

NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 161/2001

**BEFORE: THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.**

R v DAVID GORDON

Dwight Reece for the appellant

Ms. Rochelle Cameron Crown Counsel for the Crown

July 9, and December 12, 2002

SMITH, J.A.

The applicant David Gordon was on the 6th July, 2001 convicted of capital murder by a jury in the Portland Circuit Court presided over by Reid, J. The particulars of the offence were that on the 18th November, 2000 in the parish of Portland he murdered Nadine Barnes in the course or furtherance of rape.

He was sentenced to suffer death in the manner authorized by law. On the 9th June, 2002, we treated the hearing of his application for leave to appeal as the hearing of the appeal. We dismissed the appeal and affirmed the conviction and sentence. As promised then, we now put our reasons in writing.

On the 18th November, 2000 sometime after midnight Mr. Eric Dewey, a machine operator, drove his Toyota motor vehicle and picked up the deceased Nadine Barnes at her home in Land Settlement, Port Antonio. He drove to Folly with the deceased sitting beside him. At Folly he parked beside an old building about six feet from the sea. They remained in the vehicle. The windows were down. They were not there for long when he heard her say "Jesus"! He looked in her direction and saw "a hand with a knife to her throat". Before he could do or say anything he felt a knife at his throat also. A male voice ordered him not to look around. They were under attack from two men armed with knives. One was to his right and the other to the left of his female companion the deceased. The man who held the knife at his throat asked "Weh de money deh ?" He was ordered to get out of the vehicle. He obeyed. The knife was still held at his throat. His assailant again asked him where was the money. Mr. Dewey took \$3,000 from his pocket and handed it to the robber. As he handed him the money, Mr. Dewey grabbed the hand with the knife. Mr. Dewey received a wound to his hand and was forced to let go of the assailant's hand. At that time Nadine was behind the vehicle. The other man was with her holding a knife at her throat. The man manoeuvred him to the back of vehicle and then into the passenger seat. Mr. Dewey testified that he heard Nadine say "I got gonorrhea". The man who had the knife at Mr. Dewey's throat told his

companion in crime to "go f... her in her bottom den". He heard agonizing sounds coming from Nadine – it was a "moaning sound" he said. Mr. Dewey's watch, ring and amplifier were taken by his assailant. The robbers then switched roles. He testified that after the man who robbed him went to Nadine, he heard more moaning sounds coming from Nadine. He was taken out of the vehicle and marched to the spot where Nadine was. Both of them were ordered at knife point to walk as they were directed. They questioned Mr. Dewey and accused him of being an informer. As they walked he heard Nadine scream "Dem cut me throat". At this point in his testimony the witness broke down and cried. After he regained his composure he told the court that after Nadine screamed the man with Nadine said to the other "Bredda bus de bwoy throat". Just then Mr. Dewey grabbed his assailant's hand and knocked him off balance. He shouted, "murder!" jumped over the embankment and fell into an almond tree. He got out of the tree and ran into the sea shouting "help! murder!". He said he kicked off his sandals and ran to the "last rock on the reef". He was bleeding from his neck and hand. He used his vest to band his neck. He was on the rock for sometime and then he saw the flashing lights of a police vehicle. He was eventually rescued by the police. He did not see Nadine when he returned to the shore. He was taken to the hospital.

Miss Pauline Wood, a Sergeant of Police attached to the Port Antonio Police Station gave evidence to the following effect. Sgt. Wood was on highway patrol at about 2:45 a.m. on the 11th November, 2000. She was accompanied by Constable Nathan Jaghai. She received a radio transmission and proceeded to Folly Point. There she saw a body lying face down on a stone wall which adjoined the gate. She turned on the police vehicle's flashing lights and summoned assistance. They alighted from the vehicle and approached the body. It was the body of a female partially clad in a blouse and panties and appeared to be dead.

Sgt. Wood heard cries of "Murder, come and help me" coming from the direction of the sea. She and her companion were joined by other police personnel. With the aid of a flashlight she saw the person who was calling for help. It was Mr. Eric Dewey. He was assisted ashore. She observed a wound to his neck. She then went to the Folly Great House where she saw a white pick-up truck with red streaks. A few yards from the vehicle was an amplifier, a foot of slipper and a face rag. Mr. Dewey claimed these items. Sgt. Wood observed blood stains in the area where these things were found.

Detective Sgt. Auvlin Reid of the Buff Bay Police Station was in charge of the investigation. He testified that on the 18th November at about 2:00 a.m. he received a radio transmitted message and

proceeded to Folly. He saw a White Toyota pick-up near an old building. This section of Folly is known as Ruins, he said. There he met other police officers. He spoke to Sgt. Wood who showed him a female body lying face down on a stone wall. He examined the body and noticed a large wound to the throat. The body was clad in T shirt and panties. Near this body he saw a pair of black shorts and a foot of a black slipper. These items of clothing were bloody. The body was later identified as that of Nadine Barnes. That same morning Sgt. Reid met Mr. Eric Dewey. He said Mr. Dewey's neck was bandaged. Mr. Dewey gave him an account of what had happened. Mr. Dewey showed Sgt. Reid a radio amplifier and a wash rag. Sgt. Reid also observed a pool of blood. He (Mr. Dewey) identified the Toyota pick-up van. Sgt. Reid examined the pick-up van and noticed blood stains "inside both doors", on the dashboard and on the inside of the windscreen. The vehicle was driven by Mr. Dewey to the police station in Port Antonio. Sgt. Reid was also shown a white vest which Mr. Dewey identified as his.

The body of the deceased Nadine Barnes was removed to the Port Antonio Hospital and from there to the Mizpah Funeral Home. Later that day Sgt. Reid contacted Dr. Robert Taylor a registered medical practitioner. Dr. Taylor gave evidence to the effect that on the 18th November, 2000 he, at the request of Sgt. Reid, attended the Mizpah Funeral Home. He took vaginal swabs and smears from a body identified

as that of Nadine Barnes. He took finger nail clippings from both hands of the deceased. He also took a sample of blood from the deceased. The smears, swabs, nail clippings and blood sample were handed to Detective Sgt. Reid. The same day that is the 18th November, 2000 Sgt. Reid contacted Miss Sharon Brydson at the Government Forensic Laboratory. Miss Brydson is a Government Analyst attached to the Forensic Laboratory. Her duties include visiting crime scenes and examining physical evidence associated with an alleged crime. On the 18th November, 2000 at about 2:40 p.m. she went to the scene of the crime at Folly in Portland. Detective Sgt. Reid and other police officers were there. Certain areas were pointed out to her by Sgt. Reid. She testified that she examined a stone wall which defined the western boundary of Folly Point Lighthouse property. The part of the stone wall which she examined was located approximately 50 meters from the exit and entrance gate. She also examined a portion of an unpaved driveway situated approximately 32 meters north of the Folly Ruins and approximately 370 meters south of the exit/ entry gate. She observed that the area along the unpaved driveway between Folly Ruins and the Lighthouse was secluded - no houses only shrubbery. There was a cliff with a drop of approximately 2.6 meters (7ft). This cliff was about four meters east of the driveway towards the sea and about 328 meters south of the wall. On examination she found blood present in clots and

brown stains on the western wall, on the unpaved driveway and on the ground, close to the cliff and east, towards the seaside of the driveway. She collected samples from the blood stain areas for further analysis.

On the same day – 18th November, she went to the Port Antonio Police Station where she examined a pick-up van. It was a white 1990 right hand drive two door Toyota Hilux motor pick-up truck licence number 6947BZ. She observed a piece of beige coloured synthetic rope between the seats. There were a black cap and a hand towel on the driver's seat. The back of the pick-up was covered with tarpaulin. She found blood on the steering wheel and on the inner section of the left door. There were brown stains on the inner aspects of the doors. Serosanguineous stains were on the hand towel. She told the court that there were brown smudges on the passenger seat, the dashboard, the floors to the base of the steering on the left running board and on the left sun visor. She collected samples from the blood – stained areas for further analysis. We will return to the evidence of Miss Brydson later.

Det. Sgt. Reid further testified, that on the same day – 18th November, he took from Mr. Dewey a white polo shirt, a pair of green trousers and a blue brief. Mr. Dewey was detained "on reasonable suspicion". He placed the items he received in envelopes which he marked and labelled. The grey T- shirt was placed in an envelope marked 'C.' The black shorts were placed in envelope marked D. The panties

were placed in envelope marked 'E'. The pair of black slippers in envelope marked 'K'. The right hand finger nail clippings in envelope marked 'M'. The left hand finger nail clippings in envelope marked 'N'. Vaginal swabs in envelope marked 'N'. Vaginal smear in envelope marked 'O'. The sample taken from the deceased by Dr. Taylor in envelope marked 'Q'. Mr. Dewey's polo T-shirt in envelope marked 'G'. The green trousers in envelope marked 'H'. The blue brief in envelopes marked 'I'. The wash rag in envelope marked 'J'. The merino or vest in envelope marked 'F'. On the 21st November, 2000 Sgt. Reid took all these items to the Forensic Laboratory. "

On the 22nd November, at the hospital, he obtained a sample of blood taken from Mr. Dewey. This blood sample he placed in an envelope marked 'P' and on the 23rd November he took this envelope to the Forensic Laboratory. On the 30th November, Sgt. Reid attended a post mortem examination performed by Dr. Taylor on the body of Nadine Barnes. The body was identified by Jacqueline Johnson, a cousin of the deceased. Dr. Taylor told the court that on external examination he found a deep cut on the neck - 6 inches in length and 2 inches deep from the middle of the neck to the right side. The muscles of the neck and the wind pipe were severed. The bones of the neck and the blood vessels were exposed. In the doctor's opinion the cause of death was

due to severe shock due to excessive external bleeding as a result of the deep cut to the neck caused by a sharp instrument such as a knife.

On the 4th December, 2000 he charged Eric Dewey for the murder of Nadine Barnes. On the 15th December, 2000 the applicant David Gordon was taken into custody by the Police. On the applicant voluntarily agreeing to give a sample of blood he was taken to the Port Antonio hospital by Constable Lisa Marsh. Constable Marsh testified that in her presence one Miss Paula Brown, a Medical Technologist, took a sample of blood from the applicant. It was taken in a tube which was handed to Constable Marsh. In the presence of the applicant she placed the tube in a sealed envelope. She returned to the police station with the applicant and the sample. The envelope with the applicant's blood sample was handed over to Sgt. Reid. The envelope was marked 'R' by Sgt. Reid who took it to the Forensic Lab on the 29th December, 2000.

On the 17th January, 2001, Sgt. Reid received certificates from the Forensic Laboratory. Consequent on the receipt of these certificates the charge against Mr. Dewey was withdrawn. On the 22nd January, 2001 Sgt. Reid charged the applicant with the murder of Nadine Barnes. The applicant when cautioned said "Mi nuh know nutten bout de murder. You can do anything you want, sar".

Miss Brydson told the court that on the 21st November, 2000 she received 13 sealed envelopes from Sgt. Reid. These envelopes were

marked "C" through to "O". Subsequently she received envelopes marked P,Q & R from Sgt. Reid. Miss Brydson in her evidence dealt in detail with her analyses and findings in respect of the contents of the envelopes she received. She found that the samples of blood taken from Mr. Dewey, the applicant and the deceased were all group O. Indeed she found no other type but group O blood. She found semen and spermatozoa in the vaginal swab taken from the deceased. Spermatozoa was also found in the vaginal smears. Miss Brydson testified that she also did DNA analysis. She found that the vaginal swab taken from the deceased and the sample of blood taken from the applicant had the same type DNA. From this finding she concluded "with a high degree of certainty that... Gordon (the applicant) would have been the contributor of the semen". She typed six areas from the vehicle for DNA analyses. From four of these, she obtained partial results which were similar to those found in the blood sample from the deceased. These areas were in the inner aspect of the driver's door, the steering wheel, the floor at the left front and the rope found between the seats. From her analysis she also concluded that the blood taken from the cloth on the inner aspect of the left door of the vehicle was similar to that of Eric Dewey.

The most important evidence for the prosecution came from the witness Mr. Leon Wright a mechanic from Portland. Mr. Wright testified

that he knew the applicant for about ten years. He knew him as Banton. He told the Court that the applicant is from Fellowship and Windsor. He used to see him in Golden Vale District in the parish of Portland. They met often and would often sit and talk. The following is a summary of his evidence. On the 14th December, 2000 about 9:00 p.m. Mr. Wright was at a banana boxing plant in Golden Vale; the applicant was there. Other persons were also there playing dominoes. The witness testified that the applicant asked him to take him to a "bush doctor" in Annotto Bay. The witness asked him why and the applicant replied that he wanted to go to a "science man" because the police were looking for him. The applicant proceeded to tell the witness that he and his friend "Jacko" went down town to gamble. They gambled and lost. Thereafter they went to Folly - it was night. A van drove up. The applicant and his friend trailed the van. A man and a woman were in the van. They went around the van and "held up" the man and the woman. The applicant frisked the man and took from him \$3000, a watch and walkman. He threw back the walkman in the van. The applicant further told the witness that he took the girl away from the man while his companion in crime held a knife at the man's neck. The applicant took the girl a "little distance" and raped her. The witness said he asked the applicant - "why you have fe rape her?" The applicant said he took the girl a distance from the van and after he had raped her, he

cut her throat. The witness testified that he asked the applicant if he "used any protection" and the applicant said no. He asked the applicant "why you have fe kill her?". The applicant said that his friend had called his name, the girl heard the name and said "Banton ah yuh do mi dis, ah yuh a do mi dis, ah yuh ah do me so?" He said he killed her because she knew him and he did not want her to identify him. After he killed the girl he went back to his friend who had the knife at the man's neck. The man was not there. His friend told him that the man had escaped. The witness, Mr. Leon Wright, further testified that the applicant showed him a sharp knife which he said he had used to cut the girl's throat. The witness said the applicant told him, his friend did not kill the man because his friend was a coward. The applicant also told him that he went after the man who ran into the sea, and bawled out "murder".

After the applicant had finished his narrative of the events of that fateful night of the 18th November, 2000 he gave Mr. Wright \$1,100. This was for the purpose of buying gas oil in preparation for the journey to the "bush doctor" early next morning. As planned, the witness driving a motor bike met the applicant at an agreed location. The witness questioned the applicant about the knife. He persuaded the applicant not to take the knife with him. The applicant he said, threw the knife on a shed before they embarked on their journey. The applicant was the witness' pillion rider. It was about 3:00 a.m. when they set off on their

journey. On their way to the "science man" they were stopped by the police who took them into custody. It was then about 4:00 a.m. The witness was released the same day after giving a statement to the police. Detective Corporal Lloyd Kelly also gave evidence. He testified that on the 22nd of January, 2001, he was in the office of Detective Inspector Michael Ellis. The appellant Gordon was there too. He was then a suspect in the murder of Nadine Barnes. Detective Kelly gave evidence to the effect that Inspector Ellis told the applicant that he intended to question him in relation to the murder and that he was going to send for duty counsel. The Inspector then summoned duty counsel, Mr. Carl McDonald. On arrival of counsel, Inspector Ellis took the applicant into the sub-officer's office. In this office were the Inspector, the applicant, duty counsel, Woman Constable Walker and the witness Detective Kelly. At the request of counsel all except the applicant and counsel withdrew from the office in order that counsel might speak with his client in private. Thereafter counsel beckoned them to return. They all sat around a table - with counsel sitting beside his client. Inspector Ellis told the applicant that he wished to ask him some questions in relation to the murder of Nadine Barnes committed on the 18th November, 2000 at Folly in Port Antonio. The applicant was cautioned. Cpl. Kelly wrote the caution on a "clean sheet" of ruled foolscap paper and invited the applicant to sign it. On the advice of his attorney he signed it. Woman Constable Walker

signed it as a witness. The applicant was then questioned – thirty questions were put to him which he answered. Cpl. Kelly wrote down each question and answer verbatim. The questions and answers were read back to the applicant. His counsel pointed out an error in the answer to question number seven. This was corrected and initialled by the applicant and also Constable Walker as a witness. At the conclusion of this exercise Cpl. Kelly invited the applicant to sign a certificate which he had appended. This was done. The document containing the questions and answers were received in evidence and the questions and answers read to the jury. During the cross-examination of Inspector Ellis by defence counsel Mr. Richard Rowe, a remarkable thing took place. At this late stage defence counsel sought to raise the issue of the voluntariness of the answers given to the questions. The learned trial judge was obviously taken aback. He granted counsel a short adjournment to take further instructions. Thereafter a **voir dire** was held in the absence of the jury to determine the voluntariness of the answers. The judge found that they were voluntarily given. In answer to questions asked the applicant denied knowing the deceased Nadine Barnes. He denied knowing "Folly where the lighthouse is". He could not remember where he was during the night of the 17th or 18th of November, 2000. He did not go anywhere with "Jacko". He asserted that his sperm could not be found in the vagina or on the clothes of the deceased Nadine Barnes.

The Defence

In an unsworn statement the applicant said that he was taken into custody by the police on the 15th December, 2000. According to him he was severely beaten by the police and suffered injuries to his mouth, nose and finger. On the 19th he was taken to Folly, shown a spot and told that that was where he murdered the girl. He was beaten and threatened that if he did not admit it he would be killed. On the 20th he was taken back to Folly by four policemen. He said the police asked him if he knew a girl by the name of Nadine Barnes and he told them yes. He said they further asked him if he knew where she lived and worked and he said no. He told the court that he answered "no" because the police threatened to kill him. He contended that the answers he gave to the questions put to him by the police were not true. He gave those answers because of threats from the police.

In his unsworn statement he claimed that he first met the deceased at a store. They subsequently went out together. The last time they were together was a Friday night; they had drinks; they kissed and eventually had sex. Then she took a taxi home, so did he. The following Saturday morning he went to a shop and a lady told him that she heard that a murder was committed at Folly. Later he heard on the news that a girl by the name of Nadine Barnes was killed at Folly. While in custody he saw someone in gaol whom he had seen at the park when he was there the

Friday with the deceased. According to the applicant that someone said to him "My yout, de girl me see yuh wid inna de park, dem kill her at Folly". He told the court that at the time he was in custody the police had charged someone else with the murder of the girl. He denied that he was at Folly at the time of the murder or at all. He said he knew nothing about the murder of the girl.

Grounds of Appeal

Mr. Reece for the applicant was given leave to argue the following supplemental grounds:

- (1) That the learned trial judge failed to direct the jury that the main prosecution witness Leon Wright was an accomplice of the appellant and therefore his evidence required corroboration, without which it was dangerous to convict the appellant in reliance upon the evidence of the aforementioned Leon Wright.
- (2) That the learned trial judge erred in law in not directing the jury that the prosecution witness Leon Wright was a witness with an interest to serve and therefore it was desirable to look at any evidence which was capable of corroborating his testimony.

Ground 1

The Law

The cases seem to establish that in a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the trial judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated. This rule although a rule of practice has the force of a rule of law.

The term accomplice primarily means 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 misdemeanour). See **Davies v D.P.P.** [1954] 1 All E.R. 507 which was followed by this Court in **R v Beverley Champagne, Ransford Taylor and Trevor Bailey** SCCA Nos. 22, 23 and 24 of 1980 (unreported) delivered September 30, 1983. In **Davies v D.P.P.** (supra) at p. 513 Lord Simonds, L.C., referred to two circumstances where persons falling strictly outside the ambit of this category have, in particular decisions, been held to be accomplices for the purpose of the rule viz:

- "(i) receivers have been held to be accomplices of the thieves from whom they received goods on a trial of the latter for larceny (**R v Jennings**) [1912] 7 Cr. App. R. 242; (**R v Dixon** [1925] 19 Cr. App. R. 36; and
- (ii) when X has been charged with a specific offence on a particular occasion, and evidence is admissible, and has been admitted of his having committed crimes of this identical type on other occasions, as proving system and intent and negating accident: in such cases the court has held that, in relation to such other similar offences, if evidence of them were given by parties to them, the evidence of such other parties should not be left to the jury without a warning that it is dangerous to accept it without corroboration **R v Mohamed Farid** [1945] 30 Cr. App. R. 168."

Submissions & Analyses

Mr. Reece contended that the evidence of Mr. Leon Wright indicates that he was an accessory after the fact to murder or that he was involved in a misprision of felony. In the circumstances, counsel submitted that the learned trial judge ought to have given the jury a warning in regard to the witness' evidence and the danger of acting on his uncorroborated testimony. He relied on **Mark Phillips v R** SCCA 68/96 – delivered February 27, 1998; **R v Jennings** [1912] 7 Cr. App. R. 242 and **Davies v D.P.P** [1954] 38 Cr. App. R 11. Miss Cameron for the Crown submitted that there is no evidence which indicates or suggests that the witness, Mr. Leon Wright did anything with the intention to hinder the apprehension, trial or punishment of the appellant. Hence he may not be described as an accessory after the fact. She relied mainly on **R v Beverley Champagnie et al** (supra) and also on **R v Beck** [1982] Cr. App. R 221 and **R v Leroy Barrett** SCCA No. 45/89 (unreported) delivered 16th July, 1990.

Was Mr. Leon Wright an accessory before the fact? In contending that he was, Mr. Reece referred to the following facts:

- (i) Wright was a friend of the applicant, Gordon.
- (ii) Gordon told him that he had raped and murdered a lady at Folly and that the police were looking for him.
- (iii) Wright said he had heard about the murder before Gordon spoke to him about it.

- (iv) Gordon asked Wright to take him to see an obeahman and Wright agreed to do so.
- (v) Gordon gave Wright \$1,100 to buy gas in preparation for the trip.

The facts relied on in the instant case, as constituting an accessory after the fact resemble those relied on in *R v Beverley Champagnie et al* (supra). In that case *Champagnie Taylor and Bailey* were charged with the murder of James Robinson a businessman and Winston Cox a retired Supt. of Police. It was argued that the prosecution's principal witness Eustace White was an accessory before and after the fact and that the learned trial judge failed to give the jury the appropriate "accomplice warning". It was White's evidence that he had put two and two together and felt that Robinson was murdered and that Champagnie was involved. His activities after the murder included (p. 20 of judgment):

- (i) Accompanying Champagnie to an obeahman
- (ii) Accompanying Champagnie... to the bank and receiving \$200 of the moneys drawn from Robinson's account
- (iii) Accompanying Champagnie... 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.
- (iv) As courier for Champagnie conveying \$3,000 to Taylor.

Kerr J.A. in delivering the judgment of the Court said at p. 20:

"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."

He then went on to quote the following passage from the judgment of Rowe, J.A. in **Nathan Foster**:

"What 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 Archbold 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 prevent his trial."

Kerr J.A. then went on to say :

"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 would 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 categorizing White as an accomplice nor was there any sufficient evidence to leave to the jury the issue of accomplice **vel non**".

The activities of the witness Leon Wright are less significant than those relied on in the **Champagne** case. We are firmly of the view that the acts of Wright listed above could not be said to have been done with intent to hinder the apprehension, trial or punishment of the appellant. There is certainly no material to suggest that the witness might have been an accomplice. Note also that the witness Wright was contracted to and intended to take the appellant to the "bush doctor" and return to the district. The learned trial judge was therefore correct in not treating him as an accessory after the fact and thus an accomplice.

A witness for the prosecution who may be guilty of misprision of felony is not an accomplice within the definition of **Davies v D.P.P.** (supra). However, he may have an interest to serve and in such a case a warning may be desirable. This will be considered when dealing with ground two.

Ground 2

Mr. Reece submitted that the witness Leon Wright having failed to report the matter to the police when he had ample opportunity to do so, was at least guilty of misprision of felony. As such he contended that the witness had an interest to serve because he was at risk of prosecution for

misprision of felony. Therefore, he argued, the judge should have directed the jury that it was dangerous to rely on his uncorroborated evidence.

Miss Cameron for the prosecution submitted that there was no evidential basis for suggesting that the witness may be unreliable. In any event, she argued, it was desirable but not obligatory in the case of a witness with interest to serve for the judge to give a warning. She relied on **R v Beck** [1982] Cr. App. R. 221 and **R v Leroy Barrett** SCCA 45/89 (supra).

In **R v Leroy Barrett**, Rowe P, in delivering the judgment of the Court said (p.5):

"Where it is alleged by the defence that the witness had an interest to serve, but it is not suggested that he was in any way a participant in the crime charged there is no duty on the trial judge to give an accomplice warning. The Court of Appeal in England reviewed a number of well known decisions in this area of the law in **R. v. Beck** [1982] 74 Cr. App. R. 221. In that case defence counsel had submitted that even though there was no material to suggest any involvement of the witness in the crime if he had a 'substantial interest' of his own to serve for giving false evidence then the accomplice direction must be given. Of this submission Ackner L.J (as he then was) said at p.227:

'We cannot accept this contention. In many trials today, the burden upon 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'."

Having quoted the above passage, Rowe, P then drew reference to p.

228 where Ackner L.J continued:

"While we in no way wish to detract from the obligation upon a judge to advise a jury to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an improper motive, and the strength of that advice must vary according to the facts of the case, we cannot accept that there is any obligation to give the accomplice warning with all that entails when it is common ground that there is no basis for suggesting that the witness is a participant or in any way involved in the crime the subject matter of the trial".

As was held in the **Leroy Barrett** case, we are of the view that all that the judge was required in law to do, was fairly to put before the jury the defence's contention that the witness was suspect because he had an axe to grind and to charge the jury to take those criticisms into account when evaluating the credit of the witness. There was certainly no suggestion that the witness Wright was in any way involved in the crime.

It seems to us that the learned trial judge properly discharged his duty when he told the jury that (pp.326-7 of Record):

"We have got the testimony of Mr. Leon Wright. Careful attention is to be taken of what he is saying. We have a situation where he is a person giving evidence about another person who happened to be in the adjoining cell...

At the same time, it was suggested that Mr. Wright was trying to do something to save himself because he was picked up by the police".

The learned trial judge then proceeded to remind the jury of the evidence of the witness Wright. He pointed out the discrepancies in the witness' evidence and concluded at p. 335:

"Of course after the police took him in at 4:00 a.m. he was released 7:00 o'clock the same day after giving a statement. Counsel is submitting that he made the statement only to get out of this situation".

We are of the view that these directions were adequate and fair. This ground also fails.

It was for the reasons set out herein that we dismissed the appeal and made the order referred to at the outset.