JAMAICA Judgment Book

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 37/88

BEFORE: The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Forte, J.A.
The Hon. Mr. Justice Downer, J.A.

R. v. EVERALD McLAUGHLIN
CHRISTOPHER BROWN

L. H. McLean for 1st Appellant McLaughlin

D. Daly for 2nd Appellant Brown

G. McBean for Crown

November 21, 22, 23, 24 &
December 16, 1988

CAMPBELL, J.A.

The above appellants were convicted in the Gun Court Division of the Home Circuit Court on February 5, 1988 before Ellis J and a jury for the murder of Derrick Barrett committed on February 14, 1984. As the grounds of appeal filed raise questions of law the application is treated as the hearing of the appeal.

The main witness for the crown was Martha Kelly. Her evidence is that she is the common-law wife of the deceased with whom she has four children.

On February 14, 1984 at about 5.00 a.m., she was aroused from her slumber by knocking on her apartment door and shout of "Police open." Immediately thereafter, the door of her one bedroom apartment at 1M Glasspole Avenue in the Rockfort Area of Kingston was kicked off. At the time, the deceased, and their four children were in the room with her. Three men each armed with a gun entered and requested that the light be turned on. One of the children complied and the electric light in the apartment which was near the door over the children's bed was turned on. She recognized the two

appellants as persons whom she had known for some years past. The appellant McLaughlin also known to her by the alias "Tenna," played the dominant role in the incidents which took place in the apartment. He draped her in her clothes, put a small flat gun to her ears, and enquired where the deceased was.

He was told that the deceased was not in the apartment. These three men went outside where other men were assembled. A voice was overheard enquiring if they had looked under the bed. Following on this enquiry, McLaughlin and another of the three re-entered, while Brown stood by the open door. McLaughlin looked under the bed and on seeing the deceased who had dived thereunder when the door of the apartment had been kicked off, ordered him to come out, using expletives to embellish his order. The deceased complied. McLaughlin addressed the deceased in terms that it was the latter's sister and brother who had placed him the deceased in the predicament in which he was, because they had turned "labourites." McLaughlin then ordered the deceased to put on his clothes and follow them. McLaughlin actually handed the deceased the top of a sweat-suit which was hanging behind the door for him to put on, despite the exhortation of one of the three men namely "Roman" who had earlier entered the room that they should leave the deceased as he had young children and he was in any case not the one whom they were after. The deceased having dressed, McLaughlin asked him to take them to his brother. The witness then gave McLaughlin $180.00 which she had, and begged him not to kill the deceased. McLaughlin, Brown, Roman and the deceased then left. Thi Incident in the apartment spanned about half an hour. Shortly after they le she heard gunshots in the direction of Glasspole Avenue. About 6.00 a.m., heard the deceased's sister crying and saying something. As a result, s' proceeded to the cross-road of Glasspole Avenue and D'Aguilar road whe saw the dead body of Derrick with gunshot wounds. She proceeded to P Police Station where she made a report.

As the matter elicited under cross-examination are inextricably linked with the grounds of appeal filed and as excerpts from the cross-examination will hereafter be set out in extenso to provide the context within which the appeal is to be understood, we will now proceed to a consideration of the grounds of appeal filed.

Nine grounds of appeal original and supplemental were filed by Mr. McLean on behalf of the first appellant on 18th February, 1988, 12th October, 1988 and 18th October, 1988 but only 3 were fully argued. In respect of one other ground, namely that the verdict is unreasonable and cannot be supported having regard to the evidence he said he relied in support thereof on the arguments advanced in respect of the three grounds argued. These 3 grounds are:

A. Ground 3 of the Original

> "That the learned trial judge erred in law in refusing an application on the part of the defence to admit documents purporting to be statements which the witness for the prosecution Martha Kelly admitted in evidence, at the trial that she had signed and given as statements, and further in the case of one of the said two which she signed and gave to the defence witness Rosalee Ramsay, the learned trial judge also rejected a further application from the defence to hold a trial within the herein trial, in order to determine whether to admit the vital statement of the said witness Martha Kelly in evidence."

B. Ground 3 of Supplemental dated 18th October, 1988

> "The learned trial judge after intimating that a written statement by Martha Kelly (which the learned Judge refused to permit her to identify the signature on the said statement) would be allowed to be tendered through the witness Ramsay after he had overruled efforts to put it in through Kelly, the maker of the document, later refused to admit the document in evidence when it was later sought to put it in through the witness Ramsay."

C. Ground 2 of the Original

"That the learned trial judge wrongfully during the course of his address paused to inform the Crown Counsel who conducted the case for the prosecution that a report be made to the Director of Public Prosecution about the conduct of the witness for the defence one Rosalee Ramsay, mother of the accused Everald McLaughlin, as the said Rosalee Ramsay was a most important witness for the Defence and whose testimony if believed by the jury would probably result in their verdict of acquittal of the accused McLaughlin and her testimony might well have been disbelieved and lessened in its value having regard to the said directions of the learned trial judge that is to say to have the witness reported to the Director of Public Prosecutions."

Mr. Daly for the second appellant filed nine additional and further additional grounds on 12th and 27th October, 1988 and with leave argued all but one. Grounds 1, 1 (b) and 7 are as hereunder:

"1. That the learned trial judge erred in law, and thereby greatly prejudiced the applicant in his Defence, by refusing to allow counsel for the applicant to tender in evidence a signed statement of the witness Martha Kelly to discredit her identification of the Applicant.

1. (b) His Lordship, further compounded his error by directing the jury in effect, that they were not entitled to consider the contents of the statement or their possible effect upon the credit of the said witness.

7. That the learned trial judge erred in law and thereby prejudiced the applicant in his Defence by refusing to allow counsel for the accused McLaughlin to put in evidence a handwritten statement by the witness Martha Kelly which statement was in conflict with the said witness' identification of the applicant."

The above grounds are similar to Mr. McLean's grounds A and B in that they relate to two documents, one being a typewritten police statement signed by Martha Kelly but not signed or otherwise authenticated by any police officer, the other a statement which Martha Kelly gave to Rosalee Ramsay the mother of the first appellant. These grounds will be considered together.

We turn to the typewritten police statement which it is argued the learned trial judge erred in not admitting in evidence. The evidence elicited from Martha Kelly under cross-examination by Mrs. Henry for the second appellant is that on 14th February she gave a statement to Sgt. Ximines in which she mentioned the name Christopher Brown. This statement was handwritten by Sgt. Ximines. She signed this statement and her signature was witnessed by Sgt. Ximines who also signed. She admits her signature on a typewritten police statement shown to her in which the name of Christopher Brown does not appear. She however says she does not recall signing that typewritten statement nor that she had ever read it so she could not say whether the name Christopher Brown appeared therein. When shown this typewritten document and invited to read through the same to herself, she thereafter admitted that the name Christopher Brown was not mentioned therein. Defence Counsel thereafter asked for the document to be admitted in evidence. Objection was taken by Crown Counsel to the admission of the document in evidence. This objection was sustained by the learned trial judge who said at page 103 of the record:

> "The objection is sustained, and let me give the reason so that we are not in the dark. The witness speaks of giving a statement which she saw the policeman take down and then she signed. What you have purported to put in her hand is a document, typewritten, and has her signature, and you said that this statement which she would have given, or which she gave, on the first occasion was witnessed by Ximines. This one had nothing other than her signature, so it is a different document altogether, and that is the reason why I am excluding it."

Before us, Mr. Daly stated as a proposition that in cases where identification was in issue, the defence has a right to cross-examine on, and to tender in evidence statement to the police made by the prosecution witness for the purpose of challenging the evidence of identification. He conceded that there was no authority specifically on the point but said he relied on the broad sweep of R. v. Oliver Whylie 15 J.L.R. page 163 as embracing this proposition. He submitted that the learned trial judge erroneously ruled that the statement was inadmissible solely because it had not been signed by the policeman to whom the statement was given.

We think the learned trial judge was correct in ruling that the typewritten document was inadmissible in evidence.

It is unnecessary for us to express an opinion on the proposition advanced by Mr. Daly because we are clearly of the view that even if he were correct, the document to be admissible in evidence, nonetheless had to satisfy the statutory requirements of sections 15 and 16 of the Evidence Act. These sections provide as follows:

> "15. If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it, but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.
>
> 16. 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 indictment or proceeding, 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."

The impact of section 15 in rendering inadmissible this typewritten statement will be considered when dealing with the statement given by Martha Kelly to Rosalee Ramsay. For purposes of disposing of the submission that it should have been admitted in evidence, it is sufficient to say that it was inadmissible because it did not comply with the first requirement of section 16, namely that since it was a statement in writing, it must either be proved or admitted to have been written by the witness, or if oral and reduced into writing by some other, it must be proved that the witness expressly admitted the contents of the writing or that she had read the written version of her oral statement, or the same had been read over to her before she signed the same. It is not a sufficient compliance with section 16 that she acknowledges her signature on a document which is not handwritten by her. The person who reduced the statement into writing must, in the absence of admission of the contents by the witness against whom it is to be used, authenticate the writing and prove that the contents thereof were brought to her knowledge. In this case, Martha Kelly albeit acknowledging her signature on the document, said she does not recall ever reading the typewritten document and there was no evidence before the learned trial judge that the contents of this document were brought to her knowledge. It would be wrong to infer knowledge of the contents of the document which was not found in her possession, solely from her signature appearing thereon. This in essence was the reason given by the learned trial judge for refusing to admit the document in evidence and he was perfectly correct.

Mr. Daly further complained that the learned trial judge compounded his error in not admitting the document by his direction to the jury that they should exclude from their consideration a vital part of the second appellant's defence namely the omission of the second appellant's name in that document, which omission went to discredit the witness on the vital issue of identification. The learned trial judge did say thus at page 236:

> "You remember that she suggested that Martha Kelly did not tell any policeman about Brown ..... and that a document on which she cross-examined did not have it in. Now, Martha Kelly told you that she told the policeman and he wrote it down, didn't type it, he wrote it down. Now, as far as the case is concerned, that typewritten thing wasn't in evidence. You can't deal with it at all."

The above direction was perfectly correct and consistent with the non-admission of the typewritten document in evidence. The purpose of seeking to have it admitted in evidence was to contradict the evidence of the witness at trial that she knew the second appellant and had mentioned his name to the police. The contradiction was to be achieved by showing that she never mentioned the name of Christopher Brown in her earliest statement to the police on February 14, 1984. However, once it was shown explicitly on the evidence, which was, surprisingly, elicited in cross-examination, that the typewritten document shown to her was not in fact the statement taken from her by Sgt. Ximines, it could not be used to contradict her for the reasons hereinbefore stated and the learned judge was right in telling the jury that they could not make any finding that she was contradicted by having regard to that document which was not in evidence.

Turning now to the statement obtained by Rosalee Ramsay from Martha Kelly which Mr. McLean for the first appellant was desirous of having admitted in evidence through Martha Kelly and thereafter through Rosalee Ramsay, we think certain collateral complaints made relative thereto by him do not merit serious consideration.

Firstly, is the complaint that the learned trial judge by refusing to permit him to have Martha Kelly identify her signature on the statement, in effect overruled his efforts to have the statement put in evidence through that witness.

Secondly, is the complaint that the learned trial judge rejected his application "to hold a trial within the herein trial in order to determine whether to admit the vital statement of the said witness Martha Kelly."

Thirdly, is the complaint that the learned trial judge in effect misled him into not applying to have the statement admitted in evidence through Martha Kelly by intimating that he the learned trial judge would allow it to be admitted through the witness Ramsay, which when tendered through the latter, was refused.

Before dealing with the main complaint which was the non-admission of the statement in evidence, and the collateral complaints above-mentioned, we here set out the context, as appears from the cross-examination, within which the statement was introduced and cross-examined on. Martha Kelly in her evidence in chief said she went to Rockfort police station and made a report on 14th February, 1984. She did not give evidence of the contents of her report. The cross-examination began with her first deposition at the Preliminary Inquiry at the Gun Court. She admitted that under oath at the Gun Court she had said that she did not know the appellants, she did not see them at her home on the morning of the incident. They were not the men who took away her common-law husband. Having thus elicited these explicit admissions, that she on oath, had made these previous inconsistent statements and bearing in mind she had not given evidence in chief that she had mentioned the appellants' names in her first report to the police, Mr. McLean for no clearly explicable reason elicited from the witness, evidence in cross-examination that she had in fact given to Sgt. Ximines a police officer, on the morning of the incident, the names of McLaughlin, the other accused man, and Roman as the persons who were at her house that morning. This piece of evidence is highly significant in relation to a ground of appeal of Mr. Daly which complains that the learned trial judge was wrong in directing that identification of the second appellant by Martha Kelly's assertion at trial had been supported by information in the warrants of arrest which was hearsay.

With the explicit admission by Martha Kelly of her previous contradictory statement under oath, we would have thought that any earlier contradictory statement especially one not given under oath and which so to speak is merged in the subsequent contradictory statement under oath, would have paled into insignificance. This was not however the view of Mr. McLean. He proceeded to cross-examine on a statement obtained from Martha Kelly by Rosalee Ramsay the mother of this first appellant. This statement though inconsistent with the evidence of the witness at trial would not in our view carry the matter any further than the inconsistent deposition in which so to speak it was merged. The undermentioned relevant excerpts of the further cross-examination at pages 45-52 tell their own story:

"Q. You said it happened around 5 o'clock in the morning?

A. Yes, about that time it started.

Q. But you had made an earlier statement that it was about 4 o'clock in the morning?

A. I didnt made (sic) that statement

Q. Never?

A. Never made the statement I dont remember making the statement.

Q. You don't remember? I want to just show her her signature, sir."

Crown Counsel having objected to the procedure being followed by the defence, on the ground that he crown counsel had not seen the document, Mr. McLean did not further press for the witness to identify her signature but continued his cross-examination thus:

"Q. Did you give a written statement to the mother of the accused man McLaughlin?

A. Yes, she came and told me that you told her was to come to me for that.

"His Lordship: Wait just a minute

A. She told me that you told her must come to me and I must write a contrary statement to the one before."

The learned trial judge was apparently astounded that the mother of the first appellant should have taken a statement from the witness. Thus he asked:

"His Lordship: What you say why you did it?

Witness: She came to me and told me that Mr. McLean say I must write a statement contrary to the one before.

His Lordship: She came to me and said what?

Witness: I must write a statement contrary to the one that I gave to the police.

His Lordship: I should write a statement contrary .....

Witness: To the one that I gave to the police before.

His Lordship: To the one I gave the police before, yes Mr. McLean are you continuing?

Mr. McLean: If I am continuing sir? This is the whole life blood of the case.

His Lordship: All right.

Q. Yes. So you gave a statement to the mother of the accused man?

A. Yes, because I was afraid because I was living in the area same way and I got threatened in 1985.

Q. Was this statement that you gave to McLaughlin's mother a statement having to do with what happened on the morning of the incident?

A. No, what I really gave her that did'nt happen, but because of fear and threat for me life I do it.

Q. Is the writing in that statement conveying anything at all about what happened on the morning of the incident?

A. Repeat it, I didn't get that.

" Q. The statement that you wrote did it mention the incident?

A. What it mention, nothing like that did not happen, what is in the statement.

Q. Did it mention anything about the incident whether it happen so or not?

A. It is contrary, it could never mention about what happened then.

Q. Did it call McLaughlin's name?

A. Yes, I said in the statement, I said I did not know him, because I was forced to write it.

Q. You didn't mention the time that the incident was purported to have happened, to supposed to have happened?

A. The statement was contrary to it, couldn't have mentioned at 5 o'clock in the morning.

Q. I said did it mention in the statement the time when these men were supposed to have come to your premises, because that's where it started, why we had to go to the statement?"

There followed an objection by Crown Counsel on the ground that the witness had by her answer impliedly admitted that she had mentioned a time of the incident which was different from the time of 5 a.m., given by her in evidence. The learned trial judge was of a similar view but this notwithstanding, cross-examination continued thus:

" Q. Did it mention the time of the incident?

His Lordship: Don't answer that, don't answer that.

Mr. McLean: MI Lord, might I ask whether she will be allowed to answer whether it is her signature because I would like to ask that question?

His Lordship: She says she has made a statement already."

There followed an exchange between the Bench and defence in which defence counsel mentioned the reason for wanting her to identify her signature namely that he wanted to ask the witness whether she had not given another time, as to when the incident happened. To this the learned trial judge replied that the witness had in effect said "whenever it happened, yes, I was told to give a contrary statement and did give it." He enquired of defence counsel where he could go from there. The response was as hereunder:

"Mr. McLean: M'Lord, if unfortunately that I should not cross-examine any further so be it sir, because I am not feeling very well myself.

His Lordship: No, I am not saying that you should'nt cross-examine any further, but you are constrained by the answers you have received.

Mr. McLean: Might Miss Kelly be now shown her signature, sir?

His Lordship: What are you going to do with that after that?

Mr. McLean: I might even ask that it be tendered in evidence at this stage."

There followed a diversionary exchange between the Bench and defence counsel arising out of the exception which defence counsel took to Crown Counsel rising to remind the court of his objection to the manner in which defence counsel was cross examining on the document. At the end of this exchange, the learned trial judge advised defence counsel to carry on his cross-examination properly. The immediate response of defence counsel was to ask again for the witness to be shown her signature to which the learned trial judge ruled that the witness was not going to be shown anything.

After further cross-examination on the circumstances surrounding the obtaining of the statement by Rosalee Ramsay Mr. McLean is recorded at page 77 of the record as saying:

"Mr. McLean: M'Lord I propose to shortly conclude, probably a question or so, but I at this stage must alert your Lordship that I am going to apply for a hearing within the hearing to have this statement admitted into evidence.

His Lordship: Sufficient until that point.

Mr. McLean: Sufficient until the day, sir."

Nothing further was heard on the matter until after the last prosecution witness had concluded his evidence when this discourse took place between Bench and Defence Counsel:

"Mr. McLean: M'Lord, yesterday I had intimated to the Court that on the statement of which I cross-examined Martha Kelly that at an appropriate time I would have made an application to have it either admitted in evidence or in the alternative that there be the usual trial within a trial, That is to ensure, so that your lordship should decide whether, in fact, this statement was given voluntarily.

"His Lordship: Voluntarily?

Mr. McLean: Yes, M'Lord, and as such is admissible or whether in fact the statement was given under duress and as such ought to be excluded.

His Lordship: Mr. McLean. I am going to refuse your application. The witness, Martha Kelly said yesterday, 'I did write this' and she outlined the circumstances under which it was written. I am not holding any trial within any trial. It was alleged that it was taken by a person. You have the opportunity to, if you want, to put it in through that witness.

Mr. McLean: I will be so guided, M'Lord.

His Lordship: Don't be guided by me, you are conducting your defence, but as far as I am concerned with that piece of paper you have, I shan't be holding any voir dire to put it in for the witness Martha Kelly says 'yes, I made it.' Can a thing which has been admitted obtain any strong validity, according to your saying, by putting it in here? This is admitting it.

"Mr. McLean: But in conviction the same principle applies when the .....

His Lordship: That's a different thing. You have a piece of statement there which you say the boy's mother - the evidence has been given to her. Call the boy's mother when your time come but what you want me to put voir dire to find out? If this was done?

Mr. McLean: Provided your Lordship so rule, I will in fact, trail along those lines."

Pausing here, it is plainly wrong for Mr. McLean to state as a ground of appeal that his effort to have the written statement of Martha Kelly admitted in evidence through her had been overruled by the learned trial judge. If by efforts, he means having the witness identify her signature and having a trial within a trial in relation to the said statement, these were not applications to have the document admitted in evidence but rather applications relative to preliminary matters which defence counsel erroneously considered were the sine qua non to the admission of the document in evidence, assuming of course that in the circumstances it would have been admissible in evidence. The learned trial judge was absolutely correct in refusing the application for a trial within a trial because no confession or other inculpatory statement of an accused person was involved in relation to which the question of voluntariness was called in question. Regarding the ruling of the trial judge that the witness should not be shown her signature for the purpose of identifying the same, the learned trial judge was equally right in curtailing the waste of judicial time in which defence counsel was indulging by persisting with the witness identifying her signature when she had repeatedly admitted giving the statement to Rosalee Ramsay and had gone further by admitting such of the contents thereof as had been put to her. It was the obsession of defence counsel with the view erroneously held, that the witness still had to identify her signature despite her admission, and the further view that a ruling on the voluntariness of the statement was necessary which inhibited him from moving forward from the position where he said "I might even ask that it be tendered

In evidence at this stage" to a position where he explicitly and expressly asked for the statement to be admitted in evidence. No such application was made and strictly speaking no basis exists for appealing on the ground that his application to have the statement admitted in evidence had been rejected.

Next is Mr. McLean's complaint that the learned trial judge misled him in not seeking to have the statement admitted through Martha Kelly by intimating that counsel could do so through Rosalee Ramsay. The excerpt of the proceedings mentioned above relevant to this matter when construed in its entirety certainly does not support the complaint. The learned trial judge expressly stated that he did not want defence counsel to be guided by the statement that counsel would have the opportunity to put the statement in through Rosalee Ramsay. Further, he explained this statement as meaning no more than that Rosalee Ramsay could be called if defence so desired, to testify whether the statement had been voluntarily given but that he the learned trial judge would not be holding any trial within a trial in respect of the statement.

The learned trial judge did in fact subsequently refuse the application of defence counsel to have the statement admitted in evidence through Rosalee Ramsay. In refusing the application the following exchange between Bench and defence Counsel took place after Crown Counsel had objected to its admission in evidence:

"Mr. McLean: M'Lord, I distinctly heard her say that she wrote it, she Martha.

His Lordship: Yes

Mr. McLean: And it is on that basis that I propose to seek your Lordship's leave to tender it.

His Lordship: Well, I have heard both of you and I will rule that the paper will not go in as evidence. I stick to my former statement that Martha Kelly has admitted that she has written something already and she has given to the court an explanation of the circumstances under which she did write it.

"His Lordship cont'd: Whether it is so, and you cross-examined her as to what it says and she says whatever it is, it is contrary to what did happen. She explained that

Mr. McLean: In other words, M'Lord, the effect of your ruling is that what had been elicited by cross-examination would be as efficacious, as good as .....

His Lordship: Just exercising my discretion here, and I am not admitting it in the light of the evidence that Martha Kelly has given in answer to your cross-examination."

It seems to us that the learned trial judge was right in refusing to admit the statement in evidence. It could only have been admitted if it amounted to a previous inconsistent statement of Martha Kelly which she had not distinctly admitted. But she distinctly admitted that she had made the statement and she distinctly admitted such of the contents thereof which defence counsel considered relevant and which were put to her. These contradicted her evidence in court at the trial. By her admission, both her evidence in chief and the relevant contents of her previous inconsistent statement were placed before the jury as constituting her total evidence. Her credit was thus exposed to impeachment by her own admissions unless of course the jury accepted her explanation for making the previous inconsistent statement which they must have done in bringing in the recorded verdict.

The condition prescribed by section 15 of the Evidence Act for the admission of this previous inconsistent statement for purposes of contradicting the witness, namely that she does not distinctly admit making such statement, was not satisfied, because as earlier stated, she did distinctly admit making the statement. Similar reasoning would have applied to the typewritten police statement had it been necessary to consider it in relation to section 15, because the witness distinctly admitted that the name of Christopher Brown did not appear in the typewritten document bearing her signature which had been shown to her.

These grounds of appeal accordingly fail.

Grounds 2, 3 and 3 (b) of Mr. Daly's grounds complain in substance that the learned trial judge failed to direct the jury adequately or at all in relation to the contradiction and/or discrepancy in Martha Kelly's evidence relative to Christopher Brown. Further that he was in error in using the warrants of arrest for a purpose for which they were inadmissible namely to support Martha Kelly's assertion that she had known Brown. This error was even more grievous, because the contents of the warrants constituted hearsay evidence.

Martha Kelly's evidence in chief relative to Christopher at page 26 of the record is as follows:

"Q. Now, these other friends would be two in number, you said, McLaughlin and two other persons entered your room
.....
now, did you recognize any of the other persons?

A. Yes.

Q. You see any? (witness nods)

Q. Could you not nod your head, answer loudly that everyone can hear you. Did you recognize any of the other two men?

A. Yes, sir

Q. You see any of the other two men here today?

A. Yes, sir.

Q. Who?

A. Christopher (witness identifies Christopher the accused)

Q. Now, had you known McLaughlin before you saw him that morning in the bedroom?

A. Yes, sir.

Q. What about Christopher Brown, had you known him before that morning when you saw him in your bedroom?

A. No.

Q. It was the first time you were seeing him that morning?

A. Yes."

Later at page 35 the examination in chief continued thus:

"Q. Now, just taking you back to about five o'clock when this whole incident started, you said that you were seeing Christopher Brown, for the first time that morning?

A. Yes.

Q. About how much time he actually spent inside the room?

A. About ten minutes.

Q. What part of him did you see at that time during that ten minutes period. What part of his body?

A. The entire body.

Q. His face?

A. Yes.

Q. Could you be in any way mistaken that this man who you said and who you referred to as Christopher Brown, and who you saw there that morning at 5.00 a.m., are you sure that this is the same man?

A. Yes, sir.

Counsel for the first appellant dealt the second appellant a most unkind blow by eliciting from Martha Kelly in cross-examination that she had told the police that "McLaughlin, the other accused man, and a man named Roman were men that were at the house on the morning in question". Defence Counsel for Christopher was in consequence compelled to cross-examine on this, but in doing so, she gave the witness the opportunity to correct her evidence in chief and give an explanation therefor. At pages 84-87 and 113 of the record the cross-examination proceeded thus:

"Q. Martha, you, after seeing the dead body of Derrick, give a statement to the Rockfort police station. That statement was made on the 14th of February, 1984?

A. Yes, ma'am

Q. And it was to Mr. Ximines to whom you gave that statement?

A. Yes, ma'am

Q. And am I correct in saying, Martha, that you signed that statement?

A. Yes, ma'am

Q. Now, am I correct in saying also Martha, that in that statement you did not call Christopher Brown's name?

A. Yes, his name was called in that statement.

Q. The actual name Christopher Brown was called?

A. Yes.

Q. Did you tell us yesterday Martha that on the early morning of the 14th of February, 1984, it was the first time you saw Christopher Brown?

A. I don't remember saying that.

Q. Let me refresh your memory, Martha. My learned friend asked you questions, 'did you recognize any of the men, you remember that question?

A. Yes.

Q. And your answer to my learned friend was, 'yes, Christopher Brown he had a flat gun.' You remember that bit of evidence?

A. Yes.

Q. After that you said, 'I knew McLaughlin from I was about eight to nine years old. I had to pass his house to and from school.' You remember that?

A. Yes.

"Q. Do you remember that, after that, you said 'I did not know Christopher Brown before. It was the first time I was seeing him.'

A. Well if I had said that, it's a mistake because I had known him for about four to five years before the incident.

Q. So, Martha, if you knew him four to five years before, you would have called his name at the police station?

A. I did call his name.

Q. But you said yesterday that .... you not only said you didn't know him, but you said it was the first time you were seeing him.

A. Maybe I had a sort of misunderstanding of that."

Mr. Daly's submission before us is that this was contradictory evidence given by Martha Kelly on a critical and vital issue in the case namely the issue of identification of Christopher. The learned trial judge should accordingly have given a specific direction on the significance of this contradiction. Instead, he submitted, the learned trial judge albeit giving a particular direction on this discrepancy, did it in a manner amounting to an invitation to the jury to consider it of no consequence. The learned trial judge, he said, then proceeded to rehabilitate the witness by inviting the jury to infer that she must have known the appellants because their names appeared on the warrants of arrest. He submitted, that the learned trial judge should instead, have directed the jury that the names on the warrants in relation to which Sgt. Ximines testified had no evidential value because they constituted hearsay evidence in that they were prepared by someone other than Sgt. Ximines.

To the contrary, Mr. McBean submitted that the learned trial judge adequately dealt with the contradiction in Martha Kelly's evidence by directing the jury that it constituted a possible weakness. The fact that the learned trial judge proceeded thereafter to deal with other evidence supportive of the identification evidence of the witness was consistent with the positive duty of the judge to assist the jury in evaluating her evidence, this did not constitute an invitation for them to treat the discrepancy as of

no significance. As to the complaint on the rehabilitation of her credit by the use of the warrants of arrest, Mr. McBean submitted that there was nothing wrong with that, having regard to the recorded evidence and to the further fact that the contents of the warrants did not constitute hearsay.

The learned trial judge in the general part of his summation to the jury, gave them directions on contraditions and inconsistencies, how they were to be treated, and specifically how they were to be treated in the context of explanations given, Later, in dealing with the evidence of Martha Kelly, the learned trial judge specifically mentioned the fact that Martha Kelly, as the defence had quite rightly submitted, had said that she was seeing Brown for the first time that morning. He however went on to remind the jury that the witness had gone on to say that what she had earlier said was a mistake because she knew him before for about four to five years. Thereafter in directing them on the vital issue of identification he said at page 232:

> "You have to look if there is any weakness in the identification evidence. And you look also if there is any other evidence which can support this identification."

It is in elaboration of that direction that the learned trial judge further directed the jury thus at page 234:

> "But there is something you have to look at too, in relation to Brown here, and it is a possible weakness and you have to deal with it in the identification is that Miss Kelly at one stage said that she was seeing Brown for the first time. I have it that she said she was seeing him for the first time the morning but the notes seem to be that she was seeing him for the first time that morning. You have to look at that. If she is seeing him for the first time that morning, she could not have known him before. But you remember that she gave an explanation. She says it is a mistake that she made when she say so, so that is something you have to look at as a possible weakness. But, also, you have to remember that she did give the name Brown immediately, almost, to Ximines, and the other supporting evidence, if you would look at it, supporting the identification case is also the fact that she did give Ximines the name at the earliest opportunity and you make up your minds whether she had

> "any chance to make up any story that this man was there. That is something you have to look at, and this is the aspect that I wanted to tell you about on identification."

We are unable to uphold Mr. Daly's complaint that there was inadequate direction given to the jury on the evidence of Martha Kelly highlighted above. Whether it was to be viewed as contradictory by the jury, necessarily depended on their view of the explanation given that she had make a mistake in the earlier evidence given. It was for the jury to properly determine whether to accept her explanation, and to assist them in their determination, it was necessary for the learned trial judge to alert them to the evidence of what transpired shortly after the incident so that they could, if they accepted that evidence, particularly that of Sgt. Ximines, bring it to bear, on the issue of the validity of her explanation. The learned trial judge's direction was not a direction inviting the jury to gloss over the fact that the witness had earlier in her evidence said that she did not know Christopher and that she was seeing him for the first time that morning.

The complaint that the learned trial judge sought to rehabilitate the credit of Martha Kelly by using the warrants of arrest as evidence of the truth of her assertion that she knew Christopher before, is without merit so also is the further complaint that the contents thereof constituted hearsay evidence. The evidence of Martha Kelly, which ironically was elicited in cross-examination even though there was no necessity to do so, having regard to the state of the evidence at the close of the evidence in chief, was that the name of Christopher Brown was given to Sgt. Ximines. He Sgt. Ximines in his evidence, confirmed this as a fact. He also gave evidence that he did not know Christopher. The fact that Christopher's name appeared on a warrant issued on February 15, 1988 which warrant was prepared on the specific instructions of Sgt. Ximines and thereafter approved by him was in the circumstance evidence in support of Martha Kelly's evidence at trial that she knew Christopher and that she had given his name to Sgt. Ximines. The latter having approved and adopted the warrants of arrest as being his own, albeit written up by his subordinate, rendered the warrants of his own making. They

were thus documents the contents of which were not hearsay.

Grounds 2, 3 and 3 (b) are not sustainable.

Grounds 4 and 4 (b) of Mr. Daly's grounds of appeal complain "that the learned judge failed to direct the jury adequately in relation to identification of the second appellant. In particular he failed to direct the jury as to the effect upon Martha Kelly's identification if they found that she did not know him before and/or that she had not told the police his name on the date of the offence or were in doubt about them. Further the directions in regard to these issues were so strongly biased in favour of the prosecution as to amount to a usurpation of the jury's function."

Mr. Daly's argument is predicated on the hypothesis of the jury disbelieving Martha Kelly that she knew the second appellant before and had given his name to Sgt. Ximines. In such circumstances, he complains that the direction on visual identification of a person being seen for the first time was inadequate.

We do not share this view. The learned trial judge at pages 231-232 specifically dealt with the evidence of opportunity which Martha Kelly had of observing the second appellant in relation to time, lighting, proximity and another physical conditions. He directed the jury to look for any weakness in the identification evidence and highlighted as a possible weakness, her evidence in chief that she did not know the second appellant and had not seen him at the time of the incident. He explained the absence of an identification parade as resulting from the second appellant's name having been given to the investigating officer who prepared a warrant of arrest in consequence. Thus the reliability of Martha Kelly's assertion that she saw the second appellant at her apartment and recognized him, and that she was not mistaken, was left for the consideration of the jury within the context of all relevant matters having a bearing on the reliability of her visual observation of the persons who came to her apartment on the morning in question. The direction was unbiased, objective, and adequate and these grounds of appeal are accordingly entirely without merit.

Mr. Daly's final ground of appeal is that "the learned trial judge's comments on the 2nd appellant having made an unsworn statement were unbalanced and unfair and calculated to suggest that this appellant may have given an unsworn statement instead of evidence because he had something to hide and consequently, that it was a possible indication of guilt."

The learned trial judge at page 245 directed the jury in these words:

> "Brown made an unsworn statement. He is entitled to do that. It is his right. But then again I can tell you, you can ask yourselves the question, why did he do that? Did he have anything to hide or was he afraid that any advantage was going to be taken of him by counsel for the prosecution, though he ought not to be in that vein or frame of mind because he is represented by able counsel and if any advantage is going to be taken of him they would jump up and object and I as the judge would have to give him a measure of protection. So, you will have to ask yourselves why has he chosen to give an unsworn statement? But it is his right, but you look at it."

Mr. Daly says the learned trial judge was not entitled to ask the jury the question "Did he have anything to hide?" And that this amounted to an invitation to the jury to find that he had something to hide which is not permissible. He referred us to R. v. Sparrow (1973) 2 All E.R. 129 and R. v. Mutch (1973) 1 All E.R. 178 in support of his submission.

We do not derive any assistance from the above cases. In R. v. Mutch (supra) the direction was patently wrong in that it was an express and positive direction to the jury that they were entitled to draw inferences unfavourable to the accused because of his failure and or neglect to give sworn evidence. The actual direction at page 179 was in these words:

> "I have to tell you this: the jury are entitled to draw inferences unfavourable to the prisoner where he is not called to establish an innocent explanation of facts proved by the prosecution which without such explanation, tell for his guilt."

It was held that though the above form of words might have been permissible if the evidence had established a situation calling for "confession and avoidance" they were not proper for a case like the one then in question where the sole issue was, whether an identification was correct namely was it the prisoner who went into a grocery shop and therein committed robbery.

In R. v. Sparrow (supra) which raised an issue of common design to use a gun, if necessary, in the course of committing a theft, the appellant did not give evidence. The summing up to the jury at page 132 amounted to a clear direction that the prisoner was guilty because he did not give evidence.

The direction was in these words:

> "Was there a common design, a common joint enterprise to resort to loaded weapons which he the appellant must have known were in the car in the event of their being pulled up by the police and questioned about it. All those matters, as to what is in a person's mind, can in the last resort only be properly gone into if they are tested and checked and people have an opportunity of asking questions about it. That (the judge indicating the witness box) is the place to give evidence about that, not to rely, if I can put it that way, on the eloquence of your counsel in building up from a statement that you have made which may be challengable in a number of different particulars. It is very easy to take that course but you may think, members of the jury, that in a case of this kind it was really almost essential, if there was a real explanation as to his part, if there was a real belief in his mind that he never contemplated for the moment that any shooting was going to take place, is it not essential that he should go into the witness box himself and tell you that himself and be subject to cross-examiantion about it? Well he did not do so and there it is."

It was held that by using the words "Is it not essential that he should go into the witness box and tell you that himself and be subject to cross-examination about it? Well he did not do that and there it is" the trial judge overstepped the limits of justifiable comment. With that conclusion we are in entire agreement. However the words used in this case could not be equated with the positive direction in the cited cases that was given to the jury. In the present case, the learned trial judge was at best inviting the jury to consider any other rational reason which the second appellant may have had for making an unsworn statement on which he could not be cross-examined, apart from his legal right to do so. The learned trial judge juxtaposed in question form, whether the reason could be that he had something to hide or that he, notwithstanding the protection from his counsel and the judge, was afraid of being taken advantage of in cross-examination. It was left to the jury which view appeared more reasonable. It was not a positive statement that he had anything to hide nor could the direction be reasonabl construed as an invitation to the jury to conclude guilt from his failure to take the witness stand. In this regard we are in agreement with the submission of Mr. McBean for the Crown that the comments of the learned trial judge are well within the guidelines laid down by the Privy Council in D.P.P. v. Leary Walker (1974) 12 J.L.R. 1369 in which at page 1373 the learned Lords of the Privy Council stated the guidelines thus:

> "There are, however, cases in which the accused makes an unsworn statement in which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence. In such cases (and their Lordships stress that they are speaking only of such cases) the judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing. The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; that it could not be because he had any conscientious objection to

> "taking the oath, since, if he had he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and by the Court."

It is our view that the learned trial judge based his direction on the above guideline merely asking the direct question "Did he have anything to hide" as a substitute for the more subtle questions of their Lordships of the Privy Council namely -

> "Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why?

The obvious answer to their Lordships' questions in our view was reluctance of the accused to have the truth, which he was seeking to hide, extracted from him in the crucible of fair but through cross-examination. In both cases it was left to the jury to answer the question. They were not directed nor invited to answer the question in any particular way.

We think there is no merit in this ground.

Finally, we now consider Mr. McLean's complaint concerning the learned trial judge's comment in the course of his summation to the jury that he detested Rosalee Ramsay's behaviour and his further direction that it should be brought to the attention of the Director of Public Prosecutions. The learned trial judge having reminded the jury of Rosalee Ramsay's evidence in support of the first appellant's alibi, proceeded thereafter to remind them of her other evidence firstly that relating to Martha Kelly approaching her, secondly of the request to her to arrange visits to the appellants by the said Martha Kelly and thirdly of their joint visits to the appellants at the Remand Centre. The learned trial judge then said at page 242:

> "You have to look at Rosalee Ramsay in all the circumstances and look at Martha Kelly and decide who you believe in the circumstances. And Mr. Wright let me say it at this time here and now. I am putting it in this case. I detest the behaviour of Rosalee Ramsay in this case. I am saying that you are to bring it to the attention of the D.P.P."

Mr. McLean complains that the expression by the learned trial judge that he detested the behaviour of Rosalee Ramsay and that it should be reported to the Director of Public Prosecutions had the effect of seriously impairing, if not destroying the credit of Ramsay who was a most vital witness for the defence. Mr. Daly on behalf of the second appellant associated himself with the complaint of Mr. McLean and submits further that the words were disparaging and amounted to a direction to the jury not to accept Rosalee Ramsay as a witness of truth.

To the contrary, Mr. McBean for the Crown while readily conceding that it would have been eminently more desirable for the learned trial judge to have deferred until the close of the case, his direction for the behaviour of Rosalee Ramsay to be reported to the Director of Public Prosecutions submitted however that no prejudice or miscarriage of justice could or did result because the learned judge was merely expressing his view on conduct on the part of Rosalee Ramsay which he considered intolerable namely (a) her receiving a statement from a crown witness in a serious case to wit a murder case involving her son purporting to show that the witness had given false report to the police prejudicial to her son, and failing to bring it to the attention of the police; (b) her assisting the witness to visit the appellants and having discourse with them at the Remand Centre using false names and addresses and actually joining in such visits and discussions.

That the above represented the behaviour which the learned trial judge said he detested and which he directed should be reported to the Director of Public Prosecutions is manifest from what he said immediately thereafter. He said this:

> "She said that she got this information and she visited with her at the Remand Centre, and she used names, different names. At one stage she even allowed her to give her address but she hasn't reported that to the police at all. She said that she gave her three bits of paper .... and Mrs. Ramsay didn't run with it to the police, she ran with it to her lawyer. She ran with it to her lawyer."

In our view the context in which the learned trial judge made his comment and directed that the Director of Public Prosecutions be informed showed clearly that he was not inferring that Mrs. Ramsay had perjured herself in her evidence nor that she had committed any offence. He was merely referring to conduct, which was actually admitted by Mrs. Ramsay, which was undesirable, even though not necessarily affecting her credit and which should be brought to the attention of the Director of Public Prosecutions. Alternatively to the extent that such conduct could conceivably affect Mrs. Ramsay's credit as a person who indulged in improper conduct, such comment in our view was necessary to balance the comment of Mr. McLean in his address to the jury inferred from the learned trial judge's summation at pages 225 and 227 of the record of improper conduct of Martha Kelly and Sgt. Ximines namely that the former was hoodwinking the administration of justice while the latter was part of a plot to set up the appellants so that Martha Kelly could get money. These comments by defence counsel were specifically adverted to by the learned trial judge as we have earlier said in his summation at pages 225 and 227. The learned trial judge in commenting on the admittedly improper conduct of Mrs. Ramsay was properly ensuring that the same could be considered by the jury in relation to the insinuated improper conduct of Martha Kelly and Sgt. Ximines in arriving at where the truth resided.

In conclusion we are of the view that the appeal of each of the two appellants ought to be dismissed. Each is accordingly dismissed and the conviction and sentence affirmed.