C.A. CRIMINAL LAW — Larceny — Receiving — Accessory after the fact to Larceny — Trial — evidence — caution statement — Judge's comments — whether judge erred in admitting caution statement in evidence — whether judge's directions to jury on assessing caution statement inadequate — whether Judge's comments on evidence so weighted in favour of prosecution that accused not afforded fair trial. Appeal dismissed. No cases referred to ✓ comp

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 13/85

Judge's Comments on Evidence

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

REGINA

VS.

DOUGLAS DIXON

Mr. Gayle Nelson for appellant

Mr. Canute Brown and Miss Antionette McKain for the Crown

April 18, 19, 20, 21 and July 27, 1988

WRIGHT, J.A.:

After a trial lasting four days before Orr, J., and a jury this appellant was convicted on January 31, 1985 on counts 1 and 3 of a five count indictment which charged him together with Dawn Davis as follows:

Count 1 - Douglas Dixon - Larceny of Postal articles in the course of transmission by post.

Count 2 - Douglas Dixon - Receiving a quantity of Postal articles, the property of the Post-master General knowing the same to have been stolen.

Count 3 - Douglas Dixon - Larceny of money US$43,900 out of postal articles in the course of transmission by post.

Count 4 - Dawn Davis - Receiving a quantity of Postal articles in the course of transmission by post.

Count 5 - Dawn Davis - Accessory after the fact to larceny of Postal articles.

Dawn Davis was acquitted on Counts 4 and 5 and the appellant was sentence to 10 years (concurrent) on each of the two counts on which he was convicted.

The facts giving rise to the charges are not by themselves exceptional but the defence added quite a touch of the melodramatic. The appellant who at the date of conviction was 31 years of age, lived in a common-law relationship with Dawn Davis - a union which produced four children - at 16 Pouyatt Street, Jones Town, which the police describe as dilapidated premises. His job as an Office Attendant at the Central Sorting Office, South Camp Road, Kingston since 1977 paid him nett (with overtime) $82.26 per week. Two regular weekly deductions were made from his pay and lodged to his credit at Workers Savings and Loan Bank $30 and Church's Credit Union $39. The family of six had a balance of roughly $13 as its apparent source of sustenance which the prosecution contended was supplemented by extra-legal means and, strangely enough, the appellant agreed with the proposition but disagreed violently as to the actual means. But more of this anon.

On Saturday December 3, 1983 about 7:30 a.m., Detective Sergeant Errol Grant led a police party to Pouyatt Street and according to him, which is flatly denied by the defence, he came upon Dawn Davis standing at the gate of No. 16. He identified himself to her and after ascertaining that she lived there with the appellant and their children he asked for the appellant and was told that he was at his work-place already named. Next, he told her that the police were going to search the place and with her concurrence they proceeded to search the first room which she indicated was occupied by her. The search of that room yielded nothing. Further progress into the house was blocked by a locked door the key for which Miss Davis said was with the appellant. The door was forced open and in comparison with the rest of the house, some rooms of which the officer said were not fit for human habitation, this room was rather expensively appointed. It boasted among other things a queen size bed, a ward-robe, a new colour TV, a video cassette player, a lot of fine electronic equipment in addition to silverware, chinaware and a lot of expensive

kitchenware and a refrigerator". But surprising as this was the really great surprise was a brown leather travelling bag stuffed with air-mail letters and bundles of similar letters beside the bag - a total of 3,993 letters all of which were still sealed. Davis was cautioned and asked about the letters. Her answer,which was evidence neither against her nor the appellant,is stated merely for completeness and was that "it was her baby father Douglas Dixon who brought them there this morning".

The search of the room continued in her presence and in the inner pocket of a jacket which was hanging on a nail, Sergeant Grant said he found J$730 (in $20s and $10s) plus US$187. Additionally, there were currency notes of Guyana, Brazil, Columbia and Eastern Caribbean countries. From another pocket of the same jacket the officer took four bank passbooks one of which #221490 Workers Savings and Loan Bank reflected a balance of $196,203.11. In respect of this account an officer from that Bank presented to the Court at the trial fourteen lodgment slips by the appellant over the period March - November, 1983 reflecting a total of $131,700.

Having made these discoveries and recieved the information about the letters,Detective Sergeant Grant said he dispatched a team of policemen to fetch the appellant from the Central Sorting Office while he continued his search of the room and before he had finished his search the team returned with the appellant to the room in which the letters were found. Upon caution the appellant is alleged to have volunteered "just as cheap I tell you the truth officer. Is me thief the letters and took them here. Me baby-mother don't know anything about it". Asked what did he do with the letters the appellant obliged that he opened them, took out the US dollars and burn them (the letters). Thereafter an incinerator was seen at the rear of the premises. It consisted of two oval-shaped pieces of iron tied together and appeared as though it was a big wash pan, covered with zinc. Inside the incinerator the witness said he saw "ash which resembled the ash of paper". In an effort to elucidate he said it was as when one burnt paper with writing on it. He said "I am positively sure I saw writings on the ash". It would seem that what the witness was describing were the charred remains of paper on which there was writing.

The next step he took seems to make this clear. By means of his radio he summoned a photographer from the Photographic Branch and upon her arrival, he had the scene photographed including the letters, the incinerator and the premises. But the photographer seemed not to have captured what the witness claimed he saw inside the incinerator because no such photograph was tendered in evidence. Indeed, the prosecution did not even bother to call the photographer as a witness but tendered her for cross-examination. It is to be noted that although this witness in cross-examination stated that she saw the appellant sitting in a police car on the bridge near his home no effort was made to relate that bit of evidence in point of time to other events in the prosecution's case. The taking of photographs seemed to conclude the investigations at the scene and thereafter the appellant, his co-accused Dawn Davis and the articles already mentioned were removed to Operations Base at 230 Spanish Town Road.

Detective Sergeant Grant testified that he counted the letters and was in the process of making a list of them when one Detective Corporal Marr spoke to him whereupon he went to the appellant and Davis who were in the same room. The appellant said to him "Officer just as cheap me tell you the whole story". As would be proper in the circumstances, the officer said he cautioned the appellant who thereafter dictated a statement which was taken down in writing. This statement was only admitted into evidence after a rather lengthy voir dire proceedings occupying 100 pages of the transcript during which the defence mounted a very strong opposition to the admission of the statement. However, after hearing two witnesses for the prosecution and three for the defence the learned trial judge ruled the statement as admissible in evidence and so admitted it (exhibit 2). The statement reads:

> "Sometime in February 1977 I started working at the General Post Office at Oliver Place in Kingston as an office attendant. The General Post Office move up to South Camp Road around 1979 and they change the name to Central Sorting Office. In March 1983 I was cleaning out the office and I see couple letters drop on the ground.

"One of the letters was partially opened and I saw one ten dollars (JA $10.00) in it. I tek up the letter and take out the ten dollars. I tek up the rest of letters and throw them on the dip.

The dip is the place that they assort the letters. The following week I tek some letters off the dip about thirty-five. I put them in my bag and tek them home with me.

At my home I opened them and find about one hundred and seventy dollars US ($170.00) in them.

I tek out the money and then burn the letters. I then start to tek out letter every other week from the Central Sorting Office to my yard at 16 Pouyatt Street, Jones Town.

Sometime five hundred or six hundred letter from foreign. After I tek out the money from the letters I would burn the letters in two piece of irons tie together that the sewer man left in the yard. Sometime I would get all seven to eight hundred US dollars which I change out to Jamaican dollars.

Sometime I get JA $3.00 or JA $3.50 for one US dollars. During this time I start a account at the Workers Bank at Tower Street and when I change out the money I lodge the Jamaican dollars to my A.C. No. 224190.

On the 10th of August, I took some of the money and buy a house at 5 Lincoln Road, Kingston 5 for $60,000. I do not owe any money left on the house. I kept on taking letters from the Central Sorting Office up to the second week of November when I get around one thousand U.S. dollars. During this time, I used some of the money to buy one component set, some spreads, a lot of household things including cooking things, glass, toys, cologne, equilizer, mixer, jewellery, including watches, rings for my woman, Dawn Davis, and myseff.

I have a bank account at Workers Bank with No. 224190 and this account have in $196,203.11. Also, number 80135 at Bank of Nova Scotia, Cross Roads, with $130.00 in it.

> "On Saturday, the 3rd of December, 1983, I go to work at six o'clock. I tek about 1,300 letters from my workplace and to my yard and leave. Then I went back to work. The police came to my workplace and tek me about 8:30 a.m., same day to my house. At my house I see more police searching it with my woman there. The police tek me, mi woman and the letters and my component set and the rest of things to Operation Squad. I dont have anything more to say, mi boss."

This statement has the dual effect of chivalrously exonerating his "baby-mother" consistently with the statement first attributed to him and also, but more importantly, of supplying details of his modus operandi touching which the prosecution was not in a position to call any witness. The circumstances attendant upon the taking of his statement were supported by the evidence of Detective Sergeant Alderman Stewart while the events at 16 Pouyatt Street were borne out by Detective Corporal Horace Creary who confirmed the statement attributed to the appellant at 16 Pouyatt Street that it was he who had taken the letters there that morning. Also he supported Detective Sergeant Grant's evidence that there was writing on the ash in the incinerator. However, contrary to both Detective Sergeant Grant and the photographer, Constable Veronica Williamson, Detective Corporal Creary testified that the letters were photographed in situ in the room. In fact the photographer said she did not enter the house.

The prosecution was not allowed to adduce evidence by means of a list of questions put to the appellant under caution by Detective Superintendent Isadore Hibbert on 6th December, 1983 - three days after he had given the cautioned statement (exhibit 2) and the answers elicited thereto. However, evidence from Detective Sergeant Arthur McNeish, in charge of security at the Post and Telegraph Branch at South Camp Road was that when he became aware of the investigations and spoke with the appellant on 5th December, 1983 the appellant said to him "Yes sah, a mi do all a dem, me nah gi unoo any trouble". That, then in brief outline is the evidence led by the prosecution. However, the jury had to contend with much more than has been related so far. There was a very violent conflict of evidence between the prosecution and the defence, which, far

from being a mere challenge and putting the prosecution to proof, very poignantly charged the police with suppression of the real evidence found at 16 Pouyatt Street and a massive fabrication of evidence of a totally different nature calculated to incriminate the appellant and facilitate theft by the police of property removed from the appellant's home. Inherent in all this charge is a conspiracy to pervert the course of justice. How, then, did the defence present the counter-attack?

From the very outset the defence charged the police with lying about their encounter with Dawn Davis at the home. It was the case for the defence that at about 6:30 a.m. on December 3, 1983, the appellant and Dawn Davis left home on the appellant's Honda Motor Cycle leaving their four small children at home. Davis was left at the North Street/Princess Street intersection while the appellant continued on his way to work arriving there at about 7:00 a.m. and proceeded to his job of sweeping, dusting and removing cob-webs. According to Dawn Davis by about 8 - 8:30 a.m., when she returned home from the market the police had already broken their way into the house and were in the act of removing articles from the house when she met Detective Sergeant Grant at the gate who enquired of her whether she lived there. She gave the required information and then entered the house. She was thereafter subjected to assaults and threats which reduced her to tears because of fear. There were several policemen armed with long guns. It was her evidence that while she was in the house with the police the appellant never entered the house. When she was eventually taken from the house she saw the appellant sitting in a car parked by a bridge a little way from the house.

The appellant testified that while he was at work he was summoned by his supervisor to see someone outside, when he went it was the police who had come for him. He was taken away in a blue Honda Civic motor car to the Central Police Station where he was transferred to a beige Mitsubishi motor car in which he travelled with some police men to within one chain of his home where the car was parked on a bridge. He was subjected to assaults with guns while he travelled in both cars and to violent dispossession of his personal property, e.g. jewellery etc. To continue

the appellant's version, while he was seated in the car by the bridge the blue Honda Civic motor car overtook it and parked behind a jeep which was then parked by his gate and on which he saw some of his household articles. He watched proceedings through the windshield of the car in which he was seated and observed an officer who turned out to be Detective Sergeant Grant:

> "... went across the street from my house and I see him come back across the street going to my house with bundle of letters and a bag in his hand resting on a car that was parked immediately at my gate. I saw the lady with the camera dress back out into the street then he took those also from that car trunk. Put them down at my gate. Then I began to see reflection and flashes. He took them up back proceed with them over to the opposite side of the street from where he took them. Then I saw my baby-mother Dawn Davis come out of the yard with a trinket box under her arm crying ....."

The appellant was here seeking to support by his testimony what had been vigorously advanced in cross-examination, namely, that those letters were never in the appellant's house. The defence as put to the police witnesses was that Dawn Davis was not at home when the police arrived and that when they essayed to enter the house the appellant's eight year-old son attempted to bar them but his opposition was overcome and the police by force entered the house where they saw not letters, as they maintain, but one blue seam bag of ganja, one blue jean bag of ganja, one ganja press and one pound compressed ganja in a refrigerator and that it was after these items had been removed from the house that Dawn Davis arrived. Further, it was put that the money found in the house was not what the police testified but JA$5,000 and a much larger amount of foreign currency than had been disclosed. It was put to Detective Sergeant Grant that the finding of these items as well as the bank books "presented ideal circumstances for the frame-up of a man who works at the Central Sorting Post Office". Greed, it was said, got hold of Detective Sergeant Grant and he decided to make-off with the ganja and the ganja press together with the bulk of the money found and proceed with the frame-up of the appellant. Accordingly, the charge ran, Detective Sergeant Grant sent

for the appellant and at the same time directed that a number of letters be fetched from the Central Sorting Office. As a consequence the appellant was transported in the Mitsubishi car and the photographer and the letters in the blue Honda Civic car of which the appellant spoke. On arrival of the car with the letters at the appellant's gate Detective Sergeant Grant, in the gaze of the crowd which had gathered,apparently with reckless abandon took the letters from the trunk of the car, threw them in the appellant's gateway where they were photographed and then replaced in the car, and indeed on the prosecution's case the letters were in fact photographed at the front of the premises. Needless to say, these suggestions were denied.

As regards the statements, both oral and written, attributed to the appellant he denied them although he admitted signing what turned out to be the caution statement but only after he had been subjected to persistent and severe assaults and threats including threats of being shocked with electrical wires which he saw protruding from the wall of the room where he sat while Detective Sergeant Grant wrote the statement which was then covered up and presented for his signature. In addition to the assaults and threats the appellant told of further harrassment by other policemen dressed in army fatigue who kept demanding $40,000 to be shared up among four of them. All this was calculated to show the oppressiveness of the circumstances in which it is alleged he gave that damning statement (exhibit 2).

In his evidence the appellant in an obvious endeavour to show that it would be impossbble for him to remove that bulk of letters from the office undetected told of the number of supervisors whom he would have had to get past in any such effort. But it is worthy of note that the system related by him ended with him taking the rubbish he had collected on the job in a carton box out to the ramp where it would be picked up by the truck. And it was never said any supervisor checked the contents of the box. At all events, however, a system is only as efficient as the persons operating it.

In order to counter the inference that, having regard to the level of his pay and his savings, the very large accumulation of funds in his bank book was the result of stealing such as was presently charged against him, the appellant testified that he dealt in ganja on a large scale, he bought, compressed and exported ganja and burnt the residue of the processing in the incinerator to obviate the possibility of any portion of the ganja falling into the hands of his children who might unwittingly give him away.

He accounted for the foreign currency (apart from the US currency) found at his house by saying that he obtained them as souvenirs from persons whom he encountered during his drug trading. Also he denied ownership of the bag allegedly found in his house with the letters but admitted that he owned a Knapsack which he took to work sometimes. Cross-examined, he admitted that he did buy a house at 5 Lincoln Road, Kingston 5 for $60,000 cash but denied telling the police so. He said they had his bank book and his title so they could get the information. He flatly denied giving the police any information about the various items he had purchased apart from denying that he had stolen to buy them. And, significantly, he never told the police that he had bought the items with money obtained from trading in ganja. Contrary to the suggestion of the prosecution that the appellant retained this low-paying job because of the opportunity it offered him to steal letters the appellant said he retained the job despite the fact that his ganja business was lucrative in order not to arouse suspicion as to the real source of his revenue because queries would naturally arise as to how he was able to manage. It was the prosecution's case that when asked for the key to the room in which the letters were found, Dawn Davis had said that the appellant had it but the appellant testified that the key was left hanging in the house but he did not know if Davis knew of it.

After a summing-up lasting 3 hours 37 minutes the jury retired for 44 minutes and returned divided 6-1 but after a further retirement of 16 minutes they returned a unanimous verdict of guilty on Counts 1 and 3

as was stated earlier, following upon which the appellant was sentenced to imprisonment of 10 years on each count, the sentences to run concurrently. From these convictions and sentences he now appeals to this Court.

As a preliminary move, an application was made on behalf of the appellant to admit further evidence. The application was supported by affidavits from Dawn Davis and Douglas Dixon (Junior), the twelve year-old son of the appellant. Douglas (Jnr.) had given evidence on the voir dire in support of the appellant's challenge to the admissibility of the caution statement. However, he was not called to give evidence before the jury. The further evidence sought to be admitted was to the effect that "Junior" was so upset by a comment made by the learned trial judge at the voir dire that he was distraught and unwilling to give evidence before the jury. The comment referred to occurred in this way (p. 164 of the Record):

> "HIS LORDSHIP: .... Tell us again what happened the morning.
>
> WITNESS: My mother and father went on the motor bike and my brothers and sister and me were playing with cars. I see the gate kick off and I saw them coming towards us with gun and one started to come towards my bedroom and I block it and he push me down and the other went into the house and moved out my video, TV and clothing.
>
> HIS LORDSHIP: Who is your teacher?
>
> WITNESS: Miss Simmonds, sir.
>
> HIS LORDSHIP: Tell her to enter you in festival this year."

This matter of Junior's reluctance to give evidence was never brought to the attention of the trial judge.

We refused the application on the ground that neither in principle nor on the merits was the application entertainable.

Now the evidence tendered by the prosecution presented a strong case against the appellant. The evidence from the defence was diametrically different. Thus the issues in contention rendered the case eminently suitable for the determination of the jury. It is, therefore, understandable that the challenge to the verdict rested upon complaints against the trial judge's ruling on questions of law and his directions

to the jury. Applications to argue numerous supplementary grounds were granted. Some of these grounds over-lapped and in some grounds the same question was raised by a different formulation. It is, therefore, convenient to deal with the grounds under the following heads:

> (1) That the judge erred in admitting in evidence the caution statement.
>
> (2) That his directions to the jury as to their approach in assessing its weight were inadequate.
>
> (3) The directions to the jury and the comments on the evidence were so weighted in favour of the prosecution that the appellant could not be said to have had a fair trial.

As regards the admissibility of the caution statement, the appellant's Attorney's complaint was that the learned trial judge in admitting the statement wrongly exercised his discretion against overwhelming evidence on the voir dire of the use by the police of physical violence, threats, inducements and coercion.

On the voir dire, Detective Sergeant Grant gave evidence of the circumstances under which the appellant gave this statement in writing and categorically denied that any violence, threats or inducements were made or offered to the appellant to cause him to give a statment. Both the appellant and Dawn Davis were given "honourable treatment". He was corroborated in this regard by Detective Alderman Stewart. The appellant, his son and Dawn Davis all gave evidence on the voir dire alleging assaults, intimidation and inducement. It is unnecessary to deal in detail with their evidence. It is enough to say that the ruling of the trial judge was obviously based on the assessment of oral testimony in which the evidence of the prosecution witnesses was diametrically opposed to that of the defence. In giving his ruling, the trial judge said: (p. 166 of the Record)

> "The crown is asking me to admit this statement as a voluntary statement. There is objection to the statement on two grounds. 1) that the contents were not dictated by the accused, Dixon and 2) that he was forced to sign it. Evidence has been led of violence at Pouyatt Street both to himself and the co-accused, his common-law wife at the Operations

> "Base. It is of hair being pulled and Miss Davis being "jooked" in her side, her hair and neck being twisted and various threats being uttered by various constables. There is also some evidence of an empty glass being placed before him and whiskey being poured in the glass. Apparently, he did not partake of its contents. Mr. Nelson has brought to my attention the various discrepancies of the evidence. I have examined them and I direct myself as I would direct a jury and, on the totality of the evidence, I am satisfied as I feel sure 1) that the accused man, Dixon, dictated the statement to the detective, Sergeant Grant, in the presence of detective Stewart and 2) that he signed the statement freely and voluntarily. I, therefore, rule that the statement is admissible."

It is clear from this passage that he gave full and careful consideration to the evidence given by the appellant and his witnesses. He accepted the evidence of the prosecution witnesses as it was open to him so to do. We saw no good reason to hold that he erred in so doing.

In his summation the learned trial judge having reviewed the evidence by prosecution and defence relevant to the circumstances in which the statement was allegedly brought into being, said inter alia:

> "Now, that is the factual situation as regards the statement. You have, according to the defence, assault and threat from Central, then Pouyatt Street, then Operations Base and according to them, even while he was giving the statement or while he was told to sign the statement, the man hit him in his head with the 'bus-mi-cock'. The police said nothing like that, he gave it of his own free will. Those are the facts, you saw everybody concerned gave sworn evidence, you have to make up your mind what happened that morning.
>
> Remember the crown must satisfy you all the time, the defence doesn't have to prove anything.
>
> Now, as regards the statement, the only thing left is the question of the law, how you are to approach it and, of course, I have to remind you of the content of it."

and later (p. 38-9):

> The question you have to ask yourselves, members of the jury, is this, do you believe, or are you satisfied so you feel sure that the accused man dictated the statement? If you believe the

"accused when he says that this statement is concocted then,of course, you reject it. if you are not sure whether or not he gave the statement you will reject it. Before you can rely on this statement at all you have to feel sure that the words which the statement contained were words which came from his mouth, that he dictated it to the officer, Sergeant Grant. If you don't believe that he dictated it, if you believe that Sergeant Grant wrote it and then got him to sign it by force - these steps of assault, this man hitting him in the head with the "bus'-me-cock" and threatening to electrocute him with the wires down there - then, of course, it's no good, you reject it, and if you are not sure whether these threats of violence were used, you reject it.

So, you will have to examine the statement on a whole. One thing you can take into account is the contents of the statement. Of course, what he says is this, that what is written there is what the police gleaned from his title and his bank books and the questions he answered them, right? You will have to say whether or not what is contained in it was concocted by the police.

If you feel sure, members of the jury, that the accused man did give this statement, if you feel sure that the facts stated in it came from his mouth and from his own knowledge of the events which are described in the statement, if you find that, if you feel sure about it then, of course, there are other matters which you have to consider. If you feel sure that he gave the statement one of the things you have to take into account is the circumstances under which he gave it; was he beaten to give it? If, however, you feel sure that he gave it and he gave it in circumstances where he was not being beaten, or he was beaten to give it, he was forced to make a statement, then you have to consider this, that a man who is beaten or forced to make a statement might tell a lie on himself because he wants to avoid further beating. That's a matter you have to consider.

He is saying he doesn't know what's in it at all, he signed it because he was being beaten. So, you have to decide for yourself all the circumstances surrounding this statement. Was it dictated by him, or was it a concoction by Sergeant Grant, and did he really sign it because Sergeant Grant told him to sign it. As I said, if you are not sure about it give him the benefit of the doubt; but if you believe him, that he was not beaten and threatened and that he gave it freely and voluntarily well, you must say what weight you are going to attach to it."

and later at page 39:

> "I have recited the facts to you, both for the prosecution and the defence, you have to make up your mind. Remember, as I told you, he doesn't have to prove anything, it is for the crown to satisfy you that these threats were not made, and the threats are the threats beginning at the Central Police Station, at Pouyatt Street and at Operations Base, the violence and the assault - if you believe it. And, of course, you also have to take into account what he says. What he says is that his wife, his common-law wife was also threatened and she was crying. So, you have to ask yourselves, well, did he give it because he was beaten, or was afraid of it and he told a lie on himself, or was it really the truth - matter entirely for you."

Despite these full and careful directions, which were at times unduly favourable to the appellant, Mr. Nelson complained that when he came to read the statement he acted injudiciously and in a manner prejudicial to the appellant when he opted to read the statement by saying: (p.40)

> "Now, what this statement says - Douglas Dixon says: 'Sometime in February 1977 ...' Now, I am going to read the statement so that you can understand me. I am not going to rattle it off. I am going to try and read it with interplays and inflections in my voice so that you can understand it, that's what I am going to do. I am not trying to influence you. Remember it was suggested that the sergeant read it a certain way. You are people of intelligence. I won't read the statement as if to a child, I have to read it so that you can understand it. You will get it for yourself so you can see it. So, you are naturally going to hear inflexions in my voice, and if I can't read the word I am going to stop."

In our view, contrary to Mr. Nelson's opinion, the judge was being scrupulously fair. It was no more than sage counsel that they were not to be influenced by the inflexions of the reader of the statement whether it was of the sergeant or of himself. Counsel was not merely catching at a straw, the basis for his criticism was non-existent.

As regards the complaint as to the judge's conduct of the trial, Mr. Nelson complained that there were inconsistencies in the witness, Sergeant Grant, and discrepancies between his evidence and that of the other prosecution witnesses and the trial judge had not dealt adequately with these discrepancies in his directions to the jury.

The learned judge, in dealing with Sergeant Grant's evidence, adverted the jury from time to time to the challenges by the defence to his credibility by reference to inconsistency in his evidence at trial with the depositions at the Preliminary Examination and advised them on their approach to such inconsistencies thus:

> "Now, if a witness contradicts himself and he gives a reasonable explanation which you accept, then of course, you will say the witness' credit has not been affected in the way that it otherwise might have been. A matter entirely for you. If he says two different things and you ask him why and he gives an explanation, if it's reasonable... I believe it's entirely a matter for you."

and more specifically at page 23:

> "Well, when a witness is asked about what they said at the preliminary examination, it is put before you to show that he said something different from what he said in court. And the reason is simply this; that if a person sees an incident, you would expect them when they come to talk about it, they would say the same thing everytime, so if it is approached that he said one thing on one occasion, on another occasion he said something different, what the defence is saying, such a witness is not capable of belief. But, of course, what I must tell you, is what the witness tells you in court is evidence, not what he said elsewhere, unless he admits it is true, and of course, you have to take into account any explanation the witness might have given for saying two different things and nobody asked him why he didn't remember it at the preliminary examination. What happened, he said he told the R.M. and he comes to court here now and says it was Corporal Campbell. The defence says he had made up the name Corporal Campbell, he pulls a name out of a hat, why didn't he say Corporal Brown or somebody else. Is it he has just remembered, I don't know, matter for you. You must say what you make of it, you saw him give evidence."

The contradictions or discrepancies of concern to Mr. Nelson rested on the photographer's evidence and were:

> (i) Whether the letters were ever in a room in the applicant's house and were photographed in there.
>
> (ii) Whether there had been an incinerator at the applicant's home with letters and ashes with writing which had been photographed.

(iii) Why the photograph of the letters at the gate did not reveal the street number on the gate.

On this aspect of the case, the learned trial judge said: (p. 17)

> "Well now, the photographer was called - you remember her, Miss Williamson - and what does she tell us, Miss Veronica Williamson: She is from C.I.B. Headquarters; she went there and she says, 'I did not go inside the house; I took pictures at the back of the house and outside of the front gate; the letters were in the walkway and the gate'. She says boxes were in the yard; and that was her evidence.
>
> Well, having regard to what Sergeant Grant said and Corporal Creary I asked her well, after you took the pictures there - because remember it was put to him that they were outside on the sidewalk and Corporal Grant said in between - so the best thing if there was a picture there produce the picture, and she produced the picture and you can see there are some in and some out. You must make up your mind. But a further point is made now. Sergeant Grant said, 'I wanted the number of the premises with the letters there', and there is no number on the premises.
>
> Well, you know I make this comment, when the picture was put in evidence the lady could have been asked about it. They could have said to her, did you see a number on the gate? Is it that the number did not come out or what? Not a question is asked. Not a question is asked, you know. So now, we are not told there is no number."

and at page 18:

> "The photographer could have been asked because she was there, she took the picture. A matter for you. So you will have to make up your mind. When the officer - when, for example, Creary says that she went in the room and took pictures; she said she didn't. Was he lying? Was he mistaken? Entirely a matter for you. But, what the defence is saying is that the police are lying and why they are lying is because they made up a story and I suppose it is quite true, it's human experience, if you are speaking the truth you don't have to tell a lie."

and again (p 18):

> "It was put to him (Sgt. Grant) that he concocted the writing on the ashes. Remember he said he hadn't told the Resident Magistrate at the Preliminary examination. He says, 'I don't think that the photograph will show the writing on the ashes'. Of course, the photograph of the incinerator

> "was never put in evidence. But, of course, I don't think that will cause you any trouble because the accused man admits that he had something there. He says he burns debris from the ganja; the Crown says he says he burned letters. That's a question of fact for you. It really doesn't matter what shape the incinerator is like because he said it was there. The question is: 'Did the police see writing on the ashes as they say or are they telling a lie'?'

In our view these issues were placed clearly and squarely before the jury for their determination and such comments as were made were unobjectionable.

Now, Mr. Nelson was at pains to find in the summing-up material to justify his contention that the judge assumed the role of prosecutor and that his summing-up was unfairly slanted against the defence.

In the course of reviewing the evidence for the prosecution, the learned judge said: (p. 24)

> "Of course, you remember that the comment was made that the police would have to be in cahoot with somebody for them to have got the letters from the Sorting Office and bring the letters at Pouyatt Street, and the defence says that is 'runnings'. Well, matter for you. Of course, then my comment is this, that 'runnings' work both ways. The defence says that he couldn't have taken 4,000 letters from the Post Office. Actually, what the statement said, if you accept it, he took about 1,100 letters. Well, 'runnings' run for one, 'runnings' can run for two; is that so? If the police have runnings at the Post Office, why can't somebody working there have the same 'runnings'? We all know Jamaica; matter entirely for you. Comment I make, remember any comment I make you don't have to accept it, because I don't know anything about the police and the post office, but I know Jamaican people."

at page 42:

> "Now, one of the comments, and remember I told you that the law says I am entitled to make comments but as I told you before, if you think I am talking rubbish, say so, for when it comes to facts, I am in no better position than you. As a matter of fact, it has been said that you are better on facts than me as you are in the world and the judge is supposed to live a constrained life."

Comments such as these, Mr. Nelson complained, tend to influence the jury against the appellant as they implied that the jury would be unwise to think otherwise.

The trial judge had emphasized that rather than accept his comments on the evidence as binding they should discard them if they were not in agreement with them. These comments, in our view, were not beyond the bonds of the permissible, and did not withdraw from the jury the important issues for their untrammelled determination.

As a preface to his review of the evidence for the defence, the learned trial judge said: (p. 52)

> "Now, we come to the defence. Remember what I told you how you should approach the defence, and I must remind you that he was under no duty to give any evidence. In these courts he has a choice; he can remain silent, he can give sworn evidence or he can make an unsworn statement. He chose to give evidence on oath, and not because he is an accused person are you going to disregard his evidence. You have to give it the same careful attention that you gave the evidence of witnesses for the prosecution."

and later after a full review of that evidence:

> "As I said, it is the Crown who must prove the case. If you are not satisfied that he had opportunity to steal the letters, then you have to acquit him."

Notwithstanding Mr. Nelson's arduous and onerous endeavours, we are of the view that the summing-up as a whole was fair, clear and adequate. The prosecution tendered credible and sufficiently cogent evidence to support the convictions and accordingly the jury's verdict is explicable only on a rejection of the defence and an unqualified acceptance of the case for the prosecution.

We treated the hearing of the application as of the appeal, and for the reasons set out herein the appeal against conviction was dismissed. Despite Mr. Nelson's plea we saw no good reason to interfere with the sentence. The sentence was accordingly affirmed.