C.A. CRIMINAL LAW — Murder — Trial — Finding of fact by judge — statement by deceased implicating applicant: failure of judge to give directions — APPEAL ALLOWED on grounds that (1) In his directions to jury judge purported to make a finding of fact — a power which is denied him in a criminal trial with a jury. (2) Judge gave jury no assistance on how they should assess evidence of statement by deceased implicating applicant. NEW TRIAL ORDERED

Cases referred to: Ratten v The Queen (1971) 3 WLR 930; R v Andrews (1987) 2 W.L.R. 413

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 14/91

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

REGINA

VS.

JOHN McLEOD

Dorrell N. Wilcott for the Appellant

Hugh Wildman for the Crown

JANUARY 21, 1992

ROWE P.:

We propose to treat the hearing of the application for leave to appeal as the hearing of the appeal, to allow the appeal, quash the conviction and in the interest of justice to order a new trial to take place during the current session of the Clarendon Circuit Court.

We propose to confine our reasons to two aspects of the case, one of which related to a non-direction and the other to a misdirection by the trial judge.

Oswald Welcome died on the 12th of December 1989 as a result of an injury which he received on the previous night whereby his right arm was severed.

One prosecution witness, the brother of the deceased, testified that he saw the appellant and other men chase the deceased into darkened premises, that he saw the appellant emerge on to the road still in chase of the deceased and that he saw the appellant use a machete to chop the right arm of the deceased,

amputating it. At this time the appellant and the deceased were standing under a lighted street-lamp at the bank of the road.

The other eye-witness for the prosecution spoke of the chase into the darkened premises but said he saw only one person emerge from those premises and he was the deceased. Upon his emergence that witness observed that he had an injury to the right hand and the deceased addressed him thus: "Killer, you don't see a the man chop me?" The witness asked: "Who"? and the deceased replied: "Busha", the name by which the appellant is known.

There was violent conflict between these two witnesses as to the place at which the deceased received his injury. But in his summing-up at page 131 of the Record the learned trial judge addressed the jury thus:

> "I have already pointed out to you the discrepancy which exists as to where he sustained the injury, on the road or out of the road. Now, to your mind is that very important whether it happened out on the road or in the yard? What is important, to my mind, and this is a comment I make, is who chopped him. It doesn't matter whether he was chopped in the yard or out the yard; who chopped him; because whether he chopped him ... if it is the brother who chopped him, whether it is in the yard or out of the yard, then this man has committed no offence. If it is the accused man who chopped him, whether it is in the yard or out of the yard, he is not saying that he chopped in self-defence; he is not saying that. He is saying whether this man got chopped in the yard or out of the yard he did not chop him. ... Of course, let me remind you that where the incident happened goes to the credit of the witnesses when you are coming to assess their credibility, but what is important in the case is who chopped."

At one point in the passage quoted above the learned trial judge told the jury that it was not important where the injury was inflicted. In that he was purporting to make a finding of fact, a power which is denied him in a criminal trial with a jury. Further, having regard to the defence it was absolutely necessary for the

jury to determine where the injury occurred so as to know which of the prosecution witnesses could be believed.

The trial judge invited the jury to prefer the evidence of the witness who was not related to the deceased, and if they did, the scenario painted by the deceased's brother, of an injury on the road, would have been rejected. On the other hand, apart from what the other witness was told by the deceased, that witness had no knowledge of what transpired in the darkened premises. That gives rise to the second reason for allowing the appeal.

The statement made by the deceased implicating the appellant was admissible in evidence as an exception to the hearsay rule under the principles enunciated in Ratten v. The Queen [1971] 3 W.L.R. 930 and R. v. Andrews [1987] 2 W.L.R. 413. However, the learned trial judge gave the jury no directions whatever on how they should assess this evidence. In our view, having regard to the directions that the witness through whom the hearsay evidence was received was a reliable and trustworthy witness, the failure to give a direction in keeping with R. v. Andrews (supra) was fatal to this conviction.

Counsel on both sides were constrained to agree that there was an abundance of evidence on which a jury properly directed could find a verdict adverse to the appellant. For this reason we ordered a new trial.