JAMAICA

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL No. 26/73

BEFORE: The Hon. Mr. Justice Fox, J.A. (Presiding).
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Swaby, J.A.(ag.).

R. v. MICHAEL BERNARD - Murder

Mr. Ian Ramsay and Mr. Patrick Atkinson
for the appellant.

Mr. Henderson Downer and Mr. F.A. Smith
for the Crown.

October 3, 4, 5, 1973
November 2, 1973

FOX, J.A.:

This is an application for leave to appeal against a conviction for murder in the Home Circuit Court before Parnell J. and a jury. For reasons which I have put in writing and which will be filed in the Registry as soon as they are typed, I am of the opinion that this application should be refused.

SWABY, J.A. (ag.):

I have had the opportunity of reading the draft judgment of Mr. Justice Fox and substantially, for the reasons stated therein, I agree that the application should be refused. My views have also been put in writing and will be filed in the Registry.

FOX, J.A.:

Mr. Justice Hercules is unable to agree with our decision. It must be understood, therefore, that by a majority judgment of the Court, the application is refused.

FOX, J.A.:

At about 6 a.m. on June 4, 1972, the deceased, Clifton Stephenson, also known as Feddie Mettick, was sitting on an iron rail along the Bustamante Highway in Tivoli Gardens when he was shot at twice and killed by a bullet which, passing through his chest, inflicted fatal injury to his heart and lung. Two days later, the applicant was arrested and charged for the murder of Stephenson. At his trial in the Home Circuit Court on February 14 and 15, 1973, the Crown was unable to prove a motive for the killing. Three witnesses to the shooting gave evidence for the prosecution. Winston Walker, a telephone technician living in Tivoli Gardens said that he was walking along the Bustamante Highway and came up to the deceased who was sitting on the rail. He stopped and spoke with the deceased. He walked off down a passage and heard a shot fired. He ran and heard a second shot. He turned around and saw a man propped up by his forearms on a wall with a gun in one hand. He heard a click as if the gun was being fired a third time but there was no explosion. Walker said he was not able to identify the man with the gun because he received only a side view of his face, which was partially covered by a red peaked cap he was wearing. Neither could Walker say where the gun man went after the shots were fired. But Walker saw the deceased lying in the highway and when he went to that spot about 1½ minutes after the shooting, he saw the witness Paulette Stewart there.

Milton Hines, a school boy aged 13 years living in Tivoli Gardens, said that he too saw the deceased sitting on the iron rail along the Bustamante Highway. Hines spoke with the deceased, and was still with him when he saw a gun come over the wall of the adjoining cemetery and heard the first shot fired. Hines ran and in running he heard a second shot. Hines also was unable to identify the gunman. He did not see the gunman's face, but was able to observe that he was wearing a red long peaked cap, a light blue shirt, and dungaree pants. Hines also saw the gunman come from the cemetery, go on to the Spanish Town Road, and drive away in a black and blue taxi.

The only evidence of visual identification of the applicant came from Paulette Stewart, a school girl aged 14 years living in Tivoli Gardens. She said that she saw the deceased sitting on the iron rail. She saw the applicant whom she knew as Michael Hoonch, over a wall, apparently this is the wall of the Ebenezer Cemetery. The applicant saw her and drew the red "hat"

he was wearing down over his face. The applicant came up behind the deceased, and when he was about two yards from the deceased fired the first shot. She was then about six yards from the applicant. After the first shot was fired, the deceased got up and ran. A second shot was fired. The deceased fell. The applicant pushed back the cap from his face; jumped over a wall, ran into Spanish Town Road, and went away in a "Checker" taxi.

Detective Corporal Lloyd Rowe received a report at the Denham Town Police Station at about 6.45 a.m. on June 4. As a consequence of this report he went to the Bustamante Highway where he saw the deceased lying on the ground. The deceased was rushed to the hospital but was pronounced dead on arrival there. That same morning, the detective took a statement from the witness Paulette Stewart. At about 4 p.m. on June 6, as the result of a report received, the detective and two other policemen went in an unmarked police land rover to the corner of Charles Street and Bread Lane, where the detective saw the applicant whom he knew before as "Woonchie". The applicant looked in the direction of the detectives and ran into nearby premises. The detectives chased and held him in these premises, took him to the police station and arrested him for murder. The case against the applicant depended upon the visual identification of him by Paulette Stewart. The jury accepted her evidence and returned a verdict of guilty of murder.

In support of an application for leave to appeal against conviction several grounds of complaint were stated. These were discussed before us by counsel under five heads which must now be examined seriatim.

Head 1. The verdict is unreasonable and cannot be supported having regard to the evidence.

Under this head, counsel drew attention to numerous aspects of the evidence of Stewart which he submitted were unsatisfactory:

(a) In chief, Stewart had said that she knew the applicant for a long time. They went to the same school - All Saints School. He was called Michael Hoonch. She knew him by that name also. She repeated this evidence under cross-examination, and then added that the applicant "never used to go" to All Saints, "he used to come over there and play football." That was what she meant when she said earlier "me and him used to go to the same school." She also admitted under cross-examination that she did not know that the applicant was named "Bernard", she knew him as "Michael", had heard him called "Michael Hoonch", but

knew him as Bernard when he came to play football.

(b) Early in chief, Stewart had replied in the negative when asked if she saw the applicant in court. At the close of her examination by crown counsel, she was asked a series of questions by the judge which culminated in her pointing to the applicant in the dock as the person she knew as Michael Bernard. It was submitted that this examination of the witness by the judge was of such a leading character as to render her identification of the applicant in court valueless. This examination forms a part of the material upon which another head of complaint of unfair trial is grounded. The examination is recorded as hereunder.

"CROSS-EXAMINATION OF PAULETTE STEWART BY DEFENCE COUNSEL

HIS LORDSHIP: Just before Mr. Atkinson asks you any questions, did Feddie say anything?

A: No sir.

HIS LORDSHIP: Did Bernard say anything before he fired the shot?

A: No sir.

HIS LORDSHIP: Mr. Andrade, in order to be a little more to the point, remember you had asked her if she saw Feddie. Perhaps I could ask her. You went to the preliminary enquiry at Half Way Tree. You gave evidence. I am sorry. You went to Sutton St.?

A: Yes sir.

HIS LORDSHIP: And you gave evidence in the case?

A: Yes sir.

HIS LORDSHIP: You did see Bernard in the Court?

A: Yes sir.

HIS LORDSHIP: Where was he?

A: He was sitting. He was in something like that. (Witness points to prisoner's dock)

HIS LORDSHIP: Well the gentleman wants to know, you see Bernard here today?

A: Yes sir.

HIS LORDSHIP: Where is he now?

A: See him there. (Witness points to accused in the dock)."

(c) During the morning session of the court, Stewart had maintained in chief and under cross-examination that she was certain that it was the applicant who had fired the gun at the deceased. She was the first witness called and was in the witness box from about 10:51 a.m. to 12:17 p.m. when, upon the application of counsel for the applicant, and to facilitate counsel, an early adjournment of the court was taken. The court resumed at 2:22 p.m. and the record of

what then transpired must be set out in extenso for an understanding of the matters complained of in relation to this particular aspect of Stewart's evidence, and also to enable a full grasp of other heads of complaint to be noticed below.

"CROSS-EXAMINATION OF PAULETTE STEWART CONTINUES

USHER: You are still on your oath.

DEFENCE COUNSEL: Paulette, you don't have anything to be afraid of. Just relax. Now that you have had lunch time and you think about it, I am going to ask you to tell us the truth. Is it the truth that you really don't know who committed that murder?

HIS LORDSHIP: No, no, no. Is it the truth that you don't know who shot the man.

DEFENCE COUNSEL: O yes. Isn't it the truth, Paulette, that you really don't know who shot the man? You don't know? Please Paulette, the truth, I am begging for the truth, just the truth, nothing else. You don't know?

HIS LORDSHIP: What is your answer? You know or you don't know?

(Witness begins to cry)

DEFENCE COUNSEL: Nobody is going to hurt you.

HIS LORDSHIP: What is your answer, Paulette? What is wrong? Something is wrong? Paulette, did you have lunch?

A: Yes sir.

HIS LORDSHIP: Is there a policeman there?

USHER: Yes sir.

HIS LORDSHIP: Let a uniformed policeman stand there. All right. Because every time I see you looking behind.

CROWN COUNSEL: May it please you, M'Lord, I observe that before this witness answers questions she looks to the well of the Court in a certain direction. I wish that matter be investigated immediately, M'Lord. It is obvious that this witness is not at ease

HIS LORDSHIP: Tell me something. Is something wrong?

A: No sir.

HIS LORDSHIP: What we want to find out, you had your lunch?

A: Yes sir.

HIS LORDSHIP: Now a question was asked and you oried a while ago. What is the answer? Is it not the truth that you don't know who shot the man? You know who shot the man or you don't know? What is your answer? What is the answer?

A: I don't understand what you saying.

HIS LORDSHIP: You did see who shoot the man?

A: I see a man run over the open land.

HIS LORDSHIP: And who is the man? Who was the man who shoot? You understand?

A: Yes sir.

HIS LORDSHIP: Who was the man? What the man name?

DEFENCE COUNSEL: You know or you don't know?

HIS LORDSHIP: Just wait, please. You have been trying my patience. Go ahead, Mr. Atkinson.

DEFENCE COUNSEL: All I am asking you - the Judge not troubling you. We just want to hear what you have to say. The man who you see shoot Feddie, you know or you don't know him name? If you know tell us the truth.

(Witness shakes her head from side to side)

DEFENCE COUNSEL: You don't know?

HIS LORDSHIP: You don't know? You were shaking your head. You don't know who shoot the man? Is that what you are saying? The note that I have, she shows a shaking of the head indicating that she does not. (know)

HIS LORDSHIP: no. With further question asked by Mr. Atkinson, "Do you know or you don't know" (words indecipherable)

DEFENCE COUNSEL: I think she said no when she shook her head. Her lips were turned away from you at the time.

HIS LORDSHIP: What do you have? (To Shorthand Writer)

JUROR Just a shaking of the head.

HIS LORDSHIP: It is clear that -- you are going to re-examine? It is clear that something went wrong.

CROWN COUNSEL: I was just about to make a rather unusual application to your Lordship that the Court be cleared in the interest of justice. It should have been done from the very outset.

HIS LORDSHIP: No, you have to give me a good reason because this is not one of the cases ...

CROWN COUNSEL: Would your Lordship hear me in the absence of the jury?

HIS LORDSHIP: Well you are going to re-examine her with a view to rehabilitating her?

CROWN COUNSEL: Not really, M'Lord.

DEFENCE COUNSEL: To elaborate on his application..

HIS LORDSHIP: It is quite clear that something must have gone wrong because up to when we went for lunch she was clear in her evidence. The evidence is, "I am sure", and I myself am interested in this. I would like to know what has heppened.

CROWN COUNSEL: Your Lordship might hear that at a later date.

HIS LORDSHIP: Wait a second. I am thinking. I stop and think sometimes.

DEFENCE COUNSEL: I just want to point out to your Lordship that the witness is still in the custody of the police and this is where she was brought from this morning. She has always been from last night, I gather, up to when she was brought up at two o'clock. She was kept in the cells downstairs with the police.

HIS LORDSHIP: Thank you for the information. I am going to ask the Foreman and the jury to go down the jury room for about ten

minutes. I will send for you but just keep out of hearing for the time being. I want to hear something."

(Jurors leave the Courtroom)

(d) Counsel then examined in detail the evidence of Stewart concerning the headgear the gunman was wearing, and emphasized that having regard to the fast, unexpected, and frightening details of the shooting, and the time at which it occurred, the opportunity to identify the gunman was limited and clearly open to mistake -

The gravamen of the contention under this head was that upon an objective assessment, the evidence of the prosecution as to the identity of the slayer was so grossly deficient as to be incapable of belief by a reasonable jury. Consequently, the judge should have so ruled as a matter of law, and should have yielded to the submission of no case to answer which had been made at the close of the evidence for the prosecution. Other heads of complaint give rise to contentions which are linked to this contention. These other complaints will therefore be stated so that all the interrelated contentions may be considered together.

Head 2. Unfair trial

There were two limbs to the submissions under this head. Firstly, it was urged that by taking charge of the examination of the witness Paulette Stewart at crucial stages of her evidence, the judge had assumed the mantle of counsel and had participated in the presentation of the case for the prosecution beyond the limits prescribed for an impartial judge. In this respect, particular complaint was made of the intervention of the judge recorded at p. 4 and 5 of the transcript set out hereunder:

CROWN COUNSEL: Now at that time of morning, 6:30, would you tell this Court what you saw happen?

A: Any time I was carrying out the dirt pan, sir ...

HIS LORDSHIP: Carrying out what?

A: Dirt pan, sir.

HIS LORDSHIP: Just wait.

A: Anytime a goh through a little a saw a man come from the May Pen ...

CROWN COUNSEL: You have to go it over again. You will go it over a thousand times today until you speak loudly.

A: I saw a man over Ebenezer May Pen and when him saw me, sir, him draw down him hat into him face and then I hear a shot fire, sir and anytime a look a don't see him again.

HIS LORDSHIP: You then heard a shot fire?

A: Yes sir.

HIS LORDSHIP: And then when you look you what?

A: A don't see him again.

HIS LORDSHIP: Just wait.

A: And then a see Feddie get up and start run.

HIS LORDSHIP: What?

A: A see a boy get up and start run name Feddie.

HIS LORDSHIP: What Feddie?

A: I don't know him right name.

HIS LORDSHIP: And then I saw a fellow get up and run?

A: Yes sir. And then I hear a second shot fire and it ketch him.

HIS LORDSHIP: And it caught him where?

A: In him left breast.

HIS LORDSHIP: Show me. (Witness indicates) So it caught the fellow right there?

A: Yes sir.

HIS LORDSHIP: Who fired the shot?

A: Michael Bernard.

HIS LORDSHIP: Where is he? You see him here?

A: No sir.

CROWN COUNSEL: Point him out if you see him.

HIS LORDSHIP: All right, all right. Michael who, you say?

A: Michael Bernard.

HIS LORDSHIP: You knew him before?

A: Yes sir.

CROWN COUNSEL: How long before had you known him?

Counsel for the applicant contended that although the initial intervention of the judge may be said to have been for the legitimate purpose of clarifying an obscure answer, by going further and by seeking to elicit the identity of the person who had fired the shot, his participation in the examination of the witness had been carried to excess. Counsel emphasized that when in answer to the judge the witness said she did not see the applicant in court, crown counsel had attempted to resume control of the witness by asking her to point out the person who had fired the shot if she saw him. But the judge had intervened again with the statement "all right, all right. Michael who you say?" And crown counsel's question went unanswered. Counsel for the applicant asked us to understand that the judge perceived that persistence at that stage in further attempts at identification in court of the applicant could be dangerous to the crown's case. The witness might have failed to do so then. Consequently, the judge suppressed the invitation of crown counsel to "point him out if you see him," and led the witness to the safer ground of repeating the name of the applicant which the witness had already given. Finally,

counsel submitted the judicial assumption of the mantle of crown counsel was again affirmed by the examination of Paulette Stewart which the judge undertook at the close of her examination-in-chief before cross-examination by defence counsel, and again when the witness was recalled after investigations carried out in the absence of the jury. This first examination is at page 8 of the record and has already been set out above. The latter examination (pages 31 - 32) is hereunder:

"PAULETTE STEWART RETURNS TO THE WITNESS BOX Time: 3:02 p.m.

USHER: You are still on your oath.

HIS LORDSHIP: Now listen carefully to a question I am going to ask you. I just want to have my mind clear of what the position is. You told the jury this morning that accused man Bernard who you knew from the days of football in school fired the shot which caught the deceased here. Are you now saying that you did not see who fired the shot, you didn't see who fired the shot? Now I want an answer from you. What is the answer? What is the answer? I am going to see how long I am going to wait for you to answer. What is the answer? You did see or you didn't see?

A: I did see, sir.

HIS LORDSHIP: What you say? Did you see or you didn't see who do it?

A: I did see, sir.

HIS LORDSHIP: Who you did see do it? Who you did see? Well Mr. --- I am not putting any pressure on her. I am not going to ask her any further questions.

CROWN COUNSEL: I would certainly like to get an answer to her question.

HIS LORDSHIP: She said she did see. The question I asked now is whom did she see. You try and see if you can get it.

CROWN COUNSEL: Now Paulette, you saw who did it?

A: Yes sir.

Q: Who did it?

A: Michael, sir.

HIS LORDSHIP: Where is Michael? Show, point. The hand can't move?

CROWN COUNSEL: That will be all from this witness, M'Lord.

HIS LORDSHIP: Of course, your case is going to depend on her.

CROWN COUNSEL: Yes, M'Lord."

The second limb of the submission that the trial was unfair involved a reference to several passages in the transcript in which, as she gave her evidence, the learned trial judge assured Paulette Stewart of protection from outside interference, uttered warnings against intimidation of the jury and the witness, made statements suggesting that something had gone wrong when, after the luncheon adjournment, Stewart may have been faltering in her

identification of the applicant. Counsel for the applicant pointed also to statements made by crown counsel, and counsel for the applicant argued that these statements amounted to insinuations that Stewart was threatened or otherwise tampered with during the luncheon adjournment. Concisely stated, the contention under this limb was that these statements by the judge and crown counsel, and the enquiry into the allegations of impropriety which were conducted in the absence of the jury could have given them unfair impressions:-

(1) that Stewart was in need of police protection because she had dared to speak the truth - ignoring the possibility that police protection may also have been necessary because Stewart had lied.

(2) that the applicant or persons on his behalf had threatened or tampered with the witness.

Head 3. Misdirection on discrepancies

The substance of this complaint was that the judge had misdirected the jury and himself in relation to discrepancies in the evidence of Paulette Stewart. It was contended that the witness had made contradictory statements on the admittedly single material issue in the case, namely the identity of the slayer. She was the only witness in proof of this issue and the contradiction so discredited her that no reasonable jury could safely rely on her evidence. It was submitted that this situation called for the exercise by the judge of his inherent power to withdraw the case from the jury, and that having failed to do so he had compounded his error by the further failure to direct the jury in accordance with the principle in R. v. Leonard Harris (1927) 20 Cr. App. R. 144, 148 and 149, so as to enable them to realize that Stewart was a negligible witness, and to make them understand that, on the evidence in the crown's case, there was no other alternative open to them than a verdict of acquittal.

The answers to the contentions under Head 1, 2 and 3

Because they attack the sufficiency of the evidence of the prosecution, and the fairness whereby that evidence was elicited, it is convenient at this stage to consider the submissions which have so far been described. Dealing first with the alleged misdirection in the evidence of Stewart, it must be noticed that there was a preliminary question which only the jury could decide, namely what did the witness mean to convey by the shaking of her head from side to side. In deciding this preliminary

question, the jury were of course entitled to such assistance from the judge as he felt qualified to give, but, in the final analysis, the answer to the question was essentially one for the jury. The judge appreciated this position. Consequently, although he assumed from the gesture of the witness that she was then saying that she did not know who shot the deceased, in conveying this impression to the jury he realized that he could have been mistaken in his interpretation, all the moreso having regard to the interjection of the jury man, "just a shaking of the head." In these circumstances, I consider that the judge was right in leaving to the jury the preliminary question of the interpretation to be put upon the shaking of her head by the witness. This he did by entirely satisfactory directions at p.75 of the record. Particularly appropriate is this passage at the end of that page:

> "The second thing is this is it consistent with the reaction, you have a saying when a man shakes his head when another man bothers him, you are bothering me too much; and particularly under stress and strain, crying, but I think that for the purposes of this case you could very well say, and it is all for you, that this shaking of the head is an indication of a reply to Mr. Atkinson's question which would mean, I do not know who shot the man."

Very properly, the judge then went on to invite the jury to consider whether the gesture of the head reflected merely the stress and strain the witness had undergone, and to take into account her evidence at the final stages of her examination that she did in fact see the gunman, and that he was the applicant. These directions are unobjectionable.

At the commencement of his review of the evidence of Stewart the learned judge observed (Page 70, 71)

> " ..... she seems to have been a reluctant witness, but the question here is whether having regard to all these circumstances, the demeanour of this girl in the witness box, you are prepared to say that she has told you the truth and that you can rely on her; because as I told you earlier on the way this case is put, the guilt or innocence, the guilt of this accused which would be the adverse verdict you would find would flow from whether you are prepared to accept that girl as a witness of truth."

The review of the evidence of Stewart was concluded with this further observation at p.77 -

> " ..... this witness who is what you may call the star witness in the case. Are you prepared to rely on her? If you are not prepared to rely on her, then your duty is to acquit the accused man. Having examined her evidence the way she gave it and all these points that I tried to remind you of that took place during the course of her evidence, do you entertain any reasonable doubt as to her identification of the person who fired the shot? If yes, your duty is to acquit him. Why? Because as I said earlier on the case is put in such a way that it is going to stand or fall mainly on her evidence. But let us see if there is any other thing in the case that can help you."

In my view, the context in which these directions occurred was sufficient to alert the jury to their duty to conclude that Stewart had been grossly discredited as the defence contended if they thought that she had made inconsistent statements on oath concerning the identity of the man who shot the deceased or if they had a reasonable doubt in this respect. In my view further, the substance of these directions sufficiently informed the jury of their further duty to acquit the applicant if they regarded Stewart as a discredited witness. I consider therefore that at the end of his summing-up the principle in Harris had been properly applied by the judge as the guide which it was intended to be as to "the nature of the direction which he ought justly to give to a jury in the particular circumstances" of the evidence. (vide Wooding C.J. in Mills and Gomes v. R. (1963) 6 W.I.R. 418, 420).

It was pressed upon us that the further directions given upon recall of the jury inadequately advised them of their duty to acquit the applicant if they took the view that Stewart had contradicted herself on the issue of identity and if they concluded further that no acceptable explanation had been given for this contradiction. The relevant passage at page 86 of the record reads:

> "Where you find a witness is saying one thing and then saying another thing and on the same point, then it is a matter for you the jury to say whether you can rely on the witness at all. In assessing this question as to whether you can rely on the witness, the jury generally looks to see what is the explanation for this change, is there a reason for it? If a reason is given which the jury accept, then you consider the case as it is. If a reason is not given and then the contradiction remains, then the jury will have to consider how far, if at all they would be able to rely on this witness on the particular point in question."

The suggestion of inadequacy in these directions really stems from an insistence that Harris' case prescribed a rule of law; that in all cases where a witness had contradicted himself on a substantial fact, particularly when that fact is a material issue in the case, and no explanation is given for the contradiction, it was the duty of the trial judge, as a matter of law, to direct the jury to reject the entire evidence of that witness. In my view, this is too wide a statement of the position which was correctly stated by Smith J.A. (as he then was) in R. v. Eaton Barber et al. Sup. Court Cr. Apps. 24 etc. of 1971 - July, 31, 1972 (unreported) at p. 19 thus:-

> "The purpose of proving that a witness has made a previous inconsistent statement is to discredit his evidence in the eyes of the jury. It is the jury, and they alone, as the judges of facts who must decide whether the witness has been discredited and to what extent."

It is true that in R. v. Golder, [1960] 3 All E.R. 457 at 459 the Court of Criminal Appeal said:

> "when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable;" but also "that the previous statements ..... do not constitute evidence upon which they can act."

In the latter part of that passage the court was emphasizing that a previous statement cannot be treated as proof of the fact alleged therein. The apparent universality of the statement in the first part of the passage must be read subject to the well established rule that the directions to be given to a jury must have due regard to the facts of each particular case. This position has been well expressed by Wooding C.J. in Daken v R (1964) 7 W.I.R. 442, at 444 in these words:

> "No general principle can be enunciated except that it should never be forgotten that in the final analysis questions of fact are to be decided by a jury and not by the presiding judge. The judge may, and in cases such as we are now considering we think it is his duty to, give such directions as will assist the jury in assessing the credit-worthiness of the evidence given by the witness whose credibility has been attacked, but it can be but seldom that the circumstances will warrant his going beyond that."

I take the view that regarded as a whole, and giving due weight to the sentence concluding the passage at p.86 of the record which is set out above, the summing-up sufficiently informed the jury that if they considered that Stewart had contradicted herself on the vital issue of identity and that this contradiction was unexplained, she must be treated as an unreliable witness whose evidence was incapable of supporting a conviction. It is true that a direction in these specific terms was not given at any stage, but the sufficiency of a summing-up depends essentially upon the effect of what was said and not upon the use of any particular formula of words.

From what has been discussed so far it is clear that on the evidence there were matters of fact to be decided by the jury upon which the general issue of guilt depended. The trial judge was therefore right in refusing to withdraw the case from the jury at the close of the case for the prosecution. To have ruled otherwise would have been to usurp the functions of the jury. This is an important point to bear in mind when considering the complaint in head 1. This court is at liberty to set aside a verdict on a question of fact alone only where the verdict was obviously or palpably wrong. R. v. Hancox, 8 Cr. App. R. 193. This means that upon an objective assessment by this court, the evidence must be judged to be of such a quality as to be incapable of supporting a verdict of guilty. A finding that the evidence is so incapable is the only justification for holding that the verdict is unreasonable or unsupported by the evidence. I take the view that despite the unsatisfactory aspects in the evidence of Stewart which counsel for the applicant emphasized, there was material in that evidence upon which the jury could properly come to the conclusion at which they arrived. In addition, the demeanour of Stewart, the impressions she created and the meanings she conveyed while in the witness box must have been judged by the jury to be of supreme importance in assessing her credit-worthiness. Their verdict is obviously based upon a highly favourable estimate of her reliability. For this court to interfere with that verdict on the ground that it is unreasonable or unsupported by the evidence would be tantamount to the substitution of its own opinion on this vital feature for that of the jury; a course which, as many cases show, this court never takes.

I turn now to consider the charge that the trial was conducted unfairly. Such a charge, if substantiated, may be a valid reason for allowing an appeal on the ground that "there was a miscarriage of justice." (section 13 (1) of the Judicature (Appellate Jurisdiction) Law, 1962, 15 of 1962). In this respect the decisive factor is the effect of the unfair conduct. In view of the specific criticisms of undue interventions by the learned trial judge, it is appropriate to make some general observations concerning the role and functions of a judge in a criminal trial. At the outset, it is important to appreciate the significance of the circumstance that the trial system which is espoused in this jurisdiction is adversative. The effective operation of this system requires rules which may be sufficiently categorized as rules of procedure and evidence, rules defining the functions of judge, jury, and counsel, and rules of etiquette and propriety. To an extent therefore, a criminal trial with a jury is a contest conducted in the context of adversary rules. These rules are to be found mainly in the case law of England where the system has been in operation for centuries. But these rules are not rigidly applied in this and other jurisdictions where the adversary system of trial prevails. They may be modified or developed by courts outside England so as to keep pace and to cope with situations existing at a particular time and in a particular place. Nevertheless, the essential purpose, the raison d'etre of all rules of adversary trial must never be obscured. They have been evolved and must be maintained so that an accused is at all times given as fair a trial as the system allows. Consequently, in relation to a trial judge's function, these rules require him to discharge two important duties. Firstly, the judge must adopt and maintain an objective and impartial attitude to the proceedings. He must refrain from inordinate intervention during a trial, from usurping the functions of counsel, from interfering with the continuity of examination and cross-examination, from prejudging the outcome of the trial, from indicating that he favours the prosecution or the accused, and from indulging in comments, observations and discussions which may tend to compromise or to reduce that patience, that willingness to listen, that humanity and that prestige, power, and probity which makes him the epitome of our judicial system, and, in the eyes of the public, "a very special person."

Secondly, the trial judge must take sole control of his court. He must insist upon strict adherence to the adversary rules of trial. For this purpose he may be obliged to delimit the bounds of proper advocacy, and while giving the fullest opportunity of cross-examination, he may have to take steps to ensure that the right is not abused by prolix, irrelevant, or insulting questions. He may even find it incumbent to scotch dilatory tactics, to check unnecessary delays, to forbid frivolous and pointless questions and to restrict all proceedings and conduct which may be time wasting.

But a criminal trial is not conducted with vindication of the adversary rules as the sole end in view. A criminal trial is essentially a search for the truth in which, admittedly, counsel on both sides are the chief proponents. Nevertheless, the obligation upon the trial judge to assist in the search for truth may on occasions require him to take an active and virile part in directing the proceedings so that the truth is made manifest and is not suppressed. This is particularly so where through negligence, ignorance or corrupt collusion, counsel fails to bring forward evidence which is material to the issues at the trial. "A judge is not placed in that high situation merely as a personal instrument of parties," because "he has a duty of his own, independent of them, and that duty is to investigate the truth". (Edmund Burke, Report of Committee on Warren Hastings Trial, 31 Parl. Hist. 348. See 9 Wigmore on Evidence 267, para. 2484). Thus the trial judge has a discretionary power to put such pertinent and searching questions to witnesses as the exigencies of justice require. For this purpose, he may even recall a witness, R. v. McKenna (1956) 40 Cr. App. R. 65 or call a witness not called by the prosecution or the defence. R. v. Tregear (1967) 51 Cr. App. R. 280. The court of appeal will interfere with the exercise of the discretionary power of a trial judge only if it appears that an injustice has thereby resulted. R. v. Cleghorn (1967) 51 Cr. App. R. 291.

It is obvious that in endeavouring to control his court and to see that justice is done, a trial judge runs the real danger of being in breach of his duty to be impartial. The only workable safeguard against this danger is to have in mind at all times a clear concept of his essential role as a judge, and to regulate his conduct of the trial proceedings, in terms of that concept. He should see himself as a pilot whose first duty is to guide the trial in accordance with the rules of evidence and the relevant law along

lines as sedate and as orderly as the circumstances allow. It is permissible for him to see himself as "certainly more than an umpire watching the sporting - theory of litigation in action." See The Trial Judge: Pilot, Participant or Umpire? - By Hugh W. Silverman, Q.C. Vol. XI (1973) Alberta Law Review p. 40.. vide also Denning L.J. (as he then was) in Jones v. National Coal Board /1951/ 2 Q.B. 55 at 643.). But the judge should not allow himself to become a participant. He should never enter into the fray of combat nor should he take on the mantle of counsel. On those special occasions when he may be obliged to intervene in the interest of justice, he should not overlook the need for the appearance of justice nor forget the famous dictum of Lord Hewart C.J. in R. v. Sussex Justices, Ex p. McCarthy /1924/ 1 K.B. 256 at 259 that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." If a trial judge directs himself in accordance with a concept of himself as a pilot as I have attempted to describe, his interventions to bring out facts or to define issues are likely to remain neutral and dispassionate. At the same time, he himself will have exhibited a sincere interest in assisting counsel and the witnesses in the proper development of all aspects of the case. This approach will never fail to secure for him the respect of all concerned with the administration of a viable system of justice.

With these general observations in mind, I have examined the printed record of the evidence of Stewart. Her testimony before the jury consisted of 26 pages. On all pages there are interventions by the judge. Most of these occurred because he did not hear or did not understand the witness. She was nervous and uneasy, poor in vocabulary, and vocally indistinct. It is not difficult to see how interventions by the judge for the purpose of clarification became protracted. It is also understandable how on occasions the judge came to be carried beyond legitimate questions calculated to clear up or expand what counsel brought out, and was led to make enquiries which, in effect, broke new ground. This is what happened at p. 4 and 5 of the record. No complaint can be made of the questions at p. 4, but when the judge went on to ask at p. 5, "who fired the shot?", was told, "Michael Bernard", and continued to ask further "where is he, you see him here?", he had taken the examination of the witness on the critical point of identity into his own hands and out of the hands of counsel for the crown. Further judicial

intervention might have had the effect of diverting the witness from accepting the invitation of crown counsel to point out Michael Bernard, and of leading her into making safe assertions of Bernard's name, and her prior knowledge of him is also open to a like criticism.

This is admittedly an important consideration in assessing the further intervention of the judge at p. 8 of the record. The examination-in-chief had been completed. The witness had not pointed out the accused in the dock as the man whom she knew before, and who had fired the shots which killed the deceased. This omission might have been due to entirely explicable circumstances. In her nervous condition and in a strange room peopled by unfamiliar and perhaps awe-inspiring figures, her perceptions at the moment may have been confused. In judging the total situation that explanation must not be ignored. Nevertheless, it must be recognized that the omission of the witness to point out the applicant had not been due to failure by the counsel for the crown to ask the appropriate question. That question had gone unanswered because of an intervention by the judge. The necessity for an interjection of himself at that later stage into an examination of the witness, however justifiable on the ground of a judge's right to clarify an unsatisfactory evidential situation, was unfortunate. Counsel for the applicant contended that the real purpose of the interjection was to provide judicial assistance to the Crown's case.

This contention was put to the forefront of the further submissions of counsel concerning the part played by the judge in the examination of the witness after the luncheon adjournment. Counsel urged that the comments of the judge on the seemingly recalcitrant behaviour of the witness when the court resumed, could have conveyed the impression that the judge thought that prior to the adjournment she had spoken the truth, but that during the adjournment improper pressure had somehow been applied to the witness to cause her to be unwilling or afraid to adhere to the truth. In support of this contention counsel stressed the observation of the judge at p. 25 that "It is quite clear that something must have gone wrong because up to when we went for lunch, she was clear in her evidence. The evidence is, "I am sure." Counsel also complained that, as put, the very first question of the judge at p. 31 of the record was capable of conveying to the witness a threat of judicial displeasure, if she were so ill advised as to contradict the

statement she had previously made that it was the applicant who had shot the deceased. Counsel suggested that even the judge realized that he had gone too far, hence his disclaimer of "not putting any pressure on her" and of "not asking her any further questions".

I have read again and again the record of the examination of Stewart after the luncheon adjournment. In my estimation the complaint of counsel goes too far. It gives insufficient recognition to the dynamics of the actual trial and to those compulsions of the moment under which the interventions of the judge and the comments of crown counsel occurred. Those details of behaviour which reflected the anxiety and fear exhibited by the witness could never be adequately reproduced by the printed evidence. But those details would be apparent to the judge, to counsel, the jury and the spectators. This is a central circumstance to bear in mind when assessing the judge's conduct of the trial. Having regard to the manifest apprehension of the witness, it was the duty of the judge, and indeed of both counsel, to give her every assurance of protection against harm, real or imagined and to try to put her at ease.

The submissions of counsel for the applicant are also mistaken in three vital respects. Firstly they misapprehend the capacity of the adversary trial system to accommodate and permit all enquiry necessary to ascertain relevant and material facts concerning the issues in the case.

Secondly, they underestimate the power of a judge, in special circumstances, such as those which arose when the court resumed, to take control of a trial and to move it in the direction of an area of obvious importance not only to the parties, but as well to that public interest which is concerned with the maintenance of vigour in the processes of the common law. This is precisely what the trial judge did in this case, and the circumstance that in the course of his efforts, inelegancies may have ensued, cannot make his conduct any the less necessary. Having regard to what transpired when counsel continued his cross-examination after the luncheon adjournment, it was the duty of the judge to try and ascertain precisely what the witness was saying in relation to the slayer of the deceased and, in this respect, to insist on clear and unequivocal answers, subject only to the overriding principle that no one should have reason to believe that there had not been a fair and impartial trial.

In judging this aspect of the matter Lord Hewart's dictum concerning the doing, as well as the appearance of justice is admittedly of the first importance. But that dictum should not be distorted beyond its ordinary meaning so that it becomes more important than justice itself. Justice must first be actually done. Only then will it be seen to be done. To quote again Professor Silverman, "An overly active judge may give the appearance of a meddler; but equally, a passive and quiescent trial judge may give the appearance of indifference." (at p.62 ibid). The judge must strike a right balance. It is a matter of degree. Even if in this case the judge may have been "overly active" that excess simpliciter was not so substantial as to justify the charge of unfairness which was made.

Thirdly, counsel's submissions underrate the capabilities of the jury. In his summing-up, the judge made it clear to the jury that their verdict would depend upon acceptance of the evidence of Stewart. In the course of his submissions counsel suggested that the judge had not sufficiently alerted the jury to the possibility of mistake on the part of Stewart. This suggestion is without merit. The jury were told in effect that unless they were prepared to rely upon the truthfulness and the accuracy of Stewart it was their duty to acquit the applicant. The jury saw the examination of Stewart by the judge and by counsel. They were able to observe her demeanour. They were in the best position then to judge to what extent her replies were hesitating or involuntary, and to perceive whether what she said proceeded from a conviction of the truth or from doubt or falsehood.

To be of any avail to an appellant, a complaint that a trial was conducted unfairly must raise up a probability that the impropriety influenced the jury in coming to their verdict. It is not sufficient to identify judicial breaches of the rules of adversary trial. The judge is not on trial. The outcome of the appeal does not rest upon a mere ability to show that he made a mistake. Everything depended upon the replies of the witness. As it turned out, on occasions, these replies did assist the prosecution; they might equally have assisted the defence, in which event, counsel for the applicant would have been the first to acclaim the conduct of the judge. It is impossible to say that the judge showed bias or favour for one side as to have influenced the jury unfairly in coming to the

favourable opinion of Stewart which they did. This case does not fall within that category of cases exemplified by Reg. v. Barnes [1971] Cr. App. R. 100 where the Court of Appeal (Criminal Division) castigated the wholly improper conduct of the judge, quashed the conviction, and in refusing to apply the proviso, observed (at p.108) "There are cases, of which this is one, in which the principles involved are more important than the case itself." In addition, such irregularities as might have occurred in the judge's conduct of this case are not so grievously offensive, or so seriously threatening to principle, as to compel a conclusion that a miscarriage of justice has actually occurred. Consequently, if necessary, I would be prepared to dispose of the complaint of unfair trial by applying the proviso.

Heads 4 and 5 - misdirection

The remaining two heads of complaint can be dealt with together. They allege misdirection, firstly by suggesting that the evidence of Stewart as to the identity of the gunman was supported by other evidence in the case; and secondly, by attaching to the flight of the applicant on the approach of the police prior to his arrest, a value in support of the Crown's case.

In relation to the first complaint it must be observed that the judge told the jury that the case for the prosecution "centres around the witness Paulette Stewart"; that a verdict adverse to the applicant would depend upon "whether you are prepared to accept that girl as a witness of truth"; that "if you are not prepared to rely on her, then your duty is to acquit the accused man"; that "if you entertain any reasonable doubt as to her identification of the person who fired the shot, your duty is to acquit him, because ..... the case is put in such a way that it is going to stand or fall mainly on her evidence". The crux of the complaint is the use of the word 'mainly'. It was argued that because the judge preceded the review of the evidence of the other two eye witnesses with the statement "But let us see if there is any other thing in the case that can help you" he had suggested to the jury that the evidence of these two witnesses was capable of corroborating Stewart on the vital issue of identity. This argument is without substance. Upon a careful reading of the summing-up as a whole, it is clear that the judge went no further than to point out to the jury the extent to which the evidence of these two witnesses supported the claim of Stewart that she had witnessed the shooting. This position is

placed beyond doubt by the closing directions in these words

p. 83. "As far as Winston Walker and Milton Hinds are concerned they support Paulette Walker (Stewart) in this respect that two shots were fired. The man had on a red cap or hat or whatever it is. The deceased was sitting on a rail and, as far as Hinds is concerned he supports Stewart with regard to what the man did after he fired the shot but as far as the real identity of the accused is concerned that evidence only comes from the witness Paulette Stewart."

The second complaint arises out of the review of the evidence of Detective Corporal Rowe who said that he was in uniform, that he knew the applicant, that the applicant knew him as a policeman, that when the applicant saw him, he ran, and that he chased and caught the applicant. In relation to that evidence the judge said this:

p. 82. " ..... where an offence has been committed and a person is charged with committing that offence, then his conduct before or subsequently after the commission, that is his reaction, how he behaves and so on is something relevant for the jury to consider. As a matter of fact there used to be an old-time rule that where a man is suspected of committing an offence and he goes into hiding, the very fact of his running is taken as consciousness of guilt. In this case you will have to ask yourselves this question: Rowe did not call to him, according to him, but on seeing Rowe who he knows is a policeman, he is running, why is he running? Is the running here indicative of guilt? Is there an innocent explanation? As Mr. Atkinson in his address told you before, people these days no doubt because the police are very active having regard to all the circumstances, as soon as they see a police vehicle they are running, particularly those in Denham Town.

p. 83. Is that an indication that that is why he ran merely seeing the police? Because if that is so you cannot draw any adverse inference against the accused. In other words, by consciousness of guilt, the police wants to see you about it and you are running, then is it then as I told you earlier on, those two gentlemen quoted the Soripture. I am going to refer now to Proverbs, in the 28th chapter of Proverbs verse one. "The wicked flee when no man pursueth." Remove the word wicked and put the word guilty. "The guilty flee

> when no man pursueth." If that is so that is conduct that you can take into account when assessing. If you are not prepared to take that view you are not to draw any adverse inference against him merely because he ran."

The vice in this passage was presented to us in three alternative forms -

(1) It wrongly advised the jury that in assessing the evidence, and the issue of guilt, the flight of the applicant could be given a significance adverse to him;

(2) The evidence was equivocal. It was equally capable of showing guilt or innocence and for that reason the jury should have been told to ignore it altogether in their deliberations.

(3) It imposed an unwarranted qualification on the earlier direction that the Crown's case "is going to stand or fall" mainly on Stewart's evidence.

Before dealing with this complaint, it is necessary to notice two matters. Firstly, a suggestion to Detective Rowe in cross-examination (after a conference in open court between the applicant and his counsel), that the applicant did not run, but remained standing at his gate where he was held by the detective. Secondly, the complete silence of the applicant on the point when he came to make his statement from the dock. The jury must therefore have had no hesitation in finding that the applicant had run away from the police.

The relevance and the value of this evidence of the applicant's flight falls to be ascertained on the basis that it was not contradicted, was not explained, and that a <u>suggestio falsi</u> to the contrary was deliberately made to detective Rowe in cross-examination. It was incumbent on the applicant <u>as a matter of common sense</u>, though not as a matter of law to give a satisfactory explanation for his flight from the police, and since this was not forthcoming, a jury would be justified in inferring that, having regard to the total evidential situation, he was in some way concerned in the murder. The jury were not bound to make that inference. Neither would it have been correct to tell them that they ought to make that inference. But it was permissible to advise them that they could, if they wished, arrive at that conclusion and apply it in their assessments of the evidential position as a whole. The judge did nothing more than this. It is an exaggeration to suggest that the direction could have led the jury to consider that qualifications had been imposed on the importance of Stewart's evidence,

and that doubts concerning her reliability could be compensated for by adverse inferences from the fact of flight. The prior directions which made a verdict of guilty so exclusively dependent upon acceptance of Stewart as a reliable witness were too emphatic to allow the jury to make such a mistake. I take the view that this complaint also is without substance.

A final consideration

Prior to 1966, the Court of Criminal Appeal in England was empowered by the provisions of section 4 (1) of the Criminal Appeal Act, 1907, to set aside the verdict of a jury on the ground that it is unreasonable or cannot be supported having regard to the evidence. These provisions were reproduced in s.13 (1) of the Judicature (Appellate Jurisdiction) Law, 1962, Law 16 of 1962. The law which is to be applied in this jurisdiction is therefore as it was in England up to 1966, when as a result of statutory changes, the law in that country was substantially altered.

From the very earliest cases decided by the Court of Criminal Appeal after its creation in 1907, the view was taken that the only way in which the integrity of the jury as the sole arbiter on questions of fact could be preserved was by refraining to interfere with a verdict of guilty except it was shown to be blatantly wrong. In Jamaica this approach has been, and is still being faithfully followed. (See Sup. Ct. Criminal Appeals 79 and 80/70 - R. v. Grant and Hewett 29 Oct 71). But in England, as a result of numerous hard decisions of the Court of Criminal Appeal of which Hancox 8 Cr. App. R. 193 is typical, (see Chap. 5 Criminal Appeals by Michael Knight) studies were made. Reports were laid before Parliament. The law was changed in 1966. S. 4 (1) of the 1907 Act was repealed, and as a consequence of new provisions introduced by s. 4 of the Criminal Appeal Act 1966, as re-enacted in s.2(1)(a) of the Criminal Appeal Act 1968 (U.K.) the Court of Appeal in England was empowered to set aside the verdict of a jury if it thinks that "under all the circumstances of the case it is unsafe or unsatisfactory."

During the debates on the Criminal Appeal Act 1966, some Law Lords publicly admitted that they had interpreted the 1907 Act more widely than many of the reported cases suggested, and that they had quashed verdicts they considered unsatisfactory. Here are the words of Lord Parker:-

> "Then an opportunity is taken of elaborating or changing the grounds which entitle the Court to set aside a conviction. I would join issue with the noble and learned Lord on the Woolsack on this point. It is not, in my view, an innovation. I am afraid that for years on many occasions I have used these words 'In all the circumstances of the case, the Court has come to the conclusion that it is unsafe for the verdict to stand.' This is something which we have done and which we continue to do, although it may be we have no lawful authority to do it. To say that we have not done it, and we ought to have power to do it, is quite wrong. It is done every day, and this is giving legislative sanction to our action."
>
> (Criminal Appeals - Michael Knight p. 131).

Encouraged by these observations of Lord Parker - I have considered whether in all the circumstances of this case the verdict is unsafe or unsatisfactory. I have asked the subjective question whether the court should be content to allow the verdict to stand or whether 'lurking doubts' should cause it to wonder whether injustice has been done. (See Lord Justice Widgery in R. v. Cooper (1969) 53 Cr. App. R. 82). In striving for an answer to this question, those features of the trial which made the advantage of the jury in seeing and hearing Stewart of such obviously special importance were the most immediately striking in my reflections. I have found it difficult to begin to question the correctness of the verdict in this particular case without having raised up at once in my considerations the gravest doubts concerning not only the quality of a Jamaican jury, but as well the efficacy of the system of trial by jury. This case is to an extent unique having regard to the full exposure made to the jury of a type of person, a young girl of obvious limitations - commonly to be encountered in this Island. If after this advantage the view should be taken that they were unable to make a correct assessment whether she spoke the truth or not, it would be just as well to give the most serious thought to abolishing trial by jury in Jamaica altogether.

A second feature is that admittedly Stewart gave a statement to the police in the morning very shortly after the shooting. The defence suggested that she had been put up to say that the applicant was the gunman. No evidence was called in support of this suggestion, and the probabilities are overwhelmingly to the contrary. Thirdly, the applicant did not give evidence on oath. He did not attempt to say where he was on the morning of the

shooting. Neither did he call any evidence in support of an alibi. There was of course no obligation upon him to do these things, but I consider that these omissions are of importance when reflecting on the subjective element of a "lurking doubt". Fourthly in contrast to the searching enquiry made of Stewart in connection with, and to test her claim that she knew the applicant before, the applicant from his safe position in the dock said merely "I do not know the deceased no (know?) none of the people that came into the court and testified."

In the light of these considerations, I find myself free of any uneasiness concerning the evidence for the prosecution or any other circumstance of the trial which could have caused me to think that the verdict was unsafe and unsatisfactory.

I would refuse the application for leave to appeal and affirm the conviction and sentence.

SWABY, J.A.(Ag.):

I too am of the view that for the reasons stated by Fox, J.A. in his judgment which I have had the opportunity of reading, this application should be refused.

I wish merely to add, by way of emphasis in relation to the complaint of the alleged improper identification of the applicant at the trial by the witness Paulette Stewart, that this was not a case of a first "identification from the witness box", or even a case of the witness having seen the applicant for the first time on the day of the shooting of the deceased. This witness claimed that she had known the applicant for a long time before this incident and it must be remembered that she gave a statement to the Police the same morning shortly after the shooting. Such inadequacy as the witness revealed when first asked if she saw the applicant in Court was in no way as serious as the deficiencies exhibited by the two witnesses in Reg. v. Osbourne (1973) 1 Q.B. 678, who failed altogether to point out the accused in Court. To remedy this deficiency, the Recorder permitted the police inspector who had been in charge of the identification parades to say who was the man the two witnesses had pointed out on the parades. The Court of Appeal held that such evidence was admissible. The judgment of Lawton, L.J. is encouragement for the use of common sense in criminal trials. Like that learned judge I refer to the principle enunciated by Sachs, L.J. in Reg. v. Richardson (1971) 2 Q.B. 484 at 490:

> "The courts, however, must take care not to deprive themselves by new, artificial rules of practice of the best chances of learning the truth. The courts are under no compulsion unnecessarily to follow on a matter of practice the lure of the rules of logic in order to produce unreasonable results which would hinder the course of justice."

In my opinion, the conduct of the learned trial judge was in accord with the considerations giving rise to this principle. His interventions were necessary, and when examined carefully, will be seen to have been entirely free of the vice of "leading." The complaint is without substance.

Regarding the complaint of misdirection on the evidence of the applicant's flight from the police, I take the view that upon a fair reading of the record as a whole, it is clear that the jury were told no more than that they could make a limited use of this conduct in assessing the totality

of the evidence in support of the crown's case, and only if they rejected the suggestion of counsel for the applicant (be it observed unsupported by evidence) that the applicant had run because people these days, particularly dwellers in the Denham Town area as soon as they see a police vehicle approaching, run. The judge emphasised that if that was their view they could draw no adverse inference against the accused.

I too have reflected on the quality of the evidence in support of the crown's case and the circumstances under which the trial occurred. I too find myself free of any doubts concerning the fairness of the trial and the rightness of the conviction.