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Nov. 3, 2004

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 187/2003

BEFORE:

**THE HON. MR. JUSTICE P. HARRISON J.A.
THE HON. MR. JUSTICE SMITH J.A.
THE HON. MRS. JUSTICE MCCALLA, J.A. (Ag.)**

R. v. MARK WATSON

**Althea McBean-Wisdom for the appellant
David Fraser, Senior Deputy Director of Public Prosecutions (Ag.)
and Shelley Ann Beckford-Louden Crown Counsel (Ag.) for the Crown**

7th, 8th, 9th, 10th March and 29th July, 2005

SMITH, JA:

On September 25, 2003, Mark Watson (the appellant) was convicted in the Home Circuit Court of capital murder contrary to section 2(1)(d)(i) of the Offences Against the Person (Amendment) Act. The particulars of offence were that he murdered Marvin Gayle in the course or furtherance of a robbery on the 29th October 1999 in the parish of St. Andrew. Beckford J sentenced him to suffer death in the manner prescribed by law.

The deceased was employed as a security officer by the Jamaica Property Company Ltd. at Knutsford Boulevard, New Kingston.

The appellant, at the time of the murder, was a security guard employed by the Ranger Protection and Security Company Ltd. and was

on duty at the Jamaica Property Company Ltd's. buildings. At this location on Knutsford Boulevard in New Kingston are four buildings. On one side of the road are the buildings which house IBM, First Life Insurance Co. Ltd. and Pan Caribbean Merchant Bank Ltd. On the other side is Dyoll Insurance Co. Ltd.

The Crown's Case

The first witness for the prosecution was Mr. Amos Rose, a security guard employed by the Ranger Security Company.

On the 28th October, 1999 Mr. Rose was on duty outside the IBM building on Knutsford Blvd. His duty involved escorting employees of IBM to their cars in the car park. The appellant and another security guard, Michael Simms, were also on duty outside at the time. The appellant's duty, Mr. Rose said, involved patrolling the entire complex, that is, the three buildings on one side of the road and the Dyoll building on the other side. He saw the appellant at about 6:30 p.m. Miss Jennifer Smith, another security guard, was on duty inside the Pan Caribbean building. The deceased was on duty inside the First Life building. He worked at the information desk and was in charge of all the keys. The keys for all the offices in the buildings were left in his custody during the night. It was also the deceased's duty to open the garbage area for the garbage collector.

Mr. Amos told the Court that his and the appellant's duties commenced at 6:00 p.m. and ended at 6:00 a.m. At the time of the killing he had been working with the appellant for about four (4) weeks. He testified that no security officer working outside the buildings was allowed inside the buildings.

At about 11:25 p.m. on the night of the 28th October, 1999, Mr. Amos saw the deceased leaving the First Life building and walking towards the Dyoll building. They spoke; soon after that the deceased returned with an electric kettle and entered the First Life building. Mr. Amos saw the appellant on many occasions that night as the latter patrolled with a dog. At about 3:45 a.m. on the 29th October 1999, Mr. Amos said he had an attack of asthma. The appellant, who was wearing a sweater approached him and asked him what was wrong with him. After he replied, the appellant asked him for money to buy a cigarette. Mr. Amos told him he only had bus fare.

He testified that the deceased would usually hoist the flag at about 5:00 in the mornings and would at about the same time, give him the key to open the car park. He said that, when he did not get the key from the deceased and did not see the flag up by 5:00 a.m., he went to the First Life building and pressed the buzzer. When he did not get any response he went to the other side of the building. He knocked on the door; surprisingly, the door was not locked. He pushed the door open and

entered. The deceased was not at the security desk. He observed drops of blood leading from the desk to a room behind the desk. There was a glass door leading to this room. There was light in the room. Through the glass door he saw a body lying on the floor on its back. He pushed the door open and entered the room. It was a man's body. The throat was cut and blood was all over. In shock he ran out of the First Life building. He saw the appellant, who was still wearing a sweater, coming up the steps from the direction of the Pan Caribbean building. The appellant asked, "What happen, Rose?" "Them kill somebody inside there so", Mr. Rose replied. He asked the appellant to go and ask Miss Smith, the other security guard in the Pan Caribbean building to contact base. He saw the appellant walk towards the Pan Caribbean building. In the meantime, Mr. Rose went in search of the deceased's co-worker. Eventually he and the deceased's co-worker went to the First Life building. It was then he realised that the man with his throat cut was the deceased, Marvin Gayle. The police was summoned.

Miss Jennifer Smith gave evidence for the prosecution. She was also employed by the Ranger Protection and Security Company Ltd. On the 28th October, 1999 she was on duty at the Pan Caribbean building on Knutsford Boulevard, on the 10:00 p.m. to 6:00 a.m. shift. She was at the receptionist area on the third floor at about 4:30 a.m. on the 29th October, when she heard a knock on the door. She looked and saw the appellant,

Mr. Watson. She opened the door; he entered and told her he wanted to use the bathroom in the basement. He was dressed in uniform and "had on a red coat." He went to the basement where he stayed for about 20 minutes. He then left the building. Sometime thereafter the appellant returned and told her to call the police because "a man dead across the road". She telephoned the police. Thereafter she asked him who had died and he replied "the old man security". She understood him to mean Mr. Gayle. She then locked up the Pan Caribbean building and went over to the First Life building. There, in a room, she saw the dead body of Mr. Gayle. She went back to the Pan Caribbean building to let in some employees.

The appellant, she said, then approached her and said he wanted "to go and put down something" in the building. She told him that the door was not locked. The appellant entered the building. A police officer spoke to Miss Smith and then entered the building also. The police officer went into the basement. She followed and stood at the door to the basement. She said she heard the police officer telling the appellant to "put on back your clothes".

Constable Leighton Bucknor testified that during the early morning of October, 29, 1999 he received instructions from Inspector Champagne of the Criminal Investigation Bureau and proceeded to the Pan Caribbean and First Life buildings in New Kingston. Together with

Inspector Champagne, he entered the First Life building. He observed blood stains on the floor by the receptionist's desk. He next saw a man's body lying on its back with a wound to the throat. Outside the building he saw about four security guards, including the appellant, talking. The appellant walked away and entered the Pan Caribbean building. Constable Bucknor followed him. The appellant went down to the basement and stood in front of a "wash tub". He removed a windbreaker from under the tub and began to wash it. Constable Bucknor went up to the tub and noticed that the colour of the water in the tub was red. He identified himself to the appellant, took custody of the windbreaker and escorted the appellant to Inspector Champagne. The appellant was searched. Constable Bucknor said that he and the Inspector removed from the appellant's pocket just over \$5,000. He observed blood stains on the appellant's shoes which they removed from his feet. A watch was also taken from the appellant.

Inspector Derrick Champagne swore that on the 29th October, 1999 at about 5:30 a.m. he received a message from Police Control and, along with Constable Glen McGill, he proceeded to 60 Knutsford Boulevard, New Kingston. He entered the First Life building. In the lobby area he observed drops of blood. In a small room adjacent to the lobby, he saw the body of a man lying on its back in a pool of blood. He observed a large gaping wound on the neck and stab wounds to the chest. He

spoke with Constable Bucknor who left and returned to him later with the appellant and a red windbreaker. From the windbreaker was dripping what appeared to be water mixed with blood. Constable Bucknor informed the Inspector of what transpired in the basement of the Pan Caribbean building. The appellant admitted that the windbreaker was his. The windbreaker was handed to Constable McGill.

Inspector Champagnie described the search of the appellant. From his pockets were taken a plastic bag with Jamaican currency, and a gold plated Citizen's Quartz watch. Mr. Melbourne Gayle, son of deceased, was present and identified the watch as that of his father. I will mention Melbourne's evidence shortly.

Inspector Champagnie told the Court that the plastic bag contained \$5640 and a piece of white paper with the letters and words "I.O.U seven hundred dollars" written thereon. In the presence of the appellant, the Inspector showed the bag with cash and the note to Miss Tausa Swaby and other employees of DHL. The DHL office is located on the ground floor of the First Life building. The Inspector testified that Miss Swaby told him that the cash was from a petty cash pan and that the I.O.U note was written by her the day before.

The appellant, he said, when asked where he got the money from, replied, " A mi brethren give it to me and mi girlfriend come check me last night, me give her four hundred dollars (\$400)." Inspector Champagnie

said that, on close examination, he noticed what appeared to be blood stains on the security uniform of the appellant. He therefore asked him to change into civilian clothing and thereafter took possession of his uniform.

Miss Tausa Swaby gave evidence to the following effect: In October 1999 she was employed to DHL as a customer service representative and a data entry clerk.

On the 28th October 1999, Susan Reid, a co-worker, loaned her seven hundred dollars from the petty cash. In acknowledgment of the debt she wrote an I.O.U. note. This note was locked away in the petty cash pan. She left work at about 7:00 p.m. that evening and was the last person to leave the DHL office.

The following day she reached her workplace at about 7:30 a.m. She saw a crowd, including policemen. A police officer showed her the paper on which she had written the I.O.U note. She recognised her handwriting. The police officer asked her to write the same letters and words on another piece of paper which she did.

Another employee of DHL, Susan Reid, also testified. In October 1999, she was a customer service representative. She said that it was her duty, before leaving the office in the evenings to make lodgement of the day's takings and to ensure that the cash pan was locked. Whenever she was the last person to leave, she would ensure that the doors to the

offices were locked and the keys given to the security guard, the deceased.

She recalled that on the 28th October, 1999, Miss Swaby borrowed money and wrote an I.O.U note for the amount. The note was left in the cash pan which contained six thousand dollars (\$6000). She said that the following morning, when she returned to the office she saw a crowd. The DHL office was ransacked. The cash pan was open and empty and was not where she had left it. The police showed her an I.O.U note which she identified as the one which Miss Swaby had written the previous evening. The police also showed her a sum of money, the "make-up" of which was similar to that of the money left in the cash pan.

Melbourne Gayle, the son of the deceased, told the court that he was summoned to the scene of his father's murder. He saw his father's dead body in a room. The police showed him a watch which he identified as that of his father in the presence of the appellant. He subsequently identified his father's body to Dr. Pawar, a forensic pathologist at the Spanish Town Hospital morgue.

Michael Simms was employed as a security guard by Ranger Security Company in October 1999. At the material time he was on duty at the First Life building. The import of his evidence is that at about 8:30 p.m. on the 28th October, the appellant told him that he wanted a knife because he had left his own at home. At about 2:25 a.m. on the 29th

October the appellant asked him for ten dollars to buy tablets. He told the appellant that he did not have any change.

Constable Desmond Simpson, on the instructions of Inspector Champagnie, took photographs of the crime scene and of the body of the deceased. The photographs were enlarged and made available to the Court.

Corporal Glen McGill also gave evidence on behalf of the prosecution. He testified that he was in the company of Inspector Champagnie at the scene of the crime. His evidence in part supports that of the Inspector. He attended the post-mortem examination of the deceased's body and obtained blood samples of the deceased from Dr. Pawar. He took the blood samples to the Forensic Lab.

Detective Supt. Errol Grant gave evidence of his interrogation of the appellant under caution. The questions asked and the answers given were recorded and were tendered in evidence.

It is sufficient to mention some of the questions and answers at this stage.

"Q.22: Were you given instruction not to enter the First Life Building when you are working at that location unless called in by First Life Security officer?

A: Yes. Only when called we should enter the First Life Building.

Q51: Did you see Mr. Gayle working at the First Life Building last night, 28th October, 1999.

A: Yes Sir.

Q. 52: Did you speak to Mr. Gayle or hand him anything last night - 28th October, 1999?

A: Yes, I hand him a receipt that I got from the garbage truck.

Q.54: About what time the garbage truck came?

A: About 2:00 a.m. Friday, the 29th October, 1999.

Q.55: How did you get to give Mr. Gayle the receipt?

A: I knocked on the door and he opened the door by pressing the buzzer and I went in and handed it to him.

Q.56: Did you come back outside the building?

A: Yes, Sir.

Q.57: Did you go back into the First Life building that night after you gave Mr. Gayle the receipt?

A: Yes, after mi hear the shouting that they kill Mr. Gayle.

Q.58: Did you tell the police earlier today that you were the first person who saw Mr. Gayle dead?

A: Yes.

Q.59: What did you do when you saw Mr. Gayle dead?

A: I ran out the building and informed security guard Miss Smith and tell her to call the police.

Q.66: How can you account for blood on your uniform?

A: The blood catch mi clothes when mi a shake Mr. Gayle and tell him say him fe wake up.

Q.67: Did you see Mr. Gayle with his throat cut?

A: Yes.

Dr. Pawar, the pathologist who performed the post mortem examination, was not available to give **viva voce** evidence. However, the post-mortem report signed by him was received in evidence through Dr. Sessaiah another forensic pathologist.

In his report, Dr. Pawar stated that he examined the body of Marvin Gayle on the 4th November, 1999. He observed seventeen "sharp force and cut throat" injuries on the body.

1. The cut-throat injury was 19 cm in length "horizontally across the neck on its anterior aspect." It was about 2 cm wide in its centre; located 6 cm below left earlobe, 8 cm below the chin and 10cm below the right earlobe. The larynx and vital blood vessels of neck were severed. This caused massive soft tissue haemorrhage.
2. There were nine (9) incised wounds with clean cut edges on the right anterior chest. All entered the chest cavity and injured the lung and heart.
3. Two superficial incised stab wounds on the left anterior chest.
4. An irregular sharp contusion on top of the left shoulder.
5. An incised wound on the base of the thumb of the right hand.
Minor incised wounds on back left hand.

6. Two minor superficial stab wounds on the right anterior neck.

7. One superficial incised stab wound on right anterior neck.

In the doctor's opinion the cause of death was "cut throat" and the multiple "sharp force" injuries.

Miss Sherron Brydson, a Government forensic Analyst attached to the Forensic Science Lab, attended the scene of the murder at about 9:10 a.m. on the 29th October, 1999. She gave a graphic description of the scene and the surrounding areas. She told the Court of the observations she made and gave her opinion as to the conduct of the perpetrator. On examination of the scene she saw no evidence of a struggle in the telephone room. She prepared a diagram representing the ground floor, the blood stain patterns, the relationship of the offices and the security station. The original and copies of this diagram were admitted in evidence.

She told the Court that on November 3, 1999, she received seven (7) sealed envelopes from Constable Glen McGill. These envelopes contained, among other things, items of clothing taken from the appellant.

She further testified that on the 4th November, 1999 she obtained from Constable McGill a sample of blood, taken from the deceased.

She carried out DNA tests and analyses on the blood samples, the blood stains found on the items of clothing taken from the appellant and

the blood stains found at the crime scene. It is not necessary, for the purposes of this appeal, to recount the evidence of Miss Brydson in relation to the DNA tests, as the appellant admitted having the deceased's blood on his clothes and shoes.

Retired Supt. Carl Major, a handwriting expert, told the court that having done a comparison, he formed the opinion that the handwriting on the I.O.U note was the same as the specimen handwriting given by Miss Swaby.

The Defence

The appellant gave an unsworn statement. He told the Court that he did not kill Mr. Gayle. He said that he saw Mr. Gayle lying on his back, bleeding. He went "over" him and shook him "hoping that he was not dead". The deceased did not respond, so he went to Miss Smith, the security guard, and asked her to call the police. He subsequently went into the basement to change his clothing. He realised that blood was on his windbreaker. He started to wash out the blood. A man came down to the basement and accused him of killing Mr. Gayle. He told the man that he thought Mr. Gayle was unconscious and was trying to "wake him." The man escorted him from the basement and handed him over to the other officers who took him to the police lock-up. He ended his statement denying that the police took money, or a watch or an I.O.U. note from him and that he killed Mr. Gayle.

The Grounds of Appeal

Counsel for the appellant was granted leave to argue the following supplemental grounds of appeal.

1. There was insufficient evidence to support a verdict of guilty on the charge of capital murder and the case should not have been left to the jury.
2. The learned trial judge failed to adequately direct the jury on the issue of circumstantial evidence as her directions were insufficient in guiding them in relating the law on circumstantial evidence to the facts presented, impairing the appellant's chances of acquittal.
3. The learned judge failed to adequately deal with the discrepancies arising in the case during her summation. She omitted the evidence of the witnesses as led in cross-examination.
4. The learned Judge misdirected the Jury on the facts of the case in that she misstated the evidence presented before the Court.
5. The learned Judge failed to give directions to the jury on the weight to be attached to the Questions and Answers given by the Appellant.

6. The prosecution failed to give notice of the number and identity of witnesses to be called at the trial as the indictment contained the names of 8 witnesses although 14 were called. Further, Counsel for the Appellant was served with 4 Notices to adduce evidence of seven additional witnesses during the course of the trial, and so was not afforded sufficient opportunity to take proper instructions on the contents of these statements.
7. The mandatory sentence delivered by the learned Judge, being death in the manner prescribed by law, was unconstitutional, and the Appellant hereby requests that a sentencing hearing be held by the Honourable Court, to determine an appropriate sentence based on the circumstances of the case and antecedent of the Appellant.

Grounds 1 and 3

These grounds were argued together. Counsel for the appellant submitted that the evidence on which the prosecution relied was tenuous because of vagueness, inconsistencies and discrepancies. The contention of counsel for the appellant, as we understand it, is that the evidence of the presence of the deceased's blood on the clothing of the appellant by itself was not incriminating in the light of the explanation which the appellant gave to the police when accosted. Secondly,

counsel argued that the money was not properly identified as that left in the cash pan.

Further, counsel argued that the evidential discrepancies and inconsistencies between the witnesses as to the recovery of the money, the I.O.U. note and the watch were of such a fundamental nature that no jury would properly convict on such evidence. Mr. Fraser, Senior Deputy Director of Public Prosecutions, on the other hand, submitted that there was adequate and compelling evidence to support a verdict of guilty of capital murder and thus the learned judge did not err in leaving the case to the jury. He observed that at the trial, senior counsel did not make a no-case submission.

Blood on the appellant's clothing

The appellant was seen washing blood from the windbreaker which he was wearing on the night of the murder. Blood stains were also seen on the appellant's shoes and uniform (trousers). The appellant, when questioned by the police, said that "the blood catch mi clothes when mi a shake Mr. Gayle and tell him say him fi wake up". Thus, it is not in dispute that the deceased's blood was on the clothing of the appellant. The question is: in what circumstances did it get there?

Counsel for the appellant is contending that on the evidence led by the prosecution there is nothing to indicate that the blood was on the appellant's clothing at the time when Mr. Rose saw him coming up the

stairs. The logical conclusion of counsel's argument is that if the blood got on the appellant's clothing after Mr. Rose saw him and made the alarm then, clearly the appellant's explanation would have been verifiable.

Counsel contended, with some conviction, we would say, that if there was blood on the appellant's clothing when Mr. Rose saw him, that condition would not have escaped his notice. The fact, she argued, that Mr. Rose did not speak to the condition of the appellant's windbreaker, is telling.

Mr. Fraser for the Crown submitted, with equal force, that the fact that it was 5:00 a.m., that Mr. Rose was rushing from the building, that the colour of the windbreaker was red and that the appellant was some distance away, could explain Mr. Rose's failure to notice the condition of the windbreaker. Mr. Fraser observed that, according to the appellant, he himself did not realise that blood was on the windbreaker until he was changing his clothes to go home. This, he argued, would not only support his contention, but would also explain why the appellant was still wearing the windbreaker when he was seen by Mr. Rose.

The Senior Deputy Director of Public Prosecutions further submitted that on the evidence of Mr. Rose and Miss Jennifer Smith, if believed, the appellant could not have gone to the building where the body of the deceased was after Mr. Rose saw him coming up the stairs. Mr. Rose said it was about 5:00 a.m. when he rushed out of the First Life building. He

saw the appellant coming from the direction of the Pan Caribbean building. After they spoke, the appellant turned and went back towards the Pan Caribbean building where Ms. Smith was. Ms. Smith's evidence is that at about 4:30 a.m. the appellant came to the Pan Caribbean building, went into the basement, having said that he wanted to use the bathroom. He stayed in the basement for about 20 minutes and then left the building. Sometime thereafter she heard someone say "tell her to call the police", and then the appellant entered her building and told her "Call the police, a man dead across the road". When she asked him who was dead he said "Old man security."

We agree with Mr. Fraser that on this evidence a jury could reasonably find that there was no opportunity for the appellant to have gone to the First Life building where the body of the deceased was after Mr. Rose saw him coming up the stairs.

Another significant factor in this regard is the locations of the blood stains on the appellant's clothing. According to Miss Brydson, the forensic analyst, human blood was present in brown stains on the inner aspect of the back of the windbreaker. There were serosanguineous stains on the back and in the lining of the sleeves. Human blood was present in serosanguineous stains on the inner aspect of the lower left leg of a navy blue trousers. Human blood was present in brown stains on the appellant's security badge. Human blood was present in pale brown on

the appellant's black leather belt. Human blood was present in brown stains on his right leather boot.

We entirely agree with counsel for the Crown that the evidence of the presence of blood on the appellant's clothing was compelling in so far as a prima facie case is concerned.

Identification of the money

Counsel for the appellant complained that the money, which the police said they took from the appellant's pocket, was not properly identified as that which was left in the petty cash pan at the DHL's office.

The evidence of Miss Susan Reid is that the money, which she left in the cash pan was made up of small denominations – hundred and twenty dollar bills. This cash, she said, amounted to just over \$6,000.00. In her words, the money the police showed her was "just the make up of the bills we had in the pan." She said that the bills she left in the pan were obtained from the bank the day before and so they were "crisp". The money the police showed her were also "crisp". She also identified the I.O.U. note which she had left with the cash in the pan.

The evidence of Inspector Champagne is that money amounting to \$5,640 and an I.O.U. note were taken from the appellant's pocket. The money, he said, was made up of one five hundred dollar bill, some hundred dollar bills, fifty dollar bills and twenty dollar bills. These were shown to Miss Reid and Miss Swaby in the presence of the appellant. They

identified the money and the I.O.U. note as the items which were left in the cash pan. Despite the discrepancy as to the make up of the money, we are of the view that the identification of the money was sufficient for the purposes of establishing one of the strands of the circumstantial evidence on which the Crown relied. This strand, by itself, might be insufficient to sustain the weight of the standard of proof but, together with others, might be of sufficient strength.

Credibility of witnesses

Counsel for the appellant submitted that the evidence of the prosecution witnesses as to the finding of the money, the watch and the I.O.U. note on the person of the appellant, was not credible because of the discrepancies between the witnesses.

In his evidence Inspector Champagnie stated that it was he who took the money from the pocket of the appellant and Constable Bucknor took the watch from the appellant. Constable Bucknor, on the other hand, said that it was he who took the money from the appellant but could not recall who took the watch.

Another discrepancy to which counsel referred was that between the evidence of Inspector Champagnie and Constable McGill on one hand and that of Miss Susan Reid on the other hand as to the make up of the money. According to Champagnie and McGill the money consists of

a \$500 bill, \$100 bills, \$50 bills and \$20 bills, whereas Miss Reid said the money was made up of \$100 bills and \$20 bills.

Counsel also referred to the discrepancy in respect of the evidence of Ms. Jennifer Smith who said she saw the appellant putting on his clothes in the basement and that of Constable Bucknor who said that nothing like that took place.

Counsel contended that these discrepancies were so fundamental that the judge should not have left the case to the jury.

Mr. Fraser for the Crown submitted that these discrepancies were not of such a nature as to render the prosecution's case inherently weak.

A judge has a duty to stop a case where the prosecution evidence, taken at its highest, is such that a jury properly directed, could not properly convict on it. In the circumstances of this case we are clearly of the view that the evidence on which the prosecution relied, cannot be described as tenuous because of the evidential discrepancies. The evidence of each witness is not "self-contradictory and out of reason and all common sense." The mere fact that there are evidential inconsistencies between witnesses does not normally result in a finding that there is no prima facie case. Questions of credibility are generally within the province of the jury.

Ground 1 therefore fails.

Ground 3

The complaint in this ground is that the trial judge failed to deal adequately with the discrepancies. Mrs. McBean-Wisdom complained that the trial judge did not point out some of the major discrepancies to the jury.

Mr. Fraser submitted that the judge adequately dealt with the discrepancies. Further, he submitted, there is no requirement for the judge to comb the evidence to identify all the discrepancies. He also contended that the discrepancy as to the make-up of the money was immaterial.

In the general directions to the jury the learned trial judge said:

"These inconsistencies or differences or variations may be slight or serious. They may be material or immaterial. If the discrepancies are slight you, the jury, may think that they do not really affect the credit of the witness concerned. If they are serious, you may say it would not be safe to believe the witness on that point or at all. It is a matter for you in examining the evidence to say whether there are any such variations or discrepancies and whether they are slight or serious. I will, however, remind you of some of them. I do not intend to comb the evidence for every discrepancy that may have arisen in the evidence that was given."

The learned trial judge then told the jury to take into consideration also any discrepancies which they remembered and of which she did not remind them and to deal with them in the manner in which she had

directed them. Later in her summing-up the learned trial judge highlighted some of the discrepancies.

In dealing with the discrepancy as to who took the money from the appellant, the learned trial judge, after recounting the evidence of Inspector Champagnie and Constable Bucknor, said (page 705):

"So that's a discrepancy, but you have to determine is that so serious that you cannot believe him (Bucknor) when he says that these items were taken from the pockets of the accused, because you know, Mr. Foreman and members of the jury, it is not a static situation, so that it is possible that the witnesses may not be able to give direct sequence as to who took what. But the real question for you is, were these items taken from the pockets of the accused man?"

In dealing with the discrepancy between Miss Jennifer Smith and Constable Bucknor as to whether or not the latter had ordered the appellant to put on back his clothes, the learned trial judge told the jury:

"You determine how serious that is because, you know, what you are determining is the credibility of the witness ... you remember you can believe a part of what a witness has said and reject a part. If you are satisfied that the witness spoke the truth in respect of a part, but not in respect of another part, or you can say whether the discrepancy is so serious you won't believe the witness at all."

In **R.v. Fray Diedrick** SCCA 107/89 delivered 22nd March 1991 this court per Carey JA said:

"The trial judge in his summation is expected to give directions on discrepancies and conflicts

which arise in the case before him. There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial. It is expected that he will give some examples of the conflicts of evidence whether they be internal conflicts in the witness' evidence or as between different witnesses."

We have demonstrated that the learned trial judge gave full, fair and accurate directions on discrepancies and variations. She gave examples of them and told the jury how to approach them. We find no merit in Ground 3.

Ground 2 – Circumstantial Evidence

The complaint in this ground is that the trial judge failed to adequately direct the jury on the issue of circumstantial evidence.

Mrs. McBean-Wisdom submitted that the trial judge did not assist the jury by relating the law on circumstantial evidence to the facts presented. Further, she complained that the directions to the jury did not indicate that the circumstances relied on must point in one direction only and that is the guilt of the accused. In short, her complaint was that the judge did not give the Hodge's direction. She relied on the cases of **R.v. Everton Morrison** (1993) 30JLR 55 and **R.v. Paul Lawrence** (1992) 29 JLR 222, among others.

The recent decision of this Court in **R.v. Brissett** SCCA No. 69/2002 delivered December 20, 2004 was brought to the attention of counsel. After reading Brissett, counsel conceded that failure to give the Hodge's

direction does not make directions on circumstantial evidence defective. However, counsel contended that the circumstances in the instant case do not point conclusively to the appellant's guilt and, alternatively, that the trial judge did not adequately emphasise that the jury must be so satisfied.

We have already concluded that there was sufficient evidence to establish a *prima facie* case. Therefore, the submissions of counsel for the appellant in support of this ground are in effect saying that the verdict of the jury is unreasonable and cannot be supported having regard to the evidence. We must, therefore, examine the evidence of the prosecution in the light of the appellant's defence.

It is not disputed that Mr. Marvin Gayle, a security guard was murdered while he was on duty at the First Life building. The issue before the jury was whether or not, on the evidence before them, they could be sure that the appellant was the murderer. The prosecution relied on circumstantial evidence to establish their case. The trial judge correctly told the jury that, before drawing the inference of the appellant's guilt from circumstantial evidence, they had to be sure that there were no other co-existing circumstances which would weaken or destroy the inference.

We again refer to the main factors which constitute the circumstantial evidence on which the prosecution relied:

- (i) The appellant stated (see answers to questions 54 and 55) that on the 29th October, 1999 at about 2:00 a.m. he went to the First Life building to hand the deceased a receipt from the garbage collector. He pressed the buzzer, the deceased opened the door and the appellant entered the building.
- (ii) At 5:00 a.m. the deceased did not give the key for the car park to Mr. Amos and did not hoist the flag. This was unusual. Consequently, Mr. Amos went to the First Life building to see the deceased. He pressed the buzzer and got no response. He knocked on the door and was surprised that the door was not locked.
- (iii) He entered the building and saw blood on the floor leading from the security desk, where the deceased should have been, to a room behind the desk. In this room he saw a man with his throat cut, lying on his back in a pool of blood.
- (iv) He ran out of the building. He saw the appellant coming up the stairs from the direction of the Pan Caribbean building. He told the appellant of his discovery and asked him to have Miss Smith inform the police.
- (v) The appellant was at that stage able to tell Ms. Smith that it was "old man security" who had been killed.

- (vi) Mr. Amos contacted another security guard and went back with him to the First Life building. It was then that he realised that the man lying on his back with his throat cut was the deceased.
- (vii) Constable Bucknor saw the appellant washing blood from his windbreaker.
- (viii) Constable Bucknor escorted the appellant to Inspector Champagnie. The appellant was searched and a bag with just over \$5,640 and an I.O.U. note was taken from his pocket. Also taken from him was a watch.
- (ix) Blood stains were found on the appellant's windbreaker shoes, trousers, badge and belt.
- (x) The watch taken from the appellant was identified by the deceased's son as belonging to the deceased.
- (xi) The I.O.U. note and the cash were identified by Miss Swaby and Miss Reid as items they had left in a cash pan in the DHL office at the First Life building, where the deceased was on duty.
- (xii) The appellant admitted that he was washing blood from his windbreaker but explained that the blood innocently got on his clothes when he, thinking that the deceased was unconscious, shook him.

In an unsworn statement the appellant denied having anything to do with the death of the deceased. He also stated that the police did not take the money or the watch or the I.O.U. note from his pocket. He said that, when he "saw Mr. Gayle lying on his back bleeding," he went "over him" and shook him, "hoping" that he was not dead.

The learned trial judge put the statement of the appellant in the context of the locations of the blood stains on the appellant's clothing and left it to the jury for their determination. The learned judge said:

"You remember you saw the windbreaker and both sleeves, inside of both sleeves you have blood on it. You have blood around the cuff, there was blood on the back in the inside lining. All these you had and there is blood on the back of the belt that this accused had on. There was blood on his shoes, his boots. All of this you have to look at, what he says to you that he was shaking the accused and that is how he got blood on him and you may wonder, as I said, which part of him he was shaking to get that blood because you saw, you got the evidence as to how the deceased was lying. Matter for you. You decide whether or not you are satisfied so that you feel sure that the prosecution has proved to you that it was the accused who caused the injury to the deceased. Or whether or not he got the blood on him just because he was shaking him. It is a matter for you."

Before this, the learned judge had cautioned the jury to examine with care the evidence on which the prosecution relied to prove the guilt of the appellant.

In this regard she told them:

"Before convicting on circumstantial evidence you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution's case. These are matters for you, you have to look at the evidence and determine that. Finally you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence and mere speculation. Speculating in a case amounts to guessing or making up theories, without good evidence to support them."

In her review of the evidence, the learned judge directed the jury's attention to the various aspects of evidence which, the defence argued, were capable of weakening the circumstantial evidence.

We agree with Mr. Fraser that the factors on which the prosecution relied, if believed, would establish circumstantial evidence which was clear, compelling and which pointed conclusively to the guilt of the appellant.

Accordingly this ground fails.

Ground 4 was not pursued by counsel for the appellant and correctly so.

Ground 5

The appellant complains that the learned trial judge failed to give any adequate direction to the jury in respect of the questions and answers in the interview.

The learned judge told the jury:

"These questions and answers were tendered in evidence as exhibit 12 and you have had them read to you and you have been given them to read and you have gone through them at length. Both counsel for the prosecution and counsel for the defence have gone through these with you. If there is anything that you remember that you find important, then you deal with it. It is a matter for you what you make of them."

A close examination of the answers given to the questions in the interview will reveal that they concern primarily the geography of the crime scene, the appellant's duties during that fateful night, his previous employment, his interchanges with fellow security guards during the course of the night and his movements and activities during the material time.

The appellant's defence contained in his unsworn statement was foreshadowed in the interview. No other possible defence was raised in the interview. Counsel for the appellant drew our attention to a particular statement which, she submitted, was potentially prejudicial and required careful direction from the judge. It is the appellant's answer to question 12:

"Q. 12: What was your reason for not working anymore for United Protection?

A. Mi drive away a truck belonging to the Ministry of Agriculture at the site I was working and they dismissed me."

This, in our view, is the only area of potential prejudice . However, we agree with Mr. Fraser that, in the context of the nature of the offence with

which the appellant was charged, such a statement would have no adverse effect on the fairness of the trial. Consequently, the failure of the judge to direct the jury that they should not be influenced by the statement, in no way deprived the appellant of the substance of a fair trial.

We note that, at the end of the trial judge's summing up, Miss Pyke, the prosecuting counsel, as was her duty, sought to assist the judge by drawing her attention to this statement. However, the judge did not take kindly to this. We feel constrained to remind judges that prosecuting counsel has a duty to draw to the judge's attention any failure to give adequate and proper directions.

This ground also fails.

Ground 6

The only aspect of this ground which counsel argued before us is that the statement of Melbourne Gayle served on the defence did not indicate that he had identified his deceased father's watch. This complaint was also made at the trial. Prosecuting counsel's response was that the defence was served with the depositions of the witnesses which contained the fact that Melbourne Gayle identified his father's watch in the presence of the appellant. It was argued that defence counsel, therefore, could not complain that he was taken by surprise. The learned trial judge, perhaps *ex abundante cautela*, ordered that a further

statement be obtained from Mr. Melbourne Gayle and served on the defence. This was done. The evidence of five other witnesses was taken before Mr. Gayle was recalled to the witness box. The complaint by counsel for the appellant before this court is misconceived.

Ground 7

This ground concerns the mandatory sentence of death which the learned judge imposed pursuant to section 3 (1A) of the Offences Against the Person (Amendment) Act.

In view of their Lordships' decision in **Lambert Watson v.R.** this sentence must be quashed and the matter remitted to the Supreme Court to decide whether the death sentence or a lesser punishment as authorised by law should be imposed.

Conclusion

The appeal against conviction is dismissed. The appeal against the mandatory death sentence is allowed. The sentence is quashed. The case is remitted to the Supreme Court for sentence.

