 3 D.L.R. 772, Kerwin J., in the Supreme Court of Canada is reported thus, at page 776:

> "It was argued that on the authority of R. v. Harris [1927], 20 Cr. App. R. 144, and R. v. Atkinson [1934], 24 Cr. App. R. 123, the jury should have been warned that the evidence of Berard was of no value. In the Atkinson case a witness was stated by the Lord Chief Justice, at p. 125, to be not only an accomplice in connection with charges against the accused of perjury and subordination of perjury but also herself a perjurer. That precise point does not arise here because there is nothing in the evidence given by Berard at the preliminary inquiry as read into the record of the trial to show that she was a self-confessed perjurer. So far as her testimony at the trial was shown to be contradictory to the written statement in ex. 14, certain expressions in the Harris case, 20 Cr. App. R. 144, do afford a basis for the argument of counsel for the present appellant. While it must be borne in mind that the appeal in that case was dismissed the Lord Chief Justice is reported to have said at pp. 148-9: 'The learned judge directed the jury in the proper way, namely, that the effect of the previous statement, taken together with the sworn statement, was to render the girl a negligible witness, and that the jury must consider whether the case was otherwise and by others made out'. As to this, I agree with Riddell J.A. in R. v. Kadishevitz

> "61 Can. C.C. 193, [1934] O.R. 213, that that cannot be taken to correctly set forth the law. That is not to say that there may not be cases where it is advisable for a trial Judge to point out a weakness in the Crown's case, particularly if it arises from the bad record of the principal Crown witness. It was so put and not as a principle of law by Chief Justice Robertson, speaking for the Court of Appeal for Ontario, in R. v. Ferguson, [1945] 1 D.L.R. 767 at pp. 768-9, 83 Can. C.C. 23 at p. 25".

Again the Court took the view and held that the fact of a prior inconsistent statement by a witness does not raise any principle of law that a trial judge is obliged to direct the jury that the evidence of the witness is of no value.

In R. v. Headlam (supra) the circumstances were these: A witness for the Crown was deemed hostile and cross-examination of his previous testimony and a statement given to the police, was allowed. The learned trial judge recount the witness' evidence at the trial and explained that it was evidence on which they could act and that what was contained in the deposition and statement could be used only to determine whether his evidence at the trial was worthy of credit or not. It was argued inter alia that the learned trial judge had not, however, told the jury that if they found the explanation given by the witness for his contradictory accounts to be reasonable and were prepared to act on his testimony at the trial, that testimony went to support the appellant's defence which was alibi. The Court contented itself by saying that it agreed that the trial judge should have emphasized this aspect of the matter. This case was not concerned with the existence of any rule regarding directions to be given where a witness has been deemed hostile and no cases whatever were cited in argument. We are quite unable to accept that it laid down any rule which required that there was an obligation on a trial judge

to give directions, that where a witness was deemed hostile, they could act on his evidence if they accepted the explanation offered for the inconsistency and the evidence supported the defence.

Finally, we would refer to R. v. Harris 20 Cr. App. R. 144. There the main witness for the prosecution was allowed to be treated as hostile. The trial judge directed the jury that the previous statements by the witness was not evidence against the prisoner but evidence to show that her sworn evidence to the contrary was not conclusive, and that the jury must be satisfied by evidence other than (hers) that the accused was guilty.

Hewart L.C.J., at pages 148-9 spoke in these terms:

> "But when one looks at the phrases referred to, and all of them, and the summing-up as a whole, it is apparent that the learned judge directed the jury in the proper way, namely, that the effect of the previous statement, taken together with the sworn statement, was to render the girl a negligible witness, and that the jury must consider whether the case was otherwise and by others made out. In those circumstances it appears to us that here was no misdirection and, on the contrary, the jury being rightly directed, convicted the appellant upon evidence which justified them in so doing".

The headnotes states perhaps in authoritative terms at page 144, that:

> "If a witness is proved to have made a statement, though unsworn, in distinct conflict with his evidence on oath, the proper direction to the jury is that his testimony is negligible and that their verdict should be found on the rest of the evidence".

But the decision itself, in our view, does not appear to lay down any rule requiring a trial judge, as a matter of law, to direct a jury as is suggested in R. v. Golder; R. v. Jones; R. v. Porritt (supra). Lord Chief Justice Hewart approved the directions given by the trial judge in Harris (supra), but beyond that, he did not venture.

We take the view then that there is no rule of law that where a witness is shown to have made previous statements inconsistent with the statement made by that witness at the trial, the jury should be directed that the evidence given at the trial should be regarded as unreliable. It cannot however be too often stressed that a witness' credit is entirely a matter for the jury and not the judge. Each case will depend on its own circumstances. The explanation given by the witness for the previous statements might be acceptable to the jury. But there may be other cases where no explanation is given or the explanation preferred, is so tenuous that no reasonable person could accept it, then a trial judge would be acting consistent with his responsibility to ensure a fair trial, to direct the jury that the effect of the witness' evidence is negligible. In arriving at this conclusion, we prefer the approach of the of the Australian High Court as expressed by Gibbs J., in Driscoll v. R. and Kerwin J., in Deacon v. The King (supra) to that of Parker L.C.J., in R. v. Golder. We note that in R. v. Pestano [1981] Crim. L.R. 397 the Court of Appeal in England favour this approach as well. The laconic report of this case shows that where the circumstances under review exist , the evidence was for the jury to consider subject to a proper warning from the judge as to the weight, if any, which could be attached to it. That decision hardly supports the dictum of Parker C.J., in any way.

In the present case, the learned trial judge did not leave the effect of Ricketts' evidence for the consideration of the jury; he told them it was worthless, and they could not use such evidence to convict the appellant. The explanations offered by the witness appear to us altogether

tenuous. The effect of the witness' evidence was nil. In those circumstances, we entirely agree with the exercise of the learned trial judge's discretion in directing the jury as he did. We certainly can detect no prejudice to the appellant. The directions do not in our judgment amount to a misdirection.

It is right to point out that we cannot agree that the witness' evidence supported the defence. The defence, as we previously intimated, was self defence and nothing said by the witness could be regarded as remotely confirmatory of that defence. We suspect that we were being invited to view the effect of this evidence from a negative stand-point, that is to say, in the sense that it weakened the Crown's case.

It was also argued that the verdict was unreasonable and could not be supported having regard to the evidence in that the Crown's case depended entirely on the evidence of Everton Peart, which contained inexplicable discrepancies, the most glaring being his statement that the appellant had gone up to the deceased and shot him in the belly. This differed from the medical evidence which showed no injury in this area of the body. It was also said that he differed from other Crown witnesses as to the times when shots were fired.

We note that the learned trial judge pointed out these discrepancies to the jury and directed them correctly and adequately as to their treatment of the matters so identified. None of those discrepancies, in our view, are of such significance as to touch the real issues before the jury. There were two distinct stories; on the one hand, the prosecution case of the deliberate and unjustified

shooting of an unarmed man in an attitude of surrender and on the other, a killing justified on the basis of self-defence. The jury could not have failed to grasp the significance of the evidence that no gun was recovered by the police themselves, for the appellant stated that the slain man had been firing at them. On the basis of that statement and the medical evidence of the injury to the head, and the opinion that death would be almost instantaneous, the police party was bound to have recovered the firearm which, it was alleged, the slain man was using to fire at them. That failure to recover the firearm could lead the jury to determine that the appellant's story had no weight. There was evidence to support the verdict and we are quite unable to see any reason to disagree with it.

For these reasons, the appeal is dismissed and the conviction is affirmed.