JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 122, 123, 125, and 126/03

BEFORE: THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.(Ag.)

R.V. OMAR GREAVES
PAUL LARMOND
MAURICE HANSE
TROY PETERKIN

Mrs. Valerie Neita-Robertson for Omar Greaves

Mr. Robert Fletcher for Paul Larmond

Mr. Walter Scott and Ms. Carolyn Reid for Maurice Hanse

Mrs. Deborah Martin for Troy Peterkin

Donald Bryan, Assistant Director of Public Prosecutions and
Miss Grace Henry Crown Counsel for the Respondent

February 16, 17, 18, 19 and July 30, 2004

HARRISON J.A. (Ag.)

On the 20th June 2002, the appellants Omar Grieves, Paul Larmond, Maurice Hanse and Troy Peterkin were convicted at the Circuit Court Division of the Gun Court on an indictment charging them jointly for the murder of Lancelot Todd committed on the 30th December 1996. They were each sentenced to imprisonment for life and ordered to serve 16 years, 18 years, 20 years, and 16

years, respectively, before becoming eligible for parole. We granted leave to appeal and treated the hearing of the applications as the hearing of the appeals.

The case for the prosecution was that during the day between 2:30 p. m and 3:00 p. m on the 30th December 1996, the deceased was shot and killed in the vicinity of Barry Street, Kingston not too far away from the Gold Street Police Station.

The deceased man's brother, Andrew Todd, testified that he was standing at the corner of Higholborn Street and Barry Street when the deceased stopped, spoke to him and continued on his way. He then saw six men, all armed with firearms coming from Foster Lane. Maurice Hanse, otherwise called "Gummy", who was one of the men ran towards the deceased and fired one shot from a MACK 11 submachine gun hitting the deceased in the region of the back of his head. The other men opened fire at the deceased as he was falling after which they all ran off. The deceased fell to the ground and, according to Andrew Todd, in a "split second" he ran up to where Lancelot lay, turned him over, looked at him and then ran off to summon his mother.

Todd said he also recognized the appellants, Paul Larmond otherwise called "Buddy Roy", Troy Peterkin otherwise called "Dubba" and Omar Grieves otherwise called "Silly Bread" as the men who fired at the deceased. He had known all four appellants for a number of years. He also recognized Dwayne Larmond among the gunmen, but that man was not charged.

Detective Sgt. Reynolds who was at the Gold Street Police Station at the material time said he heard explosions and after they ceased, he "cautiously" came out of the station. He saw the deceased struggling on the ground and saw three men who were running towards the deceased fire shots at him where he lay. Reynolds then fired a shot at the men whom he recognized as Omar Grieves, Troy Peterkin and Maurice Hanse. They fired back in his direction and ran up Foster Lane. He then hurried to the intersection of Foster Lane and Barry Street where he saw the said men returning to Foster Lane in a "tip-toed position". They fired at him again and ran back up Foster Lane.

Sgt. Douglas assisted Detective Sgt. Reynolds with the deceased who was taken to the University Hospital where he was pronounced dead.

After leaving the funeral parlour, Sgt. Reynolds began investigations into a case of murder. He visited the scene of the shooting and spoke with a Constable Powell who handed over four spent shells and a bullet to him. Sgt. Reynolds went to the Central Police Station and whilst there, Detective Sgt. Christie gave him a statement that was recorded from Andrew Todd. Warrants of arrest were prepared for the appellants. Two of the warrants were executed on Grieves and Larmond at the Central Police Station Lock-up on the 31st December 1996. Sgt. Reynolds said he told them that the warrants were in respect of the murder of Lancelot Todd committed at Barry Street on the 30th December 1996. Each was cautioned separately and Grieves said, "a Gummy and Bush cause dem thing ya fi happen". Larmond made no statement after he was cautioned. On the 12th

January 1997, Sgt. Reynolds saw and spoke to the appellant Peterkin at Central Police Station lock-up. He read the warrant to him and arrested him. When cautioned Peterkin made no statement. Finally, on the 31st March 1997 the appellant Hanse was also arrested and charged for the murder of Lancelot Todd. He was cautioned after arrest and he said, "A Silly Bread dem run dung the man near the station an say fi mek sure him dead. Mi never de deh".

The Crown's case was challenged by extensive cross-examination of Andrew Todd and Sgt. Reynolds on their evidence of identification. The defence put forward, however, in each of the appellants' cases was an alibi. Each made an un-sworn statement from the dock denying that he was on the scene on the day of the incident.

Petrona Bennett testified on behalf of the appellant Grieves. She said she was on the scene and saw a lone gunman who is known to her as "Hitman" fire a handgun, hitting the deceased in the back of his neck. The deceased fell to the ground and "Hitman" ran across the road. She went to the deceased, turned him over, lifted his shirt and, realizing that he was still alive, called out for someone to get the deceased's mother. She further testified that it was whilst she was walking away from the deceased that she saw Andrew Todd running towards where the deceased lay.

It was also part of the defence of Grieves and Peterkin that a deal was struck between Andrew Todd and the police whereby certain charges laid against Todd were dropped in order for him to testify against the appellants.

Grieves and Hanse further alleged that the murder charge was brought against them because Sgt. Reynolds had malicious feelings towards them.

Several grounds of appeal were filed and argued by Counsel on behalf of the appellants.

Omar Grieves

Mrs. Nelta-Robertson, for the appellant Omar Grieves, advanced five supplementary grounds in support of his appeal. She argued firstly, that the learned trial judge failed to adequately identify, examine and analyze the several issues relating to identification. In particular, she submitted that the learned trial judge failed:

> (1) to point out specific areas of weakness and how to assess the effect of those weaknesses; and
>
> (2) to identify the inconsistencies and discrepancies in the identification evidence.

Secondly, she argued that the witness Todd was a witness with an interest to serve but the learned trial judge failed to warn the jury of the dangers of relying on his evidence. Thirdly, she argued that the learned trial judge failed to direct the jury on the effect of Todd's bad character and its impact on his credit.

The identification issue

The Crown's case rested entirely on evidence of visual identification. So it was important that the learned trial judge should warn the jury of:

1. The special need for caution;
2. The need to examine closely the circumstances of the identification; and

3. The need to bear in mind, any specific weaknesses in the identification evidence.

Mrs. Nelta-Robertson in the course of her submissions agrees that the learned trial judge had quite properly directed the jury that the Crown's case rested on the issue of identification. She also agrees that the trial judge did warn the jury of the special need for caution, and that they should examine the circumstances of the identification in relation to distance, lighting, the time for observation and whether the men were previously known to the witnesses. She contends, however, that the trial judge failed to remind the jury of specific weaknesses in the identification evidence and to analyze the effect of those weaknesses. We were referred to the cases of **R v Keane** (1977) 65 Cr. App. R 247 C. A; **R v Fergus** (Ivan) (1994) 98 Cr. App. R 313 and **R v Bentley** [1991] Cr. L. R. 620 C. A.

In **Keane** (supra) Scarman L.J, at page 248 stated inter alia, as follows:

> "... It would be wrong to interpret or apply TURNBULL (*supra*) inflexibly. It imposes no rigid pattern, establishes no catechism, which a judge in his summing-up must answer if a verdict of guilty is to stand. But it does formulate a basic principle and sound practice. The principle is the special need for caution when the issue turns on evidence of visual identification: the practice has to be a careful summing-up, which not only contains a warning but also exposes to the jury the weaknesses and dangers of identification evidence both in general and in the circumstances of the particular case.
>
> Unfortunately the summing-up in this case falls short of the requirements of sound practice. The warning is

> muffled and confused: the weaknesses in the evidence are not fully exposed."

In **Fergus** (supra) it was held inter alia:

> That, (1) "had the specific weaknesses been properly analyzed, the judge would have been bound to withdraw the case from the jury and although counsel for the appellant at trial had failed to invite the judge to do so, the judge was still, in the absence of such a submission, under a duty to invite submissions if it was his view that the identification evidence was poor and unsupported, and withdraw the case from the jury, if appropriate".

In this case visual identification was a live issue so one needs to examine the quality of that evidence. Mrs. Neita-Robertson submitted that despite the learned trial judge's directions on visual identification, she ought to have analyzed this evidence for the jury in order for them to assess the effect of specific weaknesses on the evidence given by Todd. She argued that Dwayne Larmond was someone Todd had known for a period of four or five years before the incident, and since Todd testified that he might have been mistaken about Dwayne's identity, this error would certainly have affected the quality of his identification of the appellants.

Mrs. Neita-Robertson also argued that Todd had accepted that he had said on a previous occasion that he had only seen the back of one man, yet he was saying at the trial that he had seen the faces of all of the men. This was another weakness in his evidence that should have been pointed out to the jury. She further argued that Todd had described the group of men as a "raiding

party" and that this would certainly have affected his ability to see all six men clearly.

She submitted that between the accounts given by Todd and Sgt. Reynolds there were discrepancies and inconsistencies, and it was expected that the learned trial judge would have exposed the weaknesses in the accounts given by the respective witnesses. She argued that the credit of the witnesses would impact upon the correctness of the identification, and that it was necessary for the trial judge to analyze the identification evidence of both witnesses carefully since it was suggested by the Defence that they were not present and only came on the scene after the event.

Mr. Bryan, Counsel for the Crown, submitted in a very concise manner that the case against the appellants turned on the issue of credibility. Furthermore, he submitted that the evidence given by Todd and Reynolds that they knew the appellants and had recognized them on the scene was never challenged.

Firstly, the identification was by way of recognition by both Todd and Sgt. Reynolds who knew and had previously seen the appellant. Todd had known him for about seven years and he also knew him by his alias name "Silly Bread". He knew his family and where he lived. He would see him on Foster Lane, Kingston; he had spoken to him before and he last saw him about a year before the incident. Sgt. Reynolds had known Grieves for about two years before the incident and had known where he lived.

Secondly, the distance between the witnesses and the appellant was not great. The closest the men came to Todd was about 1½ chains but he was still able to observe Grieves. Sgt. Reynolds testified that Grieves was roughly about fifteen yards from him when he observed him.

Thirdly, in our view, the two eyewitnesses' observations of the appellant were not fleeting glances. Todd said he had seen Grieves' face for about eight seconds. When Sgt. Reynolds came out of the station he had seen Grieves' face for between seven to eight seconds as he and two others ran towards where the deceased was lying on the ground. Sgt. Reynolds had a second opportunity to see this appellant when the men returned to the intersection and fired shots in his direction.

Fourthly, both eyewitnesses testified that they recognized the appellant in broad daylight. This incident had occurred between 2:30 p:m and 3:00 p:m.

Fifthly, the question whether the eyewitnesses had an un-obstructed view of the appellant had to be determined. At the material time when Sgt. Reynolds said he saw the three men, they were running towards the deceased with short guns in their hands. It was then that he recognized these three men. The evidence given by Sgt. Reynolds clearly indicates that nothing was obstructing his view of Greaves and the two men as they ran towards the deceased. Turning now to the witness Todd, the learned trial judge directed the jury as follows:

> "You recall in cross-examination, he said that the men who were walking behind each other, he made them out at the same time, he said they were near to each other, two of them were side by side and others

> behind each other. He said he saw them side ways and front ways. He, however, admitted on a previous occasion, that he had said that the men came down sideways and that he had said that he had seen only the back of one".

The transcript of the evidence reveals that Todd was cross-examined as to whether or not the men were walking "crowded up together' or "one behind each other". His answer was that they were walking behind "them one another". When he was pressed as to whether or not he could see all of them at the same time, he answered, "yes, ma'am, I make them out, all of them". He agreed that the men were very near together but it was only two that were walking "side by side" and the others were walking one behind the other. At page 33 of the transcript the following dialogue takes place:

> "Q: So it would not be true that you saw the men all at the same time?
>
> A: Yes ma'am. I saw all of them at one time.
>
> Q: You were seeing the men from sideways, you were seeing the side of the men who you say come down the street?
>
> A: The side and the face because they were looking to my way.
>
> Q: They were looking to your way?
>
> A: Yes ma'am."

We are of the view that when one examines the evidence carefully Todd would have had an un-obstructed view of Greaves and the other men as they made their way towards the deceased.

Sixthly, one has to consider whether there were material discrepancies, inconsistencies or other weaknesses in the evidence of identification of the appellant. Mrs. Neita-Robertson submitted that Todd's account of the shooting was inconsistent with Reynolds' account in a number of respects. What ought to be borne in mind is that both witnesses were observing the incident at different points in time. Todd was on the roadway when the shooting began whereas Sgt. Reynolds did not exit the station until the second burst of gunfire had subsided. Furthermore, Todd had looked at the deceased whilst he was lying on the ground and before running off. By this time, Sgt. Reynold's had come out to the roadway and had seen three of the appellants shooting at the deceased as he lay on the ground. The swift action on the part of Todd and his running away to summon his mother, in our view, is capable of explaining why he was not seen by Sgt. Reynolds beside the deceased when the three appellants were firing shots at the deceased. With respect to the number of spent shells and bullets found on the scene, the evidence reveals that a number of persons had converged on the scene immediately after the shooting and Sgt. Reynolds did not return to the scene until about 4:00 p:m. This fact could explain why only those shells were found.

Counsel also argued that there were further inconsistencies in the evidence of both eyewitnesses with regard to the type of firearms the men were carrying. Todd spoke of a MACK11 and 9 mm revolvers whereas Sgt. Reynolds testified that he saw Grieves and two other appellants with short guns.

We have carefully perused the transcript and are quite aware that the learned trial judge did not specifically analyze any weakness in the identification evidence, nor did she use the word "weakness" when drawing the jury's attention to the witnesses' evidence on identification. We are satisfied, however, that nothing in **R v Turnbull** [1977] 1 QB 224, or in the subsequent cases, requires the trial judge to make a "list" of the weaknesses in the identification evidence, or to use a particular form of words, when referring to those weaknesses. We are of the view that the learned trial judge directed the jury in very simple and straightforward language about the need to examine the time each witness spent observing the men, their relative positions in relation to the witnesses and the kind of opportunity the witnesses had to recognize the perpetrators of this murder. Having regard to the cumulative potency of these facts we are of the opinion that the quality of the evidence of the visual identification of Grieves by Sgt. Reynolds and Andrew Todd was good and eliminated the danger of mistaken identification. It is also our opinion that the learned trial judge directed the jury in very clear language how they should deal with inconsistencies and discrepancies in the evidence. In her directions to the jury, the learned trial judge told the jury that some inconsistencies and discrepancies are material while others are immaterial. She also directed them that it was their duty to assess the demeanour of the witnesses and to find where the truth lies. Finally she said:

> "Now, if you find that a discrepancy is material, it is for you to say whether it goes to the root of the

> Crown's case, that is for you to decide how it impacts on the Crown's case. If you think it is immaterial it is open to you to disregard it".

Accordingly, we find no merit in this ground and it therefore fails.

Witness with an interest to serve and bad character issues.

Grounds 2 and 3 were dealt with and argued together by Mrs. Neita-Robertson. She submitted that Andrew Todd had an interest to serve; he was of bad character and fell within that category of persons in respect of whom a warning as to the dangers of convicting without corroboration ought to be given.

Todd admitted during the course of the trial that he had two separate murder charges preferred against him in addition to a Gun Court charge. He also admitted that some of the charges were disposed of due to the absence of witnesses and that there was retraction by a witness in respect of another. It was suggested to him that he had made a deal with the police to be rid of these cases in exchange for testifying against the appellants, but he denied these suggestions. He had also volunteered during cross-examination that the appellants had killed one of his aunts - in – law. Counsel submitted that in these circumstances, the evidence disclosed that Todd had an interest to serve and the jury ought to have been warned of the dangers of relying on such evidence.

Mr. Bryan, Counsel for the Crown submitted that Todd was not a witness who it could be said had an interest to serve. Furthermore, he argued that there was no evidential basis upon which allegations of malice could be based such as

to necessitate a warning in that regard. He referred us to the case of **R v Berry** (1990) 27 JLR 77, where Carey P (Ag.), had this to say at page 84:

> "The first question which we think we should decide is how the law stands at present. In our judgment, the true position is as stated by Ackner, L.J., (as he then was) in **R. v. Beck** (supra), 807 at pp. 812 and 813. At p. 813 in rejecting the view now propounded by Dr. Barnett and of counsel in that case he said:
>
> > 'While we in no way wish to detract from the obligation on a judge to advise a jury to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an improper motive, and the strength of that advice must vary according to the facts of the cases we cannot accept that there is any obligation to give the accomplice warning with all that entails, when it is common ground that there is no basis for suggesting that the witness is a participant or in any way involved in the crime the subject matter of the trial.'

His Lordship then continues:

> "This Court in an unreported decision – **R. v. Beverley Champagnie and Ors** S.C.C.A. 22, 23 and 24/80 dated 30th September 1985 accepted as the correct legal position, the opinion stated by the learned Lord Justice at p. 812, a part of which we have already quoted and continuing that extract said this:
>
> > 'But, submits counsel for the appellant, even though there is no material to suggest any involvement by the witness in the crime, if he has a "substantial interest" of his own for giving false evidence, then the accomplice direction must be given. Where one draws the line, he submits is a question of degree, but once the boundary is crossed the obligation to give the accomplice warning is not a matter of discretion.

> *We cannot accept this contention. In many trials today, the burden on the trial judge of the summing up is a heavy one. It would be a totally unjustifiable addition to require him, not only fairly to put before the jury the defence's contention that a witness was suspect, because he had an axe to grind, but also to evaluate the weight of that axe and oblige him, where the weight is "substantial", to give an accomplice warning with the appropriate direction as to the meaning of corroboration together with the identification of the potential corroborative material".* (Emphasis supplied)

> In our judgment there is no need for a special warning in the instant case but we do recognize that there is a duty on the trial judge in ensuring that the prisoner obtains a fair trial to advise the jury how to deal with the evidence either generally or specifically having regard to the particular issues to be determined..."

We have carefully examined the evidence in the transcript and can find no evidence to support the contention that Todd had an interest to serve. Neither has it been established evidentially that he was a man of bad character, in the sense that he was shown to be not worthy of belief. No evidence was presented to the Court to show that his evidence was tainted by an improper motive. The learned trial judge in directing the jury how to deal with the evidence of Todd said this:

> "Now, he also told you his brother and the accused were friends, but at the time of his death, they were no longer friends. Now, he was asked why he said that and he gave an answer. The answer he gave was that his brother and himself were no longer friends because they had killed his aunty-in-law. I must warn you, Mr. Foreman and members of the jury, I must implore you, members of the jury, completely

> disregard this bit of evidence given by Mr. Todd. Do not take it into account dismiss it from your minds, please. Place absolutely no weight on it".

In a further warning she said:

> "Now, Mr. Andrew Todd is a brother of the deceased man, Mr. Lancelot Todd, he is a close relative. Now, relatives might tend to be bias in giving evidence, which' affects one of their own but you do not reject a person's evidence simply because that person is a relative of the deceased. Now, what is important is that you observe the demeanour of Mr. Todd, analyze the manner in which he gave his evidence and ask yourselves, is he a witness of truth? Can I believe him or do I disbelieve"?

In our judgment there was no need for a special warning, but it was the trial judge's duty in ensuring that the appellant obtained a fair trial to direct the jury how to treat the witness' evidence. In our view, that duty was properly discharged. We, therefore, find no merit in the complaints and these two grounds also fail.

Paul Larmond

Mr. Robert Fletcher argued three grounds of appeal on behalf of the appellant Larmond. He argued firstly, that the learned trial judge failed to isolate the case for and against Larmond with an analysis of its strengths and weaknesses so as to enable the jury to properly consider the case against him separately from the other appellants. Secondly, he argued that Todd was a witness with a possible interest to serve and the learned trial judge failed to caution the jury about the possibility that "he may have had an axe to grind". He

finally argued that the learned trial judge in her summation misquoted the evidence against Larmond in a critical respect.

The separate treatment issue

The learned trial judge in directing the jury how to treat the case against each appellant said at pages 577 - 578 of the transcript:

> "...Now, they have all been charged with the offence of murder and this is because of a doctrine in law which is called a common design. Now, if the accused persons were part and parcel of a plot and planned to kill Mr. Todd, they could be convicted of the offence of murder by virtue of this doctrine.
>
> Where two or more persons agree to join together to commit an offence and that agreement is carried out and the offence is committed, then each person who takes an active part in the commission of that is guilty of it.
>
> Now, a person cannot be convicted of the full offence unless he was present at all the commissions of the offence and actively aided, abetted, and assisted in it. Now, before you can convict any of the accused men, you will have to be sure that, that accused man committed the offence; that he committed the offence himself or that- he did an act, or acts which was part of a joint plan to kill Mr. Todd. Now, simply put, you must be sure that they were all in it together.
>
> Now, as I have told you earlier, there are four persons who have been jointly charged in this offence. I must warn you that you should consider the evidence for and against each accused person separately. You should see what evidence has been adduced against each accused and decide whether, in relation to each, this evidence satisfies you, makes you feel sure of his guilt.
>
> Now, evidence which indicates one accused only, cannot be used as evidence against the others.

> Evidence which indicates one accused cannot be used against another. So, if 'the law finds one person guilty, it does not follow that all the others are guilty.
>
> Now, each person is entitled to have his case decided separately. So, if you find one person guilty or innocent, it doesn't follow that the others are guilty or innocent".

This direction was attacked on the ground that the learned trial judge did not deal with, or did not deal with in sufficient isolation, certain issues to afford the appellant Larmond a fair presentation of his case to the jury. These issues include:

1. The significance of the evidence of Sgt. Reynolds who said he saw the incident but did not see Larmond there.

2. The possibility that the police and Andrew Todd were conspiring to get rid of gang men in the area.

3. The possibility that gunpowder residue found on Paul Larmond's hand could have in fact come from a gun but may have had nothing to do with this incident.

It is correct that Sgt. Reynolds did not see Larmond on the scene but this could have arisen because he took some time to exit the station after the initial gunfire subsided. Andrew Todd, on the other hand, claimed to have been on the scene during the first shooting incident, and he testified that he saw one of the appellants shoot the deceased and the other three appellants fire shots at the deceased. The jury had the benefit of seeing and hearing the witnesses and it

would have been for them to determine which witnesses they were prepared to believe.

There is no evidence in the transcript which supports the contention that the police and Andrew Todd had conspired to "get rid of gang men in the area". In the circumstances, there was no need for the learned trial judge to have warned the jury in this regard.

There was also no need for the learned trial judge to have directed the jury that there was the possibility that gunpowder residue found on Larmond's hand could have come from a gun that had nothing to do with this incident. Such a direction would certainly have been inviting the jury to speculate on the evidence. The forensic tests revealed that Larmond had elevated levels of gunpowder residue on his hand and the trial judge had given proper directions to the jurors on how they should evaluate this evidence.

The learned trial judge, in our view, was quite careful in her directions to the jury and did warn them how to deal with the case of each appellant. We therefore find no merit in these complaints and this ground fails.

Was Todd a witness with an interest to serve?

We have already dealt with a similar ground that was argued by Mrs. Nelta-Robertson on behalf of the appellant Grieves. We are not persuaded at all that the witness Todd had an interest to serve. In the circumstances, there was no need for the learned trial judge to give any warning in that regard to the jury. There is no merit in this ground of appeal and it also fails.

The misquotation issue

At the trial the witness Reynolds said he had noticed three of the accused men "who were sitting in the dock" running towards the deceased with firearms in their hands and that the guns were short.

The learned trial judge however, directed the jury as follows:

> "...He went on to say the four accused men were with guns in their hands firing at Mr. Todd that was lying on the ground. He had known three of these men before. When he went out he fired one shot and the men ran out cross the roadway".

Mr. Fletcher submitted that since Sgt. Reynolds had purported to see only three men, none of whom was the appellant Larmond, this evidence stood as a major negation of the evidence of Andrew Todd who had placed Larmond on the scene. He further submitted that the difference between the two witnesses' accounts was not raised by the trial judge to allow the jury the option of accepting one witness and rejecting the other. Accordingly, he submitted that the misquotation had erroneously placed Larmond on the scene and further created the impression that even if he (Reynolds) did not know Larmond before, Larmond was definitely present. He also submitted that the misquotation had reversed potential evidence in Larmond's favour and confirmed the evidence of Andrew Todd creating double identification where before only a potential contradiction existed.

We are of the view that this complaint lacks merit. At the very end of her summation, the learned trial judge asked Counsel if there was anything that she

had omitted. She then corrected the error. This is what the record reveals at page 619:

> "MISS PYKE: It is just in respect of the identification, Sergeant Reynolds said he saw four, but in evidence he said he saw three, that is it, m'lady.
>
> HER LADYSHIP: Sergeant Reynolds is correct, he said he saw three, now if you believe the accused men and their witnesses, that they were not there on Barry Street, at the time of the incident, then, they must be acquitted".

Having regard to the foregoing extract, and the evidence on a whole, we are unable to agree that Larmond's defence would be prejudiced because of the trial judge's initial error. Accordingly, this ground also fails.

Maurice Hanse

Two grounds of appeal were argued on behalf of the appellant Hanse. Mr. Scott argued that the learned trial judge erred when she allowed in evidence the statement of a co-accused after caution, which statement was highly prejudicial to the appellant Hanse. Furthermore, he argued that the trial judge, having admitted the statement, failed to direct the jury that it could not be used as evidence against Hanse. It was also argued by Miss Reid that the learned trial judge's directions on inconsistencies, discrepancies, contradictions and irreconcilable differences were inadequate in that she failed to assist the jury by

relating the law to the evidence and by directing the jury as to how such matters were to be approached.

The statement of the co-accused after caution

The impugned statement is at page 262 of the transcript and it reads as follows:

> "Q. Okay, all right. Okay, yes, murder of Lancelot Todd and continue, what else did you say?
>
> A. I read the warrant to the accused Omar Grieves charging him with the murder of Lancelot Todd.
>
> When cautioned ...
>
> Q. Well-, tell us what you - yes, when cautioned?
>
> A. He cried and said...
>
> Q. Yes, what did he say?
>
> A. A Gummy and Bush cause dem thing ya fi happen"...

Mr. Scott complained that the statement made by the co-accused Omar Grieves, may have raised doubts in the minds of the jury as to the good character of the appellant Hanse and could have caused them not to give proper consideration to his alibi. He argued that the statement was prejudicial and inadmissible as evidence against Hanse, and that it certainly did not advance the maker's case any further. He submitted that the statement having been made, credited Hanse, at the very least, with knowledge of the crime and, at its highest, raised the probability of his having committed the offence with which he was charged. In the circumstances, the evidence having been let in, the learned

trial judge was under a duty to direct the jury to disabuse their minds of its effect. He also submitted that it was important for the trial judge to have warned the jury that what one accused uttered to the police under caution was not evidence capable of use against a co-accused whom the statement sought to implicate. Further and equally important, he submitted that the jury should have been advised that the information could not constitute corroboration of the evidence of the identifying witness.

Mr. Bryan submitted, on the other hand, that the jury was directed in unmistakably clear language as to the effect of the statement and how it ought to be regarded. Furthermore, he argued that the learned trial judge did discharge her responsibility by telling the jury that this evidence was not evidence against the co-accused and should be disregarded.

Now, the directions referred to at page 588 of the transcript clearly speak to two instances of prejudicial evidence. It is correct that the trial judge had inaccurately referred to "two accused persons who caused this to happen". But, it is quite obvious when one examines the evidence that she was referring to what Grieves said to Sgt. Reynolds after he was cautioned. None of the other appellants had used words after caution which blamed others for what had happened.

The authorities all state that it is the duty of the trial judge to impress on the jury that the statement of one prisoner implicating a co-prisoner who is tried with him jointly is not evidence against the co-prisoner and must be entirely

disregarded. See **Sumatapalage Reginald Gunewardene** 35 Cr. App. R 80; **Lobban v R** (1995) 2 All E.R 602 at 613 and **R v Kenneth Clarke and Others** SCCA 62 –64/94 (un-reported) delivered on the 30th July 1999. In the presnt case this warning was given by the learned trial judge in the following terms:

> "Now, he told you that when he was taken he said that it was the two accused persons who caused this to happen.
>
> Now, I must ask you, Mr. Foreman and members of the jury, to ignore this statement. It is not evidence that persons to which he referred to have committed an offence or have anything do with Mr. Todd's death.
>
> He also told you that he executed a warrant on Hanse and when Hanse was cautioned, he said, "A 'Silly Bread' dem run dung de man near the .station, sah, and seh fi mek sure him dead, but me neva de deh." Now, even if you believe that he had said that, I again implore you to disregard it. It is not any evidence, it is not evidence .against the person to whom he referred to as 'Silly Bread'. It is not evidence that he caused the death of Mr. Todd, so place no weight on this, ignore it. Do not take it in evidence".

Mr. Scott argued that these directions were inadequate and that they failed to give sufficient assistance to the jury for the following reasons:

(a) There was no point of reference by name that Grieves made the statement and that it concerned Hanse.

(b) The statement itself was not quoted in order to put it in proper perspective.

(c) The reference by the trial judge is inaccurate in that it refers to two other persons who caused

this to happen because there is no evidence that Bush was ever charged.

(d) When juxtaposed with the directions at lines 14-25 at page 588 it demonstrates the inadequacy of those directions.

It seems clear to us that the pronoun "he" as it appears three times in the first line of the passage quoted above refers to the appellant, Hanse, although the reference occurs in the course of the trial judge's reviewal of the evidence of Sgt. Reynolds. But in any event we do not think that the language of the trial judge could have caused any confusion in the minds of the jury, or that there is any possibility that the jury may have construed that direction otherwise than bearing reference to the appellant, Hanse. Indeed, we think it highly probable that the trial judge had said "Grieves" but was recorded in error as saying "he" at the stage where the pronoun is first recorded. There is no merit in this ground of appeal and for that reason it fails.

Inconsistencies, discrepancies, contradictions and irreconcilable differences

Miss Reid submitted on behalf of the appellant Hanse that there were fundamental irreconcilable discrepancies on critical areas of the evidence. She submitted that a major discrepancy arose on the evidence given by the eyewitness Todd when he said that the injury to the back of the deceased's head was inflicted by a MACK 11 submachine gun, whereas Mr. Daniel Wray a ballistic expert testified that the bullet recovered from the body of the deceased was a .38 calibre bullet that was discharged from a .38 revolver. Deputy

Superintendent of Police, Fred Hibbert, a ballistic expert who also testified on behalf of the Crown stated that from his experience guns can be adjusted to "fire all types of missiles". He also said that most MACK 11 firearms use 9mm and .45 mm cartridges. The evidence of Deputy Superintendent Hibbert having stood unchallenged, it is reasonable to assume that the jury must have accepted it. Further, such evidence having been accepted, it was open to the jury to find that the witness Todd, was mistaken as to the type of weapon that was being used by the appellant, Hanse, or, alternatively, if there was no such mistake, that that weapon had been adjusted to discharge .38 calibre bullets or, in the further alternative, that the deceased was not actually shot by the weapon being carried by Hanse (although the witness thought so) but by one of the firearms being carried by the other men, all of whom were seen to shoot at the deceased at some time. The jury's verdict is, therefore, justifiable either on the basis that they found that the appellant, Hanse, himself shot the deceased or, alternatively, that the deceased was fatally shot by one of the other men with whom the appellant was acting in a common design to kill or to cause grievous bodily harm to the deceased.

As to the variation between Todd's evidence and that of Mr. Wray, it is true that the trial judge did not direct the jury how they should deal with this particular discrepancy. The trial judge did, however, direct the jury generally as to how to deal with discrepancies and left it for them to determine who was speaking the truth.

At page 571 of the transcript the learned trial judge said this:

> "Now, you are entitled to assess the demeanour of the witnesses, that is, the manner in which they gave their evidence. You have to act on it and you have to decide who you think have spoken the truth. Now, in all cases, as in this case, you find what you call inconsistency and discrepancy, some are material to the issue in the case and some are immaterial.
>
> Now, a discrepancy may arise because of the inability of a witness to express himself or herself, or to remember or recall an event or because of his or her powers of observation. But a discrepancy, too, may be a warning of course, but you will have to decide which is applicable.
>
> Now, if you find that a discrepancy is material, it is for you to say whether it goes to the root of the Crown's case, that is for you to decide how it impacts on the Crown's case. If you think it is immaterial it is open to you to disregard it."

Nevertheless, Counsel argued that the learned trial judge should have directed the jury that in the event they preferred the evidence of Mr. Wray such a finding would undermine the credit-worthiness of Todd. We do not agree with this submission because very early in her directions to the jury the learned trial judge told them:

> "...Now, you may accept all of a witness' evidence or you may reject all, or you may accept a part and reject a part."

It was, therefore, a matter for the jury in determining the credit-worthiness of the witnesses to decide how much of a witness' evidence they were prepared to accept or reject.

In this case, common design was a live issue and we are of the opinion that the learned trial judge gave proper directions on this issue. This is what she said:

> "Now, they have all been charged with the offence of murder and this is because of a doctrine in law which is called a common design. Now, if the accused persons were part and parcel of a plot and planned to kill Mr. Todd, they could be convicted of the offence of murder by virtue of this doctrine.
>
> Where two or more persons agree to join together to commit an offence and that agreement is carried out and the offence is committed, then each person who takes an active part in the commission of that is guilty of it.
>
> Now, a person cannot be convicted of the full offence unless he was present at all the commissions of the offence and actively aided and abetted, and assisted it. Now, before you can convict any of the accused men, you will have to be sure that, that accused man committed the offence, that he committed himself or that, he did an act, or acts which are part of a joint plan to kill Mr. Todd. Now, simply put, you must be sure that they were all in it together".

The main issue in the case was one of visual identification and the jury had before them the evidence of Todd and Sgt. Reynolds with respect to their recognition of the appellants on the scene. Todd did testify that he had seen and recognized all four appellants whereas Sgt. Reynolds testified that he had recognized three of the men. Of course, there was also evidence that when Larmond was taken into custody on the day of the incident, elevated levels of gunpowder residue were found on one of his hands.

Miss Reid also submitted that the learned trial judge failed to give adequate directions on how previous inconsistent statements that were made by the witness Todd were to be treated. Counsel argued that the trial judge merely described these inconsistencies but did not direct the jury how they might affect the credit of the maker.

We were referred to the case of **R v Baker and Others** reported at (1972) 12 JLR 902. In that case Smith J.A stated inter alia, at page 912:

> "This duty is usually sufficiently discharged in our opinion, if he explains to the jury the effect which a proved or admitted previous inconsistent statement should have on the sworn evidence of a witness at the trial and reminds them, with such comments as are considered necessary, of the major inconsistencies in the witness' evidence. It is then a matter for the jury to decide whether or not the witness has been so discredited that no reliance at all can be placed on his evidence. If, however, there is evidence in the case in support of the charge, apart from the discredited evidence on which it is open to a jury to convict, the judge in our opinion, has no power and, thus, no legal duty to withdraw the discredited evidence from the jury leaving the other evidence only for their consideration. All the evidence must, *ex hypothesi*, be left to the jury as judges of fact with a strong comment by the judge against the acceptance of the evidence which he considers to be so discredited..."

With respect to Todd's earlier statements and his testimony in court, the learned trial judge said:

> "Now, in cross-examination, he had been asked whether he had made a number of statements previously, which conflict with his evidence here in court, but I must first tell you that the evidence which

> he has given here in court is the evidence, what he has said on a previous occasion is not evidence.
>
> Some of the statements, that is, the previous statements, that he made, he admitted, and some he did not. He admitted to some, and some of these were admitted in evidence. Now, you may take the fact that he made the statement, when you consider whether or not he can be believed as a witness of truth. The contents of the statement is not part of the evidence here at this trial.
>
> You may also take into consideration any explanation which he has given, with respect to "his making of these previous inconsistencies."

Later she said:

> "Now, what is important is that you observe the demeanour of Mr. Todd, analyze the manner in which he gave his evidence and ask yourselves, is he a witness of truth? Can I believe him or do I disbelieve"?

The learned trial judge in fact directed the jury on the impact of the witness' previous statements on his testimony and also directed them that they might take into consideration any explanation given by the witness with respect to the previous statements. It would be the jury's responsibility, therefore, to decide whether any explanation the witness gave had dissipated the inconsistency. All of this was done before the jury who, no doubt, would have assessed the consequential weight of the testimony.

We are of the view that the learned trial judge discharged her duty in directing the jury on Todd's previous inconsistent statements. She might not have reminded them of each inconsistency but she did direct them with regard to

the effect which the proved or admitted inconsistencies might have on his sworn evidence. In the final analysis it was a matter for the jury to say whether or not the witness had been discredited and, if so, to disregard his evidence.

It was also submitted by Counsel that there was a serious discrepancy in the evidence with respect to the shooting at the deceased whilst he was lying on the ground. She argued that despite six men firing several shots at him, the deceased had only sustained one injury. On perusing the transcript it seems to us that Todd's evidence in relation to the firing at the deceased has been misunderstood by Counsel. The transcript reveals the following dialogue after Todd testified that the man with the MACK 11 submachine gun had shot the deceased man:

"Q. Continue, what happened next?

A. Then the rest of them start to fire.

Q. Fire in what direction?

A. Lance same way, backway, when him nearly drop on the ground...

Q. Hold on. Tell us what happened to Lance?

A. Him got shot in the head.

Q. No, no you said something about him dropping

A. Yes, him dropping like backway, but him spin an drop on him face.

Q. What happened next?

A. Him drop and a run go up Foster Lane.

Q. What did you do?

A. Run go to him and turn him over pon him back.

Q. Yes?

A. Then same time I run off go tell my mother".

The evidence of Sgt. Reynolds, on the other hand, is that as the deceased lay struggling on the ground three of the men ran towards the deceased and fired shots at him where he lay. He (Reynolds) returned the fire and the men ran up Foster Lane.

It was a matter for the jury to determine whether there was a discrepancy here and, if there was, what impact, if any, it would have on the Crown's case.

Before leaving this ground of appeal we take the opportunity of referring to an extract taken from the Trinidadian Court of Appeal case of **Ramiah (Joey) v The State** (1997) 55 WIR 304 where Sharma J. A stated at page 335:

> "...Our criminal jurisprudence is replete with cases which are intended to guide trial judges; we think, however, that it would be unrealistic and impractical to ask a judge to point out all material discrepancies to the jury. After all, appellate courts have repeatedly said that **jurors today are intelligent and enlightened**; and by the same token the same appellate courts must not seem ready to erode that approach. It all depends on how a case is conducted, what are the salient issues; and the judge has to be very astute to ensure that the juror's attention is not diverted from the issues by exhaustive and copious directions." (emphasis supplied)

We endorse these sentiments and adopt the dicta of Sharma J.A in our consideration of the instant case. In our view, the learned trial judge left the issues fairly with the jury and we find no merit in the ground argued.

Troy Peterkin

Miss Martin argued three grounds of appeal on behalf of the appellant Peterkin. Firstly, she argued that the witness Todd fell within the category of being a person with an interest to serve thus raising the need for a special caution when the jury approached his evidence. Secondly, she argued that although the learned trial judge gave the usual "incantation of the law relating to identification evidence" she had failed to point out to the jury the weaknesses in the evidence. Thirdly, she argued that "the verdict is unreasonable having regard to the evidence".

Witness with an interest to serve

Miss Martin raised similar complaints to those argued on behalf of the appellant Grieves. We have already indicated that we find no merit in these complaints.

Visual identification

Miss Martin submitted that although the learned trial judge gave directions on identification and highlighted the need for the jurors "to examine the evidence in the light of all the evidence surrounding the circumstances" she failed to assist the jurors in an analysis of the evidence. She argued that the failure to analyze the evidence was most apparent in the following areas:

1. Although the learned trial judge had directed the jury that Todd testified that he saw the faces of the appellants when they were on Foster Lane, it was only on one occasion that she reminded them of a previous occasion on which he admitted seeing the Appellant Peterkin "side way".

2. Todd's evidence was that he had seen the back and the side of Peterkin and the faces of persons only on Barry Street for what amounted to glances but from the position where he was he could not have seen up Foster Lane.

3. The significance of retired Assistant Commissioner Wray's evidence in relation to the bullet recovered and the spent shells that were found on the scene. Miss Martin argued that a review was necessary in order for the jury to determine the credibility of the witnesses Todd and Reynolds.

Todd testified that he had seen the face of Peterkin whom he also knew as "Dubba", for a period of roughly eight seconds and that nothing was obstructing his view. They were at a distance of approximately 1½ chains from each other. He had known Peterkin for about seven years previously and had recognized him on the scene. He knew his family and where he lived. He had also seen him the day before the incident and would see him every day. They had spoken to one another and he knew that he frequented Ladd Lane and Higholborn Street. This was certainly not a fleeting glance situation at all.

Todd's ability to recognize Peterkin and the other two appellants whom he recognized was tested during cross-examination. He agreed under cross-examination that when the men came out of Foster Lane they were heading in a westerly direction away from him. When asked if at all times he saw their backs or sides, his response was, "and them face too, because them come down the

road looking to my way, the east way and south way". The cross-examination continued as follows:

"Q: When you say them look, they glance?

A: I don't understand.

Q: They look elsewhere or they stop and penetrated?

A: No, I don't think they see me.

Q: Well, is glance, in your direction?

A: Yes.

Q: So you saw their faces only when they glanced in your direction?

A: No miss, when they running up back the lane.

Q: Running up back which lane?

A: When they running up back the lane, up Foster Lane"

Sgt. Reynolds testified also that he had seen all of Peterkin including his face. He had seen his face for about seven seconds and nothing was blocking his view of the appellant. He had known him for about twelve months before the incident and knew where he lived. He would see Peterkin virtually every week and had last seen him some days before the incident.

We are of the opinion that the quality of the identification evidence of both witnesses was good thereby eliminating the danger of mistaken identification. Credibility was a major issue and the learned trial judge, in very clear directions, left it to the jury to decide which witnesses they thought had

spoken the truth. We agree with Harrison J A when he stated, inter alia, in **R v Anthony Rose** SCCA 105/97 (un-reported) delivered on the 31st July 1998 at page 8 of the judgment:

> "A summing up is not required to conform to any particular format nor to any set formula. What is required is a careful direction of the jury of their functions, the relevant law involved, what evidence to look for and how to apply that evidence to the law in order to find facts.
>
> ...Neither is a trial judge required to identify every bit of evidence capable of amounting to a particular aspect of proof. He cannot be faulted, in the circumstances of some cases, if he describes the nature of the evidence capable of establishing proof, gives some examples and leaves it to the jury to decide what evidence they accept and what inferences they may draw as satisfactory proof"

We, therefore, reject Counsel's submission that the failure to analyze the evidence of identification for the benefit of the jurors was a non-direction amounting to a misdirection so grave that the conviction of Peterkin ought to be set aside. We find no merit in this complaint.

The verdict is unreasonable

Miss Martin argued that the verdict is unreasonable and cannot be supported having regard to the evidence for the following reasons:

1. The evidence of the pathologist as to the build of the deceased, the nature of his injury and the trajectory of the bullet which caused his death is unchallenged;

2. The evidence of the ballistic expert is that the injury was caused by a .38 bullet from an ASTRA revolver;

3. The evidence of Todd does not support the forensic circumstances nor does the firearm he saw correspond with the bullet recovered from the body of the deceased;

4. The wanton shooting described by Sergeant Reynolds does not support the number and nature of spent shells found on the scene or the absence of further injury on the body of the deceased.
5. The evidence given by Petrona Bennet is more consistent with the trajectory and of the point of entrance into the body of the .38 bullet recovered by the pathologist and the gun she saw in the hand of the assailant.

She submitted that:

> "on the totality of the evidence, had there been a proper analysis of the evidence in support of identification of the persons present and their weapons, a proper and corresponding analysis of the forensic and pathology evidence and a proper invitation from the judge to the jury to assess the inconsistencies in the evidence as between witnesses and within the evidence of witnesses themselves, the jurors could have realized that there was no reasonable basis on which to return a verdict unfavourable to the appellant".

For the appellant to succeed on this ground he must show that the verdict is so against the weight of the evidence as to be unreasonable and insupportable: See **Joseph Lao** (1973) 12 JLR 1238 the headnote to which reads as follows:

> "Where an appellant complains that the verdict of the jury convicting him of the offence charged is against the weight of the evidence it is not sufficient for him to establish that if the evidence for the prosecution and the defence, or the matters which tell for and against him are carefully and minutely examined and set out one against the other, it may be said that

> there is some balance in his favour. He must show that the verdict is so against the weight of the evidence as to be unreasonable and insupportable."

We have given very anxious consideration to the conflicts that arose on the evidence. Those conflicts notwithstanding, the weight of the evidence shows that the appellants were all present and actively participated in the murder of Lancelot Todd. They were all armed with various types of firearms. They had all shot at the deceased. From the ballistics report there were different types of shells found at the scene. The indications are that at least five weapons were used. Furthermore, the Crown's case rested entirely on evidence of visual identification, and there was additional evidence in the case against the appellant Larmond. His hands were swabbed on the day of the murder and elevated levels of gunpowder residue were found on one of his hands.

The principle of common design was a live issue in this case. The evidence revealed that the appellants had joined together to commit this offence and that each appellant had played an active role in its commission.

There was unchallenged evidence that the appellants were previously well known to both eye-witnesses so the question that the jury had to decide was whether or not the witnesses had a sufficient opportunity to recognize the persons they claim to have seen. Credibility was also a live issue to be determined by the jury. The learned trial judge gave the jury adequate directions in relation to assessing the evidence of the witnesses and as to how they should

treat the submissions of Counsel. At the end of the day it was all a matter for the jury and they arrived at their verdict having seen and heard the witnesses.

We find no merit in this ground.

Conclusion

We conclude, therefore, that nothing has been urged which would warrant our interference with the conviction of any of the appellants. The appeals are, accordingly, dismissed and the conviction and sentence in respect of each appellant is hereby affirmed. Sentence is to commence as of the 20th day of September 2002.

COOKE, J. A. (Dissenting)

This dissenting opinion is that the convictions should be quashed, the sentences set aside and there should be a new trial. Accordingly, recourse to the evidence will be limited to those aspects which are necessary to explain my conclusion.

On the 30th of December 1996, between 2:30 p.m. and 3:00 p.m. in the afternoon the deceased Lancelot Todd was murdered. This took place at the corner of Barry Street and Gold Street in Kingston in close proximity to the rear entrance of the Gold Street Police Station. He succumbed to a gunshot wound to the back left side of the neck. A deformed bullet (the fatal missile) was found in the pharynx.

In a trial in the Home Circuit Court in Kingston, which was concluded on the 21st June 2002, Omar Grieves, Paul Larmond, Maurice Hanse and Troy Peterkin were convicted of this murder. They made applications to this court for leave to appeal which was granted and the hearing was treated as appeals.

A number of grounds were put forward by the appellants but there was only one of any substance which although subject to different formulations amounted to the complaint that the learned trial judge, on the case for the prosecution, did not sufficiently analyse the evidence adduced. This failing, it was submitted, resulted in the appellants not having had a fair trial and the resulting deficiency to do the requisite analysis was a non-direction amounting to a mis-direction in law.

The prosecution relied entirely on evidence of visual identification except that in respect of Larmond, whose hands had been swabbed on the day of the murder: there was in addition elevated levels of gunshot residue on his hands. The defence of the appellants was that of alibi. Further, there was the contention that the two witnesses who gave identification evidence were not present at the time of the murder. These witnesses were Andrew Todd, the brother of the deceased and Sergeant Bertland Reynolds.

Andrew Todd said that at the relevant time he was at the corner of Barry and Higholborn Streets. His deceased brother passed him, and after a brief conversation continued on his way along Barry Street. Very shortly after this, Andrew Todd saw a group of men emerging from Foster Lane. This Lane

crosses Barry Street and was fairly close to the intersection of Higholborn and Barry Streets and to the left of where the witness was talking to an acquaintance. When the men entered Barry Street they turned right along Barry Street and proceeded in the direction where the deceased was headed. Hanse ran up to him and "fire shot" which was "backway after him". After the deceased fell the other appellant "start fire" at him. The estimated distance between where the witness Todd was and where the murder took place was between one chain and one and a half chains.

In cross-examination this witness displayed familiarity with different types of firearms. He knew the difference between a .38 revolver and a Mack 11. A Mack 11 was an entirely different firearm from a .38 revolver in description. In his view a Mack 11 was a sub-machine gun with 'a clip, a long clip'. He was sure that Hanse discharged a Mack 11. The bullet that was recovered from the pharynx of the deceased was examined by Mr. Daniel Wray, a government ballistic expert, attached to the Forensic Laboratory. His opinion was that, this was a .38 calibre bullet. He said:

> "I found that it is a bullet of the type used in a .38 special firearm ammunition and that it was discharged from a firearm believed to be a revolver and it bore the class markings of a .38 Special R.G. Revolver."

There is therefore variance between the opinion of the ballistic expert and the evidence of Andrew Todd. This variance is significant in the assessment of the credit worthiness of this witness especially in view of the stance of the appellant at the trial that Andrew Todd was not present. At that

trial, a witness was called who swore that the deceased was murdered by a lone gunman and that none of the appellants were involved. In these circumstances it was incumbent on the learned trial judge to deal fully with the possible significance of this conflicting evidence and for the jury thereafter to come to its resolution. This is how the learned trial judge dealt with this aspect of the evidence:

> "Now, in cross-examination he said, Mr. Todd said, that he is familiar with guns. He said he knows a 0.38 Revolver. He knows a 9mm Revolver and he knows a AK47, and he said the person who did the shooting had a Mack 11. It is Mr. Wray's opinion, the Ballistic Expert, that the bullet taken from the body was from a 0.38 type or a 0.3 Revolver. It is for you to say what you make of it."

The treatment of the variance in the evidence as between Andrew Todd and the ballistic expert was at best perfunctory. It is not enough to say "It is for you to say what you make of it." The jury should have been specifically directed as to their approach in dealing with the variance. Did Todd in fact see the shooting?

It was the evidence of Andrew Todd that after the shooting ceased the men ran up Foster Lane. He then went and turned over the body of his fallen brother. He next ran off to tell his mother the dreadful news. Sergeant Bertland Reynolds was at the Gold Street Police Station. He heard explosions to the rear of the station. He cautiously went through the back gate of the station which is located at the corner of Barry and Gold Streets. He saw the deceased lying on the ground in the vicinity of the back gate of the Gold Street

Police Station. He saw the appellants Grieves, Hanse and Peterkin each of whom he knew before running towards the deceased with short firearms in their hands. There was an exchange of gunfire between Reynolds and those three appellants. The deceased was soon placed in a jeep and taken to hospital. Reynolds did not see the appellant Larmond. Neither did he see Andrew Todd. There is potential conflict between the evidence of Reynolds and that of Todd. Is each describing the same incident that resulted in the death of Lancelot Todd? Is it that after Andrew Todd turned over the body of his murdered brother Hanse Grieves and Peterkin returned to the scene from Foster Lane into which according to Todd the men had fled? These were issues which arose on the case as presented by the prosecution. These were issues with which the jury had to grapple in the consideration of their verdict. Regrettably, the learned trial judge did not alert the jury to them. Therefore there is merit in the submission that the learned trial judge failed to analyse the evidence presented by the prosecution thereby depriving the appellants of a fair trial. This failure in respect of this aspect of case as well as the deficiency in dealing with the variance between the evidence of Todd and the ballistic expert were non-directions which amounted to mis-directions in law.

Reid v. Regina (1978) 27 W.I.R. 254 is a case from our jurisdiction. In its advice the Judicial Committee of the Privy Council provided guidance as to the approach to be utilized in circumstances where because of error by the trial judge in the summation (as in this case) the verdict cannot be allowed to

stand. Lord Diplock who delivered the advice, in his analysis, categorized two "extreme" positions. The first pertains to that category of case where the prosecution has adduced insufficiency of evidence to discharge the burden which it is obliged to discharge. In such a situation a verdict of acquittal is the correct conclusion. The second is where it would be proper to apply the proviso to section 14(1) of The Judicature (Appellate Jurisdiction) Act. This is where on the state of the evidence any reasonable jury if properly directed would have convicted the accused. Then the conviction would stand. If, it is such, that the case does not come within either of these two categories then the question of whether or not there should be a new trial falls to be considered.

In respect of the first position (supra), it cannot be said that there was insufficiency of evidence. The quality of the evidence of identification given by either Todd and Reynolds did not suffer from such weakness that would have obliged the learned trial judge to withdraw their respective evidence from the jury. In respect of the second position (supra), it would not be proper to apply the proviso to section 14(1). This is so, because as earlier advanced, there are issues for the jury to resolve after having been adequately directed.

In suggesting factors for consideration in the determination as to whether or not there should be a new trial the advice in **Reid** was at pains to indicate that the factors enumerated were not "an exhaustive list."

At page 258 a-c this was said:

> "Their Lordships would be very loth to embark upon a catalogue of factors which may be present in particular cases and, where they are, will call for consideration in determining whether upon quashing of a conviction the interests of justice do require that a new trial be held. The danger of such a catalogue is that, despite all warnings, it may come to be treated as exhaustive or the order in which the various factors are listed may come to be regarded as indicative of the comparative weight to be attached to them; whereas there may be factors which in the particular circumstances of some future case might be decisive but which their Lordships have not now the prescience to foresee, while the relative weight to be attached to each one of the several factors which are likely to be relevant in the common run of cases may vary widely from case to case according to its particular circumstances. The recognition of the factors relevant to the particular case and the assessment of their relative importance are matters which call for the exercise of the collective sense of justice and common sense of the members of the Court of Appeal of Jamaica who are familiar, as their Lordships are not, with local conditions."

The factors suggested were:

> (i) The interest of justice that is served by the power to order a new trial is in the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge in the conduct of the trial or his summing-up to the jury." Page. 257 a-d.
>
> (ii) A new trial should be ordered if this would permit the prosecution to remedy evidential deficiencies.
>
> (iii) The Court should consider
>
> (a) The seriousness of the offence.
>
> (b) The prevalence of the offence

(c) The complexity of the case and the consequent length of time for which the court and the jury would be involved in a fresh hearing.

(d) The ordeal of the accused in going through another trial through no fault of his own.

(e) Availability of evidence which had been tendered by the defence.

(f) The particular circumstances of the commission of the crime and the current state of public opinion in our country.

In this case there are other factors to be considered. They are:

(g) A new trial would be the third trial.

(h) The appellants have been in custody since 1997.

(i) This long passage of time since the murder on the 30th December, 1996, will result in an inability to recall what then occurred.

There can be no doubt about the seriousness of this offence. The murder would not be improperly classified as an assassination. The prevalence of murders by way of illegal guns is of grave concern to the well-being of our civil society. The public shudders at the frightening incidence of these types of murder. This is not a complex case and should not involve a protracted period of trial. The danger of the ossification of the evidence as a result of the passage of time is remote. The identification evidence adduced by the prosecution by each of the witnesses Todd and Reynolds was, for what it was

worth, simple in delivery. The possibility of the prosecution filling any evidential gaps or providing a remedy for any deficiency does not arise in this case. The prosecution will stand or fall on the evidence on which it now relies. There has been no indication that the witness for the defence who was called would not be available at a new trial date.

In this case, the length of time that these applicants have been in custody and the ordeal of yet another retrial are weighty considerations. However, if the jury were to return a verdict adverse to any of the appellants, the learned trial judge would certainly take into consideration the time spent in custody in specifying the time to be served before eligibility for parole. In Jamaica, today, the public interest outweighs the considerations peculiar to these appellants. There should be a new trial. This new trial should be instituted with utmost expedition.

WALKER, J.A.

By a majority appeals dismissed. Convictions and sentences affirmed. Sentences for purpose of parole to commence on September 20, 2002.