JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 286/77 & 287/77

BEFORE: THE HON. MR. JUSTICE LEACROFT ROBINSON - PRESIDENT
THE HON. MR. JUSTICE ZACCA, J.A.
THE HON. MR. JUSTICE KERR, J.A.

REGINA

VS.

OWEN DONALDSON

AND

SEYMOUR EDWARDS

Mr. Dennis Daly for appellant Donaldson.

Messrs. K.D. Knight and B.E. Frankson for appellant Edwards.

Mrs. Z. Holness and Mr. M.J. Dukharan for the Crown.

July 9, November 28, December 5, 1979;
May 6, 1980.

KERR, J.A.

The appellants were convicted in the St. Thomas Circuit Court before Willkie, J. and a jury of the murder of Augustus Samuels and sentenced to death.

After hearing full and careful arguments from the Attorneys on both sides we allowed the appeal against conviction in respect of appellant Donaldson and ordered a new trial.

With respect to the appellant Edwards we dismissed his appeal against conviction, but were moved to set aside the sentence of death and substitute the following:- "To be detained during Her Majesty's pleasure." This was in response to the following unchallenged ground of appeal:-

> "Ground 5.
>
> The Learned Trial Judge erred in law in holding that in as far as sentence was concerned the age of the Applicant was relevant at the time of the trial and not at the time of the offence."

It was conceded by the Crown and as appeared from the record that the appellant Edwards was at the time of the offence under the age of 18 years. Subsequent to the Privy Council's decision in Baker and Another v. The Queen (1975) 3 All E.R. p. 55 the Legislature by Act 39 of 1975 amended the Juvenile Act and Section 29(1) thereof now provides:-

> "Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the Court that at the time when the Offence was committed he was under the age of eighteen years, but in place thereof the court shall sentence him to be detained during Her Majesty's pleasure................"

It is obvious that the learned trial Judge's attention was not drawn to this comparatively recent amendment and he erred in law in so sentencing the appellant.

Because of the order made in respect of Donaldson, we do not consider it necessary or prudent to review in depth nor comment upon the evidence or the trial Judge's review thereof except in so far as it is necessary to deal with the questions raised on appeal.

The deceased up to the time of his death lived in a two apartment house on a plot of land at Top Hill, Seaforth in the parish of St. Thomas. There he reared and kept goats in a mesh wire pen and cultivated vegetables. On May 14, 1977, his dead body was found in adjoining premises near the dividing fence with wounds to his head. Dr. Ronald Lampart who performed the post-mortem found:-

On external examination -

"(1) A laceration of the forehead approximately two and a half inches long extending to the skull." ....

"(2) There was an abrasion of his left hand."......

"(3) There is a contusion, that is a swelling, and small laceration of posterior aspect of the skull and neck, that is the back of the neck."

On dissection -

"(a) A fracture of the occipital region, that is the back of the skull."..........

"(b) There was a large haemotoma, that is a swelling."

In his opinion death was due to concussion following a fracture of the skull which could have been caused by direct impact either by being hit by a stone or falling and hitting the skull, and the contusion and abrasion by being hit by a stick.

The case for the prosecution rested in the main on circumstantial evidence supported in certain vital areas by admissions in statements - oral and written from the two appellants. Henry Brown, a lad of fifteen years said that on the Saturday, May 14, at about 10:00 p.m. while at home about ¼ mile away from that of the deceased he heard him bawling out and he recalled the words:-

> " 'Lawd God, oonu bus' me head, oonu bruck me hand oonu lick out me eye, ooi.' .... I heard him said the same things that I talk little while; seh, 'Lawd God, oonu bus' me head, lick out me eye. Oonu come in a me house and bruck me hand and lick out me eye.'"

The following morning about 7:00 a.m. as a result of what one Delroy Samuels told him, they both went to the home of the deceased and there on the adjoining premises near the line he saw the dead body of the deceased. He made an alarm and others came. He identified the appellants as persons he had known before - Donaldson for 2 months and Edwards over a year and that at the time they were living at the Johnson's yard about ¼ mile from the deceased and that on the Thursday before at about noon he witnessed an incident between the appellants and the deceased. They were on the land of the deceased cutting his fence and digging his yams and when the deceased called to them, they threw stones at him. He was cross-examined as to the opportunity of recognizing or identifying the appellants. Annette Johnson and her sister Veronica Kerr who was the girlfriend of appellant Donaldson gave evidence that both appellants were living in their yard at the time and on that Saturday evening between 6:30 - 7:00 p.m. they both

left the home. They described the clothes they were wearing down to Donaldson's tractor-bottom boots. According to Kerr, Donaldson returned about 9:30 - 10:00 p.m. and at that time she also heard Edward's voice. The following morning on her return from Seaforth she told Donaldson of the death of the deceased. Later she and Donaldson went to the Police Station at Seaforth. She denied in cross-examination seeing the Police beating or ill-treating either appellant. Norman Johnson, who shared a room with Edwards said that afternoon both appellants left for Seaforth and he never saw Edwards at about 9:30 p.m. and Donaldson the following morning. Sgt. V. Marshall the Senior Police Officer in the investigations on the morning of the 15th as a result of a report went to the home of the deceased and his observations at the scene included.

(i) An open back door with impressions on the door facing indicative of being forced open.

(ii) An axe by the steps leading to that door.

(iii) The bolt from the door lying on the floor.

(iv) A stone in a bed.

(v) A portion of the mesh wire forming the goat pen chopped down.

(vi) The body of deceased fully clothed lying in the adjoining premises.

(vii) Wounds to the forehead and back of head.

(viii) Impressions of a "tractor-bottom" boots at the goat pen.

The body was removed to the Princess Margaret Hospital. Later that morning he saw Donaldson and Veronica Kerr on the road near the gate of deceased. He took them in his Land Rover to their home where he took possession of Donaldson's 'tractor-bootom' boots and at his invitation they accompanied him to the Seaforth Police Station. Later Edwards was brought to the Station. Both men were interrogated in each other's presence. It is unnecessary to review what transpired except to note that during the interrogation Edwards admitted that he gave deceased one blow with a stick after he fell over the line. As a result of information received from Edwards and

from Veronica Kerr he returned to the home of the appellants and took as potential exhibits clothing and two sticks he had previously seen in a pit latrine there. On the night of May 15 about 7:30 p.m. he arrested them for murder and transferred them to the Morant Bay lock-up. Detective Corporal Wilbert Watson gave evidence of his assisting in the investigations. He said that about 11:15, May 16, appellant Edwards who was in the lock-up at Morant Bay spoke to him to the effect he would like to give a statement. He thereupon telephoned Mr. C.J. Todd, a Justice of the Peace, who attended at the Station about 15 minutes later. The appellant Edwards was taken to the C.I.D's Office where in the presence and hearing of the Justice of the Peace under the usual caution a statement written down by Watson at Edwards' request was taken and witnessed by the Justice of the Peace. On the following day as a result of a message he received he went to the cell where appellant Donaldson was. Donaldson told him that he had heard that Edwards had given a statement and although he was cautioned he said he wanted to tell his side of the story. Mr. C.J. Todd was again sent for - he attended and in the C.I.D's Office the appellant under caution in the presence of the Justice of the Peace dictated a statement which Watson took down in writing observing the usual formalities.

In a trial within a trial in the absence of the jury, the admissibility of both statements were strongly challenged on the ground that they were not voluntary - Watson, Todd and Marshall were extensively cross-examined. Todd as to the circumstances of the taking of the statement and whether in relation to Donaldson he was absent from the room during the taking of the statement. Watson and Marshall denied the suggestions that ill-treatment and/or threats were meted out to the appellants by themselves or any one to their knowledge. Edwards gave evidence of being taken to the guard room at Seaforth and seeing Donaldson with only his briefs on; of being made to sit on the floor, of being beaten and that he was kicked on his testicles and had to be taken to the Doctor and that the statement he gave to Watson

was under the fear of being beaten again. He was cross-examined at length by Counsel for the Crown. He called Constable Hines who said he took him to the Doctor sometime in May but the medical journal bore date 20th June, 1977. After lengthy submissions on the question of admissibility the learned trial Judge admitted the statement of each accused.

It is unnecessary to refer in any detail to the contents but each appellant placed himself on the scene with the deceased at the material time but denied striking the fatal blow.

There was in relation to both statements an encore before the jury in the cross-examination of the relevant prosecution witnesses. In the case of Edwards the issue before the jury was simple and clear cut. What weight if any to be given to the statement having regard to the circumstances (such as they may find) under which it was given. For Donaldson the issue was more complex - for in addition they had to consider the genuineness or reality of the statement i.e. whether or not the material facts or some of them therein came from the lips of the appellant or were added or fabricated by Constable Watson during the absence of Todd, the Justice of the Peace who had been clandestinely lured away or that when he signed the statment he was led to believe that he was signing a "charge sheet".

In defence Donaldson gave an unsworn statement from the dock in which he spoke of meeting appellant Edwards at Seaforth - and at his request going with him along the road towards Top Hill; of on reaching Johnson's premises refusing to go any further with him along a certain road but turning back and that some minutes after Edwards returned and joind him. He never went near the premises of the deceased nor did he see the deceased that night.

This was materially different from the written statement in evidence and in particular that he had gone with Edwards to the premises of the deceased and he flung a stone at the deceased as he was coming towards him as he did not know the intention of the deceased. In his statement from the dock he averred that at the Seaforth Police Station his clothes were taken off, he was put to sit

on the floor, bastinadoed and boxed and when he denied killing the deceased Sgt. Marshall kicked him in the side. That while at Morant Bay he was taken to a room where Watson and the Justice of the Peace were. Watson was writing - the Justice of the Peace was away for twenty minutes while Constable Watson questioned him and when the Justice of the Peace returned he asked the Justice of the Peace to sign what he was writing and that he the appellant signed what was purported by Watson to be a charge sheet.

Edwards gave evidence on oath of being in Seaforth the night in question of meeting Donaldson there; of buying flashlight batteries and of asking Donaldson to follow him to gather some bean sticks he had left by the road; that on the way Donaldson complained that it was too far and turned back; that he collected his sticks and in passing a yard a dog ran at him and then a man ran at him and he flung a stick at him and ran away to his grandfather's yard. Next day he heard of the man's death - he did not then know his name.

While on the road four men came and bound him and took him to the Police Station where he saw appellant Donaldson "strip naked." He was told that if he did not say it was he who killed the man they would beat and kill him - so "because me no want no more lick me tell them say a me." Both Watson and Marshall were at the Seaforth Police Station when he was being beaten. When he was being transferred to Morant Bay Marshall threatened him and that the statement which he gave at Morant Bay was because he was afraid of getting more beating. He was cross-examined at length against the background of evidence given by certain witnesses for the prosecution. He said he had seen the deceased before but did not know he was "Gussie" - he did not know if the stick he flung caught the deceased. He was unable to account for the blood on the shirt he wore that night and he denied the truth of all the important particulars in the cautioned statement when put to him in cross-examination.

Leave was sought and granted the Attorneys for the appellants to argue a number of supplementary grounds of appeal in lieu of those filed with the Record.

Of those in relation to Donaldson only the following merited our careful consideration:-

"Ground 6 -

That the learned trial judge's comments (p. 568) that it was 'grossly improper for the accused man to seek the refuge of the dock and at the same time make serious allegations of criminal misconduct" by crown witnesses', went beyond the permissable boundaries of adverse comment which a trial judge is entitled to make of an accused who gives an unsworn statement, and gravely prejudiced the defence."

As the basis for his submissions we were referred to the following passages in the summing-up:-

"I will remind you of the evidence in relation to the statements. Before doing so, however, you remember, as I told you, Sergeant Marshall was cross-examined rather severely by both Counsels and suggestions were made to him that he had threatened and beaten Donaldson; the same thing about Edwards, but you are concerned about Donaldson now. Now, some very serious allegations were made by Donaldson through his counsel on the conduct of Sergeant Marshall. Now, Donaldson gave a statement from the dock as was his right. You remember when he was called on he was told that he could say nothing at all because there is no onus on him to prove his innocence; or he could make a statement from the dock where he would not be cross-examined, or he could go and give sworn testimony where he would be cross-examined, and he elected to give an unsworn statement from the dock where he can't be cross-examined. As I told you, it is quite proper: He was exercising his right, but that right does not extend to making very serious allegations against a police officer of misconduct, criminal misconduct. If you are going to make those allegations against the police officer you should go and give sworn testimony so it can be tested just as how Sergeant Marshall was subjected to cross-examination and testing of his testimony that these statements were given voluntarily and freely, and it is grossly improper for the accused man to seek the refuge of the dock and at the same time make serious allegations of criminal misconduct on the part of Sergeant Marshall, and you bear this in mind when you come to consider the evidence as to whether what this man says is true or what Sergeant Marshall says is true. You bear in mind that he made a statement about it, that the statement was not tested in cross-examination - because this is how you test a statement a person makes, in cross-examination, as to whether he is telling the truth."

again at page 569:-

"As I told you before, it is improper for him to seek the refuge of the dock if he is making serious allegations of serious misconduct on the part of the police."

and again at page 578:-

> "The accused man has not gone and given - gone into the witness box where his allegations, his evidence of these allegations could be tested. He sought refuge in the dock to make these allegations against the police officer and the Justice of the Peace because if it is so it would be criminal misconduct on their part."

Mr. Daly frankly conceded that it was proper for a trial judge to comment on an accused making a statement from the dock instead of giving evidence on oath and in the instant case having regard to the nature of the defence some comment was to be expected but contended that in doing so, the learned trial Judge went beyond the permissible limits by telling the jury in effect that the appellant had no right to make certain allegations in his statement from the dock, and that this misdirection denied the appellant a fair consideration of a vital issue in the case. He sought support for his submissions in pertinent passages from a number of decided cases including R. v. Mutch (1973) 1 All E.R. 178; R. v. Sparrow (1973) 2 All E.R. 129; and D.P.P. v. Walker (1974) 1 W.L.R. 1091.

In reply Counsel for the Crown submitted that the summing-up on this aspect of the case should be considered as a whole and adverted our attention to other passages and in particular the following (pp. 625-626):-

> "Donaldson did not give evidence, he made a statement from the dock and as I told you before in connection with his defence, it is perfectly legitimate for him to do so. Remember the learned registrar called on him and told him he could do one of three things. He could either say nothing, and the reason for this is because there is never any burden on an accused person to prove his innocence, in this country. He is presumed to be innocent unless you by your verdict say he is guilty. The burden is on the Crown to prove his guilt to your satisfaction. So he was told that he need not say anything at all or he could go in the witness box and give evidence on oath where he is liable to be cross-examined or he could stay in the dock and give a statement from there. He elected to stay in the dock and give a statement. It is a right. It is not a privilege, it is a right that he has and any person who exercises his rights under the laws of this country, it cannot be held - the exercise of this right - to his prejudice. In other words, you can't say, 'because him stay there and talk I going find him guilty', otherwise the right would mean nothing.

> It was a right that he has and it is a right that he utilized and you can't infer anything prejudicial to him in regards to the exercise of that right. It is for you, however, to say what weight you are going to place on the statement that he has given because you have to bear in mind that what he said was not tested in cross-examination: This is how you evaluate and assess evidence given by a person, when it's tested in cross-examination. So what he has said is not evidence in the case, it is a statement he has given unsworn. But it is a matter - he has said, you have heard it, and you must say what weight, what value, you place on it."

Further she argued that in the light of this passage which followed those passages referred to by Mr. Daly such prejudicial effect, if any, would have been effectively removed. In any event, having regard to the conduct of the defence the comments were perfectly proper. In this regard she relied on dicta in R. v. O'Neill & Ackers (1950) 34 Criminal App. R. 108.

It is beyond debate that a trial judge may comment on the failure of an accused to testify. The nature of the comments understandably will depend upon the circumstances of the particular case. The instant case having regard to the nature and conduct of the defence fell within the type of cases in which comments on the failure of the accused to testify may be expected as categorized in D.P.P. v. Walker (supra) at p. 1096.

As was said in R. v. Sparrow (1973) 2 All E.R. at p. 135:-

> ...."if the trial judge had not commented in strong terms on the appellant's absence from the witness box, he would have been failing in his duty. The object of a summing-up is to help the jury and in our experience a jury is not helped by a colourless reading out of the evidence as recorded by the judge in his notebook. The judge is more than a mere referee who takes no part in the trial save to intervene when a rule of procedure or evidence is broken. He and the jury try the case together and it is his duty to give them the benefit of his knowledge of the law and to advise them in the light of his experience as to the significance of the evidence; and when an accused person elects not to give evidence, in most cases but not all, the judge should explain to the jury what the consequences of his absence from the witness box are and if, in his discretion, he thinks that he should do so more than once, he may; but he must keep in mind always his duty to be fair."

The question to which we gave our anxious consideration was whether or not the directions of which complaint was made were fair, having regard to all the circumstances and in the sense that the issue to which they related was fairly left to the jury for their determination.

The jury's careful assessment of the cautioned statement was vital as in that statement was an admission of being on the scene and being involved with the co-accused in an incident with the deceased on the fatal night and if this was accepted by the jury it effectively destroyed the defence that the appellant Donaldson never was on the scene at the material time. It was an important link, perhaps the most important one, in the case for the Prosecution.

In the attack upon the voluntariness and genuineness of the statement the appellant's Attorney in cross-examination put suggestive questions involving serious imputations on the character and integrity of Police Officers Marshall and Watson and the Justice of the Peace, Mr. Todd. The appellant Donaldson's election to make an unsworn statement denied the prosecution the opportunity of cross-examining him not only as to the allegations but as may be permissible under the Evidence Act. Section 9(f)(ii) as to his own character. Clearly the situation demanded comments from the trial judge. In R. v. O'Neill & Ackers (supra) at p. 111, Lord Goddard, C.J. in the Court of Criminal Appeal in commenting on a similar situation had this to say:-

> "In this case, a violent attack was made on the police. It was suggested that they had done improper things, and indeed, Ackers repeats that suggestion in his notice of appeal. The applicants had the opportunity of going into the box at the trial and explaining and supporting what they had instructed their counsel to say. They did not dare to go into the box, and, therefore, counsel, who knew that they were not going into the box, ought not to have made these suggestions against the police. It is one thing to cross-examine properly and temperately with regard to credit, though it is very dangerous to do so unless you have material on which to cross-examine, and with which you can confront the witness. It is, however, entirely wrong to make such suggestions as were made in this case, namely that the police beat the prisoners until they made confessions, and then, when there is the chance for the prisoners to substantiate what has been said by going

into the box, for counsel not to call them. The Court hopes that notice will be taken of this, and that counsel will refrain, if they do not intend to call their clients, from making charges which, if true, form a defence but which, if there is nothing to support them, ought not to be pursued."

We note with interest that in Archbold's 38th Edition - paragraph 527 the following:-

"Rules Approved by the Bar Council 1950.

....

The Rules headed "cross-examination" were first published in November 1950. It is submitted that this may be material in resolving the apparent conflict between observations of Lord Goddard in R. v. O'Neill (1950) 34 Cr. App. Report............

Cross Examination.

....

If an accused person instructs his counsel that he is not guilty of the offence or offences with which he is charged but decides not to give evidence upon his trial, it is nevertheless the duty of counsel to put his defence before the court to the extent, if necessary, of making positive suggestions to witnesses.

CROSS-EXAMINATION WHICH GOES TO A MATTER IN ISSUE

(2) In such cross-examination it is not improper for counsel to put questions suggesting fraud, misconduct or the commission of any criminal offence - (even though he is not able or does not intend to exercise the right of calling affirmative evidence to support or justify the imputation they convey), if he is satisfied that the matters suggested are part of his client's case and has no reason to believe that they are only put forward for the purpose of impugning the witness's character."

The phrase "the shelter of the dock" used by the trial Judge occurred in Charles James v. R. (1959) 1 W.I.R. p. 117 at p. 125:-

"In the present case the trial judge did point out to the jury that the appellant was not bound to give evidence and that it was for the prosecution to make out the case beyond reasonable doubt. He also told the jury his reason for making the comment that the appellant had not given evidence on oath, that is that Ogle and other witnesses had been accused by the appellant of a conspiracy to frame him and that this accusation had only been made from the shelter of the dock."

We note however that in the extract from the trial Judge's summing-up as set out in the judgment no such phrase occurs and such passages as were quoted therein seem to us impeccable and within the permissible limits.

In the instant case the Attorney for Donaldson in cross-examination having put questions impliedly casting imputations on the character of the witnesses for the prosecution had the appellant Donaldson failed to support them with assertions from the dock then those suggestions having been denied by the witnesses would be empty and unworthy of any consideration whatsoever. It has been laid down in a number of cases including D.P.P. v. Walker (supra) and as they were directed in this case by the trial Judge that the jury should give the statement from the dock such weight as they, the jury, thought it deserved. Had the appellant not included these allegations in his statement from the dock there would be nothing from him to be considered by the jury in relation to this important issue.

The learned trial Judge in dealing with the appellant's failure to testify told the jury in effect that his right to make a statement from the dock did not extend to include those assertions which to us were clearly in keeping with the questions put in cross-examination. In our view those assertions were relevant to the particular issue and generally were in keeping with his defence and in telling the jury he had no right so to do was a misdirection.

It is not always easy to determine whether or not the comments of a trial judge are likely to preclude a jury from giving a fair consideration to an issue. In the particular passage at p. 568 the trial Judge may very well have intended those remarks to be treated as comments but by making them a part of his directions on the right to make a statement from the dock and by telling them those assertions were outside that right he clothed them with the mantle of directions on the law. Comments by a trial judge may be disregarded by the jury but directions on the law (and as they were in effect told by the trial Judge) must be accepted without reservations. Whether or not there is merit in the implied criticism in the Bar Association Rules (supra) in relation to the dicta in R. v. O'Neill & Ackers (supra), as was intimated by this Court in R. v. Alfred Hart, Supreme Court Criminal Appeal No. 154/77 delivered July 12, 1978, the didactic dicta of an appellate tribunal may not

always be appropriate in a summing-up to a jury.

Accordingly, notwithstanding that the summation was in all other respects full, fair and free from fault, we were of the view that this misdirection deprived the appellant of fair and careful consideration by the jury of an issue which was vital to the determination of guilt or innocence. For these reasons we treated Donaldson's application for leave to appeal as the hearing of the appeal, we allowed the appeal but held that the interests of justice would be best served by ordering a new trial.

We now turn to the grounds of appeal argued on behalf of the appellant Edwards:-

Supplementary Grounds filed June 7, 1979.

"Ground 1:

> The Learned Trial Judge erred in law when he told the jury pursuant to their request, "that there cannot be any inspection of the locus in quo after completion of the summing up", thus depriving the jury of vital assistance which they sought to properly assess the defence and to the prejudice of the Applicant."

In support Mr. Knight referred to the following passage from that venerable case, R. v. Martin (1865) (1865 - 72) Vols. 1 and 2 L.R. Cases at p. 378 - 26 L.T. 779:-

> "The first objection to the conviction was, that the jury were permitted to view the urinal after the summing-up of the learned judge. We are unanimously of opinion that there was no irregularity, and no impropriety in the learned judge allowing the jury to have that view. It must always be discretionary on the part of the judge to allow a view, and he should grant it with proper caution to the jury not to receive any communications from the witnesses or otherwise whilst having the view - per Bovill, C.J."

He submitted that a visit to the locus in quo simpliciter should be distinguished from a visit at which witnesses attended and gave a demonstration.

The following appears from the Record:-

"Jury retires at 10.13 a.m.

....

10:35 A.M.

CROWN ATTORNEY:	M'Lud, I just got a note that the jury would like to go to the locus.
HIS LORDSHIP:	The what?
CROWN ATTORNEY:	The locus.
HIS LORDSHIP:	Well, can the police arrange that?
COURT SERGEANT:	Yes, sir.
HIS LORDSHIP:	You have a transportation now?
COURT SERGEANT:	We can get it at the station.
HIS LORDSHIP:	Well, could you bring it here?
COURT SERGEANT:	Yes, sir.
HIS LORDSHIP:	When it comes just tell me, you see."

....

"JURORS RETURN: 11:00 A.M.

....

HIS LORDSHIP:	Now, Mr. Foreman, I understand that you have requested to visit the locus.
FOREMAN:	Yes, sir. The jurors request that they see where the bean was planted, number one: They request to see where the stick was cut: Where Gussie was found.
HIS LORDSHIP:	Where the bean was planted?
FOREMAN:	Yes, sir.
HIS LORDSHIP:	Where ...
FOREMAN:	Where stick was cut; where Gussie was found.
HIS LORDSHIP:	Where his body was?
FOREMAN:	Yes, sir.
HIS LORDSHIP:	Where Gussie's body was found?
FOREMAN:	Yes sir. Where fence was cut and yam ...
HIS LORDSHIP:	Mr. Foreman, this is going to create a great deal of problems. It's a pity you didn't request this before I completed my summation. It means that we have to get all the witnesses again, to point out these places.

FOREMAN: The following jurors have said they would like to see these things.

HIS LORDSHIP: Well, I will think about it and I will tell you in a few minutes, while we see whether we can get transportation or not....."

RESUMPTION: 11:11 A.M.

....

HIS LORDSHIP: Mr. Foreman, members of the jury, I took the question on advisement and I have discussed the matter with the counsel, in the case, for the Crown and for the Defence, and they are in agreement with my view of the law, that there cannot be any inspection of the locus in quo after the completion of the summing-up. So, I am afraid you will have to retire and come to a verdict on the evidence that is before you. So will you please retire. Please follow the police officers."

At the outset may we say that from the passage quoted from R. v. Martin it does not follow that a view of the locus in quo by the jury alone after the conclusion of the summing-up is the desirable practice. R. v. Martin was cited in Karamat v. R. (1956) 1 All E.R. p. 415 at 417 but not for the dicta referred to herein. Whether or not a visit to the locus in quo is merely an aid to assessing or appreciating the evidence or is in fact evidence in a case depends on what transpires at the locus.

In Charles James & Others v. R. (1958 - 59) 1 W.I.R. p. 424 - It was held:-

"(i) on a simple view without witnesses the jury may carry out demonstrations among themselves with a view to testing the credibility or accuracy of the testimony of a witness.

(ii) on a visit of a jury to a locus in quo the removal and replacement of an object there at the trial judge's direction is not the giving of evidence and the absence of the accused when those acts are done does not constitute an irregularity.

(iii) where a simple view without witnesses is had by a jury it is not necessary for evidence to be given on oath of what the jury did or were shown at the view."

In Tameshwar & Another v. R. (1957) 41 Cr. App. R. at 169

The Privy Council held:-

> "If witnesses give demonstrations or answer questions at a view, that is undoubtedly part of the trial and must be had before the judge and jury. These observations do not apply to a simple view without witnesses. It is rather like their examination of an exhibit or a plan in the jury room without the judge being present, but the judge usually sees it himself too."

However in the three modern cases referred to above, the question of the view being taken after the summing-up did not arise. On the other hand in R. v. Lawrence (1968) 52 Cr. App Report p. 163 it was held:-

> "The strict rule of procedure that no further evidence shall be adduced in a trial after the jury have retired to consider their verdict extends to the inspection by the jury of an object such as a motor vehicle referred to in the evidence during the trial, even though no oral evidence is given at the time of the inspection; and where there has been an inspection by the jury in such circumstances, the conviction will be quashed."

In the instant case the request of the foreman of the jury clearly required the attendance at the locus in quo of the accused and the prosecution witnesses Sergeant Marshall and/or Henry Brown and would involve demonstrations or the answering of questions at the view. This would certainly be the tendering of further evidence after the close of the summing-up. The Record indicates that the learned trial Judge was certainly not unaware of the problem. In the circumstances he came to the correct decision when he ruled that there could not be any inspection of the locus in quo at that stage of the proceedings for the purpose stated by the jury.

> "GROUND 2(i):-
>
> The Learned Trial Judge erred in law in the following instances:-
>
> (i) In admitting the evidence by the witness Henry Brown as to the alleged events "of the Thursday before the 14th of May" (p. 12) in that the prejudicial effect of same outweighed the probative value and that the warning of the Learned Trial Judge was contradictory (p. 550-1) and that further, the evidence tended to show a criminal propensity."

On this aspect of the case the learned trial Judge directed the jury as follows:-

> "Now you bear in mind, Mr. Foreman and Members of the Jury, that this evidence is led - if you believe the boy's evidence - to show that the two accused men intended stealing yam and wire of the deceased. This would be a criminal offence, stealing of the man's yam or the stealing of his wire, or the destruction of his wire. Both of these men are not charged with stealing yams or destroying the wire or trying to steal the wire, so you have to disregard that piece of evidence for that purpose. You cannot say, well, these fellows are thieves and because they are thieves they might very well have injured this man and have committed this crime. You cannot do that. You have persons who can come and steal something and yet will not hurt somebody. It would be prejudicial, and it would be wrong, and it would be biased on your part to use the fact - if you accept the boy's evidence that these people were doing what they did, to use that to say that they must be guilty of murder, because they did that. The evidence is led by the Crown merely to show that these two accused men knew this man's place, Augustus Samuels who is called "Gussie", that they knew his place and that they knew him, that they also knew what he planted on the place and what he kept on the place. This is the purpose of the evidence being put before you. For that limited purpose. There was no other way that they could put that evidence before you without revealing what the fellow said that he saw, but the Crown does not intend - and I am directing you as a matter of law, that you cannot use the fact, if you accept it, that they were interfering with this man's property. You cannot use that to ground your conclusions that they must be bad men and as a result they are capable of doing what has been charged to them. So bear that in mind. So that is the purpose that the evidence has been put forward and that is the only consideration you should give to that piece of evidence."

We were surprised that in the light of directions so manifestly favourable to the defence there should be such a ground of appeal. It is enough to say we found no merit in this ground.

<u>Supplementary Grounds filed November 27, 1979</u> - and argued by Mr. B.E. Frankson:-

> "1(a) That the Learned Trial Judge erred in allowing hearsay evidence of the words alleged to have been used by the deceased on the night prior to the body of the deceased being found by Henry Brown.

(b) The Learned Trial Judge failed to direct the jury that the words used were not evidence of the truth of the fact stated herein but merely of the fact that the statement was made."

Having regard to the evidence of Doctor Lampart and in particular to the injuries which he found on external examination of the body of the deceased and to Sergeant Marshall's observations at the scene as described by him the inference is inescapable that if the jury accepted Henry Brown's evidence as to the words he heard the deceased crying out that night, that they were uttered contemporaneously with the infliction of the injuries by persons there and were admissible as part of the res gestae. In our view the admissibility of this evidence would seem to rest on even stronger grounds than that in Ratten v. R. (1971) 3 All E.R. 801. In that case the appellant was charged with the murder of his wife.

> ...."At about 1.15 pm a telephone call was made from the house; the telephonist at the local exchange who answered it, stated in evidence at the trial: 'I plugged into a number at Echuca, 1494 (the appellant's number) and .... I opened the speak key and I said to the person "Number please" and the reply I got was "Get me the police please". I kept the speak key open as the person was in an hysterical state and I connected the call to Echuca 41 which is the police station. As I was connecting the call the person gave her address as 59 Mitchell Street'. The telephonist added that, as she was connecting the call to the police station, the caller hung up and she (the witness) then told the police that they were wanted at 59 Mitchell Street. At about 1.20 pm a police officer telephoned the appellant's house from the local police station and spoke to him. By this time the deceased had been shot. The shooting, from which she had died almost immediately, had therefore, taken place between 1.12 pm and 1.20 pm."

HELD: - (Dismissing the appeal).

"(i) The evidence of the telephonist was not hearsay evidence and was admissible as evidence of fact relevant to an issue, i.e. as evidence that, contrary to the appellant's

> account, a call was made only some three to five minutes before the fatal shooting by a woman who could only have been the deceased; it was also relevant as possibly showing (if the jury thought fit to draw the inference) that the deceased woman was at the time in a state of emotion or fear."

In the instant case the witness Brown recognized the voice of the deceased and the injuries which caused his death and the damage to his house were consistent with his outcries. Accordingly, we found no merit in this ground.

For these reasons we treated the application for leave as the hearing of the appeal and as set out ante we affirmed the conviction but varied the sentence.