JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 8, 10 & 11 OF 1982

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

REGINA

V.

GLANVILLE HENRY
GIBSON BUNTING
MICHAEL MCLEAN

Mr. Noel Edwards, Q.C., and Miss P. Dyer for Henry

Mr. D. McKoy and Dr. R. Williams for Bunting

Mr. Horace Edwards, Q.C., and Mr. Fletcher for McLean

Mr. Murrio Ducille for the Crown

February 7-10; & 15-17, 1984; & June 21, 1985

KERR, J.A.

Mr. Charlton Anderson and his wife, Mrs. Ivy Anderson who had been married for twenty-four years returned to the district of Logwood in the parish of St. Thomas to live out the rest of their mortal lives after a sojourn of over twenty-six years in the United Kingdom. Mr. Charlton Anderson returned in October 1979, and his wife joined him in November of that year.

Notwithstanding the absence of electricity in the area

they built for themselves a substantial dwelling house of four bedrooms, living room, two bathrooms, back porch, kitchen, front porch and carport, using blocks, cement and wood. The house was completed about the middle of June 1980 when they took up residence therein. Mrs. Ivy Anderson was herself born in Logwood where she grew up prior to her departure for England. She also had her parents and some of her other relatives still living there. Within less than three months of their taking up residence in this house, tragedy struck. The couple's home was subjected to gunfire, was broken into and invaded. Mr. Anderson was shot dead in one of the back rooms of his house, and Mrs. Anderson suffered the agony and humiliation of being raped by each of two invaders. The circumstances surrounding Mr. Anderson's death indicated murder and for this the three appellants were tried in the Home Circuit Court in January 1982. They were each found guilty of murder by the jury and were convicted and sentenced therefor on January 19, 1982. The first and third appellants were each sentenced to death while the second accused being under the age of eighteen (18) years when the offence was committed was sentenced to be detained until the pleasure of the Governor General is known.

The case for the prosecution was that the three appellants, one of whom at least was armed with a gun, acting in concert with the common purpose violently to break in, rob the Andersons and plunder their home, using violence invloving death if necessary to achieve their purpose, and in the course of executing their common purpose killed Mr. Anderson and that it was the first two appellants who actually entered the home from the rear porch, committed the acts therein including the shooting of Mr. Anderson while the third appellant stood Guard on the front porch to prevent surprise; that he further

participated in the common purpose by taking delivery on the front porch of some of the burgled goods which were passed to him by the second appellant in the presence of the first appellant.

The evidence in support of this case was substantially that of Mrs. Ivy Anderson. In summary her evidence in chief was that on the night of Tuesday, 2nd September, 1980, she and her husband returned on foot to their home at precisely 11:00 p.m. They had visited her parents who lived a short distance from them. They had a chiming clock in their living room and she heard the chime of 11:00 o'clock p.m. as she reached their front porch. They checked and verified that all doors and windows were closed and thereafter retired to bed in a front bedroom. This bedroom has two large louvre windows. One of these windows faces the front porch while the other is to the right side of the room. On the night in question the windows were draped with netted curtains only, so that whatever light there was outside filtered into the bedroom. The bedroom had two doors, one internal, the other external opening on to the front porch. This front porch extended beyond the bedroom along the living room to a car-port. Beyond the carport was the other section of the house.

Having thus retired to bed, they were between 11:30 p.m. and 11:45 p.m. aroused by bangings on the bedroom door which opened on to the front porch. She heard shouts of "Police, open up". This was followed by the sound of gunshots smashing through this door and the glass louvre window of the living room. She and her husband got up. Her husband put on his trousers over his pyjamas. In one of the pockets of this trousers there was the sum of J$130.00 wrapped in a handkerchief. This sum to her knowledge had been given by her brother to her husband earlier that night, while they

were out visiting.

She and her husband proceeded from the bedroom to the hall where as a result of something said to her by her husband she went into the bathroom serving their bedroom, while the husband proceeded in the direction of the living room. She locked herself in the bathroom. She heard gunshots still continuing around the house. She later heard movements outside the back of the house and after an interval of about ten minutes she heard the voices of two persons conversing inside the house. They were then passing the bathroom door going towards the bedroom which she and her husband had earlier left. She heard the sound of drawers in this bedroom being opened and of things being thrown about. She does not recall for how long she was in this bathroom before the door thereof was pushed as if someone wanted to open it. She decided to open the door and did so. A young man whom she identified as Bunting the second appellant, came into the bathroom armed with a revolver and grabbed hold of her. The second appellant placed the revolver at the side of her neck and pushed her into the bedroom. Inside the bedroom she saw the first appellant searching with the aid of the light from a flashlight. The second appellant having pushed her into the bedroom, released his hold on her but had the gun at the back of her neck. He demanded of her where the gun and money were. She replied that they had no gun and that such money as she had they had already taken. The second appellant then took her back to the bathroom and while still armed with the revolver had sexual intercourse with her without her consent. When he was finished he took her to the hall. He handed over the revolver to the first appellant and took from the latter the flashlight. The second appellant proceeded to the bedroom with the flashlight while the first appellant led her to the

living room and on the settee therein he also had sexual intercourse with her without her consent. In the course of so sexually assaulting her she heard a shout from outside saying "There is a boy outside". The first appellant responded to this shout by telling the person who had shouted to shoot off the head of the boy. The first appellant discontinued his sexual assault on her and took her back into the bedroom where the second appellant was. While in the bedroom with the first and second appellants she saw a third man standing on the front porch. He was close to the open bedroom door and the second appellant handed to him a travelling bag in which had been packed items from the room by the first and second appellants. The first appellant next asked her for the car keys. On her reply that she did not have them, the second appellant persisted in the demand. She told him that her brother had the keys. They searched the bedside table and found them. The second appellant then went out with the keys to the car. After a little while he came back without the car having been started. He then kicked her in her stomach and obscenely accused her of giving him the wrong keys to which she replied that she had not given him, it was he who had taken them. Both appellants then proceeded to break open some small wooden boxes. They took therefrom money which had been collected by her for the Holiness Church of God of Logwood. On her remonstrating about these sacrilegious acts, the second appellant in blasphemous and obscene language threatened to blow her head off. He then ordered her to sit on a stool and not to move. Both appellants later went through the living room to the dining room which was the furthest she could see from the bedroom. Thereafter she heard the clattering of drawers and things in the kitchen. When she heard the clattering in the kitchen, she got up from the stool and went to the bedroom door opening on to the front porch

intending to escape. She saw the third appellant, Michael McLean, standing on the porch as if guarding the door so she went back inside and again sat down on the stool; he was the same man to whom the second appellant had passed the travelling bag. She said that a few minutes later she got up and peeped through the same door. She did not then see the third appellant by the door. She accordingly ran across the front porch out to the carport and across to the next door premises where she hid in the bushes. Sometime after, she heard the sound of two vehicles which entered her yard. She also heard the voice of her neighbour from across the road and the voices of her father and brother. She came out of the bushes and recognised that her father and brother were there with the police. She with the police went into the house in search of her husband. She found him lying in the back bedroom in a pool of blood, dead.

Reverting to incidents in the house, she said when the second appellant left the bedroom, he returned with J$130.00 wrapped in a handkerchief which had been in the pocket of the trousers which her husband had on when he was killed. A further $300.00 and her jewellery which were taken from the home were never recovered. The travelling bag in which other things had been packed and handed to the third appellant was found on the porch abandoned.

As regards the damage to her house, she saw next morning, bullet holes in the bedroom door facing the porch. The louvres in the living room, in the back bedroom where her husband was killed, and in the kitchen were shattered. The back bedroom door was splintered by bullet holes and the lock was busted and the door open.

On events thereafter, she said she could not remember if when the police came that night she spoke with them about

what had happened because after she found her husband she became hysterical and she was ordered to be taken and was taken to Princess Margaret Hospital where she was examined. She returned therefrom about 10 o'clock a.m. on the morning of 3rd September, 1980. On her return she saw hundreds of people in the road, in the yard and everywhere. There were cars and buses around. She was in the garden, having been taken there from the room in which her dead husband was, when she heard a commotion along the road. A jeep came along on the road. She looked and saw three persons sitting on a side seat in the jeep facing the yard. There were lots of people around the jeep. She at once recognised the first appellant and when she looked again she saw that the other two persons were the second and third appellants.

Against their conviction, they have each appealed to this Court.

In addition to and consistent with the challenge to the identification evidence by cross-examination, each accused gave evidence in support of an alibi. No witnesses were called in support of these alibis. According t. Glanville Henry at the date of the incident, he was living at Norris about a mile from Woodburn. He lived alone. He was taken into custody while going to work at Poor Man's Corner on the road to Norris. On September 2, he came from word at 4 p.m. and never left home until about 7:30 the following morning. He had lived at Logwood up to July 1980. He knew nothing about the shooting of Mr. Anderson.

Gibson Bunting in evidence said he worked on his father's property at Norris. His father keeps two homes; one at Norris and one at Woodburn. On the evening of September 2, he left the farm at 5 p.m. and went to the home at Norris and later to the home at Woodburn. He was there at 11:00 p.m.

He was there with his mother, brother and sister. Later that night he was suffering from a toothache and his father went out and got phensic for him. He remained there until the following morning when he left and went with his father to his father's farm. He was later returning to Woodburn when he met Detective Ellis and a group of policemen. Ellis searched him and in answer to his question he told Ellis he was "at home the night before". He was at first released, but later he was placed in the jeep. He knew nothing about the offence. He never lived with Henry and that morning police did not find him in the same yard with Henry.

Michael McLean in evidence said he operated the water pump at the Food Farm at Woodburn and on 2nd September he worked there from 6:00 a.m. to 10:45 a.m. - on September 3, he switched on the pump at 6:00 a.m. and returned home at 10:45 a.m. He was picking ackees when police came and took him away in a jeep. He had left the Food farm the evening before at 5:00 p.m. and went home, where he remained until the following morning.

The defence called as witness Mr. Perci Muir a Meteorologist. The trial judge's treatment of his evidence is a matter of complaint. Accordingly his evidence will be reviewed later against the background of the relevant ground of appeal.

The grounds of appeal argued were in substance common to all three appellants.

First, it was submitted that the directions on inferences were wrong in law, inadequate in content and likely to mislead the jury. In that regard, the submissions of Mr. Horace Edwards were adopted by the Attorneys for the other appellants. These submissions were concerned with the following passage in the summing-up (p. 422):

> "So, there it is, Mr. Foreman and members of the jury. And, in every case the facts put forward by the witnesses are yours; reasonable inferences to be drawn are tantamount to facts, those are yours too; the ordinary operations of the facts of life in this country; customs, as you know them, which exist throughout the region, you can take them into consideration, and I will point out about two or three, how they arise in this case".

It is not clear as to whether the criticisms of Mr. Edwards were aimed at the statement "inferences to be drawn are tantamount to facts" or from the trial judge's failure to explain how and within what limits inferences are to be drawn. In our view these remarks were general and introductory, designed to advise them that it was open to them to draw reasonable inferences and that their knowledge and experience of life and the nuances of Jamaican Society could assist them in their deliberations. He was not dealing at this stage with the particular and vital issues of identification, alibi and common design and which issues were dealt with later in his summation. There really is no merit in this complaint.

Secondly, it was submitted that the directions on alibi were inadequate because (i) there was no specific direction that if the alibi caused the jury to be in doubt, then the appellants were entitled to be acquitted, and (ii) there were no directions on the effect which the evidence of alibi could have in contradicting the evidence of identification.

On alibi, the learned trial judge said (pp. 426-7):

> "What each accused is saying in his defence, and he is not assuming any burden of proving anything, amounts to this: 'I was not there. I was not at the house of the Andersons at Logwood at the particular time alleged, during half past eleven and thereafter as she said'. Three men attacked the house with guns, broke into her house and these several acts which I shall remind you of, leaving in their wake a dead man, the husband. They say: 'I wasn't there'. What that amounts to is raising an alibi. Not only raising but

"proving in their defence. All these are matters for you and it is for the prosecution - as part of its general burden of proving guilt - to destroy this alibi, which is a Latin word meaning elsewhere, when this thing was taking place. 'I didn't have the opportunity of committing this offence because I was elsewhere', and no human being can be present at two different places at one and the same time. A man cannot be at King Street and at Stony Hill at five minutes to four as the clock is now showing. It is only the Lord who is omnipresent. The prosecution has to destroy what each man is saying".

and later (p. 428):

"The prosecution is saying that on the evidence which has been put before you by Mrs. Anderson who is the star witness in the case, that alibi has been destroyed. That would be a matter for you".

and again (p. 481):

"Remember as I told you yesterday the defence of each accused is an alibi. I was elsewhere. I wasn't there. I did not take part in this incident. The defence which the prosecution must destroy as part of the general burden of proving guilt. And even if you do not accept this alibi which has been put up you would still have to examine carefully the evidence of Mrs. Anderson as to whether or not you are satisfied to the extent that you feel sure that you can rely on her when she said that they were the men. Even if you reject it you would still have to feel sure that Mrs. Anderson's evidence can be relied on,.....".

and finally (p. 498):

"I have already told you that the evidence which each has given is part of the evidence in the case. The alibi which each accused has raised and have given evidence in support has to be destroyed by the prosecution. There is no burden that each had assumed. It was a question where he was exercising his right to tell you his side of the story.

If you reject out of hand what each has said with regard to what they are saying, that I was elsewhere when those offences were taking place, it wouldn't necessarily mean that you have to find them guilty. You would still have to examine closely the prosecution's case and in particular the evidence of Mrs. Anderson, for you to say whether you are satisfied to the extent where you feel sure. That is the duty of the crown in a criminal case and you must look to see that the crown has accomplished what it set out to do and what it set out to

> "do from the start is to prove beyond any reasonable doubt that these three men are guilty".

In our view those directions on alibi when considered together advised to the effect that on that issue, the prosecution must by evidence satisfy the jury so that they feel sure of the presence of the appellants at the scene at the material time. Such a finding would be wholly incompatible with the entertainment of any reasonable doubt. In the extracts quoted emphasis was placed on the diametrical opposition between the alibi as raised and the evidence of visual identification as given by Mrs. Anderson. The learned trial judge was not obliged to adhere to any formula. Accordingly these directions were fair, clear and adequate and the criticisms are unmerited.

Thirdly, it was submitted that the directions on common design were inadequate and prejudicial to the appellants as the learned trial judge failed to adequately and clearly state the general law or relate the law to the evidence in the case and in particular to the position of the person on the verandah.

In his directions on common design the learned trial judge said (p. 434):

> "Now, what we have in this case, Mr. Foreman and members of the jury, is an indictment which charges three men, jointly, with this murder and the evidence would suggest that all three were working together. Now, where you have two or more persons acting together in order to carry out a common purpose then the act of one is the act of all of them. All three, like in this case, or four - you have four - each man is allotted his task and they are acting together in order to carry out the crime, and particularly where the purpose must of necessity involve violence, the use of violence, the use of a gun, the use of force to the extent of killing, in such a case if that is what the men would have set out to do, each doing his part, then if murder is committed all three or four of them would be guilty of murder".

and later (pp. 434-5):

> "Now, the evidence which has been put before you - and I am just giving the outline - suggests that the first accused would be what you would call the commander. You remember when Mr. McIntosh at one stage - I am not quite sure whether it was in his final address or where - he used the word, 'leader' and Mr. Brown objected on the ground that the evidence didn't support it? Well, that is Mr. McIntosh's view to you and if the evidence is examined carefully could support that suggestion. The first man was the commander or the leader, the second accused would be the deputy commander, junior officer, the third man is the watchman or the guard outside. And let me remind you of a piece of evidence, a piece of evidence in the case coming from Mrs. Anderson is that when the time for the first accused now to have his intercourse - the lady on the seetee in the house - a voice from outside shouted a little boy out there, who answered? The first accused, according to her, and he gave the order, "Blow off his f---ing head". So it seems that whoever is outside now would be alerting the men inside that somebody outside there watching and know what is happening and he is giving the command or the advice, what is to be done. What inference would you draw from that? That whoever it is that is outside he would know who it is and that person outside would be armed, and he would know that the person is armed, otherwise what is he going to blow off his head with? What is the inference to be drawn but that person would be having a gun and he would know that. The prosecution is saying that from all the circumstances the man outside shall be the third man, so those would be the parts that each, the prosecution is saying, is playing in the case and the status of each of them; the commander, the deputy and the watchman".

In our view those directions in an easily comprehensible manner adequately related the law on common design to the evidence in relation to the role of each of the three nocturnal invaders of the home of the Andersons. The cardinal issue and which was specifically raised by the nature and conduct of the defence was identification. Having regard to the evidence, the inference that the person on the verandah, whoever he may be, was part of a burglarious enterprise that had in contemplation armed robbery and in case of opposition, murder, seems inescapable.

We find no merit in this ground of appeal.

Fourthly, the appellants complained that they were gravely prejudiced at the trial because not only did the learned trial judge wrongfully refuse to send the jury out during the making of a no-case submission on behalf of all three appellants but aggravated the prejudice by the comments which he made from time to time during the submissions and in the exchanges between Bench and Bar. These comments, it was argued, indelibly implanted in the minds of the jury a favourable view of the prosecution's evidence before they had heard from the defence. In support of this ground we were referred to the following dicta in R v. Falconer-Atlee [1974] 58 Cr. App. R. 348 at page 354 per Roskill, L.J.:

> "This Court has said again and again that it is very undesirable that this should happen where there is a submission of no case to go to the jury either because the evidence for the Crown is suggested to be insufficient to justify leaving the case to the jury, or because, though there may be some evidence, it is so tenuous that it would be unsafe to leave the case to the jury. It is most undesirable that that discussion should take place in the presence of the jury. Inevitably the judge may express a view on a matter of fact, which is within the province of the jury. The presence of the jury may hamper freedom of discussion between counsel and judge. But the jury stayed there for what must have been quite a long time before the learned judge gave his ruling in favour of the husband but against the appellant. Before considering what else went wrong, this Court desires to emphasise once again that this sort of submission should, as a general rule, be made in the absence of the jury and not in their presence".

Now in Jamaica, as the experienced trial judge stated, the long established practice is that no-case submissions are made in the presence of the jury.

The submissions in the instant case, were opened by Mr. Bentley Brown for the first accused with an apologetic air and the following interchange between Bench and Bar occurred (pp. 225-228):

"MR. BROWN: Although I originally had somewhat misgivings as to my client's and my stand, I have decided to make a no-case submission, very briefly on behalf of my man, Mr. Henry, but I request that I be allowed and my colleagues support me, to have the jury out whilst we are making no-case submissions. This is in an abundance of caution, especially, mostly that the jury look very alert and intelligent but they may still be, nevertheless, be confused by questions of law in a no-case submission.

HIS LORDSHIP: What is the authority for asking the jury to go out? Don't quote me anything since 1962 because that was never the law. This came out of a case called Young, Harvey Young, a little statement came out...

.....

MR. BROWN: My Lord, it may not be the law as approved in any recent case in our Court of Appeal in Jamaica but, My Lord, since, it has become, more or less, the practice over the past - well within my experience - the past 26 years...

.....

MR. BROWN: ...for the counsel who proposes to make a no-case submission to state clearly whether he wants it done in the presence of the jury or the absence of the jury. Speaking for myself I don't see that it makes any difference once you have a certain intellectual standard existing in the jury by assessment. But, as I said, the possibility of confusion of law and fact quite often, from my experience, has a detrimental effect to the case of the accused; for don't care how you warn the jury as the judge warns, they sit and listen to these deep argument in law and you rule against the lawyer then clearly they start to feel that the man is guilty or that they should find him guilty It is natural human reflections. S when at the end of the no-case submission Your Lordship rules, 'Mr. Brown, there is something to go to the jury or plenty to go to the jury so I over-rule you'. They might start to laugh like what happened yesterday. I speak for myself. In this particular case I don't want to take any chances if I still have a choice in law.

HIS LORDSHIP: Who is going to make a no-case submission, you alone?

MR. BROWN: No, M'Lord, and they all asked me to lead off followed by them. Of course they wish to make it abundantly clear that we are in your hands as to guidance in this procedure.

HIS LORDSHIP: Well, on the question as to whether - first of all, the court cannot prevent counsel from making no-case submission but what

> "the court can rule on is whether the no-case submission is to be made in the presence of the jury or in its absence and it is on that part now I am going to make a ruling. I take the view and I have always taken the view, both as counsel when I was practising down there and as a judge, that everything that is done or said during the course of a trial except where the question as to the voluntariness of a statement is in issue should be done in the presence of the jury who is trying the case. The argument that a no-case submission should be made in the absence of the jury is one of recent vintage as far as Jamaica is concerned and I am happy to say that it is one the senior judge in this country, Chief Justice and I am strongly of the view that that practice of sending out the jury mainly because a no-case submission is to be made is wrong and for the purposes of the record I will just state briefly the history of it.
>
> The thirty-fifth edition of Archbold was published on the 5th of May, 1962 and there is no note of proposition to the effect in that edition of Archbold that a no-case submission could be made or should be made in the absence of the jury. On the 25th of September, 1963, the Fourth Cumulative Supplement, fifth edition, was published. Again, there was no note or suggestion to that effect".

The learned trial judge then referred to the English cases of Regina v. Young [1964] 48 Cr. App. R. 292; Regina v. Falconer-Atlee (supra) and Regina v. Kellett [1975] 61 Cr. App. R. p. 240 and concluded (p. 229):

> "My ruling is that any defence submission to be made in this case must be done in front of the jury. I will give them the appropriate direction".

And after hearing lengthy submissions on behalf of all three accused ruled thus - (pp. 275-276):

> "I think one of the authorities, one of the recent authorities in England deals with this question as to whether or not a no-case submission should be made in the presence of the jury or in the absence of the jury and it supports, I believe, that it should be held in the absence of the jury as there is the likelihood of the judge, in his ruling, going into details in the facts and there could be some prejudicial effect in his analysing the evidence before coming to a conclusion. To put it another way, if the judge is of the view

> "that there is material to go to the jury and the submission is one in law - the submission of no-case is a submission in law - if he believes there is material to go to the jury he should be as concise as possible and reserve his comments on any particular aspect of the case until when the due time comes and that is what I do. So, the ruling is that there is a case for all three to answer".

then in his summation he said - (p. 426):

> "Now, Mr. Foreman and members of the jury, when the prosecution closed its case, you remember all three attorneys made what is called in law 'no-case submissions' and there was an argument. I need not go over that. It is a legal point, not for you. It was whether or not the submission should be made in your absence or your presence. I ruled - for the reasons which I gave then - that those arguments should be put forward and let you hear them. At the end of the arguments I didn't call upon Mr. McIntosh and I ruled that, in law, there was a case for each accused to answer. When I did that I wasn't making any one conclusion as to any fact. I wasn't doing anything concerning the guilt or otherwise of the accused because that is not my function. What I was saying is that there was something in the case fit to be left to you and the defence, as they have a right to do, may give their evidence, as the case may be, and each accused exercised a right which the law gives an accused man. So, I am just reminding you here that when I made that ruling it was not a ruling touching guilt of anybody. It was a ruling in law which is not your concern".

In his Practice Note to the Justices of the Peace [1962] 1 All E.R. 448 Lord Parker, C.J., outlines the bases on which a submission of no-case may properly be made thus:

> "A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it".

In R. v. Galbraith [1981] 73 Cr. App. R. 124, guidelines in relation to no-case submissions were expressed by Lord Lane, C.J., thus (p. 127):

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that

> "the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury".

In Galbraith the following passage from R. v. Barker [1977] 65 Cr. App. R. at page 288 was quoted with evident approval:

> "It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury and would have been quite wrong in the present case. The judge, whatever his personal views, put the issue before the jury fairly. The jury reached their conclusion. We do not see the slightest reason for thinking that the resulting conviction was unsafe or unsatisfactory".

And in the Privy Council case of Haw Tua Tua v. Public Prosecutor [1982] A.C. 136 on the same theme Lord Diplock said at page 151:

> "The proper attitude of mind that the decider of fact ought to adopt towards the prosecution's evidence at the conclusion of the prosecution's case is mostly easily identified by considering a criminal trial before a judge and jury, such as occurs in England and occurred in Singapore until its final abolition in capital cases in 1969. Here the decision-making function is divided; questions of law are for the judge, questions of fact are for the jury. It is well established that in a jury trial at the conclusion

> "of the prosecution's case it is the judge's function to decide for himself whether evidence has been adduced which, if it were to be accepted by the jury as accurate, would establish each essential element in the alleged offence: for what are the essential elements in any criminal offence is a question of law. If there is no evidence (or only evidence that is so inherently incredible that no reasonable person could accept it as being true) to prove any one or more of those essential elements, it is the judge's duty to direct an acquittal, for it is only upon evidence that juries are entitled to convict; but, if there is some evidence the judge must let the case go on .....
>
> In their Lordship's view the same principle applies to criminal trials where the combined roles of decider of law and decider of fact are vested in a single judge (or in two judges trying capital cases). At the conclusion of the prosecution's case what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is he justified in finding 'that no case against the accused has been made out which if unrebutted would warrant his conviction' ".

Though in more elaborate language these passages express the pith and substance of the "two bases" for properly upholding a no-case submission as defined in the Practice Note, namely (i) where an essential element in the offence has not been proved; (ii) where the prosecution evidence is so inherently incredible that no reasonable person would accept it.

It is enough to say that neither of these grounds existed in the instant case. Indeed, Mr. Brown's opening conveyed the impression that he himself had no faith in the submission which he intended to make. The issues raised in this case were essentially matters for the determination of the jury. In deciding whether or not a no-case submission should be made, we advocate that counsel be mindful always of the basic principles so clearly outlined in the statements

quoted above. No-case submission ought not be made merely as a matter of form.

It is fair to say that before us the main thrust of the arguments was directed to consideration first, as to whether or not the judge erred in not acceding to the applications that the submissions be made in the absence of the jury and, secondly, that the comments made by the judge were such as to deny the appellants a fair consideration of their defence.

In the Privy Council case of Ajodah v. The State [1981] 3 W.L.R. 1 in outlining the procedures when admissibility of a confession statement is in question, Lord Bridge of Harwich said (p. 13):

> "In the normal situation which arises at the vast majority of trials where the admissibility of a confession statement is to be challenged, defending counsel will notify prosecuting counsel that an objection to admissibility is to be raised, prosecuting counsel will not mention the statement in his opening to the jury, and at the appropriate time the judge will conduct a trial on the voir dire to decide on the admissibility of the statement; this will normally be in the absence of the jury, but only at the request or with the consent of the defence: Reg. v. Anderson [1929] 21 Cr. App. R. 178".

This evident but unqualified approval of the Anderson case but without any reference to the particular circumstances was therefore clearly intended to embrace the following statement of Hewart, L.C.J., at page 183:

> "It is difficult to imagine any circumstances in which, except at the request or with the consent of the defence, a jury can possibly be asked to leave the box in order that statements may be made during their absence".

The Privy Council was concerned with the admissibility of a confession statement. The circumstances in which a confession is made are relevant to admissibility, which is a question for the judge, as well as to weight, which is a

matter for the jury. Nevertheless in the light of the blessing so conferred on the Anderson case, it follows that the general rule is that questions concerning the admissibility or weight of evidence should be argued in the presence of the jury, save in those cases where arguments and discussions may involve disclosures prejudicial to the accused and then only with the approval of the defence. Accordingly, statements such as those made in the Falconer-Atlee case must be taken to express no more than the desirability of the jury being absent when a no-case submission attacking the general credibility of the prosecution evidence is being made and then only with the approval of the defence.

Further, to say that the making of a no-case submission in the presence of the jury will necessarily prejudice the fair trial of an accused would be to deny the jury the presumption of reasonable intelligence. Indeed, it may at times be advantageous to the defence to advert the jury at this early stage to the questionable areas in the case for the prosecution. It would be in the nature of a prologue to the final address.

Accordingly and having regard to the practice obtaining here, we do not consider it obligatory on the judge to accede to counsel's request that a no-case submission be made in the absence of the jury. We would not wish to fetter a trial judge's discretion in this regard.

With respect to the specific question as to whether in the instant case, the trial judge's comments during the exchanges between Bench and Bar, were likely to deny the appellants a fair consideration of their defence, we have considered those comments to which our attention was adverted. We are of the view that they were in general in response to counsel's misinterpretation or omissions in reference to the

evidence adduced. In the manner in which the learned trial judge gave his ruling on the submissions and in carefully advising the jury that in so ruling he was "not making any one conclusion as to any fact" we are of the view that such comments as were made could not have had the effect as contended by the appellants' attorneys.

Although we have declined to impose any obligation on the trial judge to accede to the request of the defence that no-case submissions be made in the absence of the jury, prudence would usually favour the grant of such a request and so obviate an appeal being made on such grounds as were here argued. We would also advocate that when no-case submissions are being made in the presence of the jury that defence attorney ought to confine his arguments to matters directly affecting the credibility of the prosecution evidence, such as unexplained inconsistencies or uncertainties in a witness' evidence, glaring discrepancies in the evidence of the prosecution witnesses, breaks in the chain of circumstantial evidence or that there is no evidence to prove an essential element in the offence charged. He should strive for accuracy in his recitals or summary of the evidence so as not to evoke from the judge corrective comments. A trial judge could not be expected to be silent while erroneous interpretations of the evidence are being made in the presence of the jury. On the other hand, the trial judge should refrain from expressing his views or commenting on the evidence in a manner that could be interpreted as determining an issue of fact or as being prejudicial to a fair consideration of the defence.

Turning to the identification evidence the general complaint may be summarised thus:

1. (A) Though there existed the opportunity for visual identification, the purported visual identification was unsatisfactory because of the difficult circumstances existing at the time of the incident.

   (B) The subsequent purported recognition by Mrs. Anderson of the appellants on the morning of 3rd September, 1980 had little or no evidential worth having regard to the circumstances under which it was made and the conflicts or uncertainty as to whether or not there was an 'engineered' confrontation of the appellants by Mrs. Anderson.

2. In the light of these weaknesses in the identification evidence the summing-up was inadequate having regard to the helpful guidelines on visual identification in R. v. Oliver Whylie [1977] 15 J.L.R. 264.

3. Further in relation to the third appellant not only was there even less opportunity for making a positive identification than in relation to the other appellants but the learned trial judge so misinterpreted the evidence of Perci Muir, an expert witness called by the defence to contradict the prosecution evidence and particularly Mrs. Anderson's, that there was light from moon at the material time to assist her in observing the third appellant and his comments thereon were such as to deny the appellant a fair consideration of that evidence and consequently of the defence of the third appellant.

Now with regard to the first and second appellants the evidence disclosed that they were in the house with Mrs. Ivy Anderson for about one hour and a half. There was in use by them throughout that period a lighted flashlight held at various times alternatively by both appellants. She was throughout in very close proximity to them and in particular during the time each was raping her. In addition, in respect of the first appellant, she had seen him on previous occasions and had even spoken once to him in her yard. In fact, he said for about four weeks he had lived in the same district and near to her. There was also mild support from the prosecution witness, Alice Sinclair, who said that the night in question about midnight she passed the first appellant whom she knew before by the road-side under an

ackee tree about three and a half chains from the Andersons home.

Mrs. Anderson admitted she did not know the other appellants before the night of the murder.

The evidence of Mrs. Anderson with regard to the third appellant was that she had two opportunities of observing him. The first, when the second appellant passed the bag to someone else on the front porch. In relation to the second opportunity her evidence is recorded thus (pp. 56-57):

"Q. When you heard the clattering in the kitchen, did you do anything?

A. I got up from the stool and I went to the front bedroom door, the one in front of the porch and that was when I saw number three. He was standing out there as if he was guarding the door.

HIS LORDSHIP: So the bedroom door was open then?

WITNESS: Still open.

HIS LORDSHIP: As if he was guarding the door?

WITNESS: Yes.

HIS LORDSHIP: Where was he? Inside or outside?

WITNESS: He was standing on the front porch.

Q. What happened next?

A. I saw him standing there so I went back inside and sat down.

HIS LORDSHIP: So you walked back inside?

WITNESS: To the stool and sat down.

Q. Yes.

A. I can't say how long I sat there because everything looked like eternity, sitting there in those conditions, but I got up a few minutes later and peeped through the door and he wasn't standing by the door.

HIS LORDSHIP: You went to the door and you peeped?

WITNESS: Yes, but he wasn't there anymore.

"Q. Yes?

A. So I ran across the front porch out to the carport and across to the next door premises where I lay in the bushes.

.....

Q. Now, Mrs. Anderson, I want to take you back to the third man. You remember you said you saw him?

A. Yes.

Q. Were you able to see his face?

A. Yes, I was.

Q. Had you known him before?

A. I had never seen him before that time.

Q. Were you able to see his face well enough so that you could recognise him if you saw him again?

A. Yes, I did.

Q. Can you say how you were able to see his face?

A. Yes, because it was very light as if the moon was shining and he was very close to the door when I went to the door.

Q. About how close to him, can you say, you went?

A. I went to the door, the front facing of the door. He was standing in the corner which is right by the door on the front porch".

It was under cross-examination on behalf of the third appellant that it came out that the third appellant was the person to whom the bag was passed. She said that on the second occasion she observed his features and that he had locks showing from under a cap he was wearing. She admitted that going to door, seeing him and slipping back, all happened very quickly.

In our view, with respect to the appellants Henry and Bunting, there was ample opportunity to make a positive identification. The circumstances including the length of time in which they were in very close proximity to her and the lighting were conducive to the making of a positive

recognition within a short time thereafter. The same however, cannot be said of the third appellant. The evidence portrayed brief glances and as to the light by which she said she observed him - namely, moonlight, the defence tendered evidence by Perci Muir to contradict her. Muir's evidence will be reviewed later against the background of the judge's treatment of that evidence.

Now with respect to the evidence as to her subsequent identification of the appellants in the police jeep next morning the events immediately preceding are relevant. According to Acting Corporal Ellis, acting on the report of Mrs. Anderson, with a party of policemen, he had gone to Woodburn, a district about two miles from the Andersons home arriving there about 11:00 a.m. In a yard there he saw the first two appellants. He had known as a fact that they lived together in that yard. He informed them that he was investigating the murder of Charlton Anderson of Logwood and heard they were involved. He cautioned them and took them into custody. There was challenge to this evidence both by suggestive cross-examination as well as traversing evidence by the appellants:- By Henry, that he was taken in custody on the road at Norris while on his way to work at Poor Man's Corner. He was dressed in vest and trousers. Ellis stopped him, searched him and took him in the jeep saying he wanted to question him at the Station. Bunting whom he did not know before was picked up and still later the third appellant. In that he was corroborated by Bunting. According to Bunting he was on the road from his Food Farm to his home when he was detained. By McLean, that after he returned from his work at the Food Farm on September 3, about 10:45 a.m., he was picking ackees at his home at Woodburn when Ellis called him and told

him to go in the jeep. The other two appellants were then in the jeep. The jeep was an open back vehicle. The appellants were sitting together in the back.

Now the route taken to the Station passed the Andersons home. Ellis when pressed in cross-examination with some reluctance admitted that an identification parade was desirable in the circumstances but explained that although there was another route to the Station, the one by the Andersons home was the shorter and the stoppage there was due to the crowd in the street. Mrs. Anderson's evidence on what transpired there is of sufficient importance to merit quotation - (p. 60):

EXAMINATION-IN-CHIEF

"WITNESS: While I was there" (in his front garden) "I heard a commotion coming along the road. People were all about and I was standing there talking to some relatives. I can't remember who but they were trying to comfort me and a jeep came along the road.

HIS LORDSHIP: That was outside?

WITNESS: Yes, on the road.

HIS LORDSHIP: A jeep came along?

WITNESS: People were milling all around and a jeep came along and I looked and I saw three people in the jeep. At first I recognised number one and when I looked again I saw that the other two were with him".

CROSS-EXAMINATION BY MR. BENTLEY BROWN

Page 89: "....

A. All I can remember they were sitting on the side seat, you know, sort of facing the yard.

Q. You were then on the verandah?

A. No, I was not on the verandah.

Q. Where were you?

A. I was out in the yard".

pp. 90-91:

"....

A. Yes, I remember seeing them because they were sitting together as they are now, on the side, on a side seat.

Q. And nobody else beside them?

A. There was nobody else sitting beside them.

....

Q. You did not go down to that jeep of itself?

A. No, I did not leave my yard.

Q. What's the nearest distance that you went to the jeep that had the three men?

A. To where I was standing and to where the road is I would have said it is somewhere in the region of - yes, by that bench where the young man is sitting.

HIS LORDSHIP: That bench there?

WITNESS: Yes.

Q. And while you were that distance from the jeep did Acting Corporal Detective Ellis come out to where you were and speak to you?

A. He did not.

Q. He never came to where you were?

A. No, he did not. I beckoned him.

Q. When you beckoned him, did he come to you?

A. Yes, he was outside the jeep. He was sort of clearing away the crowd from around the jeep with others. I can't tell you who the others were.

Q. The corporal was beating the men?

A. Beating? Pardon? I did not say that.

Q. I am asking if.

A. I did not see anything like that. I just told you that the crowd was there and they were just trying to keep back everyone from the jeep. That's why the jeep had to slow down anyway because they were bunched in the crowd. They couldn't have driven over them.

Q. Did you see when the jeep drove off eventually with the men?

A. No. I did not".

Page 92: "Q. So you remember attending the preliminary at the Gun Court sometime ago?

A. I did.

Q. Would I be correct in saying that's the first time that you were pointing out in the dock each of these men and say they were the three men?

A. Yes".

Alice Sinclair corroborated Mrs. Anderson that there was no confrontation with the men in the jeep that morning.

Corporal Ellis' evidence differed materially. He said he came out the vehicle to assist in clearing the road of people when Mrs. Anderson appeared and pointed out the three men. To His Lordship's pertinent question (p. 167) - "In their presence and hearing?" he evasively replied "In their presence".

"HIS LORDSHIP: As the men that what?

A. As the men who had...

HIS LORDSHIP: Yes?

A. .....entered her house earlier the said morning.

HIS LORDSHIP: Yes?

A. They made no statement".

But in cross-examination thus - (p. 219):

"Q. And I am also going to suggest to you that when you told the court that Mrs. Anderson came out of the crowd to the jeep to the vehicle, when you said Mrs. Anderson appeared and pointed out the three men, in their presence and hearing, as the men who had entered her house earlier the said morning, you are not speaking the truth.

A. Yes, ma'am".

The learned trial judge quite properly left (1) the question of alleged confrontation as a discrepancy between the evidence of Anderson and Sinclair on the one hand and Corporal Ellis on the other and (2) the question whether or not if there was confrontation, was it contrived for the consideration of the jury.

However, what is even more important is that if they accepted, as they were entitled to do, that there was no confrontation then her report to the Police Officer out of earshot of the appellants would be of little or no probative value.

Accordingly, instead of alerting the jury to the fact that if there was no real confrontation between accuser and accused, as would raise the expectation of a response and also that there was a risk of auto-suggestion or rationalising by the witness, having positively recognised the first appellant, the judge's directions concentrated on presenting the explanation of the police concerning the stoppage at the gate of the witness. In the circumstances in which this subsequent recognition was made and in the absence of an identification parade to test the witness' ability to make a subsequent recognition, the true quality of the identification evidence must be assessed at the time of the incident to determine the reliability of a subsequent recognition of persons unknown before the incident. In that regard the evidence against the third appellant was materially distinguishable from that against the first and second appellants in the following amongst other important aspects:

1. Whereas the first and second appellants entered the house proper, spent considerable time in raping Mrs. Anderson and looting the house, the third man, alleged to be the appellant, was outside throughout the entire incident.

2. While Mrs. Anderson was able to see the faces of the first and second appellants not only from prolonged proximity but also because they had the flashlight on during the long encounter and she was undoubtedly assisted by the light from it, whereas she saw the third appellant only twice, once a fleeting glance when he received the bag and the other when she was trying to escape and as she alleged, by light of the moon.

3. While the first and second appellants who according to Corporal Ellis lived in the same yard were

found together, the third appellant was picked up about quarter of a mile away.

4. Mrs. Anderson knew the first appellant before the night of the incident. She had seen him on occasions before and had even spoken to him in her yard.

Because of the obvious lack of cogency in the evidence of the alleged confrontation and because the evidence against the third appellant was so materially distinguishable from the evidence in relation to the others and especially in respect of the comparatively limited opportunity for making a positive identification, the case in relation to him called for special and careful directions. In R. v. Whylie [1977] 25 W.I.R. 430, in an endeavour to illustrate the type of assistance a judge should give a jury when the case for the prosecution rests solely upon evidence of visual identification and which evidence had been subjected to challenge, Rowe, J.A., (Actg.) [as he then was] after referring to a number of cases including R. v. Turnbull [1976] 3 All E.R. 549, said at page 433:

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

In the later case of R. v. Champagnie and others (Supreme Court Criminal Appeals Nos. 22-24/80) (unreported) after quoting with approval certain passages from Whylie's case it was said:

> "From the careful language used, we do not interpret this judgment as laying down as an inflexible rule of law, that in every case where there is evidence of visual identification, a trial judge is obliged to warn the jury of the dangers of mistaken identification. As Rowe, J.A. (Actg.) puts it, 'what matters is the quality of the identification evidence'. Indeed, the issue may be one, not of mistake, but of deliberate falsehood".

In Champagnie's case the witness passed the test of an identification parade and the Court pointed out that there was other cogent evidence.

In the instant case, the case for the prosecution rested entirely on the identification evidence of Mrs. Anderson.

Because of the identification evidence in relation to the third appellant and the circumstances under which the purported identification was made, we are of the view that the case of the third appellant fell within the type of cases in which helpful directions in the manner advocated in Whylie's case were necessary to render the summing-up fair and adequate.

The learned trial judge on this aspect of the matter said at page 443:

> "So, it leaves now, Mr. Foreman and members of the jury, one main issue in the case, and what is that issue? Can you rely on the evidence of Mrs. Anderson that the three men - two inside and one outside acting as a guard man or .... keeping the gate, watching the door, the watch man - can you safely rely on her evidence that those are the three men? In other words, the question of the identity of each of them?
>
> That is the issue in this case".

at page 445:

> "Thirdly, she told you of the relevant position of each of these men and how close she was to them and in particular she demonstrated, under cross-examination of Mrs. Brice, how she was able to make out the third man. It was during the cross-examination - Mrs. Brice wasn't too happy with what she was saying up there so I said 'You want the lady to go down there and use some policemen to show?'. She said: 'I don't mind, M'Lord, if yu say so'. So, she went and you saw what she did. The demonstration she made while under cross-examination, Mr. Foreman and members of the jury, is part of her evidence. While she was there she showed where the second accused was, actually on her right. She could touch him. The third accused, in passing the bag, was just a step from there and she could touch him. .....
>
> It was suggested to her she was making a mistake. To Mr. Brown - she reminded him he wasn't there, she was and to Mrs. Brice she said: 'I am making no mistake' ".

and at pages 470-471:

> "And that, Mr. Foreman and members of the jury, is the evidence of Mrs. Anderson, the salient points. You are to say - it is for you to say whether she has impressed you as, first of all, a reliable witness; secondly, whether her evidence that she was able to make out the three men and in particular the first accused whom she had seen several times before satisfies you to the extent that you feel sure that no mistake is being made, because from start to finish this case rests on her evidence as to identification. If you are left in a state of reasonable doubt as to the evidence concerning the identification you have to acquit them. She is the star witness in the case. Suspicion isn't good enough in a court of law to convict anybody. It must be evidence which satisfies you to the extent that you feel sure that he is guilty".

These directions, though in their generality cannot be faulted, nevertheless, in our view, did not give the assistance necessary to advert the jury's attention to the material and important differences between the evidence against the third appellant and that against the other two appellants. In particular, the evidence of Mrs. Anderson in relation to the third appellant with respect to the opportunity for identification called for careful treatment with respect to the second occasion when she met him at the door and which occasion would seem to provide the less fleeting opportunity for identification as she said she then saw him as "it was very light as if the moon was shining". At no time did she say that she was assisted in identifying the third appellant by the aid of the flashlight. However on this the learned trial judge had this to say (p. 458):

> "According to her the bag is passed to the third man. Now, she admitted that the view that she had of the third man - when I say the view, it wasn't long, but she demonstrated in the court how the bag was passed, how near she was, and she maintains that this torch was on, but she didn't say, didn't tell us exactly how it was held at the time".

The manner in which the learned trial judge invited the jury to consider whether or not she was aided by the flashlight was to import speculation as there was no positive

evidence to support the inference. Imagination is no substitute for evidence and where, as here, positive proof is required, a jury should not be invited to fill in omissions in the prosecution evidence with conjectures.

The second earnest complaint on behalf of the third appellant concerned the learned trial judge's treatment of the evidence of the defence witness, Perci Muir. Muir a Meteorologist in the Government Meteorological Services, was called to give evidence of moonrise at the material time. There is no challenge to his evidence that the moon was on the wane. His evidence was tendered to contradict the evidence of Mrs. Anderson that the moon provided light which assisted her in seeing the features of the appellant. Muir's evidence was that his duties include computing the times of moonrise and moonset in Jamaica. Records of such computations are kept where he works and are open to public scrutiny. From those records, the accuracy of which he is responsible, there would be on September 2, little light from the moon which was in the last quarter as of September 1, 1980. On the night of September 2, there would be no moon in the Jamaican sky since the moon having set at 1:15 p.m. of the 2nd, would not rise until 12:49 a.m. in the early morning of the 3rd September. At about 12:30 a.m. on the morning of 3rd September, the moon would be nineteen minutes before its time of rising; it would be below the horizon. Any light which could be seen from it would be light reflected from the sky which would not be appreciable for anyone to see.

Despite some confusing questions in cross-examination it seems clear that his computations were made in accordance with tables relating to Eastern Standard Time (E.S.T.). Daylight Saving Time (D.S.T.) was in use then, so the clocks would be an hour in advance. It seems that his conclusion that by

D.S.T. moonrise would be 1:49 a.m. instead of 12:49 a.m. rested on a firm mathematical basis.

The learned trial judge however misinterpreted the evidence of Mr. Muir when the latter said that during the night of 2nd September, 1980, there would be no moon in the Jamaican sky. It was clear that Muir regarded night as ending at midnight and was not speaking of the early hours of the morning of the 3rd. The learned trial judge however interpreted him as saying that throughout the period defined under the Larceny Act as night, that is to say, from 7:00 p.m. of one day to 6:00 a.m. of the following day there was no moonlight at all. Despite the endeavours of defence attorney to advert the judge's attention to the witness' meaning of 'night' the learned trial judge pursued his adverse comments on Muir's evidence thus at page 491-493:

> "The substance of the evidence of Mr. Muir is this: The moonset was at 1:15 p.m. in the afternoon of the 2nd of September; the moon was not shining in the Jamaican sky during the night of/the 2nd September, 1980 because it had set at 1:15 p.m. and wouldn't rise until 12:49 a.m. on the 3rd; the moon was not shining in the Jamaican sky at all during the night.
>
> Now, in our law, when we refer to night in Jamaica it refers to that period between 7:00 p.m. of one day, of one evening to 6:00 o'clock next morning. That is night-time, for the purposes of the Larceny Act. In this case, the Larceny Act would be relevant because although they are charged with murder, it was a case where burglary was committed and a felony - the house was broken and entered into and a felony committed in it. But, lighting-up time can be before 7:00 o'clock.
>
> What I gather, he is saying that during the night - he never tell us what he mean by night - there was no moon at all. He couldn't help us ... no moon in the sky, according to him; he couldn't help us further because as Mr. McIntosh asked him and he admitted, he doesn't know Logwood District. The atmospheric conditions, situation of the place, the question of whether you have any clouds or any other obstacle there would be relevant as to the amount of light that would be relevant as to the amount of light that would be reflected from the heavenly bodies, the stars and if there is a moon at that time.

"When Mrs. Brice asked him a further question now:

Question: 'What would be the state of light between 11:30 p.m. on the 2nd of September and 12:30 a.m. on 3/9/80?'

Answer: 'There would be no light coming from the moon; it would be a dark night'.

As he went along he is saying one thing. And, I must confess that I am not clear on what he is saying. At one time he is saying that there would be no moon in the Jamaican sky during that night, the 2nd of September; then when he is put a specific thing, the time, what would be the state of the light, he says there would be no light from the moon; it would be a dark night. I don't follow him to be saying on the night of the 2nd of September .... 'oh, yes, some time during that night, the moon would be up there but the amount of light that it would be reflecting on the earth would be minimal because of the state of the moon'. As a matter of fact, in the first part of his evidence, that is what he indicated; when the specific thing is put, he doesn't stick to that - 'there is no moon at all during the night'.

But, as I pointed out to you yesterday, there is no month of the year, as far as our Jamaica is concerned - I don't know about any other country - in which you are going to have a Last Quarter or a First Quarter one day and the following night you don't see the moon at some time in the night in the sky - no month of the year. The amount of light that you will get is a different thing. I think I invited you yesterday, as the case was still going on, those who could get up by about 4:00, 5:00, 6:00 o'clock, to get out the bed and look in the sky and this would be the third night about the Last Quarter for January".

Mrs. Brice for the appellant again intervened to put the evidence in the right perspective but the learned trial judge would have none of it and concluded thus at pages 494-495:

"The impression that he left with me, Mr. Foreman and members of the jury, is that during the time, during the night of the 2nd of September - and he was asked specifically to look up for that - during the relevant time that we are dealing with here, we would say from around 11:00 o'clock and right on to the period of darkness that normally we would have, there was no moon. That is what I understand him to be telling you.

A man who comes here and calls himself an expert who is learned in the sciences is expected, as Mr. McIntosh has rightly pointed out, to explain to us in simple language - those of us who are not learned as he is, in his eyes - to explain in simple language what he is trying to say. As a

> "matter of fact, judges, outstanding judges have always said that where you find a man who is said to be skilled, and on a simple matter is trying to explain to the layman and the layman can't understand, he is using the language or putting it in a confusing way then he is not expert at all, because the more learned a man is the more he should be in a position to simplify matters.
>
> Anyway, what I am asking you to do is this. If you find that he has expressed a proposition dealing with the period when normally there would be darkness, there would be no moon at all, he is expressing a proposition that the night after - the day after - the night following a day when the moon reaches the last quarter you will never see any moon in the Jamaican sky during that period of darkness, then you can use your own experience and say that he is expressing something which is contrary to our experience, what we know to be the habitual life. If you take that view then the rest of his evidence, you approach it with great caution and see what you can make of it".

In the light of the manner in which he misinterpreted and deprecated the evidence of the witness and in leaving the matter to the jury as he did, the conclusion that Muir was either a liar or so incompetent as to render his evidence wholly unacceptable was inescapable. We are of the view that on this important issue, the jury were precluded from giving a fair consideration to the evidence of Perci Muir.

Accordingly, not only did the trial judge fail to give directions appropriate to the special circumstances of the case in relation to the third appellant but his mistreatment of the evidence of Perci Muir denied the appellant a fair consideration of his defence.

With respect to the other two appellants, the evidence of identification was cogent and the directions were adequate.

The hearing of the applications are treated as the hearing of appeals. The appeals in respect of the first and second appellants are dismissed and the convictions and sentences affirmed.

The appeal of the third appellant is allowed and the

conviction quashed. We have given earnest and long consideration to the consequential order to be made in respect to this appellant. Among the circumstances considered by us, were the weaknesses in the evidence against him and the fact that a new trial would provide the prosecution with an opportunity to cure certain omissions in the evidence and that so much time has elapsed since the offence was committed. Accordingly, we are of the view that it would not be in the interest of justice to order a new trial and therefore we order that a judgment and verdict of acquittal be entered in respect to the third appellant.