418

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS.: 22, 23 & 24/80

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE ROSS, J.A.

R. v. BEVERLY CHAMPAGNIE
RANSFORD TAYLOR
TREVOR BAILEY

Mr. Berthan Macaulay, Q.C. and Mrs. Macaulay for Champagnie

Mr. Dennis Daly for Taylor

Mrs. Pamela Benka-Coker for Bailey

Mr. Howard Cooke Jnr. for the Crown

February 1,2,3,4,7,8,9,10,11 & July 29 - September 30, 1983

Kerr J.A.:

On the night of Thursday July 27, 1978, businessman James Robinson and retired Superintendent of Police, Winston Cox were shot dead as they stood conversing within the gateway of the popular "J.J." Club on Holborn Road, St. Andrew. For these killings at a trial in the Home Circuit Division of the Gun Court before Parnell J., and a jury, Taylor and Bailey were jointly charged and convicted for the murders of Robinson and Cox and Champagnie for accessory before the fact to the murder of Robinson. All three accused were sentenced to death.

Their applications for leave to appeal from the convictions included grounds of appeal on questions of law and accordingly the hearing of the applications was treated as the hearing of the appeals which were dismissed and the convictions and sentences affirmed.

The deceased Robinson up to the time of his death was Manager of Robinson's Furnishing Company. The company's principal place of business was at Beeston Street, Kingston, but there were branches in the country. Champagnie was the secretary but she actively assisted Robinson in running the business. For some time before his death, he had been estranged from his wife Pearl, and Champagnie had been elevated to be his paramour and lived with him at his St. Andrew Beverly Hills home at No.9 Shenstone Drive

It was the prosecution's case that their relationship had deteriorated considerably, due, in the main, to Robinson's blatant infidelity with other women and his scornful treatment of Champagnie which led her to procure Taylor to kill Robinson. Taylor recruited Bailey to assist. The killing of Cox who unfortunately was in the company of Robinson at the tragic moment, was apparently a spontaneous incidental.

The defence in general was broad denials by all three appellants of these allegations and challenges by way of rigorous cross-examination of the credit of the chief witnesses for the prosecution.

The principal witness as to procurement was Eustace White and having regard to the arguments advanced as to his credit and the credibility of his evidence, it is necessary to review in some detail his evidence. He had been employed to the company as a furniture repairer for twelve years but for the last two years his duties included accompanying Champagnie on her visits to the branch shops and he took orders, often directly from her, According to White, on a return journey from a branch shop at Lionel Town in July 1978, with Champagnie who was driving the motor vehicle, she asked if he knew anyone "who could fire a gun". He replied that he personally did not know of any such person but he could ask one Charley. Some days after, in premises at the corner of Beeston and Charles Street Kingston, he spoke with Charley, who called to Taylor across the street. Taylor came and was introduced as "Star". He reported back to Champagnie and a rendezvous at Paradise Street off the Windward

Road was arranged through White for later that Wednesday - a half working day.

After closing time, White accompanied Champagnie to the rendezvous where Charley and appellant Taylor were waiting. In Champagnie's car all 4 drove to Paradise Beach where Champagnie gave White $10 to entertain Charley and leaving Champagnie and Taylor in the car, White and Charley went to a bar some 2½ chains away. There White spent the $10 on drinks of white-rum for Charley and himself. They then returned to the car where Champagnie spoke with Charley out of ear-shot. The party then returned to Windward Road where Charley and Taylor alighted, and Champagnie drove him home. This house in which he was living was Champagnie's; he paid no rent, being a sort of caretaker.

The following Tuesday, Champagnie asked him if he knew anyone with a driver's licence who could rent a car for her. He suggested Gladstone Riddell, one of the company's drivers. Riddell gave evidence of being asked by Champagnie on Thursday July 26, to rent a car for her as her car was going to the garage and she needed a car to take her mother to Westmoreland the Sunday following. He made unsuccessful efforts to rent one, and on reporting to Champagnie, she told him he should leave his home address as she would make telephone enquiries.

Later that day, she informed him that she got a car to rent from Coxe's Rent-a-Car on Mountain View Avenue and gave him $400 to cover the rental. In Champagnie's car, according to both White and Riddell, she drove them to Mountain View Avenue. Patricia Dougall, the clerk at Coxe's Rent-a-Car, gave evidence corroborating Riddell that he attended there and entered into a contract for the hireage of a white Datsun, which was delivered to him. She gave the contract price as $480 paid by him for one week's hireage. Dougall said that earlier that day a lady had telephoned about the rental. Deparis Campbell, manager of a store owned by deceased Robinson and trading as Broadway Furnishing Company, in evidence said that that Wednesday Champagnie had asked him to say, that if anyone telephoned about the driver Gladstone Riddell, he should say he knew him for about 3 years. He agreed, for in fact he knew him

2-3 years, but no one enquired.

Riddell, when he drove out of Coxe's said he did not see Champagnie. According to White, she had driven further on the road to visit her mother. Champagnie and Riddell eventually met on Mountain View, and both cars were driven to White's home. There, according to both White and Riddell, they all went into the Datsun with Champagnie driving. They went easterly on Windward Road, where, in the vicinity of the Vauxhall School, Champagnie gave Riddell taxi fare to get him home - $4 according to White, $2 according to Riddell. White said he and Champagnie then drove to Paradise Beach. Taylor was there. He took over the driving and drove to Windward Road where he and Champagnie left the car and took a taxi to his, White's home, where Champagnie took her car and departed.

On the fateful night, White was at home about 8 p.m., when, in response to the blowing of a car horn, he went to his gate. There he saw the white Datsun with Taylor driving, and beside him in the front seat, the appellant Bailey, whom he knew before, having seen him on several occasions on Beeston Street.

At Taylor's invitation, he entered the car. Taylor asked, "where Robinson drink, if it is "Jo Jo" or ".J.J."? and he replied "J.J." Taylor then produced two guns, and on Bailey's advice, they left him. Later that night, he heard a radio news flash of the shooting at "J.J." He then set out for the Libra Club which was nearby and which was operated by Evelyn Rose. En route, a white taxicab came around the corner. The passengers were the appellants Taylor and Bailey. Taylor told him to tell Miss Champagnie that he saw the man and everything is alright. The taxi drove off and he went to Libra Club, where he had a drink before returning home.

Cynthia Simmonds that night was sitting on a wall by the front gate of the Kingswood Apartments. The Kingswood Apartments are on the left of Holborn Road coming from Trafalgar Road and are opposite the 'J.J.' Club. In evidence, she said that while there, she saw a Volvo motor car driven and parked in a

parking lot, opposite the club.

In it, were a man and a lady. The man described by her as a tall fair man, was the deceased Cox, who came from the car and entered the club. The lady in the car was Marjorie Chung, who, in evidence said Cox had gone in the club to buy cigarettes. Simmonds said shortly after a big white car came along and was parked beside the Volvo and from it, came the deceased, Robinson, described by her as a 'short dark man', who walked across to the club. She then saw him on the verandah talking to Cox. They walked together towards the gate and stood talking within the gate-way. A white Datsun drove up from the direction of Trafalgar Road and stopped in the middle of the street. Two men alighted and went up to the two deceased and appeared to be touching and talking to the two deceased. Then she heard from there an explosion, and saw what looked like blood coming from the head of Cox, then another explosion. She then jumped over the wall and ran to the watchman at the apartments. She returned shortly after to the club and saw both deceased lying on the ground. The white Datsun and its occupants were gone. The police arrived and she spoke with them. On September 8, she attended an identification parade, where she identified appellant Bailey as the one who came out of the Datsun on the side nearer to her and as the man who shot Cox. She had seen him clearly as he went towards the club with something shiny in his hand. From her evidence, as well as that of Police Constable Delroy Foster and Detective Superintendent Richards, the area was well lit by streetlights, lights on the gate posts and lights from the club building.

Further evidence of the post-mortem activities of the appellants was relevant. According to the witness White, Champagnie and a number of fellow workers, including Riddell, came to his home later that night. He went with them to the home of Mrs. Lopez the mother of the deceased Robinson, and thence to Robinson's home, arriving there in the early hours of the morning.

At Champagnie's instructions, and with the concurrence of Mrs. Lopez, the workers started removing furniture from the house apparently to forestall the widow Pearl. The police arrived and

on their instructions the furniture was returned. From there Champagnie, Mrs. Lopez and White went to the store at Beeston Street. There Champagnie took away money and jewellery from the safe and placed them in grips. Later, at Lopez's home, some jewellery and money were placed in a bag and left with him. The scene shifted to the Libra Club on the Saturday following, with Champagnie, Rose and White. There Champagnie complained that the widow Pearl, had turned her out the house and, at her request, Rose took her to an apartment at Golden Road. Then on the Monday morning, Taylor, driving the white Datsun, accompanied by Bailey and a "strange man", came to White's home. Taylor told him to tell Champagnie, he could be found at Paradise Beach. After they left, Rose came along, and he and Rose went to Champagnie at Golden Road. There, according to Rose and White she gave White $3000 with instructions to deliver same to Taylor. With Rose driving his van, White went to Paradise Beach and delivered the money to Taylor who was sitting in the white Datsun. Introduced in cross-examination, both gave evidence of accompanying Champagnie on visits to an obeah-man. Both denied that they took Champagnie on visits to the obeah-man.

In cross-examination, White said it was after Robinson's death that he put 2 and 2 together and felt that he was in some way responsible for his death, and on August 7, he went to the police a Mr. Hutchinson. He had spoken before, but to Detective Richards when he made enquiries about the jewellery, but he did not report his conclusion, because he did not know him enough to confide in him. Further injudicious cross-examination elicited, that after the death of Robinson, Champagnie had told Rose and himself while on a journey from the country that Taylor was her new boyfriend. In every detail, Rose's evidence of this disclosure was similar to White's. Rose had been introduced to Champagnie about April 1978, by White and both had become friends and business associates. He operated the R & E Furniture Company on premises adjacent to his club, and from time to time, she would consign to him items of furniture to sell on her bahalf. Because her prices were low, he bought some for himself. He denied in cross-examination ever

registering any shop of Champagnie in his name, or having any quarrel with her about so doing. He gave evidence of White's visit to his club on the night of the murders about midnight, and of putting up Champagnie when Pearl turned her out. She occupied a room upstairs his club. While there, on the Saturday following, about 7 p.m., "Charley" and one Clovis visited her. About 5-10 minutes later, he heard indecent language coming from her room. He went up there. She asked him to lend her $6000. As he did not have so much money, he offered a cheque but this was refused by one of the men. Champagnie then gave each $500. They left, one promising to return for the balance on Wednesday. Rose said he enquired for what purpose she was paying the men. She then told him that those were the men who introduced to her the gunmen who killed Cox and Robinson. She then told him of Robinson's changed attitude to her - his curt announcement of going to Miami some weeks before, of his children not greeting her in the usual manner because Robinson forbade them to do so, of his bringing home other women and turning her off the bed so that they could sleep with him, of telling her to leave the home as his son was coming to live with him, of his threatening to kill her and that, as she believed he would, she took the first chance. It was after this disclosure, he took her to Golden Road. Rose's next assignment was to return the white Datsun.

Champagnie told him that there was a car parked on Lyndhurst Road to be returned to Coxe's Rent-a-Car, and that the key was under the floor mat on the driver's side. On her advice, accompanied by White, and using Granville Simpson who had driven them to the obeahman, and whose evidence corroborated Rose on this aspect of the case, he drove to Lyndhurst Road where he found the white Datsun and the key under the floor mat as Champagnie had described. Simpson drove the car to Mountain View and according to Simpson as the gate of Coxe's Rent-a-Car was closed, he parked it outside, and delivered the key to Rose, who later gave it to Riddell. Riddell subsequently returned the key to Coxe's.

Rose said that on the following Wednesday, while he, White and Champagnie were at the house at Somerset Avenue, as had been promised, Charley and Clovis returned. At Champagnie's

request, he took them to "a club that was dark" - Champion House - at the corner of Lyndhurst Road and Maxfield Avenue. There they demanded money and on the faith of Champagnie's promise to pay, Charley and Clovis were each given $250 leaving a balance of $2,500. The following Monday he was present when Champagnie handed over certain items of jewellery to Superintendent Richards, retaining for herself certain personal items, which she claimed. Subsequently, on the Sunday morning, Champagnie brought Taylor to him -Champagnie made the introductions, and at her request, Taylor told him of going to the club and when he asked who had a gun Cox held up his hands but Robinson reached for his gun at his waist. He Taylor, boxed away his hand and shot him, while his friend shot Cox. As Rebinson did not appear dead, he shot him again.

Subsequently, he Rose, assisted in moving Champagnie and Taylor who was there living with her to 25 Wiltshire Avenue, Barbican, where Inspector Wilbert Neysmith said he saw them when he visited there at 2.20 p.m. on September 8. He also assisted Champagnie in the purchase of a Benz motor car. The car was actually purchased in his name. He provided the down-payment of $400. Champagnie gave him the rest of the money.

From the evidence of Rose, White and Mrs. Lopez, on 11th August, money to the credit of the deceased Robinson amounting to $36,200 was drawn from 2 accounts. One account was in Robinson's name and the other in the joint names of Mrs. Lopez and Robinson. Mrs. Lopez drew the money but Champagnie who was with her took charge of the money and gave $1000 to Mrs. Lopez and $200 to White according to Mrs. Lopez.

The scene shifts to the office of Clive Anderson who ran the business of "advice on Travel documents and documentary Service". In his evidence, he said that on 6th September 1978, Champagnie attended at his office at 66 Duke Street, Kingston, and told him she would like a sponsor for herself and her boyfriend for the U.S.A. and that her boyfriend would join her shortly. Taylor duly turned up. Champagnie told him she had previously applied to the U.S. Embassy for a visa but her application was refused. Anderson wrote down on foolscap certain particulars

which she gave orally or were obtained from her passport. She signed the list of particulars. The same procedure was followed in the case of Taylor. The form of particulars, Taylor's birth certificate and photograph were tendered in evidence. Champagnie paid $400 on account and the following day the balance of $800 for his services to both of them.

Superintendent Albert Richards in charge of the investigations gave evidence of visiting the scene at Holborn Road on the night of July 27, of obtaining from Champagnie a quantity of jewels, of visiting Champagnie at Barbican on September 18, of informing her that he had information that herself and Taylor and a man named "Moose" are the people responsible for the murder of Robinson and Cox - and of taking her into custody. Bailey was arrested by him on September 25, and Taylor on 2 warrants on 18th October for the murder of Robinson and Cox.

All three appellants gave unsworn statements from the dock. Champagnie to the effect that on a Sunday, Rose, White and herself went to Harbour View to look at some cars as she intended to buy a car. From Harbour View they drove her to St. Thomas. She did not know appellant Bailey before she saw him in court at the Preliminary Examination. She met Taylor when her Mercedes Benz stalled at Cross Roads and he assisted her. He introduced himself and she gave him her telephone number and he subsequently visited her on occasions. She denied knowing Charley or having any meeting at Paradise Beach. Riddell did not hire any car on her behalf nor did she give White any money to pay anyone. She asked Rose to assist her in operating furniture stores in May Pen and Old Harbour. When she found he had registered them in his name, they had a quarrel. She did not ask Rose to buy a Mercedes Benz for her. She had no talk with Deparis Campbell about Riddell. She was not guilty of the charge.

She reported to Detective Inspector Walker and Superintendent Albert Richards that the jewellery was purchased by Robinson from men who came to the store and she took him to the house of White who had stolen them on the night of Robinson's death.

Bailey's short statement was to the effect that he was never in a car with Taylor whom he saw for the first time at the Preliminary Examination. He did not know who shot and killed the two deceased. He was not in the vicinity of the "J.J." Club that night.

Taylor's was to the effect that some time in August 1978 he was on Half Way Tree Road near the State Theatre. He went to the assistance of the appellant Champagnie whose car had stalled in the road. She gave him her telephone number and they had a relationship. He did not know either deceased -he did not know the witnesses Rose and White - he was innocent of the charge.

The following ground of appeal filed on behalf of Champagnie was in substance common to all three appellants and counsel for Taylor and Bailey adopted or supplemented the arguements of Mr. Macaulay:-

> "On the prosecution's evidence, the witness White was particeps criminis, and the witness Rose, was an accessory after the fact. In the circumstances, the trial judge should have directed the jury that they were accomplices, and as a matter of law, should have also directed them, that their evidence required corroboration, telling them what corroboration meant and giving them such assistance on the evidence that could or could not amount to corroboration. The learned trial judge not only failed to give any of these directions, but misdirected the jury that the witness Rose was an independent witness".

Mr. Macaulay submitted that on his own evidence, White was an accomplice being accessory before the fact as well as an accessory after the fact and the learned trial judge in his directions failed to draw the distinction between an accomplice and a "person with an interest to serve". In respect to Rose, he was also an accomplice being an accessory after the fact and the learned trial judge failed to so categorise him, and to give the usual warning to the jury of the dangers of convicting on the uncorroborated testimony of an accomplice and further, that an accomplice who is a particeps criminis, as these witnesses were, could not corroborate one another.

He cited in support a number of cases including:

Davies v D.P.P. (1954) 1 ALL E.R. 507

D.P.P. v Kilbourne (1973) 1 ALL E.R. 440

R. v Leonard (1975) 13 J.L.R. 135

P v Persaud 24 W.I.R. 97

Before examining the learned trial judge's treatment of the witnesses White and Rose in his directions to the jury, it seems convenient to examine certain decided cases in order to identify the guiding principles laid down by judicial pronouncements. In that regard, in relation to the evidence of accomplices, pride of place must perforce be given to the case of Davies v D.P.P. described as the locus classicus. It was in this case, that the controversy as to whether in the case of an accomplice giving evidence as a witness for the prosecution, it was obligatory or merely discretionary for the trial judge to warn the jury of the dangers of relying on the uncorroborated evidence of an accomplice, was firmly decided in favour of the obligatory view. Thus at p.513 per Lord Simmonds:-

> " The true rule has been, in my view, accurately formulated by the appellant's counsel in his first three propositions, more particularly in the third. These propositions as amended read as follows:
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> "First proposition: In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated. Second proposition: This rule, although a rule of practice, now has the force of a rule of law. Third proposition: Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice, unless the appellate court can apply the proviso to s. 4 of the Criminal Appeal Act, 1907."
>
> The rule, it will be observed, applies only to witnesses for the prosecution."

Lord Simmonds then went on to define and to categorise persons falling within his definition thus:-

> "On the cases it would appear that the following persons, if called as witnesses for the prosecution, have been treated as falling within the category:
>
> (1) "On any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours). This is surely the natural and primary meaning of the term "accomplice".

He dealt with 2 other categories which may be termed quasi-accomplices. However, for the purpose of this appeal, only the first category is relevant and was treated with care and lucidity thus (p.514):

> "The branch of the definition relevant to this case is that which covers "participes criminis" in respect of the actual crime charged, "whether as principals or accessories before or after the fact". But, it may reasonably be asked, who is to decide, or how is it to be decided, whether a particular witness was a "particeps criminis" in the case in hand? In many or most cases this question answers itself or, to be more exact, it is answered by the witness in question himself, by confessing to participation, by pleading guilty to it, or by being convicted of it. But it is indisputable that there are witnesses outside these straightforward categories, in respect of whom the answer has to be sought elsewhere. The witness concerned may never have confessed, or may never have been arraigned or put on trial, in respect of the crime involved. Such cases fall into two classes. In the first, the judge can properly rule that there is no evidence that the witness was, what I will, for short, call a participant. The present case, in my view, happens to fall within this class, and can be decided on that narrow ground. But there are other cases within this field in which there is evidence on which a reasonable jury could find that a witness was a "participant". In such a case the issue of "accomplice vel non" is for the jury's decision: and a judge should direct them that, if they consider on the evidence that the witness was an accomplice, it is dangerous for them to act on his evidence unless corroborated: though it is competent for them to do so if, after that warning, they still think fit to do so".

In D.P.P. v Kilbourne (supra) the rule in Davies v D.P.P. was approved by Lord Hailsham thus (p.447):

> "Since the institution of the Court of Criminal Appeal in 1907, the rule, which was originally discretionary in the trial judge, has acquired the force of a rule of law in the sense that a conviction after a direction to the jury which does not contain the warning will be quashed, unless the proviso is applied:
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> However, it is open to a judge to discuss with the jury the nature of the danger to be apprehended in convicting without corroboration and the degree of such danger and it is well established that a conviction after an appropriate warning may stand notwithstanding that the evidence is uncorroborated, unless, of course, the verdict is otherwise unsatisfactory".

and at p.453:-

> "Obviously where two or more fellow accomplices give evidence against an accused their evidence is equally tainted. The reason why accomplice evidence requires corroboration is the danger of a concocted story designed to throw the blame on the accused. The danger is not less, but may be greater, in the case of the fellow accomplices. Their joint evidence is not 'independent' in the sense required by R. v. Baskerville, and a jury must be warned not to treat it as a corroboration".

[R. v. Baskerville [1916]2 K.B. at p. 667]

Now in the course of his directions, the learned trial judge referred to the witness White as "a person with an interest to serve". In R. v. Prater (1960) 1 ALL E.R. p.298, a co-prisoner who could have been considered an accomplice gave evidence. The common sergeant did not give a warning in regard to his evidence and the danger of acting on his uncorroborated testimony. Edmund Davies J. in the course of his judgment, said at pp 299-300:

> "For the purposes of this present appeal, this court is content to accept that, whether the label to be attached to Welham in this case was strictly that of an accomplice or not, in practice it is desirable that a warning should be given that the witness, whether he comes from the dock, as in this case, or whether he be a crown witness, may be a witness with some purpose of his own to serve."
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> It is to be observed that in Davies v Public Prosecutions Director, which went to the House of Lords, Lord Simonds, L.C., in initiating what was described as the third proposition, dealt with the matter in these terms:
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> > 'Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice, unless the appellate court can apply the proviso to s. 4 of the Criminal Appeal Act, 1907'. The rule, it will be observed, applies only to witnesses for the prosecution.'
>
> This court, in the circumstances of the present appeal, is content to found itself on the view which it expresses that it is desirable that, in cases where a

> "The rule, if it be a rule, enunciated in R. v Prater, is no more than a rule of practice. I say deliberately "if it be a rule" because, reading the passage of the judgment as I have just read it, it really seems to amount to no more than an expression of what is desirable and what it is to be hoped, will more usually then not be adopted, at any rate where it seems to be appropriate to the learned judge. It certainly is not a rule of law, and this court does not think that it can be said here that there was any departure in this respect from proper procedure of trial; still less does it seem that any injustice can possibly have flowed from the undoubted fact that no such warning was given in the present trial."

In R. v. Beck (1982)1 ALL E.R. 807, Ackner, L.J., with scholarly industry, in considering the statements in both Prater and Stannard against the background of Davies v D.P.P. summarised the submission of counsel for the appellant and delivered the opinion of the court in the following passage:-

> "Merely because there is some material to justify the suggestion that a witness is giving unfavourable evidence, for example, out of spite, ill-will, to level some old score, to obtain some financial advantage, cannot, counsel for the appellant concedes, in every case necessitate the accomplice warning, if there is no material to suggest that the witness may be an. accomplice. But, submits counsel for the appellant, even though there is no material to suggest any involvement by the witness in the crime, if he has a 'substantial interest' of his own for giving false evidence, then the accomplice direction must be given . Where one draws the line, he submits is a question of degree, but once the boundary is crossed the obligation to give the accomplice warning is not a matter of discretion. We cannot accept this contention. In many trials today, the burden on the trial judge of the summing up is a heavy one. It would be a totally unjustifiable addition to require him, not only fairly to put before the jury the defence's contention that a witness was suspect, because he had an axe to grind, but also to evaluate the weight of that axe and oblige him, where the weight is 'substantial', to give an accomplice warning with the appropriate direction as to the meaning of corroboration together with the identification of the potential corroborative material."

The principles to be extracted from these cases may be summarised thus:-

(1) Where an accomplice or an accomplice vel non gives evidence as a prosecution witness, the trial judge is obliged to warn the jury of the dangers of relying on his uncorroborated evidence. (D.P.P. v Davies).

(2) An accomplice or accomplice vel non who is a particeps criminis cannot corroborate another and the jury must be so advised by the trial judge. (D.P.P. v Davies, D.P.P. v Kilbourne).

(3) Where an accomplice or an accomplice vel non gives evidence as a defendant against a co-defendant a warning by the trial judge is desirable but not obligatory. The reason being, that independent of, and prior to his giving evidence, the prosecution has already established a prima facie case.

4) Although a witness for the prosecution may not be an accomplice within the definition of Davies v. D.P.P., nevertheless he may have an interest to serve, a motive for falsehood, and in such a case a warning is desirable. (R. v. Beck).

In the light of those principles the learned trial judge's treatment of the witnesses White and Rose demands a careful analysis and to that end it is necessary to consider the following relevant passages from his summing up:

> "Now there is a matter which I will have to refer to before I remind you or give you a summary of the evidence of each accused, and it is this; that where, in a criminal case there is evidence to suggest or to support the proposition that a prosecution witness who is called may have an interest to serve that there may be a special reason why he has given that kind of evidence that he gave, that it is desirable for the judge to warn the jury that you must be careful in accepting that evidence, in thinking about it, unless you find some other evidence in the case from other witnesses supporting what he has said. And it is the same kind of warning that would be given where the person is an accomplice, that is to say, took part in the commission but the crown is using him as a witness against another person. And the reason for it is that where you find a person who is implicated in the charge itself being used as a witness for the crown against an accused, he may have a very good reason to paint a lovely picture for himself and make it hard for the other man, hoping to clear himself by that way.
>
> So that the question really goes to credit and it is in such a position that the judge should warn the jury of that situation.

> "That is, in such a case,look to see whether there is any other evidence from any other witness in the case, who is not tainted, to support in a material particular what he has said.
>
> Now there are two witnesses in this case that I have examined the evidence carefully in which I am going to make reference. In one of them I am going to point out the steps in the evidence he has given and I will be advising you that that will be evidence in which you could say, you as a jury could say that he may have a purpose to serve; in which case you look for some evidence from some other witness to support him and I will try and help you on that.
>
> Now let's take the first witness that I see in this case in which there could be this view that it would be desirable for the judge to warn the jury about his evidence, to tell the jury that they should look to see if there is anything supporting what he has said. And where you have a case in which it is required that evidence should be looked for with a view to finding if it supports the evidence in a material particular it would be a matter in which you have to say first of all, was the offence committed and was it the accused who committed it?"

The learned trial judge then referred to the points in the evidence of White that would tend to taint his evidence and then said:-

> "So on these bits of evidence Mr. Foreman and members of the jury, it would be open to you to say that 'Allman Town', Mr. Eustace White, could be regarded as a witness who has some interest to serve, in which case, if you take that view, then my warning to you is examine his evidence carefully and see whether in any material point he is supported by other witnesses in the case; and,of course, I need not go over it, that there is plenty of evidence from other witnesses tending to support him. You will have to examine his evidence carefully if you take the view that from what I have pointed out you regard him as one who has an interest to serve."

Then of Rose he said:

> "Now we turn to another witness, and there are eight points here that I will outline to you and that is in regard to Mr. Evelyn Rose, a very important witness in the case.

Now, what are these points?

(1) He is a businessman and he was an associate of the accused in the furniture business. He knew her for two years.

(2) Between April and July, 1978, he received about Nine to Ten Thousand Dollars ($9,000-$10,000) worth of furniture for selling.

(3) According to him this was without commission, for no commission was charged for sales that he effected and he accounted for all that he had received.

(4) He knew that the female accused was working with the deceased Robinson, a big dealer in furniture business and that she was friendly with her boss and living at his Beverly Hills home. He knew that. That was made very clear during the cross-examination of Mr. Macaulay. The question went like this: "Did you know that all material times she was Robinson's girlfriend?" Ans.: "Yes; yes sir, I know that."

(5) When she was turned out of the house by the widow of the deceased on the Saturday following the death, that would have been the 29th of July, he rescued her, gave her a room to stay in the days while she had a place to sleep in the nights and he would always take her to this place where she was staying: but

(6) I can find no evidence that he knew or had reasonable grounds to believe that he was assisting or harbouring a woman who was allegedly implicated in the murder of Robinson and Cox. There is no evidence to support that.

(7) The evidence is that as soon as she confessed to him of the part she played he became afraid and thereafter he got in touch with the police; and

(8) He was in constant touch with a certain police officer thereafter and they even exchanged telephone numbers.

So what is my direction is that there is no evidence that the witness Rose is one with an interest to serve.

The primary question is, was the judge's treatment of those witnesses correct? In relation to White, was he an accomplice being (a) an accessory before the fact and/or (b) an accessory after the fact?

We accept as correct the following concise definition of accessory before the fact in Archibald's 34th Edition para. 4141 based on the authorities cited:-

> "An accessory before the fact is one who, though absent at the time of the felony committed, doth yet procure, counsel, command or abet another to commit a felony: 1 Hale 615: 1 Russ. Cr., 11th ed., 159; Steph. Dig. Cr. L. (9th ed.) 18; R. v. Mac Daniel, 19 St. Tr. 745".

The evidential requirements to prove a person an accessory before the fact were considered in R. v. Bainbridge (1959)3 ALL E.R. 200: In that case:-

> "Oxygen cutting equipment used by thieves for breaking into a bank had been bought for them, some six weeks earlier, by the

> "appellant. He was charged with being an accessory before the fact to office-breaking, the case against him being that he had bought the cutting equipment on behalf of the thieves with full knowledge that it was to be used for breaking and entering premises. He admitted that he had suspected that the equipment was required for something illegal, i.e. breaking up stolen goods, but he denied having any knowledge that the equipment would be used for any such purpose as that for which it was used."

In delivering the judgment of the court, Lord Parker, C.J. said at P.202:

> "The court fully appreciates that it is not enough that it should be shown that a person knew that some illegal venture was intended. To take this case, it would not be enough if the appellant knew - he says that he only suspected - that the equipment was going to be used to dispose of stolen property. That would not be enough. Equally, this court is quite satisfied that it is unnecessary that knowledge of the intention to commit the particular crime which was in fact committed should be shown, and by "particular crime" I am using the words in the same way as that in which counsel for the appellant used them, namely, on a particular date and particular premises".

Of the evidence to which we were adverted and to which the trial judge referred in his summing up, the following merited careful consideration:-

> First: That with Charley's help White found a man "who could fire a gun" and was the "go-between" in arranging the rendezvous at Paradise Beach.

Mr. Macaulay submitted in effect that having regard to the temper of the times, the procuring of a gunman could bear but one purpose, namely the commission of a crime of violence against the person of another.

With this we do not agree. The procuring of a gunman may be for defensive as well as for an offensive purpose. In the instant case, there was no evidence that Champagnie disclosed to White the purpose for which she required a man "who could fire a gun" and White was not privy to her conversation with Taylor or Charley. He lived rent free in her house, he took orders directly from her and he apparently was obsequiously obedient.

It is one thing to say he ought to have been sufficiently suspicious to enquire of her the purpose for which she wanted a gunman, but that is a far cry from imputing to him the requisite knowlwdge that he was assisting her to commit murder or some s[illegible]

offence against the person of another.

Secondly, Mr. Macaulay referred to this evidence of White concerning appellants Taylor and Bailey coming to his gate on the night in question and of his telling them that Robinson drank at "J.J." This information White said he would have given to anyone. In our view it could only be on the basis that he knew of the arrangements between Taylor and Champagnie that this could amount to assistance and there was no evidence to that effect.

Thirdly, that White admitted in cross-examination that after the death of Robinson, he put 2 and 2 together and felt that in someway he was responsible. This could not be taken as an admission to being an accessory before the fact but of being wise after the event. It may, however, be a factor relevant to accessory after the fact and in that regard will be referred to later.

Accordingly, as stated in Bainbridge's case mere suspicion is not enough to make a person an accessory before the fact.

Was White an accessory after the fact? Having put two and two together he then knew that Robinson was murdered and that Champagnie was involved.

His post-mortem activities included:

(1) Accompanying Champagnie to an obeahman.

(2) Accompanying Champagnie and Mrs. Lopez to the bank and receiving $200 of the moneys drawn from Robinson's account.

(3) Accompanying Champagnie and Lopez to the main store on the morning after the death of Robinson and being caretaker for a quantity of the jewels taken from Robinson's safe.

(4) As courier for Champagnie conveying $3,000 to Taylor.

(5) Accompanying Rose on the occasion when the white Datsun was returned to Mountain View Avenue.

This court has had to consider what was necessary in order to hold that a person was an accessory after the fact in R. v. Nathan Foster Supreme Court Criminal Appeal No. 13/80 (unreported) delivered November 5, 1981. In giving the judgment of the court Rowe, J.A. said.

"What it is necessary to show, however, is whether on the facts of any given case a person does fall into the category of an accessory after the fact. The quotation which I wish to refer to is that which comes from paragraph 4155 of the 36th Edition of Archibald dealing with accessories after the fact, and here it is said:

> 'An accessory after the fact is one who, knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon.
>
> To constitute this offence it is necessary that the accessory at the time when he assists or comforts the felon, should have notice, direct or implied that he had committed a felony. It is also necessary that the felony should be completed at the time the assistance is given.
>
> Any assistance given to one known to be a felon, in order to hinder his apprehension, trial or punishment, is sufficient to make a man an accessory after the fact.'

"In our view, the important question in relation to an accessory after the fact, is, that the assistance should be given to the felon himself, and that whatever assistance is given should either have the effects of assisting him to escape his arrest, to prevent his apprehension or to prevent his trial."

Rowe, J. A. then reviewed the relevant evidence and concluded:-

> "We are of the view, therefore, that the learned trial judge was correct in not treating him as an accomplice or an accessory after the fact. However, the directions which the learned trial judge gave in relation to a person who had an interest to serve were almost identical to those which he would have had to give if he had decided that there was evidence on which the witness Daniels could have been treated as an accomplice vel non."

In the instant case, save for the payment of the money to Taylor, White was the silent listener and ever present, but inactive companion. In our view, these acts could not be said to be done with intent to hinder apprehension, trial or punishment of any of the appellants in the case. Accordingly, the learned trial judge was correct in not categorising White as an accomplice nor was there sufficient evidence to leave to the jury, the issue of accomplice vel non.

In any event, it is the effect of the summing up as a whole that is important. A trial judge is not obliged to follow any formula or pronounce any shibboleth. As was said in R. v O'Reilly (1967) 51 Cr. App. R. 349:-

> "But the rule that the jury must be warned does not mean that there has to be some legalistic ritual to be automatically recited by the judge, that some particular form of words or incantation has to be used, if not used, the summing-up is faulty and the conviction must be quashed. The law, as this court understands it, is that there should be a solemn warning given to the jury, in terms which a jury can understand, to safeguard the accused."

In the instant case, White, although not an accomplice, was not by any means, immaculate. He had remained silent when he ought to have promptly informed the police. The learned trial judge pointed out to the jury, material in the evidence that might provide an improper motive and might be considered capable of tainting his evidence, and then gave them a warning that would be appropriate to the case of an accomplice. The jury, therefore, could be in no doubt as to the risk of relying on White's uncorroborated testimony and the necessity to look for corroborative evidence.

Now in the case of Rose, Champagnie went to him as a damsel in distress complaining that Pearl the widow had turned her out. As a friend and business associate, he took her in, and later found more commodious accommodation in Barbican. His evidence was to the effect that as soon as he heard from her of her involvement in the murder of Robinson, he went to a Mr. Service, whom he knew for sometime and Service passed him on to Superintendent Hutchinson to whom he made a report. Detective Richards in evidence said he had spoken with Hutchinson before interviewing Rose at Police Headquarters, Old Hope Road.

In addition to these open acts of friendly assistance, emphasis was placed by appellant Champagnie's attorney on Rose carrying out Champagnie's instruction in relation to the white Datsun. Rose's thoughts concerning the Datsun car, which Champagnie had described to him as "hot", were never probed nor was it elicited from him whether or not White had communicated to him his knowle[illegible]

or suspicion concerning it. In the cirsumstances, we are of the view that the judge was correct in holding that there was no evidence that Rose was a person with an interest to serve. Having so concluded, he went on to deal with the suggestion that Rose registered Champagnie's store in his name thus:-

> "But let me remind you that there was one question in cross-examination by Mr. Maccaulay on behalf of Champagnie and she herself in her statement said something to suggest that Mr. Rose was not being fair with her in the business deal, that is, the operation of a store, the registration of a store, he is supposed to have registered it in his name instead of her name, that's the only thing. But that is a far cry from saying that that was knowledge of assisting her or knowing that she had committed murder or she was about to do it before it was done."

In the circumstances, the learned trial judge's treatment of the witness Rose based on the evidence before him was neither unfair nor incorrect.

Mr. Macaulay's further complaint was that the trial judge's definition of corroboration was inadequate and that in any event he did not identify to the jury the bits of evidence which if accepted might be corroboration. We are of the view that the learned trial judge's definition of corroboration in the passage quoted earlier in substance was not different from that advocated in R. v Baskerville (1916)2 K.B. 658 and as approved and quoted by his court in R. v Sailsman (No.2) 1963 6 W.I.R. 46 at p.48:-

> ".....evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular, not only the evidence that the crime has been committed, but also that the prisoner committed it."

During his summing up, it was the style of the learned trial judge to collate the evidence of the several witnesses in relation to each aspect of the case as it affected a particular accused. This was not a sex case where the first complaint is admissible evidence relevant to the issue of consent and to show consistency of conduct on the part of the complaint and there is

the risk of the jury mistaking such evidence for corroboration, and therefore, it is very important to tell the jury that a first complaint is not corroboration.

In Dockery & Brown v R. (1965)8 J.L.R. 150, after considering the cases of R. v Zeilinski (1950)2 ALL E.R. 1114 and R. v Goddard [1962]2 ALL E.R. 582, Lewis, J.A. in delivering the judgment of the court said at p.154:-

> "We would stress, however, that the duty of the trial judge and the guidance which he must give must depend upon the circumstances of each case, and Goddard's case is not in our opinion to be understood as laying down an inflexible rule that the trial judge must be in every case point out to the jury the portions of evidence which are capable of affording corroboration."

This approach in R. v Dockery and Brown was approved and followed in R. v Black (1963)8 J.L.R. 218. ...

In the instant case, there was abundance of corroboration and the learned trial judge subsequent to his definition quoted ante, concisely but clearly summarised the evidence against each appellant. As in Dockery's case, we see no reason to think that the jury may have been misled in their consideration of the relevant evidence. Accordingly, we are of opinion that the summing up on this aspect was fair and adequate.

In the light of his summary of the case against each accused, the complaint that the learned trial judge failed to direct the jury to consider the evidence against each accused separately, was equally without merit.

Another ground of appeal applicable to all three appellants, was to the effect that the summing up was unbalanced and unfair. Further, Mr. Daly submitted that the learned trial judge frequently and unnecessarily interrupted Taylor's Counsel in his cross-examination, sometimes prohibiting the witness from answering until counsel explained his reasons for the questions and, on the predication of assisting junior counsel, commented to the effect that he was cross-examining aimlessly and generally denigrating him in the eyes of the jury, and the interruptions of the trial judge rendered it impossible for counsel to effectively

challenge the Crown's case or advance the case for the defence. He cited in support R. v Stephenson 12 J.L.R. 1681. On examining R. v Stephenson, Mr. Daly conceded that the interruptions in that case were more extensive.

In deference to his complaint, we examined the record and note that on occasions, because of the imprecise formulation of the questions by junior counsel, the judge had to seek clarification. At other times, when inexperienced counsel embarked on a line of questioning, which, while not advancing the cause of the accused he was defending, would be likely to elicit evidence damaging to a co-accused, the learned trial judge would point out the "error of his ways." If in so doing, the gaucherie of young counsel was incidentally exposed, the learned trial judge cannot properly be blamed.

Mr. Daly further submitted that the summing up was little more than a narrative of the prosecution's case uncritically expressed, as if it were an unchallenged account of indisputable facts, often couched in language designed to enhance the credibility of the case for the prosecution and that the learned trial judge failed to point out such inconsistencies as were in the prosecution's case.

On this aspect the grounds of appeal argued on behalf of Champagnie read:-

> 4. (a) "The learned trial judge's summing up to the jury was in the nature of a speech for the prosecution, in that throughout he expressed his views too freely and strongly as if they constituted the inescapable facts to be inferred from the evidence. These expressions could not possibly have been saved by the usual statement he interposed, to the effect that questions of fact were for the jury.
> 4. (b) The learned trial judge directed the jury that they could infer, from the evidence, that the fact that the applicant had applied for a U.S. Visa, after the date of the incident, that the applicant had a guilty conscience, thereby implied, suggesting to the jury that this evidence was of probative value on the issue of guilt-or innocence. Such a direction was held in R. v. Steele (1975) 13 J.L.R. at 2441-256 A; 24 W.I.R. at 319 H - 320 H, to be a very fatal mis-direction."

"4. (c) The learned trial judge failed to advance any point in favour of the defence, nor mention any weaknesses in the prosecution's case, particularly when dealing with the question of the motive of the applicant, as alleged by the prosecution."

Mr. Macaulay submitted that not only did the trial judge express his views on the evidence, but on occasions when he did so in relation to matters in dispute, he omitted to make it clear, it was a matter for them. As illustrative, he referred inter alia, to his directions and comments on the evidence relevant to motive and complained that the learned trial judge omitted to give specific directions on the areas of weakness in the prosecution's case or to the evidence supportive of Champagnie's statement from the dock and to deal with discrepancies between the witnesses (i) White and Lopez (ii) Lopez and Brown (Bank Manager) and (iii) Lopez and White. He cited in support a number of cases including R. v. Miles and Gomes 6 W.I.R. 418 R. v. Persand 24 W.I.R. 97, Broadhurst v. R. (1964) A.C. 441.

Early in the history of this court, in R. v. Anderson (1963)8 J.L.R. 183, a similar complaint concerning a trial judge's comments upon the evidence was considered. In delivering the judgment of the court, Duffus, J.A. said at p.186:-

> "Undoubtedly the directions of the learned judge were strong, but he had the right to express his opinion and to express it strongly so long as he did not purport to take away the issues from the jury. We were referred by learned counsel for the Crown to R. v. O'Donnel . I refer to the judgment of LORD READING, C. J., where the same point has been dealt with, and this is what he says (12 Cr. App. Rep. at p.221):
>
> > 'In regard to the second point, it is sufficient to say, as this court has said on many occasions, that a judge, when directing a jury, is clearly entitled to express his opinion on the facts of the case, provided that he leaves the issues of the facts to the jury to determine. A judge obviously is not justified in directing a jury, or using in the course of his summing-up such language as leads them to think that he is directing them that they must find the facts in the way in indicates. But he may express a view that the facts ought to be dealt with in a particular way, or ought not to be accepted by the jury at all. The judge did express himself strongly, but he left the issues of fact for their decision, and therefore this point fails.'

" and that is our view here."

In the instant case, the trial judge in reviewing the evidence followed closely the mode of expression of the witnesses and often quoted the actual words, which were usually in language which was graphic and emphatic. However, done in this manner, the jury could be in no doubt that the trial judge was reciting the evidence and not stating established facts.

Early in his summation, the learned trial judge advised the jury at p. 674:

> "Now you remember particularly Mrs. Gayle and I think Mr. Frankson, they are very strong in putting forward certain views. If you agree with them then you can use those views in arriving at your verdict.
>
> Now there are some people or some attorneys who will acknowledge the judge's right to express a view, but although he has a right to express the view he must not express it because he will be influencing the jury. It's a kind of contradiction. You have your right but you don't use it. It could be, and as I go along I will express a view too because as I have already indicated any views put forward on the facts are all matters for your consideration. You are entitled to accept them, use them or reject them because you are the one trying the case."

and further at p. 676:

> "So, Mr. Foreman and Members of the Jury, as I told you earlier on, what your functions are, what my duty is, and how you are to approach it, not to allow anything to influence you other than the facts that you have heard, reasonable inferences to be drawn from the facts, the law as I am giving it to you and trying to explain to you, along with any views with which you agree,"

During the course of his long summing-up, he reminded them generally that "all questions of fact are for you" and from time to time specifically, in relation to particular issues.

As regards motive, referred to the relevant evidence and said:-

> "So that, Mr. Foreman and members of the jury, shows that she realised now that Robinson would be losing interest. Is it a case where Robinson could have found out about the primary move in this re-presentation or what? but whatever it is, we turn to another piece of evidence that Rose told us that she further said Mr. Robinson would go home in the night and

> "take women and run her out of the bed and sleep with the women. What you get from that then, jealousy, lack of interest and as it were not much concern for her presence even in her own bed? Well, it is a matter for you. As I say, it looks like jealousy there; and he was telling her to leave the house as his son was returning to live at the house. So an expulsion from the house was near at hand. She further said that Mr. Robinson was threatening to kill her and she knew he would do it, so she took the first chance. What the first chance means? Does it mean at the first opportunity I will move instead of his moving does it mean that? Taking the first chance must mean something, so put in the first blow before he puts in his; and along with the evidence that shortly after the death of Mr. Robinson, as a matter of fact the very night, we have evidence that a van, which was driven to Shenstone Drive where she was, was going to be loaded up with furniture and but for the intervention of the police who took the view that the man was not even cold yet, these things would have been taken away, would have been spirited away. The reason given, according to the evidence, why she did it, is because Miss P. meaning the widow, now suddenly made a widow would get everything. Along with that is the other bit of evidence, now, that after this killing which took place on the Thursday night, on the Friday morning we are told that a visit was paid to the premises at 36 Beeston Street, where in a vault Mr. Robinson used to keep jewellery and money, and the evidence that we have is that all that was cleared out by the accused. So Mr. Foreman and members of the jury, if you accept those bits of evidence which I have outlined to you in the case, if you accept them you would have a vast amount of evidence to show what drove her to plan the killing and, of course, as far as Taylor is concerned, we have evidence that at least the sum of Three Thousand Dollars ($3,000) was paid to him, money counted out by Champagnie, put in a paper bag, handed to White and in the presence of Rose, and Rose now is the driver taking down White to Paradise Beach to hand over what you call the blood money; and as far as Bailey is concerned, we have evidence which I shall remind you of it, that he, too, was concerned with his cut of this blood money for the part that he played. So that the motive for those two male accused men would be financial gain from the hiring, from the employment to execute the job."

We do not see this passage as likely to lead the jury to believe that these matters were being put to them as indisputable facts no longer open to their consideration.

As regards conduct subsequent to the murder and in particular, the urgent endeavour of Champagnie to obtain visas for the U.S.A. for herself and Taylor, the learned trial judge having reminded them of the unchallenged evidence of Clive Anderson went on to say:-

> "....dealing with subsequent conduct, what is the direction I gave to you on that? It is this. Within each and every one of us, however, good or bad, whether good or bad, whether it is a good man or a bad man, there is a thing called conscience and when a man has done something there is an inner working that can influence him and sometimes he doesn't even know. Unconsciously he may do something and give the game away because of that inner working and that is why it is sometimes said that no crime is perfect; particularly, if it takes a long period some mistake is going to be made along the line, some trial will be left there. So that it is always relevant to look at the conduct of a person immediately before or immediately after an event to see how the person behaves. And if you come across a certain piece of conduct relevant to the transaction and which you the jury may think shows consciousness of guilt and the conduct is traceable to the doing of the act in question, the jury takes the view that the act whether prior to or subsequent - sorry, if the conduct whether prior to or subsequent to the commission of the offence is influenced by the consciousness of the guilt of the accused then it is evidence going towards the identity of the person and his connection with it."

In support of his complaint concerning this aspect of the summing up, this passage was compared with a passage, the subject of criticism in R. v. Steele (1975)13 J.L.R. p.200. In that case the issue was one of the identification. The complainant Mrs. Kottle said that she was indecently assaulted and robbed at knife point by a man, and she subsequently identified the appellant at an identification parade as her assailant. There was evidence from the arresting constable that on the day after the offence was committed, as the jeep he was driving approached the appellant, he took to his heels. He was chased and held. In his summing up the learned trial judge directed to the jury that this conduct was evidence relevant to the issue of identification. In giving the judgment of the Court, Watkins, J.A. said at p.255:-

> "One of the clear suggestions emerging from these passages is that if they, the jury, were to accept that the appellant had run from the police when he saw them, it was open to them on that evidence simpliciter to infer that it was the appellant who was guilty of the assaults upon the women. We resile from such a proposition the invalidity of which becomes manifest when one

> "enquires whether a like inference would not be equally irresistible in all other cases in which on that or any later date other accused parties had run from the police when similarly approached. The mere act of running away from the police, unsupported as it was by other evidence linking the appellant in a material way with the commission of the crimes of which he was indicted, is incapable in our view of giving rise to any inference whatever, whether of innocence or of guilt."

The instant case is clearly distinguishable. First, there was other cogent evidence implicating both Taylor and Champagnie. Secondly, the evidence was clearly admissible as relevant to their state of mind. Here, while to their obvious knowledge police investigations were being hotly pursued, they were seeking to leave the country quickly by costly and irregular channels. In the circumstances, we are firmly of opinion that the evidence was relevant and probative, and the comments and directions could not in our judgment be said to be unfair or unwarranted.

With respect to the general complaint that the trial judge failed to advance any point in favour of the defence or any evidence supportive of the defence, or mention any weakness in the case for the prosecution, it is enough to say that the volume of credible evidence tendered by the prosecution presented a strong and overwhelming case against the appellants. In response, and in turn, each gave an unsworn statement from the dock. Save for such collateral matters as to how the friendship between Champagnie and Taylor started and that the idea of the visits to the obeahman did not originate with Champagnie, the statements amounted to no more than general denials. It was clearly the strategy of the defence of all three accused to endeavour by testing cross-examination to discredit the witnesses for the prosecution. The records reveal that the witnesses without exception passed the tests in convincing matter. They gave graphic details and in proper sequence of actions and events and such discrepancies as may be said to exist were merely of peripheral matters.

Mr. Macaulay quite properly conceded that these discrepancies by themselves were not sufficient to be a ground of complaint

but asked that it be considered in relation to the summing up on motive.

In our view, having regard to the nature and conduct of the defence, there was nothing the trial judge could urge as positive alternatives or traverses put forward by the defence. He could not be expected to say more for them, than they said for themselves, or to put forward theories not warranted by the conduct of the defence or the evidence.

Accordingly, we are unable to agree that the summing up as a whole was unfair to the appellants, or that the trial judge's comments withdrew from the jury, consideration of the important issues in the case.

On behalf of the appellant Bailey, Mrs. Benka-Coker submitted that in relation to the evidence of Cynthia Simmonds, the learned trial judge erred in law when he failed to direct the jury on the dangers of visual identification and to the risks of mistake and as to their approach in considering evidence of visual identification. She cited in support R. v. Oliver Whylie (1977)15 J.L.R. 165;25 W.I.R 43[illegible]:

Oliver Whylie's case has been cited so often in these courts that it is fair to say that that case is the "locus classicus" on visual identification. In giving the judgment of the court Rowe, J.A. (Atg.) said at p.432:-

> "Where, therefore, in a criminal case the evidence for the prosecution connecting the accused to the crime rests wholly or substantially on the visual identification of one or more witnesses and the defence challenges the correctness of that identification, the trial judge should alert the jury to approach the evidence of identification with the utmost caution as there is always the possibility that a single witness or several witnesses might be mistaken. A mistake is no less a mistake if it is made honestly. Although it is the experience of human beings that many honest people are quick to admit their mistakes as soon as they become aware of them, it is also possible that a perfectly honest witness who makes a positive identification might be mistaken and not be aware of his mistake.
>
> In every such case what matters is the quality of the identification evidence. The judge should direct the jury that in order for them to determine the quality

> "and cogency of the identification they should have full regard to all the circumstances surrounding the identification."

The learned judge of appeal then indicated a number of factors or circumstances to which a trial judge ought to advert the jury's attention and continued (at p. 433):-

> "It is of importance that the trial judge should not consider his duty fulfilled, merely by a faithful narration of the evidence on these matters, enlightening with his wisdom and experience what might otherwise be dark and impenetrable."

Reference was then made to a number of cases including:

(1) Arthur v. A.G. for Northern Ireland (1970), 55 Crim. App. Rep. 161.

(2) R. v. Turnbull,]1976]3 ALL E.R. 549; [1976]3 W.L.R. 445; 63 Crim. App. Rep. 132.

(3) R. v. Peggy Gregory (1973), 12 J.L.R. 1061.

and Rowe, J.A. concluded:-

> "....from these cases we extract the principles that a summing-up which does not deal specifically, having regard to the facts of the particular case, with all matters relating to the strength and the weaknesses of the identification evidence is unlikely to be fair and adequate. Whether or not a specific warning was given to the jury on the dangers of visual identification is one of the factors to be taken into consideration in determining the fairness and the adequacy of a summing-up."

From the careful language used, we do not interpret this judgment as laying down as an inflexible rule of law, that in every case where there is evidence of visual identification, a trial judge is obliged to warn the jury of the dangers of mistaken identification. As Rowe, J.A. (Atg.) puts it, "what matters is the quality of the identification evidence." Indeed, the issue may be one, not of mistake, but of deliberate falsehood. Nor was it intended that the list of factors and circumstances affecting identification, as set out in the judgment, should be considered exhaustive or of general applicability. Much will depend upon the circumstances of the particular case.

In the instant case, the trial judge in a painstaking review of the evidence of Simmonds, adverted the jury's attention to the evidence of opportunity for making an identification of the appellant, the physical conditions existing at the time, namely,

the light, distance and unobstructed view, her subsequent identification at the parade, and the fact that no parade identification was made in respect of the appellant Taylor. There was other cogent evidence implicating this applicant.

Accordingly, we are of the view that the omission to give a specific warning in the circumstances did not render the summing up on this aspect, unfair or inadequate.

With respect to the indictment as presented, Mr. Macaulay submitted that there was no evidence that Champagnie procured Bailey and that the indictment as it stood could mean either:

(1) Both Taylor and Bailey were procured at the same time; or

(2) Both were procured separately.

In those circumstances counsel concluded, the appellant could not be convicted on the indictment as it stood, No amendment of the indictment was sought by the prosecution at the trial to reflect the evidence and none could now be made by the Court of Appeal.

The relevant count of the indictment reads:

"PARTICULARS OF OFFENCE'

> "Trevor Bailey and Ransford Taylor, on the 27th day of July, 1978, in the parish of Saint Andrew, murdered James Robinson.
> Beverley Champagnie, on the same day, in the parish of Saint Andrew, did procure, and command the said Trevor Bailey and Ransford Taylor to commit the said offence."

In our view, evidence of procurement of one or the other or of both would be sufficient to maintain a conviction on the indictment as presented. In this regard we accept as correct the statement of the law in this passage from Archibald's 36th Edition §4152:

> "A man may be indicted as accessory to one of several principals, or to all: and if he is indicted as accessory to all, he may be convicted on such indictment as accessory to one or some of them: Lord Sanchar's Case, 9 Co. Rep.119; Fost.361;1 Hale 624."

On behalf of Champagnie, the following ground was also argued:-

> "The learned trial judge erred in law when he ruled that the witness WHITE, who admitted his signature on his deposition before the Gun Court Resident Magistrate, could not be contradicted by that deposition, since the witness

> "WHITE, had not admitted making the statement to him. The learned trial judge, impliedly made a finding of fact, which was for the jury when he held that it was not clear from the hand-writing of the Resident Magistrate, whether the word written by the Magistrate in the deposition shown to the witness "Man" or "men". The learned trial judge, expressly, ruled that the only way the witness could therefore be contradicted, was by calling the Resident Magistrate himself or somebody else who heard the witness give evidence at the Preliminary Examination."

Mr. Macaulay submitted that Section 17 of the Evidence Act specifically provides for proving inconsistency between evidence given at the Preliminary Examination and that given at the trial and the witness White having admitted his signature to the deposition, there was no need to call the examining magistrate. White said in evidence, that after the news-flash of the shooting, he saw appellants Taylor and Bailey in the white taxicab, and Taylor had said that he should tell Miss Champagnie, he (Taylor) saw the "man" and everything was alright. It was put to him in cross-examination that at the Preliminary Examination he had said "men". This he denied and when confronted with his deposition, which he admitted signing after it was read over, he nevertheless maintained that he had not said "men". Mr. Macaulay sought to prove the inconsistency by tendering the deposition. The matter, however, did not end there. Counsel for the crown contended that she was familiar with the Resident Magistrate's hand-writing and that the word in the original deposition was "man" and it was the copy typist who erred.

On the general question as to whether or not it was necessary to call the examining magistrate to prove the inconsistency, the learned trial judge said:-

HIS LORDSHIP: "....If you were to look, for instance, under section 27 of the judicature Resident Magistrate's Court Act, you will see there where specific provision is made whereby the notes taken by a magistrate when he is trying a case by virtue of the special statue summary jurisdiction or by indictment or which would follow like a civil case, once the notes are certified that of itself, that document of itself is sufficient to contradict the witness pursuant to section 18 of the Evidence Act. Where, However, what you want to, what you are

"referring to is the deposition taken by the magistrate there is no provision under the Act whereby that of itself by mere production is sufficient to contradict the witness. You either have to call the magistrate or somebody who was in court who will support you on that point. That is the rule."

and after further submissions -

HIS LORDSHIP: "....Well, the ruling is that there is a difference between making provision for something and proving it, what has been provided for: that where a witness is being cross-examined at a circuit court trial and it is intended to contracdict him by referring to what is supposed to have been said at the preliminary enquiry, then the mere production of the deposition is not sufficient to contradict him; and no law says that that should be so. It is quite a different thing where what is produced is where by statue like in section 27 of the Resident Magistrate's Court Act the statue says that the mere production of the document is enough and it would be quite a different thing if the document that is to be taken to contradict the witness was made by him, that he write it out, every word in there and sign it. It doesn't apply in this case. That is what I have been doing for the thirty-odd years, and that is the ruling that I have been giving for thirteen years on the High Court Bench."

Before us, Mr. Cooke, with commendable frankness advised the court that having compared Section 17 of the Evidence Act, with English Criminal Procedure Act, 1865 he could think of no arguments to support the trial judge's ruling on the general question.

Now section 17 of the Evidence Act provides:-

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

and section 27 of the Judicature (Resident Magistrate) Act reads:

"The Clerk of the Courts, or in his absence the Assistance Clerk, or such Clerk as may be directed by the Magistrate, shall take notes of evidence

> "in every case heard summarily before either the Court or the Court of Petty Sessions; and the Magistrate shall take notes of the evidence in the trial of all indictments and in all civil suits; and such notes, heretofore taken, or hereafter to be taken, by the Magistrate, or a copy thereof, purporting to bear the seal of the Court, and to be signed and certified as a true copy by the Clerk of the Courts, shall at all times be admitted in all Courts and places whatsoever in the trial or hearing of all civil proceedings suits and matters, for the purpose of impeaching the credit or contradicting the evidence of any person in accordance with the provisions of sections 15 and 17 of the Evidence Act, as prima facie evidence that the statements therein appearing to have been made by such person were so made."

In our view, it was absolutely necessary to have the provisions of section 27 of the Judicature (Resident Magistrate) Act, to elevate notes of evidence to the category of "statements reduced into writing" and so to bring them within the ambit of section 17 of the Evidence Act. This is so because in truth and in fact, they are, as described, "notes of evidence". The Clerk of the Courts or the Resident Magistrate is not obliged to take down either verbatim or in indirect speech or even in summary, everything a witness said but only such as the note-taker may consider relevant and useful.

On the other hand, the witness has no means of knowing whether or not the notes accurately recorded his evidence or recorded it in its entirety. The notes therefore could not strictu senso be said to be his statement reduced into writing. Accordingly, the notes of evidence taken pursuant to the provisions of section 27 are admissible only by virtue of those provisions and for the purposes expressed therein.

Depositions however, are in a different mould. When the evidence in a deposition is given on oath or affirmation, it is taken down by the magistrate, read over to the witness who is given the opportunity to alter or amend, and he signed as correct, it become his word and act, and is, in every sense of the word, his evidence reduced to writing and obviously within the contemplation of section 17 of the Evidence Act.

Therefore when a witness admitted to signing the depositions, in the absence of challenge to the procedure laid down for the taking of depositions in Preliminary Examinations as provided

by section 34 of the Justices of the Peace Jurisdiction Act, then they were admissible to prove an inconsistency between the evidence in the deposition and that given at the trial without calling the Examining Resident Magistrate. Further, in Preliminary Examinations, the procedure is to preface or introduce the depositions by the form 19 prescribed by section 34 of the Justices of the Peace Jurisdiction Act and to close them with a jurat under the hand of the resident magistrate. It is presumed that this procedure was followed at the Preliminary Examination in this case. Accordingly, it would be pointless to call a resident magistrate merely to say that what appeared in the depositions is what the witness said at the preliminary examination. Indeed, it would be unlikely that he could categorically so state from memory, independent of the depositions. Further it would be undesirable and a waste of precious judicial time to have a busy resident magistrate flitting in and out of circuit courts to prove simple inconsistencies between evidence in depositions and that given by the witnesses at trial. With due deference to the experience and erudition of the learned trial judge, we are firmly of the view that he erred when he ruled as a general principle that to prove such an inconsistency it was necessary to call the examining magistrate or someone who was present and heard the evidence at the preliminary examination.

However, in the instant case the prosecution raised the question of legibility and this therefore became the primary issue. The best evidence to resolve that issue would be from the examining resident magistrate. As the burden of proving the inconsistency rested on the defence, it was for them to call the magistrate. In any event, if inconsistency it was, it pales into insignificance against the quantum of credible evidence given by the witness White. Notwithstanding, it was perfectly proper for Mr. Macaulay to raise the question on appeal and to seek an authoritative answer from this court.

The Attorneys for the appellants industriously and with a gleaner's dilligence, searched the summing-up for material to support their criticisms. The court gave careful consideration to all the matters raised in these appeals and concluded that the appeals failed and for the reasons now set out herein.

> "person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given. But every case must be looked at in the light of its own facts."

Further, having considered the position of a witness called for the prosecution to whom questions suggesting he was an accomplice were put Edmund Davies J. continued at p.300:-

> "Mr. Truman was called as a witness for the prosecution, and a number of suggestions were made to him, of course on instructions, by learned counsel for the appellant which appears to have been wholly denied by Mr. Truman. This court has looked in vain at the transcript of the summing-up, and had listened in vain, with respect to counsel for the appellant, for any satisfactory indication that there was material on which the learned Common Serjeant would have been justified in presenting Mr. Truman to the jury as being an accomplice. As HILBERY, J., said, it is easy to make suggestions to a witness. That is one thing. More than that is required to cloak a witness for the crown or any other witness with the garment of an accomplice. This court is unable on the material before it to hold that it is shown that any warning was in prudence called for, for it is by no means satisfied that there was any material on which Mr. Truman could properly be described as an accomplice. Here, again, had the matter arisen, this court is satisfied that there was ample and overwhelming evidence of a compulsive character which would have necessitated the court saying that this conviction ought not to be quashed."

Prater's case was considered in R. v. Stannard (1964) 1 ALL E.R.34. in this case:

> "Three appellants were indicted jointly with a fourth accused on a count of conspiracy to receive stolen cars. At the trial the appellant S., giving evidence - in-chief, returned answers to questions concerning certain payments, which answers showing that he paid one of his co-appellants, B., tended to incriminate B. On a fair assessment of the conduct of S. in the witness box he did not intend nor desire to incriminate either of his co-appellants. In addition, there was a direct conflict of fact, between the evidence of S. and the evidence of his co-appellants, concerning three of the cars involved; this conflict was a matter essential to the guilt of S.'s co-appellants. Thus the jury had to choose between the versions given in evidence by S. and by his co-appellants."

In giving the judgment of the court Winn J. said at p.40: