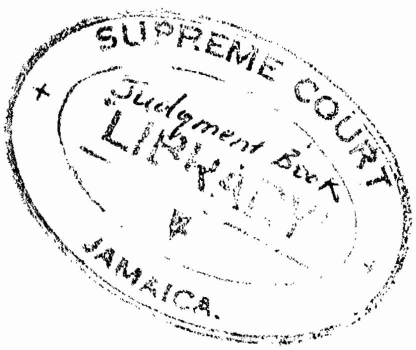

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 134/83

BEFORE: THE HON. MR. JUSTICE KERR - PRESIDENT (AG.)
THE HON. MR. JUSTICE WHITE, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A. (AG.)

REGINA

VS.

LINCOLN GOLDING

Messrs. Dennis Daly and Howard Cooke for the appellant.

Messrs. G.R. Andrade, Q.C., and Garth McBean for the Crown.

October 9 and 10, 1985 and April 21, 1986

KERR, P. (AG.):

This application for leave to appeal against a conviction for murder in the Portland Circuit Court on 7th December, 1983 before McKain J. and a Jury was treated as the hearing of the appeal; the appeal was allowed, the conviction quashed and a judgment and verdict of acquittal entered.

As promised we set out herein our reasons for so doing.

About 7:30 p.m. on Sunday the 18th of September, 1983, the dead body of Egbert Thorpe was found under a mango tree in his field at Farm, Sherwood Forest in the parish of Portland by his widow, Adina Thorpe, Sudlow Deans and others. He was last seen alive by Sudlow Deans at about 1:30 p.m. that day. The appellant is the step-son of the deceased.

Dr. Parvatanenei who performed the post-mortem examination found:

(1) An incised wound on the right side of the face extending from below the outer edge of the right eye and cutting through the jaw-bone, parotid gland and muscles; and

(2) A wound at the back of the neck cutting through the muscles, spinal cord and cervical vertebra.

The wound to the face was consistent with infliction by a machete or a big knife and the wound to the back of the neck by a sharp, heavy object with moderate force. To inflict wound No. 1, the assailant would have to be to the right of the deceased while in respect of wound No. 2, the assailant could be either to the right or left.

The case for the prosecution rested entirely on the evidence of Ralph Blake, also known to his neighbours as Jagoon, a farmer and common-law husband of Adella Kentish, the aunt of the appellant. Blake lives about five chains from the field of the deceased. He said in evidence that the appellant was known to him for about eleven years and lived about a mile away. According to him, that Friday morning, September 16 at about 7:30, the appellant came to him and asked him to keep on Kentish's property a goat of which he had "made a move" i.e. stolen. He Blake refused saying it could easily be seen if the owner passed there. The appellant then tied the goat on one Festos Harris' place but later removed it to Cornwall's. The appellant told him he had finally moved the goat to the field of the deceased. On the following Sunday he saw the appellant - first in the morning, and later in the afternoon, when in response to a request he accompanied the appellant to the field of the deceased for the purpose of killing the goat. The deceased who was there sitting under a tree, told the appellant he had told him not to come to his field and that he wanted no stolen goods on his property. Thereupon the appellant said he was going to make the deceased see and do like he did not see, and chopped the deceased with a big knife at his neck. He, Blake, then ran away. Later he saw the appellant at

George Sherwood's shop; there the appellant threatened to kill him if he talked. He kept scarce and never saw the appellant again until the Thursday before the appellant's arrest.

Blake's integrity as a witness was strongly challenged in extensive cross-examination tending to show that he was the primary suspect, and it was after he was detained as a suspect and under duress he fabricated a story involving the appellant.

As this aspect of the evidence and Blake's general credibility formed the bases of certain grounds of appeal, this evidence will later be comparatively analysed with other evidence in the case.

The Investigating Officer, Detective Acting Corporal Neville Thompson of the San San Police Station in Portland, on receipt of a report on the night of Sunday 18th September went to the field where the body of the deceased lay. On the 29th of September acting on certain information he went to the home of the witness Blake and returned with him to the San San Police Station, questioned him and took a statement from him. On the basis of that statement he arrested the appellant at his home. Then and later at the confrontation with the witness, the appellant denied knowing anything about the murder or the stealing of any goat. Blake was also arrested for murder and larceny of a goat, the property of Errol Gregory. Gregory gave evidence of missing his black ram goat on a Wednesday in September and of Sudlow Deans returning it on the 18th, while Deans said that she was directed by the deceased when she visited him to return the goat to Gregory and this she did.

In cross-examination Thompson admitted that during the period of investigation he had often seen the appellant, but not so the witness Blake, and he had asked the appellant to assist him in his investigations; that he took clothing and a machete from the home of

the appellant, and a machete from the home of the witness Blake, but these articles were never submitted for scientific analysis and that the appellant's articles had been returned to him before arrest. He denied asking the whereabouts of Blake, or that Blake had been so beaten under the soles of his feet that he could not walk properly, or that any force was used against him to make him make or change his statement. The appellant travelled from Zion Hill with him in the police vehicle to Farm on the night of 18th September.

Consistent with his challenge to the credibility of Blake's evidence the appellant gave evidence on oath contradicting certain allegations of the witness and specifically raising the issue of alibi.

He said he was a plumber and a farmer and on the material day at about 8:00 a.m. on the way to his pasture he visited the home of the deceased who was his step-father. Both deceased and his mother were at breakfast. He asked his mother for a loan of $20.00 to visit his common-law wife Pearlita Watson who was then in the hospital. To overcome her reluctance he agreed to let her have some pimento for the $20.00. He went to his pasture about half of a mile away and returned by the same way with his cows to Big Mount where he watered and pastured them. He returned to his home at 11:00 a.m., sent his son with the pimento to his mother and he returned with the $20.00. He prepared lunch for his father, since deceased, and his children and dressed in a completely brown out-fit, pants, shirt and cap to match, he left home at 12:45 p.m., boarded a bus at the nearby Zion Hill and arrived in Port Antonio at 1:45 p.m. There he had a drink in a bar at William Street with one Allison - he having a brandy and Allison a beer. He arrived at the Hospital at about 2:00 p.m., spent half an hour with Pearlita and returned to the bar.

Allison was still there and also Caiphus Anderson. He left the bar at 3:30 p.m. and returned by the same bus but passed Zion Hill disembarking at Fairy Hill where he visited Hilton Scott. He returned home at 4:30 p.m. Later he was at Zion Hill when he got the news of the death of his step-father. He went in the police jeep and with them to the field of the deceased. He later saw Ralph Blake with two other men, Alvin Gayle and one Weston Edge. He denied threatening Blake then or at any time as alleged. The following Sunday while assisting in preparing the vault for the interment of the deceased the witness Blake came there, and he questioned Blake about his recent visit to Comfort Hall. The tenor of the appellant's evidence was that he doubted the accuracy of Blake's statement that after digging yams at 6:00 p.m. he took the bus at the same hour for Comfort Hall.

He had lived in the house of the deceased from he was five years old until he was twenty-three when he left to live in his own home. Their relationship was good throughout. He was not on friendly terms with Blake since they had a quarrel some time before. He had assisted Detective Thompson in his investigations by telling him of Blake's visit to Comfort Hall shortly after the murder of Thorpe.

When he was taken to San San he saw Blake walking a "funny way", and Blake, in answer to Thompson, said it was due to the beating Thompson had given him. He denied Blake's statements that he had stolen any goat, that he knew anything about the stealing of the goat or the death of Thorpe. Blake was beaten because his statement was not consistent. Blake and himself were transferred to Port Antonio and then back to San San where Blake was again beaten.

In cross-examination there were suggestions unsupported by any evidence whatsoever that he quarrelled with the deceased because the deceased refused to stand security for a loan at the Bank which suggestions were categorically denied. He had his own security, namely a title for his land.

There was some support for his alibi from the prosecution witness Sudlow Deans as to his visit on the morning of the 18th September to the home of the deceased. The defence also called the following witnesses:

(1) Pearlita Watson, who corroborated him as to his visit to the Hospital. She had been hospitalized the day before because of a mishap that threatened miscarriage to her advanced pregnancy and the appellant visited her there the Sunday afternoon while she was eating.

(2) Caiphus Anderson, a painter of Port Antonio, who covered the period of having drinks in the bar at Port Antonio while the appellant and Allison were there. The appellant was in a brown outfit. He remembered the day because he had gone by Buff Bay to see the body of his friend Detective Hemmings otherwise called "Massa God", who had been shot and killed. He admitted in cross-examination being reminded by appellant of the occasion one day when he saw the appellant in the lock up.

(3) Hilton Scott, whose evidence covered his visit to his home at Fairy Hill at about 5:00 p.m.

(4) Adina Thorpe, his mother, who corroborated him in every important particular as to his visit to her home on the morning of the 18th September and as to the friendly relationship between the deceased and the appellant.

The first Ground of Appeal argued by Mr. Daly was:

"That the witness Ralph Blake, having fallen within the category of an accomplice vel non, the Learned Trial Judge erred in failing to give the jury any directions as to how his evidence ought to be assessed.

In the alternative, the witness Ralph Blake had an interest to serve and in the circumstances the Learned Trial Judge ought to have directed the

> "jury that his evidence should be viewed with caution."

Mr. Daly submitted that the witness Blake was the primary suspect, and that there was no corroboration in any form or manner of his evidence. On his own admissions, as well as from the evidence of the witnesses for the prosecution and the defence, there was sufficient evidence to leave the issue of accomplice vel non for the determination of the jury with appropriate directions as to how to approach his evidence should they find he was an accomplice. He cited in support - R. v. Champagnie et al - Supreme Court Criminal Appeal Nos. 22-24 of 1980, delivered the 30th of September, 1980.

Further, nowhere in the directions were the jury advised of the special position of the witness Blake, and that there was no corroboration of his evidence. Instead, the directions erroneously suggested that Blake was corroborated. In any event, Mr. Daly urged in effect that the witness Blake had so great an interest to serve, namely, to save himself from being committed for trial for the offence as the sole perpetrator, that in all the circumstances, a warning was highly desirable.

In reply, Mr. Andrade contended that a careful examination of the evidence could not lend itself to the interpretation which would classify the witness Ralph Blake as an accomplice vel non. Therefore, a warning as to the danger of relying on his uncorroborated evidence was not necessary. However, he frankly conceded that he was a person with an interest to serve; that his evidence was uncorroborated, and that the learned trial judge at no time adverted the jurors to the factors that would render him a person with an interest to serve, but on the contrary glossed over certain circumstances unfavourable to the credit of the witness. Nevertheless he argued that the conviction should be affirmed as the jury saw and heard the witnesses and

the important issues were left for their determination.

Now in the judgment in R. v. Champagnie et al the following propositions from Davies v. D.P.P. (1954) 1 All E.R. at 513 were quoted with approval, thus at p. 11:

> "First proposition: In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated. Second proposition: This rule, although a rule of practice, now has the force of a rule of law. Third proposition: Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice, unless the appellate court can apply the proviso to s. 4 of the Criminal Appeal Act, 1907," - per Lord Simonds.

As well as Lord Simonds' statement of the functions of judge and jury when the issue of accomplice vel non arose thus at p. 12:

> "In many or most cases this question answers itself or, to be more exact, it is answered by the witness in question himself, by confessing to participation, by pleading guilty to it, or by being convicted of it. But it is indisputable that there are witnesses outside these straightforward categories, in respect of whom the answer has to be sought elsewhere. The witness concerned may never have confessed, or may never have been arraigned or put on trial, in respect of the crime involved. Such cases fall into two classes. In the first, the judge can properly rule that there is no evidence that the witness was, what I will, for short, call a participant. The present case, in my view happens to fall within this class, and can be decided on that narrow ground. But there are other cases within this field in which there is evidence on which a reasonable jury could find that a witness was a 'participant'. In such a case the issue of 'accomplice vel non' is for the jury's decision: and a judge should direct them that, if they consider on the evidence that the witness was an accomplice, it is dangerous for them to act on his evidence unless corroborated: though it is competent for them to do so if, after that warning, they still think fit to do so."

After considering dicta and pronouncements from a number of cases the principles were defined and summarised thus in Champagnie's case at p. 16:

"(1) Where an accomplice or an accomplice vel non gives evidence as a prosecution witness, the trial judge is obliged to warn the jury of the dangers of relying on his uncorroborated evidence, (D.P.P. v. Davies - (1954) 1 All E.R. 507).

(2) An accomplice or accomplice vel non who is a particeps criminis cannot corroborate another and the jury must be so advised by the trial judge, (D.P.P. v. Davies (supra); D.P.P. v. Kilbourne - (1973) 1 All E.R. 440).

(3) Where an accomplice or an accomplice vel non gives evidence as a defendant against a co-defendant a warning by the trial judge is desirable but not obligatory. The reason being, that independent of, and prior to his giving evidence, the prosecution has already established a prima facie case.

(4) Although a witness for the prosecution may not be an accomplice within the definition of Davies v. D.P.P., nevertheless he may have an interest to serve, a motive for falsehood, and in such a case a warning is desirable, R. v. Beck - (1982) 1 All E.R. 807."

In support of his arguments Mr. Daly adverted attention to the following evidence as capable of raising the issue of accomplice vel non.

(1) The witness Ralph Blake's admission that he had accompanied the appellant to the field of the deceased to assist the appellant in the butchering of a stolen goat, and that he was present at the time of the killing of the deceased by the appellant, but made no statement to the police until after he was taken into custody although he had opportunities to do so confidentially; that Sudlow Deans, witness for the prosecution, accused him of the murder; that the deceased had objected to his tying goats in his cultivated field, and had also accused him of stealing his pines, and that on the Friday morning after Thorpe's death he left to visit his mother at Comfort Hall - it was the fourth visit in eleven years -

the third visit being but two months before.

(2) Sudlow Deans in evidence said that at about 3:30 p.m. on the day after the deceased was murdered, she saw the witness walking briskly along the road leading from Thorpe's field. Later that day, at about 8:00 p.m., while at her gate crying the witness Blake held her hand and to his enquiry she had said: "How you ask me is what like you don't know is you kill Mass Thorpie", and that Blake then looked nervous. That the witness Blake used to steal from the cultivation of the deceased, and in July the deceased accused him of stealing his pines.

She also corroborated the appellant as to the incident between the appellant and the witness at the vault the following Sunday and of the witness being "scarced" from the area the week following.

(3) Corporal Thompson's evidence to the effect that it was after Blake was taken into custody and questioned about the murder that he told "a story" and gave a statement implicating the appellant. That Blake was arrested and jointly charged with the appellant but he was discharged by the Resident Magistrate.

(4) Adina Thorpe's evidence that at about 3:00 p.m. of the fatal day she saw the witness on the road leading to Thorpe's field and that the relationship between deceased and the witness Blake was very bad as the deceased complained about Blake stealing yam heads from his field.

In our view there was sufficient evidence of motive, opportunity and suspicious behaviour, to leave the issue of accomplice vel non for the consideration of the jury. Further, the witness was clearly a person with an interest to serve. The defence had raised the issue of the voluntariness and veracity of his evidence on the grounds that he was beaten to give or change his statement to the police and he had been in custody and had been jointly charged for the murder of the deceased.

Accordingly, the circumstances demanded careful directions adverting the attention of the jury to the peculiar position of the witness, the issue as to the circumstances under which he gave the statement implicating the appellant and consequential motive for falsehood that may exist in him. Instead the learned trial judge presented the witness in an unduly favourable light when she said at p. 209:

> "He is not an accused man - and while I am on that subject, a policeman will charge ten people and put them before the court and they say what is the position and they say no and they say you and you and you step down and only leave three people now. The three people who are left are the three people who are going to face the enquiry. So the fact that the witness, Mr. Blake, came originally by the act of the police and came before the Resident Magistrate's Court does not make him anymore of an accused person charged with that man. He is still a witness for the prosecution. All you are going to judge him on are the facts of the case; whether you thought he was a truthful witness, whether you thought the things he was telling you could go as they went - as he said they went and whether you think he saw it."

And later at p. 216:

> "He said yes, they had charged him and he was in the dock with this accused man at the other court - and I will say at the other court when the matter came up before the resident magistrate before the matter even began the Clerk of the Court who was at that court asked that no order for indictment - a charge like this is made under indictment. You have the information after arrest. Perhaps the police arrest a man and drafts information and brings him before the court or sometimes they get information first or get a warrant and arrest a man, then it comes to court. At that time the Clerk of the Court prepares the indictment and asks the judge to give an order to charge the parties on the indictment. In this case when the men came up the clerk would have asked the judge that he didn't want any order to charge Blake; so Blake was accused but not charged."

And again at p. 217:

> "It was put to him that when he moved from San San to Port Antonio that he was beaten. Nobody can know more than you if you were beaten and he kept insisting that no police beat him. Nothing was made of the beating. Nobody said how, where or why he was beaten. It was only put to him and he denied all along that the police beat him. It is neither here nor there. It doesn't take the matter any further."

And yet again at p. 217:

> "If you believe him when he says that he went with this accused man up to the field to kill the goat, if you believe when he says that he saw the accused man chop the deceased and he ran, then you ask yourselves when Sudlow Deans tells you that she saw him around that same hour running down briskly, you ask yourselves, Madam Foreman and Members of the Jury, was he coming from the scene at that time?"

Further she fell into error in directing and advising them thus at p. 230:

> "What the prosecution tells you here now to negative that alibi, to show you that the alibi could not be, the prosecution says, 'I bring you the man whom he was with at the time the thing occurred. I bring you the woman who tells you that she saw him running from that direction shortly after the incident. Therefore, that woman is corroborating that man who said, "I saw it and I ran".' Somebody else say 'I saw him running'. Mrs. Thorpe tells you 'I saw him at around 3:00 o'clock'. This is Jahgoon we are talking about."

For evidence to be corroborative it must implicate the accused in the commission of the offence. This evidence of Sudlow Deans manifestly fell far short of so doing.

Accordingly, we are of the view that the failure to leave the issue of accomplice vel non with appropriate directions, the unduly favourable treatment of the witness Blake, and the misdirection on corroboration, precluded the jury from a proper consideration and assessment of the credit of the witness Ralph Blake and the credibility of his evidence.

The second Ground of Appeal pursued in argument reads:

> "That the learned trial judge erred in that she failed to assist the jury as to how to treat discrepancies and inconsistencies."

In support Mr. Cooke identified the following amongst other inconsistencies:

(i) In his deposition at the Preliminary Enquiry and in his statement to Detective Neville Thompson, Blake had said that it was at about 3:00 p.m. on that Sunday the appellant asked him to accompany him to kill the stolen goat while at the trial he said it was 12 - 1:00 p.m.

(ii) At the Preliminary Enquiry Blake said it was at about 1:00 a.m. the Thursday that the appellant first spoke about the goat he stole while at the trial he said it was at 7:30 a.m. on the Friday.

(iii) At the Preliminary Enquiry Blake said the wound to the back of the neck of the deceased was inflicted by a machete while at the trial he said the appellant used a "big enough knife."

(iv) At the Preliminary Enquiry Blake said the appellant and himself "are not friends but we talk to each other" while at the trial he said the appellant was a friend of his.

Now on the matter of inconsistencies the learned trial judge directed the jury thus at p. 208:

> "So the idea of questioning a witness as to what he says in this court and what he says in a preliminary examination is not to compare the two cases but to show you and to bring it to your mind that a man who says this thing once and says that at another time, who is inclined to change his words so often, you can't believe him.
>
> So when you come to judge the witness, Blake, which is the man, you will bear in mind when he says yes and no and when I broke it down actually he has not said anything different from what he said at the preliminary enquiry; but in any event what he said at the preliminary enquiry would not have been evidence here. It is only what he says before you that you can judge him on."

In dealing specifically with the inconsistencies relating to time said at p. 215:

> "Time means nothing to me as they put to me I say 'yes'; that is the effect of what he was saying here."

With reference to the inconsistency concerning the weapon used she said at pp. 215-216:

> "These are my comments, subject to your views: but you remember, good country folks, some people call the cutlass knife, they call it sword, they call it hooker. So it is for you Madam Foreman and Members of the Jury. If is knife he meant knife, but an eighteen inch knife is quite a" knife - or is it a goat-killing knife or cow-killing knife or hog-killing knife a different thing from a machete? It is a matter for you, Madam Foreman and Members of the Jury, except to say that the witness says that he saw the accused man take it and chop him at which stage he got so frightened and he ran."

And on friendship thus, at p. 215:

> "That he knew the accused and they are good companions. They were good friends, as everybody says and they fall out."

In our view these inconsistencies are in important material particulars and relevant to contentious issues. The appellant by evidence has set up an alibi and therein has furnished particulars of times and places and brought witnesses to support him. Waiving aside for the moment that on the face of the record, it does not appear that the alibi has been broken by cross-examination and that certain particulars could easily be checked for accuracy, and if not true rebutted by evidence, the integrity and credit of the witness Blake was challenged by cross-examination and impugned by witnesses for the prosecution and for the defence.

There were obvious deficiencies in the general directions on inconsistencies. The jury were not specifically advised how they should treat the evidence of Blake if they found unexplained and inexplicable inconsistencies on important issues. Instead,

the learned trial judge by her comments presented for their consideration explanations and excuses for Blake's blatant and unexplained inconsistencies. In the peculiar position of the witness Blake, these inconsistencies should have been left to the jury's consideration with the advice that if they considered them important it was open to them not only to disregard Blake's evidence on those issues but to regard his entire evidence as unreliable.

Another Ground argued was that the learned trial judge erred in law in permitting Counsel for the Crown to make suggestions to the appellant in cross-examination which were baseless and in seeking to establish a motive for the murder, these suggestions, though denied, must have had a prejudicial effect on the minds of the jury, and that the learned trial judge failed to exercise her discretion before permitting Counsel for the Crown to ask questions of the accused which sought to establish that he was a person of bad character.

Mr. Andrade conceded that certain questions went too far but argued that as they were categorically denied no great harm had been done. The appellant was asked in cross-examination about quarrelling with the deceased over money and suggestively that this was because the deceased refused to stand surety for him for a loan at the Bank; that he was a violent man of quick temper and likely to threaten people with a knife, and that he was detained by the police for threatening a man with a knife. Apart from the prejudicial effect of these questions there was no evidential foundation for them. From the Record, in our view, the cross-examination of the witness was hectoring; prosecuting Counsel was like a hound after its quarry.

With respect to Mr. Andrade's suggestion that we affirm the conviction by the application of the proviso to Section 14 (1) of the Judicature (Appellate Jurisdiction) Act, by holding that there had been no substantial miscarriage of justice, it is enough to say that such independent evidence as existed in this case was often adverse to the witness Blake and favourable to the appellant. It cannot therefore be said that had the proper directions been given the jury would in all probability have come to the same conclusion.

For these reasons the appeal was allowed with the consiquential order set out above.

There were no indications of intent or application to the Court to cross-examine the appellant in reprisal for imputations on the character of any witness for the prosecution pursuant to the provisions of Section 9(f)(ii) of the Evidence Act. Nor was there, as is desirable, a warning that the nature and conduct of the defence if pursued, would expose the appellant to this type of cross-examination, see R. v. Selvey (1970) A.C. p. 342.

In the circumstances, prosecuting Counsel ought not to have been permitted to pursue to the extent he did, this prejudicial line of cross-examination.

Finally, there was the general complaint that the summing-up as a whole was unhelpful and prejudicial to the defence, in that there were unwarranted comments on the evidence adverse to the defence, and that the learned judge failed to bring to the attention of the jury vital evidence which could have influenced the jury in favour of the defence.

Now, it is well established that a judge is entitled to comment on the evidence, providing the important issues of fact are left for the determination of the jury. In the instant case the learned trial judge had advised the jury of their unchallengeable supremacy in deciding issues of fact. The learned judge's comments were apparently influenced by her view of the witness Ralph Blake as an independent eye-witness. In the light of our opinion expressed herein as to the proper treatment and directions concerning the witness Blake and his evidence, we do not consider it necessary to indulge in any critical examination of the comments