JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 25,26 & 27/2001

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE, J.A.

REGINA V. PRINCE McCREATH
RUDOLPH SIMMS
JASON RERRIE

Arthur Kitchin for McCreath

Lord Gifford, Q.C. for Simms

Robert Fletcher and Mrs. Celia Blake for Rerrie

Ms. Paula Llewellyn, Senior Deputy Director of Public Prosecutions, and Ms. Diahann Gordon Crown Counsel (acting) for the Crown

June 9, 10 and 11, 2003 and July 30, 2004

PANTON, J.A.

1. On June 11, 2003, after a three day hearing, we granted the applications for leave to appeal in this matter and treated the hearing of the applications as the hearing of the appeals. In respect of the appellant Rudolph Simms, we allowed the appeal, quashed his conviction for the murder of Vencott Beckford, set aside the sentence and entered a verdict of acquittal. So far as the appellants Prince McCreath and Jason Rerrie were concerned, we reserved our decision.

2. Vencott Beckford was murdered in the parish of Hanover on June 16, 1999. The appellants were convicted of this murder on January 25, 2001, after a trial lasting fourteen days before Wesley James, J., and an all female jury of twelve sitting in the Circuit Court Division of the Gun Court, Montego Bay, Saint James. They were sentenced to life imprisonment with the specification that each should serve twenty-five years before being eligible for parole.

3. The deceased died from haemorrhage and shock as a result of gunshot injuries to the chest and neck. These injuries were received while he was seated in a car at the entrance to the Orange Bay Housing Scheme in Hanover where Constable Charlene Irving lived.

4. The evidence for the prosecution came mainly from the witnesses Denzil Williams and Charlene Irving and a cautioned statement given by the appellant McCreath. In addition, there was important supporting evidence given by Marcia Dunbar and Marcia Brown.

5. Denzil Williams, a carpenter living in Little London, Westmoreland, in June 1999, was a friend of the deceased and the appellant Rerrie. He was asked by the deceased to borrow Rerrie's gun (presumably unlicensed) with the intention of not returning it. Rerrie got wind of this plan ahead of any approach being made by Williams. By chance, Williams and Rerrie met on Wharf Road on the morning of June 16, 1999. Rerrie invited Williams to his house. The invitation was accepted. At the house, however, the treatment meted out to Williams was far from being what the ordinary house guest would have expected. Rerrie told

him that he had heard about the plan to relieve him of his gun. The appellants Simms and McCreath and others were at the house at some stage or other during the day. Williams was bound, beaten and threatened with death.

6. Rerrie had a date at the Green Island Court House. He gave McCreath a gun and instructed him to guard Williams until he returned from Court. This gun was passed from McCreath to others during the course of the day. McCreath informed Williams that he (McCreath) had turned many persons into duppies, meaning of course that he had killed many individuals.

7. When Rerrie returned from Court, he used the gun to assault Williams and promised to release him if he called the deceased on the telephone. The group of men had earlier taken Williams' diary from him and given it to Rerrie who had torn from it a page with the telephone number of the deceased on it. Williams refused to call the deceased, telling Rerrie that he felt he would be killed even if he called the deceased. Rerrie instructed McCreath and Simms to stuff the witness' mouth and take him outside. This they did. Rerrie gave McCreath the gun. The latter pointed it at Williams and inquired as to what part of his body he wanted to be shot. A car drove up, and McCreath took Williams into the bushes to hide.

8. Eventually, Rerrie retrieved the gun from McCreath and said to Williams, "look how me and you a friend and me have fi go kill you". They took Williams to a "ballfield", then Rerrie and Simms took him to a bar. At the bar, Rerrie asked the barmaid for permission to use the telephone. He dialled the deceased's

telephone number and instructed Williams to tell the deceased to meet him (Rerrie) at the roadside. Williams spoke on the telephone, advising the deceased's girlfriend to tell the deceased accordingly. He also told her to tell the deceased that he had "gotten the something". This was a reference to the gun he had undertaken to get from Rerrie.

9. Rain started to fall. Rerrie, Simms, Williams and another male person walked for about fifteen minutes up to the top of the hill. There they saw McCreath. This was in Orange Bay. Rerrie then said that they were going to kill the deceased. An unnamed male, described as "the fat youth", suggested to Rerrie that he should make McCreath deal with it. McCreath said he would deal with it. They all walked down the road; Rerrie, Simms and "the fat youth" on the left side of the road while McCreath held the gun on Williams and ordered him not to move. Rerrie, Simms and "the fat youth" went into a bus stop and immediately ran from it. One of them said, "him wi see wi deh soh". They ran into the bush on the right hand side. Rerrie then said, "the car a come, see him a come deh". Williams noticed that it was the deceased's car – a "greyish" Nissan Sunny. McCreath then took the gun off Williams and pointed it at the car. At that point, Williams ran off while hearing shots being fired. He looked back and saw Rerrie and Simms running towards the car. This was about 7-7:30 p.m. There was a light post in the area. Williams went back to Little London, then in the morning he went to the Little London Police Station where he was advised to report the matter to the Green Island Police. Eventually, the police went to him

in Negril. He gave a statement, was arrested and charged for murder but the charge was dismissed.

The arrest of Rerrie and McCreath

10. At about 7.30 p.m. on the 16th June, Corporal Black received a telephone call about the murder. He went to the scene where he saw the deceased in the car with gunshot wounds to the right side of his chest, left side of his neck and on the right leg. Based on the information that he received, he went in search of Rerrie and others. He saw McCreath three days later at the Green Island Police Station. McCreath was told that he had been seen running from the scene of the murder. He denied being there.

11. Constable Stenneth Lewis assisted Corporal Black in swabbing McCreath's hands on the said 19th June, 1999. The swabs were delivered to the Government Analyst on the 25th June. A statement was given by McCreath to Inspector Harris in the presence of Miss Lona Gayle, J.P. Following that statement, McCreath was arrested and cautioned. His response when cautioned was, "me did stand up pon the bank with the pumpie, but me never fire nuh shot". When Rerrie was arrested months later, he, when cautioned, said he knew nothing about the murder.

The shooting as seen by Constable Charlene Irving

12. Constable Irving was at her home in the Orange Bay Housing Scheme. At about 7.20 p.m., she heard an explosion coming from the direction of the main entrance to the scheme. She switched off the lights. She heard other explosions.

She looked towards the direction of the explosions and saw a group of four men running. Rerrie who was known to her for about two years was in the front of this group of men. He had a semi-automatic pistol in his hand. She called the Green Island Police from a neighbour's house. The motor car impacted on a wall at the entrance to the Scheme.

The swabbing

13. The analysis of the swabs showed the presence of gunshot residue on both hands of McCreath. The view of Miss Marcia Dunbar, the expert, was that gunshot residue can remain on the hands up to four days. It depended on how thoroughly the hands were washed, if indeed they were washed.

The presence at the bar

14. Miss Marcia Brown was the bartender at the bar to which Denzil Williams was taken. She said that Rerrie and Simms had come into the bar at about 2 p.m. and she had served them drinks. They went away, and returned after 4 p.m. with another person. Rerrie, she said, made a telephone call while in the bar. They went away. Rerrie and Simms, she said, returned about 6 p.m. and finally left the bar "after 8-8:30 p.m.".

McCreath's statement

15. Inspector Harris, in the presence of Miss Lona Gayle, J.P., recorded a statement from McCreath, as dictated by McCreath. In it, McCreath said that he was taken by one George to a place called "Bump" where they met two young men, "Furro" and "Johnny" (Rerrie and Simms). George told him that Rerrie ran

the place. He said that he never saw Rerrie again until "Tuesday of this week" (the 15th June, that is). This meeting was at a bar at Bump. He saw Rerrie again on the Wednesday. Rerrie said that a man wanted to kill him (Rerrie) and that he was going to show McCreath that man later. Rerrie left and returned with "a brown youth". He, McCreath, Simms, George, Rerrie and the brown youth were all at New Town. Rerrie assaulted the brown youth saying the latter wanted to kill him. Rerrie made a telephone call and instructed the brown youth to speak to the deceased on the telephone.

16. Rerrie told McCreath to walk through the bush and meet him at the housing scheme at Orange Bay. According to the statement, McCreath said Rerrie told him of a spot where he had hidden a firearm and instructed him to take it and meet him "at the next side". He picked up the firearm and when he reached "the bush part", he saw Rerrie, Simms and the brown youth. He saw the car come on the scene, and the brown youth walked towards it. The brown youth fired a shot towards the car and ran. Rerrie and Simms then ran to the car and fired several shots into it. The statement continued that Rerrie and Simms then ran to where McCreath was. He (McCreath) bent down. Rerrie whistled, and he (McCreath) got up. Rerrie came up to him and informed him that Beckford was dead. Rerrie then took the firearm from McCreath.

The appeal of Simms

17. We heard the arguments of Simms, Rerrie and McCreath in that order. Accordingly, we will give our reasons in that order. As said earlier, at the

conclusion of the hearing of these appeals, we allowed that of Simms and entered a verdict of acquittal in his favour. The amended supplementary grounds of appeal filed on Simms' behalf may be summarized thus:

> (i) the identification was so tainted that the learned trial judge ought to have withdrawn the case from the jury; and
>
> (ii) the learned trial judge erred in law in failing to give the jury adequate directions on the issue of identification and also in respect of the conflicting evidence given by Denzil Williams.

18. The only evidence against Simms came from Williams. Lord Gifford, Q.C., although conceding that Williams had spent several hours in the company of Beckford's assailants on the day of the murder, submitted that the failure to hold an identification parade was fatal. At best, he said, the witness had a very limited acquaintance with Simms. This being the situation, there was need for the learned judge to have given very careful directions to the jury. This was lacking. At page 76, lines 17 and 18, of the transcript, the witness indicated that he knew Simms. On page 80, lines 6 to 16, he said that he knew Simms for three to four weeks before the date of the incident; and that Simms was never present on any occasion when he had spoken to Rerrie, but he did not remember whether he had spoken to Simms in the presence of Rerrie.

19. During cross-examination of the witness by Mr. Trevor Ruddock, at pages **308** et sequitur, the transcript reveals the following:

> lines 6 &7: "Q. All right, when was the first time you see this man Johnny?

line 8:	A.	I don't remember sir.
lines 12 &13:	Q.	The first time you see this man in your life, Johnny, you don't remember?
line 14 square	A.	I believe down a Orange Bay

Page 310

lines 5 & 6:	Q.	How many days before did you see him before the killing?
line 7:	A.	I don't remember sir.
line 8:	Q.	One time?
line 9:	His Lordship:	Days can't be one time, counsel
lines 11- 13:	Q.	I ask him, he says he doesn't remember. I ask if is one time. One day, two days or how many days did you see him?
line 14:	A.	'Bout three days, sir.

20. In the statements given by Williams to the police on the 21st and 22nd June, he referred to "Johnny" as being one of the men involved in the activities of the 16th June, 1999. The statement of the 21st June gives a general description as to the height, frame, complexion and weight of Johnny but that would have been clearly insufficient to identify "Johnny" as Simms. There was no other information that was disclosed to the police that would have enabled them to pinpoint Simms as the Johnny referred to by the witness. It was only at the Court appearances for the preliminary examination and the trial that the witness

pointed to Simms. Indeed, in his evidence in chief at the preliminary examination, he said that apart from Rerrie whom he had known for about two years, he did not know the other accused before the 16th June, 1999.

21. Lord Gifford argued that the learned judge had failed to appreciate that there was a real issue as to whether "Johnny" and Simms were one and the same person. We agreed with Lord Gifford. In the absence of reliable information that was capable of being put forward as evidence of prior knowledge of Simms as "Johnny", the purported identification amounted to a dock identification and so we now look at how that was dealt with by the judge.

22 On this aspect of the case, Lord Gifford cited two cases **R. v. Errol Thomas, Errol Hanson and Michael Bailey** 25 WIR 495 and **R. v. Hugh Allen et al.** 25 JLR 32. The headnote in **Thomas, Hanson and Bailey** reads:

> " The applicants were convicted for murder. The principal witness, a brother of the deceased, identified them as part of a large group of men armed with stones, bottles and guns who attacked the deceased and himself, apparently for political reasons. The attack, according to the witness, was entirely unprovoked and during the course of it he heard an explosion and saw his brother fall engulfed by flames and smoke. The applicants Thomas and Bailey were known to the witness before the day of the incident but Hanson was not. The witness gave the police no recognizable individual descriptions of the men who took part in the attack and he next saw the applicants in the dock. On appeal against conviction,
> **Held:** (I) that the dock identification of Hanson called for the most careful and positive directions from the trial judge as to the dangers inherent in it and in the absence of such a direction the conviction of Hanson could not stand.
> (II)...".

23. At page 497 A-B, Henry, J.A. said:

> "Two of the four persons charged were known to him before and on his evidence he was in no doubt that they took part in the attack. There was in our view a very real danger of the witness identifying the other two merely by association with the two who were known to him rather than by actual recognition and recollection. But there was an added danger. It is clear from the evidence that the police could not have identified Hanson and White from the description given by the witness Blake. That identification must have come from some undisclosed source. There was, therefore, the added danger of the witness making his dock identification merely because he believed that the police must have acted on reliable information in arresting Hanson and White."

Henry, J.A. continued at paragraph E:

> "Before parting with this aspect of the appeal we wish to say that we view with alarm a growing tendency not to hold identification parades in circumstances which clearly demand that such a parade be held. The purpose of the parade is to minimize the ever-present risk of mistaken identification with consequences which may be calamitous for a person wrongly identified but unable to refute with certainty the allegations made against him. It is, therefore, of the first importance that an identification parade be held in every case, in which the circumstances require it..."

24. So far as the dock identification is concerned, Henry, J.A. said at page 497D:

> "The circumstances called for the most careful and positive directions from the learned trial judge as to the dangers inherent in this dock identification. No such directions were given although general directions as to the danger of relying on identification evidence were given. We were of the view, therefore, that the

> conviction of Hanson ought not to stand and counsel for the Crown very properly conceded this".

25. In **R. v. Hugh Allen and Danny Palmer** (1988) 25 JLR 32, the complainant said she was sexually assaulted in her bedroom at 3 a.m. by two men whom she did not know before. She knew the appellant Palmer by a nickname. At the preliminary enquiry, she said that Palmer had used an ice-pick to threaten her. However, at the trial, she said it was something like a gun. She said that a third man, who was convicted but did not appeal, subsequently came into the room and escorted her to another place where he threatened to allow the earlier assailants to "finish her off" unless she had sexual intercourse with him. She yielded. On the following day, she reported the matter to the police and pointed out Palmer. Later that day, she pointed out the third man but she did not identify Allen to the police, and said at the trial that she next saw him at the preliminary enquiry. She admitted that at the preliminary enquiry, she had said she told her boyfriend who it was that had told her to call Allen's name. The appeals were allowed partly on the basis that the circumstances called for the most careful and positive directions from the learned judge as to the dangers inherent in dock identification, and this had not been done. It is worth noting that counsel for the Crown in that case conceded that the dock identification was "unfair by itself".

26. Finally, Lord Gifford referred to the oft-quoted case **Reid, Dennis, Whylie and Others v. R** (1989) 37 WIR 346 which re-stated the law thus: a significant failure by a trial judge to follow (in an appropriate case) the guidelines

laid down in **R. v. Turnbull** (1976) 3 All ER 549 (for example, on the need for caution and the possibility of mistake in identification evidence) will constitute a substantial miscarriage of justice and, if a conviction ensues, it will have to be quashed.

27. Miss Llewellyn for the Crown conceded that there was no direction by the judge along the lines suggested by **Turnbull** but, at first, she submitted that the failure to follow the guidelines, in the particular circumstances, would not prevent this Court from applying the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act. There was, she said, evidence to form a substratum for this to be viewed as a recognition case. Of course, Miss Llewellyn could not have been interpreted as saying that that would have dispensed with the need for the **Turnbull** warning. In fact, in **Shand v. R.** (1995) 47 WIR 347 at 351d, Lord Slynn of Hadley, delivering the advice of the Board, said:

> "The importance in identification cases of giving the **Turnbull** warning has been frequently stated and it clearly now applies to **recognition** as well as to pure identification cases".

In the end, however, Miss Llewellyn conceded that it would have been prudent for the judge to have directed the jury in respect of the need for the holding of an identification parade.

28. There was an absence of reliable information that the person whom the witness referred to as Johnny was the appellant Simms. There was no proven association between the two persons, thus making it necessary for an identification parade to be held. The situation therefore in respect of Simms may be summarized thus:

(i) there was no identification parade in circumstances where one was necessary;

(ii) although there was a dock identification, there were no directions on how that type of identification should be considered by the jury; and

(iii) there were no directions as required by **Turnbull.**

Miss Llewellyn suggested that a new trial be ordered in the interests of justice. However, we did not think that the interests of justice would be served by a new trial. The flawed process that affected the case against Simms was not merely in respect of the learned judge's failure to give directions. That was secondary to the fact that an identification parade should have been held, but that had not been done due to what appears to have been incomplete investigative procedures by the police.

29. It is for the above reasons that we quashed the conviction of the appellant Simms. The situation with the appellants Rerrie and McCreath was quite different. The appellant Rerrie was well known by the witness Williams while McCreath's statement placed him on the scene.

Rerrie's appeal

30. Mr. Robert Fletcher for the appellant Rerrie abandoned the original grounds of appeal and received leave to argue four supplementary grounds, the fourth of which he later abandoned. The remaining three were:

"(i) The learned trial judge erred in law in that his directions to the jury did not warn them that where an accomplice or an accomplice vel non gives evidence for the prosecution, although they may convict on such evidence, it is dangerous to do so unless it is corroborated. In addition, such directions as were given were

inadequate given the centrality of the evidence of the accomplice vel non. Further, because these directions were juxtaposed to a consideration of the cautioned statement of Prince McCreath they might not have been received by the jury as applicable to the case of the appellant Rerrie;

(ii) The learned trial judge erred in law in that he failed to give the required Turnbull warning in respect of the identification evidence of Constable Irving;

(iii) The learned trial judge erred in that he ought to have directed that the cautioned statement of Prince McCreath be edited to remove reference to the name of the appellant, Furro. Such an editing would have maintained the integrity of the case against the purported maker of that statement and removed the severe prejudice against Jason Rerrie that it must have caused. Such prejudice could not have been corrected but rather reinforced by repeated directions to ignore the prejudicial parts of the statement against Rerrie."

Williams – an accomplice?

31. Mr. Fletcher argued that the activities and involvement of the witness Denzil Williams in the case were such that the jury could have found him to be an accomplice. He referred to page 688, lines 6-23 where the judge said:

> "Remember what I said, if you accept the caution statement, then it is evidence against him, which evidence you would accept to say he was there. Then when you look at the witness, the main witness for the prosecution called Denzil Williams, you will have to determine – and you will remember yesterday morning when Mr. Morgan addressed you, he never used any big words, but he said that Williams is a witness with an interest to serve. And in legal jargon, that has a particular meaning. And it alerts you to the fact that

> you need to exercise great caution when you are dealing with his evidence before you accept it. You have to tread carefully, and the reason for saying he is a witness with an interest to serve, it is because the defence is saying – and there was some evidence too coming from the prosecution through his very mouth, that he seemed to be so involved in it that whatever he says may be evidence which tends to put a good life on his side of things."

Mr. Fletcher then submitted that this direction given by the judge fell short of what was required in that it understated the danger that may exist from the accomplice's evidence and, juxtaposed as it was to the directions on McCreath's statement, there was the distinct possibility that the jury might not have transferred the warning to the case of the appellant Rerrie. He relied on the case **R. v. Paul John Whitaker** (1976) 63 Cr. App. R. 193, particularly pages 195-196, where the Lord Chief Justice of England quoted the headnote from the case of **Prater** (1959) 44 Cr. App.R. 83:

> "Where it appears that a witness, whether a co-prisoner or a Crown witness, may have some purpose of his own to serve in giving evidence, it is desirable in practice that a warning should be given to the jury with regard to the danger of acting on his uncorroborated evidence similar to that which is given in the case of accomplices, whether the witness can properly be classed as an accomplice or not."

and then continued:

> "Sure enough, when one comes to look at the judgment of the Court given by Edmund Davies, J., as he then was, it does contain what the headnote promised. At the bottom of p.85 and at p.466 he says: 'For the purposes of this present appeal, this court is content to accept that, whether the label to be

> attached to Welham [a co-accused who gave evidence on his own behalf adverse to the appellant] in this case was strictly that of an accomplice or not, in practice it is desirable that a warning should be given that the witness, whether he comes from the dock, as in this case, or whether he be a Crown witness, may be a witness with some purpose of his own to serve'.
>
> Later (at p.86 and p.466) Edmund Davies J says:
>
> 'This court, in the circumstances of the present appeal, is content to express the view that it is desirable that, in cases where a person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given. But every case must be looked at in the light of its own facts'. ..."

32. Miss Llewellyn's response was that as a matter of law, the evidence did not show Williams as an accomplice. She described him as an hapless victim who was imprisoned at Rerrie's house and threatened with death. She referred to **R. v. Calvin Hunter** (Supreme Court Criminal Appeal 161/90 – delivered on June 30, 1992). In that case, the principal prosecution witness, having heard shouts for help and murder from one of the two deceased victims, failed to respond. This failure was apparently due to fear for his personal safety. However, this failure was one of the factors put forward by the appellant at the hearing of the appeal as indicating that he was an accomplice. The other factors included the fact that the police had taken him into protective custody and also that he too had the opportunity to commit the murders; and there was a discrepancy between his evidence and that given by another witness who had survived the murderous attack by the appellant. Wolfe, J.A.(acting), as he then was, in

delivering the judgment of the Court cited the words of Ackner, L.J. where he said in **R. v. Beck** (1982) 1 All ER 807:

> "Merely because there is some material to justify the suggestion that a witness is giving unfavourable evidence, for example, out of spite, ill-will, to level some old score, to obtain some financial advantage, cannot, counsel for the appellant concedes, in every case necessitate the accomplice warning, if there is no material to suggest that the witness may be an accomplice. 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."

Wolfe, J.A. (Acting) went on to point out that these principles were approved in the case **R. v. Champagnie et al** (Supreme Court Criminal Appeal Nos. 22, 23 and 24/80 – delivered September 30, 1983) a judgment of this Court delivered by Kerr, J.A.

33. An accomplice, in the case of a felony, is someone who is associated with another in the commission of the offence whether as a principal or an accessory before or after the fact. In the instant case, on the case presented by the

prosecution, Williams was forced to be present at or near the scene of the murder. He had been in the custody of Rerrie and his cohorts throughout the period. His presence was an unwilling one. There is no evidence of him actively participating in the crime even though present. Despite the spirited submission of Mr. Fletcher, there was no basis for any direction to have been given as to Williams being an accomplice. Indeed, the learned judge may be described as having been either cautious or generous in directing the jury to consider whether the witness had an interest to serve. At page 768, the learned judge said:

> "Now, Madam Foreman and members of the jury, it is clear to you, isn't it, that when we came here Williams was no longer a person charged and he appeared as the chief witness for the prosecution. You remember I referred earlier to when Mr. Morgan was addressing you yesterday he told you that Denzil Williams is a witness with an interest to serve, and I said if you accept that he is such a person as a witness with an interest to serve, you must exercise great caution in accepting his evidence."

34. The quotation used by Mr. Fletcher from page 688 of the transcript and referred to earlier does not present the full picture and has to be viewed in conjunction with the above passage from page 768 which stresses the need for the jury to exercise great caution in deciding whether to accept Williams' evidence. In the circumstances, therefore, there is no merit in this ground.

The identification evidence of Constable Irving as it relates to Rerrie

35. The record does not show that any directions were given as required by **Turnbull** as to how the jury should deal with Constable Irving's evidence identifying Rerrie. Although the credibility of the constable was left for

consideration, no direction was given as to the possibility of her making a mistake. Notwithstanding this failure on the part of the learned judge, as pointed out by Miss Llewellyn, the Crown did not rely on Constable Irving for the identification of Rerrie. The Crown relied on the evidence of Williams in this respect. There was no question of Williams being mistaken. It was a straight question of his credibility as he knew Rerrie and had been in his company for several hours leading up to the murder. So far as directions on credibility were concerned, the learned judge cannot be faulted as he gave them repeatedly.

The editing of McCreath's statement

36. Mr. Fletcher submitted that the learned judge had made a serious error in not editing the statement that was given by McCreath. He readily recognized that the editing of the statement was a matter for the discretion of the judge. That discretion, he said, is grounded in the judge's duty to ensure fairness. In the instant case, he submitted that the removal of the name"Furro" which refers to Rerrie would not have affected the story of the involvement of the maker of the statement. (McCreath). The non-editing, he said, was prejudicial to Rerrie.

37. The fact that substituting an X or Y for the real names in a statement would not have altered the meaning of the statement does not, in our view, mean that a failure to do so is an error of law. This point was made by Miss Llewellyn. Mr. Fletcher relied on **Lobban v. R.**(1995) 2 Cr.App.R 57. It seems, with respect, however, that this reliance was misplaced. In **Lobban**, the appellant was convicted of murdering the popular reggae artist Peter Tosh.

Lobban's co-accused who was acquitted at the end of the prosecution's case gave a statement under caution to the police. That statement was admitted in evidence in its entirety although the final sentences implicated Lobban, and his counsel had suggested that there be editing seeing that the sentences were not evidence against Lobban. This proposal was opposed by both the prosecution and the counsel for the co-accused. The Court of Appeal dismissed his appeal. On further appeal to the Judicial Committee of the Privy Council, it was held that (1) it was clearly established that a trial judge in a criminal trial always has a discretion to refuse to admit evidence tendered by the prosecution if in his opinion its prejudicial effect outweighs its probative value; and (2), there is no discretion to exclude, at the request of one co-accused, evidence tendered by another.

38. In the Privy Council's dismissal of Lobban's appeal, it should be noted that this was done notwithstanding that at the end of the prosecution's case, the maker of the offending statement was acquitted and the prosecution was, additionally, allowed to cross-examine Lobban on the said statement which was not evidence against him. The dismissal was due, in part, Their Lordships said, to the fact that they "must look at the matters in the round" (page 588A). The case for the prosecution was based on the recognition evidence of two witnesses. Their Lordships concluded: "The jury thought they were honest witnesses and disbelieved Lobban" (page 588B). At page 582E, Lord Steyn had this to say about the suggestion of substituting letters for names:

> "And counsel's suggestion of the substitution of a letter of the alphabet for Lobban's name, if adopted by the trial judge, would probably have set the jury on an irresistible trail of speculation. For these reasons the alternative challenge to the exercise of the judge's discretion is rejected."

39. In the instant case, not only would the use of the alphabet probably have set the jury on the "irresistible trail of speculation", it would have led to a swirl of confusion when it is considered that there were two co-accused. At page 586 E-F, Lord Steyn states:

> "Inevitably, the legal principles as their Lordships have stated them result in a real risk of prejudice to co-defendants in joint trials where evidence is admitted which is admissible against one defendant but not against the other defendants. One remedy is for a co-accused to apply for a separate trial. The judge has a discretion to order a separate trial. The practice is generally to order joint trials. But their Lordships observe that ultimately the governing test is always the interests of justice in the particular circumstances of each case. If a separate trial is not ordered, the interests of the implicated co-defendant must be protected by the most explicit directions by the trial judge to the effect that the statement of one co-defendant is not evidence against the other."

Wesley James, J. gave explicit and emphatic directions to this effect. And he gave them repeatedly. The jurors would not have failed to understand what the learned judge was saying; nor would they have failed to understand what he meant. It is clear that the jury believed the main witness, Denzil Williams, while they rejected the unsworn statement of the appellant Rerrie. There is no merit in this ground of appeal.

The appeal of McCreath

40. The appellant McCreath relied on a single supplemental ground of appeal, namely:

> "The learned trial judge's directions on the applicant's caution statement were wrong in law and thereby deprived the applicant of a fair trial, as the jury were directed to reject the self-serving parts of the statement instead of being told that the whole statement, both the incriminating and self-serving parts, must be considered by them in deciding where the truth lies. See: page 687, lines 9 to 14; (ii) page 726, line 21 to page 727 line 6)."

The words of the learned judge as referred to above were as follows:

> "It is only what he said against himself is evidence against him. And if he says anything that is favourable to himself, the law is that that evidence is self-serving. If he says anything that is favourable to himself, they say that is self-serving, you don't have to deal with it." (page 687 lines 9-14)

And later, the learned judge said:

> "And if you are sure that he made it, what he said is true, and it was not as a result of any beating as he said, or any oppressive measure, then you may rely on it so far as it incriminates him. I must also tell you that if he makes any, if you find anything which is self-serving, remember I was talking about the self-serving part this morning earlier, then you may think that he is putting that in to help himself, and you cannot rely on any part of his statement which you find is self-serving." (page 726 line 21 to page 727 line 6).

41. Mr. Kitchin submitted that by these statements the judge made an error which would have caused the jury to reject from their consideration anything that they found exculpatory, and acted only on the parts that they found

incriminating. Mr. Kitchin maintained this stance even after his attention was directed to page 728 where the learned judge gave further directions which will be quoted shortly.

42. In **Lobban** (referred to earlier), Mr. Peter Thornton, Q.C., for Lobban submitted to their Lordships in the Privy Council that where there was a "mixed" statement containing admissions as well as exculpatory explanation, the admission of it in its entirety was "an indulgence (by the judge) as part of the narrative". The Board disagreed with this view. However, the judgment pointed out that in earlier times, in the strict theory of the law of evidence the exculpatory part of such a statement was not regarded as evidence in favour of the maker's case (page 580 A-B). Continuing, Lord Steyn pointed out that in **R. v. Sharp** (1988) 86 Cr.App.R.274, the House of Lords had deprecated any idea of the jury being told that the exculpatory parts of a mixed statement amount to something less than evidence. He concluded this aspect of the judgment by saying:

> "Nowadays, it is plainly part of the evidential material which forms part of a case of a defendant who does not testify. No doubt it has less value than oral evidence tested by cross-examination, but the defendant has an absolute right (subject to considerations of relevance) to have his exculpatory explanation fairly placed before the jury as part of his case."

43. In the instant case, the learned trial judge had given the directions complained of just before the luncheon adjournment was taken at 1.06 p.m. It appears that during the adjournment, he realized that he had made an error

because, immediately on the resumption at 2.20 p.m., he addressed the jury thus:

> "Now, Madam Foreman and members of the jury, when we took the break for lunch, I was dealing with the statement given under caution by the accused man, McCreath and I said, maybe too many times that whatever he says in the statement, if you find that he made the statement, concerning any of the other accused, it is not evidence against the other accused.
>
> Now, in so far as the statement is concerned, you Madam Foreman and members of the jury, must consider the whole statement, all of it, to decide where the truth lies. You may well find that the statement contains incriminating parts, that is, parts which put him on the scene and things like that, and part may have excuses or explanations, and you remember as I was telling you earlier, that those parts which are not incriminating, that does not incriminate him may be self-serving, but you have to consider all of it, ..." (page 728 lines 3 to 21)

When Mr. Kitchin was directed to this correction, he commented that "the correction can only be such if the jury understands it". This comment clearly underestimates the ability of the jury to understand the English language. By and large, juries in this country are comprised of intelligent persons who readily appreciate that in a long trial, and a lengthy summation, a judge may make an error and he, having discovered it, may then correct it. There is nothing unusual about that. Indeed, it is only right that a judge who has discovered that he has made an erroneous ruling or made an incorrect statement of law should correct the error at the earliest opportunity if it is not too late to do so. In the instant case, this is what happened to Wesley James, J. He made the error just before

the luncheon adjournment, and he corrected it immediately on resumption, that is, less that ninety minutes thereafter. In our view, it was not too late for him to have done so.

44. In making the correction, the very experienced and learned judge was obviously mindful of the decision and reasoning in **Leung Kam-Kwok v. The Queen** (1984) 81 Cr. App.R. 83. There, an armed robber who had shot and killed the wife of an employee where the robbery was taking place, gave a statement admitting his part and explaining his intention in firing the fatal shot. Lord Roskill, at page 91 said:

> "Where (an accused) does not go into the witness box it behoves the trial judge, when dealing in his summing up with the admission, in common fairness to the accused, also to refer to the accompanying explanation or excuse, adding if he thinks fit to do so that the explanation or excuse has not been supported by evidence on oath before the jury. It is then for the jury to evaluate the admission and the unsworn explanation or excuse as they think fit."

We are of the view that the learned judge did what was required of him in this case. No complaint has been made in respect of anything else in his handling of the case of McCreath. Indeed, we see nothing which could have been the subject of complaint.

45. The appellants Rerrie and McCreath having failed in relation to the complaints that they made, we see no reason to disturb their convictions. It has not been even faintly suggested that there was an insufficiency of evidence. Both appellants intentionally lured the deceased to the scene of the murder and both

actively participated in the cold-blooded, cowardly killing, having planned it earlier in the day. Their appeals are dismissed, and the convictions affirmed. The sentences are to commence from April 25, 2001.