JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 1/83 & 3/83

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE WHITE, J.A.

R. v. DALTON SHEPPY

&

DELROY JONES

Noel Edwards, Q.C., & Delroy Chuck for appellant Dalton Sheppy

Horace G. Edwards, Q.C., & Miss Veronica Morris for appellant Delroy Jones.

Howard Cooke for the Crown

On April 24, 25, & 26, 1985 and September 26, 1985

WHITE, J.A.:

After hearing arguments on the applications by Dalton Sheppy and Delroy Jones for leave to appeal against verdicts of guilty of the murder of Victor Kentish, delivered by a jury on their joint trial in the St. James Circuit Court, we treated the applications as the hearing of their appeals. This was because of the questions of law which were raised. The appeals were dismissed, the convictions and sentences were affirmed. We now set out the reasons for our decision.

The case for the prosecution was that Victor Kentish died from stab wounds which he received in the morning of the 13th day of October 1981. Dr. Mohan Yalla, who performed the post-mortem examination on the 16th October 1981,

identified six injuries on the body of the above-named deceased: On external examination he noted: (1) a laceration of one and a half inches by half an inch over the left anterior aspect of the parietal area; (2) a three inch long laceration of a superficial nature on the anterior aspect of the parietal area, in the midline; (3) a one inch long by half an inch wide laceration over the left shoulder; (4) a stab wound of half an inch by one and a half inches in the fourth intercostal space of the right chest situated just lateral to the sternum; (5) a stab wound of one inch by half an inch over the eleventh thoracic spine, posteriorly; (6) Upon dissecting the body, the doctor traced the last mentioned stab wound downward and medially. This downward and medial inclination entered through the posterior wall of the right atrium of the heart and made its exit through the anterior wall of the right ventricle in its lower portion.

The doctor saw blood not only in the pleural cavity, but also in the pericardial sac. He concluded that death was due to hypovolaemic shock secondary to massive intrathoracic bleeding internally, which resulted from the stab wound to the chest. The injuries which he had described were inflicted by a sharp object such as a knife.

It should here be stated that, at about 3:00 a.m. on the 13th October, 1981, while Detective Acting Corporal Caswell Hamilton was on mobile patrol he went to Rustic Road in the city of Montego Bay. He gave evidence that on that road, and in front of the Charles Gordon Market, he saw the dead body of a boy about sixteen years of age. It was lying on its back beside a stall "which is nearby to the roadway". The witness observed stab wounds to the head and chest of the body, which was removed to the Cornwall

Regional Hospital. This body was later identified to Dr. Yalla, on the day of the post-mortem examination, by Beresford Miller as the body of Victor Kentish.

Continuing his evidence, Detective Acting Corporal Hamilton said that on the 14th October, 1981, he went to the Montego Bay lock-up where he saw the appellants. He spoke to both of them in the presence of each other. He cautioned each of them, after which he arrested and charged them for the murder of Victor Kentish. After caution Jones replied, 'Officer me never mean fe kill him sah'. He denied that Jones said to him 'Me never kill him, me don't know anything about it'. After caution Sheppy reportedly said, 'Officer, a no me kill Victor, sir'.

How then did Victor Kentish receive the fatal wounds which Dr. Yalla found? The evidence of Adina Blackall and Nedra Hunter provide facts which the jury had to weigh in considering the guilt or innocence of the appellants. Because of certain issues raised at the trial and before this Court, it is appropriate to first delineate the locale of the incident which those two witnesses related, albeit that Adina Blackall became ill early in her sworn testimony, and was not able to return to Court to complete her oral evidence. Consequently, the learned trial judge after due enquiry, exercised his discretion and directed that the deposition taken from her at the preliminary examination should be read. We will have to return to this, considering that this ruling was a point for strong submissions in the Court below as well as before this Court.

Nedra Hunter's evidence regarding the locale will accordingly be dealt with at this stage. She was subject to much cross-examination to test her powers of observation in the circumstances about which she gave evidence.

Particularly was this so in regard to the situation of her shop vis-a-vis that of Adina Blackall, and in relation to the Charles Gordon Market. Miss Blackall at the time of the incident operated a cock-shop, which was situated to the left of the 'shop shed' - 12ft by 10ft in area - from which Miss Nedra Hunter did her higglering. Both shops were on Fustic Road. At the time there was one door into Nedra Hunter's shop. In her own language "the whole thing zinc off but outside, it never box round as yet, that mean it never board up as yet". So that it is correct to interpret her evidence to the effect although on the 13th October, 1981 there was a zinc roof, there were no walls to this shop. The roof extended over the door and when one went out through the door one would be facing the market, looking straight across to the market which is on the other side of Fustic Road.

According to Nedra Hunter, her shop was to the side of Miss Blackall's shop, and about a chain from it. Miss Blackall's shop was nearer to the roadway of Fustic Road. To use her words: "the sidewalk is here, and she just step off the sidewalk and into her shop". Again, "she can stay at her doorway and look on the street, on the sidewalk". Significantly, she said that Miss Blackall's shop was in front of her's - "her shop side before my shop". Her doorway was turned to the street, and Miss Blackall's shop also faced the market. When Miss Hunter looks through her door she is not able to see the door of Miss Blackall's shop, but only the side. Miss Hunter's evidence maintained that she has an unimpeded view of the whole market when she is at her door, and she had such an unimpeded view in the vantage position as testified by her.

It was the contention of the applicants that bearing the locale in mind the judge wrongly exercised his discretion not to visit the locus in quo. This visit was made

necessary, argued Mr. Chuck, because of the confusion which clearly existed in the evidence, which raised the question whether or not Nedra Hunter could have seen the men she deponed about from the position which she identified. This point of vision was important, because, if the defence succeeded in casting doubts upon this portion of the evidence of Nedra Hunter, her credibility regarding what she saw would have been seriously and effectively challenged. This was especially so, as her evidence was of vital importance in assessing the ability of the witness to properly identify the persons who were outside of her shop, as well as to accurately relate what was going on. Her point of vision was "a hole in the boarding-up" of her shop, through which she looked when she heard a voice calling her in the early morning of the 13th October, 1981. Initially, she testified she peeped through that hole and saw the two applicants and the deceased.

Miss Hunter was subjected to lengthy and repetitious cross-examination as to the position of the peep-hole. Despite the (to the reader) confusing questions to the witness on this point in the case it became clear that in the interval of time since the 13th October, 1981, and the date of the trial, Miss Hunter had made substantial alterations to the shop. In fact, she said at the trial that she had added a little room. She had inserted a door into this room. She described this new door as a "two-side door". It did not replace the old door, which itself was in the middle of the old structure.

Cognisant of the fact of the alterations to the building, the learned trial judge refused the application to visit the locus in quo. But in this Court this ruling

was seriously questioned, in that allowing for the alteration of the structure the alteration had not affected the position of the hole. It followed, therefore, said the argument, that despite the additions to the front of the shop, it would have been possible for the dimension of the hole, its position in relation to the front of the market and its position in relation to the Blackall shop to have been properly assessed by the jury, and the view was therefore vital to the applicants, bearing in mind that the defence was an alibi, also the question of whether the identification was well-grounded.

Misunderstanding the evidence as he did, ran the submission, the learned trial judge exercised his discretion wrongly, viz., on incorrect premises and on a mistaken view of the facts. It should be observed that as regards the shape and size of the hole, the witness had on more than one occasion demonstrated to the jury the size of the hole. Therefore, the criticism of the judge's ruling was not well-founded, and, to put it mildly, we are of the view that the judge was indulgent to defence Attorneys-at-Law who, especially Miss Morris for the appellant Jones, kept asking the same questions over and over, despite the fact that the witness never deviated from her evidence regarding the hole through which she peeped on the morning in question. We do not disagree with the judge's ruling. We do not agree that the learned trial judge deprived the jury of vital assistance necessary for them to assess the witness, Nedra Hunter, and her evidence concerning the conditions surrounding her identification.

Before considering further the complaints about

how the learned trial judge dealt with the evidence of identification, we would at this stage deal with the Ground of Appeal that:

> "The learned trial judge wrongly admitted the evidence (sic) the deposition of witness Adina Blackall since there was insufficient evidence that the absent witness was too ill to travel or unable to speak on the 7th October when her evidence was required".

The allusion here is to the following facts: Adina Blackall was the first witness called when the trial commenced on the 6th October, 1982. Under oath she described her occupation - 'operator of a little cook-shop' - at Fustic Road, Montego Bay. She was not living in Montego Bay, but she would travel from her home in Sandy Bay, Hanover, on Wednesday of each week. She would conduct her business from Wednesday to Saturday after which she would return home. On the nights she spent in Montego Bay she slept in a little room attached to the shop. She said that on the early morning of the 13th October, 1981 at about 2:30 a.m. or 3 a.m. she was lying down, but awake, in the room, when she heard a noise. She described it as "Somebody was running up and down and talking and saying, 'Give it to me; give it to me' ". When she looked outside she heard someone say, 'No, I nah give you, a no fi you, a fi me it'. She was able to see outside by peeping through a little hole in the door. This hole was created by the lock coming out of the door. She said she then saw four persons of whom she knew two. One of these two she called Sheppy. It was the first time she was seeing 'the boy that get dead'. The fourth person was a rastaman who she was seeing for the first time. When asked about the name of the other man whom she knew before she gave no answer, but the transcript records that Mr. Brooks, Crown

Counsel, observed that something was wrong with the witness. When she was asked if she wished to sit, the transcript records "Witness gesturing does not speak".

An adjournment was taken and on the resumption, Crown Counsel addressed the learned trial judge in these words:

> "May it please you, M'Lord. The witness Miss Blackall was taken to the hospital, sir, and from the information I have received from the investigating Officer, the doctor has kept her there for observation. She will therefore, M'Lud not be available this afternoon but what it is proposed to do, My Lord, with your permission, is, in order that we do not waste the rest of the afternoon call the next witness, Miss Nedra Hunter, to continue giving evidence in this matter, and hopefully Miss Blackall will recover her health, and will be able to continue her evidence tomorrow morning. ..... She is in hospital, My Lord".

When the Court resumed on the following day, Mr. Brooks informed the Court that:

> "She is now out of hospital but she is still very weak and it appears that she will be unable to come to Court to give evidence, but the Crown will be making a certain application to your Lordship when the appropriate time comes concerning Miss Blackall".

On the 7th October, 1982, Dr. Gadhar of the Cornwall Regional Hospital gave evidence that on the 6th October at about 12:45 p.m. he examined Miss Adina Blackall at the Cornwall Regional Hospital where he was on emergency duties. He heard complaints that she had fainted earlier. She appeared distressed, had a headache, and was not able to talk. She indicated to him by signs that she had pains in her abdomen. Her blood pressure was high: 160 by 130 milimetres. His assessment was a cerebral insufficiency, and that in fact she had suffered a cerebro-vascular accident, of which the

underlying cause was hypertension. He discovered from the relevant past medical history that she was hypertensive in addition to being diabetic. As a result of the foregoing, Dr. Gadhar opined that "she is not in a position medically, to give evidence, to stand in Court".

The learned trial judge had to consider this evidence together with that given by Police Corporal Joslyn Kelly. He told the Court that he was present at the Montego Bay Resident Magistrate's Court on the 23rd February 1982, where and when His Honour Mr. D.J. Pitter, Resident Magistrate for the parish of St. James, took down in writing the deposition of Adina Blackall, during the course of a preliminary examination. The two accused were present during the taking of the deposition. They were represented by Mr. Holyn and Miss Morris. She cross-examined Miss Blackall after which the deposition was read back to the witness who eventually signed her name to the deposition His Honour the Resident Magistrate also signed his name thereto. The Corporal identified both signatures, and the written deposition was eventually admitted into evidence by the learned trial judge as an exhibit. This ruling was in accordance with the provisions of S. 34 of the Justice of the Peace Jurisdiction Law.

It was argued that this was wrong since there was insufficient evidence to establish that the absent witness was too ill to travel or unable to speak on the 7th October, 1982 when her evidence was required. It was even suggested that the trial judge of his own volition, should have adjourned the case until the Crown placed evidence before him to establish that Miss Blackall within a reasonable time would not be able to attend Court.

Mr. Horace Edwards, Q.C., who argued this ground of appeal, pointed out that Dr. Gadhar had said he had referred the patient to a specialist but he refused to give a medical opinion on the present state of the patient at the time he was giving evidence, nor would he say what would likely be her future medical condition. Mr. Edwards invoked the chimerical principle of "the abstract justice of the case" even although he conceded that R. v. Noakes [1917] 12 Cr. App. R. 204, [1917] 1 K.B. 581 shows that the state of health of an absent witness whose deposition it is proposed to read may be proved by any credible witness on whom the Court can rely on the point. In that case a police constable had given evidence about the ill-health of two other police constables. To the objection that that was not sufficient evidence, because medical evidence of the condition of the witness should have been given Ridley, J., spoke for the Court of Criminal Appeal when he said at page 205:

> "This Court does not think that is a correct statement of the law. S. 17 of the Indictable Offences Act 1848 [s. 34 of the Justices of the Peace Jurisdiction Act] enacts that before a deposition can be read as evidence it must be proved by the oath or affirmation of any credible witness that the person whose deposition is proposed to be read is dead or so ill as not to be able to travel. There is no provision in the section that medical evidence shall be given. On the other hand, the evidence, whatever it may be, must be such as the Court can rely upon. It must not be merely the statement of a person who has been informed of the illness which prevents the witness from travelling".

Remarking that "it seems quite impossible to say that the Chairman here exercised his disection wrongly in allowing the depositions to be read", Ridley, J., pointed out that Baker [the police constable] did not give evidence of what he had heard about the condition of Eades and Bates. He had actually seen them in the presence of the doctor who

was attending them.

In the circumstances of the instant case, it was permissible for the judge to relate what had occurred to the witness while she was in the witness box to the evidence given by the doctor. Certainly, all in Court had seen her collapse in the witness-box, and the doctor had informed the Court that she had suffered a cerebro-vascular accident, which in plain everyday language is a stroke, a condition which it is well known is not overcome overnight. When he submitted to us that the learned trial judge should properly have granted an adjournment for the purpose of further enquiry, Mr. Horace Edwards was oblivious of the fact that the transcript does not disclose that such request was ever made to the trial judge. Indeed, Mr. Edwards did not say what would have been a reasonable time for the adjournment, which in itself would be disruptive of the enquiry into the serious charge of murder. It is sophistry to argue that the evidence of her being too ill to travel fell short of the evidence the learned trial judge must have before him in that what is required is not evidence of what her condition was on the day before, but what it was at the actual moment of trial when her evidence was required. This is to ignore the real nature of her illness.

On this whole question of the admission of a witness' deposition as evidence at the trial, we would draw attention to the judgment of Carberry, J.A., delivered on December 20, 1982 in the appeal of Regina v. Richard Scott & Dennis Walters SC Cr. Appeals Nos. 153 & 154/80. This case in our view sets out the considerations which should guide trial judges when a deposition is tendered by the Crown under the provisions of S. 34 of the Justices of the Peace Jurisdiction Act. Firstly at page 49 Carberry, J.A., said:

> "We are clearly of the view that the statutory provisions in our Act give no power to exclude the deposition where it is shown that the witness has died or become too ill to travel to court. Such discretion as the Judge enjoys under the statute relates only to witnesses who are absent from the island or have become insane".

At pages 55-56 he said:

> "The section in our judgment makes the depositions of witnesses who have died or are too ill to travel to court admissible without the consent of the judge, whereas his consent is needed when it is a case of the witness being absent from the island, or affected by insanity. In the former case the Crown need only tender the deposition, and the onus of successfully appealing to the judge to exercise his residual discretion to exclude it, lies on the accused and his counsel. It is for the defence to establish the facts or factors that make it unfair for that evidence to be admitted, and to persuade the judge to exclude it. On the other hand, in the two latter cases it will be for the prosecution under the statute to secure the judge's consent to the admission of the deposition, and there will be therefore an onus on them to secure that consent. The application of the residual discretion of the trial judge will apply to all cases, but there will be important differences in the onus of proof and in its application depending upon which particular cause for admitting the deposition is being advanced.
>
> While Donald White's case shows the discretion being applied to the admissibility of depositions under the Justices of the Peace Act, Section 34, it does not draw the distinction indicated above as to the onus of proof, or the onus of moving the court. The discretion basically is to exclude for cause to be shown, and the onus of showing that evidence otherwise admissible ought to be excluded is not a light one; it was not in fact discharged in either Selvey's case or Sang's case. As to review of the exercise of such a discretion it is well settled that this court will not interfere with the exercise of a discretion by the judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision".

This last quoted passage mentions the case of Donald White [1975] 24 W.L.R. 305, 13 J.L.R. 217. The judgment of the Court of Appeal in Scott and Walters (supra) must be accepted as over-ruling the decision of Donald White

which was exhaustively examined in the judgment of Carberry, J.A. Therefore that case should no longer be propounded as the definitive authority on the point.

We are of the view that in this case there is nothing at all to bear out the speculation that the doctor made a cursory examination - a mere preliminary examination. The material which was before the judge was conclusive as a proper foundation for the deposition to be read. The statutory requirements were fulfilled so that the judge properly admitted the deposition. It has not been shown to this Court that there was in this case a danger that the prejudicial effect of the deposition being read would outweigh the probative effect thereof. The applicants have not discharged the onus of showing why the admissible evidence should have been excluded and have consequently failed to move this Court to say that the judge was wrong in admitting the deposition and having it read to the jury.

We now set out the deposition which was read to the jury by the Registrar of the Court:

> "On this deposition Adina Blackall upon her oath said as follows:
>
> I operate a cook shop along Fustic Road, Montego Bay, St. James. On Tuesday the 13th of October, 1981, at about 2:30 a.m. I was in my bed, I heard a noise outside and someone talking. I next heard running across the house, I peeped through a hole at the door looking towards the market, I saw four persons, two of whom I recognised to be the accused. I knew accused, Jones, from he was a little boy when his father used to take him to the market. The other accused, Sheppy, I know for about one and a half years. I have always seen him at the market. Of the other two persons one was the deceased. I saw accused, Jones, kicking up the deceased. The accused, Sheppy, drew a knife and jammed at the accused - the deceased, sorry. The deceased ran, picked up a piece of stick and hit accused, Sheppy,

"on his hand. The knife fell. When Sheppy jammed at deceased the knife caught him two places in the chest. When the knife fell, Jones picked, picked it up. He then started jamming deceased. Deceased bawled out, 'Miss G! Miss G! Help Me! Roy dem a kill me out yah!' Nedra Hunter is called Miss G. Signed Adina Blackall.

She operates a cook shop near to mine. After deceased got the cut he ran to Miss G. doorway and dropped. Miss G. bawled out saying, 'Lord God, oonu kill de boy! Come tek him up from the doorway'. Both accused ran away. I come out and went to Miss G. doorway where I saw the deceased. He had stab wounds all over him - bleeding. He appeared dead. I could see because there were street lights around and it was also moonshine. Cross-examined, Miss Morris: The hole in the door is a big one. A lock was removed from the door leaving this hole. I locked my door by bolting it. I do not know the name of the deceased. Another person was there. He is a rastaman. He was not in the fight. He was just standing there. After deceased hit Sheppy and the knife fell and Jones took it up he left. My door from Miss Hunter's is about 10 yards. The door I peeped through. (The witness points/out the distance of about one chain) I had measured it, ten yards. Peeping through that hole I could not see Miss Hunter's shop. It is sideways by my doorstep. Doorway faces the market. Signed again, Adina Blackall.

I saw the four men right before the kitchen door. They had the deceased all on the kitchen door. Lights were in my room. The door is about six feet tall. The hole in the door is not too far from the bottom. You have to bend down to peep. The door is about a yard from the sidewalk. My kitchen is on the same level as the sidewalk. The door starts at the bottom of the floor".

It is of interest to advert to the following remarks of the learned trial judge at the commencement of his summing-up when he advised the jury at pages 185-186:

"Another aspect that I ask you to disregard altogether is Adina Blackall's portion of her evidence. She started to give evidence and you saw what happened; she became speechless, she started to long her tongue out and she had to sit down and you heard that she had to be taken to the hospital. Now, that is regrettable as you see that she's not a very young lady, I estimate that she's perhaps in her sixties, and she has had a very hard life, that is, she works as a higgler and you have heard the general conditions as to how

> "people work and live at the market. Now, that evidence - that is what she gave up to that point - I ask you to disregard it altogether in considering your verdict".

Further, at pages 219-220 he asked the jury to treat with great caution and care the information given in the deposition of Adina Blackall:

> "But let me tell you why you must treat this evidence with caution. It must be treated with caution because although the law makes provisions in certain circumstances - and that's a matter of law I ruled on - that when someone is ill so that they will not be able to come here to give evidence, implicit in the whole Act is that in certain circumstances evidence is receivable in court where the witness is not present. So the witness is ill, unable to give evidence; you heard that she couldn't talk but that was a matter for me and I decided to, in fact, let this evidence in; but you must be careful about it and you must be careful about it because she was not tested under cross-examination. She was not tested so you could see her reaction and she was ill, and that was a misfortune, but nevertheless you can look at it and you can give it some weight bearing in mind the warning that I have given you and it is to the credit of the Defence, they, themselves told you of how skeptically you are to view this evidence because it wasn't tested in cross-examination.
>
> So we now turn to this evidence that she gave at the preliminary enquiry and she was cross-examined down there but, as Miss Morris said, that was not a trial and counsel for the Defence, although they have carried out a cross-examination, you see, they may have decided not to show their hand down there and let me tell you, nothing is wrong with that. Counsel often do it and it is quite respectable. There is nothing wrong with it because you are saying, 'I am waiting until the matter comes up for circuit'. What defence counsel is trying to tell you, that although they defended the accused or helped him, that although they were afforded an opportunity to cross-examine, it doesn't mean that the full rein of their cross-examination came out. In any event you were not there to see her demeanour or how she shaped up under cross-examination, so, as I said, be very careful how you act on this evidence and having given you the warning that I have given you I will show you certain aspects of it - and it was read to you by the Registrar - I will show you how certain aspects of it, how you could, in fact, treat it - bearing in mind what I have said - treat it with skepticism; also bear in mind that whether evidence in it is coming from the Crown or it's coming from the Defence, you give the accused the benefit of your doubts and

> "it is only if you are satisfied that you feel, to the extent that you feel sure about the Crown's case that you can return a verdict of guilty".

Then at page 222 he adjured the jury to "give much more weight to Nedra Hunter's evidence because it is evidence which was tested here". He again stressed his caution about the evidence of Adina Blackall:

> "Now, quite apart from viewing this evidence with great skepticism it doesn't mean that you can't use it but let us see if on this evidence there is anything that you can find, in fact, that goes - that would assist you towards returning a verdict of guilty and if there is anything that assists you towards a verdict of not guilty".

These passages have been quoted from the summing-up to indicate the context in which, by the judge's instructions, the jury had to decide the several issues which arose, viz., identification, discrepancies and inconsistencies, the interpretation of what the appellants said to the police officer after caution, self-defence, common design, circumstancial evidence, and the withdrawal of manslaughter from consideration by the jury. This range of enquiry was canvassed in the several grounds of appeal.

Bearing in mind the charge by the judge regarding the deficiencies of the deposition of Adina Blackall, the above listed issues must nevertheless be addressed on the strength of the facts therein disclosed together with the sworn evidence given by Nedra Hunter.

Nedra Hunter's account was that while she was in her shop on the 13th October, 1981, at about 2:30 a.m. - 3 a.m. she was awakened from sleep by a male voice calling her and she heard a knock on her shop door. The voice said, "Help! Help! Help Miss G., Help Roy dem a kill me out yah". When she heard this she peeped through the boarding-up hole of the shop; and she saw the two accused,

who she knew before, standing up right at the doorway of the shop. She saw them plainly near to each other. She saw the whole body of them. She saw Sheppy with a 'machete knife' in his hand. She did not see Jones with anything in his hand. She saw Sheppy push the deceased in the front of his body and towards the doorway of the shop, as if he wanted to push him into the shop.

As she opened the door of the shop, she saw the deceased, Victor Kentish, fall on his back to the ground. He was dead. When she came out of the shop she saw Sheppy and Jones running away and across the street towards the railway line bridge. She called to them to come back and take up the dead body from the doorway of her shop. They kept on running. She ran across to the market, where at her request, someone summoned an ambulance. When she returned to where she had seen Victor fall, she observed that he was bleeding from some wounds to the breast, temple and over the heart. At all times when she had the appellants in her vision she was able to see them clearly. When she was peeping through the hole she said she saw a third person, "the side coming down", who was probably the deceased. She said she saw him from the waist down. It must therefore follow that since she was insistent about this that at the time she did not see his face, but she was as insistent under rigorous, repetitious cross-examination that she saw the faces of the appellants - when they were running away she saw the whole of them. Although it was 2:30 a.m. she was able to see them quite clearly because of the electric street light which were "bright like day"..... "As plain as ever.... Pretty light over, coming in like day!". She demonstrated to the judge and jury how the light was positioned and

highlighted her description with the following words - "and all over is light that the men that playing dominoes play it off a the electric light ..... the men that play domino at my shop are able to play domino without my light".

In this setting, let us look at the directions by the learned trial judge to the jury on the factor of identification. The several passages quoted hereafter will adequately direct attention to the importance which the judge placed upon the jury's properly understanding the significance of the issue of identification. At page 206 the transcript records:

> "So bearing in mind, Mr. Foreman and your members, that identification is the crucial issue in this case; bearing in mind that she has told you that she knew the two accused before, you must say whether the lighting situation was as good as she makes it and whether she had this good opportunity when she came outside the door to see both ROY and SHEPPY whom she knew. That's a matter for you to decide".

Again at page 208:

> "It's a matter for you as to whether you accept that or as MR. HOLYN is asking you to infer, if she saw them, in fact, through the hole, running, then she couldn't have seen them at the door at all because their backs would have been turned to her, and as you know, if, in fact she couldn't see them, in fact it would be a case of mistaken identity and you must bear in mind, as I told you, the crucial issue in this case is identity. So you must say whether the lighting, the opportunity, the vantage point either from the hole or the door or both taken together was such that she could see or that she didn't see because they ran away. It is a matter for you Mr. Foreman and your members".

At page 212 he remarked:

> "So you see Mr. Foreman and your members, remember we are dealing - if you accept her evidence - with a well-lighted place. Here she is giving you the accurate position as she saw it from the door one was sideways

> "and SHEPPY was facing the door, so here it is, if you accept this evidence coming out of the cross-examination of MISS MORRIS then, in fact, you have evidence that she was able to see and if you find that and you are certain that she is making no mistake, you have good evidence that these two men, DALTON SHEPPY and DELROY JONES were there that night".

At pages 212-213:

> "I am saying to you, if you accept NEDRA HUNTER'S evidence and you are certain that she is making no mistake about the identification, that the light was as good as she said and that she knew them and she saw them there that night, then you can infer from the evidence that both of these men are responsible for, in fact, killing VICTOR KENTISH".

Following Crown Counsel's reminder at page 228, the learned trial judge said at page 230:

> "... and the last matter identification. I am not going to give you a formula. I have highlighted to you the circumstances surrounding the identification and I have also told you that you must be certain that NEDRA HUNTER was not making a mistake at all about it because sometimes people make mistakes; but bear in mind that she said she knew them before, the light was bright and bear in mind all the circumstances that is the hole in the door that she said she saw them and bear in mind the Defence has suggested that she never really saw their faces, all she saw were their backs. Take into account all that and come to your decision".

It was submitted that the summing-up does not disclose adequate directions to the jury in the terms of formulation of the guidelines laid down in R. v. Oliver Whylie [1977] 15 J.L.R. 163. In addition, the complaint was that the judge did not bring to the attention of the jury the importance of the suggestions made by the defence to show the defects and the short-comings of the evidence of Nedra Hunter, even giving due weight to the fact that she said she had known both appellants and the deceased before the incident in question. Earlier in this judgment attention was directed

to the cross-examination of the witness regarding her range of vision, and the constant and repetitious questions put to her on this matter. The central question was, did she see the two men when she peeped through the hole? But just as importantly, did she see them clearly to identify them when they were running away from the shop? Defence Attorneys did test her as to whether she was able to see them and identify them on both occasions. In fact, it was said that she did not at all see them when she peeped through the hole, nor did she in fact see 'the whole body of them while they were running away'. It is certainly of much weight that peeping through the hole and then opening the door was almost one operation. From her answers under cross-examination, it is clear that she was not mistaken as to who were the persons outside her shop, even if it is sought to argue that she saw them only for a very short time. Tellingly, each of the quoted passages commenting on the issue of identification place this central question in proper perspective for the jury's consideration.

We are not persuaded that the learned trial judge insufficiently alerted the jury to all the relevant considerations concerning identification. The contention by the defence that when Nedra Hunter peeped through the hole which she insisted was beside the door, she could not see the doorway is not borne out by any evidence. Nor is there anything in the evidence which would underscore the suggestion that the hole in the boarding-up and the door were not on the same side in the same wall.

The issues of provocation and self-defence in relation to the facts of the case were raised by Grounds 6 and 7, respectively. Ground 6: 'the learned trial judge

misdirected the jury when he withdrew manslaughter from the jury'. Ground 7: 'the learned trial judge unduly influenced the jury in regard to self-defence by expressing his firm opinion that it does not arise'.

These questions at issue were based on the contents and scope of the deposition by Adina Blackall, which having been admitted into evidence was regarded by the appellants as casting a responsibility upon the learned trial judge. That responsibility was to leave absolutely to the jury the issues of self-defence and provocation considering that this deposition was the basis of the case against the appellant Jones. The Crown puts its case on common design, in respect of which there is no complaint about the directions in the summing-up. Indeed, those directions brought home to the jury the necessity to determine whether the two appellants were present on the scene, and what part each played in the incident. The omnibus question was posed by the judge. 'Did the accused men, Dalton Sheppy and Delroy Jones, acting together, stab Victor Kentish to death?' And 'Were Dalton Sheppy and Delroy Jones acting in lawful self-defence when they killed Victor Kentish?'

The learned trial judge said at page 196:

> "...you must take into consideration ... what both defendants are saying ... 'We were not there at all', but on the Crown's case, and I say on the Crown's case, on the deposition evidence which I will detail to you, it is possible for you to find - although it is going to be a matter for you - that they were acting in self-defence, and if you find that they were really acting in self-defence or you doubt whether they were acting in self-defence or not, then it would be your duty to acquit".

In pursuance of the inquiry the learned trial judge spoke to the jury in the following terms at page 197:

> "I will detail the evidence, if possible, for which you could say that self-defence arises in this case. It will be for you to say whether that evidence you have heard - the defence in fact, told you how little attention to pay to the depositions and you heard me specifically ask Miss Morris what, in fact, if a defence arises on the deposition do I not have a duty to put it and she said yes. So I will show you the portion of that deposition evidence which can raise the defence of self-defence and you will understand why counsel for the Crown was insistent in trying to put in the deposition in fairness to the defence so that you could have the whole picture of the case, ...".

By focusing attention on the contents of the deposition and its possible indications of self-defence and provocation, the trial judge was doing no more, no less, than he would have been bound to do if Adina Blackall had in fact given sworn oral evidence in the same words. The learned trial judge would then have had to give the jury directions on the nature of self-defence and what it entails, and the results if that issue were successfully accepted by them. In the event, and dealing specifically with what could be gleaned from the deposition which he read to the jury, he highlighted that portion of the deposition which described how Sheppy drew a knife and jammed at the deceased, after she had related that she saw Jones kicking the deceased. The deceased ran, picked up a piece of stick and hit Sheppy on his hand, causing the knife to fall from Sheppy's hand. Jones then picked up the knife and started 'jamming' the deceased, so that in addition to the two cuts already received when Sheppy jammed him, the deceased received others from Jones. This was the material which the judge used to formulate his commentary as reported at pages 223-225 of the transcript. At pages 222-3 he said:

"Now this is what she said: The

> "accused Sheppy drew a knife and jammed the deceased. Deceased ran and picked up a stick and hit accused Sheppy on his hand".

Advising the jury in those words necessarily raised the question whether Sheppy was being attacked in such circumstances as to cause either Sheppy or Jones to jam at the deceased - the aggressor? - with the knife to save himself from death or possible serious bodily harm.

No complaint is made about all the foregoing. What was contended was that the judge expressed a firm opinion that self-defence did not arise. This confused the jury even although he did leave the jury to decide whether they found that the appellants acted in self-defence. The judge's expression of opinion is at page 224:

> "So once more, for emphasis I put it to you. Mr. Foreman and your members out of an abundance of caution I have put the defence of self-defence to you. I have told you how to regard this evidence with great care. My opinion is self-defence does not arise bearing in mind - because I am saying that the facts as outlined here - in fact in my opinion I do not find self-defence but having left the defence of self-defence to you, if you find on your interpretation of these facts that Sheppy was acting in self-defence you would be entitled to acquit him".

This passage should not be taken in isolation and underlined as a withdrawal of something favourable to the appellants from the consideration of the jury when from the outset of the summing-up the jury had been cautioned that they were not bound to accept as valid any comment made by the judge on the evidence. It was specifically pointed out to them that the verdict on any issue, and certainly on the paramount question of guilty or not guilty, was for them alone. Even in the questioned passage he instructs the jury that in the light of his instructing them how to regard this

evidence with great care, "if you find on your interpretation of the facts that Sheppy was acting in self-defence you would be entitled to acquit him".

Although it is arguable that the judge should not have left self-defence to the jury, the final question must be, did he by the strong comment deprive the jury of their responsibility to decide the issue? Firstly, as was pointed out by Mr. Cooke, the reported use of a stick by the deceased was entirely a defensive measure on his part. Accordingly, that action could not be said to warrant the raising of self-defence on the part of the appellants. And if the jury accepted that after the knife fell from the hand of Sheppy, Jones took it up and began jamming at the deceased, they would have had before them a continuing story of the two appellants attacking the deceased in a similar manner and culminating in the positioning of all three before the door of Nedra Hunter's shop, when and where she saw Sheppy with the knife in his hand - this after she had heard the anguished cry for help from the deceased in which he said 'Roy dem a kill me out yah!' Secondly,"out of an abundance of caution and out of fairness to the defence" the learned trial judge finally at page 229 said this:

> "Now bear in mind, Mr. Foreman and your members, the directions I have already given you on self-defence. So you have to say, was the hitting of Sheppy with a piece of stick after Sheppy jammed him with a knife, was this self-defence for both Sheppy and Jones? That is did they fear an imminent attack or were they attacked and in the agony of the moment they gave these two other jabs which this lady said that two were first and the rest were after? If you feel that that is necessary then, in fact, you have a duty to acquit. If you on the other hand, feel or you find from the evidence that it was an act of aggression on the part of these

> "two accused men that night in inflicting the wounds which Miss Adina Blackall said they inflicted, then, in fact, you have a duty to return a verdict of guilty".

In the light of the foregoing, the argument that the judge unduly influenced the jury in regards to self-defence by exercising his firm opinion that it does not arise, is not sustainable.

Turning to the question of provocation we have not been persuaded that the direction by the judge to the jury - 'there is no room in this case for manslaughter' - is a matter for successful complaint. Mr. Edwards sought to cull this issue from the deposition of Adina Blackall and her evidence before she collapsed in the witness box. The particular basis was the words of demand and refusal which she said she heard on the morning of the incident. She did not identify the person making the demand, nor the person refusing. Apart from this it was submitted that the answer of the appellant Jones to the caution upon arrest was a factor on the consideration of manslaughter. He told Detective Acting Corporal Hamilton - "Officer, me never mean fi kill him". We hold that in the light of the evidence before the jury, the judge was perfectly right to instruct the jury that their verdict could only be guilty or not guilty of murder.

Peculiarly enough, the approach of the appellants to the evidence as it appears, from the transcript was ambivalent. Their counsel exercised the right to object to the deposition of Adina Blackall being received into evidence, but when it became part of the evidence, and the judge used parts of it in their favour they complain about it, while at the same time seeking to extract from it arguments which have no foundation in support of the

superstructure they endeavour to create.

In the same vein, apart from challenging by cross-examination that each accused never made the statement he is supposed to have made after caution, there has been the complaint on behalf of the appellant Jones that:

Ground 5 -

> "The learned trial judge's directions to the jury concerning the two possible interpretations of the statement made by the appellant to the police at the time of his apprehension failed to take into account the alibi advanced by the appellant to his prejudice".

The directions about which complaint is made are at pages 214 and 215:

> "Now, I ask you to look at it this way: You can look at it and say this is tantamount to an admission that 'I killed him and I am sorry'; that is one way you can look at it; and that is in fact the way favourable to the Crown. You can also look at it this way; 'he is dead but I didn't mean to do it, it was in self-defence'. I will come to and describe that to you and explain it to you. I have given you the outline, but I will relate the evidence that could be so. This is why you are chosen as jurors because the interpretation of these words in the context that they were used, if you find that he did say these words, is for you. Is it a man saying, 'No I never meant to kill him, I really mean to defend myself, he died, so I didn't mean to kill him', or is he saying, 'Yes I did kill him', this is what he means? But I never meant it?".

When dealing with the reply of Sheppy - 'A no me kill Victor sah' - the learned trial judge's analysis is recorded thus, at page 215:

> "Now Mr. Holyn says that the words he used are 'him' that is his suggestion. The police officer denied it. But Mr. Foreman and your members, I cannot think that it matters a great deal because the police officer tells you that he charged them specifically for the murder of Victor Kentish. So whether you say, 'A no me kill Victor, sir', or 'A no me kill him sah', then there is a relationship with Victor, given that he was charged with

> "the murder of Victor Kentish.
>
> Now what do these words mean? Again it is for you to decide. Does he mean that it is not my hand which was on the knife which was plunged into him?".

The posing of these questions was followed by directions to the jury as to the relevance and importance of their deciding whether the appellants were acting in concert in a common design to use the knife to inflict the fatal wounds upon the deceased. It must be borne in mind that all this is in the context of the review of the Crown's case.

Ingrained with the submission against how the learned trial judge dealt with the issue of self-defence was the grievance that the cardinal line of defence, viz., alibi, was inadequately put to the jury. It was argued that the learned trial judge's directions concerning the possible two interpretations of the statement made by the appellant Jones to the police at the time of his apprehension, did itself not take account of the alibi. By treating the words as he did, the learned trial judge interpreted them to mean only that Jones was present and was acting in self-defence.

In so far as Sheppy's reply was 'A no me kill Victor sah', the learned trial judge at page 215 of the transcript asked the jury to consider what was the meaning of these words, reminding that they will have to decide that meaning. And he put the matter to them in the following words:

> "Does he mean that it is not my hand which was on the knife which was plunged into him? Now that would be no excuse, because, as I explained to you, if in fact, you find that he was acting in concert, that he was acting together with Delroy Jones, if he was of one mind, they had a prearranged plan

> "to go there and use that weapon that night and used that knife which Nedra Hunter said she saw, and which the doctor gave as his opinion that the wounds he saw were knife wounds, the fact that he, himself, did not do it, his hand was not on the knife, it was his co-partner, if you find that they were one mind, even though it was Delroy Jones, if you so find, who used it, then Dalton Sheppy would be equally guilty of murder".

He added at page 216:

> "But there is another way to look at the evidence because, bear in mind, you always have to remember, if you have reasonable doubts you must give the benefit of it to the accused. If in fact what he was saying is that I was not in any plan at all, I only went out there and, in fact, the other man did and I merely ran; if that is what he means then you must in fact, acquit him".

Reading these passages with care one understands that they are advice to the jury on the assumption that if they were to find that Sheppy was present and he said the words attributed to him certain consequences might follow. The passages were uttered in analysing for the jury the evidence which was given by the arresting constable. The judge is here dealing with the Crown's case, the strength of which depended on the eyewitness evidence of Nedra Hunter, buttressed by what use the jury would make of the information given in the sworn deposition of Adina Blackall. He is directing the jury in the light of that evidence. Carefully and cautiously he said to them:

> "So it depends on how you look at the evidence, how you weigh it up, bearing in mind that if you are sure that he was there, that he planned to go with his friend and kill and that his friend killed and he was there present, aiding and abetting then he is equally guilty. So that is how I ask you to treat the matter".

The submissions of Mr. Cooke in reply to the arguments by the appellants' counsel are also a telling riposte.

We agree with Mr. Cooke that the trial judge did not whittle down the defence of alibi. At page 197 the judge reminded the jury that the defence being projected is an alibi, and the directions that the Crown must disprove the alibi - that neither nor both accused were at the scene of the murder - must have brought home to the jury that if they accepted:

> "that they were where they said they were, they were not at the scene of the crime, then you must acquit them or if, in fact what they say make you doubt, whether the Crown's case is true or not then you also acquit them because that is how you will treat the defence which has been projected in this case; that is one of alibi".

This theme was again put squarely before the jury that they can test the alibi by matching it against the Crown's case. Emphatically at page 227 he repeated to the jury that if they believed the story that each accused related 'then there is no question, you must acquit. If it leaves you in doubt about Nedra Hunter's story and the police officer's story, then you must acquit'. So that far from the learned trial judge whittling down the projected defence of alibi, he undoubtedly highlighted it for the jury's consideration. The first issue for the jury was, were the appellants present at the scene of the crime? Secondly, were they involved together in the criminal and and fatal acts? Thirdly, did they each say what the Detective Acting Corporal said they replied to him after caution?

The other points advanced before us can correctly be described as inconsequential. To this extent the version that the withdrawal of manslaughter was wrong in that there was evidence of provocation, does not stand up to scrutiny. Even if there was an argument previous to

the stabbing, there was no evidence as to who did what, and who was speaking when Adina Blackall said she heard a voice making a demand and a voice refusing the demand. If that defence of provocation arose it could, in the circumstances, only have been credited if the appellants were in a position to speak of it. As it was their defence was an alibi. The judge's remark that 'I have heard manslaughter being mentioned by the counsel ..... there is no room in this case for manslaughter', must have been based on the suggestions of defence counsel to the jury. Such submissions were made without any basis and were rightly scotched by the trial judge.

Whatever discrepancies and inconsistencies arose on the Crown's evidence were adequately dealt with by the trial judge.

All in all there was no ground of appeal upon which we could have satisfactorily determined these appeals in favour of the appellants. We accordingly dismissed the appeals and confirmed the convictions.