

J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 112/76

BEFORE: THE HON. PRESIDENT
 THE HON. MR. JUSTICE WATKINS J.A.
 THE HON. MR. JUSTICE HENRY J.A.

R. v. SYDNEY CAMPBELL

Mr. B. Macaulay Q.C., and Mr. K. St. Bernard
 for the applicant

Mr. J.S. Kerr Q.C., Director of Public Prosecutions
 and Mr. G. Andrade for the Crown

February 21, 22, 24, 25, 28,
March 1, May 27, Sept. 28, 1977

WATKINS J.A.

This is an application for leave to appeal from a conviction for murder recorded in the Home Circuit Court on June 17, 1976 before Robotham J. and a jury. At the end of six days of arguments the Court took time for consideration, and on May 27, 1977 the Court by a majority refused the application. This is the dissenting judgment.

The victim Richard Mills died at his home No. 46 Woodhaven Avenue, St. Andrew on May 18, 1974. With his wife Celeste Mills, a lady, reputed for her beauty, who bore him a son named Ian, Richard carried on the business of a restaurateur at 7 Constant Spring Road in the same parish. The applicant was a policeman. Attached to Traffic Headquarters his duties seemed less arduous than those of other policemen. Mondays through Fridays his hours of work were from 8 a.m. to 5.30 p.m. On Saturdays he ceased work at 12.30 p.m. and he did not work on Sundays at all. These circumstances facilitated his engagement in the evenings by Mr. and Mrs. Mills to carry on on their behalf the business of the restaurant, where he had been accustomed for some time to have his evening meals. On occasions the applicant drove the family van, carried Ian to school, and visited the family home at 46 Woodhaven Avenue. In course of time a close relationship developed between the applicant and Mrs. Mills, apparently

sufficiently close indeed to attract the displeasure of Mr. Mills who began, but later discontinued, divorce proceedings in which the applicant was, or was to be, named. In February 1974 the applicant and Mrs. Mills, having left the latter's home early one Saturday afternoon, did not return until early the succeeding Sunday morning. Mr. Mills expressed his disgust and ordered the applicant to leave his home. He stood his ground however, supported by Mrs. Mills, and it was only upon the arrival of the Police and upon their insistence that the applicant reluctantly took his leave. For his part the applicant quite openly expressed to Mr. Mills his resolve to have Celeste (that is Mrs. Mills) "for your (Mr. Mill's) time is up now." From that time the applicant never returned to the matrimonial home.

In the evening of May 18, 1974 Mrs. Mitchell who lived at 44 Woodhaven Avenue, and a close friend and neighbour of the Mills, had a party for one of her young daughters and Ian, Mr. and Mrs. Mills together with Ivy Fraser their domestic helper attended. Mrs. Mills did not long remain. She left the party at about 6.30 and in fact she never returned home until about 2.30 to 3 a.m. of the following Sunday morning. The rest of the family returned to No. 46 at 9.30 a.m. They entered by the open front door, the rest of the house having been already locked up by Ivy much earlier that evening, and they all sat down to watch television. Mr. Mills, a bottle of pepsi-cola close at hand, reclined in his favourite chair, the back of which stood upon an open glass sliding door from which entrance was gained into an adjoining storeroom in which was kept among other items a meat-cutter to which was attached a length of electric cord. At 9.45 Ivy and Ian retired to their respective rooms, leaving Mr. Mills still watching television, the front door also still open. Three-quarters of an hour later Ivy heard Mr. Mills scream, a somewhat faint sound of

her name upon his lips. Quickly she put on her dressing gown and went to the living room. The television set was still in operation but Mr. Mills was not there. She turned on the light in his bedroom and there on the floor she saw the prostrate body of her employer. He made response neither when she called his name nor when she enquired what had happened to him. Fearful, Ivy returned to her bedroom, locked herself in as securely as she could, and standing on her bed and looking through her bedroom window she called out to her neighbour Mrs. Mitchell and asked her to come for something had happened to Mr. Mills. Mrs. Mitchell responded promptly to her entreaties, and it is around her testimony as to what she said that she saw when she went over to No. 46 that the whole case against the applicant revolves. Dr. Marsh testified that the deceased had died from asphyxiation by garrotting with an instrument like the cord on the meat cutter.

Mrs. Mitchell's testimony -

Mrs. Mitchell was a nurse of many years standing. Her husband was the manager of a bank in Montego Bay and as for some time before the date of this incident there was no telephone in their home, it was Mrs. Mitchell's practice to make and receive calls on the telephone of her neighbour Mrs. Mills. On one of these trips to the Mills' home Mrs. Mills introduced the applicant to her and thereafter and up to the date charged Mrs. Mitchell said that she saw the applicant no less than fifty times at No. 46. The defence categorically denied this. Having been summoned on this particular night by Ivy, Mrs. Mitchell said that she hurried to her car porte which overlooked Ivy's bedroom. From that position she learned from Ivy that something was amiss with Mr. Mills. She returned to her house, put on her dressing gown and equipping herself

with flashlight and smelling salts she scaled the dividing wall between the two homes, crossed the lawn at No. 46 and made her way to the front of their premises. From this critical point onwards the accounts of Ivy and Mrs. Mitchell differ. Mrs. Mitchell's account is that as she got on the verandah step she saw the applicant with Mr. Mills reclining on his back in his hands. She spoke to him. The applicant, she said, continued to carry Mr. Mills down to an Escort car that was parked in the drive way, the left-hand door already open. The applicant dumped Mr. Mills in the car, closed the door and faced her, for she had followed him down to the car. The applicant took off the dark gloves he was wearing and addressed her thus "You are Mrs. Mitchell," She replied "Yes, I am Mrs. Mitchell, but I am here because Ivy the helper called me saying that Mr. Mills is sick and I am a nurse." The applicant left her there, went back to the house, and then returned to the right hand side of the car. He fiddled with the keys for the car for some time unable apparently to find the right one. Mrs. Mitchell's offer to help was refused. She then said to him "Does Mrs. Mills know that Mr. Mills is sick" and he replied "No, she is at work" Mrs. Mitchell then enquired "Where is Ivy" whereupon the applicant replied "She is inside there in her room." Mrs. Mitchell then expressed a wish to look at Mr. Mills and the applicant replied "No, you might not like what you will see because he is vomiting." Mrs. Mitchell turned her flashlight on the body of Mr. Mills and saw that whilst his buttock rested on the left bucket seat his torso was rather wedged between that seat and the one on the right side. She neither saw nor smelled vomit. The applicant volunteered "I am taking him to the hospital but trying to find the keys is the other thing." Significantly enough when eventually the Police came and examined the car they did find a key in the switch but it was not the right one. At his request Mrs. Mitchell opened wide the driving gate, left the applicant by

the car, and was glad to return to her home where she locked herself in. On her way back she again stopped at her car porte and spoke with Ivy. She did not however tell Ivy what she had just seen. Mrs. Mitchell called her husband on the telephone. Mr. Clarence Walker, Attorney-at-law, cousin of Mr. Mills and friend of Mrs. Mitchell arrived about one hour later, that is between 12.30 and 1 p.m. He apparently had learned of the incident through Mr. Mitchell. Mrs. Mitchell admitted him to her bedroom and there she told him all that she had seen. Shortly thereafter Constable Fuller arrived and she said that she also told Fuller what she had seen. Between 2.30 and 3 a.m. Mrs. Mills arrived. She made three or four telephone calls, calling hospitals enquiring for her husband. During all these happenings there was light in the television room. It shone on to the verandah through windows without obstructing curtains. There was a red bulb in the car porte at No. 46 hanging over a disabled van parked there. Bright lights shone from the eaves of Mrs. Mitchell's home onto the lawn of No. 46 and at the entrance to No. 46 there was a street light brightly glowing.

If Mrs. Mitchell had been the only witness called as to the facts by the prosecution, the verdict of guilty returned by the jury, one may confidently say, would have been virtually unassailable. As it was, however, the prosecution called two other witnesses to facts whose testimony in the one instance created serious internal conflicts in the case for the Crown and in both instances brought the conduct of Mrs. Mitchell under scrutiny and questioned the veracity of her story.

The testimony of Ivy Fraser -

So far as relevant Ivy Fraser said that having come out to her car porte in response to her call Mrs. Mitchell "went back quickly in her house and then she ran out back and come over the wall." From her room she heard Mrs. Mitchell around the front talking to her and asking her to come out the room and in cross-examination the following exchanges took place.

- Q: "Now, when Mrs. Mitchell got to the front of your house, she called to you?
A: Yes; she say where I am.
Q: Hold on; she called to you. You said she said where are you?
A: Yes.
Q: And you answered?
A: I said I am in my room.
Q: And ...?
A: And then she said she is round the front.
Q: She said she was in the front?
A: Because I ask her where were you and
Q: And she said she was in the front?
A: Yes, sir; because I heard her.
Q: Now, but you did not go out to your room?
A: No, I didn't go out, sir."

Mrs. Mitchell's account of what immediately happened upon her crossing the dividing wall between hers and the Mills' premises appears in the examination in chief as follows:-

- Q: "Now, what happened in the bedroom?
A: I got my dressing gown, slippers, flashlight and smelling salts and came outside.
Q: Why did you get smelling salts?

A: Because of what Ivy told me.

Q: I see. You might be able to answer this: When Ivy spoke to you, how did Ivy appear? You are a nurse; can you assist us?

A: She spoke to me in a calm voice.

Q: Calm?

A: Yes.

Q: I see.

A: Soft Spoken.

Q: Soft. Now, did you leave your bedroom after putting on your slippers and your dressing gown?

A: Yes, sir.

Q: Where did you go?

A: I came out to the kitchen, gave my helper instructions that I was going over to 46.

HIS LORDSHIP: Don't tell us what you told her.

MR. ANDRADE : You spoke to your helper?

A: Yes.

Q: Gave her certain instructions?

A: Yes, sir.

Q: And then what happened?

A: I came out through the kitchen door, walked down my driveway, got to the portion of the wall where we climb over, sat on the wall and I jumped over.

Q: You just eased over?

A: Yes, sir.

Q: Where you went after climbing over the wall?

A: On the lawn; and I got into the Mills' premises on the lawn, walked across the lawn and passed the bedroom window.

HIS LORDSHIP: Walked across the lawn and passed whose bedroom window?

A: By the bedroom window.

HIS LORDSHIP: Whose bedroom window? The Mills?

A: The Mills.

MR. ANDRADE :

Q: Was there darkness or light in there?

A: There was light in there

Q: Were the windows open or closed?

A: They were closed.

Q: So you passed the Mills bedroom. Where you went?

A: I was - to the verandah.

Q: Did you actually get up to the verandah?

A: Yes, just to a little rising or step-up to the verandah.

Q: There is a step-up to the verandah?

A: Yes, sir.

Q: I see. Did anything happen as you got there?

A: Yes, sir.

Q: I want you to talk clearly and slowly.

HIS LORDSHIP: Speak up, you see.

MR. ANDRADE : And loudly. What happened as you got to the step-up to the verandah?

HIS LORDSHIP: What happened now?

A: As I got to the little step-up of the verandah and about to step up on to it, I saw the accused.

MR. ANDRADE : Who is that? Would you point him out?

A: That man sitting over there (points to dock).

HIS LORDSHIP: Yes?

A: Coming out of the living-room door on to the verandah.

HIS LORDSHIP: Speak up. Living-room door?

A: Coming on to the verandah with Mr. Mills in his arm (demonstrating).

MR. ANDRADE : Would you prefer to stand up and demonstrate?

Please do so, Mrs. Mills.

A: Mitchell.

Q: Mrs. Mitchell, rather. Would you show the jury and the court how you saw Campbell with Mr. Mills?

A: He had Mr. Mills across his arms like this, lying on his back, his head thrown back and the body was limp."

According to Ivy's testimony Mrs. Mitchell and herself entered into conversation on the subject of Ivy's coming to the front of the Mills' premises and this conversation took place immediately upon Mrs. Mitchell's arrival at the front of No. 46. Ivy further said that after a while, Mrs. Mitchell, unable to prevail upon her to leave her room, crossed the wall and went back to her premises. On the other hand Mrs. Mitchell's testimony is that no sooner had she reached the front of No. 46 than she was confronted with the spectacle of the applicant with Mr. Mills reclining in his hands, that she was taken up with this spectacle for some ten minutes thereafter until she opened the gate of No. 46 for the applicant and returned to her home and locked herself in. She said "on my way back leaving the Mills premises I heard Ivy and I saw her head at the window just the same. She spoke to me and I spoke to her." As already indicated she did not however tell Ivy anything whatever of what she had just seen. Now as Mrs. Mitchell could hardly have been carrying on the conversation with Ivy attributed to her by Ivy at the very time that she Mrs. Mitchell was being surprisingly confronted with the limp body of Mr. Mills whose welfare was the occasion of her presence there at that hour of the night, a very serious conflict as regards a most critical aspect of the case for the Crown had emerged. Who was speaking the truth, Ivy or Mrs. Mitchell? and so far as the credit of Mrs. Mitchell was concerned, if she did indeed see anything or anyone, why is it that she failed to tell it to Ivy to whose cries for assistance for her employer she had responded?

Mr. Walker's testimony -

Mr. Walker arrived at the Mitchell's residence at about 12.30 a.m.

He was admitted to the bedroom of Mrs. Mitchell where she told him all that she had witnessed that night. Shortly thereafter the first policeman to visit the scene arrived. He was Constable Fuller. Walker and Fuller went to the car porte of No. 44. Walker called to Ivy and his re-assuring voice persuaded her to leave her room and admit them to the living room. Walker asked Ivy what had happened to Mr. Mills and he and the policeman proceeded to search the house for Mr. Mills. The search in the house of course yielded nothing. Later Mrs. Mills arrived and Walker said that he told Mrs. Mills all that Mrs. Mitchell had told him. Mrs. Mills and Mr. Walker went over to Mrs. Mitchell's home and in the presence and hearing of both Walker and Mrs. Mitchell, Mrs. Mills made three or four telephone calls, some of them to hospitals, enquiring for her husband. Walker said that from what he had been told by Mrs. Mitchell he formed the impression that the body of Mr. Mills had been dumped. As it were instinctively he nevertheless undertook his search of the Mills' home for the body of Mr. Mills. Neither instinct, reason, judgment, common-sense nor mere curiosity however led him to look in the Escort car which was still in the same position when last Mrs. Mitchell had left it. Nor did Mr. Fuller, the constable to whom Mrs. Mitchell said that she told everything. Whatever consideration may have restrained Mrs. Mitchell or Mr. Walker from looking in the Escort car, how could a constable so deny or betray his instinct and training unless it was that he was told nothing which would have led him to search the car. Neither Mrs. Mitchell nor Mr. Walker saw fit to tell Mrs. Mills that, having heard what she was told by Mrs. Mitchell she was wasting her time and incurring unnecessary expense in the futile calls to hospitals that she was making.

Sergeant Leonard Wright's testimony -

Sergeant Wright was on mobile patrol when at 2 a.m. of May 19 he received a report which occasioned his visiting No. 46 Woodhaven Avenue. He arrived there in three minutes. Up to that time no one, apart from Mrs. Mitchell, Mr. Walker and Mrs. Mills had known or heard that Mr. Mills' body was in the Escort car. Nevertheless Sergeant Wright, within a few minutes of his arrival, with the aid of his flashlight discovered the lifeless body of Mr. Mills in the car.

The Defence -

Dusting of the car by members of the Criminal Investigating Department yielded no incriminating evidence against the appellant whose defence was an alibi. He was at his home at 8 Renfew Avenue at the time of Mr. Mills' death. He could not then have been the author of Mr. Mills' death. Further he had never met Mrs. Mitchell. She was either telling a lie or was mistaken in her identification of him as the person she saw bearing the body of Mr. Mills.

The conflict in the evidence of Ivy Fraser and Mrs. Mitchell and the conduct of Mrs. Mitchell, Mr. Walker, Mrs. Mills and Constable Fuller, described by counsel for the appellant as strange, provided the focus for the issues to be resolved by the jury upon fair, balanced and incisive directions by the trial judge.

The grounds of appeal were many, but in the view that I take of the case it is necessary only to consider parts (a) of the third and fifth:

Ground 3(a) - The first question on the evidence was:-

"Could Mrs. Mitchell be believed when she said she saw the deceased being carried by someone in the yard of No. 46 on the night of the 18th May, 1974?"

The learned trial judge therefore erred when he directed the jury at pages 577-579 of the transcript that the first question was:-

Was the accused the person Mrs. Christine Mitchell saw that night carrying the body of the deceased towards the car?

By so doing, the learned trial judge usurped a most critical function of the jury, by withdrawing from them a question of fact, in that he was there impliedly telling them that the evidence of Mrs. Mitchell that she did see someone carrying the body of the deceased in the yard that night was a fact. That being so, the only question that they really had to determine on that serious aspect of the case was whether or not that person was the accused. Furthermore the learned trial judge's error eroded one of the bases of the defence, of which he was well aware (see p. 572), in that, the defence had contended that the first question on the evidence could only be answered in the negative. In the circumstances of this case, where the entire case for the prosecution rested on the credibility of Mrs. Mitchell's evidence the wrong direction and the erosion of the defence deprived the applicant of a fair chance of acquittal which was open to him thereby occasioning a miscarriage of justice."

Ground 5(a) - "The learned trial judge failed to crystalise and simplify correctly the issues of fact in the case on which the jury should concentrate their minds. The case against the applicant depended entirely on the evidence of the sole eye-witness Mrs. Christine Mitchell. The part she played on the night of the alleged murder in relation to what she alleged saw; what she did; her conversation with Mrs. Ivy Fraser and Mr. Billy Walker; and the part played by Mr. Walker were all matters most relevant to Mrs. Mitchell's credibility. Therefore, this aspect of the case cried out for a most scrupulous, a most fair and a most balanced direction so that the jury's attention could be focussed on the evidence relating to these matters. The learned judge instead of giving assistance to the jury on these matters merely recited the evidence to them."

The challenge to the conviction of the applicant was therefore directed fairly and squarely at the summing-up of the learned trial judge and to alleged inadequacies therein.

The summing-up -

At the outset of what was otherwise indubitably a most expertly

handled and ably narrated summing-up the learned trial judge briefly outlined the case for the crown and that for the defence, giving early indication that Mrs. Mitchell was the principal witness in the case. He then dealt with the burden of proof, the elements of murder, discrepancy, alibi, his role in the case and that of the jury. He then juxta-positioned the strange behaviour of the Crown witnesses with two main questions, for the jury, which he would later identify for them in these words:-

"During the course of the address by counsel for the defence to you yesterday evening he quoted from the judgment of the Court of Appeal in which that august body up there, in delivering the judgment, used certain words which he has adopted as his own, that "to describe the behaviour of the principal actors in this drama unfolded by the evidence in this case as strange is to make a gross understatement." He adopted those words as his own and he is asking you to agree with that. Well what that august body up there thinks is neither here nor there as far as you are concerned. You are the persons seized with the trial of this case now and it is for you to say, on the evidence which you have heard over the past two weeks, whether you consider the behaviour of the principal witnesses in this case strange or not. For even if you should consider their behaviour strange, it is not going to absolve you from answering the two main questions about which you will have to answer and which I am coming to shortly."

Later on he stated the two main questions for the jury in these terms:-

"Now, Members of the Jury, there is one other very important direction, which I want to give you, before we turn to the evidence. The crown's case here revolves around two main issues. The first one leads on to the other; but you can't move on to the second one, unless you resolve the first one. The two main issues are these: Was the accused the person who Christine Mitchell saw that night, carrying the body of the deceased towards the car? That is the first question. You will have to answer the first - because if you are not satisfied on that point, Members of the Jury, bearing in mind that her testimony on this, stands alone, then that would be an end of the case and your verdict would have to be one

of not guilty. If you are in doubt about it, then your verdict would also be one of not guilty. Once you are satisfied, however, to the extent that you feel sure that Christine Mitchell is making no mistake, when she says that the accused was that person, then you would move on to consider the second issue. Then and only then would the second issue arise. If you are not satisfied that Christine Mitchell saw this man, you wouldn't have to consider the second issue at all; and the second issue is that: Was it the accused who caused the death of the deceased by strangulation? Now, let us return to the first issue. Was the accused the person who Mrs. Mitchell saw that night, carrying the body of the deceased? On this, Members of the Jury, the certainty of the identity, as told to you by Mrs. Mitchell, is of vital importance. If you believe she is lying on this, or if you believe she is mistaken, or if you find that she was acting out of any improper motive, which would induce her to lie on this vital issue, then that would be an end of the matter. In this respect, therefore, you must look at all the surrounding circumstances and examine her evidence very critically in arriving at a conclusion as to whether or not you can believe her on this."

The complaint of counsel for the appellant^{ie} is that the first question was not as the learned trial judge expressed it, but rather that it was as to whether Mrs. Mitchell had indeed seen anyone whether in the circumstances described by her or otherwise and that this arose directly from the evidence of Ivy Fraser with which Mrs. Mitchell's evidence, as already indicated, conflicted and with the consistent failure of both Mr. Walker and Mrs. Mitchell to tell persons whom they would most naturally be expected to tell and who would most obviously have had an interest in knowing that Mrs. Mitchell had seen Mr. Mills in a condition which convinced her that he was dead and that he was last seen in the Escort car standing within the driveway of No. 46.

Still later the learned trial judge came back to the matter and directed the jury once more in terms in which he linked the strange behaviour of the witnesses with the same two questions which he had

propounded. After narrating the evidence of Ivy Fraser up to and including her returning to her bedroom he said:-

"Well, you saw her give her evidence. This is where now, you are being asked by the defence to say that the behaviour of these people had been so strange as to make them - their evidence unbelievable. It is for you to say, when you examine the evidence, whether in the light of the evidence you have heard and having seen the witnesses, whether you are going to regard their evidence, their behaviour as strange and inexplicable; but remember even if you regard it as strange and inexplicable, you will still have to bring it to bear on the two questions which you have to decide."

Finally towards the very end of his summing-up and in response to a somewhat obscure plea by counsel for the appellant that the jury should be given some specific directions as to how they should treat the credit of Mrs. Mitchell against the background of the strange behaviour of the witnesses the learned trial judge concluded:-

"I think I told them that very early this morning when I was dealing with comments of the court of appeal. I think I told them that even if they should find their behaviour strange it would still not absolve them from answering those two burning questions within the context of their finding the behaviour strange - the two questions: Was the accused the person Mrs. Mitchell saw? and, if it was, was he responsible for the strangling of this man?"

The case for the defence as we have seen was conducted on the footing:-

- (i) that the applicant was elsewhere at the time of the murder.
- (ii) that Mrs. Mitchell was mistaken when she identified him as the person she saw bearing the limp body of Mr. Mills.
- (iii) that Mrs. Mitchell's account of what she saw was false having regard (a) to the conflict of her evidence with that of Ivy Fraser and (b) to the strange behaviour of Mrs. Mitchell, Mr. Walker, Mrs. Mills and Constable Fuller.

To repeat, that strange behaviour consisted in this:-

- (i) Mrs. Mitchell's evidence that on her return to her residence she spoke to Ivy but did not tell her what she had seen.
- (ii) Mrs. Mitchell's reasons for not telling Ivy what she had seen, namely because Ivy did not meet her at the front of No. 46 as they had agreed to do and because despite the lapse of seven more minutes Ivy had still failed to meet her at the front of the premises.
- (iii) Mrs. Mitchell's failure to tell Mrs. Mills that telephoning the hospitals was a waste of time in view of what she had three to four hours before seen and believed concerning Mr. Mills.
- (iv) Mr. Walker's search of No. 46 in spite of having been told by Mrs. Mitchell all that she had seen.
- (v) Mr. Walker's failure to search the Escort car in the light of what Mrs. Mitchell had told him.
- (vi) Constable Fuller's failure to search the Escort car in the light of what Mrs. Mitchell said she had told him concerning Mr. Mills.
- (vii) Mr. Walker's failure to tell Mrs. Mills that her telephone calls to hospitals was unavailing having regard to what Mrs. Mitchell had told him about Mr. Mills and his own impressions arising therefrom.

The first question to which ground 3(a) gives rise is: Was the question whether Mrs. Mitchell had seen anyone at all, and not just the applicant, an issue in the case, for whether it was substantial or otherwise the defence was in law entitled to have it put to the jury. In R. v. Dinnick 3 C.A.R. 77 at 79 it was laid down that "there is a principle of our criminal law (which we think has been violated in this case) namely, that when a defence, however weak it may be, is raised by a person charged, it should be fairly put before the jury." The last question put to Mrs. Mitchell in cross-examination was: "And I am also putting it to you that in fact Mrs. Mitchell you saw nothing of what you told this court you saw on the night of the 18th of May, 1976 at 46 Woodhaven Avenue" to which she replied "I saw everything that I have told this court." That it was an issue in the

case whether Mrs. Mitchell had seen anyone seems therefore quite beyond controversy. It was however not merely an issue as such raised by the defence as such but one that sprang logically from the internal conflicts in the evidence tendered on behalf of the Crown and from the conduct of some of the principal actors in the drama that night of May 18, 1976. Further it was a most substantial issue. Mrs. Mitchell gave two reasons for her failure or refusal to tell Ivy what she had seen. The first was that Ivy had failed to fulfil the arrangement to meet her at the front of No. 46. The second was that she had waited near seven minutes for Ivy to meet her around the front of No. 46 but had not done so. It was essential, indeed imperative, that the jury should decide specifically whether they could accept such an explanation. Could such reasons, coming as they did from a responsible person such as a nurse, the neighbour and friend of a family, the principal member of which was in distress, a person who had often had the facility of that family's telephone to speak with her husband, and whose child that very evening had been the recipient of gifts from the Mills, commend themselves to the credulity of twelve intelligent and reasonable Jamaican jurymen? If neither instinct, nor reason, nor judgment, nor common-sense, nor curiosity could have urged Mrs. Mitchell or Mr. Walker to search the Escort car for the body of Mr. Mills, how must one account for the like failure on the part of Constable Fuller who could have had no other interest to advance than to ferret out the truth, to put together any relevant exhibits (e.g. the Escort car) and to bring the guilty party or parties to justice? Was Fuller really told something by Mrs. Mitchell which could have aroused his investigative instincts to go to the Escort car, instincts which he nevertheless suppressed? Without apparent benefit of any information or instructions, and certainly with no more information than Constable Fuller

flashlight into the Escort car and there discovered the body of Mr. Mills. If Mrs. Mills on her arrival had been told by Mr. Walker all that Mrs. Mitchell had told him, why instead of searching the Escort car, did Mrs. Mills make enquiries of hospitals by telephone for her husband? Was Mrs. Mills dissimulating? There can be little doubt that the paramount question in the case was whether Mrs. Mitchell had really seen anyone as she testified that she did. Until this question was resolved no other question could rationally be considered and this paramount question required a careful and balanced analysis of the evidence and of the conduct, described as strange, of Mrs. Mitchell, Mr. Walker, Mrs. Mills and Mr. Fuller. Whatever views the learned trial judge had entertained of the case or of the witnesses from their demeanour or otherwise it was his plain duty to put to the jury this case for the defence. To leave questions to the jury which omitted this vital first question was to divert the minds of the jury from the most critical issue in the case, to fatally erode the case for the defence and to deprive the appellant of a fair chance of acquittal.

The complaint in ground 5(a) in one respect rests upon, and flows directly out of the complaint in ground 3(a). It is the paramountcy of the issue whether Mrs. Mitchell had seen anyone which impels the critical enquiry into the evidence and conduct of the principal witnesses for the Crown. The assumption, albeit erroneous that the first question was whether or not it was the appellant whom Mrs. Mitchell had seen, presupposes the substantial veracity of her story, negates the need for critical enquiry which in turn induces an uncritical and narrative like treatment of the evidence. Indeed, as already noticed, the learned trial judge expressly invited the jury to examine the strange behaviour of the witnesses in the light of his two questions, to neither of which the behaviour of the

witnesses really had any relevance. The first question posed by the learned trial judge assumed that Mrs. Mitchell had indeed seen someone. This was to invade the province of the jury on an important issue of fact and the direction amount to a fatal misdirection.

I therefore would allow the appeal, treating the application for leave to appeal as the hearing of the appeal, quash the conviction and set aside the sentence. Mrs. Mills did not attend the second trial. She was and is not in the island. Neither is the key witness Mrs. Mitchell. The applicant has already had two trials on the capital charge and has been in prison for three unbroken years. Neither in fact nor in principle could a third trial serve the interests of justice. I would therefore not order a new trial but would enter judgment and verdict of acquittal.