169

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 176 & 177/80

BEFORE: The Hon. Mr. Justice Zacca, J.A.
The Hon. Mr. Justice Rowe, J.A.
The Hon. Mr. Justice Carey, J.A. (Ag.)

THE QUEEN

v.

LURLINE PRITCHARD
&
MAXINE GLAVE

Mr. Patrick Atkinson & Mr. Lloyd McFarlane for Applicants

Mr. Kent Pantry for the Crown

February 5,6, & March 18, 1981

ROWE J.A.

The Kelvinator Lawn, a dance hall, situate at the corner of Tower Street and Fleet Street in the parish of Kingston, was the scene of a killing on October 7, 1979. At a trial which ran from November 4 - 11, 1980 before Malcolm J. and a jury, both appellants were convicted of murder and at the conclusion of the arguments before us on February 6, 1981 we treated the hearing of the applications as the hearing of the appeal, we dismissed the appeals and as then promised we now put our reasons in writing.

Two young women Maxine Jones and Patricia Anderson testified for the Crown that at about 1.30 a.m. on the fatal morning they were standing together with the deceased Beverley Johnson in the dance Hall at Kelvinator Lawn and the two appellants were standing on the other side of the Lawn. The distance which separated the two groups of women was much in controvesy but the distance pointed out at trial was estimated by the Court to be ten feet. These witnesses

said the deceased was standing with her back to the appellants. Maxine Jones saw the applicant Glave

> "pulled a knife from a wrapped newspaper place it in Dawn's (Pritchard) hand and Dawn rushed down and stab Beverley with it".

Pritchard made other stabbing motions at the deceased but the witnesses intervened by pushing away Pritchard thus giving the deceased the opportunity to run and so escape further injury. Anderson's evidence was to the same import. In addition to handing the knife to the appellant Pritchard, the appellant Glave was seen to whisper something to Pritchard when she handed her the knife and just before she rushed towards the deceased. The injured woman was placed in a motor car and accompanied by the two Crown witnesses was taken to the University Hospital where she was pronounced dead. Her body was then taken to the Gold Street Police Station where a report was made to Sergeant Howell. He observed that on the body was a large wound to the back of the shoulder and on a brief examination of the car he saw blood on the floor and on the back seat of the car. The deceased's body was removed to the morgue. Dr. Clifford performed a post-mortem examination on that body. On external examination he found a 2¾" incised transverse penetrating stab wound to the dorsal or back aspect of the right shoulder at the middle of the right scapular. On dissection he observed that the external wound entered just at the middle aspect of the right scapular, passed unto the right pleural cavity and penetrated the upper lobe of the right lung with a one inch incision. There was gross haemorrhaging in the right pleural cavity with secondary haemothorax. In his opinion death was due to shock and haemorrhage secondary to the stab wound to the back of the thorax. Dr. Clifford deponed at the preliminary examination and was not cross-examined. By the time the trial came along the doctor had left Jamaica and his deposition, after proof of the necessary formalities, was read to the jury.

In the course of his investigations on the night of the fatal stabbing Sgt. Howell received into custody Maxine Glave who was brought to the Station at Gold Street about 3.30 a.m. Maxine Jones at some later time that night alleged in the presence of the applicant Glave to Sgt. Howell that Glave was the person whom she saw with the newspaper parcel, who pulled the long knife from the newspaper, talked to the applicant Pritchard, then gave her the knife whereupon Pritchard ran down on the deceased and used the knife to stab her. The applicant Glave instantly denied the allegation adding that she had not been present at the time of the stabbing.

After Sgt. Howell's brief examination of the motor car which had transported the body of the deceased and the two main prosecution witnesses to Gold Street Police Station, the car was left parked on the street with the doors closed but the windows down and without anyone guarding it. Someone gave Sgt. Howell some information and as a consequence he returned to the car and saw on the left side of the dashboard two knives looking like kitchen knives the handles of which were smeared with what appeared to be blood. He showed these knives to Maxine Jones apparently in an effort to identify one or other of them as the weapon which had been used to injure the deceased. Neither knife was identified.

Early on the following morning, at about 6.30 a.m. the applicant Pritchard came to Gold Street Police Station and spoke to Sergeant Howell. She said, "Sergeant is me you looking for, is I kill Beverley." Sgt. Howell stopped her cautioned her and asked her what she really meant. The applicant Pritchard said, "Is I kill, is I stab Beverley at the dance at Kelvinator Lawn and she dead and I hear you come at me yard ah look fe me." Later that morning the applicant Pritchard was arrested and charged with the murder of Beverley Johnson. Upon caution she asked to be permitted to see her son. On the following day Glave was arrested on a similar charge. On caution she said "I was not there."

Both applicants gave evidence in their own defence. Pritchard related how she had gone to a dance at Success Club on the night of Saturday October 6, and how she and the deceased quarrelled and had a fist fight from which she emerged the victor. The deceased threatened her saying, "wait until the next time when me and Maxine see you." The opportunity presented itself the very next night when the two applicants together with their friends Joy and Doreen went to a dance at Kelvinator Lawn. Pritchard said Glave did not remain at the dance as her 'baby-father' came to the dance quarrelled with her and Glave left with him and did not return. According to Pritchard at about 1.30 a.m. while she was in the dance she saw the deceased, the two principal crown witnesses and 2 other girls enter the dance. The deceased approached her and tried to grab her dress. Pritchard pushed her away and then the deceased drew a knife from underneath her dress while Maxine Jones drew a knife from her bossom. As the two armed women approached her she turned and rushed away from them in search of some weapon with which to defend herself. As fortune would have it, there was a man standing with his back to her who had a knife wrapped in paper in his pocket. Pritchard said she grabbed this knife and turned to face her attackers. Maxine Jones said to the deceased "Rush her now Beverley" and Beverley rushed in and stabbed at her twice, missing on both occasions as she Pritchard leaned away out of the reach of the knife. The deceased partly lost her balance after making the second stabbing motion and while the deceased was bent forward, she Pritchard gave one stab which caught the deceased in her back. People crowded around the injured woman and so she made her way to her mother's home. Pritchard told of being awakened early the next morning and as a result of what she was told she went to the Police Station and saw the Sergeant around his desk and after they had exchanged "good mornings" she said "I say I hear you looking for me for murder of Beverley".

"Q. He said anything to you?

A. No, he didn't say anything and then I say, "is me stab her fe true"

Q. And then what him say to you?

A. Him never say anything, he said I mustn't say anything more."

She admitted that when she was arrested and cautioned she asked to be allowed to see her son.

The applicant Maxine Glave said she had gone to the dance at Kelvinator Lawn at about 10 p.m. on the Sunday night. An hour later her 'baby-father,' Norman Stewart, came to her saying that the baby was awake. She left with him to her house at 28 Foster Lane and did not return to Kelvinator Lawn on that night. She knew nothing whatever about the stabbing incident. Maxine Jones was not her friend as they had had a quarrel a long time ago although she could not remember what the quarrel was about.

Mr. Atkinson argued nine of the ten grounds contained in the supplementary grounds of appeal. The first ground complained:

> "That the learned trial judge failed to direct the jury adequately or at all as to important evidence which arose in the case which was in support of the Defence - viz. the Deposition of the Doctor who described the single injury to the deceased as "transverse" and which therefore accorded with the Defence and fundamentally contradicted the Prosecution's Case."

The location of the wound on the deceased assumed some importance having regard to the defence of Pritchard. A careful perusal of the Record does not disclose any positive evidence by the prosecution witnesses as to the angle or direction of the stab-wound which they say the applicant Pritchard delivered. Maxine Jones demonstrated how Pritchard held the knife but this demonstration was not translated into words. In his summing-up the learned trial judge reminded the jury that Mr. Atkinson for the defence was saying that the infliction of a transverse wound was more consistent with the applicant's defence

than with the prosecution's case. On page 211 of the Record the learned trial judge is quoted as saying:

> "I have already commented on Mr. Atkinson's submission to you about transverse; that transverse is more across, it means across; and that what the Crown is saying is that the stab wound was down. He mentioned it to you, brought the dictionary, read it to you; it's for you to say whether you pay any attention to his submissions, whether you agree with him, whether you attach any weight to it or not."

It would make for greater clarity if the learned trial judge in his summation differentiated between what is evidence and what is comment on that evidence. Quite apart from Mr. Atkinson's submissions that the word "transverse" means across, the evidence is that a transverse wound was inflicted upon the deceased. "Transverse" not being a word in common usage, Mr. Atkinson was right in pointing out to the jury the meaning of the word and as to this the jury ought not to be invited to accept or reject the meaning of the word transverse. The punctuation in the passage quoted is not the judge's - it is that of the shorthand-writer. When the judge used the words "It means across" it seems only reasonable that he was there giving the jury the benefit of a direction, agreeing with Mr. Atkinson that "transverse" means across.

The jury saw the demonstration given by Maxine Jones, they listened to the address and in a very summary way the learned trial judge reminded them of Mr. Atkinson's interpretation of those gestures. We do not consider that there was any non-direction here amounting to a grave misdirection as was argued for on behalf of the applicants.

Ground 2 may be summarized thus. The presence of the two blood-stained knives in the car which transported the deceased to the Police Station supported the defence, contradicted and embarrassed the prosecution and the learned trial judge failed to adequately relate that evidence to the issues in the case. We were quite unable

to see the basis of Mr. Atkinson's complaints with regard to the learned trial judge's treatment of this piece of evidence. He reminded the jury of the curious circumstances in which the knives were discovered. They were plainly in view on the dash-board of the motor car but had not been seen by the Police Sergeant when he made his first observation of the motor car. Having regard to the submissions of counsel in the case, the learned trial judge invited the jury to say whether they considered the knives as mere red-herrings or that they indicated that other knives were on the scene that night. After reviewing the cross-examination of the prosecution witnesses as to their alleged possession of knives in the dance hall, the learned trial judge said:

> "And no doubt the defence is saying to you that the knives got into the car because they were the knives used in this fracas earlier on between the deceased and the accused and Maxine Jones."

From that final comment on that issue to the jury, it seems to us that he had adequately drawn the jury's attention to the reasonable inferences which they could draw, having regard to all the other evidence from the undoubted presence of the two blood-stained knives in the car in the course of that night of tragedy.

The facts which gave rise to the complaint contained in Ground 3 arose out of the prosecution's attempt to read to the jury the deposition of Dr. Clifford which was taken at the Preliminary Examination by the Resident Magistrate at the Sutton Street Resident Magistrate's Court. Dr. Clifford had since left the Island and the Clerk of the Courts, Mr. Robin Smith, was called as a witness to identify Dr. Clifford's deposition and to testify to the circumstances under which it was taken so as to bring it within the provisions of Section 34 of the Justices of the Peace Jurisdiction Act. When Mr. Smith had finished his evidence in chief, Mr. Atkinson was asked if he wished to cross-examine. He said, "I intend to cross-examine

but not necessarily limited to this aspect of the deposition." The learned trial judge then and there gave his consent for the deposition to be read, but Crown Counsel thought this had better be done at the close of the cross-examination.

Mr. Atkinson embarked upon his cross-examination. He asked preliminary questions to establish that Maxine Jones and Patricia Anderson, the principal crown witnesses had testified before the Resident Magistrate under exactly the same procedure as Dr. Clifford. Then he asked:

"Q. At this preliminary enquiry distances were pointed out and estimated?"

"Crown Attorney: Objection."

Crown Counsel argued that Mr. Smith was called for the sole purpose of satisfying the conditions of Section 34 of the Justices of the Peace Jurisdiction Act and consequently the form of oath administered to him was as to "True Answers". Mr. Atkinson agreed that the witness had attested to "True Answers" but in rebuttal said that he had the right to cross-examine him on anything material to the case of which he had knowledge.

The learned trial judge's ruling consisted of one cryptic sentence: "So I think we will stop here".

At common law it is permissible for a witness who simply wishes to produce a document pursuant to a subpoena duces tecum to be allowed to do so without being sworn if there is another witness who can identify that document. Cross on Evidence - 3rd Edition 161 - Perry vs. Gibson (1834) 1 Ad. & El. 48. In the instant case Mr. Smith was called to do much more and indeed he did much more. He identified the deposition and he supplied the evidence that the statutory conditions had been complied with. The form of True Answer Oath in use in the Court in which this case was tried is as under.

"I swear by Almighty God that I will True Answers make to all such questions as this Court shall demand of me."

This form is in all respects similar to the form of oath on the voire dire used both in England and in Jamaica. This form of oath is entirely suitable when the exercise is to determine the competency of a juror who has been challenged for cause - Archbold, 37th Ed. at para 520n. or the competency of a witness to give evidence Archbold 37th Ed. para 1284.

Every member of the Court is familiar with the form of oath regularly in use in the Circuit Court of the Island. It differs in particulars from that quoted above. However, we agree with Mr. Atkinson that for the purpose of the Oaths Act, Mr. Smith gave his evidence on oath. Section 3 (1) of the Oaths Act prescribes:

> "Any oath may be administered and taken in the form and manner following, that is to say, the person taking the oath shall hold the Bible in his uplifted hand and shall say or repeat after the officer administering the oath the words - "I swear by Almighty God that .....followed by the words of the oath prescribed by law."

Sections 7 -10 of the Oaths Act set out the forms of the Oath of Allegiance, Official Oath, Judicial Oath, and Oath of Privy Councillor. The forms of the Oaths for the Governor General and Ministers of Government are scheduled to the Constitution.

The important words of the Oath "I swear by Almighty God" were in fact used by Mr. Smith. In future, a person called as a witness for the purposes of Section 34 of the Justices of the Peace Jurisdiction Act should not be sworn on the voire dire; they ought to be sworn in the regular way as a witness whose competence to testify is not in doubt.

It follows then that Mr. Atkinson was wrongly prevented from cross examining Mr. Smith. As the only material question put by Mr. Atkinson to Mr. Smith indicated, Mr. Atkinson wished to challenge the veracity of the two crown witnesses who had pointed out certain distances in the court before the jury as the distance which separated the applicants from the deceased when they saw the applicant

Pritchard accept the knife proferred by the applicant Glave. That was the distance which Pritchard on their evidence had to cover to get to the deceased. These witnesses did not cry a warning to the deceased. The argument for the defence was that the distance pointed out by Maxine Jones at the Preliminary Examination was estimated by the Court with the approval of the counsel in attendance at 15 feet while the distance pointed out by the same witness at trial was no more than 10 feet. Maxine Jones under cross-examination maintained that at the Preliminary Examination she did not give a distance in feet or yards. She pointed out a distance which a policeman measured and the figures which appeared in the deposition were those supplied by the policeman. When she was shown her deposition she had no quarrel with what it contained but she maintained that the distance she pointed out at the Preliminary Examination was similar to that which she pointed out in the trial court.

Patricia Anderson when cross-examined as to the distance which she pointed out at the Preliminary Examination said:-

> "I didn't say six yards, you know, I estimate a way and show them in the court house, I didn't say six yards, how much feet or nothing, I just show them a distance."

Mr. Atkinson did not consider it prudent to tender the depositions of either witness to discredit her. If he did this he would have nothing to lose as the present practice in the Circuit Court is that defence counsel does not lose his right to the final speech to the jury merely by introducing into evidence depositions to contradict prosecution witnesses.

During his cross-examination of the witnesses Jones and Anderson, Mr. Atkinson was quite unable to pin point any particular place in the court room at Sutton Street to which either witness had pointed. He had no marks on earth on which to mount his challenge. What assistance could he have gained from Mr. Smith as to the actual distances pointed out by these witnesses that would be more probative than the depositions? What more could Mr. Smith say than to agree

with Mr. Atkinson that if the Resident Magistarte wrote down an estimated distance and was not corrected by the witness that that distance would in all probability be a fair reliable estimate. This is how the learned trial judge dealt with the issue before the jury:-

> "Then we had cross-examination about distances and it was suggested to her that it was less than 15 feet. She admitted giving evidence at the preliminary enquiry and she said it was a police who estimated the distance at Sutton Street, and defence Counsel had comments to make on this aspect of the matter, that if she had pointed out some other distance it was hardly likely that learned judge who was conducting the preliminary enquiry, Clerk of the Courts, Attorney-at-law all those knowledgeable people would agree on a distance which turns out to be something different when she comes here -- She said she pointed out the distance and it was agreed; and she said it was not true that the distance she pointed out at Sutton Street was twice the distance pointed out in this Court, and of course the significance of this was shown to you and it is quite obvious and apparent, because it had been the subject of comment by defence counsel. You are standing, you see a knife being passed to another person, you know that there was a fight the night before, you see somebody with a knife coming to attack your friend and you don't say a solitary word but possibly you don't even draw her out of the way. You will have to determine whether that is how people react."

Insofar as evidence was available on the issue of what was contained in the depositions as contrasted with the evidence at trial, we are of the view that the learned trial judge's directions to the jury were fair and adequate. Our concern is as to what extent his failure to permit the Attorney for the defence to cross-examine Mr. Smith can be said to affect the verdict. We are guided by the principle recognized by this Court in R. v. Peter Blake S.C.C.A. 122/76 - Judgment delivered on 21/10/77 (unreported). Blake was convicted before White J. in the High Court Division of the Gun Court for illegal possession of a firearm and ammunition. During the cross-examination of the principal witness for the crown, the arresting police officer, defence counsel

placed in his hands a newspaper clipping and endeavoured to ask him some questions on the clipping. The learned trial judge did not permit him to to do. The Court of Appeal examined that newspaper clipping and at page 13 of the unreported judgment Watkins J.A. said:-

> "The alleged contents of the newspaper clipping are referred to because it is necessary to observe that they leave uncertain what was the locale of the incident and as to whether this was indeed a report on the incident in the instant case. Whatever may be the truthfulness or otherwise of this newspaper clipping there can be little doubt that the denial of counsel of his right to solicit answers from the witness on it as it was put into his hand deprived his client of the right to a fair trial of his case, however, unintentional and mistaken or misled the court was. It is neither necessary nor desirable to speculate what answers would have been elicited from the witness. It is enough to say that the court deprived itself of a vehicle of testing the credit of the witness on an issue in the case on the outcome of which the guilt or innocence of the appellant largely depended.
>
> Taking all these matters into consideration - in particular the hopeless and inexplicable inconsistency in the arresting Constable's version as to the movements of the appellant - several chains away from the intersection of Lyndhurst and Elgin Roads when he is shot, yet he runs another 5 or 6 yards further away from that intersection and falls in it - we experienced no hesitation in coming to the view that if the Court below had properly advised itself of the facts it could not have found that the case for the Crown had not been established beyond reasonable doubt."

We do not think that the answers which could properly have been obtained from Mr. Smith could have any dramatic effect upon the evidence given by the two alleged eye-witnesses and we cannot say that in the circumstances of this case the refusal to permit cross-examination deprived the applicants of the right of a fair trial of their case.

Mr. Atkinson argued grounds 4, 10 (a) and 10 (b) together:

> "4. That the Learned Trial Judge in failing to direct the jury not to treat a statement of the applicant Pritchard as a Confession or admission, having regard to the Defence of self-defence amounted to a mis-direction to the prejudice of your appellant.
>
> 10 (a) That the Learned Trial Judge was wrong in law to allow in evidence applicant Pritchard's response to a question by the arresting officer without the proper caution being administered.
>
> (b) That the Learned Trial Judge was wrong in law to allow, (and to endorse) counsel for the Crown to address the jury adversely on the applicant Pritchard's silence after caution."

During his closing speech to the jury, counsel for the Crown in inviting the jury to reject Pritchard's defence of self-defence argued that if it were a genuine defence one would have expected her to have given some hint of it to the Sergeant when she told him that she it was who had stabbed Beverley. Mr. Atkinson objected to this line of address on the ground that Pritchard was entitled to remain silent when she went to the police station and more especially after having been cautioned. The learned trial judge permitted Crown Counsel to continue his comments and when he came to sum up told the jury that he found no impriority in those comments.

Before us Mr. Atkinson submitted that it was a serious error for Crown Counsel to comment adversely on or to invite the jury to find adversely to an accused person owing the fact that he remained silent on any element on which he relies for his defence at the time of his arrest and caution. He submitted that the right to remain silent incorporates the situation where the accused makes some statement but is silent on some element which he subsequently advances at a trial in his defence. This would in his view include the instant case where the accused admitted causing the death but was silent as to the circumstances. In support of these propositions of law he relied upon:

R. v. Naylor (1932) 23 Cr. App. R. 177

R. v. Whitehead (1930) 21 Cr. App. R. 23

R. v. Chavavanmuttu (1930) 22 Cr. App. R 1

R. v. Hoare (1956) 50 Cr. App. R. 166

R. v. Ryan (1964) 50 Cr. App. R. 144

R. v. Gilbert (1978) 66 Cr. App. R. 237

At the preliminary examination in Naylor's case, after the close of the evidence for the prosecution, the statutory caution was read to him and he replied:

> "I dont wish to say anything except that I am innocent."

He was committed for trial and during his summing-up, the learned Recorder commented at length on the failure of Naylor to have given an explanation to the magistrate after he was cautioned. The Recorder ended his adverse comments with words which Lord Hewart Lord Chief Justice termed remarkable:-

> "Of course what lurks in the background of this sort of hanging back, and not disclosing his defence is this, that he gives the prosecution and the police no time to inquire into any statement he may make, so that it might be possible to show that these statements are not true. That is the real reason why many men dont make statements when they are first called upon to do so, why they don't wish to do."

In our respectful view the Court of Criminal Appeal quite correctly held that the words of the caution, "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence upon your trial," mean exactly what they say, and that a person is quite entitled to remain silent and not to disclose his defence. But in our view the facts in Naylor's case are entirely different from those in the instant case.

Ryan's case was decided in the Court of Criminal Appeal in March 1964. That appellant, a railway servant, was seen at 12.50 a.m. on a September morning removing 144 minature bottles of gin from a railway wagon. At no stage before trial did he give an explanation as to his possession of the gin or as to the circumstances described by the police as to what they saw and heard in connection with the removal of the gin. The trial judge in very strong language commented adversely on the failure of the appellant to offer an explanation. After reviewing several cases including Naylor's, Melford Stephenson J. said:-

> "It is, we think, clear as a result of those authorities that it is wrong to say to a jury "Because the accused exercised what is undoubtedly his right, the priviledge of remaining silent, you may draw an inference of guilt;" It is quite a different matter to say, "This accused as he was entitled to do, has not advanced at an earlier stage the explanation which has been offered to you today; you the jury, may take that into account when you are assessing the weight that you think it right to attribute to the explanation."

In the view of this Court, there is a clear dividing line between those two courses....."

Viscount Dilhorne in his speech in the House of Lords in Gilbert's case supra - at p. 244 in relation to the passage quoted above said:-

> "We have to confess that we are unable to perceive that that is the case. The second of the statement quoted seems to us an invitation to the jury to draw an inference adverse to the accused on account of his exercise of his right of silence though in a more oblique fashion than in Davis (1959) 43 Cr. App. R 215".

Hoare's case, too, was considered by the House of Lords in Gilbert, supra. In Hoare's case, Lord Chief Justice Parker, approved of the dictum of Humpherys J. in Gerard (1948) 32 Cr. App. R. 132 when that learned Judge said:-

> "It could be a misdirection only if it was an invitation to the jury to form an adverse opinion against the applicant because he did not then given an explanation.....we have been referred to a number of cases some of which fall on one side of the line and some on the other, but here in this case the court feels that undoubtedly this was making a comment about the prisoner which was inconsistent with his innocence. The expression:
> "Can you imagine an innocent man doing this? is not a mere comment on the fact that perhaps it was unfortunate he did not give an answer, but is really saying "Do you as a jury of people of common-sense really think that a man can be innocent if he makes no reply in those circumstances."

Gilbert's case reached the House of Lords. He was convicted of murder. Following upon his arrest, Gilbert had agreed to give a statement to the Police and actually commenced to do so. He had a change of heart and refused to complete the statement. The first time he advanced the defence of self-defence was at trial. The learned trial judge commented:

> "Bear in mind we have heard of this matter of self defence for the first time. Ask yourselves the question, if it is the real explanation of what happened, do you or do you not think it remarkable that when making the statement, the accused says nothing whatever about it. That may help you applying your commonsense to [illegible] the substance of the matter of self-defence which he has now gone into in some detail in the witness box."

The House of Lords held that the judge in asking the jury to consider whether it was remarkable that, when making his statement to the police the accused said nothing about self-defence fell into error and misdirected them. They nevertheless applied the proviso and dismissed the appeal.

It seems to us that this result was inevitable on the facts of that case, as it was clear that Gilbert had not completed his statement to the Police. The guidance which the House of Lords offered at p. 244 of the Reports appears somewhat tentative. Viscount Delhorne said:-

> "We regard the present position as unsatisfactory. In our view it may not be a misdirection to say simply, "This defence was first put forward at this Trial" or words to that effect, but if more is said, it may give rise to the inference that a jury is being invited to disregard the defence put forward because the accused exercised his right of silence in which case a conviction will be placed in jeopardy.
>
> It is not within our competence sitting in this Court to change the law. We cannot over-rule the decisions to which we have referred."

Later Viscount Dilhorne said:-

> "A judge is entitled to comment on his failure to give evidence. As the law now stands, he must not comment adversely on the accused's failure to make a statement."

It seems to us, however, that if the trial judge can point out to the jury that the defence offered at trial is being put forward for the first time that indeed is adverse comment but of the milder form falling on the side of that which is permissible as explained by Humphery's J. in Gerard's case, supra. Crown Counsel's comments to the jury in his final address appear to us to fall on the permissible side.

Be that as it may, this is not a case of silence simpliciter. This is a case in which without any prompting from the police the applicant Pritchard gave a statement and after caution expanded upon that same statement. We are of the view that Counsel for the prosecution was entitled to explore with the jury the probable meaning and import of that statement and in that exercise if he drew to the attention of the jury the fact that the statement is as eloquent in what it said as in what it did not say, that such comment is permissible.

In his directions to the jury the learned trial judge made no comment of his own as to the failure of the appellant Pritchard to disclose the defence of self-defence. He did no more than to remind the jury in the briefest of passages of the view expressed by the

Crown without endorsing them in any way.

We found no merit in Ground 10 (b).

The learned trial judge did not direct the jury to treat the remarks made by the applicant Pritchard to the police as a confession of murder. He merely left the statement to them to determine what weight they would ascribe to that piece of evidence. Sergeant Howell acted in a most proper and professional way to caution Pritchard when that applicant began to make admissions to him and his single question to her after the caution - "What do you really mean?" did not in our view in the circumstances constitute any breach of the Judges Rules. We therefore found no merit in Ground 4 or 10 (a).

Once the jury believed the evidence of Maxine Jones and Patricia Anderson there was abundant evidence on which they could find both applicants guilty of murder.

For these reasons we did not find it necessary to call upon the Crown to answer. We treated the hearing of the application as the hearing of the appeal and we dismissed the appeal.