Privy Council Appeal No. 40 of 1990

Linton Berry *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH JUNE 1992

Present at the hearing:-

LORD KEITH OF KINKEL
LORD ROSKILL
LORD ACKNER
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY

*[Delivered by **Lord Lowry**]*

This is an appeal by special leave of Her Majesty in Council granted on 24th July 1990 from the judgment of the Court of Appeal of Jamaica given on 10th November 1989 and dismissing the appellant's appeal against his conviction on 22nd March 1988 in the Home Circuit Court, Kingston, Jamaica for the murder of Paulette Zaidie ("Paulette") on 11th January 1987.

Paulette died as a result of a head wound inflicted by a single bullet fired at point blank range (3"-5") from the appellant's Smith & Wesson .44 revolver. Her body was found in the driver's seat of her own jeep, a left-hand drive model. Another bullet fired from the same revolver had entered the outside of the driver's (that is, the left-hand) door of the jeep and passed through to the edge of the driver's seat without striking Paulette. There was no independent witness to the shooting.

The prosecution case was that the appellant had fired deliberately at Paulette. It relied both on the circumstances of the shooting and on a confession alleged to have been made by telephone by the appellant to Paulette's husband, Jimmy Zaidie ("Zaidie") immediately after the shooting, and also on threats previously made by the appellant to kill Paulette, as alleged by the prosecution and as testified to in evidence by Zaidie and by Daphne Matadial ("Matadial"), Paulette's sister.

The appellant accepted as a fact that he was holding the revolver when the fatal shot was discharged, but the case for the defence was that the revolver went off accidentally in the course of a struggle during which the appellant forcibly placed Paulette in the driver's seat. The appellant, who gave evidence at the trial, also denied that he had confessed to Zaidie and further denied that he had ever made any threats against Paulette, as alleged by Zaidie and Matadial.

Before the shooting Melrose Spence, a friend of the appellant, saw him sitting on the bonnet of his car, talking to someone in a jeep. John Johnson said in evidence that he heard two shots and saw the appellant's car reverse and then drive away from the scene "like a jet". The ballistic expert's evidence was that the appellant's gun was fitted with a hammer block safety mechanism, which was in proper working order, so that it could only be fired if the trigger was fully pressed back. The minimum pressure needed to fire the gun (cocking and firing) was $7\frac{1}{2}$lb. or (if the gun had been already manually cocked) 2lb., a heavy pressure in either case.

By the time that the appeal had reached this Board, the appellant's case had reduced itself to seven heads. In view of the conclusion which their Lordships have reached, namely, that the appellant's conviction should be quashed and that it must be for the Court of Appeal in Jamaica to say whether a new trial should be ordered, their Lordships consider that it is unnecessary, and indeed undesirable in the interests of justice, to examine the rival contentions and the facts to which they relate with the same particularity as their Lordships would have felt bound to do if their recommendation had been in favour of dismissing the appeal. Four of the appellant's submissions can be disposed of quite shortly.

As already stated, the appellant's real defence was one of accident, but that did not dispense with the need for the judge to leave the issue of provocation to the jury if there was any evidence to justify that course; and the appellant contended that the judge was wrong to have directed the jury that provocation did not arise for their consideration. Their Lordships, however, mindful that one of the recommended courses open to the Court of Appeal is to order a new trial, are of the opinion that <u>on the evidence adduced at the original trial</u> the judge was right to direct the jury as he did.

The appellant submitted, consistently with the conduct of the defence at the trial, that the trial judge ought not to have excluded his evidence, or any other admissible evidence which he could have elicited by cross-examination, tending to show that Paulette was addicted to drugs in the form of cocaine and ganja cigarettes, the appellant's object being to show that

Paulette's conduct just before the shooting rendered more credible the now irrelevant defence of provocation and the defence of accident. Their Lordships concede that the judge erroneously classed as hearsay some evidence which, though tenuous, was admissible, but they consider that the evidence of Paulette's drug addiction could not, if admitted, have affected the outcome, particularly having regard to the fact that the appellant's own evidence did not tend to show that Paulette was affected by drugs at the material time.

A third point was that Crown counsel at the trial, Mr. Pantry, improperly tried to cross-examine the appellant and also commented to the jury on the appellant's exercise of the right to silence and that the trial judge was wrong not to correct him. About ten hours after the shooting the appellant attended the local police station with his attorney. He was reminded of his right of silence by being cautioned on two occasions within a short time of his arrival and, acting on the advice of his attorney, he remained silent when he might have been expected to explain that the shooting had been due to an accident. Undoubtedly Crown counsel's comment was improper, but when summing up the trial judge said, "an accused man having been cautioned is under no obligation to say anything. The law gives him that right ... you cannot use it adversely against him". Therefore the real complaint is that the judge did not correct Crown counsel at the time. Their Lordships are satisfied with the course taken by the trial judge and are further satisfied that the adverse effect on the jury from the appellant's point of view was in the end no greater than it would have been if counsel had not made his improper observation. To find the best way in which to correct such an observation and to nullify its effect always poses a problem for the judge because, if he intervenes immediately, the effect will probably be to emphasise the obvious relevance and cogency of the comment which ought not to have been made.

Another complaint was that the trial judge failed to give the jury any warning about the evidence of Zaidie and Matadial as witnesses who may have had a purpose of their own to serve or whose evidence could be tainted by an improper motive. The appellant pointed to the close relationship of those witnesses and Paulette, the background of tension and domestic strife and the animosity of each of them towards the appellant and stressed the ease with which their evidence could have been fabricated and the absence of corroboration. While not inviting the Board to adopt in regard to Zaidie and Matadial a rule such as that which applies to accomplices, the alleged victims of sexual assaults and young children, the appellant submitted that there was an obligation (not performed in this case) to advise the jury to proceed with

caution where there was material to suggest that the evidence of the witnesses might be tainted by an improper motive.

It must have been obvious to the jury that these witnesses were in a special position, one as the husband of a woman with whom the appellant had had an intimate relationship and the other as the sister of the deceased, whom the appellant had shot, according to himself, accidentally. The judge would not have erred had he drawn attention to the circumstances (which were in fact plain for all to see), but their Lordships reject the adoption of any rule which would impose new obligations on trial judges in their approach to the consideration of witnesses' evidence and they refer to the judgment delivered by Ackner L.J. in *R. v. Beck* [1982] 1 W.L.R. 461, as well as to his speech in *Reg. v. Spencer* [1987] A.C. 128, 138-142.

In this case by far the most important ground of appeal was the contention that written statements made by Zaidie and Matadial to the police and not disclosed before or during the trial had been wrongly withheld from the appellant and his advisers. Zaidie and Matadial were the most important Crown witnesses to the facts, or alleged facts, which preceded and followed the shooting and the statements were one made by Zaidie to the police on 12th January 1987, the day after the shooting, one by Matadial on the same day and an addendum by Matadial made on 9th May 1987. Indeed, none of these statements, apart from two short but damning extracts from Zaidie's statement which the prosecution put into evidence, came to light at all (and consequently were not available to the Court of Appeal) until 20th July 1990, three days before the presentation of the petition for special leave to appeal, when they were furnished to the appellant's advisers at the insistence of Mr. Guthrie who had by then been instructed on behalf of the Crown. Counsel's action of course does not resolve the question whether some or all of these statements ought or ought not to have been disclosed earlier and it will now be convenient to state the accepted procedure with regard to statements, as described in the respondent's case, and the relevant principles as set forth in the Jamaican authorities.

When investigating offences in Jamaica the police take from potential witnesses written statements which are not, however, used for the purpose of committing accused persons for trial. The witness gives oral evidence at the preliminary inquiry in the magistrate's court which is recorded in the form of a deposition. The accused, if committed, is given copies of the depositions, but is not provided with copies of the statements taken by the police except when the Crown intends to call a witness who did not give evidence at the preliminary inquiry, in which case the Crown will serve the defence with a notice of intention and a copy of the witness's statement.

There is also a rule of practice under which Crown counsel owes a duty to inform the defence of any material discrepancy between the contents of a witness's statement and the evidence given by that witness at the trial. The duty may in addition require Crown counsel to show the statement to the defence. If any question arises as to this, the defence is entitled, and is under a duty, to invite the trial judge to exercise the discretionary power given to him by section 17 of the Evidence Act, which corresponds exactly to section 5 of the Criminal Procedure Act 1865 and reads as follows:-

> "A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him:
>
> Provided always, that it shall be competent for the Judge at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purpose of the trial as he shall think fit."

In relation to the disclosure to the defence of material in the possession of the prosecution, the key is fairness to the accused but the practice varies between different jurisdictions in the common law world. In Jamaica there are three guideline decisions of the Court of Appeal, *R. v. Purvis and Hughes* (1968) 13 W.I.R. 507, *R. v. Barrett* (1970) 12 J.L.R. 179 and *R. v. Lindel Grant and Leslie Hewitt* (1971) 12 J.L.R. 585, which confirm the practice described in the respondent's case.

In *Purvis*, which involved the identification of the driver of a car, counsel submitted that the trial judge should have granted his application to see the statement of the Crown witness who had given the police a description of the driver. That argument was rejected because there was no suggestion that there was any discrepancy or inconsistency between the evidence of the witnesses and their earlier police statements. Waddington P.(Ag.), giving the judgment of the Court of Appeal, referred to the trial judge's rulings, and to *R. v. Hall* (1958) 43 Cr.App.R. 29, *R. v. Clarke* (1930) 22 Cr.App.R. 58, and Archbold 36th Edition (1966) paragraph 1374 and continued (at page 512):-

> "It is to be noted in the instant case that no suggestion was made by defence counsel that there was any discrepancy or inconsistency between the evidences which the witnesses had given in court and the statements given to the police. If there was in fact any such material discrepancy or

> inconsistency it would have been the duty of counsel for the Crown to inform the defence of the fact, and indeed the learned trial judge expressly referred to Crown counsel's duty in this respect. Crown counsel did not make any offer of the statements and in the circumstances the learned trial judge was entitled to assume that there were no discrepancies or inconsistencies therein and to refuse to order production of the statements. We had no doubt that if there was the slightest suggestion that the statements differed materially from the evidence given by the witnesses the learned trial judge would have called for these statements and examined them himself and if necessary would have made them available to the defence. We did not think therefore that there was any merit in this ground of appeal."

In *Barrett*, where again the accused applied unsuccessfully for leave to appeal against conviction, the defence contended that the trial judge should have allowed them to see the statement of a witness who had identified the accused at an identification parade ten days after the commission of the offence, on the ground that, the witness having stated that she had given a description of the accused to the police, the defence were entitled as a matter of law to know the details of that description for the purpose of cross-examining the witness and testing her credibility. Distinguishing *Clarke* and *Hall*, Shelley J.A., delivering the judgment of the court, observed that the defence is entitled to see such a statement, not by virtue of any general rule of law, but by virtue of the prosecution's duty to inform the defence of statements in their possession made by a witness whose evidence at the trial differs substantially from what has been said in the statements. Citing with approval *Clarke*, Archbold and *Purvis*, he stated:-

> "The 'right' to see statements in the possession of the prosecution is therefore really a rule of practice described in terms of the ethics of the profession and based upon the concept of counsel for the Crown as minister of justice whose prime concern is its fair and impartial administration."

The judgment concluded:-

> "If, therefore, for any unhappy reason, counsel for the defence is unable to accept the assumption which stems from the fact that a particular statement has not been made available to him by the prosecution, it would become counsel's duty to invite the judge to exercise the discretionary power which is given to him by the proviso to s. 17 of the Evidence Law, Cap. 118 [J.], by examining the statement himself and directing that it be used in such manner as the justice of the case demands.

> In this case the judge was not so invited and counsel may not complain of failure to exercise the discretionary power in the proviso because the learned judge was entitled to rest his judgment on the assumption referred to above.
>
> The application is therefore refused."

The case of *Grant*, although it adds nothing to the established principles, is an example of inconsistent previous statements wrongly withheld by the Crown at the trial but properly, if belatedly, disclosed on appeal, so that a conviction depending on evidence of identification was quashed for want of a fair trial.

These principles are fully consistent with paragraph 1374 of Archbold 36th (1966) edition and the cases there cited and paragraph 4-179 of the 41st (1982) edition, which was written just before the publication in (1981) 74 Cr.App.R. 302 of the Attorney General's Guidelines (applicable to England and Wales) for the disclosure of unused material. Paragraph 4-278 of the 44th (1992) edition of Archbold is to the same effect, though it must be read in the light of the Guidelines, which their Lordships find it unnecessary for present purposes to consider. It is enough to say that paragraph 2 of the Guidelines contains a general requirement for the prosecution to disclose "unused material" to the defence, consisting of witness statements and documents which are not included in the committal bundle, but this requirement is qualified by a number of exceptions listed in paragraph 6. Two aspects of the common law position set out in Archbold, which are relevant to the present appeal, are illustrated by a passage in the judgment of the Court of Criminal Appeal in Northern Ireland in *R. v. Foxford* [1974] N.I. 181 at page 200:-

> "Where in the ordinary course a person gives a statement to the police and later comes to give evidence for the Crown, the defence cannot inspect in advance such statement. ... The defence can call in court for the statement but, if it does, it may make the statement evidence, possibly to the detriment of the accused. The Crown ought of course to offer the statement to the defence if the statement is materially at variance with the maker's evidence in court, but in this regard the trial judge has to rely on the Crown's discretion and propriety. In certain circumstances the trial judge might feel that the facts relating to the making of statements such as those made in this case to Mr. O'Hanlon were so unusual as to justify him in directing the prosecution to furnish them to the defence, but this must be a matter within the discretion of the trial judge."

Their Lordships were shown a judgment of the Supreme Court of Canada delivered on 7th November 1991, in an appeal entitled *R. v. Stinchcombe* from which it appears that (partly in reliance on section 7 of the Canadian Charter of Rights and Freedoms) a much wider view is taken of the prosecution's duty of disclosure of documents to the defence, namely, that, subject to certain discretions as to whether and when disclosure should be made, the Crown has a legal duty to disclose all relevant information to the defence on the basis that "the fruits of the investigation which are in its possession are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done".

In *The People of the State of New York v. Rosario* (1961) 213 NYS 2d 448 four members of the Court of Appeals of New York, adopting the view of the United States Supreme Court in *Jencks v. United States* 353 U.S. 657, ruled that the entire previous statements of prosecution witnesses ought to be shown to defence counsel after the direct examination with a view to his cross-examining those witnesses and attacking their credibility, saying that counsel were best able to decide what use could be made of the statements, whereas three members of the court took a narrower view and, following the line of authority which had hitherto prevailed in New York, held that defence counsel could examine and use only those portions of a statement which, according to the view of the trial judge, contained variances from a witness's evidence. In the event the conviction for capital murder was affirmed on the ground that (the evidence being overwhelming) there had been no miscarriage of justice, despite the majority's view that the trial judge had been in error.

Having examined the practice in different common law jurisdictions, their Lordships consider that the principles endorsed by the Jamaican Court of Appeal, particularly with regard to inconsistent previous statements, represent what will normally be an acceptable way of achieving fairness to the accused and they take the opportunity of saying that in a civilised community the most suitable ways of achieving such fairness (which should not be immutable and require to be reconsidered from time to time) are best left to, and devised by, the legislature, the executive and the judiciary which serve that community and are familiar with its problems.

Bearing in mind the reference by Shelley J.A., in *Barrett* to the concept of counsel for the Crown as "minister of justice whose prime concern is its fair and impartial administration", their Lordships, while not feeling bound to accept in relation to Jamaica the comprehensive principles, almost amounting to criminal discovery, which the appellant has attempted to rely

on, recognise that the *Purvis - Barrett* principles do not cover every situation in which fairness may demand that the prosecution make available material to the defence.

Since the defence must be given a copy of the statement of a proposed witness who has not made a deposition, it must follow that, if a Crown witness's evidence is intended to depart significantly from his deposition and to be based on his statement to the police, it is the duty of the Crown to give the defence a copy of that statement in advance of the hearing. An analogy is the need to serve a notice of intention to adduce additional evidence of a witness who has already given evidence in the committal proceedings. Furthermore, the affidavit sworn on 24th May 1990 of Mr. Richard Small, the appellant's counsel at the trial, deposes that on 29th July 1982 the Director of Public Prosecutions of Jamaica issued to all Crown counsel and clerks of the court a memorandum which stated:-

> "Where the Prosecution intends to lead evidence of verbal admissions or confessions, the Defence should always be alerted before the start of the case of such intention and the terms of the admissions/confessions so as to give the Defence an opportunity to determine whether or not to challenge the admissibility of the evidence." (emphasis supplied by deponent.)

Zaidie's evidence at the trial included the following points:

(a) That one night in June 1986 at Illusions night-club the appellant said that he was having an affair with Paulette and that, if Zaidie ever laid a hand on her, he would kill him.

(b) That later on the same night, after Zaidie had reached home, the appellant had driven there with another man and confronted him with a gun and had said that he had come to move out Paulette.

(c) That after that incident, but still in June 1986, when Zaidie was driving into a friend's house, the appellant drove up and, saying that he had heard that Zaidie had hit Paulette, again threatened to kill him if he touched her.

(d) that very late on 6th January 1987 the appellant telephoned Zaidie and said that Paulette was with him. She then arrived at Zaidie's house followed by the appellant. On entering the house, the appellant said that he was unhappy at Paulette's having married Zaidie and that he was going to obtain a copy of the marriage certificate and would shoot Paulette if she had married while she was still talking to the appellant (the date of the marriage was actually 10th December 1986).

(e) that on 9th January 1987 the appellant repeated that threat at the night-club in conversation with Zaidie and Paulette.

Zaidie's deposition referred to conversations (a) and (d) but not to any threats. Incidents (b) and (c) were not mentioned. With reference to incident (e), the deposition attributed to the appellant the statement that he would "do something drastic". The statement of 12th January 1987 was completely consistent with Zaidie's evidence on incidents (a) to (e), except that it did not mention a threat in connection with incident (d). Zaidie's statement also contained damaging but inadmissible evidence of threats allegedly uttered to Paulette and Zaidie's brother which was not adduced at the trial. Zaidie's deposition, it should be added, contained a statement that about 20th or 21st December 1986, on Zaidie's return from his honeymoon in Miami, the appellant had telephoned him and had said he was sorry for the threats he had made against the lives of Zaidie and Paulette. This call was mentioned in Zaidie's evidence but not in his statement. Apart from this last point and Zaidie's description of the words used by the appellant when he telephoned Zaidie after the shooting, the impression is created that Mr. Pantry was examining the witness out of his statement rather than his deposition. It may also be noted that there is a discrepancy between the statement and the evidence with regard to the December telephone call and incident (d) above.

Matadial referred in some detail in her evidence to five or six occasions between October 1986 and the end of the year when she had discussed with the appellant his frequent beating and threatening of Paulette. The only similar reference in her deposition is to a conversation on 9th January 1987:-

> "I told him that he is violent, has mistreated her very badly, have been trigger happy and whatever kindness he might have done for her he had cancelled by beatings and threats he had made on her life. He said, 'Daphne, even though she is married now, I am willing to forget the bad talks that were going around about him being foolish and wanting her back'."

Her evidence about being telephoned late at night on 11th January 1987 (when her husband answered and passed the receiver to her) was that the caller was female and that the call lasted three to five minutes. She then went to the scene of the shooting. In the deposition the caller was simply "a person".

In cross-examination she agreed that she gave the police a statement and, when asked how many statements she gave, replied, "I gave one statement to the investigating officer ... the day after Paulette was murdered". Crown counsel never sought by reference to

the May addendum to correct the witness or to clarify what she meant by "one statement", nor did he reveal to defence counsel the existence of the May addendum.

Matadial's statement of 12th January 1987, like her deposition, did not mention the conversations in 1986 but did refer to that of 9th January, but her account in the statement of her telephone call on 11th January was that, when her husband gave her the receiver, she recognised the voice of Linton Berry who said, "I have just shot Paulette. She is at Jacks Hill service station". There was thus a material discrepancy between the 12th January statement and the evidence at the trial, albeit in favour of the appellant, so far as the evidence given was concerned.

As already mentioned, there was another statement, the very existence of which was not disclosed by the Crown or by the witness herself. It was headed "Addendum to statement of Daphne Matadial", typed and signed "Daphne Matadial 9th(sic).5.87." and reads as follows:-

"Addendum to statement of Daphne Matadial:

I had reason to ask Berry to come and see me because of reports made by Paulette to me of his violent treatment to her.

Paulette, Berry and I sat down on at least five occasions to discuss his treatment to Paulette. To this he answered 'Daphne, I respect you very much, and I respect your husband very much, and because of this I am going to tell you the truth. I did hide in the upstairs of her apartment in a mask with a gun and (violently) terrorised her, because she doesn't want to go out with me anymore'.

I said to him 'Isn't that because you have been labelled a gangster who fights, and is a total embarrassment. She cannot speak to anyone for fear you will fight them. You have beaten her on many occasions with your gun, tore off her clothes, threatened to shoot her, kicked her down (in your anger), put your foot in her stomach, caused her bodily harm and wounded her. She is asking you to leave her, and not come back to see her'.

I further said to Berry 'You set men to watch her, you trail her and found her at Gloria Chin's house and there you threatened to kill her with your gun, but she escaped you. You have told me you had a ticket to Miami to go and shoot herself and Jimmy Zaidie but you cancelled it, although I know you did go to Miami subsequently (around Christmas time 1986) to carry out your threat'.

I often suggested to Berry to leave Paulette and find another woman whom he could get along with

and stop mistreating her. At a later date when he had further discussions with me I advised him not to harass Paulette anymore because I will be reporting it to my attorney and the police. I spoke to him like a mother but he was determined to put an end to her life, so on the 11th January 1987, when Paulette was leaving the home of her friends on the way to her own home, Berry stopped her and shot her and then placed a call to my home to inform me of the murder.

During the time preceding her death, I have had to hide Paulette at my home with my gate guarded.

Berry is a violent man who told me of his past and of his having shot and killed at least three other men. I advised Paulette to come and live with me, or with our cousin. While she was trying to do this, he went to the apartment and beat her, wounding her in the head for which she was treated at hospital."

In an affidavit sworn on 17th December 1991 "to assist the Judicial Committee of the Privy Council in relation to the conduct of the appellant's trial" Mr. Pantry stated that the addendum was in the case file which was given to him when he was assigned to prosecute. He continued:-

"I did not know, and do not know, in what circumstances this document came into existence. It is possible that it could have been left with the Registry in this office and that it reached the case file as a result, but I cannot be sure."

Their Lordships are both surprised and disappointed that, right up to the time when this appeal was heard by the Board, no information has been forthcoming to explain how the addendum came into existence and came to be typed, or whether this further statement was sought by the investigating authority or volunteered by the witness. That is a most unsatisfactory state of affairs which, in the absence of an explanation, reflects no credit on the prosecuting authority.

Mr. Pantry informed Mr. Small, for the defence, of the discrepancy between the 12th January statement and Matadial's evidence about the telephone call after the shooting, but did not consider it his duty to show him the statement. Nor, it seems, did he think it necessary to tell Mr. Small that Matadial had adhered to her statement in this respect when making her addendum in May. This was clearly important when it is recalled that Matadial, when cross-examined about the discrepancy between the January statement and her evidence, gave the explanation that the earlier version was due to a mistake by the police. Matters were not improved for the defence when the trial judge refused Mr. Small's application for the judge to look at the

January statement for himself pursuant to section 17. He gave as the ground for his refusal Matadial's acceptance that her statement to the police was incorrect, but Mr. Pantry did not oppose the application and their Lordships consider that the judge would have done better to read the statement before giving his ruling.

A comparison of the statements with the evidence of the two important witnesses reveals a small but not insignificant number of discrepancies, only one of which was disclosed by the Crown to the defence. What their Lordships find still more important in this case is that important evidence was adduced which had not been foreshadowed in the depositions. They consider that it was the Crown's clear duty to give advance warning of that evidence by furnishing the three statements to the defence. Failure to do this was in their Lordships' view a material irregularity: *Reg. v. Maguire* [1992] 2 W.L.R. 767, 782.

The respondent submitted that, even if the appellant's approach be accepted, the defence could not exclude admissible evidence, even if proper notice of it had not been given, and further argued that Zaidie's evidence (confirmed by the appellant) that an accident was not suggested in the telephone call to him was conclusive when taken with the incontrovertible circumstances of the shooting, thereby suggesting that the "irregularities" were not material in the sense that the defence could have profited if they had not occurred.

But, unless the proviso can be invoked, one must adopt the maxim that the more difficult (short of impossibility) is the defending advocate's task, the more vital it is to see that he does not labour under an unfair disadvantage. Had the statements been supplied, the defence could have planned their campaign, prepared a more effective cross-examination, been ready to object, if challenging admissibility, and been prepared to let the judge and jury see the statements if that course appeared to offer prospects of success. It could well be that Matadial was thoroughly discredited, even as the case ran, but with advance information her demolition could have been more clinically achieved, with perhaps a greater effect on the jury and with a better chance of involving Zaidie in the destruction of the Crown case on motive and malice. The joint credibility of Zaidie and Matadial was crucial and was bound to vary inversely to the credibility of the appellant. Taken at face value their evidence was a powerful counterweight to the tenuous defence of accident and the defence needed all the information it could get in order to decide how best to attack the Crown case. To take one example, the unavailability of Zaidie's statement helped to lead Mr. Small, relying on the deposition, into the trap of

suggesting that the witness had not previously alleged that the appellant had threatened the lives of Zaidie and Paulette, thereby giving the Crown the chance of introducing, as exhibits 3 and 4, deadly extracts from Zaidie's statement: *Fox v. GMC* [1960] 1 W.L.R. 1017 and *Flanagan v. Fahy* [1918] 2 I.R. 361.

It is beside the point for the respondent to argue that the material in the statements, so far from helping the defence, was damaging. According to the evidence at the trial, only Zaidie bore witness to the appellant's telephoned confession, but the defence might have promoted a viable theory of conspiracy if they had been able to show that Matadial had also testified to a confession, then resiled from it in her deposition, taken the offensive again in her addendum and finally opted for a female voice in her evidence. Of course another result of the withholding of the statements was that the trial judge and in their turn the Court of Appeal were ignorant of the contents of the statements and of the very existence of the May addendum.

The appellant then complained that the trial judge had failed to direct the jury adequately with regard to the appellant's previous good character in that he failed to point out that this is primarily relevant to the question of credibility. While the historical survey of Viscount Simon L.C. in *Stirland v. Director of Public Prosecutions* [1944] A.C. 315, 324-6 is both interesting and instructive, the modern case law all points the same way on this point: see *R. v. Bellis* [1966] 1 W.L.R. 234, *R. v. Falconer-Atlee* (1973) 58 Cr.App.R. 348, *R. v. Marr* (1989) 90 Cr.App.R. 154, *R. v. Cohen* (1990) 91 Cr.App.R. 125 and *R. v. Berrada* (Note) (1989) 91 Cr.App.R. 131. The last three cases are also authority for the proposition that it is proper, though not obligatory, for the trial judge to tell the jury that, as well as going to credibility, good character is relevant when considering whether the defendant is the kind of man who is likely to have behaved in the way that the prosecution alleged. But the primary point, one now has to accept, is credibility. The Crown admitted that the judge's direction as to the effect of good character was flawed in the manner contended for by the appellant but, adopting the view of the Court of Appeal, while admitting the error, contended that it had caused no injustice.

Their Lordships, however, did not feel able to accept this conclusion. Such case as the defence were able to make depended, like the defence in some of the cases cited above, almost entirely on the appellant's credibility if it was to have any prospect of success and therefore the misdirection was material. Had this been the only ground of complaint, their Lordships might have reached a different conclusion on the appeal.

The last ground of appeal which their Lordships have to consider comprises a group of complaints under the general heading of the trial judge's treatment of the jury. The first of four complaints was that the trial judge exerted undue pressure by sending the jury out to consider their verdict at 5.28 p.m. after they had spent the day listening to the end of the prosecuting counsel's closing address and the whole of the summing up, but their Lordships consider that this was a reasonable course to have taken. The second accusation of pressure was that the judge made clear his views concerning the appropriate verdict by his final remarks. These were reproduced in the appellant's case:-

> "The task is yours, you have to face it head-on. You cannot shrink from it. You swore, each and every one of you, to undertake this task; you must do so fearlessly and without fear or favour consider the evidence. My one wish for you is that you will be given the strength and the courage to deal with the matter in accordance with that great and solemn oath which you have taken."

According to the official transcript the judge's closing observations were as follows:-

> "You, the judges of facts, must now consider the verdict in the light of the evidence which you have heard. The task is yours, you have to face it head-on. You cannot shrink from it. You swore each and every one of you, to undertake this task, you must do so fearlessly and without fear or favour consider the evidence and let the chips lie where they fall.
>
> The only consideration in this case is the evidence. Deal with it, discuss the evidence amongst yourselves and when you have arrived at your verdict please return and let me know how you find. My one wish for you is that you will be given the strength and the courage to deal with the matter in accordance with that great and solemn oath which you have taken." (emphasis supplied.)

The main thrust of this passage, it must be said, was to instil a measure of resolve into jurors who, even if intellectually convinced, might shrink from the unwelcome duty of convicting on a capital charge, but the words emphasised above show that the judge (who had earlier adverted to the burden of proof) was also telling the jury to concentrate on the evidence. He was using the common coin of the judicial language which is frequently employed to remind the jury of their duty in a serious case and their Lordships do not consider that he overstepped the limits of his obligation to ensure a fair trial.

Thirdly, the appellant complains, the judge failed to deal with the problem which the jury indicated they had on returning to court after an hour's deliberation. Having ascertained that the problem related not to the law but to the evidence, he said:-

> "All right, well I have told you that the facts are for you; you have seen all the witnesses in the case, you have heard them and it is for you to assess their evidence and to decide which of them you believe, if any, which of them you disbelieve, if any."

The judge then gave a brief and accurate summary of the factual contest, adverted again to the burden of proof and reminded the jury that they were the sole judges of the facts. But he did not find out what was the problem which had brought the jury back into court and it is therefore impossible to tell whether anything said by the judge resolved the problem or not, because no one knows what the problem was. Their Lordships have already met this difficulty in some other recent cases. The jury has sought assistance and, once it appears that the problem is one of fact, the judge has not inquired further but has merely given general guidance, as in the present case. The jury are entitled at any stage to the judge's help on the facts as well as on the law. To withhold that assistance constitutes an irregularity which may be material depending on the circumstances, since, if the jury return a guilty verdict, one cannot tell whether some misconception or irrelevance has played a part. If the judge fears that the foreman may unwittingly say something harmful, he should obtain the query from him in writing, read it, let counsel see it and then give openly such direction as he sees fit. If he has decided not to read out the query as it was written, he must ensure that it becomes part of the record. Failure to clear up a problem which is or may be legal will usually be fatal, unless the facts admit of only one answer, because it will mean that the jury may not have understood their legal duty. The effect of failure to resolve a factual problem will vary with the circumstances, but their Lordships need not decide how in this case they would have viewed such failure, seen in isolation.

The trial judge concluded his supplementary directions with a reference to the need for the members of the jury to "give and take" in their deliberations, while still adhering scrupulously to their jurors' oaths. The appellant's fourth sub-head of complaint was that the judge did this when the jury had been deliberating for only an hour, citing *R. v. McKenna* [1960] 1 Q.B. 411, *R. v. Ashley* [1987] 1 W.L.R. 712 and *R. v. Watson* [1988] Q.B. 690.

In *R. v. Walhein* [1952] 36 Cr.App.R. 167, before the days of majority verdicts, after the jury had returned to court and one juror had said, "I cannot in my own

mind find him guilty of the charge which prosecuting counsel have not proved" the learned Commissioner at the Central Criminal Court then said:-

> "You are a body of twelve men. Each of you has taken an oath to return a true verdict according to the evidence, but, of course, you have a duty not only as individuals, but collectively. No one must be false to that oath, but in order to return a collective verdict, the verdict of you all, there must necessarily be argument, and a certain amount of give and take and adjustment of views within the scope of the oath you have taken, and it makes for great public inconvenience and expense if jurors cannot agree owing to the unwillingness of one of their number to listen to the arguments of the rest. Having said that, I can say no more. If you disagree in your verdict in relation to one or other of these men, you must say so."

The Court of Criminal Appeal, in which Lord Goddard C.J. presided, considered the direction to be perfectly satisfactory and the judgment referred specifically to the phrase underlined above, which had no echo in the directions given in the present case. Their Lordships consider that the judge's direction here was both helpful and procedurally acceptable and indeed, subject to any practice which may hold sway in a particular jurisdiction, can see absolutely no objection to incorporating similar directions in the judge's original charge to the jury.

The latest and perhaps the final pronouncement on the so-called *Walhein* direction was made by Lord Lane C.J. presiding in a court of five judges in *R. v. Watson supra*. The court disapproved of the reference to inconvenience and expense (which the judge omitted in the present case) as increasing the risk that jurors might be seduced from their duty by the attractions of finality (a result, their Lordships would observe, which will usually favour the prosecution) and further considered the direction in the context of majority verdicts. At page 700F the court gave its approval to a shortened version of the direction (which, in the court's view, could properly be given at any stage).

In their approach to the irregularities which have been discussed their Lordships gladly adopt what was said by the High Court of Australia in *Davies and Cody v. R.* (1937) 57 C.L.R. 170, 180 and cited with approval by the Jamaican Court of Appeal in *R. v. Grant and Hewitt supra*:-

> "From the beginning, that court has acted upon no narrow view of the cases covered by its duty to quash a conviction when it thinks that on any ground there was a miscarriage of justice, ... It has consistently regarded that duty as covering not only cases where there is affirmative reason to support

> that the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled. This is the basis upon which the English court has set aside convictions resting upon identification conducted in an unfair or unsatisfactory manner."

On this basis, the prima facie view is that the appellant's conviction should be quashed.

Having reached that conclusion, their Lordships considered whether the case was one in which the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act might suitably be applied to uphold the conviction. The fact that the charge is one of capital murder does not exclude that possibility: *Woolmington v. Director of Public Prosecutions* [1935] A.C. 462, 482-3 per Viscount Sankey L.C., a decision of the House of Lords which was noted in the judgment of this Board in *Anderson v. R.* [1972] A.C. 100, where both the Court of Appeal in Jamaica and the Board applied the proviso in a capital murder case (see also *The People v. Rosario supra*, in which the proviso was applied). But, as stated in *Anderson*, "in cases of murder great care must be taken to see that there has been no miscarriage of justice" and the test, a strict one, has been described in *Woolmington* as whether "if the jury had been properly directed they would inevitably have come to the same conclusion" and in *Stirland v. Director of Public Prosecutions* [1944] A.C. 315 as involving "a situation where a reasonable jury, after being properly directed, would on the evidence properly admissible without doubt convict". The case against the appellant was indeed a strong one and for that reason their Lordships would not be prepared simply to recommend that an acquittal be ordered, but they do not feel able to say that the jury would inevitably have convicted, if the defence had been furnished in advance with the three statements in question and if the jury had received the accepted direction on evidence as to character and guidance from the trial judge on the problem, whatever it was, indicated when they first returned to court.

Accordingly, their Lordships will humbly advise Her Majesty that the appeal should be allowed and the case remitted to the Court of Appeal with the direction that that court should quash the conviction of the appellant and either enter a verdict of acquittal or order a new trial, whichever course it considers proper in the interests of justice. Adopting as a precedent the order

made by this Board in *Baksh v. Reg.* [1958] A.C. 167, 172, their Lordships consider that this is a case in which the right course is to rely for that purpose on the judicial discretion and experience of the court in Jamaica. The Crown must in any event pay to the appellant his costs of the appeal to the Board.