JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 169/72

BEFORE: The Hon. President.
The Hon. Mr. Justice Grannum J.A.(ag.).
The Hon. Mr. Justice Swaby J.A.(ag.).

HORACE COATES v. R.

Roy Taylor for the Applicant.

Karl Atterbury for the Crown.

July 23, 24, 25, 26 and 27, 1973
October 26, 1973

SWABY, J.A. (ag.):

On July 27, 1973 we refused this application for leave to appeal. The applicant was convicted and sentenced to death on October 30, 1972 in the Home Circuit Court, Kingston, on an indictment charging him with having on May 23, 1971 murdered Keith Howell. The Court promised to put its reasons therefor in writing which it now does.

On the prosecution's case, the deceased, a police constable, had been shot in the back by a bullet fired from a revolver by the applicant at Constable Keith Halsall, who had challenged the applicant after Constable Halsall had heard a shout for thief coming from the southern end of Wellington Street on May 20, 1971. Shortly after being shot the deceased was taken to the Kingston Public Hospital where he was admitted and died three days later. A postmortem examination of the body performed on May 27, 1971 by Dr. Eric Depass disclosed inter alia, that the deceased had died from pulmonary embolism and traumatic paraplegia, namely, paralysis of the lower limbs, secondary to a bullet wound of the spine. The doctor's external examination of the body revealed that there was a bullet entry wound on the left side of the back at approximately the level of the eleventh thoracic vertebra and approximately $2\frac{1}{2}$ inches from the mid-line. The Doctor recovered a bullet from the eleventh thoracic vertebra which he handed over to Detective Sergeant Campbell, who handed it to Detective Inspector Wray, the police

ballistics expert. No revolver was recovered from the applicant. Constable Halsall's revolver which he had fired during this incident was not submitted to Detective Inspector Wray with a view to testing it and comparing the bullets fired from it with the bullet recovered from the deceased's body. This bullet although tendered in evidence as exhibit 1 at the trial was not available for inspection by this Court.

Only two eye-witnesses were called by the prosecution, namely, Constable Keith Halsall and one Joseph Purcell a barman. Constable Halsall who was then stationed at the Admiral Town Police Station said that at about 1.40 p.m. on Thursday May 20, 1971 while he and the deceased had been standing talking on the sidewalk at the south eastern corner of the intersection of North and Wellington Streets in the parish of Kingston he heard a shout of "thief" coming from the southern part of Wellington Street. He looked in the direction from which the shout came and saw three men including the applicant running up towards Howell and himself. These men were then about 70 yards off. Two of the men turned back. The applicant stopped running and walked towards Howell and himself. This action on the part of these men aroused Halsall's suspicions and so he stepped down into Wellington Street, moved towards the applicant, and when he was about 7 yards from him called to him saying "Stop! police! come here!" The applicant immediately pulled a gun from his waist and fired a shot at Halsall who ducked it by crouching. The applicant fired other shots in rapid succession during which Halsall said he heard Constable Howell who was then behind him call out "Halsall me get shot!" Halsall at this stage drew his revolver and fired about four shots at the applicant who was then more over towards the western side of Wellington Street. Neither Halsall nor the applicant was hit in this exchange of shots. Halsall chased the applicant who ran into North Street in a westerly direction, then into Milk Lane where he jumped into a gully and escaped. Halsall gave up the chase; returned to the intersection of North and Wellington Streets where he saw Constable Howell lying face downwards on the sidewalk bleeding from a wound in his back. Constable Howell was removed to the Kingston Public Hospital. Halsall who had later gone to this hospital stated that he telephoned from the hospital to the Denham Town Police Station reporting the incident and later wrote a report concerning same at the Denham Town Police Station which he thought he handed to the Superintendent in charge of that

station. Halsall also gave evidence that he had seen the applicant on several occasions during a period of about two years prior to this incident. He knew him by the nickname "Phantom". At an identification parade held on the first of June, 1971, he pointed out the applicant as being the man who had shot at him in Wellington Street and in so doing had shot Constable Keith Howell who had died on May 23, 1971.

The evidence of Joseph Purcell, the other eye-witness was to the effect that he was standing near a bar (spirit licensed premises) at the south eastern corner of North and Wellington Streets at about 1.30 p.m. on the 20th of May; when the applicant came and asked the barmaid to call the deceased who was inside the bar. She did so. On the deceased walking out through the door to go on the piazza, the applicant whom he had known as "Phantom" for about three months prior, shot the deceased who fell to the piazza bleeding from a wound in his side. "Phantom" then ran off into North Street firing his revolver, with Constable Halsall pursuing him; but Halsall did not fire his gun because of the crowd there. Purcell also gave evidence that he made a report of the incident at the Denham Town Police Station at the request of the deceased's brother, Winston Howell, and that he did not attend any identification parade with a view to pointing out the applicant.

Further evidence adduced by the Crown showed, inter alia, that the applicant was on the 31st of May seen at the Gaiety Theatre at about 6.30 p.m. by Detective Constable Augustus Jones who told him he was wanted for questioning in connection with a case of murder arising out of the fatal shooting of Constable Howell, whereupon applicant said "Me, Mr. Jones." The applicant willingly accompanied Constable Jones to the C.I.D. Office at the Central Police Station where Detective Inspector Audley Brown who had known the applicant for about 18 months told him he was investigating the murder of Constable Howell. After cautioning applicant he interrogated him. He was later detained and following the holding of an identification parade on June 1, 1971 Detective Inspector Brown arrested him on this charge. On being cautioned he said "Me a juvenile, me soon come out." One Beryl Campbell who was called on the identification parade failed to identify the applicant as one of three young men who had entered her fish shop in Wellington Street just before there was the shout of thief. She did not give evidence at the trial.

The defence was an alibi. The applicant testified on oath that on May 20, 1971 he was either at Mr. Albert Williams' his trademaster's place but which he later explained meant that he was with Mr. Williams painting a house in Molynes Road, the number of which premises he did not remember or at Carmenita Bartley's house, his Aunt's home at 5th Street, Greenwich Town, where he then resided. He had never been in Wellington Street near North Street on May 20, 1971 at about 1.40 p.m. nor did he shoot Constable Keith Howell, and afterwards run into North Street and Milk Lane being chased by Constable Halsall. He swore that on Sunday May 23, 1971 he was along with other boys in Scott Lane when Constable Halsall whom he had known before and who knew him drove up in a car in which there were other men. Halsall stopped the car, got out of it and called to him. Applicant went to him and on doing so Halsall said to him "I hear that you know the men who shot the police at North Street." Applicant replied "No Sir, I know nothing about it" whereupon Halsall boxed him and said "You no know the boy dem." One of the men in the car said "Take it easy with the boy." Halsall made to box him again, when he ran off and Halsall said "I will catch up with you." He denied that upon Halsall driving up in Scott Lane he had run away and that was why Halsall did not arrest him that day.

The conviction and sentence were challenged on thirteen grounds of appeal, nine of which were filed with the notice of appeal, and four supplementary grounds which were by leave of the Court allowed to be argued. Two of the grounds were eventually abandoned. The Court only called upon the Crown to reply to grounds one and five.

We shall deal with the 11 grounds in the order in which they were argued. The first was ground 1, namely, that,

> "the learned trial judge erred in law in refusing to admit in evidence two entries made in the Denham Town Police Station Crime Diary by the witness Dawkins in consequence of reports made to him concerning the shooting of Constable Howell, the deceased."

It is necessary to refer to the evidence which led up to defence attorney attempting to have these entries in the diary put in evidence.

Halsall had under cross-examination stated that he had made two reports of the shooting incident to the police, and that he had known the applicant by the nickname of Phanton, but that he had only learnt that his

proper name was Horace Coates after the holding of the identification parade. Halsall admitted that he had not mentioned the names Horace Coates even in the second report which he had written after the holding of the identification parade and that he could not remember if he had mentioned the name "Phantom" in any of his reports. Defence attorney had argued at the trial that since Halsall knew at least the slayer's nickname it was reasonable to expect that in making his reports to the Police he would have mentioned the nickname of the slayer as "Phantom" and that a warrant for the arrest of a person named "Phantom" should have been issued before May, 31, 1971, when the applicant was merely detained for questioning. He was not arrested by Detective Inspector Brown until after the holding of the identification parade on June 1, 1971. Defence attorney had also argued that the reason for Halsall's failure to mention even the applicant's nickname in his reports was evidence that Halsall did not in fact know who Howell's slayer was and that Halsall's testimony at the trial that it was the applicant was wholly inconsistent with his previous reports made to the police concerning the shooting incident, and that therefore the entries in the diary were properly admissible to show the inconsistency of Halsall's evidence in this regard. He also argued that this submission applied equally to the evidence of the witnesses Purcell and Detective Inspector Brown who at the time of the trial was dead, but whose deposition was read to the jury.

Halsall had been allowed by the trial judge to read aloud to the jury entry No. 2 of May 20, 1971 in the crime station diary of the Denham Town Police Station but it was only marked for identity at that stage. The evidence was that the entry was recorded by Constable Noel Dawkins who was later called by the defence, when the trial judge ruled that the entry was inadmissible. Entry No. 2 reads as follows:-

> "Entry No.2 20th of May, 1971. Time: 2.30 p.m. Subject: Shooting with intent: Report: Constable Dawkins reported on behalf of Trevor Howell, police constable of Hannah Town Police Station and residing at the corner of North Street and Wellington Street a case of shooting with intent committed at the intersection of North and Wellington Streets at about 1:30 p.m. 20.5.71. Complainant was standing at Wellington Street when four men on foot armed with revolvers fired shots at him, one of which caught him in the back ....."

It was suggested at the trial that this entry had been recorded from a report made either by the deceased Howell, or Constable Halsall or Purcell. It was also put in cross-examination to Constable Halsall that entry No. 3 under the same date in the same diary purported to have been reported by him. Halsall agreed that the entry so indicated but he denied that the particulars of the entry which he read to himself, but not aloud to the jury, was the report he had made at the Denham Town Police Station. Constable Dawkins when he was later called by the defence gave sworn testimony that he had recorded both entries No.2 and No.3 from reports made to him under the instructions of Detective Inspector Audley Brown and not from reports by the deceased Howell, or Halsall or Purcell. Defence attorney at that stage sought leave of the trial judge to treat Constable Dawkins as a hostile witness, but the judge refused leave so to do. Attorney for the applicant admitted in this Court that he had not taken any "proof" of the evidence he proposed to elicit from Constable Dawkins before calling him into the witness box so that he could not properly have pursued his application for leave to treat Dawkins as a hostile witness.

Attorney for the applicant submitted orally and in writing that these entries in the diary were admissible because they were relevant and pertinent to the issues of credibility and identification. The effect of these submissions was that:-

(a) the entries in the diary were admissible under the principle stated in Subramaniam v Public Prosecutor (1956) 1 W.L.R. 956 as matters relevant to the credit and conduct after the incident, of Halsall, and as being matters affecting the identification of the applicant as the slayer of the deceased. It was said that the evidence contained in the entries were being adduced to show, specifically that:-

(i) neither the name "Phantom" nor the name "Horace Coates" appeared in the reports of the incident recorded at the police station,

(ii) the reports of the incident recorded in the station diary were totally inconsistent and irreconcilable with the evidence given at the trial both as to the number of the participants and as to the narrative of events, and

(iii) the witness Halsall did not know who shot Howell.

It was contended that the entries became admissible once the formalities relating to production from proper custody and identification of the particular entries were complied with and it did not matter whether the deceased or the witness Halsall or the deceased Audley Brown had himself made the reports to Dawkins, who made the entries.

Further or alternatively,

(b) the entries were admissible under the exception to the hearsay rule that the oral or written statement of a deceased person made in pursuance of a duty to record and report his acts is admissible evidence of the truth of such contents of the statement as it was his duty to record or report, provided the record or report was made roughly contemporaneously with the doing of the act and provided the declarant had no motive to misrepresent the facts (See Cross on Evidence, 3rd ed. p.406). Again it was submitted that it did not matter whether the report contained in entry No.2 was made to Dawkins by the deceased Howell himself, or by the deceased Audley Brown; and whether in respect of entry No.3 the report was made to Dawkins by Halsall or by the deceased Audley Brown. In each case it was said there would have been a duty to record and report and the reports would have been sufficiently contemporaneous with the shooting. It was contended that if the deceased Howell made the report in entry No.2 to Dawkins the jury would have been entitled to consider the truth or otherwise of the contents of the report; that if Howell and Halsall respectively reported to the deceased Brown who reported to Dawkins then the jury were entitled to consider the fact that the reports were made in assessing the credit and conduct thereafter of the deceased Brown and in respect of entry No.3, the witness Halsall.

During the course of his submissions relating to this ground of appeal learned attorney for the applicant cited besides the "Subramaniam" case the following other authorities in support thereof:-

William A. Thompson (1912) 7 Crim. App. R. 276
Myers v D.P.P. (1964) 2 All E.R. 881
Mawaz Khan v Reginam (1967) 1 All E.R. 80
Charles Oyesiku v Reginam (1972) Crim. App. R. 240

submitting that the cases showed that previous statements or reports of a witness although hearsay, were not necessarily inadmissible, where they were relevant and admissible in evidence as regards matters affecting his state of mind, his conduct and credibility.

We should point out that entry No.2 stated that Constable Dawkins recorded a report on behalf of constable "Trevor" Howell, not that constable Trevor Howell had himself made that report. The name of the deceased constable was "Keith" Howell. True enough the entry goes on to state "Complainant was standing at Wellington Street when four men on foot armed with revolvers fired shots at him one of which caught him in the back", suggesting that it might have been the deceased who made the report, but it is also capable of the interpretation that the report had been made on the deceased's behalf. The evidence was that after Constable Keith Howell had been shot he was rushed to the Kingston Public Hospital but there was no evidence that he was able to speak, and if so, whether he was ever conveyed to the Denham Town Police Station on the way to the hospital. There was evidence that a brother of the deceased had asked the witness Purcell to make a report to the Police and that the deceased had a brother named "Winston" Howell who had been in the bar in question at the time of the shooting. Constable Dawkins called by the defence gave sworn testimony that he had at no time spoken to the deceased about the shooting incident. Dawkins was never asked whether Purcell had made a report to him, and Purcell's evidence was that he could not remember the name of the policemen at the Denham Town Police Station to whom he had made his report. There was thus no evidence that the entries No.2 and No.3 in the crime diary were recorded from reports made by Halsall or Purcell, and were therefore not admissible to impugn their sworn testimony; nor was there any evidence that entry No.2 had been made by the deceased Howell.

In so far as entries No.2 and No.3 were said to have been recorded by Constable Dawkins under the instructions of Detective Inspector Audley Brown we are not satisfied that this means that the reports were made by Brown himself. In any event, in so far as the reports refer to the shooting incident it is clear that Brown was not an eye-witness of the incident. Any report about the shooting by him would have been second hand for the accuracy of which he could not vouch. Even if Dawkins had recorded it under circumstances where Brown could have checked the accuracy of what was recorded, it would not have been admissible as to the truth of the contents of the report under the alternative head that defence attorney claimed it was admissible; and this diary is not a public record. In so far as

Inspector Brown's deposition is concerned the only apparent inconsistency between it and the report to Dawkins was as to time. The report to Dawkins was alleged to have been made at about 2.30 p.m. whereas the deposition states that Brown received a report about 4 p.m. as a result of which he started investigations. This time variance by itself would not have been sufficient to discredit Brown's testimony assuming it was the report made about 2.30 p.m. which in fact gave rise to the investigations. But it may well have been a different and fuller report he received at about 4 p.m. which caused him to start investigations. The deposition does not state that the report received at about 4 p.m. was the first report he had received regarding this incident as the applicant's attorney asserted.

In our view and in the light of what we have stated above these entries in the crime station diary were not admissible under any limb of the submissions made by attorney for the applicant. The learned trial judge was therefore right in not admitting them in evidence.

The second ground of appeal argued was ground 3, namely that,

> "The learned trial judge erred in ruling against the submission of "No case to answer", alternatively, that the verdict of the jury was unreasonable and cannot be supported having regard to the evidence".

It was submitted that the evidence was manifestly unreliable because it failed to conform with the reasonable and natural expectations of common human experience, and that no reasonable tribunal could safely convict upon it. Attorney for the applicant pointed out various discrepancies in the transcript of the evidence of the two eye-witnesses and submitted that the evidence was so unreliable that no reasonable tribunal could safely convict upon it. He cited the judgment in the case of George Harrison and Lenford Brown (Supreme Court Criminal Appeals 51 and 52 of 1970 - unreported) which turned on the question of the identification of the prisoners and said that the instant case justified the same approach as the identification of the deceased's slayer in the instant case was a vital issue.

In Harrison's case the Court of Appeal found that the only evidence implicating the applicants in the commission of the crime was that of a child of tender years whose evidence was shown conclusively to be without foundation in fact, and there was no corroborative evidence. In the instant case the question of what evidence should have been accepted or rejected was eminently

a matter for the jury's decision and we agree with the learned trial judge's ruling that there was a case to go to the jury.

On the alternative submission that the verdict was unreasonable and cannot be supported having regard to the evidence, although the evidence of the witnesses Halsall and Purcell were conflicting as to how the shooting took place, it was open to the jury to accept the evidence of the one or the other. The probabilities are that they accepted the evidence of Halsall. There is therefore no justifiable ground on which we can say that the verdict is unreasonable.

The third ground argued was ground 4, namely that,

> "The learned trial judge erred in law in telling the jury to reject ALL the testimony of a witness found to be lying."

Attorney for the applicant submitted that it was likely that the jury would have found that Purcell had given perjured evidence as regards the events he is said to have witnessed, but the jury were obliged on the facts to accept the undisputed evidence that Purcell knew the applicant before May 20, 1971, which was a matter relevant to the identification of the deceased's slayer and to consider this fact and its consequences in arriving at their verdict. The direction to the jury to reject all the evidence of a witness found to be lying he submitted would therefore have prejudiced a proper assessment of the evidence against the applicant, embracing as it did rejection of the fact that the applicant was known to Purcell and was therefore a usurpation of the jury's function to decide what evidence to accept and what evidence to reject.

The learned trial judge did at least thrice in directing the jury tell them "you may accept all or any part of a witness's testimony as you deem fit." He further charged them to try and ascertain the truth from all the evidence they had heard in the courtroom. The direction complained of was in our view amply qualified. There was no merit in this ground of appeal.

The fourth ground of appeal argued was ground 5, namely that,

> "The learned trial judge erred in directing the jury that only two verdicts were open to them, i.e. Guilty or Not Guilty of Murder, because this direction effectively removed from their consideration the issue of intention."

It was submitted that it was for the learned judge to put for the consideration of the jury such questions or defences as properly arose on the evidence even though they may not have been raised or urged by the defence. Defence attorney cited as authority the case of Regina v Roberts (1942) 28 Crim. App. R. 102, in which he said the Court of Appeal distinguished between the direction being necessary as a matter of law or fact. He further submitted that in the circumstances of the instant case, the jury might have concluded that the bullet wound to the back of the deceased resulted from a ricochet and not from a direct hit. In that event, assuming that the jury's finding that the applicant fired the fatal shot was reasonable, then having regard to the evidence as to the distance he was from the deceased at the time of the shooting and the number of shots fired it would have been open to the jury to return a verdict of manslaughter on the basis that the evidence though not sufficiently cogent safely to find the inference required for a verdict of murder clearly showed reckless, wanton and dangerous conduct on the part of the gunman and should have been put to the jury to find whether the crime was manslaughter and not murder. This withdrawal of the issue of manslaughter from the jury's consideration was a misdirection which deprived the applicant of the possibility of a manslaughter verdict.

The evidence on Halsall's account was that the applicant on being challenged by himself saying "Stop! Police! Come here! at about 1.30 p.m. on a public thoroughfare in the city of Kingston immediately pulled his revolver and fired at Halsall who crouched, one of the bullets hitting the deceased in his back whilst he was on the piazza near the door of the bar.

There was no evidence from which it could reasonably or properly have been inferred that :- (i) the fatal bullet might have ricocheted; or that (ii) Halsall or the deceased was outside "killing distance" of the applicant's range of fire. On the contrary the evidence was that Howell was hit by one of the bullets deliberately fired by the applicant at Halsall from which bullet wound the deceased died.

In our view the learned trial judge rightly charged the jury on the essentials that the Crown must prove on a charge of murder and on how the intention of a person can be inferred from his conduct. He directed the jury that if they did not find that the applicant when he fired the shot intended to kill or cause grievous bodily harm they should acquit him. There was no

evidence to support a verdict of manslaughter and the learned trial judge was therefore right in withdrawing from the jury such considerations, not supported by any evidence, as would induce them to make compromise, as learned Crown Counsel submitted in his reply to this ground of appeal. This ground of appeal also failed.

The fifth ground of appeal argued was ground 6, namely that

> "The learned trial judge's direction to the jury to consider first the alibi put forward by the applicant and if they concluded that he was present on the scene then to consider his intention, was wrong as suggesting that the question of the applicant's presence at the scene was to be determined solely by reference to the alibi."

In our view there was no merit in this ground of appeal.

The next grounds of appeal argued were grounds 7 and 8 which were taken together:-

> "Ground 7 - the learned trial judge failed to deal adequately with those aspects of the testimony of the witnesses for the Crown necessary to a proper and impartial assessment of the evidence in the case, while highlighting aspects of the evidence with value more speculative than probative." and,
>
> "Ground 8 - the learned trial judge failed to put the applicant's defence to the jury in its proper perspective."

Attorney for the applicant pointed out various discrepancies between the testimony of the witnesses Halsall and Purcell which he said the judge ought specifically to have drawn to the jury's attention in the interest of a proper assessment of the credibility and reliability to be placed upon these variances which he contended were relevant to considerations of interest, motive, state of mind, conduct and the like matters because they were relevant to the determination of the sole issue in the case, namely, the issue of identification. He submitted that the defence was not put to the jury in a way to ensure due appreciation of the value of the evidence as it affected the applicant. It was contended that the identification parade was valueless because Halsall knew the applicant for about two years and had seen and spoken to the applicant in Scott Lane three days after the shooting incident yet he had not been arrested by Halsall. He also submitted that the failure of Beryl Campbell who had known the applicant from he was a small child to identify him on the parade as being one of the men who had held up her fish

shop on May 20, 1971 (when there was the shout for thief) should have been specifically brought to the jury's attention as it was relevant to the identification of the deceased's slayer and was a matter in favour of the applicant's defence. Finally attorney for the applicant contended that the trial judge's failure to have directed the jury as above indicated could reasonably be said to have brought about a miscarriage of justice since on all the facts and with a correct direction the jury might fairly and reasonably have found the applicant not guilty.

In our view the learned trial judge satisfactorily reviewed the whole of the evidence and on numerous occasions directed their attention to portions of the evidence which they should not hold against the applicant and that they as judges of the facts should endeavour to ascertain where the truth lay. The judge also charged the jury on numerous occasions that before they could convict the applicant they must feel sure of his guilt on the evidence as a whole. After giving them adequate directions on the law to be applied and after a full review of all the evidence and after commenting on various aspects thereof, and directing the jury that they could discard any of his comments if they did not coincide with their views the learned trial judge finally charged the jury as follows:-

> "You bear in mind, members of the jury, what I told you as to the law and the burden of proof, what I told you in relation to the law touching the evidence as given by the accused man. Unless you feel sure of the guilt of the accused man you must not convict him. If you entertain doubt as to his guilt you must acquit him. Remember what I told you as to his defence of alibi. If, after examining all the evidence you have heard in this courtroom, if on the totality of that evidence, from the evidence which you find proved, you feel sure of his guilt, then it is open to you to convict him. If you reject what he has told you, you must not for that reason convict him; you must go back and look to the totality of all the evidence of the prosecution and the defence and see whether you feel sure of guilt."

These directions were in our view sufficient to bring the matters complained of to the jury's attention. These grounds of appeal also fail.

The eighth ground argued was ground 9, namely that,

> "The learned trial judge was wrong in law in sentencing the applicant to death because he was under 17 years of

age when the offence was committed".

Attorney for the applicant had filed a written submission on this ground of appeal giving certain data.

The Court without hearing argument stated that sentence of death could properly be passed on the applicant, he being over 18 years of age at the time of his conviction, which was the relevant date to be considered, and not the date of the commission of the offence - (See Martin Wright v Reginam, February 4, 1972 - unreported).

The Court intimated to the applicant's attorney that if he wished he could submit a copy of the particulars relating to the delay in bringing on the case for trial to the Clerk to the Privy Council for the consideration of the Governor-General in Privy Council when the applicant's case goes before the local Privy Council for final consideration.

The ninth ground of appeal argued was supplementary ground 2, namely that;

> "the learned trial judge erred in declining to rule that the applicant's attorney was entitled to see the statement from which the witness Halsall had refreshed his memory".

The transcript of the proceedings show that the learned trial judge had so ruled when the witness Halsall had asked to refresh his memory from his second report (i.e. his full statement) to the police touching this incident in order to see whether he had mentioned the name Horace Coates or the nickname Phantom in it, before the statement was handed to the witness, and defence attorney had asked to see this statement <u>before</u> it was handed to the witness for that purpose.

The rules as to a witness refreshing his memory are to be found in Cross on Evidence, 3rd edition, at pages 189-193 and in Phipson on Evidence, 11th edition, at paragraphs 1528-33. The rules show that cross-examining counsel may cross-examine upon the document used to refresh the witness's memory to check it without making it evidence, provided that his cross-examination does not go further than the parts which are used for refreshing the memory of the witness. On the other hand if the witness is cross-examined about other parts of the document the party calling him may insist on its being tendered in evidence in the case.

Defence Attorney was therefore entitled to see the statement Halsall used to refresh his memory after Halsall had done so. The transcript does not show that defence attorney then renewed his application to see the statement. His application was prematurely made.

Grounds 3 and 4 of the supplementary grounds of appeal were finally argued together, namely that,

> " 3. The learned trial judge inadequately directed the jury on the issue of the deceased having been shot in the back and
>
> 4. The learned trial judge's omission to relate the relevant facts to his directions in law on the issue of intention prejudiced the applicant's chances of acquittal".

Attorney for the applicant urged that it ought to have been pointed out to the jury:-

(a) that there was a gap in the Crown's case as to how the deceased came to be shot in the back,

(b) that if they were in doubt as to the source of the bullet which injured the deceased man then they should acquit the applicant,

(c) how to approach the question of inferences in the context of the problem posed by the evidence that the deceased man was shot in the back.

In our view on the evidence adduced the jury could not have been left in any reasonable doubt as to (a) or (b) above. The clear evidence was that:-

(i) the applicant fired in the direction of Halsall and Howell,

(ii) when Halsall fired his revolver he had done so over towards the western side of Wellington Street where the applicant then was. Howell was then behind Halsall so that Howell was not in the path of any bullets fired by Halsall, and there was no evidence that any of the shots fired by Halsall ricocheted from the western side of Wellington Street. It had been suggested by defence attorney to Halsall that he may have accidentally shot the deceased, but Halsall denied the suggestion and no evidence was called to support the suggestion,

(iii) before Halsall pulled his gun and fired a shot Howell had called out that he had got shot.

Regarding (c) above the witness Winston Howell testified that he had to take cover when he heard so many gun shots being fired. The learned trial judge suggested to the jury that from this evidence they could probably come to the conclusion that there was some panic at the time of the shooting and that it was in that context the facts surrounding the shooting of the deceased existed. It seems a reasonable inference from the facts proven that the deceased may have turned to take cover in the bar and this could account for his having been shot in the back.

In our view the learned trial judge adequately directed the jury according to all the evidence adduced, and we have previously dealt with his directions of "intention". These grounds also fail.

For the above reasons we therefore dismissed the application for leave to appeal.