

NmLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 62, 63 & 64/97

**BEFORE: THE HON. MR. JUSTICE RATTRAY, P
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A. (Ag.)**

**R. V. KENNETH CLARKE
DONOVAN STARRAD
HOPETON ROBINSON**

Dennis Daly, Q.C. for the applicant Clarke

C. Dennis Morrison, Q.C. for the applicant Starrad

Elham Bogle for the applicant Robinson

Lloyd Hibbert, Q.C. & Sonya Wint-Blair for Crown

February 10, 11 & July 30, 1999

RATTRAY, P

On the 24th February, 1996 David Darby, a cable operator was shot to death whilst engaged in making a cable installation to a house in Roehampton Circle in the parish of Saint Andrew. The evidence as given by Edgar Gayle, a cable technician employed to Mr. Darby was that at about 5.00 p.m. he was present at Roehampton Circle with two other employees, Mark Johnson and David Brown assisting in the installation. Mr. Darby was on a ladder by a post in front of the house in respect of which the installation was being made. A van driven by Mr. Brown was parked behind Mr. Darby's van. Two men passed him and went to Mr. Brown's van and spoke to Mr. Brown. Mr. Darby came off the ladder and walked towards the front door of his van. The two men pulled guns and pointed at Mr. Darby. The witness heard explosions. Mr. Darby fell on his face with blood coming from his head.

At an identification parade held on the 28th of March, the witness pointed out the applicant Robinson as one of the men he had seen at Roehampton Circle and who had shot Mr. Darby.

The indictment charged the applicants jointly with capital murder. It is alleged that the murder was "pursuant to an arrangement whereby money passed from a person unknown to the said Kenneth Clarke, Donovan Starrad and Hopeton Robinson as a consideration for causing or assisting in causing the death of the said David Darby." It was what is commonly referred to as a "contract murder".

The prosecution relied heavily on the evidence of one Kirk Rose, a cousin of the applicant Kenneth Clarke o/c "Paul Clarke" or "Rumporridge". He testified that on the 24th of February, 1996 he was at his aunt's yard at Myrie Avenue where he was living when his cousin Kenneth Clarke told him that he had somewhere important to go and asked him to come along with him. While there the applicant Donovan Starrad whom he knew as "Danny" drove up in a motor car and had some discussion with Clarke. The latter identified him to Danny as his cousin from the country. Danny said to let him come along with them. Danny drove to a place known as the Chinese Cemetery on Waltham Park Road. The two applicants went inside the cemetery. They later came out with the third applicant Hopeton Robinson o/c "Flipper". Both Danny and Flipper had guns. They travelled to a bar on the Waltham Park Road where they had drinks. They drove into a residential area where they saw some men running wires on a cable line. Danny said: "See the boy deh." The cable truck was parked beside a pink gate. The other three men came out of the car and walked down the road in the direction where the cable men were working. The witness was left behind in the car. He heard about six explosions sounding like gunshots. The three applicants came running towards the car and came into the car. Danny told him to make haste and drive the car. He drove the car with the other three men as passengers to a gas station where Danny took over the driving. They then drove further to a bar. From the bar the three

men drove off leaving the witness. He walked to his home. Later on, he saw the applicant Clarke, who said to him: "... that I am not to take Danny and Flipper simple. They are serious man dem." He also said that "He just kill the cable man."

Next morning Clarke asked him to go somewhere with him to collect something. Both of them rode a bicycle to a "Chiney man" where videos and T.Vs are fixed at Waltham Park Road by a gas station. Clarke, and a Chinese man hug-up and went in into a glassy place. Clarke returned and told him he was going to buy him something. He took him to town where he bought him a jeans pants and shirt. Clarke told him he would give him some money but never did. On the way to town Clarke told him that he is going to collect the money he got to kill the cable man, and that the amount was \$90,000.00. He also told him that the money was to be divided between himself and Flipper, that is the applicant Robinson, and Danny that is the applicant Starrad and that they were each to receive \$30,000.00. The witness showed the police the street on which the shooting took place and was told it was Roehampton Drive. He further took the police to where the applicants Clarke and Robinson were hiding. Clarke took them to where the applicant Starrad was hiding.

A witness named Owen Clarke gave evidence that he was the owner of the car which Starrad was driving. He had arranged that Starrad should pay him \$1000.00 per day for using the car as a taxi.

The police took cautioned statements from both Donovan Starrad and Kenneth Clarke which they wrote down in the form of questions and answers. With respect to Clarke Det. Inspt. Errol Grant administered sixty-nine (69) questions. When Clarke was asked "Who then shot Mr. Darby?" His answer was "Me and Hopeton shot him sir." Clarke's answers to the questions posed, corroborated in material particulars the evidence given by the witness Kirk Rose in respect of Clarke's involvement. It disclosed that he was paid the sum of \$90,000.00 to kill Mr. Darby by an "Indian man

who owns a bicycle shop on Waltham Park Road in front of Mangoose Town and in the cable business too."

Although Clarke's statement implicated both Starrad and Robinson, the jury were clearly warned that the contents of the statement were not evidence against the other persons charged. The statement was only properly admissible as evidence against Clarke.

Counsel for the applicant Clarke has taken issue with the adequacy of the trial judge's summing-up to the jury in respect of the question and answer cautioned statement taken from Clarke by the investigating police officers. It was suggested to the police officers Inspector Errol Grant who wrote down the statement and Senior Superintendent Osbourne Dyer who witnessed it, that Clarke was beaten by the police and the signing of the statement was achieved through the application of force and duress. This also was stated by Clarke in his unsworn statement from the dock given in his defence.

How did the trial judge deal with the applicant's Clarke's statement to the police? He posed two questions for the jury's determination. Firstly, it was their duty to decide whether or not the applicant made the statement, and secondly, if they were sure that the applicant made the statement, they would then consider whether or not what was said in those answers given by the applicant to the questions were true. The trial judge then continued:

"In determining that, you should take into consideration all the circumstances having regard to the allegations by the defendants of threats, of beating, of inducement, of their teeth being knocked out, and you must say whether you find any, or all of the statements made or may have been. If, for whatever reason, you are not sure whether the statements were made, or were true, then you must disregard them. If, on the other hand, you are sure both that they were made and that they were true, you may rely on them even if they were or may have been made as a result of oppression or improper circumstances."

He further continued:

"You must consider the whole of the statement in deciding where the truth lies. You may feel that the incriminating parts are likely to be true; you may feel that there is less weight to be attached to the excuses or explanations, they are there not made on oath, have not been repeated on oath and have not been tested by cross-examination."

He was careful in pointing out:

"It is only what an accused person says against himself that you can rely on. What he says against another accused is no evidence against that other accused."

Mr. Dennis Daly, Q.C. for the applicant Clarke has submitted that while it was for the jury to accept or reject the truth of the statement, the question of beating and duress was crucial in their determination and the judge should have so indicated to the jury. Further, he maintained that the trial judge erred in inviting the jury to accept less than a standard of certainty when he told them that they "may rely on them even if they were or may have been made as a result of oppression or improper circumstances."

The summing up in relation to this area of direction must be looked on as a whole. The trial judge had to determine the admissibility of the question and answer statement. He had to be satisfied that the statement was voluntary. He directed the jury on the proper standard to be applied with respect to the acceptance of this evidence that is (1) if they were sure that the statements were made by the appellant and (2) that the answers given were true.

The acceptance by the jury of the content of the statement depended upon the above criteria. If those criteria were not satisfied the trial judge directed the jury that they must disregard the content of the statements. If they were satisfied the jury could rely on the statement:

"... even if they were or may have been made as a result of oppression or improper circumstances."

Counsel therefore was not correct when he submitted that the jury was being invited to accept a standard of proof less than that of certainty.

In order to convict the applicant Clarke of capital murder the jury were required to find, on the evidence that the murder was "committed pursuant to an arrangement whereby money or anything of value - passes or is intended to pass from one person to another or to a third party at the request or direction of that other person". The trial judge directed the jury thus:

"So if you find that the killing was done pursuant to this arrangement, admitted by Kenneth Clarke, then the accused man, Kenneth Clarke, would be guilty of capital murder."

Counsel maintains that in this regard there is a serious discrepancy between what the witness Kirk Rose told the court and what he gave in his statement to the police with respect to the payment of money. The question was asked:

"Q: Did you ever tell the police that you and Paul went to this Chiney man shop and Paul collect money? Did you ever tell the police that? Did you ever tell that to the police?

A: I don't remember that sir, lots of things on my head couldn't remember some of these things sir.

Q: But you will agree with me that in your opinion that would be an important thing to tell the police?

A: Yes sir, but words and brain and those things moving so fast, I cant remember some other things same time.

Q: In the statement that were read over to you a little while ago by the Registrar, did you see there that you told the police you and Paul went to the Chiney man place to collect money, did you see that there?

A: I don't see that part."

It is on this basis that counsel submits that the evidence in relation to the payment of the money is not established. There is a great difference between contradicting a witness on something that he has said before which is contrary to what he has given in evidence in the witness box and asking the witness whether in another statement he had mentioned a "particular matter." In the latter it is the question of omitting to say something, and not a matter of saying something contradictory to what was said on a previous occasion. Counsel for the applicant therefore could not properly rely upon this state of the evidence as exposing a contradiction in the evidence of the witness. There is in my view no evidence to contradict the evidence given at the trial which would lead to the conclusion that the killing was done by the applicant Kenneth Clarke as a result of an arrangement by which he would have received money to carry out the murder.

Counsel for the applicant contended that there were serious discrepancies between the evidence given by the witness Kirk Rose, and the statement which he had made to the police in respect of the payment of the money. The learned trial judge stated as follows:

"Now, you may be satisfied that Rose had previously made a statement which conflicted with his evidence in this court. You may take that into account, you may take into account the fact that he made such a statement when you come to consider whether he is believable as a witness. However, the contents of the statement are not part of the evidence in this trial except for those parts which he has told you are true. What is evidence in this trial is what Rose told you from the witness box in this court but you will bear these previous inconsistent statements in mind when you come to consider what weight you give to Kirk Rose's evidence. Now, I merely draw your attention to these inconsistencies but you may consider that these inconsistencies are neither serious or central to the issue but that is a matter for you . . .".

There is no cause for complaining as counsel does, that to the great prejudice of the defence the trial judge minimized the effect of the discrepancies. The determination of where the truth lies was a question of fact for the jury. On the

evidence given by Kirk Rose they could reasonably have come to the conclusion which they did. The nature of what is referred to as discrepancies is also relevant. Are they on vital or peripheral issues? What counsel was seeking to do was to establish that his statement to the police did not mention a particular fact, which as I have already pointed out, could not establish a contradiction.

The final submission of counsel for Clarke was that the trial judge's summing-up was inadequate in terms of bringing to the jury's attention the danger of relying on the evidence of Rose, an admitted accomplice, who was *particeps criminis* to the murder of David Darby. The trial judge warned the jury that in a criminal case where there is evidence to suggest or support a proposition that the prosecution witness called may have an interest to serve it was desirable for a judge to warn a jury that it was dangerous to accept his evidence unless the jury could find some other evidence in the case from the other witnesses supporting what the witness had said. He directed:

"And it is the same warning that is given where the person is an accomplice, that is to say, took part in the commission of the crime but the crown is using him as a witness against another person or persons."

He gave the reason why this is necessary and he stated:

"So here the question really goes to credit and it is in such a case I have to warn you of that situation. It is in such a case you must look to see whether there is any other evidence from any other witness in the case, who is not tainted, to confirm in a material particular what Kirk Rose has told you."

The trial judge then recited some of the evidence of Kirk Rose and continued:

"These are matters which you have to bear in mind that these matters are capable, these bits of evidence are capable of making Kirk Rose an accomplice. But that is a matter for you to say whether or not he is an accomplice.

Well on those bits of evidence, Mr. Foreman and your members, it would be open to you to say that Kirk Rose is an accomplice or could be regarded as a witness who has some interest to serve, in which

case you take that view, then my warning to you is to examine his evidence carefully to see whether in any material point he is corroborated by other witnesses in this case."

He then proceeded to direct the jury on corroboration. He asked them to look for some independent evidence which could confirm in some important respect the evidence of Kirk Rose. He then stated:

"It is for me to point out to you the evidence which if you accept is capable of independently confirming Kirk Rose's evidence, and I shall do so now. Now, what is the independent evidence which would tend to corroborate Kirk Rose's evidence in respect of the accused man Kenneth Clarke? That independent evidence is the caution statement. Now, you will recall the questions and answers under caution which Kenneth Clarke gave to the police. If you accept his evidence that he committed the offence then that is independent evidence which corroborates Kirk Rose's evidence."

The trial judge's summing-up therefore satisfactorily dealt with the issues which counsel has submitted he inadequately dealt with and provides no basis on which this ground of appeal can be supported.

RE: DONOVAN STARRAD

The evidence implicating the applicant Starrad came from the witness Kirk Rose. Starrad, referred to as Danny, drove the car which took the witness and Clarke to the Chinese Cemetery where they entered and later returned with Robinson o/c "Flipper" armed with guns. At the scene where the cable men were running wires Danny pointed out the deceased saying "See the bwoy deh." Danny with the other two applicants walked in the direction where the cable men were working and the witness heard gunfire. They ran back to the car and Danny told the witness to make haste and drive the car.

The caution statement taken from this applicant apart from admitting going to the Chinese Cemetery with Kirk Rose and Kenneth Clarke on the 24th of February does not in any other particular implicate the applicant. The reason for going as the

applicant stated in the question and answer cautioned statement was because "Rumporridge' (Clarke) told me he has two tweeters to sell me." He never got the tweeters. It cannot be said therefore that Starrad's question and answer statement implicated in any way this applicant in the commission of the murder. It could only support the evidence of Kirk Rose that they did go to the Chinese Cemetery.

Mr. Dennis Morrison, Q.C. for the applicant submitted that the trial judge erred in refusing to accede to an application made on behalf of the applicant to edit the caution statement of Kenneth Clarke the co-accused, and maintained that the refusal to order this to be done created substantial prejudice to the applicant.

There can be no doubt that the questions and answers of Kenneth Clarke implicated Donovan Starrad in the murder. Such references however, to Starrad's role provided no admissible evidence against Starrad, only against Clarke. The prosecution was not entitled to rely upon any part of Clarke's statement which inculpated Starrad. The judge therefore had no discretion to edit the statement by Clarke so as to omit reference to Starrad since the Crown could not rely upon Clarke's statement as evidence against Starrad. As Lord Steyn stated in *Lobban v. R* [1955] 2 All E.R. 602 at page 612 letters e - g:

"The discretionary power to exclude relevant evidence applies only to evidence on which the prosecution proposes to rely. It exists to ensure a fair trial to the defendant, or in a joint trial, to each defendant without seeking to differentiate between the quality of justice afforded to each defendant."

Further at page 613 letter h:

"If a separate trial is not ordered, the interests of the implicated co-defendant must be protected by the most explicit directions by the trial judge to the effect that the statement of one co-defendant is not evidence against the other."

It is therefore necessary to see how the learned trial judge directed the jury with respect to the statement against Starrad to be found in the cautioned statement of the

co-accused Clarke to determine whether he ensured that Starrad would receive a fair trial.

Before admitting the statement of Clarke the learned trial judge directed as follows:

"Well Mr. Foreman and members of the jury the full statement will be read to you but whatever is in that statement is evidence against the maker of the statement himself and is not evidence against the other persons named in the statement. I am not giving you a warning now, but will give you a warning later on when I come to sum up the case to you."

Further in his summing-up to the jury the trial judge stated:

"Now in respect of the accused man Donovan Starrad, there is no corroboration of Kirk Rose's evidence, but there is evidence which supports Kirk Rose's evidence and I will point that out to you; that is the evidence of Starrad himself which he gave in a caution question and answer in which he stated that on the particular day, the 24th of February, 1996 he visited the Chinese cemetery. Now that is a statement, if you accept it, which came from him, himself, and that would be evidence which supports though not corroborates Kirk Rose evidence. "

Later he stated:

I want to make it abundantly clear that you must discard from your minds anything that Kenneth Clarke said in his statement which implicates either Donovan Starrad or Hopeton Robinson."

And further:

"It is only what an accused person says against himself that you can rely on. What he says against another accused is no evidence against that other accused. Please bear that in mind."

Counsel for Starrad has submitted that it was possible to edit Clarke's statement by deleting reference to Starrad, and this would have done no violence to the body of the statement. This exercise in my mind would be somewhat comprehensive and cumbersome as against an admission of the whole document with a strong warning as to how to treat any reference to Starrad in Clarke's statement.

The trial judge having given the required warnings and strongly directing the jury that Clarke's statement was not evidence against Starrad fulfilled the requirement of fairness which is necessary in this regard.

At the trial a no-case submission was made in respect of capital murder and the trial judge ruled that there was a case to answer in respect of all three accused persons. The jury convicted Starrad of non-capital murder. Mr. Morrison, Q.C. has submitted that the trial judge erred in ruling that there was a case for Starrad to answer in respect of capital murder.

Since the jury convicted Starrad of non-capital murder what is not explained is how this ruling in any way adversely affected the applicant. The applicant was clearly not prejudiced by the ruling and this court need not therefore analyse the evidence to establish whether the trial judge was correct or not in ruling that there was a case to answer in respect of capital murder.

Further complaint had been made that the directions of the trial judge were inadequate in respect of the uncorroborated evidence of an accomplice, in this case the evidence of the witness Kirk Rose. This complaint is not borne out by a reading of the judge's summing-up. The trial judge indicated the pieces of evidence which reflected the involvement of Kirk Rose and stated:

"These are matters which what you have to bear in mind and these matters are capable, these bits of evidence are capable of making Kirk Rose an accomplice. But that is a matter for you to say whether or not he is an accomplice.

Well on those bits of evidence Mr. Foreman and your members it is open to you to say that Kirk Rose is an accomplice or could be regarded as a witness with some interest to serve in which case you take that view then my warning to you is to examine his evidence carefully to see whether in any material point he is corroborated by other witnesses in this case."

He then went on to direct the jury in relation to the question of corroboration, and there can be no complaint that he did so incorrectly. He stated:

"It is for me to point out to you the evidence which if you accept it is capable of independently confirming Kirk Rose evidence and I shall do so now."

He pointed out that there was no separate evidence in respect to Starrad which supported Kirk Rose's evidence. He continued:

"So, Mr. Foreman and members of the jury you will have to examine Kirk Rose's evidence carefully. If you take the view, from what I pointed out to you, you regard his evidence as coming from one who has an interest to serve and is an accomplice, but nevertheless, if you take the view that Kirk Rose's evidence is not independently confirmed, that is not corroborated, and providing you bear in mind the warning which I have given you of the danger of convicting without it, you may rely upon Kirk Rose's evidence if you are sure that he is telling you the truth."

In this regard therefore, the learned trial judge gave a fair and comprehensive direction and there is no cause for complaint.

The applicant Starrad in his defence made an unsworn statement from the dock and in that statement he contended that he signed the question and answer statement which had been written down by the police after he had been beaten. In relation to these question and answer statements, the learned trial judge had directed that two issues had to be determined by the jury:

"First you must decide whether or not the defendants actually made them. Second, but only if you are sure that they made them, you consider whether or not what they said if those questions and answers were true. In determining that you should take into consideration all the circumstances having regard to the allegations by the defendants, of threats, of beating, of inducement of their teeth being knocked out, and you must say whether you find any, or all of the statements made or may have been. If, for whatever reason you are not sure whether the statements were made, or were true, then you must disregard them. If on the other hand, you are sure both that they were made and that they were true, you may rely on them even if they were or may have been made as a result of oppression or improper circumstances."

Counsel submitted that the judge's directions as to the basis on which they could convict the applicant on the strength of the answers after caution were "inadequate and prejudicial" to the defence, in that he failed to say clearly and unambiguously that in deciding whether to act upon them they should have regard to the allegations of the use of force and threats by the police. The summing-up does not support these allegations since the trial judge said:

"In determining that, you should take into consideration all the circumstances having regard to the allegations by the defendants of threats, of beating, of inducement, of their teeth being knocked out, and you must say whether you find any, or all of the statements made or may have been."

In any event there is nothing in Starrad's question and answer statements which implicates him in the shooting of Mr. Darby.

It is also submitted that the trial judge's warnings as to how the jury should treat statements made by one accused against the other was inadequate. Firstly, the trial judge told the jury that :

"I want to make it abundantly clear that you must discard from your minds anything that Kenneth Clarke said in his statement which implicates either Donovan Starrad or Hopeton Robinson. It is only what Kenneth Clarke says against himself in his out-of-court statement, whether to the police or to Kirk Rose, that you can rely on when you come to consider the evidence or the statement against Starrad and against Robinson. Likewise, when you come to consider Donovan Starrad's statement, you must discard anything he said which implicates Clarke or Robinson. It is only what an accused person said against himself that you can rely on. What he says against another accused is no evidence against that other accused, please bear that in mind."

This direction was clear and strong and the jury would have understood that anything said by one accused against the other was not evidence against that other accused.

It is further submitted that the directions of the trial judge on the effect of the applicant's unsworn statement were wrong and prejudicial to the applicant. What did the trial judge say in respect of the applicant's choice in this regard?

"Now you have not heard any testing of these accused men on their evidence. They made unsworn statements from the dock. They had a completely free choice, either to do so or to make unsworn statements from the dock or to say nothing. You shouldn't treat their failure to give evidence as evidence of their guilt. However, you may perhaps be wondering why the defendants have elected to make unsworn statements. Could it be because they had any conscientious objection to taking an oath, since, if they had, they could affirm? Could it be that these accused men were reluctant to put their evidence to the test of cross-examination? If so, why? They have nothing to fear from unfair questions because they would be fully protected from these by their own counsel and also by the Court.

So it is exclusively for you to make up your minds whether these unsworn statements have any value and if so, what weight should be attached to them. It is for you to decide whether the evidence for the prosecution has satisfied you of these accused men's guilt beyond a reasonable doubt and in considering your verdict you should give these defendants' unsworn statements only such weight as you may think they deserve."

This direction followed closely the advice of the Privy Council in *DPP vs. Walker* [1974] 12 J.L.R. 1369 at 1373, when the Board gave guidance on "the objective evidential value of an unsworn statement." The format and content therefore of the direction on the unsworn statement given by the trial judge cannot be faulted.

Re: Hopeton Robinson

Miss Elham Bogle representing the applicant Bogle challenged the summing up of the trial judge relating to (1) the evidence of Kirk Rose as a person with an interest to serve and/or accomplice. (2) The inconsistencies in his evidence at the preliminary examination as against his evidence at the trial. (3) The direction to the jury concerning the danger of convicting on the uncorroborated evidence of Kirk Rose.

She further adopted the submissions of counsel for the other two defendants with which we have already dealt.

The witness Edgar Gayle identified Robinson at an identification parade and counsel submitted that the trial judge should have withdrawn the case from the jury as the identification was manifestly weak and unsafe.

Mr. Gayle was a cable technician working with the deceased Mr. Darby on the fatal occasion at Roehampton Circle. The two men passed him going towards Mr. Darby. He saw them pulling out guns and he heard explosions. He went flat on the ground. He heard Mr. Darby cry out for help. He raised up and saw the men going in the direction from which they came. He got up fully and saw Mr. Darby on the ground with blood coming from his head.

On the 28th of March he attended to an identification parade and pointed out Robinson as one of the men. The trial judge in relating his evidence to the jury said:

"He said when he saw Hopeton Robinson for the first time on the scene he was about twenty yards away from him. He says while the men were passing he turned with them. He saw both of them pulling out guns. He was still on the side of the van when he saw the men coming and they pulled their guns. The men were in the middle of the road when they pulled their guns. They were about twelve feet from me. That is in line with the bumper of the van and twelve feet away from the left bumper. He said he was looking at them. And they made an L turn toward the front of the van. The guns came from their waist. He said the men he saw that day he had never seen before."

Sgt. Lionel Morgan who conducted the parade had given evidence that the applicant Robinson had been represented on the identification parade by Mr. Lloyd McFarlane, Attorney-at-law and had elected position number five in the parade. He had testified that when the witness Gayle came on the parade he asked him if he knew why he was there and he said "to point out the man who killed Mr. Darby." The witness walked along the line turned and came back up and stopped at number five and identified Hopeton Robinson who was at the number five position as one of the

men. Sgt. Morgan had pointed to Kenneth Clarke in the dock as the person who was pointed out by the witness. He was sure that the witness had pointed out the person in the number five position at the parade and the name of the number five person was Hopeton Robinson. At the trial Clarke was wearing a cross and Sgt. Morgan had said the man with the cross. In cross-examination he was asked by counsel:

"Q. I am suggesting to you that you are mistaken when you say this man was pointed out on an identification parade by Edgar Gayle, you are mistaken.

A. I'm absolutely sure that the name is Hopeton Robinson.

Q. I didn't ask you that. I am suggesting that you are mistaken when you say it is this man with the cross.

A. Well, if the name is not Hopeton Robinson, then I could have been mistaken."

What Sgt. Robinson was saying that the man identified was number five and whose name was Hopeton Robinson and that his mistake was in pointing out in the dock Clarke who was wearing a cross as that man. He was however sure that the man pointed out was number five and that his name was Hopeton Robinson. How did the trial judge deal with this? In dealing with the evidence of Sgt. Lionel Morgan the judge said:

"He said Hopeton Robinson was a suspect and you will recall that he pointed to the wrong person in the dock but, as Hopeton Robinson, he pointed to Clarke but he said he was certain the person who was pointed out was Hopeton Robinson even though he might have made a mistake with the face of the person."

Further he said :

" He said the witness Edgar Gayle, walked down the line turn and came back up. He stopped and said number five. He told the accused man Hopeton Robinson and Hopeton Robinson never said anything. He asked Hopeton Robinson to sign the parade form which he did and he said that Det. Cpl. Brown also signed the form as well as himself."

Det. Cpl. Brown had also given evidence that the witness Gayle had pointed out Hopeton Robinson on the parade. The evidence therefore is clear despite the error that was made when the Sergeant pointed out Clarke in the dock as Robinson, that it was Robinson who was identified and indeed the form signed by the applicant Robinson substantiated this.

There was therefore the evidence of the witness Kirk Rose as well as the evidence of the identification parade in which the applicant was pointed out by the witness Edgar Gayle. In these circumstances the trial judge could not have been faulted for not withdrawing the case from the jury and allowing a determination to be made at the end of the trial.

The other area of Miss Bogle's complaint in relation to the evidence of Kirk Rose as a person with an interest to serve or an accomplice, and the judge's directions of the jury in relation to this have all been dealt with in respect of the other applicants.

Miss Bogle further sought to make a point that the trial judge failed to advise the jury of certain inconsistencies between the statement of Kirk Rose at the preliminary hearing and his evidence at the trial. These she maintained went to the core of the evidence and crippled his credibility as a witness.

The two examples given by Miss Bogle were of minimal discrepancies which could not be said to have gone to the core of the case so as to affect the determination of the jury in respect of Robinson's involvement in the killing of Mr. Darby.

In a case of this length and complexity a trial judge is not expected to direct the jury on every small discrepancy, when that discrepancy in no way affects the establishment of guilt of the applicant. Furthermore, the jury heard the whole case and is expected to have followed and recalled the evidence in the case so as to arrive at a verdict.

At the commencement of the summing up the trial judge stated his duty to tell the jury "what the law is, and how to apply that law to the issues of facts which you have to decide, and to remind you of the important evidence on those issues." It cannot be said that he failed to carry out that mandate.

Consequently, we have treated the application for leave to appeal as the hearing of the appeal which is hereby dismissed.