C.A CRIMINAL LAW — Murder — Identification — ① whether trial judge misdirected jury as to identification evidence — whether trial judge failed to relate identification to evidence — whether trial judge concentrated more on credibility of witness rather than on reliability — ② whether Judge failed to give jury assistance as to meaning and effect of the caution statements put in by Crown — [Appeal of Vincent Grant allowed; Application for leave to appeal of Lloyd Grant refused] ②

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 91 & 92/86

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Bingham, J.A. (Ag.)

Cases referred to:
R v Wolfgang (1977) 15 JLR 163
R v Valentine Frances (unreported) S.C.C.A. 63/71

R. v. LLOYD GRANT
VINCENT GRANT

Mr. Delroy Chuck for Lloyd Grant

Mr. Dennis Daly for Vincent Grant

Miss Donaree Banton for Crown

September 28 & October 2, 1987

ROWE: P.

An ugly drama, an utterly dehumanizing series of events occurred in the quiet village of Richmond, Hanover, on the night of October 1, 1985. Two men broke and entered the dwelling house of Mr. Timothy Malcolm and his wife Ella, then aged 72 years and 75 years respectively, gaining entry by climbing up the bathroom wall and removing the wooden louvres from the bathroom window, during the early morning of October 2, 1985. They robbed Mr. Malcolm of more than $2000.00. One or both of them inflicted four wounds to the body of Mr. Malcolm viz:

"(i) A deep laceration 9" long above and in front of the left ear;

(ii) a deep laceration 5" long on the left side of the neck just below the ramus of the mandible, cutting through the 4th cervical vertebra and exposing the spinal cord;

"(iii) a deep laceration 2" behind the neck extending in the right side and cutting through the 3rd cervical vertebra;

(iv) a deep laceration of 4" on the right scapula fracturing the bone.

Timothy Malcolm bled profusely from these wounds which in the opinion of the pathologist were inflicted with quite a hard degree of force, very violently.

The applicants were convicted in the Hanover Circuit Court on November 7, 1986 before Theobalds J., and a jury for the murder of Timothy Malcolm. Evidence upon which the prosecution relied came from civilian and police witnesses and included statements allegedly made by both applicants under caution. It is necessary to refer to the evidence.

Mrs. Malcolm operated a grocery shop at Richmond while her husband farmed. On October 1, Mr. Malcolm was away from home on business. In the afternoon Mrs. Malcolm saw the applicant Vincent Grant, whom she had known all her life and who lived in the same district, enter her shop. Although she spoke to him he stood mute, staring at a cherry tree which grew "at the bottom side of the house where the bathroom is." He left and one David Smith made a report to Mrs. Malcolm and gave her some advice. Mr. Smith had good cause to be suspicious as he said he saw the applicant Vincent Grant holding a sharp machete and leaning against the wire to Mrs. Malcolm's premises and staring into her banana field. In that banana field were two masked men both carrying sharp machetes. Mr. Smith recognized one of these masked men to be the applicant Lloyd Grant by his features and he shouted an enquiry at him wishing to know what Lloyd Grant was doing there. Both men ran, chased by Mr. Smith. A heavy downpour of rain followed. Mr. Smith did not further

pursue the men but rather he sat in Mrs. Malcolm's shop. He saw Vincent Grant attempt to enter the shop. Mr. Smith shouted at Vincent Grant who ran away.

Mr. Timothy Malcolm returned from Lucea in the late evening, had supper with his wife and both retired to bed after Mrs. Malcolm had securely locked the doors and windows of their house. She left a kerosene lamp burning brightly in the sitting room. Sometime after 1.00 a.m. Mrs. Malcolm was suddenly awakened by a noise in the house and went to investigate. As she lifted the curtain which separated the sitting room from the dining room she saw two men standing by her dining table. She cried "Lord have mercy" and was immediately pounced upon by the men who hit her twice in her head and commanded her to keep quiet. She was propelled from behind into the living room and at the men's demand for money she gave them two parcels one containing the proceeds of sale from her shop and the other her husband's money which he kept to pay the wages of those who were labouring on his farm. Mr. Malcolm who had come into the living room was accosted by one of the men and Mrs. Malcolm who in the meantime had been placed on the floor to lie face downwards saw when the applicant Lloyd Grant hold on to Mr. Malcolm and after a series of manoeuvres which she called, Lloyd stiff up "on Mr. Malcolm," she saw the two men lay him down on the floor, apparently dead.

The evidence of Mrs. Malcolm is that the applicant Lloyd Grant then proceeded to humiliate and brutally assault her in the most abhorrent manner. With a length of electric wire he tied her neck until she gasped for breath, he tied her hands with the same length of wire, placed her thumb in her mouth and tied her hands so that her thumbs were firmly fixed in her mouth, he pushed a piece of iron into her mouth and almost down her throat; he led her from the house by

pulling on the length of wire and when she fell to the ground he dragged her along causing bruises to her legs and knees; he dragged her to her feet then threw her to the ground and sitting astride her pounded her head into some trash; his companion tore off her underclothes and suggested in the crudest language that the applicant Lloyd Grant should kill her. Mrs. Malcolm survived this assault as somehow she managed to loosen slightly the noose around her neck as also to remove the piece of iron from her mouth. She struggled to her sister's house, got some attention and sounded the alarm. The police who came released the corded knots and the length of wire was produced in evidence.

On the issue of identification Mrs. Malcolm said that when she lay on the floor of the sitting room the applicant Lloyd Grant bent over her, brought his face to within six inches of her and demanded to know if she knew him. She replied "No" out of fear, although he was somebody whom she knew all his life. She said further that while he was tying her with the "wire" they were face to face and her full concentration was upon his face. The light in the room was good as the shaded lamp was turned up fully. Mrs. Malcolm said she had no difficulty in identifying the applicant Lloyd Grant on an identification parade held on October 25, 1985.

There was other evidence connecting the applicant Lloyd Grant to the offence charged. Tendered in evidence, after a challenge on the voire dire, was a statement allegedly made by Lloyd Grant to Det. Supt. Walker on October 11, 1985. In this statement Lloyd Grant identified Vincent Grant as the master-mind behind the robbery, gave details of the burglary and of his entry into the Malcolm's house in company of

Vincent Grant and one "Delroy," of the robbery of Mrs. Malcolm and of a report made to him by Delroy that Mr. Malcolm had thumped him and so he Delroy had chopped up Mr. Malcolm. In that statement Lloyd Grant is purported to have said that the division of the money took place at the home of Vincent Grant.

In addition to the evidence of Mr. Smith as to the events of the afternoon of October 1, he gave potentially damaging evidence of what he saw between 2 a.m. and 3 a.m. on October 2. Notwithstanding his 72 years, Mr. Smith was returning to his home from a visit to his girlfriend when, with the aid of bright moonlight, he saw the applicant Vincent Grant with a sharp machete in his hand running towards his home from the direction of Mrs. Malcolm's home. Behind Vincent Grant was his brother Lloyd Grant carrying a machete and a bag and behind Lloyd Grant was an unidentified man. In fear, Mr. Smith dodged into a culvert and all 3 men ran into the home of Vincent Grant.

The applicant Vincent Grant denied making a statement which was tendered in evidence after a voire dire. In that statement the prosecution alleged that he said thus at pages 158 - 159 of the record:

> "Well, I was inna mi house and I heard someone come and call me say 'Trimmer.' Me say who is that. This was Tuesday, the first October, 1985 around 8:00 p.m. to 9.00 p.m. When the person said Trimmer open the door, I said who is that and the person said open the door to rass claat, man, you nuh hear me dey call you. Me say a who dis come a mi place a gwaan so. Me open the door and see mi brother Lloyd and two other men but me no know the next two. Lloyd say to me say me must lend him mi machete. Me give him the machete, it was inna mi house. Lloyd say to me say him want some money. Me say to him wey you a go get money. Him say him come fi go pon a robbery. Me tell him say me no inna them

> "thing dey fah me a rasta and him a baldhead. He said to me say no chat no fuckery or else him will burn down mi house and go wey. Me ask him how him a deal with me so. My girlfriend call me inside and ask me what the matter. Me tell Lloyd say me nah go because me no inna them thing dey. Him say to me say me too coward. Me told him say coward man keep sound bone. Him say to me say come mek we go up the road, me tell him say me nah go. Him say a wah you a say. Come on, man, you want me do you something. Me and him and him two friends go up the road. When me reach at a Tangerine tree at Mass Tim shop me brother and him two friends go over the wire. Them go inna Mass Tim yard. Me stand up out ah the road fi sometime. Me brother tell me say me no fi lef. When them go behind the house me tek time and squeechie wey. Me go back down a mi house, me tell mi girlfriend say a true me fraid a them mek me go, cause him say him gwine burn down me house. When we a go down a the house me hear me brother call the two men 'Jah B'. Mi brother come back down a mi house inna the before day and left the machete. Him say to me say me must hide the machete. Me say to him say mi nah hide no machete cause me no do nothing. He said dat a fi you business, we a go wey. Me no see him again. Later inna the morning me hear say Mass Tim dead.

The defence of the applicant Lloyd Grant consisted of an alibi the substance of which was that he was in Kingston with his girlfriend at the material time and that he was severely assaulted by the police to make a statement. He denied any participation in the offence.

Vincent Grant, like his brother Lloyd Grant, gave an unsworn statement in which he said quite simply that he was at home with his girlfriend from 5 p.m., on October 2 and knew nothing about the murder.

Before us Mr. Chuck quite correctly admitted that there was overwhelming evidence emanating from Mrs. Malcolm that she had ample opportunity to observe her assailant, that on the evidence the applicant Lloyd Grant was well known to her and that the lighting was not indifferent. Mr. Chuck without particularizing, thought that the learned trial judge's directions on identification in relation to Lloyd Grant could have been more helpful but he did not believe that any reasonable argument could be mounted in law as to what the trial judge actually said. He admitted too that the trial judge gave proper directions on common design and that overall he could find no arguable ground to urge on behalf of the applicant Lloyd Grant.

The learned trial judge paid special attention to all the aspects of the case of Lloyd Grant. He was specific in relating the law to the evidence on identification and he grouped the circumstances which connected Lloyd Grant to the offence in a neat manner for the consideration of the jury. In our view the evidence against the applicant Lloyd Grant was overwhelming and his application for leave to appeal is refused.

Mr. Daly argued that the learned trial judge failed to give the jury adequate warning of the dangers of identification evidence and, in addition failed to relate such direction as he gave on identification to the evidence by David Smith identifying the applicant as one of the men he had seen running along the road between 2 a.m. and 3 a.m. on the 2nd of October and that he failed to alert the jury to the evidence of David Smith that "my eye dark." It was identified by this Court in R. v. Whylie (1977) 15 J.L.R. 163 that a trial judge should direct the jury that in order for them to determine the quality and cogency of the identification of an accused person they should have full regard, inter alia, to:

"(i) the opportunity which the witness had of viewing the criminal;

(ii) physical conditions including the state of the light;

(iii) any special weaknesses in the identification evidence.

In the instant case Mr. Smith said his eye was dark. This answer was volunteered by him in examination-in-chief when he was being asked in Court to identify the applicant Vincent Grant. True the question had a colour element because he was asked to say what was the colour of the shirt which the applicant Vincent Grant was wearing. The statement "my eye dark" must have meant something and the only reasonable inference is that his sight was impaired. It would be a question of degree as to the extent of the impairment but when defence counsel attempted to probe the extent of impairment he was met with contradicting answer that there was no impairment and the witness identified Mrs. Malcolm in court which drew the comment from the trial judge that it was a jury question to decide whether or not the witness had passed the "eye-test" with flying colours.

Given the fact that Mr. Smith could have had some defect in his sight, it was an important factor for the jury to determine whether he could observe and recognize men running at him in the moonlight in the dead of the night. For just how long he had them under observation was never determined. By any standard the light and the motion of the runners would render recognition difficult. Of this the jury ought to have been alerted. Mr. Daly is plainly right when he submitted that the learned trial judge oversighted the fact that the identification evidence offered in respect of the two men on trial was materially different and that each case required

appropriate and specific treatment.

In further support of this ground of appeal, Mr. Daly submitted that the learned trial judge improperly concentrated on the credibility of the witness Smith on the issue of identification when the jury's primary duty was to determine his reliability having regard to the circumstances. He instanced a passage in the summing up at pages 319 - 320 of the record:

> "Well, if you accept that that was his action early in the afternoon as described by Mrs. Malcolm and if you accept this witness, David Smith, in relation to what he said he saw later on in the night, or rather in the early morning of the 2nd of October, these circumstances and these facts, if you accept them, the crown is inviting you to infer from this, that Mr. Vincent Grant was in fact looking over the premises and he had Lloyd and an unknown man in the banana field, at the time he was standing out in the road. The crown is inviting you to infer that the attempt or the plan to effect a robbery was foiled at that time by the presence of Mr. Smith and that later on in the darkness in the early morning of the 2nd of October, that plan was put into fruition, it is for you to say whether or not you accept this.

That passage would not by itself be in anyway offensive if there had been adequate prior directions on how Mr. Smith's evidence as to identification ought to be tested. But in the absence of such specific directions, the jury were not entitled to have regard only to the general creditworthiness of Mr. Smith without an awareness of the possibility of a mistaken, yet honest identification.

The second ground of appeal complained that the jury were not given any assistance as to the meaning and effect of the caution statement of the applicant Vincent Grant nor as to the difference in effect of the two separate caution statements.

To introduce this ground of appeal, we will refer to the precise directions given by the learned trial judge at page 298 of the record, he said thus:

> "And, you must bear in mind, Mr. Foreman and members of the jury, that in relation to those caution statements which you will eventually wish to read over, that a statement made by one accused in relation to his co-accused is not evidence against him. So, keep that in mind when you come to peruse the caution statements.

Later on at pages 308 - 309 he said:

> "Now, in relation to the caution statement, Mr. Foreman and members of the jury, you should bear in mind that a caution statement is not admissible in evidence unless it is proven to have been made voluntarily. It is your function as judges of the facts to decide first of all, whether or not that caution statement was made by the accused person. Bear in mind in the case of one of the accused, he says that it was written out on foolscap and just presented to Mr. Young, the Justice of the Peace, to sign. So, you have to decide before, whether the accused person made the caution statement. Having decided that, if the answer is 'yes', then you go on to say, 'was that statement made voluntarily and freely without force'? If the answer to that is 'yes', then you ask yourself what does it mean, and finally you decide amongst yourselves what weight and value you attach to that caution statement. I don't want you to go in to retire with any belief, Mr. Foreman and members of the jury, that the prosecution's case was or in any way based on your assessment of the value of that caution statement. Quite independently of that statement, there is sufficient evidence on the prosecution's case for you to consider. There is evidence of identification, there is evidence of pre-arrangement, there is evidence of casing the joint, if you know the expression. That simply means looking over the place beforehand. There is abundance of evidence apart from the caution statement which you can probably consider.
> When you come to retire, you will have the benefit of having both caution statements with you and you will - if you

> "consider it free and voluntary statements made by the accused persons, then you will decide what weight and what value you attach to it, and you will relate it to the rest of the evidence and consider it with the totality of the case, but don't believe that the crown's case rests on the caution statements.

The gravamen of Mr. Daly's submission was that the learned trial judge having admitted the caution statements at the instance of the crown and having handed them over to the jury for their consideration upon retirement, he was under a duty to give the jury some directions as to the possible effect of those statements and that it was prejudicial to the defence for the trial judge to invite the jury, in the case of Vincent Grant to treat the caution statement as superfluous.

In R. v. Valentine Francis (unreported) S.C.C.A. 63/71 on the crown's case the injury to the deceased was caused by a stone flung by the accused but the crown also led evidence from a brother of the accused to the effect that he saw the deceased run into the trunk of a tree and fell backwards on to the back of his head. The doctor's evidence was that such a fall could possibly result in the fatal injury. Upon the learned trial judge omitting to remind the jury of the brother's evidence and that of the doctor, Luckhoo P. (Ag.) said:

> "This was one of the issues which arose for the determination of the jury. It is unfortunate that the learned trial judge failed to remind the jury of the evidence in relation to this issue. We cannot say that had he done so the jury would inevitably have returned the verdict which they did return in this case."

The appeal was allowed and a new trial refused.

In neither case did the prosecution depend wholly upon the caution statement of the particular accused. One must ask why was the caution statement of Vincent Grant tendered? To prove what point? Was it to show an admission that he was present with the applicant Lloyd Grant and another man at the house of the Malcolm's on the night of the murder? And if so, for what purpose was he there? As Mr. Daly submitted, if the jury believed that Vincent Grant accompanied the two other men under threats to his life, the learned trial judge would be required to discuss and direct them on the issue of duress. If Vincent Grant slipped away in the dramatic way in which he said he did, the jury were entitled to directions as to whether Vincent Grant had resiled from any pre-arrangement which he may have made prior to the commission of any offence as also whether his conduct showed that he was not a consenting party to a common design to rob and kill.

On no account could the applicant Lloyd Grant escape conviction if the jury accepted as true and voluntary the contents of his caution statement. Not so, however, Vincent Grant. Therefore, the learned trial judge erred in simply leaving the issue of the effect of the caution statement of Vincent Grant for the determination of the jury without guidance as to the manner in which such a statement should be assessed.

We find merit in grounds 1 and 2 of the grounds of appeal argued by Mr. Daly. Accordingly we treat the hearing of the application for leave to appeal by Vincent Grant as the hearing of the appeal. The appeal is allowed. The conviction quashed, sentence set aside and a verdict of acquittal entered.