JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 57, 58, 59 & 60 OF 1981

BEFORE: The Hon. Mr. Justice Zacca - President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Ross, J.A.

REGINA VS. NEVILLE NEATH
DENNIS DOUGLAS
LORENZO KERR
ERROL GENTLES

Berthan Macaulay, Q.C., & Mrs. Margarette Macaulay for Neath & Kerr

Eric Frater for Gentles

Horace Edwards, Q.C., & Noel Edwards, Q.C., for Douglas

Mr. F.A. Smith & Miss Ola Edwards for the Crown

March 2, 3, 4, 10, 11, April 13, 14, 1983

March 14, 1985

CAREY J.A.

On the 14th April, 1983, this court treated these applications for leave to appeal against convictions for murder as the hearing of the appeals which were, in the result, dismissed. We then intimated that we would put our reasons in writing and hand them down at a later date. We now do so.

The appellants were convicted in the Clarendon Circuit Court on 10th April, 1981, before Chambers, J. (now retired) sitting with a jury for the murder of one Howard Campbell, and each was sentenced to death. The indictment alleged that the offence was committed on 30th August, 1980. A number of men armed with a variety of weapons including sticks, knives and pieces of iron arrived in the village of Woodside, Clarendon. They came in a van, but were preceded by two motor cycle outriders. Among this invading force were the appellants who all played their part in beating to death a Mr. Howard Campbell, one of the villagers. The medical evidence which was read at the trial shewed that the victim received -

(i) "cut injuries" over the face and forehead;

(ii) laceration ¼" incised, over the mid-abdomen;

(iii) fracture of the cervical spine;

(iv) 4" incised wound over the left parietal bone of the skull;

(v) large subdural haematoma over the left parietal side;

(vi) puncture wound over messentric artery.

Death was due to injuries to the head which caused the subdural haematoma and to the fracture of the cervical spine.

Some further facts may be shortly stated. When the van arrived in Woodside, a number of men from the village, including Campbell, were sitting by the side of the road on a bank, three men were in the church listening to the running of a horse-race and others were in their yards. The attackers debouched from the van in front of the church and Douglas was heard to shout - "see the ..... cloth bwoy dem yah." Gentles who was attired in military trousers was also in this party. He was observed to have some wrapped object in his hand. The villagers scattered, dividing themselves into two groups while Howard Campbell made off by himself, hotly pursued by the invading force. A voice was heard "shot that man" followed by the sound of a gun shot; Gentles had a gun. In his escape, Campbell jumped a fence but ran straight into another group of the pursuers. Neville Neath and Lorenzo Kerr were part of this group. Gentles flung a stone which hit Campbell in the back and felled him. Douglas also hit him in the back, and everyone joined in beating Campbell. Neath, Kerr and Gentles assisted. Sticks, iron-pipes, knives and a sawn-off shot gun were the weapons brought into play. Neath wielded the sawn-off shot-gun and clubbed the hapless Campbell and he used a knife to inflict injuries in the region of the head.

At this point a voice from the crowd was heard to assert

> "Is seven a unoo we come fi kill. You lucky a you one we ketch now. A seven a unoo we come fi kill."

The invaders then withdrew. This allowed a villager, Earl Thomas, to take up the injured man who by then was covered with blood to his head and over his face. But before they could reach Campbell's house, there was another sally. Neath removed Campbell from the grasp of his rescuer, and observed:

> "You nuh dead yet. You have life still a blow in you"

and drew a knife across the injured man's throat. When Campbell who had been propped up against a tree fell from his hand, Neath then said:

> "You ..... you. A dead you fi dead."

Campbell was - "pelting out blood" and looked near to death. The attacking force finally withdrew, Neath, Douglas and Gentles being identified as part of that group.

On that evidence, the jury were entitled to conclude that a group of men which included these appellants had made a raid on the village of Woodside with the express intention of killing seven of the villagers and proceeded to inflict serious bodily harm on one of the inhabitants, whom they had been fortunate enough to capture, and he had succumbed to these injuries.

Three of the appellants raised alibis in their defence but a fourth, Neville Neath, admitted that he had been asked to campaign in Woodside, and said he had gone there. In passing a group of five men sitting on a bank near a church, a shot was fired from the group. Men from the van chased the group. Campbell who had a gun ran off by himself and was beaten but he never participated. He admitted that he put a knife at Campbell's throat and warned him about firing at people.

Although a good many grounds of appeal were filed on behalf of the several appellants, a fair number of these were abandoned and some counsel in helpfully adopting submissions on the same

points previously canvassed before us at the hearing, greatly shortened the proceedings.

Neville Heath:

On behalf of the appellant Neath, it was argued by Mr. Macaulay that since neither self-defence nor provocation arose on the facts, to have left such defences to the jury, would only have tended to confuse and hinder them in reaching a true verdict. We can dispose of this ground quite shortly. The issue of provocation arose from the unsworn statement of this appellant who had said that while engaged in his campaigning on behalf of the P.N.P. in Woodside he heard a shot fired as the van passed a group of men sitting on a bank. As he was getting out of the van, he heard someone say - "them aiming! Him aiming." He also saw Campbell with a gun. It was on the basis of that statement that the learned trial judge generously left provocation to the jury. After reminding the jury of the facts we have just rehearsed, he said this:

> "and they jumped off because of that provocation, and it would be a serious provocation, somebody firing at you."

There is an undoubted duty on a trial judge to leave for the jury's consideration any issue which fairly arises on the facts as part of his responsibility to ensure a fair trial. The duty cannot and does not depend on a defence being expressly raised by counsel. The occasions are legion when counsel from a tactical point of view raise for example the defence of self-defence but hope that a verdict of manslaughter may result. The circumstances are usually such as to show that provocation is the real issue. Provocation sometimes masquarades as self-defence. There was no complaint as to the correctness of the directions either as to self-defence or provocation, but what was being emphatically stressed was that the directions were wholly inappropriate in the particular circumstances of the case.

In our view, the learned trial judge was entitled to leave

the issue of provocation to the jury for it fairly arose having regard to the unsworn statement of the appellant. This Court in R. v. Hart [1978] 27 W.I.R. 220 at p. 235 made it clear that

> ".... on the trial of a person charged with murder it is the duty of the judge in his summing up to deal adequately with any view of the evidence which might show that the crime committed was manslaughter and not murder."

This dictum which appears in the headnote of Thompson v. R [1960] 2 W.I.R. 265 a decision of the defunct Federal Supreme Court of the West Indies was approved by this court in R. v. Hart (supra).

The question always will be, was there evidence sufficient to raise the issue for the determination of the jury? As the court pertinently asserted in the same case through the words of Kerr, J.A.:

> "Our concern here is with the existence of the issue and not with the probability of the jury finding provocation."

So our concern in this case was as to the existence of the issue of provocation and not with the probability of the jury finding provocation. We are satisfied that this issue arose for the jury's consideration and the learned trial judge would have gravely erred had he not left it to the jury.

What we have stated here applies with equal force in respect of self-defence. On the same evidence indicated in relation to provocation, this defence of self-defence arose. We cannot therefore accept the arguments of Mr. Macaulay that to leave such defences to the jury would only tend to confuse and hinder them in reaching a true verdict. This ground accordingly fails.

It was next said that the learned trial judge should have left manslaughter on the basis of lack of intent. We do not think there is any merit in this ground. There was clear evidence before the jury that the objective of the men who came into Woodside that afternoon was to kill, an objective which they

achieved. The evidence of intention was express. During the chase of the villagers, a voice was heard - "shot that man" followed by an explosion. Then there was also the announcement by a raider "Is seven ah unoo we come fi kill." Assuming this evidence about which complaint has been made on the basis of its inadmissibility, was properly admitted, then, there would plainly be no basis for leaving manslaughter in that there was a lack of the necessary intent.

In the unsworn statement of this appellant, he had admitted having possession of a knife which he said he used to draw across the deceased man's throat. Campbell did not come to his death by having his throat cut nor were there any injuries to the throat or neck. Neither on the prosecution case nor in the appellant's unsworn statement was there any material from which the jury could have been invited to consider whether the intention to kill or cause grevious bodily harm existed. We find no merit in this ground.

This leads us to consider the next ground argued which related to the admission of certain evidence said to be inadmissible. The ground was thus stated:

> "The learned trial judge admitted and left to the jury inadmissible evidence -
>
> (a) relating to a statement by persons in a crowd
>
> (b) the police statement of a witness
>
> (c) the evidence of Det. Cons. Daley inadvertently given in answer to the question:
>
> 'How he (meaning Campbell) appeared to you?'
>
> The response was:
>
> 'To me he was in a subconscious state, he couldn't move. I asked him several questions. He said - A Nickie Neath .....' "

We will deal with each of these pieces of evidence seriatim. As regards (a), there was evidence from a prosecution witness, District Constable Septimus Thomas, that while Neath held Campbell and was stabbing him in his head, some person from among the raiders shouted -

> "Is seven ah unoo we come fi kill - You lucky a you one we ketch now."

It was contended that statements of other persons who are together with an accused person, do not constitute evidence against him. We are not clear what learned counsel intended to convey by the use of the words - "who are together with an accused person." As we understand the position, where persons are engaged in a common enterprise the acts and declarations of one, in pursuance of that common purpose are admissible against the others. There was no authority cited to us in support of the bold assertion made by learned counsel. The cases show that the declarations may even be made by a person who is not charged. See R. v. Duguid [1906] 94 L.T. 887. In this connection we would refer to Phipson on Evidence 13th Edition where the learned authors discuss the topic at paragraphs 8 - 14 and 8 - 15 (pp. 110 - 111) and the cases in support in the footnote. So far as this case is concerned, the declaration of intention loudly exclaimed by one of the members of the raiding party was made in the presence of the appellant, contemporaneously with violence being inflicted upon the person of the victim by this appellant himself.

We think it right to add that there was evidence from prosecution witnesses Septimus Thomas and Earl Thomas that after a number of the appellants had left off beating Campbell, Neath returned to say "You don't dead yet. You have life still a blow in you ...." This evidence would tend to show that the intention of the raiders was not merely to beat any of the villagers who happened to be there, but to inflict serious bodily harm. We mention this because there was some suggestion that the learned

trial judge could have left the statement, although not attributed to Neath, to the jury to draw the inference that he came to beat. We are unable to accept this view for the reasons we have already stated. The evidence was admissible for the purpose of showing the intention of the raiders, viz., the intention to kill, which was a relevant issue and a necessary ingredient of the charge of murder.

The next piece of "inadmissible evidence" to which we were referred, was adduced in these circumstances. In the course of his examination-in-chief, the witness Earl Thomas had testified that he saw men beating and stabbing the deceased man. When cross-examined by counsel for Neath (not being counsel who now appears) he admitted after his deposition was put to him that he had not mentioned the word "stabbing" in it. He did not accept that it was being mentioned for the first time, but said he had done so when he gave his statement to the police. The learned judge overruled an objection taken by defence counsel, and allowed the statement to be tendered to confirm that the witness had in truth mentioned the matter before the trial.

It is clear from the circumstances detailed above that the witness was being accused of concocting evidence at the last moment. We understand the law to be that the statement is admissible as negativing the suggestion of recent fabrication. The matter was considered in R. v. Oyesiku 56 Crim. App. R. 240 and the English Court of Appeal (Criminal Division) adopted as good law dicta of Dixon, C.J., in Nominal Defendant v. Clements [1961] 104 C.L.R. 476. The headnote we think accurately reflects his statement of principle:

> "I can recall seeing these two men Neville Neath cutting Howard with a knife."

In our view the statement is to the like effect as his testimony before the jury. This satisfies the second condition to which we have alluded, because in the circumstances of the case, any distinction between cutting and stabbing the victim is far to seek. There was evidence before the court that the statement was given on the very day of the incident which plainly was the first available opportunity for the witness to have done so. In the result, all the conditions were satisfied that would make the evidence admissible.

The basis of the learned trial judge's ruling was not as we have indicated but sections 17 and 18 of the Evidence Act, which relate to contradicting a witness by confronting him with a previous inconsistent statement. Those provisions are wholly inapplicable to the present circumstances as we have endeavoured to indicate. In founding his ruling on that misconception the learned trial judge, we feel, fell into error. Seeing, however, that the evidence was admissible, there can be no prejudice to the appellant.

The third and final piece of "inadmissible evidence" occurred during the following colloquy between Crown Counsel and a police witness, Detective Contable Alphanso Daley:

> "Q. How he (meaning the deceased) appeared to you?
>
> A. To me he was in a subconscious state, he couldn't move. I asked him several questions. He said, 'A Nickie Neath. ...' "

Then there was an objection by defence counsel.

There is no doubt that whatever the witness intended to have said amounted to hearsay and on that account, plainly inadmissible. But the witness was not allowed to complete whatever it was he was intending to say. There was evidence before the jury of a great many things which Neath did and indeed said. This evidence could

hardly have prejudiced the appellant, and the circumstances here are therefore to be distinguished from R. v. Parker 45 Crim. App. 1. In that case, where one of the witnesses for the prosecution gratuitously gave hearsay evidence which implicated the appellant, it was held that -

> " ... the fair test in deciding whether the inadmissible evidence was so prejudicial and so likely to influence the jury that the matter could not be cured by the judge's direction was whether there was a probability that the improper admission of the evidence had turned the scale against the accused person."

There was no question in the instant appeal that the blurting out of - "A Nickie Neath ...." could turn the scale against the appellant for it was not said what he had said or done; it was an incomplete sentence.

Another of the grounds of appeal argued before us sought to challenge the learned trial judge's direction as to intention. It was said that although he had correctly directed the jury that it is the actual intention of the accused that they should find, erroneously directed them, that if any of the accused must have known that death or really serious bodily harm or injury would result from their actions, they may infer or draw the inference that that was his intention. He called our attention to R. v. Hyam [1974] Cr. App. R. 91. He complained that the judge was inviting the jury to apply an objective test in determining intention. The same ground was agitated before this court in R. v. Loxley Griffiths S.C.C.A. 31/80, October 26, 1981. We do not propose to say other than that this court held that these directions "are consistent with the decision in D.P.P. v. Smith [1960] 3 All E.R. 161 as modified by the decision in Hyam v. D.P.P. (supra) and are in no way objectionable or in conflict with Lang v. Lang [1954] 3 All E.R. 571."

The learned trial judge in the present case as in Loxley Griffiths was not concerned with the anthropomorphic man - the reasonable man - but with the appellant before the court. The use of the word "he" i.e. the accused - must have known that death or really serious bodily harm would result, from his actions then, they could draw the inference that that was his intention, makes that point quite clear. We do not propose to depart from the decision in that case, which we consider to be sound in principle.

We can now turn to an incident which occurred during the trial about which complaint has been made, and which would affect all these appellants. The ground was stated in this way:

> "The learned trial judge wrongly refused to discharge the jury after a note had been addressed to counsel suggesting that a prosecution witness Abner Thomas had been threatened. The learned trial judge obviously did not take into account the following matters:-
>
> (a) that the juror must have accepted the credibility of the witness Abner Thomas on a matter prejudicial to the appellant;
>
> (b) in the alternative, must have obtained the information from elsewhere contrary to the judge's directions that the case must not be discussed with anyone;
>
> (c) that the credibility of Abner Thomas was likely to have been accepted by the juror before all the evidence was in and the jury's retirement to the jury room."

In the course of the trial, counsel leading for the Crown brought to the court's attention a note which had been transmitted to him through the clerk. The note was written by one of the jurors, referred to as the 6th juror but later identified by name. The note recited:

> "Dear Counsel, please ask judge to warn those who are threatening Abner Thomas, please."

The juror when asked, admitted that it had emanated from him, but said he had written it on his own and not in consultation with the rest of his colleagues on the jury. He stated also that he did so "because of the words which ...." Presumably, he was about to add "Abner Thomas." On a voir dire which followed, when asked whether he had made up his mind regarding the "truthfulness or otherwise of the witness that was giving evidence," he replied:

> "I don't reach as far as that, Sir."

All counsel appearing for the respective appellants declined to cross-examine the juror. The word of the juror that he had not prejudged the witness as to whether his evidence was truthful or not, must therefore be accepted. Indeed the senior counsel then present, remarked:

> "May I just indicate that I accept that the juror involved acted bona fide, in what he did."

We would have thought that in the face of that candid observation from Queen's Counsel that it was accepted that the note meant no more than that the witness having complained of threats, it was a matter which the juror felt, the trial judge should have investigated. It is not to be supposed that a Judge of the Supreme Court would warn persons alleged to be threatening a witness without first causing the matter to be investigated. We are satisfied that there was no irregularity which could have any effect on the trial, once the bona fides of the juror was not being questioned and was not in doubt.

Re: Neath & Kerr:

Mrs. Macaulay who followed her husband, argued two grounds common to both these appellants. The burden of the submissions was that the directions of the learned trial judge with respect to discrepancies were singularly inadequate and unhelpful, in that he failed to point out that in the case of Neath, the witnesses Septimus Thomas, Earl Thomas, Abner Thomas and Wayne Ferguson at the trial had given different versions of what they saw from that

which they had given at the preliminary examination. In the case of Lorenzo Kerr, the learned trial judge had failed to point out that the sole eye-witness implicating him had at the trial given a different version of what he saw from what he said he saw at the preliminary examination, in very material particulars. It was said that the learned trial judge had directed the jury that the version at the trial were merely additions, thereby implying that the credit of the witness was not affected. In this regard, it was also urged that although the learned trial judge had given impeccable directions with regard to discrepancies, in general, he did not apply those directions to the particular circumstances of the case. He could not then have greatly assisted the jury.

We begin by noting that the learned trial judge regarded what was said at the trial, but not mentioned by the witness at the preliminary examination, as an "addition" and not a material omission or a discrepancy as Mrs. Macaulay suggested they were. He treated the matter in this way at pp. 500 - 501 of the transcript:

> "I might tell you, members of the jury, where there is a difference between a preliminary examination, because it is suggested he didn't say it at the prelim and therefore he has changed. In my humble opinion he wasn't changing from what he said in his deposition. Is just that he named the persons which he didn't name in the deposition, because if a witness isn't shown to have made a previous statement inconsistent with his evidence given by him at the trial, his evidence or that inconsistent portion given at the trial should or ought to be disregarded as unreliable. However, members of the jury, the previous statement is not evidence on which you try this case. It does not substitute evidence upon which you can act in this case. Neither does that previous statement become an admissible statement of the truth of the facts stated therein. It does not become admissible evidence of the truth of the facts stated therein. In this case it seems to me there is no change or inconsistency between the previous statement. It's only that names were not mentioned and he mentioned it now to you in the trial. And he gave reasons. For you to accept it or reject it.

> "The question for you in this regard is to ask yourselves: is the previous statement or deposition inconsistent or not?
>
> And if you regard it as inconsistent, if you cannot regard it as inconsistent, you consider whether it it material or not. As I said it's an addition, not an inconsistency. And you must remember that the previous statement or statements including the police statement have not been put in evidence, but the portions of the police statement, exhibit 1 that becomes part of the evidence in this case where it appears that the names were mentioned. The previous statement is put to the witness for the purpose to destroy his credit and for the purpose of making his evidence before you at the trial negligible, of no weight. But such previous statements can be used only for such purpose, that is for contradicting the witness. Is there a contradiction in a statement which gives certain facts and then at the trial additional facts are given? And the witness explains that certain questions weren't asked of him at the prelim, and he didn't give an answer to questions not asked. Accept it or reject it. Is he telling the truth or not. You saw the witness' demeanour."

It seems to us that if it is the fact that material facts are omitted from a deposition of a witness because, as the witness explained, he was not asked any question to generate those material facts, we cannot appreciate how proof of the omission means that there is a discrepancy which must inevitably affect the credibility of the witness. The approach of a judge to a situation where material omissions are discovered or, put another way, that material facts are being disclosed for the first time at the trial itself, is to tell the jury that they should look for any explanation put forward by the witness, as to his reasons for making the disclosure at the trial and not before. We think the learned trial judge was right in regarding the disclosure at trial as "additions" and not discrepancies.

The final two sentences in the extract we have just quoted from the summing-up - "And the witness explains that certain questions weren't asked of him at the prelim, and he didn't give an answer to questions not asked. Accept it or reject it. Is he telling the truth or not. You saw the witness' demeanour" are apt to bring this home to the jury.

We do not propose to detail the additions brought to our attention by counsel except to note that where these additions existed in the evidence of any witness they were brought home to the jury by the learned trial judge who also gave correct directions as to the jury's approach in that regard. It is not without significance, that despite these "additions", it was never suggested to any of the eye-witnesses called by the prosecution, that he was not present during the events which led to the death of Howard Campbell.

Mrs. Macaulay called attention to the fact that in so far as these discrepancies related to the appellant Kerr, the only witness who implicated him was Septimus Thomas and consequently they would affect the witness' credit materially. She said it called for a careful direction by the learned trial judge.

From what we have so far stated, it must be clear that we are not persuaded by that argument. In our opinion the fault of the summing-up is stylistic not substantive: it lapsed in prolixity, and the style does not read fluently. But it must be borne in mind that a summing-up is not an essay or a thesis but a speech or monologue with the jurors then engaged in the trial.

Lorenzo Kerr:

On behalf of this appellant, Mr. Macaulay urged one further ground. It was said that although the learned trial judge directed the jury as to the matters they should take into consideration in deciding whether an identifying witness is mistaken, he failed to direct them on two material points, namely:

(a) to warn them as to the charges of convicting on visual identification, and

(b) that the identification may be not as a result of a mistake but as to the incredibility of the witness.

In the prefatory stages of his summation, the learned trial judge called the attention of the jury to this question. We have him recorded at pp. 430 - 431 as saying this:

> "Now, members of the jury, the question of identification has loomed a bit in this case. And although Neath tells you he was there and you might think that identification should not be considered with him, there is a cutting according to a Crown witness or a stabbing by Neath of the deceased and Neath says I only held a knife to his throat and warned him. So in regard to that stabbing, you consider identification in regard to Neath whether he was the man who, although he said he put a knife at the throat, was the man that he saw, or one of those that he saw stabbing or cutting the deceased Howard Campbell. So I must emphasize that the question of the proper identification of each accused has been raised by the evidence, and arises in this case. And I must ask you to bear in mind that where the proper identification of an accused is important in relation to this charge, and which identification arises as appears from the evidence, both in chief and in cross-examination, you may find that an accused or any of them was not properly identified in which case you must find that accused not properly identified or where there was a mistake or you are in doubt whether there was a mistake on the identification, you find that particular accused not guilty."

At pp. 438 - 439, he deals again with this important issue, and gives the warning, counsel complains was not given, and points out that a faulty identification is as likely from an honest as a dishonest witness. He said this:

"I will further talk about it, as the case depends in regard to each of these accused, depends wholly or partially or substantially on the correctness of the identification in relation to each accused, especially as from the circumstances of the case, it is being put up for some of the accused, or all for that matter, that any identification is mistaken. I must therefore warn you that there is a special need for you to be cautious before coming to the conclusion that any of the accused is the right person charged. If you find that the case of murder against any accused is based solely or substantially on the evidence as to identification, you ask yourselves: was that particular accused correctly identified as being there, or being with others, who were attacking the deceased Howard Campbell, and was a party with those who were armed and was that particular accused a party to such action? The reason for being careful in regard to identification before convicting an accused of an offence, unless you are sure of the proper identification by any witness or witnesses who tells you that any of the accused is the right person charged, you must consider whether he is not making a mistake because if it is a mistaken identification, then an innocent person could be convicted.

There is also the possibility that a mistaken witness can be convincing, and that even a number of such witnesses can all be mistaken. You should consider carefully the circumstances under which the identification is purported to be made. Such matters as closeness to the particular accused, the proximity of the person identified to the person identifying. Whether it was dark. The time itself was around afternoon. For you to say whether it was daylight. Beleive he went to hospital about 3.30. For you whether it was dark, whether the lighting was poor, whether the sunlight was poor. We have no evidence that it was cloudy, or whether the view of the particular person was obstructed by any persons or by any object, and how long a period there was for such identification. All these are matters you must take into account. How many of you must have heard a person say: 'Oh, I saw at such and such a place, at such and such a time, and you were really nowhere at that place at that time. Such mistakes in recognition of even close relations and friends are sometimes made and might at some time or other have been made by one or other or some of you, members of the jury. So you

> "must weigh carefully the evidence of the circumstances including the excitement, if any, under which such identification was made, so that you do not make a mistake in coming to your verdict."

In our view the learned trial judge in directing the jury on the dangers inherent in visual identification had in mind R. v. Whylie 27 W.I.R. The language of the directions is the language of that case. We see no merit in this ground.

Dennis Douglas:

The first ground argued by Mr. Edwards on behalf of this appellant related to a ground argued by Mr. Macaulay, viz., the wrongful admission of the statement given to the police by Earl Thomas to show that his evidence at trial regarding the use of the word "stabbing" had been mentioned before. The matter has already been dealt with, but we confess that as the admission in no way concerned this appellant, we are unable to understand what prejudice to him was being suggested.

The next ground canvassed before us was stated in this way: "The jury were not given adequate directions on how they should approach and assess in law and fact the defence of alibi raised by this applicant."

A similar ground had been put forward on behalf of Lorenzo Kerr but not argued as it was conceded by learned counsel, Mr. Macaulay, that a clear and specific direction had, in fact, been given. Of course, this concession did not bind Mr. Edwards. We understood that the real burden of learned counsel's complaint, was that the learned trial judge although he had correctly pointed out to the jury that Septimus Thomas, one of the prosecution witnesses, had testified that he had not seen the appellant during the incident, he had not gone on to say that this evidence reinforced the alibi defence of the applicant.

The learned trial judge specifically told the jury that Douglas' defence was an alibi. At. p. 429 he said:

> "The defence of Douglas, number 3 and tendered by Mr. Hines, he was not there. In other words, if a man says when an occurence occurs I was not there, he is setting up a defence known as an alibi."

Having thus identified the defence, he made plain to the jury how they should approach that defence. These were the terms in which he directed the jury at pp. 429 - 430:

> "Having briefly told you what is the defence, I say to you if you accept the defence or you are in doubt whether to accept it, and even if you do not accept what each accused says and that of his witness in the case of number one, two and five, it may nevertheless leave you in doubt as to what the truth of the matter is. In that event, again it would be your duty to return a verdict of not guilty in regard to that particular accused who you have that doubt about. And, indeed, members of the jury, even if you were to reject every word that an accused said, and that of that accused's witness, you would not on that account alone return a verdict of guilty. You would still have to ask yourselves on the totality of the evidence and the unsworn statement that you have heard in this case, including the three exhibits tendered in this case: are we sure that this accused Dinnal, this accused Neath, this accused Douglas, this accused Kerr and this accused Gentles is guilty of murder in the circumstances presented by the Crown. Remember I told you they needn't have given any evidence. If you answer to that question, members of the jury is yes, you are satisfied and feel sure in respect of any of these five accused, then it would be your duty or open to you to return a verdict of guilty of the charge against that particular accused, bearing in mind as I told you earlier that an accused is not called upon to prove his innocence. And I will add, he is not called upon to satisfy you even as a matter of probability on any issue which you are required to resolve in this case."

We do not accept that the omission of the trial judge to say that the evidence of one of the witnesses for the Crown supported the defence of alibi amounts to a failure to give adequate directions. The judge had identified the defence, told the jury correctly how to deal with it, and indicated the witnesses who had in fact

identified the applicant as an assailant. It would have been surprising if such a glaringly stark fact that Septimus Thomas was the only witness to say he had not seen the applicant, had not been forcefully stressed in the address of counsel to the jury. Of course, that testimony of the witness was not the same as saying that the applicant was not in fact present. We do not see the need on the part of the learned trial judge to state the obvious. To omit to state the self-evident, is not to be inadequate, nor, more to the point, was it unfair to the applicant. This ground fails.

The next ground about which we think something need to be said, concerns the admission of certain evidence in the course of re-examination. In order to rebut the suggestion that the witness in mentioning the names of the accused was doing so for the first time at the trial was asked and answered as follows:

> "Q. Did you call them in the statement to the police?
>
> A. Yes sir.
>
> Q. And is it the same names?
>
> A. Yes sir."

It was argued that this evidence was inadmissible and therefore prejudicial. Both questions put to the witness were leading questions and ought not to have been allowed by the learned trial judge. We note in passing that there was no objection by counsel at the trial. We considered this point earlier in the judgment and have no desire to repeat ourselves. We are content to say that the evidence was admissible to rebut the suggestion of after-thought. Since the statement itself was admitted in evidence, and its contents known to counsel, we are quite unable to see wherein lies the prejudice to the applicant.

It was next said that the learned trial judge should have left manslaughter for the jury's consideration. We have earlier indicated that the case for the Crown supported a charge of murder.

The object of the raid was announced: it was to kill seven persons. This applicant's defence was an alibi. So neither on the Crown's case nor on the defence, were the jury called upon to consider other than a verdict of guilty or not guilty of murder. The learned trial judge left murder vel non and in our judgment, he was right to have done so.

Errol Gentles:

Mr. Frater abandoned some of the grounds, and was content to adopt the submissions of Mr. Macaulay and Mr. Edwards with respect to the appellant Gentles.

We propose finally to deal with a ground which was common to all these appellants, viz., that the verdict in each case was unreasonable and could not be supported having regard to the evidence. The basis of this argument was largely the admission of witnesses for the Crown that some parts of their testimony was being given for the first time at the trial. It would unduly prolong the judgment to set out all the evidence in this regard, but some examples, would be illustrative. In the case of Septimus Thomas, he admitted that he had not recounted the words "Is seven ah unoo we come fi kill" before. His explanation was that "he had not got such a long privilege," which we interpret to mean that he had not been given the privilege to answer because he had not been asked. Again, at the trial he admitted saying that Neath took a "cut off gun" from Gentles and beat the deceased all over his body. He explained that nothing had been said about this at the preliminary examination but he had mentioned the use of a "gun" in the statement he had given to the police after the incident. Another witness, Abner Thomas, said he had not called the names of the appellants Douglas, Neath and Gentles at the preliminary examination because he had not been asked any question to evoke that response, and moreover he had been threatened but he added - "but now is the time." At all the events he had mentioned the names in his statement to the police.

The events which led to the death of Mr. Campbell took place in broad daylight and occupied an appreciable length of time. There was more than ample time to observe the several assailants and to be able to identify them subsequently. The only appellant who did not appear to have been known to any of the witnesses was Gentles. But three of the four eye-witnesses spoke of the significant role he played in the affair. He was seen with a bulge about his person, and with something wrapped in his hand, then after a gun shot was heard, he was seen with a firearm. He was one of those who assisted in beating Campbell. His striking garb also appeared to have attracted attention: he was wearing military shorts - "soldier pants cut at the knee." His build seem also to be worthy of note. Abner Thomas described him as "the big stout guy." It is not altogether clear from the transcript whether the witness Ferguson knew the appellant Gentles before; he was not asked by counsel for the Crown and defence counsel was more concerned with whether the witness had mentioned the name "Gentles" before. Septimus Thomas did not know the appellant before the date of the incident and no identification parade was held so far as the transcript shows. At the trial, the experienced counsel who appeared made no point of it nor did counsel for Gentles press the matter. We are of the view that the three witnesses who implicated this appellant had every opportunity to observe him on the day of the crime.

In the event, we have carefully considered the case against each of these appellants and the defences offered. There was evidence, which, if believed, would result in verdicts adverse to these appellants. We are also satisfied that the learned trial judge in an overly exhaustive summing up adequately analysed the evidence against each of the appellants and clearly, correctly and fairly left the issues which arose on the evidence for the consideration of the jury. We are therefore not disposed to interfere with the verdict which we think to be warranted.

> "If the credit of a witness is impugned on a material fact on the ground that his account is a late invention or has been lately devised or reconstructed, even though not with conscious dishonesty, an earlier statement by the witness to the same effect becomes admissible if it was made contemporaneously with the event or at a time sufficiently early to be inconsistent with the suggestion that his account is a late invention or reconstruction. The trial judge must exercise care in assuring himself not only that the account given by the witness has been attacked on the ground of recent invention or reconstruction or that the foundation for such an attack has been laid, but also that the contents of the earlier statement are in fact to the like effect and that, having regard to the time and circumstances in which it was made, it rationally tends to answer the attack."

The concern of this court must be whether the learned trial judge properly exercised his discretion in ruling the evidence admissible. He must as is apparent from the principle enunciated -

(i) determine whether a case for applying the rule of evidence has arisen i.e. by being satisfied not only that the account given by the witness is attacked on the ground of recent invention or the foundation of such an attack has been laid;

(ii) determine whether the contents of the statement are in fact to like effect as his account given in his evidence;

(iii) determine that having regard to the time and circumstances in which the statement was made, it rationally tends to answer the attack.

We are not in the least doubt that the thrust of the cross-examination of the witness Earl Thomas was to suggest to the jury that the mention of "stabbing" was taking place for the very first time at the trial, and had not been mentioned at the preliminary enquiry. The precise question asked:

> "Am I not correct M.. Thomas in saying that you have introduced for the first time that Kerr stabbed Campbell with a knife in his head, for the first time?"

The contents of the statement on this point, were -