Evidence

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 46 OF 1974

BEFORE: The Hon. Mr. Justice Edun, JA., Presiding
The Hon. Mr. Justice Graham-Perkins, J.A.,
The Hon. Mr. Justice Hercules, J.A.

P. 5, 17, 19

R. v. VIVIAN STEPHENSON

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

Andrade for the Crown.

30th September, 1974
1st October, 1974
17th December, 1974

EDUN, J.A.,

On March 6, 1974, the applicant was convicted in the Home Circuit Court of the murder of Violet Phillipson and sentenced to death. Against that conviction he has applied for leave to appeal.

For the prosecution, Glenford Phillipson, brother of the deceased woman, said on oath that on the morning of August 31, 1973 he was lying down in his room on a bed with his girl friend Durlene Garwood, His sister and the applicant were living together as man and wife. She bore two children for the applicant, the youngest being about three months old. They were residing in a room adjoining that of the witness. There was a board partition separating the two rooms. At about 6.15 a.m., that morning, Phillipson said he heard his sister saying: "Don't touch me. Dont't touch me." And as soon as he heard those words, there was an explosion from a gunshot from that room. He saw Garwood jump up on the bed and peep through the creases of the partition. He heard the windows of his sister's room being opened. He jumped up and started to put on his pants. He peeped through the door of his room into the yard outside. Then he saw the applicant with a gun in his right hand running from his door towards the toilet - a pit latrine - which was facing the witness' door and was in the yard. The applicant bawled out "Chutch, Chutch" and he was lifting up a board in the toilet and throwing something under the board. He could see what what the applicant did through the creases in the toilet. "Chutch" was a fifteen

/ year.....

year-old boy who lived in the same yard. Phillipson saw the applicant and Chutch talking and as he was stepping down out of the house, the applicant ran back into his sister's room and slammed the door behind him. He did not notice what happened to Chutch.

Phillipson knocked at the door and the applicant said: "Open it quick, open it quick, open the door quick." He shoved open the door and saw the applicant with his sister in his hand and there was a big hole in her head - over the eye. Phillipson asked the applicant: "Junior, you shot my sister?" He replied: "No, no, a shot came through the window." He added that Phillipson should run and call a doctor. Phillipson left, returned with a taxi and found his sister lying down out at the roadside - apparently dead. He noticed that two of three windows in the sister's room were open.

Durlene Garwood said on oath that about the same time that morning, she heard Violet Phillipson, the deceased, say "Junior, Junior, tek your hand off me." She then heard an explosion coming from Violet's room. She jumped up on the bed, peeped through a little part of the board partition into Violet's room. She saw the applicant with a gun in his left hand and opening his door. Violet was lying on her back on the bed, her face towards her with "foot hang over" the bed. She claimed that she had seen guns in the yard before and that the gun she saw in the applicant's left hand was a thirty-eight revolver. She spoke to Glenford Phillipson (Glen for short)who got up and went to the door. She got off her bed-head as the applicant was going through his door. She went to her door and peeped through the door. She heard the applicant say or call: "Chutch, Chutch"; he ran towards the toilet and she demonstrated the way in which he held both hands. All she could see at that time was the handle of a gun. Chutch ran around the toilet and took something from the applicant and Chutch ran up the street. The applicant went inside his room. She went back on her bed-head and peeped again. She saw the applicant open both windows take up the deceased and go out of the room. She then opened her door and Glen and herself came out of their room "same time."

/ Glen said.....

Glen said to the applicant, "Junior, you mean you kill mi sister: you kill mi sister." The applicant replied: "Is not me, Is not me.... Me and her lay down inside there, I hear like a shot fire, it sound like is in the house and I only see she go back so .... Run go call taxi for me, nuh?" Glen left the premises and later returned with a taxi. In the meantime, the applicant placed the dead body of Violet Phillipson at the gate.

Durlene Garwood also stated that two weeks before the incident she overheard a quarrel between Violet and the applicant. Violet had said: "Junior why you don't go and look for work and come and give something for the pickney them ... that the children them can have food to eat, and leave the girl that you have alone." The applicant replied that he was not leaving the woman "because is fe him personal woman that " He said that if Violet left him, he would kill her. According to Durlene Violet was due to move the very Friday she got shot. Under cross-examination, she admitted that about two months before the death of Violet Phillipson two men came into the yard one night and fired shots and that they accused Glen of stealing their guns. Also on the occasion of the "nine-night celebration" for the deceased three shots were fired in the back yard.

Dr. Louis Dawson testified that on September 13, when he performed a post-mortem examination on the body of the deceased, she had externally a circumscribed wound in the mid-region of the right eye-brow. Internally, he traced that wound into the brain and discovered a damaged bullet in the soft tissue of the brain at the back of the skull. The right side of the skull was fractured from front to back. In his opinion, the fracture was caused by the bullet and the damage to the bullet was caused by its entry through the bone at the front of the skull.

Under cross-examination, the doctor disclaimed any considerable knowledge about bullet wounds. However, he found no powder burns, nor did he find any extraneous matter like bits of carbon or smoke in that wound. He was also of the view that the force of the bullet was complete spent but that if the bullet was fired from a distance of four feet it would have gone through the skull.

Detective Constable Longshaw said that after he received the report of the shooting he went to 15h Upper Second Street and in the yard he saw the dead body of Violet Phillipson. He saw the applicant who told him he was in the room with his girlfriend, the deceased, when he heard an explosion. He was then sitting at the bed-head while the deceased was sitting at the bed-foot feeding her three month old baby. The applicant took him into the room and the constable noticed two windows were open, that the foot of the bed was all in blood. The applicant pointed out the window at the western side and said: "Is this the shot come through, Sir." After making further investigations, he arrested the applicant on a charge of murder.

Under cross-examination, he said the applicant did say "Me no kill me baby mother, sir." There were male and female clothing hanging on the partition in the room behind the bed. He searched the room thoroughly but found no spent shells. Many policemen searched the toilet in the yard but they found no gun.

In his defence the applicant gave evidence on oath. He said that on the day in question about 6.15 a.m., he heard a knock on his window and when he opened it he saw Chutch who asked him for a hammer, plane and saw which the deceased had kept for him the night before. He gave those things which were under a chair to Chutch. He was about to close the window through which he handed Chutch those things when Violet asked him to leave the window open as the room was hot. She was then lying on the bed breast-feeding the smaller baby which then started crying. She got up with the baby, then sat up with it on the bed and took a small bottle with feed out of a mug. He was then reclining on the bed reading a "Star" newspaper. He heard an explosion. Violet said "Lord" and she fell back on the bed on her back and her head was hanging over the foot of the bed up to the corner. He lifted up her head, the baby dropped. He called Glen twice. There was a small hole over her right eye and blood was running over her forehead and face. He went towards the door which was locked. He opened the door and went out with her into the yard. Glen came out and asked what happened and he said "Dem shot Blossom." He asked Glen to get a taxi - and after he realised Blossom was dead he put her down by the gate.

/ A crowd ...

A crowd gathered and he was able to show the crowd the room, the "Star" he was reading and the position where he and his baby mother were before she was shot. Later, the police came and he was arrested and charged for the murder of Violet Phillipson.

What appears to us to be a case involving very simple issues turned out to be a lengthy exercise in the hearing of the appeal. The applicant, through his attorney, filed several grounds of appeal among them were the following:-

1. The interruptions of the trial judge during the hearing of the evidence made it virtually impossible for the defence -

(a) to cross-examine the prosecution witnesses properly,

(b) to put the case for the defence, and

(c) to elicit the applicant's case in his own examination-in-chief, properly or adequately.

Learned attorney for the applicant cited over thirty instances of such interruptions.

2. The trial judge wrongly restricted the cross-examination of the prosecution thus hindering the defence in properly testing the credibility of the witnesses as to facts,

3. The trial judge erred in many instances properly or adequately to sum up the case to the jury.

Learned attorney for the Crown submitted that the trial judge had in many instances interrupted attorney for the defence on sound legal bases but conceded that in a few instances the trial judge was a bit premature. On the whole, however, he claimed that the case for the Crown was a strong one. He urged that if the Court were minded to agree with the submissions for the applicant, as there was no substantial miscarriage of justice, it should not order a re-trial but on the authority of Anderson v. The Queen (1971) 3 AER 768 apply the proviso.

Learned attorney for the defence in reply submitted that the proviso cannot be applied where the trial was unfair. He cited R. v. Hickman (1969) C.L.R. 502, and R. v. Hulusi and Purvis (1974) 58 Cr. A.R.

He submitted also that a re-trial in this case would be wrong because an injustice to the applicant would follow, the blame or defect in the trial rested with the prosecution and a re-trial might result in giving the prosecution an opportunity of filling in gaps in the evidence. He has found no local case which would assist the court on the point but submitted that we should follow the Privy Council's unreported decision of Nana Son of Chanda Bali v. The Queen No. 46 of 1970 and Sumar v. Republic (1964) East African L.R. 481.

We proceed now to consider the interruptions by the trial judge as complained of in the first ground of appeal. In the recent case of R. v. Hulusi and Purvis (supra), following the leading judgment of Lord Parker C.J., in the unreported case of R v. Hamilton, delivered on June 9, 1969 in Court of Appeal (Criminal Division), the principles by which the Court of Appeal should be guided in its approach to questions relating to the conduct of a trial judge were stated in the following terms - "Interventions by the judge during a trial which lead to the quashing of a conviction occur (i) when they have invited the jury to disbelieve the evidence for the defence in such strong terms that the mischief cannot be cured by the common formula in the summing-up that the facts are for the jury, and they may disregard anything said on the facts by the judge with which they do not agree; (ii) when they have made it impossible for defending counsel to do his duty in conducting the defence; (iii) when they have effectively prevented the defence or a witness for the defence from telling his story in his own way."

Interruptions in the instant case

1. Page 20 of the transcript of evidence and summing-up:

"Defence Counsel: Did you tell Constable Longshaw anything about how the gun left the yard, just answer yes or no.

His Lordship: No, no, I have already told him not to answer that question. I want to hear your question first.

Defence Counsel: I thought - sorry.

His Lordship: Did you tell Constable Longshaw any thing about how the gun left what?

Defence Counsel: Left the yard.

/ His Lordship.....

His Lordship: How is that evidence? How can you ask him that question?

Defence Counsel: As my Lord pleases.

His Lordship: No, no, I am asking you, if you can convince me that I should allow it, then I will allow it; but how is that evidence?

Defence Counsel: My Lord, I will leave the question for the time being.

His Lordship: Don't answer that question."

In our view learned attorney for the defence was entitled to ask the first question above and in the way he did. If the witness's answer was "Yes" what the witness said might well have been admissible if the applicant was present; or, if the applicant was not present, the answer might have been relevant as to the credibility of the witness having regard to the evidence. If the answer was "no", it might well have been the end of that exercise. Therefore, to shut off the questions at that stage was premature.

2. Pages 28 - 29 - 30.

"Defence Counsel: (cross-examination of Glenford Phillipson).

Q. Thank you. Now, it is a fact, Mr. Phillipson, is it not, that you and the accused did not get along very well?

A. At that moment we was getting along well

.....

Q. What moment?

A. The moment when him kill mi sister.

Q. Which moment then you were not getting along well?

A. One time when him accuse me of stealing a radio from him

.....

Q. Did Violet, that is Blossom, and Yvonne and yourself ever had any quarrel at any time after your father arrived from England?

A. No, Sir.

.....

Q. Did you ever attack Yvonne at any time with anything?

His Lordship: Who?

Defence Counsel: The accused.

/His Lordship:.....

His Lordship: Attack his sister?

Defence Counsel: Yvonne at any time with anything?

A. I only hold her and lick her. I don't attack her with nothing.

.....

Q. You seem to remember what I am talking about. This particular thing when Yvonne who was littler than you, was facety with you; what was she facetying you about?

His Lordship: Wait a second. What has all this got to do with the case, Mr. St, Bernard? You are defending a man charged with murder, and I am giving you all the latitude, what has all this got to do with the case?

Defence Counsel: My Lord, this has quite a lot to do, in my humble opinion, My Lord, with the credibility which is of extreme importance, of this witness.

His Lordship: Credibility as to what?

Defence Counsel: To his credibility generally, My Lord, that is what I am getting at.

His Lordship: You can start at that.

Defence Counsel: From the answers that he gives me to these questions and possibly the questions

His Lordship: But the questions must be relevant to the case; the questions must be relevant to the man's defence. You can't fun from Dan to Bathsheba and all over the place.

Defence Counsel: I am most grateful to My Lord, But I hope My Lord will bear with me in this.

His Lordship: I have been bearing with you a long time.

Defence Counsel: This witness has testified ....

His Lordship: All right. You have asked him whether he attacked his sister Yvonne - you attacked your sister Yvonne, did you?

A. Yes, Sir.

/ His Lordship:.....

His Lordship: You attacked her?

A. I lick her with my hand, sir.

His Lordship: You bigger than Yvonne? A. Yes Sir.

His Lordship: So You chastising her? A. Yes, Sir.

Defence Counsel:

Q. This time when you chastise Yvonne, you remember what you chastise her for? She was facetying you about what?

A. Well, after the girl come up and she start move mongst some little bredda and carry off some little play in the house where me as a bigger one could'nt sit down and watch what a go on.

Q. You see, I am putting it to you. Mr. Phillipson, that you never heard that morning Violet saying in that room, 'Don't touch me; don't touch me,' you never heard that."

We need hearly state what an elementary mistake the trial judge made when he ruled that the questions in cross-examination must be relevant to the case, and to the man's defence. He shut off questions as to the witness's crddibility, questions as to his means of knowledge, his disinterestedness, or his integrity. Learned attorney for the defence began by putting to the witness that he did not get along very well with the applicant. However, in the exchange, the trial judge made it clear to the jury how much he was bearing up with attorney. It is evident to us how impossible it was for defence attorney to do his duty to conduct his defence and how the trial judge was prepared to take over the cross-examination.

To show that the trial judge was determined to adhere to his wrong ruling, and make it difficult for defence attorney to do his duty there are the following exchanges: at pages 33 - 34:

3. "His Lordship: You don't refer to the preliminary enquiry as to sequence, you refer to what was said.

Defence Counsel: No, My Lord, I said sequence here for My Lord. What I am trying to get from th

/ the ....

the witness is whether or not he said certain things to the magistrate. Again, My Lord, I am endeavouring here to expose the, or test the credibility of the witness,

His Lordship: What is it that you have brought out now to show that he is contradicting what he said?

Defence Counsel: I am not asking what he is contradicting.

His Lordship: No, no, you can only refer to what he said at the preliminary enquiry if there is a contradiction here when compared to what he said there. You cannot just refer to what he said at the preliminary enquiry at large like that.

Defence Counsel: Maybe if I put it this way to the witness: Now, did you ever say to anyone that you heard your sister say: 'Don't touch me, don't touch me' and then your sister got up and peeped and then ....

His Lordship: His sister?

Defence Counsel: Your girlfriedn; you heard your sister - did you say to anyone ....

His Lordship: But he said so this morning; that is what he said.

Defence Counsel: There is a slight difference there, My Lord, and My Lord, will appreciate, maybe I am not putting it very well; if My Lord is patient with I might go through with it. Did you ever say ....

His Lordship: No, no, wait a second. I am not allowing it. What is it you say the witness is contradicting himself on?

Defence Counsel: My Lord, I am not saying he has yet; I am now trying ....

/ His Lordship....

His Lordship: Well, I am not allowing any question unless you show me; I am not allowing it.

....."

4. Words or remarks used to defence attorney in front of the jury.

(a) Page 36.

Defence Counsel:

Q. Before the actual day the child was born, didn't she stop working?

His Lordship: Before the actual day, you mean before she went in labour?

Defence Counsel: Yes.

His Lordship: Oh, my."

(b) Page 65.

"His Lordship: What is all this about? That is the contradiction you see? She is explaining. Some of the Magistrates don't even understand some of the Jamaican witnesses. She is explaining to you what she meant, so what is the contradiction?

Mr. St. Bernard: M'Lord, if My Lord will bear with me?

His Lordship: I have been bearing a long time."

(c) Page 68.

His Lordship -

"Q. Does it matter which hand opened the door Mr. ....

A. M'Lord, with respect M'Lord, it matters ...

Q. I have heard a lot of nonsense in my time. Let's get on with the substance of the case."

Durlene Garwood was here being cross-examined. She stated at the trial that the applicant had the gun in his right hand and he used the left hand to open the door. At the preliminary enquiry she stated when the matter was fresher in her mind that she saw the applicant with a gun in his right hand. Defence attorney had in his cross-examination and in keeping with the defence questioned the fact that the two witnesses for the prosecution never peeped through any holes or ever saw the applicant with a gun in the room. The exchange continued:

Page 69. "His Lordship: There is not contradiction. There Mr. .... let's get on from there, that is on the record. Next question.

.....

His Lordship: Whether right hand or left hand which opens the door?

A. Yes."

Page 70. His Lordship:

"Q. Let me tell you something, my ruling is, I will not be allowing her to answer any more question about which hand the gun was in, whether right or left hand. Her evidence is that he had a gun, that she saw a gun. How we get on from here.

A. As Your Lordship pleases.

Q. You can test that somewhere else if the time comes, you have been wasting too much time in this place.

A. Is that last one a ruling, M'Lord?"

(d) Page 75.

Defence Counsel:

"Q. Apart from Chutch then, how many other used to live in the yard apart from Chutch?

His Lordship: How many other people?

/ Mr. St.Bernard...

Mr. St. Bernard: Yes Sir.

Q. What has that got to do with the case Mr. Bernard?

A. If M'Lord would be a little patient with me it might very well come out.

Q. My patience is running out.

A. I am terribly sorry if that is the case, M'Lad, but I stand here to do a duty, and I am sure, M'Lad would appreciate that I must do that duty.

Q. Yes, I will have some comments to make later on."

(e) Page 77.

"His Lordship: What kind of what?

Mr. St. Bernard: People.

His Lordship: Oh, my. You have a duty to your client, Mr. Bernard. You have a duty to your client, but I have been trying to save your client. I have to save your client from yourself all this time.

Gunmen nuh?

Mr. St. Bernard: I am most grateful for My Lord's help in trying to save my client.

His Lordship: Trying to save him from you."

(f) Page 91. Cross-examination of Dr. Louis Dawson.

"His Lordship: No, he can't answer that, that is for the jury.

Mr. St. Bernard: M'Lord he can say because he had experience.

His Lordship: I am telling you he cannt. I am ruling in here. I am the judge in here.

Mr. St. Bernard: I appreciate that.

His Lordship: He can't answer that."

Defence attorney was endeavouring to elicit from the doctor whether in his opinion from the conversation heard from the deceased immediately before the explosion was heard the bullet could not have been discharged from a range farther than about four feet. But there was no power burns on the entry wound of the bullet and the bullet being discharged from a.38 revolver could not in those circumstances be completely spent in its force so as to lodge in the soft tissue of the brain at the back of the skull. The defence was that the applicant did not and could not discharge a bullet in that room. Though the applicant had said the bullet was fired from outside, there was no burden on him to prove that it was. Nevertheless, the doctor did say that the damage to the bullet was caused by its entry through the bone but that if the bullet was discharged from four feet it would have gone through the back of the skull. The doctor on page 94 volunteered this answer despite the sharp remarks from the trial judge to defence attorney.

It would serve very little purpose to refer to many other interruptions.

When the applicant gave evidence on oath, these interruptions occurred:-

1, Page 140. Examination-in-chief.

Defence Attorney:

"Q. Now, was there any foundation? You understand me? Was there any foundation, any basis for this talk about you have woman, did you have any other girlfriend?

His Lordship: He answer that already. He said no he didn't keep a girlfriend, isn't that so?

A. Yes, Your Honour."

2. Page 143. Examination-in-chief.

Mr. St. Bernard: If it's any of the "r's" just say the "r" and don't say the rest.

A. Him say, "How you go on like a man a "r" ....

His Lordship: What is the relevance of all this?

Mr. St. Bernard: The allegation here is that this accused is the one who was - was associated, if I may use

/ the word....

the word, with 'gunmen'.

His Lordship: The allegation, that evidence came under your cross-ecamination.

Mr. St. Bernard: That evidence, M'Lad, that was said in answer to questions asked. We are clearing it up M'Lad, we are clearing it up, that is the relevance, M'Lad."

3. Page 144.

Defence Counsel:

"Q. And him see them put down the gun and him tief it weh. And how many people - how many men said that to Glen? How many were there when this was said to Glen?

His Lordship: What has that to do with the case?

Mr. St. Bernard: M'Lad, the witness is saying that he has no association with ...

His Lordship: Well, yes, he has denied it already, Why we are going in further detail?

....."

4. Page 145.

Defence Counsel (referring to Chutch). Examination-in-chief.

"Q. He started to work there as fixing the benches you say.

A. Yes sir.

His Lordship: Bumper Hall School?

Mr. St. Bernard: How old would you say he was?

His Lordship: Do you have evidence? What is the relevance of all this? We have evidence that the fellow is fifteen years of age and it is not contradicted, isn't that so, the boy about fourteen or fifteen?

A. To my knowledge he is seventeen, Your Honour.

His Lordship: What does it matter? I have never seen a case that counsel put in everything he can put in whether it is relevant or irrelevant he put it in.

Mr. St. Bernard: Finally Mr. Stephenson ...."

Pages145 - 146. The applicant under cross-examination by Mr.Harris.

"Q. While Violet was living with you you would not like her to leave you?

His Lordship: What is that?

Mr. Harris: While Violet was living with him M'Lad, he would not like if Violet left him.

Accused: Would I like it?

Mr. Harris: If she leave you and go away?

His Lordship: What Mr. Harris means, you were in love with Violet?

A. Yes, Sir.

Mr. Harris: If she leave you you wouldn't like it?

A. No. I wouldn't like it.

His Lordship: I was in love with Violet ...."

After cross-examination and re-examination were concluded the trial judge subjected the applicant to trenchant questioning; pages 156 to 160. From the evidence elicited by the questions asked by the trial judge, it would appear, that

1. the applicant's eyesight was not so goof for reading: how could the applicant state that he was reading the "Star" when Violet Phillipson was shot;
2. the applicant demonstrated how Violet held her baby whilst feeding: how could Violet Phillipson be shot from outside and the baby was not injured;
3. the applicant explained that he did not jump up and have a quick look to see who it was could have fired the shot because he was more concerned with his baby mother; how impossible his evidence was if he did not pursue the alleged assailant;
4. the applicant said that Violet had no enemy in the yard, "she was delicate, soft and easy to sick". Such evidence coming from the mouth of the applicant would impress the jury that the more likely motive was for the applicant to kill Violet Phillipson to prevent her leaving him.

It is quite clear to us from a consideration of the above extracts of the evidence that not only was the applicant effectively prevented from telling his story in his own way but that the jury were invited to disbelieve the defence. No only did the trial judge make it impossible for defending attorney to do his duty in conducting the defence but what is more alarming is that the trial judge descended into the well of the court and "slugged it out" with the defence.

If in this case the applicant was not denied a fair trial we are at a loss to know what is a fair trial. The complaints we have dealt with above are sufficient to allow the appeal. We find in the reasonf for decision in quashing the conviction in the recent case of R. v. Hulusi and Purvis (supra) much support for our views.

In that case, Lawton L.J. delivering the judgment of the Court of Appeal (Criminal Division) had this to say at page 385:-

> "..... Counsel who appear in English Courts have to be robust. They must be prepared to take the knowks and misfortunes of advocacy, and one of the difficulties they must learn to cope with is the judge who is not entirely fair to them. But it is another matter when unfairness to counsel has had bad effects upon the accused. These constant criticisms of Mr. Parrish may very well well have led the jury to think that the appellant's counsel was in some way behaving in a tricky manner, the object of which was to mislead them.
>
> If Mr. Parrish's complaints about the judge had stopped there, the appellant's in thi court would not have been very strong; but a much serious matter hasnow to be considered. It is a fundamental principle of an English trial that, if an accused gives evidence, he must be allowed to do so without being badgered and interrupted. Judges should remember that most people go into the witness-box, whether they be witnesses for the Crown or the defence, in a state of nervousness.

> They are anxious to do their best. They expect to receive a courteous hearing, and when they find, almost as soon as they get into the witness box and are starting to tell their story, that the judge of all people is intervening in a hostile way, then, human nature being what it is, they are liable to become confused and not to do as well as they would have done had they not been badgered and interrupted."

The least we say about the summing-up, the better. Suffice it however, to say that the learned trial judge in his summing-up

1 used a great deal of words to answer every criticism of the prosecution made by defending attorney;

2. played down every conceivable point in favour of the defence for prosecution's story; and

3. on vital discrepancies in the evidence, the jury were not assisted or guided in the way which would enable them to appreciate points for the defence.

In those circumstances and for the reasons we have given, we treat the application for leave to appeal as an appeal the appeal.

We consider now whether or not we should apply the proviso. In R. v. Clewer (1953) 37 Cr. A.R. 37, the conviction was quashed on the ground of undue interruption by the judge which made it impossible for defending counsel fairly to present his defence. That Court of Criminal Appeal held that as the defence had not had a fair opportunity it was its duty to quash the conviction and that in such circumstances it was impossible to apply the proviso. In R. v. Hickman (1969) C.L.R. 502 the judge played a conspicuous part with frequent interruptions and trenchant c ss-examination of the appellant. The Court of Criminal Appeal held that the general effect was that justice was not done and though the judge told the jury that the facts were for them and the prosecution's case was strong it was not a case for the application of the proviso. In Anderson v The Queen (supra) cited by learned attorney for the Crown, the proviso was applied by the Privy Council. There was no allegation in that case that there was an unfair trial.

The question was "whether a jury properly directed as to the presence of Blood on the water boot or carboard would inevitably have come to the same conclusion." The circumstances of the instant case are clearly distinguishable. We, therefore, do not apply the proviso and so we proceed to quash the conviction and set aside the sentence.

We now consider whether in the interest of justice we should order a new trial. We have considered the submissions of learned attorney for the appellant and the authorities cited by him. We are of the view that

1. a re-trial should not be ordered unless the court is of the opinion that on a proper consideration of the admissible or p tentially admissible evidence a conviction might result;
2. a re-trial should not be ordered when the conviction is set aside if the evidence was insufficient to establish the charges, or for the purpose of enabling the prosecution to fill gaps left in their evidence at the first trial ;
3. a re-trial should not be ordered where an injustice would result. Where, for example, the re-trial would take place some considerable time after the original offence was committed, or where the appellant had stood his trial before.

We are grateful for the industry of learned attorney for the appellant and for assisting us with the reports of the case of Ahmedi Sumar v Republic (supra) and we are prepared to formulate the above three principles for the guidance of our courts in cases like the present where re-trials are to be considered.

Learned attorney for the appellant urged this court that we should not order a re-trial in this case because the prosecution will be given an opportunity to fill the gaps left in the evidence for the prosecution, that if a re-trial was ordered an injustice to the appellant will follow, and that the blame or defect in the trial rested with the prosecution in that the medical evidence has established a gap in the evidence.

We have considered the evidence carefully and we hold that on a proper consideration of the evidence as led in the instant trial a conviction might occur. We would be appalled if the prosecution at a re-trial introduced evidence to fill any gaps. If the witnesses for the prosecution were minded to give perjured evidence, they will be dealt with according to law. If they were minded to change their evidence their credibility would be affected, the available transcript would assist the defence in following any changes or variations in the evidence. It is however, no part of our consideration in the ordering of a new trial that the witnesses would change their evidence or that the prosecution will fill in any gaps. The interest of justice does not concern the appellant alone. In this case had it not been for the conduct of the trial, the appellant might well have been properly convicted.

We accordingly order a new trial of the appellant before another trial judge at the next session of the Home Circuit Court. The appellant will be kept in custody pending the new trial.