GA6 • Murder – Trial – Verdict – evidence : extra judicial statement by accused ("mixed statement") evidence : identification. Accused dismissed

Cases referred to.

(Card prepared)

Evidence

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 7/87

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE WHITE, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.

REGINA

v.

ALLAN McGANN

Mr. Frank Phipps, Q.C., Mr. W. Charles and Miss D. Satterswaite for Applicant

Mr. G. McBean for Crown

November 10, 11, 12, 13, 16, 17, 18, 1987
and May 30, 1988

KERR, J.A.:

On January 22, 1987, the applicant was convicted of murder in the Saint Catherine Circuit Court before Patterson J., and a jury. The victim was Carmen Batticks, the applicant's former lady friend on whom sulphuric acid was thrown in the evening of November 29, 1984. This was the operative cause of her death which occurred approximately one month later on December 26, 1984.

Ground 1 of the grounds of appeal filed is that the verdict was unreasonable and cannot be supported having regard to the evidence. To determine the merit of this ground, it becomes necessary to summarize the material evidence which was before the jury.

Kevin, the deceased's elder son, aged 10 years at the time of the incident was living with the deceased together with his younger brother, Jarmaine at Lot 24 Spaulding Gardens, Central Village, Saint Catherine. His evidence is that the applicant at some earlier time had been living with the deceased on intimate terms but that she had driven him away prior to the incident. The applicant had nonetheless on occasions

returned in an endeavour to renew the relationship, but on each occasion he had been driven away by the deceased. Kevin was, however, unable to state the last occasion prior to the incident on which the applicant had renewed his visit.

On November 29, 1984, at a time which Kevin described as night and which he estimated as about 8 p.m., he, the deceased and Jarmaine returned home together. Kevin stated that he was returning home from Swallowfield All-Age School in Kingston. They entered the gate of their home. He remained behind to close the gate while the deceased proceeded to the grilled door of their section of the house. The other section of the house was in the occupation of one Mr. Jones. While at the gate, Kevin saw a man run from behind a rubbish pan which had been placed within but against the wall at the gate about 4 yards away from him. This man had a large plastic jug. The man ran towards the deceased who was in the act of opening the grill door. The man, on reaching beside the deceased, threw the contents of the plastic jug all over her. The man then dropped the plastic jug in the driveway and ran behind the house and disappeared. The rest of the facts which the jury could have found, is a matter of inference from what Kevin actually said in answer to specific questions asked. The relevant questions and answers are as follows:

"Q. After the man ran behind the house, did you see him again?

A. See him next morning.

Q. Where?

A. Miss Icy and mi and mi cousin dem did go up the house and then a see - I was there and then I see him come through the gate.

Q. Who is that?

A. Allan McGann

His Lordship: Let us get, who was the first man you saw the night.

Q. Who was the man you saw the night?

A. I did not saw him face.

"Q. What part of him you saw?

A. The back of him.

Q. So how did you know who it was?

A. I don't know who it was.

Q. Now, you were telling us something about the next morning, did anything happen the next morning?

A. Yes.

Q. What happened?

A. When I see him come in the house I see him go round the back.

His Lordship: Who is the him you talking about now?

A. Allan McGann

Q. What happened after he went around the back?

A. I saw him come round back to the front and leave.

Q. You say that this happened the next morning?

A. Yes.

Q. About what time was it?

A. About 7.00

Q. That night or evening, that night, did you hear your mother call out Jones name?

A. Yes, sir.

Q. And at that time was there somebody living at the house named Jones?

A. Yes.

His Lordship: What time you heard your mother called out Jones' name?

Witness: What time?

His Lordship: Yes. What was happening then, was it before, after she got the burn or before or when?

Witness: After she got the burn.

His Lordship: Where was Jones at that time?

Witness: At work.

"His Lordship: He was at home?

Witness: No

His Lordship: It was after the man run behind the back, your mother so called out to Jones?

Witness: Yes, sir.

His Lordship: You answered a question and you said that the next morning you did not tell anyone that your mother said 'Lord God Jones burn me up.' Is that correct?

Witness: Yes.

His Lordship: Did you hear your mother say that at anytime?

Witness: Yes, I hear her say that.

His Lordship: When you heard her say that?

Witness: When she running down Miss Icy.

His Lordship: Jones is a man?

Witness: Yes sir.

His Lordship: What size man?

Witness: Short and fat.

His Lordship: The man that you saw throwing the thing on your mother, was he a bigger or a smaller man or the same size as Jones?

Witness: A taller man.

His Lordship: Tall like who?

Witness: Tall like Allan McGann

From the above questions and answers, it would have been open to the jury to find as a fact that the person who threw the contents of the plastic container on Carmen Batticks was a man about the height of the applicant and could not be Mr. Jones who was Carmen's neighbour because Mr. Jones was shorter than the man whom Kevin saw and Mr. Jones was not at home but was at work. Kevin was not cross-examined as to the basis of his knowledge of the whereabouts of Mr. Jones.

Enid Batticks, the step-mother of the deceased, confirmed Kevin's evidence that the applicant had been the male companion of the deceased, living with her on and off. She Enid, lived at Lot 39 Spaulding Gardens

about two to two and one half chains away from the deceased. She said that on November 27, 1984, the applicant was on her verandah speaking to a lady by the name of Shane. She overheard the applicant saying to Ms Shane that the deceased had lied on him by saying that money problem was the cause of their having broken up, and that a man was coming in December to marry the deceased. As to the incident of November 29, 1984, her evidence if accepted, would indicate that it took place well before 8 p.m. as estimated by Kevin, because she said that some minutes after 7 p.m., while she was in her drawing room she heard the sound of a person crying on the street. The person came to her gate and called out to her. She recognized the voice as that of the deceased who by then had come through her gate. She opened her door to the deceased. The deceased was almost naked. She had on only a piece of brassiere and a piece of panty. Some dark liquid substance was running down from her body. The skin of her body had changed. It was very dark. She was crying.

She was helped to the bathroom and the bathroom shower was turned on her. While the water was beating down on her, she was tearfully complaining that she was burning up. This witness said she took the deceased from the bathroom, wrapped her in a sheet, obtained transportation, and ultimately had her admitted in the Spanish Town Hospital. On the following morning about 7 a.m., while she was on the road leading to the deceased home, she met the applicant coming from the general direction of the deceased's home about two yards therefrom. The applicant enquired of her as to what had befallen the deceased. She asked him if he had not heard that the deceased had been burnt. He was further told that she was on admission to Spanish Town Hospital. This witness said she observed a scar which she described as looking like a sore on the face of the applicant in the area of his jaw.

Detective Acting Corporal Davey gave evidence that at about 7:30 p.m. while he was at Central Village Police Station, the deceased, wrapped in a sheet came there in the company of three ladies. He

despatched her to Spanish Town Hospital. He thereafter went to the deceased's premises. He noticed that a large area of concrete walkway extending from the gate towards the front of the verandah was "wet and foaming froth." He saw a white plastic container lying in the wet area. He took possession of it and noticed that it contained a little liquid. He searched the yard and found, folded and stuffed in the branches of a tree, a blue long sleeve shirt which appeared to be burnt in parts. The tree in which the shirt was stuffed was on the left side nearer to the rear of the house as one faces the road. He took the shirt and the plastic container to the Central Village Police Station and locked them away in his quarters. On the morning of November 30, 1984, he returned to the deceased's premises and made enquiries. From there he went to Enid Batticks' home where she showed him a blue floral dress which was partly melted down. He took possession of this dress, proceeded to the Spanish Town Hospital and spoke to the deceased. He was told something by her. He later proceeded to the home of the applicant at Lot 31 McNeil Boulevard, Central Village, where he saw in his room, a red short sleeve guernsey shirt on which there were several dark spots on the front. He also took possession of this item and locked them away, after placing each in a separate large open envelope on the floor of the locker in his quarters as he had similarly done with the plastic container and blue shirt which he had taken from the deceased's premises at about 7:30 p.m., in the night of November 29, 1984. On December 3, 1984, he went to the cell block where the applicant was. He took with him the items which he had locked away in his quarters. He saw what he described as raw blisters on the face and hands of the applicant. He informed the applicant of his mission, cautioned him and enquired how he came by the blisters. The applicant replied saying "a radiator bun mi a Falmouth Court House." He asked the applicant where he was between 6:30 and 7:30 p.m. on the night of November 29, 1984. The applicant replied that he was at Carib Theatre. He was invited to have a doctor examine the blisters on his face. His response was that he would not go to any doctor until he had spoken to his lawyer. He was

shown the blue long sleeve shirt and asked if he knew it. His response was that it was his shirt, but he had thrown it away some two weeks ago and he could not say how it had got so burnt up. He was shown the red short sleeve guernsey and similarly asked if he knew it. He replied, "Dis a my shirt too." He was shown the spots on this shirt and he said, 'Dis a must be grease, mi work pon car inna it sometimes'. He was shown the plastic container and asked if he knew anything about it. He made no reply. He was shown the blue floral dress and he responded by saying that he had sometimes seen the deceased wearing it. The items were then separately enveloped in the presence of the applicant, labelled, sealed and later taken to the Government Analyst. On or about December 11, 1984, this witness caused the applicant to be examined by Dr. Shivashanker of the Spanish Town Hospital. As a result, he charged the applicant with assault occasioning grievous bodily harm to Carmen Batticks. On being cautioned he said, "She say she si mi?" On December 20, 1984, the applicant was taken to Dr. Dunwell on referral from Dr. Shivashanker. The applicant was examined by Dr. Dunwell. On a subsequent date, this witness went to the Kingston Public Hospital where he saw the dead body of Carmen Batticks. He returned to the Spanish Town lock-up where he arrested the applicant and charged him with the offence of murder. The applicant's response was "She dead?"

Dr. Shivashanker found acid burns on the face, eye, chest, breast, abdomen and on both thighs of the deceased. Both her eyes were completely burnt. Dr. Shivashanker gave as her opinion that the burns were acid burns because there were streaks on the skin. Further, the skin was completely blanched which she explained as meaning that the skin was completely discoloured and scaly.

On December 9, 1984, she examined the applicant and found two very small burns in the process of healing. These were located one on the forehead more to the right, the other on the chin. She expressed the view that these were acid burns because there was a complete loss of skin where the burns were, and the skin was atrophied. Further, she

said if the burns were caustic and not acid burns she would have expected a wider area of burns. In the case of acid burn, the acid burns "exactly where it falls on the spot." She referred the applicant to Dr. Dunwell, the skin specialist attached to the Kingston Public Hospital for confirmation of the nature of the burns. She stated that the applicant had given a history of having been burnt in the face by hot water spilling from a radiator.

Dr. Patricia Dunwell examined the applicant on December 20, 1984. On that date she saw scars, the largest of which was 10 millimetres by 2 millimetres on the right cheek. There were three small scars on the forehead, more centrally on the right side measuring 2 millimetres by 5 millimetres. The scars were all localized, depressed and hyper-pigmented. She explained that depressed meant that the scars were sunken, that is to say, lower in level than the surrounding normal skin. She gave as her opinion that whatever caused the burns which left the scar, must have been quite damaging immediately to have caused the atrophy shown by the depression in the healing process.

She said one of two things could have caused the scars, namely, sparks landing on the skin, or acid damage. She ruled out hot water, saying that this would result in superficial lesion instead of a penetrating one and in addition the immediate surrounding skin would be involved which was not so in the case of the applicant.

In summary, the evidence led from Enid Batticks and Detective Acting Corporal Davey was that the first saw a sore on the face of the applicant on the morning of November 30, 1984 which was about 12 to 13 hours after the incident; the second saw raw blisters on the face of the applicant about 5 days after the incident on December 3, 1984. Dr. Shivashanker some 11 days after the incident saw two very small burns in the process of healing. One was located on the forehead, more to the right, the other was in the area of the chin. She expressed the opinion that they were acid burns. Dr. Dunwell, some 22 days after the incident saw scars which had completely healed. She expressed the

opinion premised on the reasons which she gave that the scars were more consistent with fire sparks or acid damage but not from hot-water spillage from a car radiator. Since no issue of fire sparks was involved, but solely hot water spillage which was the case of the applicant, and acid which was the case for the Crown it was open to the jury properly to have found that the applicant had suffered acid burns.

Next is the evidence of Dr. David Lee, the Government Analyst to whom the shirts, plastic container and blue floral dress had been submitted for analysis. His evidence is that all the items of clothing had been damaged by sulphuric acid. The plastic container also had residue of sulphuric acid. The cross-examination of this witness was directed to establish that the blue shirt and the red guernsey could have been damaged by cross-contamination with the plastic container and that this is more probable because in the case of the red guernsey, he the witness had found acid burns both to the front and back which if the guernsey was being worn at the time when acid came into contact with it, the person wearing it would be burnt on the body. The witness, however, asserted that the burnt areas in the back of the guernsey could have resulted from cross-contamination if acid was on the front area and the guernsey had been folded.

Thus at the close of the Crown's case there was before the jury the evidence of Kevin that a man threw the contents of a plastic container on the deceased. This man was of the height of the applicant. This man dropped the container and ran to the rear of the house and disappeared. There was a broken down fence at the rear of the house over which the man could leave the premises. Shortly after this incident, about 7:30 p.m. on the same night, Detective Acting Corporal Davey found a blue long sleeve shirt folded and stuffed in the branches of a tree at the side but more to the rear of the house behind which the applicant had disappeared. This shirt was burnt in parts. He also recovered a plastic container. These were examined by Dr. Lee who found that the plastic container contained the residue of sulphuric acid and

and the shirt had been burnt by sulphuric acid. Corporal Davey also recovered a red short sleeve guernsey shirt from the room of the applicant on the morning following the incident. This shirt was also damaged by sulphuric acid. The applicant admitted ownership of both shirts though he went on further to say that the blue shirt had been thrown away some two weeks before the incident. He the applicant had acid burns on him and the deceased died of acid burns.

Mr. Phipps submitted that the primary evidence of the expert witnesses, namely, Dr. Shivashanker and Dr. Dunwell, that it was acid that had burnt the applicant's face was equivocal as they did not positively rule out the defence version. Dr. Lee's evidence of acid burns to the red guernsey shirt, admittedly the applicant's was equally equivocal on the hypothesis of cross-contamination. In regard to the blue long sleeve shirt, he submitted that the evidence of applicant's ownership was also equivocal but on a different ground. He said that on the Crown's case the shirt could not be said to be his, having regard to the full statement which the applicant made to Corporal Davey. He submitted that it was only on the basis of an error in law constituted by a non-direction on the effect of the exculpatory part of that statement that the jury could likely have found as a primary fact that the blue shirt was the applicant's. This latter issue is the subject of a separate ground of appeal which is dealt with hereafter. The evidence in our view does not disclose any equivocation by the medical experts that the burns to the applicant's face could have been caused in the manner asserted by him. Equally, the suggestion that the red guernsey shirt could have been contaminated by sulphuric acid while in the custody of Corporal Davey was dispelled by the latter's evidence. Thus, once the jury accepted the Crown witnesses as credible and further accepted the evidence of Detective Corporal Davey that he had separated the items so that the shirts or either of them could not be damaged by sulphuric acid from the container while these items were in his custody, it was open to them to find that the blue shirt was damaged by whoever threw

the acid on the deceased. It was further open to them to find as a fact that this shirt had never been thrown away by the applicant at the time when he said he did, but rather that he had taken it off when he went to the rear of the house, stuffed it in the tree branches intending to retrieve it the following day for which purpose he returned to the yard about 7:00 a.m. the following morning and proceeded to the rear of the house only to discover that the shirt was no longer there. There was thus a prima facie case for the applicant to answer and the learned judge was right in over-ruling the no case submission.

Mr. Phipps submitted that even if it could be contended that there was a case to answer at the close of the case for the prosecution, the defence properly considered, showed that the verdict of the jury was even more unreasonable, and manifestly so, because the alibi defence was unassailable. He submitted that having regard to the time frame within which the incident took place, the improbability of the applicant being involved was manifest as it was inconsistent with his undoubted presence at Cross Roads about 7:30 p.m. that same night.

In his defence the applicant denied that he had ever owned the blue shirt. He denied making the statement attributed to him by Corporal Davey. He, however, admitted that the red guernsey was his. He also admitted having marks on his face but said they were caused when water from a hot radiator spilled out on his face and hands some eight weeks before Corporal Davey questioned him. He did not deny being shown the red guernsey shirt. He did not deny being shown the spots thereon. He did not deny that he had told Corporal Davey that the spots could be grease as he sometimes wore it when working on cars. He raised the defence of alibi, namely, that he was in the Carib Theatre at Cross Roads between 4:00 p.m. and 7:30 p.m. He said he saw persons in the theatre including a former co-worker named Sharon Green and a friend named Benjamin alias "Seckie" who sells drinks in the theatre and from whom he actually bought drinks that evening while in the theatre. None of these persons were called by him as witnesses. True enough, he is not required

to call any witness to support his alibi but inasmuch as he did call witnesses to support his presence elsewhere after 7.30 p.m., it would be reasonable to expect him to call witnesses if available to cover his presence over the critical period of 7.00 p.m., to 7.30 p.m., or tender some explanation for the absence of such witnesses. The applicant said he went from the theatre to the Civil Service Association building at Caledonia Place in Cross Roads and spoke to one Miss Cooper some minutes to 8.00 p.m.. He spoke with her for about two or three minutes. He then left and walked to the clock at Cross Roads where he took a bus for Central Village, Spanish Town. He alighted there, walked straight home to 31 McNeil Boulevard arriving there at about 9.00 p.m.. Central Village to Cross Roads he says is roughly twelve miles. His witness Delores Cooper confirmed his evidence as to his presence at the Civil Service Association building in the night of November 29, 1984 and that he spoke to her. She however said it was about 7.35 p.m. They spoke for about five minutes. She packed her things to leave immediately thereafter and this was about 7.40 p.m. On her evidence the applicant's presence at the Carib Theatre as he said he was, until about 7.30 p.m., would not seem probable especially as Ruby Bailey another witness called by him said she saw him at the office about 7.30 p.m., on November 29, 1984 and summoned Delores Cooper on his behalf. Thus the alibi defence of being at the Carib Theatre between 4.00 p.m., and 7.30 p.m., was not unassailable.

At the conclusion of all the evidence in the case, it was reasonably open to the jury to conclude that the alibi defence of the applicant was false and had been eroded by his own witnesses because, unless he had left the theatre before 7.30 p.m., (which he does not assert in evidence) he was not likely to be at the Civil Service Association building at the time when his witnesses said he was there. On the other hand it was reasonably open to the jury to conclude that the circumstantial evidence against the applicant was both credible and cogent and that it inevitably led to the

inescapable conclusion, and to that conclusion only, that it was the applicant who caused the death of Carmen Batticks by throwing sulphuric acid on her sometime around 7.00 p.m., in the night of November 29, 1984. It was open to the jury to infer that from the appellant's own admission that he had a car for purpose of his job which involved servicing fire safety equipment, extinguishers and alarm, islandwide, and the further admission that when his car was not available he either borrowed or rented a car for going to work instead of using bus, he had a car at his disposal in the evening of November 29, 1984, despite his denial, and therefore had adequate time to travel the twelve miles from Central Village, Spanish Town after doing the heinous act about 7.00 p.m., or minutes thereafter, reaching the Civil Service Association building at the time when his witnesses said he was there. Alternatively the jury could certainly with their knowledge of worldly affairs have found that it was not improbable for the applicant to have reached Cross Roads at the time he did, travelling by bus based on the evidence which, having regard to the sequence of events indisputably fixed the time of the throwing of the acid as around 7.00 p.m., or a few minutes thereafter.

In the light of the above there is in our view no merit in this ground of appeal namely that the verdict is unreasonable having regard to the evidence.

Another ground of appeal argued was that the learned trial judge misdirected the jury as to the effect of the exculpatory part of an extra-judicial statement of the applicant led in evidence by the prosecution to prove ownership of the blue shirt which was found in the branches of a tree in the yard of the deceased.

Concerning this evidence, the learned trial judge in his summing up to the jury said: (pp 171-2):

"Detective Davey said he showed the accused the blue long-sleeved shirt, Exhibit 2 and asked him if he knew it and the accused said, 'yes, dis a mi shirt, mi dash it way two weeks ago, mi no know how it burn up so.' Said he showed him the other shirt and asked him if he knew it and he said, 'Dis a my shirt to.' Said he pointed out the spots on that shirt and the accused said, 'This a must be grease, mi work pon car in deh sometime'."

"Now, Madam Foreman and members of the jury, it is very important as I say for you to consider whether you accept that bit of evidence or not; what Detective Davey said. Because if you accept his evidence that it is this accused man's shirt you will have to ask yourselves, how did it get in that tree branch? How did it get sulphuric acid on it? Is it that the accused man had it on that night and that was how sulphuric acid got on it? Because you will recall that Kevin said that this man went up behind his mother, close to his mother, threw the thing on her, was there a spillage? Detective Davey said that in the walkway from the gate going towards the house he saw the ground foaming, those were his words. What does that suggest to you, Madam Foreman and members of the jury. Could it have gotten there from a spillage before it was thrown, could it have gotten there when the deceased walked by because we heard that the deceased left the house and walked to Mrs. Batticks home."

and later at p. 173:

"Learned Counsel for the defence said that having regard to the burns that you saw on the Exhibit 2, if the accused man was wearing Exhibit 2 then you would have expected more burns on Exhibit 3."

"But as I said, there is no evidence to say what he was wearing, whether he was wearing two shirts, five shirts or six shirts. If he was wearing more than one shirt, whether the blue shirt was on the outside or the inside or the red shirt was on the inside or the outside."

In support of this ground of appeal, Mr. Phipps submitted that the learned trial judge misdirected the jury on the "mixed statement" attributed to the applicant by Detective Corporal Davey. In that statement, the applicant admitted ownership but denied possession at the relevant time. Accordingly, argued Mr. Phipps, the directions on this issue left the jury to infer that an admission of ownership would naturally lead to possession at the relevant time. He sought support in statements from the following cases, R. v. Duncan (1981) 73 Cr. App. R. 359; R. v. Hamand (1985) 82 Cr. App. R. 65; R. v. Sharp (1987) Times Report 22/1/87; R. v. McFarguhar (1974) 12 J.L.R. 1363.

R. v. Duncan (supra) the facts are set out in the headnote thus:

> "Late one night the appellant strangled the woman with whom he was living and took her body to nearby woods, set fire to it and then fetched a shovel and covered it up. He admitted he had killed the woman to a neighbour, the police were summoned and the appellant made various statements to them, including a confession admitting the killing but was unable to explain the motive for his actions. He suggested that he must have lost his temper when the victim teased him. He was charged with the victim's murder and at the end of the prosecution case at his trial he elected not to give evidence or call witnesses. The trial judge raised the issue of provocation and invited submissions from counsel. Thereafter he ruled that, in so far as the appellant's statements were self-serving, they could not be evidence of the facts and, accordingly, he withdrew the issue of provocation from the jury. The appellant was convicted of murder and appealed on the ground that the judge's ruling was wrong."

In delivering the judgment of the Court, the Lord Chief Justice said: (p. 365)

> "Where a "mixed" statement is under consideration by the jury in a case where the defendant has not given evidence, it seems to us that the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. Equally, where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight." (Emphasis supplied)

In R. v. Hamand (supra), although the appeal turned on the applicant being denied by the judge of a free choice whether or not to give evidence on oath, this statement of principle in the Duncan's case was expressly approved. It is of interest to note that in Regina v. Sharp, Kenneth James, J. in giving the judgment of the Court, used language suggestive that the advent of this new trend rather than being ardently welcomed was mourned as ending an era when he said:-

> ".....the law made clear in R. v Duncan (1981) 73 Cr App R 359, 365) that the jury should be told to consider the whole of such a statement, both the incriminatory parts and the excuses or explanations.
>
> That represented a departure from the approach to mixed statements adopted for many years, and might well have created difficulties for judges trying criminal cases. But it was binding upon their Lordships, and was followed in R v Hamand ((1985) 82 Cr App R 65).
>
> .....
>
> The judge had directed the jury that in looking at the mixed statement made by the appellant the only admissible evidence to be found in it was that part where he admitted, contrary to his own interests, that he was present in the area of the burglary at the material time.
>
> In so directing the jury the trial judge was not following the law as it was laid down in Duncan and repeated in Hamand. That constituted a misdirection and the appeal had to be allowed."

The problem posed by mixed statements was considered here and in other West Indian Jurisdictions. In R. v. McFarquhar (1974) 12 J.L.R. 1363, the headnote reads:-

> "What an accused person says by way of seeking to exculpate himself from guilt of the offence charged is not necessarily to be regarded as exculpatory merely because he says it, and because the prosecution leads it in evidence. The statement of the accused must be taken in its entirety and the jury should be directed to say whether, looking at the case as a whole, they think the accused's statement consistent with the other evidence in the case and whether they believe it to be true."

This principle was extracted from the judgment of the Court delivered by Luckhoo, J.A. in which he quoted with approval at p. 1366, the following passage from R. v. Steptoe (1830) 4 C and P at p.397:-

> "What a prisoner says is not to be of necessity taken as an exculpation, merely because he says it, and the prosecutor gives it in evidence. You are to take what he says all together. You are not bound to take the exculpating part as true merely because it is given in evidence; but you will say, looking at the whole case, whether you think the prisoner's statement consistent with the other evidence, and whether you believe that is really true."

and went on to say:

> "When the trial judge declined to leave the issue of manslaughter on the basis of the appellant's oral statements "I did not cut him fi kill him" being construed to mean that the cutting was done without an intent even to cause serious bodily harm to the deceased, he was not in error, for that statement was neither consistent with the applicant's cautioned statement nor from his statement from the dock nor was it consistent with the prosecution's case of the circumstances and manner in which the fatal injury was given as narrated by Byron Gordon."

In Callwood v. R (1967) 10 W.I.R. 262, it was held that:-

> ".....the mere unsupported statement of the appellant to the police that he had stabbed the deceased in self-defence (which statement the jury by their verdict had rejected) did not constitute a proper foundation to justify leaving the issues of manslaughter or self-defence to the jury, and, accordingly, the judge was under no duty to do so."

The statements in later Jamaican cases were not as wide as that in Callwood v R. In R. v. Delroy Prince No. 31/83 - delivered October 14, 1985, the complaint against the directions of the judge was in

contrarium to that in the instant case. In that case, the appellant Prince was jointly indicted and tried with three other men for the murder of Donna Henry.

The case for the prosecution rested on the evidence of Michael Davis and was to the effect that a party of five men tied together himself and the deceased, Donna Henry, who was his girlfried. Of the men, two were armed with firearms, namely, the appellant and another man, who was subsequently killed. But before the trial, the men were taking them to a place of execution when, an on-coming car light shone on them and precipitated action. Both armed men opened fire on the deceased and the witness who had fallen to the ground. The deceased who fell on top was killed. The prosecution tendered a statement signed by the accused in which he had admitted being present but taking no part in the killing of the deceased. The defence of the other three accused who were acquitted, was duress by one, and innocent spectators by the others. The applicant's defence was an alibi and he gave a statement from the dock that he was at home sleeping with his girlfriend at the material time. He denied making the statement to the police, alleging it was a fabrication which he was forced to sign.

In his directions to the jury, Smith, C.J. said:-

> ".....If you believe he gave it freely and voluntarily, it still doesn't implicate him in the offence. So, if you believe what he said there is truth and not what he said in the dock, you still have to acquit him, if you believe that is all he knows about it. So, either on what he told you from the dock - where he said he wasn't out there at all and the first thing he knew is when the police came to him - or what he said in the statement - if you believe either account you must acquit him and if you are not sure whether either account is true or not you must acquit him as well."

The complaint was that the Chief Justice went out of his way to say that the statement did not implicate the applicant and this was damaging because:-

> "By playing down the real effect of the statement a "time bomb" was thereby placed under the defence which on further consideration would explode with disastrous results, namely that that version of the accused's movements could not be true and therefore the confession statement if believed must wholly contradict the defence in Court; once it was believed that the accused was admittedly on the scene then the way was open for the jury to accept the evidence of the sole prosecution witness with the clearest of intentions."

In giving the judgment of the Court, I said:-

> "Now of the men who escorted the witness Davis and the deceased, only the appellant and the absent Tony were armed according to Davis. Accordingly, the basis on which all four accused were jointly indicted was common design.
>
> .....
>
> It was therefore necessary for the trial judge to advise the jury that mere presence at the scene was not sufficient to implicate an accused in the commission of the offence. Therefore in the manner in which the trial judge directed the jury in this passage he was not putting forward the acceptance of the statement in its entirety as part of the defence, but a consideration in the event they did not accept the evidence of Davis and had a reasonable doubt as to the part played by the appellant."

I then went on to deal briefly with the evidential value of an extra-judicial admission put in by the prosecution and after quoting the following statement of Lawton, L.J. in R. v. Sparrow 1 W.I.R. p. 492.

> "The trial judge had a difficult task in summing up that part of the case which concerned the appellant. First, he had to try to get the jury to understand that the appellant's exculpatory statement to the police after arrest, which he had not verified in the witness box, was not evidence of the facts in it save in so far as it contained admissions. Many lawyers find difficulty in grasping this principle of the law of evidence."

I said:-

> "It is not unusual that an extra-judicial statement put in by the prosecution contains an embryonic exculpatory issue. Where, however, the defence not only fails to develop the issue but virtually kills it by raising a defence wholly incompatible with the exculpatory parts of the statement, then that issue is no longer a 'live one' meriting the jury's consideration. To us this seems implicit in the statement of Lawton, L.J."

Although this statement was obiter, it was approved and given authoritative status in the judgment of this Court delivered by Carey, J.A. in R. v. Colin Johnson - Supreme Court Appeal 89/85 dated June 19, 1987.

Now, as Mr. McBean so correctly pointed out, the cases of Duncan and Sharp are clearly distinguishable from the instant case in that, in those cases the appellants did not give evidence whereas in the instant case, the statement was not only denied but the exculpatory part was incompatible with the defence, was wholly inconsistent with the evidence of the applicant and also inconsistent with the case for the prosecution. In our view were the trial judge to have left to the jury as a separate issue the exculpatory part of the statement, he would be presenting to them an issue which was jettisoned by the applicant. Further, the trial judge would be putting forward a theory not relied on by either side and expressly rejected by the defence. By so doing, he would obliquely be undermining the issue specifically raised by the applicant in relation to the ownership of the shirt.

The statements in the cases of Callwood, McFarquhar, Prince and Johnson (supra) indicate that issues are raised in Court and not by extra-judicial statements, and, above all, certainly not by the exculpatory part of such a statement which the accused, at his trial, not only denied making but specifically raised an issue inconsistent with that exculpatory part of the statement. There was therefore, no obligation on the trial judge to leave the exculpatory part of the statement as an issue for the determination of the jury. However, where the exculpatory part of the statement relates to an element or fact essential to establishing the case for the prosecution, it therefore emphasises that the onus of proof remains on the prosecution to prove that essential. In the instant case, the learned trial judge unlike the judge in R. v. Sharp (supra) and in R. v. Duncan (supra) did not withdraw the exculpatory part of the statement from the consideration of the jury. Instead, in reviewing the defence, he reminded the jury

of the issue in relation to the blue shirt - thus:- (p.179)

> "Madam Foreman and members of the jury, let me remind you of what he said. He said at the very beginning, the shirt, the blue shirt, exhibit 2, is not his, he did not tell Corporal Davy that it was his and that he threw it away two weeks ago."

He had early in his summation as well as after his review of the evidence for the prosecution given appropriate directions on circumstantial evidence and, towards the end, after reviewing the evidence of the defence on the specific issues, reminded the jury that there was no duty on the accused 'to prove anything;' and went on thus:- (p.188)

> ".....but even if you reject entirely what he has said, you cannot on that score alone say he is guilty. You will have to look back at the prosecution's case and bear in mind his evidence and the evidence of his witnesses, and you say whether or not the prosecution has satisfied you to the extent where you can say you feel sure that Carmen Batticks is dead. That it was this accused man who killed her."

and ended on this note (p.188):-

> "The most important consideration is who did it. Was it this accused man? And that is what the prosecution will have to satisfy you that you feel sure about."

In the light of these directions the jury could be in no doubt that the guilt of the applicant rested on the cumulative cogency of the circumstantial evidence and not on any single fact. We do not agree that the directions were such as would lead the jury to infer that his admission of ownership would be conclusive on the issue as to his wearing the shirt at the material time. Accordingly, this ground of appeal fails.

With regard to the evidence of Kevin Brown, the complaint was made that the learned trial judge failed to withdraw his evidence from the jury's consideration. The ground of appeal as first stated was that Kevin Brown was a child of tender years whose evidence was unreliable in two important areas of the case: (1) identification; and (2) the time at which the offence was committed.

These stated grounds of appeal were abandoned, but arguments were addressed to us on the supplementary ground which reads:-

> "The learned trial judge failed to give the necessary directions to the jury on the evidence elicited in the prosecution's case proving that the deceased had identified her assailant and it was not the accused."

This submission was made on the answer of Kevin Brown that on the night in question he had heard his mother "call out Jones' name". And the earlier quoted passage indicates that his mother called the name of Jones "After she get the burn". Despite the fact that Kevin had denied that on the next morning he had told anyone that his mother had said "Lord God, Jones burn me up;" the trial judge, without any further ado, questioned him whether he heard his mother say so. The answer was 'Yes, sir'. It was contended that the words "Lord God, Jones burn me up", are words which could fairly lead to the inference that the deceased had seen and was able to identify her assailant.

In the end, the questions for the jury, will be whether taking all the circumstances into account, it can be maintained that she credibly saw and named her attacker and in any event to what extent, if any, in all the circumstances as outlined by the evidence, this reported remark could cogently and adversely affect the inculpating evidence upon which the Crown depended to prove the applicant guilty of the murder of Carmen Batticks.

It is therefore germane to look at how the trial judge dealt with the relevant piece of evidence. Firstly, the transcript at pages 160-161, records his directions in the following words:-

> "Kevin is saying that he saw a man but his back, the man run, went up to his mother throw the thing on her and keep running towards the back away from him. So at no time did he see the person's face. He told you later that it was night and that it was dark that night. So he is saying that he could not see who it was. Now I may as well deal with this aspect of the case because learned Queen's Counsel for the defence made heavy weather ~~to you of the fact~~ that young Kevin said that he heard his mother call a name. Now, the evidence is, he said it was after his mother got burned that she called out Jones' name.

> "Now, you remember the evidence is that at home one Paul Jones and Beatrice Jones, man and wife, they occupy a half of the house and the deceased and her two children occupy the other part. Kevin went on to say it was after the man ran from behind the house, that is after his mother had been burnt that she called out the name Jones. He said he did not hear his mother say, "Lord, Jones burn mi up" at that time, but he did hear her say that was when she was at Miss Icy's home. You remember the evidence is that after she got burnt he left her and she went to Miss Icy's home which is some two-and-a-half chains away. Miss Icy being Enid Batticks. I think I am being correct there in saying that the person he refers to as Miss Icy is Enid Batticks. So, he was asked to describe the size of the man that he saw who threw this stuff on his mother. He said he could not describe the size of the man he saw but he said that Jones is a short and fat man and the man that he saw that night was a taller man than Jones, tall like the accused man, that is what he said. You were told that Jones was not brought here to say that it was not he who threw any acid on the deceased that night. Mr. Foreman and members of the jury, your duty is not to judge the case off evidence that you have not heard. Your duty is to judge the case on the evidence that you have heard, the evidence you have heard, not what has not been presented to you, what has been presented to you. If there is a sufficiency then you act on it. If there is insufficiency of evidence in your view then you will be true to your oath in returning a verdict according to the evidence that you have heard."

Again at page 167 the trial judge's remarks are:-

> "Now, the prosecution is saying Kevin can't say who it was. Only four persons were there, the deceased, she is dead, she can't talk now and in any event you may well say from the injuries she received if you accept what the doctors she was in no condition at all to (sic) make out anyone that night, but Mr. Phipps has asked you to consider and you will have to consider it, the evidence that came from Kevin that she did call out a name after the man had run away. And when she went down to Miss Icy's house she did say something to Miss Icy which would be inconsistent with the accused being present. But you will view all that in the light of whether or not she was able to identify any person. Kevin said it was night, it was dark. Nothing was thrown on Kevin, he was not able to make out anybody."

According to Mr. Phipps, the learned trial judge thereby dealt inappropriately with this part of the prosecution's case. He submitted that the gravamen of his complaint was that the directions of the

learned trial judge eroded the effect of that piece of evidence. He did not pose what were the relevant and most important questions: (a) Was the remark said by the deceased? (b) If it was so said, what was meant? (c) What effect did it have on the case as a whole? Had these questions been asked, he urged, the jury upon a fair consideration would have concluded that the words attributed to the deceased destroyed any inference that the accused was the guilty party.

He further stressed that the evidence in the case is that the name of Jones was called when the assailant had run behind the house. He argued that there were two occasions on which the name of Jones was called.

In our view, this is not an accurate detail from the evidence. What Kevin was saying was that the man had already run to the back of the house before his mother called the name of Jones. And that when she actually called the name, she was then on her way to her aunt. It is not so that he was speaking of two separate occasions on which she called the name of Jones. When the name of Jones was called, Kevin Brown told the Court, he did not know the whereabouts of the man who had thrown "the something" at his mother, and then run around the back of the house. But he did tell the judge that it was after the man ran behind the back of the house that his mother called out the name of Jones. In fact, after further questioning by the judge, Kevin said she called the name of Jones, "When she running down to Miss Icy [Batticks]".

Mr. Phipps referred to the directions on page 167 and said that although the trial judge made reference to what the deceased must have said on her way to Mrs. Batticks, he did not remind the jury of the words, and specifically what effect those words would have had on the outcome of the case. A positive direction, it was urged by Mr. Phipps, was called for at some stage indicating to the jury in no uncertain terms that if they found that the deceased in fact used the words, that

could only mean that the accused was innocent or alternatively, that there would be doubt in the Crown's case.

In pursuit of his arguments, Mr. Phipps adverted to the well-known authorities of Ratten v. The Queen [1971] 3 All E.R. 801 P.C., and the later decision of the House of Lords in R. v. Andrews [1987] 1 All E.R. 513. These authorities, he argued, in effect, make the remarks of the deceased admissible as being part of the res gestae.

Now it is clear that these cases are concerned with the admission into evidence of statements made as part of the res gestae, and the circumstances in which such evidence is admissible, laying down the test that the statement must have been made in circumstances of spontaneity, and contemporaneously with the event, thus ruling out any possibility of subsequent fabrication or adaptation by the speaker. They were cases in which the respective statements reported by the witness were made by a person not called at the trial. The statements were such that they were taken as part of the circumstances in which the accused was identified as the person involved in the perpetration of the offence.

Lord Wilberforce's judgment in Ratten v. The Queen at page 805 states the basic principle as follows:

> "The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words are relied on 'testimonially' as establishing some fact narrated by the words."

In the instant case, at the trial when the matter of the calling of Jones' name was first raised by Mr. Phipps, he readily conceded that how he sought to obtain an answer on the point of the name being called was by a double hearsay. Does it matter that the judge obtained a more direct answer? Can it be said that because the judge's question returned an affirmative answer that conclusively or

circumstantially proved a fact? Faced with this quandary, Mr. Phipps contended that what the deceased said was part of the res gestae.

In evaluating this submission, this Court is mindful of the observation by Lawton, L.J., in Bryan James Turner and Others [1975] 61 Cr. App. R. 67, deploring "the idea which may be gaining prevalence in some quarters that in a criminal trial the defence is entitled to adduce hearsay evidence to establish facts, which, if proved, would be relevant and would assist the defence."

On this question of the admissibility of the statement for its evidential worth, we consider whether it falls within the 2nd and/or 3rd categories in Ratten v. The Queen as described by Lord Wilberforce thus (p. 806g-h):

> "2. The evidence may be concerned with spoken words as such (apart from the truth of what they convey). The words are themselves the res gestae or parts of the res gestae, i.e. are the relevant facts or part of them.
>
> 3. A hearsay statement is made either by the victim of an attack or by a bystander - indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to depend on whether it was made as part of the res gestae. A classical instance of this is the much debated case of R. v. Bedingfield (1879) 4 Cox C.C. 341, and there are other instances of its application in reported cases. These tend to apply different standards, and some of them carry less than conviction. The reason why this is so is that concentration is focused on the opaque or at least imprecise latin phrase rather than on the basic reason for excluding the type of evidence which this group of cases is concerned with. There is no doubt what this reason is, it is two fold. The first is that there may be uncertainty as to the exact words used because of their transmission through the evidence of another person than the speaker. The second is that the risk of concoction of false evidence by persons who have been the victim of assault or accident."

At page 808f-g, after examining the relevant authorities, Lord Wilberforce said:

> "These authorities show that there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused."

The principle in Ratten was approved in R. v. Andrews and the headnote to the judgment of the House of Lords reads:

> "HELD: Hearsay evidence of statement made to a witness by the victim of an attack describing how he had received his injuries was admissible in evidence, as part of the res gestae, at the trial of the attacker if the statement was made in conditions which is sufficiently spontaneous and sufficiently contemporaneous with the event to preclude the possibility of concoction or distortion. In order for the victim's statement to be sufficiently spontaneous, to be admissible it had to be closely associated with the event which excited the statement that the victim's mind was still dominated by the event. If there was a special feature e.g., malice, giving rise to the possibility of concoction or distortion the trial judge had to be satisfied that the circumstances were such that there was no possibility of distortion or concoction. However, the possibility of error in the facts narrated by the victim went to the weight to be attached to the statement by the jury and not to admissibility. Since the victim's statement to the police was made by a seriously injured man in circumstances which were spontaneous and contemporaneous with the attack and there was thus no possibility of any concoction or fabrication of identification, the statement had been rightly admitted in evidence."

However, in Ratten's case at page 809, Lord Wilberforce acknowledged that -

> "Facts differ so greatly that it is impossible to lay down any precise general rule, it is difficult to imagine a case where there is no evidence at all of connection between the statement and the principal event other than the statement itself, but whether this is sufficiently shown must be a matter for the trial judge. Their Lordships would be disposed to agree that amongst other things he may take the statement itself into account."

These remarks were made in relation to a situation in which there were no eye-witnesses. In the case before us, there was an eye-witness whose evidence had to be considered in the light of the surrounding circumstances, not least of which was the physical stature of the assailant as described by Kevin Brown. The man he saw on the fateful night was a taller man than Jones. He did not see that man's face, but he was tall like McGann whom he said he saw again the next morning, when he came to the yard of the deceased.

From the circumstances of the case, the following factors emerged. Firstly, there is the manner in which the answer was elicited, in that, the witness had not himself said so, but it was in answer to questions posed by the judge. Secondly, this was after his denial that he had told anyone so on the morning after. Thirdly, from his answers, it could be inferred that in all the circumstances of the case, the deceased was not able to identify her assailant. Fourthly, the answer which Kevin Brown gave that Jones was not at home at the material time. He was at work. There was no further questioning to test this assertion by the little boy so that his blunt statement has to be accepted, not as hearsay but as original evidence. Fifthly, the position of the assailant, vis-a-vis, the deceased. Kevin Brown said that while he was at the gate his mother holding his brother's hand, walked up to the grille. He was four yards away from them when he saw the man run from behind the rubbish bin which was by the gate but inside the yard. This man went near to the deceased whose back was turned to the man. Said Kevin, "she was taking out the key to open the grille". Their relative positions are put in sharp focus by the following questions and answers.

"Q. And when he threw this thing on your mother, was he near to her or far from her?

A. He was near to her.

Q. About where?

A. Like she was right here and him was standing beside her.

"Q. And can you tell us, at the time he threw this thing on your mother, was her back to him or was she sideways to him or was she facing him?

His Lordship: He was behind her?

A. Yes sir.

His Lordship: What was your mother doing then?

A. She taking out the key to open the grille."

There is thus a sixth factor which is of some significance, namely that, at the material time it was dark. This would likely have compounded the difficulty of the deceased being able to properly identify her assailant, giving due weight to the obvious swiftness of his motion, coupled with her pre-occupation to find the key for the door.

Added to the foregoing there was no evidence of bad relationship between Jones and the deceased. But there was cogent evidence that the deceased had repeatedly rejected the overtures by the appellant to be reconciled with her.

The foregoing analysis of the background evidence strengthens the reasonable view that there was material upon which a jury properly directed, could infer that in all the circumstances of the case, the deceased was not able to identify her assailant. And in fact, when one takes a careful look at the evidence of Kevin Brown, on this point, the conclusion must be that he has not weakened the Crown's case against the appellant.

Therefore, the complaint contained in the three questions of Mr. Phipps which were set out earlier in this judgment are not questions that necessarily arise as deep-seated matters for discussion. The remarks of the judge at page 167 were pertinent especially as it was the reminder to the jury of what Mr. Phipps had submitted to them. Mr. Phipps' argument before us on this point was to the effect that the judge was obliged to give the jury fuller directions than were given in the summing-up.

The learned trial judge in fact left the words of Carmen Batticks as if they were testimonial, namely that she was asserting a fact in issue. He did not, rightly so, concern himself with the niceties of whether those words spoke the truth as to the identity of the assailant. Indeed, there is nothing on the transcript to suggest any arguments were directed to that point. He projected it favourably to the jury as a factor for their consideration. It was not withdrawn from the jury. And they must have understood that, if in fact, those words convinced them, that the assailant was Jones and not the applicant, they should acquit the applicant. This is made quite clear on page 188 where he dealt with the resolutions which the jury will have to make on the totality of the evidence. Among these is that they have to be satisfied to the extent that they feel sure that it was the accused man who killed Carmen Batticks by throwing the acid on her.

Near to the end the judge posed this question "The most important consideration is who did it. Was it this accused man? And that is what the prosecution will have to satisfy you that you feel sure about". These words, in our view, did impress on the jury the vital questions in the case which was answered in the jury's verdict.

To summarise, we are of the view that this statement of the deceased was admissible and admitted for its evidential content and that the learned trial judge in the directions quoted above left it as such to the jury for their consideration. We disagree with Mr. Phipps that the judge was obliged to direct the jury that if they found that the deceased used the words, it could only mean that the accused was innocent or alternatively there was a doubt in the Crown's case. In the light of the wealth of circumstantial evidence tendered by the Crown, this would be a usurpation of the jury's function to render a just and true verdict on consideration of the evidence in its totality.

Accordingly, this ground of appeal also fails.

For the reasons set out herein, the appeal is dismissed and the conviction and sentence affirmed.

This application for leave to appeal against the conviction has been treated as the hearing of the appeal and for the reasons set out herein, the appeal is dismissed and the conviction and sentence affirmed.