JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 14 & 16 OF 1979

BEFORE: THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE WHITE, J.A.
THE HON. MR. JUSTICE MARSH, J.A. (AG.)

EARL PRATT & IVAN MORGAN v. REGINAM

Eric Frater for the Appellant, Earl Pratt
Noel Edwards, Q.C., and Miss Dorothy Lightbourne for the Appellant, Ivan Morgan
Alder for the Crown

September 30, 1980; November 21, 24, 25, 26, 27 28, 1980; December 1, 2, 5, 1980; September 24, 1984

WHITE, J.A.:

On the 5th day of December, 1980, when we dismissed these appeals against conviction and sentence for murder, we promised to put our reasons for so doing in writing. This we now do.

The appellants were tried together before Parnell, J., and a jury in the Home Circuit Court over a period of four days (10th to 15th January, 1979) during which the Crown presented evidence that on the 6th October, 1977, between the hours of 3:00 p.m. and 4:00 p.m. the deceased, Junior Anthony Missick, then 17 years of age, was shot to death; that three men were involved in his murder, and that the two appellants were of that group. The case for the prosecution essentially rested on the account of one witness, Herbert Wallace, who said he had seen the circumstances surrounding the death of Missick.

His evidence was that on the 6th of October, 1977, between the hours of 3:00 p.m. and 4:00 p.m., while he was walking through bushes along the bank of the Rio Cobre, he heard crying and talking. When he first heard these sounds he could not discern exactly where they were coming from, although as he walked he was going towards from where they seemed to emanate. He came out from the bushes

into a clear spot at which time he saw four men whom he knew before. He identified them by nicknames. Firstly, "Itchie," who was the deceased. Secondly, "Mongrel," who is the appellant, Ivan Morgan; thirdly, "Natty Baldhead," who is the appellant, Earl Pratt, and "Dummy, whose correct name was Errol Boyd (as later disclosed by the evidence, the last-named person was subsequently shot dead by the police in an unconnected incident). This piece of evidence formed one of the grounds for argument before us.

From his vantage point, Wallace saw that while "Itchie" was crying, "Dummy was holding "Itchie" by the left shoulder. "Dummy" called to the witness as he continued walking towards the group of four who were walking towards him. He noticed that the appellants and "Dummy" had guns in their hands. "Dummy" had a knife also. "Itchie" was crying and beseeching "Dummy" not to kill him. At one time "Dummy" tried to stick "Itchie" with a knife. "Itchie" boxed it away and, apparently, it cut "Dummy" who thereupon repeatedly said: "I am going to kill you 'Itchie.' " He placed the knife into his pocket, took out the gun, while they were all walking towards the witness. "Dummy" was on the right hand side of "Itchie," "Mongrel" on his left hand side and, "Baldhead" behind him. As they were walking, "Itchie" again knocked the hand of "Dummy" from his shoulder and, having thus loosened the hold on him, he ran towards the bushes. As "Itchie" was running, Pratt pushed "Dummy" aside, and fired four shots at "Itchie," who dropped. He got up and limping, ran off, at which stage "Dummy" fired one shot at "Itchie." He dropped again. The subsequent actions of the other three are best told in the words of the witness.

> "They position themselves in the proper way ... they positioned themselves; all three kind of gang him like they would a face him to get a close range shot at him.... Pratt said, 'Make sure him dead.' ..... They all running up ... I heard Pratt say again 'Shoot him inna him head ....' "

The witness said he heard several shots. He had just shortly before, because of the unexpected and unbelieveable tableau which he had seen, started to back away. At the shooting, Pratt, other-

wise called "Natty Baldhead" called to the witness who ran off. His evidence was that Pratt fired a shot at him. The other two were with Pratt. The witness was not hit. He went home. Later on that day at about 7:00 p.m., the two appellants came to him there and told him to come and help them bury "Itchie," the deceased. He was specifically told by Pratt to go and get a cutlass. The witness said he did not wish to get mixed up. He outsmarted them, because he advised that "cutlass can't dig grave," but promised to get a shovel. He called out loudly to a neighbour for a shovel, but did not get any shovel. He later went into hiding at the mission house of a local pastor, a Mr. Williams, who locked him inside the building. The witness said he later made a report to Detective Constable Ashman.

The police having been informed, started a search for "Itchie." Because of the dark nothing was found that night. His body was eventually found at daylight of the following day buried in the sand. According to Detective Corporal Morrison, during the search, he saw a spot which appeared to have been dug up and swept, and another point about fifteen feet away there was the impression of somthing dragged in a straight line either way from these two spots.

The body which was recovered from the shallow grave by the police was identified by Miss Gloria Fray as that of her son, Junior Anthony Missick. The post-mortem examination revealed three entry bullet wounds; one was in the head on the left side, behind the left ear; one in the left calf, and the third in the right loin and which entered from behind. Below the entry wound in the skull there was a left subdural clot. A gold coloured bullet was extracted from that area. The bullet which entered the loin posteriorly went upwards and inwards by which movement it caused rupture of the abdominal aorta and rupture of the spleen. In the abdomen there was a large collection of blood, and there was evidence of massive bleeding behind it as well. The path of this bullet was from the right of the body, and it ended in the left anterior abdominal wall, tearing the large vessel of the heart in its journey. The doctor's opinion was that death was caused by massive haemorrhage as a result of the rupture of the aorta and the spleen from a bullet in the

abdomen.

The endeavours to counteract the account given by Herbert Wallace, otherwise called "Queeny," ran the gamut of suggesting to him by cross-examination that he neither saw nor heard what he recounted, and his evidence was the reciting of what he was told to say, as well as the alibi stated by each of the appellants in his unsworn statement from the dock.

The submissions which were made to this Court in support of the appeals encompassed not only an application to call fresh evidence, but certain complaints regarding irregularities during the trial.

To deal first with the application for leave to call fresh evidence. This was made on behalf of the appellant Pratt. It was said that the witness who it was desired to call was not available at the trial. He was a member of the Jamaica Defence Force, by name Clarence Smith. The proposed evidence was intended to show that the appellant Pratt, on the 6th October, 1977, was in company of Smith and a girl, and therefore considering the hour after 3:00 p.m., when Smith parted from them, it would not have been possible or would have been improbable for Pratt to have left Tivoli Gardens, Kingston and to have reached Central Village at the hour at which Herbert Wallace said he saw him on the river bank. Although counsel recognised that there are certain conditions to be met by an applicant who seeks leave to call fresh evidence, it was the argument for the appellant that the evidence of Clarence Smith was not available at the material time of the trial for the reasons and circumstances set out in the affidavits of the said Clarence Smith and Mr. Eric Frater of counsel, who appeared for Earl Pratt at the trial, and who argued that this fresh evidence if heard and believed would tend to show that Pratt was not present at the killing of Junior Missick.

What is clear is that the intended witness, Smith, had attended under escort at the trial in the forenoon of Friday the 12th day of January, 1979, to give evidence for the defence. He spoke to Mr. Frater. Although he was told by Mr. Frater that he was not yet ready for him, and he should therefore wait, by all

accounts, Smith and his escort left the environs of the Court, went across to the Attorney General's Office from where they returned to the Court at 3:00 p.m. that day. By this time the Court had adjourned till Monday the 15th January, 1979. It should be pointed out that, Mr. Frater's affidavit showed that he was ready for the witness at about noon on the Friday, and to facilitate him the judge had first adjourned the trial for half an hour on the Friday. So that in fact there were two adjournments on that day to enable the witness to attend Court.

On the resumption on Monday, the 15th, Smith was still not present and eventually Mr. Frater addressed the trial Judge thus:

> "The witness has not come. I understand that steps will be taken at Camp to bring him here. In fact, I understand they left some time ago, but they are still not here. The subpoena has been served, he is still not here. I expect he will be on his way. In the circumstances and after consultation, we decided not to wait on him and to close the case at this point."

(Emphasis supplied)

It is clear that this was not a case of the witness not being available. However, Mr. Frater submitted that the Court should exercise its discretion and allow in the fresh evidence and because of the administrative problems posed in getting the witness, the Court should deem it that the witness was not available. In the ventilation of this aspect of the case we were referred to several authorities both English and Jamaican, viz., Collins (1950) 34 Cr. App. R. 146; R. v. Parks (1961) 46 Cr. App. R. 29 [1961] 3 All E.R. 633; Preston Williams (1974) 12 J.L.R. 1314. Suffice it to say that for present purposes, after considering them in depth, we refused the application on the ground that we were not satisfied that the non-attendance of the witness was not due to a lack of diligence in pursuing the steps necessary to get the witness to Court and we were not able to say that the evidence would not have been available if due diligence had been used. Indeed, we formed the view that counsel at the trial had chosen to close his case and to take a calculated chance and that following R. v. Weisz (1920) 15 Cr. App. R. 14 and R. v. Beresford (1971) 56 Cr. App. R. 143, leave should be refused.

In any event on the face of it, the proposed fresh evidence would have been inconclusive even if it were believed. Central Village and its environs are but a short ride from Kingston.

Turning now to the substantive grounds of appeal, we note that the original grounds as filed were not proceeded with and in fact all the supplementary grounds except one were abandoned. The remaining ground which was argued with force was to the effect that the learned trial judge "wrongly exercised his discretion not to discharge the jury upon the disclosure of prejudicial evidence, upon extraneous and irrelevant grounds, and upon a misinterpretation of the evidence."

The prejudicial evidence referred to was that given by the witness, Herbert Wallace, while (according to Mr. Edwards), "he was under critical questioning by the trial Judge." This bit of evidence, it was contended by Mr. Edwards, was "irreparably prejudicial to the appellant." He complained that the failure to discharge the jury was magnified by the fact that the trial Judge was afforded every assistance to the proper course by alert and responsive counsel at the trial.

The alleged prejudicial evidence contextually relates to the knowledge of the witness Wallace of the friendship between the accused, the witness and the deceased. The defence had relied on this to suggest it was unlikely the accused would ever have killed their "friend." The learned trial judge at the conclusion of the cross-examination asked the witness about the friendship that had previously existed between all the parties. His concluding questions were:

> "Q. And the last question is: Do you, up to the time of Itchy's death, regard yourself as a friend of Itchy?
>
> A. Yes, Sir.
>
> Q. And you regard Itchy as a friend of theirs?
>
> A. Yes, Sir.
>
> Q. As far as you could see?
>
> A. Yes, Sir even Itchy and him, Pratt, shot one of him own a friend.
>
> Q. Just a second. You regard Pratt and Morgan as friends up to the time of the accident.

" And you now volunteer (to Reporter): Kindly read back that little bit of evidence that he just volunteered."

Reporter reads:

"Even Itchy and him, Pratt, shot one of him own friend."

After this the judge told the witness:

"I want you to come back tomorrow."

To which the witness replied:

"If I live to see tomorrow sir. I have to sleep at stable you know."

"Q. You are afraid?

A. I 'fraid, long, long time sir.

Q. I don't want you to disclose where you are sleeping now.

A. I have been getting threats over two weeks now, not to come to Court, that if I come to Court me head going lick off. Dem have more friends.

His Lordship: The police will give you all the protection that is necessary."

The strictures of Mr. Edwards on that extract are muted by his recognising that there is no way in which the learned trial judge could have anticipated the remark of the witness. Indeed, the learned judge described the witness as volunteering that Itchie and Pratt had shot a friend. Undeniably, the judge recognised the nature of the problem which had arisen, when he invited counsel for both accused to consider what they intended to do. He specifically invited them to deal with the matter in the light of -

"Those cases which deal with where a witness gives a piece of evidence, whether deliberately, or he volunteers it, during the conduct of the prosecution case, and I believe it would even apply also, even if he volunteered something in answer to the Judge, of the nature that has been given. You will now consider what you intend to do and tell me tomorrow morning and then I will decide what ruling to make....."

The adjournment was then taken. Next day, the judge heard full argument and decided not to discharge the jury as had been requested. Naturally, it was strongly argued by defence attorneys that the jury should have been discharged and a new trial ordered as requested by

them, because the remarks were prejudicial. Before us, Mr. Edwards used adjectival phrases such as "irreparably prejudicial," "irrevocably prejudicial," "its damaging and devastating effect remains all pervasive," "prejudicial evidence with its utterly devastating influence" - in his attack on this section of the evidence of the witness, Herbert Wallace. He submitted that in all the circumstances of the case, the trial judge should have exercised his discretion to discharge the jury, at the same time ordering a new trial.

The remarks by the witness were interpreted as giving evidence of the bad character of the appellant, Pratt, in the sense that the insinuation is that just as it was commonplace for "Itchie" and Pratt to shoot one of their friends it was normal for Pratt to have killed "Itchie." This would result in all probability in that the jury would be persuaded by that remark to the detriment of the appellant, although there was nothing to indicate the circumstances under which the reported shooting took place, and the results of the shooting. It was argued that Wallace's evidence was the deciding factor in turning the scales against the accused, especially when note is taken of his allegation of threats by friends of the appellants. Added to this, complained the appellants, were the directions of the learned trial judge to the jury that the unsworn statements made by the appellants about their own good character should be disregarded; and it would be recognized that the defence was eroded and denuded by this combination of events in the course of the trial. These were the main points argued for the appellants on this consolidated appeal.

All these remarks take cognisance of the fact that Wallace, the only eye-witness, was the lynch-pin of the Crown's case against the two appellants. The jury had first to accept his evidence that he saw the appellants with the deceased, that the appellants called to him when they became aware that he was the spectator of the scene of execution; the jury had to interpret and give meaning to his evidence of the tearful pleas by "Itchie," that they should not shoot him; also whether in fact it was when he tried to escape that he was shot at causing him to fall; and that, thereafter, while he

was in that prostrate position all three armed men positioned themselves, and thereupon shots were fired at "Itchie," one of which resulted in his death. In addition to all this, there was his further account that he (the witness) was chased and shot at after the shooting of "Itchie." This last was an inescapable piece of evidence which had a bearing not only on the actions of the appellants, but indicated their state of mind. Despite this behaviour of theirs, the appellants later requested him to help them bury the deceased. All of these pieces of evidence had been given by Wallace and had been subject to lengthy cross-examination, prior to the remarks complained about. The cross-examination in effect strenuously accused Wallace of not speaking the truth; that he did not see anything which he had related; that he had fabricated that evidence upon instruction by some unanmed person, and that he had given the evidence he gave out of mallace against Pratt following some incident between the witness and "Ali Dub," the girlfriend of "Dummy," after which Pratt took him to "Dummy" who beat up the witness.

It is in the face of all this that it was argued before this Court that the judge should have exercised his discretion in stopping the trial, and should have ordered a new trial. In this regard, it is important to be reminded once again of the attitude of the Court of Appeal when considering the exercise by a judge of his discretion in a criminal trial before a jury where evidence regarded as prejudicial to the character of the accused is inadvertently given. First of all, whether the judge is to discharge the jury must depend on the particular facts of the case: R. v. Parsons (1962) Cr. L. R. 631 at 632 and, the Court of Appeal will not lightly interfere with the exercise of the judge's discretion. In George Weaver and John Weaver (1967) 51 Cr. App. R. 77 at p. 83, [1968] 1 Q.B. 353 at 359 - 360, Sachs, L.J., affirmatively set out the modern position as follows:

> "... the modern practice evolved in the light of these cases is that in essence, as has now often been said (see, for instance, a passage which appears in Parsons (1962) Crim. L.R. 631) whether or not to discharge the jury is for the discretion of the trial judge on the particular facts and the court will not lightly interfere with the exercise of that discretion.

> "It follows, as has been repeated time and again, that every case depends on its own facts. It also, as has been said time and again, this depends on the nature of what has been admitted into evidence, the circumstances in which it has been admitted and what, in the light of the circumstances of the case as a whole, is the correct course. It is very far from being the rule that in every case where something of this nature gets into evidence through inadvertence the jury must be discharged."

It will be understood that these remarks have receded from the earlier stand taken by Lord Hewart, C.J., in Peckham (1935) 25 Cr. App. R. 125, that where a statement prejudicial to a prisoner with regard to his previous record has been inadvertently made to the jury by a witness and counsel for the prisoner applies for the trial to be started afresh, the Court ought automatically to discharge the jury and begin the trial again before another jury. Lord Hewart regarded such misreception of evidence as fatal "and the effect is not merely to make the trial a nullity." There the conviction was quashed and the appeal allowed. This was not the only case in which this strong stand was taken by the Court of Criminal Appeal on this issue, see for example, Lilian Grace Palmer (1935) 25 Cr. App. R. 97, where that court quashed the conviction of the appellant where her trial followed on remarks about her made before the jury by defence counsel concluding an earlier case when he moved in mitigation of sentence. That previous trial had concerned the appellant's son who was described by his counsel as the son of a notorious shoplifter, This remark was made in the presence of a jury who were about to try the appellant. "The appellant was, therefore, tried by a jury which had quite recently heard that she was a notorious shoplifter, the jury having been actually in the box, though not sworn, at the time when the remark was made." (p. 99) At p. 100, Lord Hewart, C.J., expressed the Court's view that "it clearly would have been more satisfactory if the case had been adjourned and tried before a jury who had not heard any such remarks." He added, "That highly unfortunate incident is itself a sufficient reason for allowing the appeal and quashing the conviction."

In commenting on how the judge should deal with this matter, Lord Hewart in Peckham's case implicitly recognised one aspect of the judge's discretion.

At p. 128 he said:

> "Moreover no warning was afterwards given to the jury that they were not to pay attention to this inadvertent statement on the part of the witness. It may be that in particular cases and on particular facts it is not necessary for reference to be made in the summing up to a prejudicial statement of this kind inadvertently made by a witness. Every case must be looked at in relation to its own facts. But there is a great difference between these cases and the present case in that here there was an application by counsel for the prisoner that the trial be started afresh. It was in those circumstances that the Deputy Chairman refrained even from alluding to the topic when he came to sum up. ...."

The decision in Peckham was authoritatively regarded as outdated by the Court of Appeal (Sachs and Karminski, L.JJ., and Lawton, J.) in the case of William Richard Palin (1969) 53 Cr. App. R. 535, [1969] 3 All E.R. 689. The question as to whether to discharge the jury in these cases was there described as a discretionary jurisdiction to be exercised on the particular facts of the case. The judgment of Lawton, J., noted the argument of counsel for the appellant who conceded "that the learned Assistant Recorder had a discretion, but he submitted that in the circumstances of this case he had exercised his discretion wrongly. The basis of his argument was that the appellant was putting forward a difficult defence, to wit, that although he had homosexual inclinations, he had not given way to them during his association with these boys whose names appeared in the indictment. He submitted that anything which tended to hamper the appellant in putting forward his defence was something which should have been taken into consideration when the Assistant Recorder came to exercise his discretion." The judgment expresses the Court's conclusion "that the Assistant Recorder did exercise his discretion properly. There is nothing to indicate that he exercised it on wrong principles. Indeed, the short ruling which he gave indicates that he exercised it on right principles."

In a closer look at the matter of the inadvertent disclosure of matters indicating bad character of an accused, the Court of Appeal in Palin, underlining their opinion regarding the exercise of discretion by the Judge, described the decision of the Court in

Weaver as "a definitive statement of the Law," and expressed the strong view that that is the proper case to be cited when this matter comes up for consideration, and not the trio of cases, viz., Peckham (supra), Palmer (1935) 25 Cr. App. R. 97 and, Firth (1938) 26 Cr. App. R. 148.

In the instant case, the learned judge was guided by the observations in the judgment in Weaver and Weaver (supra). Tellingly relevant, was the concession of Mr. Frater, Attorney-at-Law for the appellant, in his submission on this point at the trial; "We are aware m'Lord that it is in your discretion as to whether you allow this application or not. At one time it was almost automatic that in cases like this the matter would be discontinued at this stage. It is not so for some time. However, m'Lord cases still show that if the matter would be so prejudicial as to affect the jury's mind, that the matter is best treated by discharging the jury and ordering a new trial." He brought to the attention of the learned trial judge the decision in Palin.

Before us, Mr. Edwards drew a distinction between the older cases and the rulings in the cases of Weaver and Palin. He said the distinction which would operate today is not that the trio of cases are no longer relevant. It is merely that the discharge is no longer automatic. Each case must be determined on its own facts. He argued further in this way: If there is a case of murder by shooting of one's friend and the inadmissible evidence contains a statement with respect to the accused that he had shot at a friend previously, then any critical analysis of the context would probably suggest that the jury must be discharged because it would underscore the high probability of his having committed the offence with which he is charged.

With the assistance of the attorneys for the appellant and the Crown, this Court made a critical analysis of the context of the circumstances of this case. In passing, two things should be clearly reiterated. For one, the trial judge has a discretion whether to continue the trial despite the prejudicial and inadmissible evidence. Secondly, having decided to continue the trial, the judge has a

discretion how to deal with the prejudicial statement. He may either ignore it or comment on it in his summing-up. If he adopts the latter course, it is incumbent on him to deal with it fairly and even-handedly. The contention on this appeal was that the offending remark was of such a nature, that no treatment in the summing-up, however felicitous, could have remedied the defect. Therefore, the jury should have been dismissed.

The critical analysis was along the three lines laid down at p. 83 in Weaver which were (a) the nature of what was admitted into evidence, (b) the circumstances in which it was admitted, and (c) what in the light of the circumstances as a whole was the correct course? The consideration of these must be in the light of the over-all enquiry as to whether, the accused had had a fair trial notwithstanding the prejudicial remark and the applicant must show that in the light of all the circumstances, the judge did not take the proper course.

The factual context in which the offending statement occurred here was discussion of the already established friendship of the deceased with the appellant Pratt and the witness. Clearly, also, it was abundantly proved that the appellants used to visit the witness at his mother's home. Additionally, the character of the witness himself was called into question by this admitted friendship with men who he said were in the habit of handling guns as political body guards. Indeed, at p. 54 of the transcript, he was cross-examined to the effect that two nights before the 6th October, 1977, he was himself involved in a shoot-out with other men. He replied no. So too, was the character of the deceased "Itchie" tarnished, when the witness Wallace swore that he and Pratt had shot a man before. And so, the jury in this case had to consider not only the character of the witness, and the character of the deceased, but also whether this bit of evidence was a factor inherently supportive of the case for the Crown, however cogent the evidence against the accused might otherwise have been. Add to this, the concerted and repeated attack on the witness that he had been dubbed an informer, that he was lying and had fabricated all the evidence he was giving, and it becomes

clear that, both before and after the offending remark, the jury had to continuously ask themselves whether this witness was a credible and truthful witness. His was an eye-witness account, and the straight issue of fact was whether all that he had said up to then was factual, notwithstanding that he stood alone in relating the circumstances under which "Itchie" met his death. Certainly, if the jury accepted that the witness had previous to the day when "Itchie" died, been accused as an informer by the accused and "Dummy" and "Ali Dub," the jury had to consider his fears when both the accused and the others came to him during the night and commanded him to get a cutlass to dig a grave. This, the witness said he told them, could not be done with the cutlass, adding under cross-examination that "that is why I know I never have a chance to live that night." This impression was strengthened by Wallace's evidence of being shot at earlier that day contemporaneously with the incident surrounding the shooting of "Itchie," when he witnessed the incident which he related in Court. Regarding himself as a friend of Pratt and "Itchie," he did not call to them because he could not really believe that Pratt would do something like that. When he was asked by Parnell, J., "You did not think it prudent to ask them what was wrong?" The witness replied: "I would not do such things from I hear Itchie cry, 'Do Dummy, don't kill me.' I was afraid they may get me before, I was going but not with a fully good heart." Here then was the immediately preceding context to the offending statement in evidence which could not have been anticipated by the judge. It was an unexpected statement volunteered by the witness. Did it really add anything more of substance to the account which he had previously given in chief and under cross-examination? We think not.

It was the argument of Mr. Alder, who appeared for the Crown, that the statement could not, in the circumstances of this particular trial, have prejudiced the fair trial of the appellant. At the best, he said, the statement was ambiguous in import, and therefore, the next phase of the matter is to discover how the judge dealt with it in his summing-up. First of all, it is well to bear in mind that the trial judge was placed more advantageously than is

this Court to assess the degree of prejudice flowing from this inadvertent and ambiguous remark. And for the appellant to succeed, it must be adequately shown that the trial judge did not deal with the matter at all when he should have done so, or if he did deal with it, his treatment fell far short of what was demanded by the exigencies of the case.

Two cases are relevant here. First, Parsons (1962) Crim. L.R. 631. In this case a police officer was asked his source of information as to where the accused formerly lived. His reply was "From records held at our office." Implicit therein was a reference to the bad character of the accused. The trial judge refused to discharge the jury and, the Court of Criminal Appeal held that he had adequately dealt with the matter in the summing-up. More importantly, the Court of Criminal Appeal would not lightly interfere with the exercise of the judge's discretion, when he refused to discharge the jury, considering that the offending inadvertent remark was not plain and unambiguous. The holding of the Court of Criminal Appeal was that, if the statement made is plain and unambiguous and was something which clearly influenced a jury, the trial judge will no doubt discharge a jury and order a retrial. But where, as in Parsons, what was complained of was ambiguous and not strong against the defendant and where the matter can be dealt with in the summing-up, there is no ground for the Court to interfere.

The remark in this case, in our view, did not necessarily and only mean that the accused Pratt and deceased "Itchie" were involved in a prior murder. The reported shooting could have been done accidentally or in self-defence, as well as being murder by shooting. But the degree of prejudice was not so great that it could be said that an injustice would occur and did occur by allowing the trial to continue with the jury as it was. The volunteered remark added little or nothing to the weight of the evidence already given by this witness - if that evidence was believed. And if the main evidence was not believed the offending remark would not have made it more credible.

Another case worth mentioning is Martin Coughlan (1976) 63 Cr. App. R. 33 in which reference was made during the trial to the appellant's previous conviction. A co-accused was asked under cross-examination if he and Coughlan were "in the I.R.A." The co-accused

answered as follows: "I was sentenced in Manchester with Coughlan, we got 16 years." Counsel cross-examining sensibly went on with his cross-examination as if nothing untoward had happened. Other counsel in the case as sensibly, did not object, but in the absence of the jury counsel applied that the jury be discharged; which application the judge refused. The complaint to the Court of Appeal was that the trial judge had exercised his discretion wrongly. Lawton, L.J., rendered the judgment of the Court of Appeal, from which we quote:

> "We do not agree. The judge made his own assessment of the impact which Guilfoyle's outburst may have made on the jury. It is our experience that if this kind of casual remark is made and no notice taken of it at the time it tends to be forgotten, particularly when the trial is a long one, and there are a number of defendants. The judge was in a far better position to assess the likelihood of prejudice to Coughlan than this Court is."

When the trial judge in Coughlan's case declined to discharge the jury, he said this: "It was a wholly accidental happening, the reference to a conviction. In fact it was made at such a speed, I could not get it down accurately, because Mr. Russell (leading counsel for the Crown) stepped in so quickly after it was made, that I doubt if anybody could have got it down, apart from the shorthand writer and the matter there passed on with such speed, that I doubt it really impinged with any great force on the minds of the jury, and it seems to me to be wholly wrong at this stage of the trial when such accidental disclosure was made to order a fresh trial before another jury.

With this case may be contrasted Parker (1960) 45 Cr. App. R. 1, which really concerned the admission of hearsay evidence at the trial. At the trial the licensee of the public-house - the scene of the incident which gave rise to the charge against Parker of wounding with intent to cause his wife grievous bodily harm - is reported to have said before he could be stopped: "She came in, her face was all bleeding, and she said, 'He shot me, he said he would.' This remark was not heard by the judge, and it seemed to counsel that the jury probably had not heard it. But at the conclusion of the summing-up, when the jury were about to retire, a juror put a question to the judge which indicated that he had heard the whole of the aforementioned

evidence. The judge did not discharge the jury, but gave them a strong direction that they were not to attach any weight to that evidence of the licensee.

The Lord Chief Justice applying the test laid down by Lord Normand in Lejzor Teper v. R. (1952) A.C. 480 at p. 482), said that the fair test in deciding whether the inadmissible evidence was so prejudicial and so likely to influence the jury that the matter could not be cured by the judge's direction, was whether there was a probability that the improper admission of the evidence had turned the scale against the accused person; that in the present case there was distinct danger that the jury had been influenced by the evidence to that extent and that, therefore, the Court could not apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, but would quash the conviction. In giving the judgment of the Court of Appeal, Lord Parker, C.J., expressed the following opinion at pp. 3 - 4:

> "It seems to the Court perfectly clear that, if the matter had been drawn to the judge's attention when the words were spoken by Mr. Head, he would have been almost bound, in the exercise of his discretion, to discharge the jury and order the prisoner to be retried. The question is whether the matter having been raised at such a late stage, it could be dealt with by means of a direction such as the judge gave. Whether a direction of this sort will in any particular case cure the wrongful admission of evidence must in the opinion of the Court be one of degree. There may be many cases where the inadmissible evidence is of such little weight or is liable to create so little prejudice that it would be right and proper that the matter should be dealt with by a direction to the jury. On the other hand, there are other cases where the inadmissible evidence is so prejudicial and so likely to influence the jury in arriving at their verdict that the Court is reluctantly forced to the conclusion that the matter cannot be left to a direction, but must be dealt with by discharging the jury."

As Lord Parker further pointed out -

> "In the present case the words 'He shot me, he said he would,' are words which it would be almost impossible for the jury to put out of their minds in considering whether this was a case of wounding with intent or malicious wounding." (p. 4)

And this, despite his earlier saying on p. 3 -

> "At the trial his case was that the whole matter was an accident. How he came to have the gun in his hand, how it came to be loaded, how he hit her at forty yards, were all matters negativing accident; but accident was his defence; and he was entitled to have that defence left properly and impartially to the jury."

The inadmissible hearsay evidence in Parker went to the root of the defence. In Coughlan the offending remark was in a context in which the defence started from a plea of autrefois convict. In the one, the circumstances showed clearly that the defence could have been eroded, by the inadvertent prejudicial remark, while in the other there was no obvious possible distortion of the defence.

In the present case, Parnell, J., at p. 112 dealt with the matter in these words:

> "One other matter now and I leave it for your consideration, members of the jury. You will remember when the witness Crinny had given evidence and after he was cross-examined, as I have a right to do, I asked him a few questions and you will remember what the questions were centered around. The prosecution had not given evidence concerning a motive why the friend of Itchie wished to destroy him, so I asked him questions concerning whether he felt that he, the witness was a friend of both accused up to October 6, and he said yes and that is why he could not believe what he saw. I asked him also whether he regarded Itchie, the deceased, Pratt and Morgan as friends up to the day of the incident and he said yes but he volunteered this now 'even Itchie and Pratt shot one of his own friends.' Now what I gather the witness in his innocence was doing and not knowing the law on that point, was trying to stress the fact that so much so he regarded these three men as friends that these two would join together to do harm to another one, but as to the circumstances of the shooting we do not know. Remember, an application was made to me to discharge you at this stage, but I refused for reasons which I have given. It is within the discretion of the judge for two things - first of all whether I discharge the jury or whether in the final summing-up I should make any mention of it. In this case I thought I would make mention of it and this is the point I am making. Do not allow what the witness told you or volunteered that Pratt and Itchie shot one of his own friends, to influence you. What the witness was really doing was stressing a friendship that existed between that man, so far as he could see, with the deceased, up to the very last. It does not follow that because one man would shoot another man, whatever the circumstances that he is going to commit murder. It does not follow, so do not allow that to influence you. But I thought I would mention this development during the trial and keep it to the last so that you can have it uppermost in your minds in considering your verdict. The evidence of this witness is that all four of them, these two, he, the witness and a man now dead were all friends for about three years and moving together all along. He has not given any evidence why these two or three of them wanted to eliminate one of their friends."

We were unable to agree with Mr. Edwards that the way in which the trial judge dealt with the central point at issue was not

adequate. In this case the learned judge strongly advised the jury not to take the remark by the witness, Wallace, into account when considering their verdict. The learned judge gave this caution, thus emphasizing the exercise of his discretion, because even as some of the older cases show, having decided not to discharge the jury, it was for him to decide whether he would refer to it in the summing-up. Had he not dealt with it in the summing-up, it could have been cogently argued that in the light of all the circumstances the learned judge had not taken the proper course. We are of the view that on this ground there was no undue prejudice excited against the appellants by the way in which the judge dealt with the matter. The anathematised statements did not give any additional credence to the evidence of the lone eye-witness. His credit worthiness did not depend on those statements, especially bearing in mind that throughout the summing-up the jury were left in no doubt upon which side lay the burden of proof.

Another matter to which this Court was adverted was the remarks of the learned judge on the unsworn statement by each accused in which each said he had no previous convictions. At p. 107 of the transcript, the judge's remarks in this respect are set out. We quote:

> "Now the other point which has been raised by the defence is - that this is a point of law - and I must confess that I am a little surprised to find that both attorneys believe that an accused who is charged with a criminal offence can prove his good character by making a statement from the dock. First I am hearing this. I am really surprised. I do not know that today I would find an attorney practising in our Court who thinks that that can be done."

He then embarked upon an explanation as to the relevance of character evidence, pointing out the impropriety of the prosecution as part of its case, trying to prove that an accused is a man with a bad character. Then he continued (at p. 108):

> "... but from the background of fairness and humanity an accused man can always urge as part of his defence the fact that he is a man of hitherto good character for the purpose of stengthening the presumption of innocence and for the purpose also of going to the question of credibility if he gives evidence. You see, law is not always logical, but there is a reasoning which says that if a man who gives evidence for instance as a man of hitherto good character the fact that he has a clean record, is one thing that you can take into account because you can say this is a well behaved man, never been before the police before, never been to jail, never tried."

The learned trial judge indicated to the jury that there are three ways in which evidence of the character of an accused person may be given at his trial. Firstly, by cross-examination on his behalf of a witness at the trial, secondly, by the defence calling a witness as to character; thirdly, the accused can by sworn evidence assert his good character. Where any or all of these methods of proving character are used, the Crown, if in such a position, could pursue the matter in an effort to disprove what at first sight appears to be good character.

Parnell, J., continued his directions in the following words (at p. 109):

> "It could be done that way, but then an opportunity would be given to the Crown then and there to challenge it. So then, you cannot raise good character by a naked statement from the dock which cannot be challenged; that is not the law, and, as I said, I am really surprised that at my age and at this stage of our development, I have heard it being done in this Court. As a matter of fact, the law shows it cannot be done. If you look at the Evidence Act of Jamaica, Section 9, Sub-section 3, (sic) [s. 9 (4)(ii)] this shows quite clearly that where a person is charged and called as a witness, he shall not be required to answer - then it goes on -
>
> > 'unless he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establishing his own good character or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution ....'
>
> The law says it there and, what the section has really done is to codify the common law principles and long before the Evidence Act of 1898, which we have copied under there, many years before it was established beyond any doubt, that an accused man who wished to put as part of his defence, his good character, he can only raise it by evidence, not by statement from the dock.
>
> "So my direction to you is that as far as the statement of each accused is concerned, that they were of hitherto good character, has no weight and has nothing to do with it because it has not been done in the proper way. It does not follow that because I ask you to reject it, it means they are of bad character. The point is that I am under no duty to give you the traditional summing-up on that particular issue as to how you are to treat it."

The submission by Mr. Edwards, was that the learned trial judge by the abovequoted directions, had deprived the appellants of the benefit of a piece of information which was a counter-weight to the inadmissible and, prejudicial evidence given by the witness, Wallace. This, despite the judge's caution that "it does not follow that because I ask you to reject it, they are of bad character." In considering this, one should bear in mind that the principal defence of each appellant was an alibi. There was no complaint of the judge's treatment of that defence.

However, the complaint is that the judge's statement of law is wrong, and the accused's unsworn statements about their own good character must be efficacious and taken into account in favour of the appellants. It is noteworthy that the judge directed the jury at p. 113 in general terms on how they should treat the unsworn statements. He said that -

> "..... what they have said in the dock, you are to take into account and treat it and give it such weight as you think it deserves. The only other point that they are trying to raise is that they are men of good character and, I have already told you how to deal with it. There is not sufficient material, it is not evidence about good character by talking in the dock. It is like a man in the dock putting as part of his defence a long document pertaining to the defence and we do not know how he got it and, he wants that to go in evidence, that is not allowed. So what has been done so far as the character part goes, is not allowed and, I will not give you any directions on the point."

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Here these general directions followed the guidelines laid down in DPP v. Leary Walker (1974) 21 WIR 406 P.C. at p. 12, JLR 1369 at p. 1373; and Archibald James Campbell and others (1979) 69 Cr. App. 221, p. 225. In the latter case, the Court of Criminal Appeal assumed that an unsworn statement from the dock as to good character can in appropriate cases be rebutted by the Crown. The trial judge in that case had allowed the Crown to call rebutting evidence to an unsworn statement. The Court of Criminal Appeal in its judgment was of the view that -

> "Supposing that the statement of fact made unsworn from the dock, had represented his sworn evidence, the highest we think that it could be put is that the material available to the prosecution relating to the activities of the other companies with which Campbell

> "had been associated in the past would have been material available for cross-examination, not going to character, but cross-examination going to credit ...."
>
> "We do not see any view on which it could legitimately be said that if any of this matter had been denied, the Crown could then have had evidence in rebuttal on an issue which went to credit and to credit alone."

Interestingly, the judgment, which was delivered by Bridge, J., argued that the evidence from the dock, was not given on oath,

> "so that in that sense, one could say that Campbell's credit as a witness claiming to tell the truth with the sanction of an oath was not before the jury at all. We are, at the end of the day, quite satisfied that the evidence of rebuttal was wrongly admitted and, it was an irregularity, in course of the trial."

The foregoing comments are quoted to show the practical effect of an unsworn statement from the dock. While there, the central point in discussion was rebuttal evidence, it nevertheless is not inappropriate to the present facts. Even if one says that the questioned direction to the jury went too far, it is clear that at the end of it all, the jury still had to decide what weight should be given to the unsworn statement in its entirety.

Accordingly, in all the circumstances of the case, we are of the view that the directions did not operate to the detriment of the appellants.