JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 5/87

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A. (AG.)
THE HON. MR. JUSTICE BINGHAM, J.A. (AG.)

REGINA

VS.

MICHAEL FREEMANTLE

Delroy Chuck for the Applicant

Paul Dennis for the Crown

October 28 and December 4, 1987

WRIGHT J.A.:

The district of Raymonds in the parish of Clarendon was subjected to a night of terror, a vendetta-type operation on the night of August 29, 1985, which left one person dead, others perforated with gun-shot pellets and nine homes badly damaged by gun-shots and stones. Undoubtedly that is a night which that community will long remember. Dead was Virginia Ramdas, who succumbed on August 30, 1985 to a 3" x 2" gun-shot wound which blew away a portion of her left side at a place called "Bongo's Lawn", the first place to be attacked that night. For the uninitiated it needs to be explained that this "Lawn" was not what is traditionally so called. Rather this was a paved enclosed area where dances etc. are kept.

The applicant was convicted on the 19th of January, 1987, for the murder of Virginia Ramdas and sentenced to death after a trial lasting four days before Walker J. and a jury in the Clarendon Circuit Court. From such conviction and sentence he seeks leave to appeal.

The defence was an alibi and it may not be without significance that the very person whom the prosecution places alongside the applicant at Raymonds is the very person whom he called as a witness to prove that the applicant was elsewhere with the said witness.

An inflammatory element in the case was the contention by the defence that there were political undertones based on the allegation that the district of Raymonds was a P.N.P. stronghold, whereas the applicant was a supporter of the J.L.P.

But politics apart, there was an incident earlier the same day which the prosecution advanced as the motive for the night's escapade. It was extracted in cross-examination of the witness called by the defence that one Laurel Murray, a cousin of the applicant, had received a beating at the hands of persons from Raymonds on the same day which the prosecution claimed was sought to be avenged by the night's events.

The layout of the lawn would be helpful but it is only with some difficulty that any details can be extracted from the evidence. However, so far as is relevant the area was walled around and within this enclosed area was the dwelling-house of Eric Christian, otherwise called, "Bongo Man" (hence Bongo's Lawn). Mid-way in the western wall, said to be about one chain in length, was a urinal and on the outside of this wall in the vicinity of the urinal was a soursop tree which over-hung the wall. The lawn had two entrances but only one was being used. Mid-way in the lawn was a structure used, both as a bar and as a projector room on the occasions when there were film-shows. A portion of a wall was used as the screen for the showing of films. On the night in question a film-show was in progress at the time of the invasion. It was bright moon-light at the time and apart from the light from the projector, which was beamed on to the "screen", there was no other light in the lawn. It is relevant to note that the film was being shown in an uncovered area. Indeed, the only covered area was the bar/ projector room.

From this outline it is evident that the issue of identification would be of paramount importance and to meet the challenge the prosecution called its first witness, Anthony King, who said he, had known the applicant for over eighteen years. But there was to be no easy passage. The witness made a volte-face and failed to supply the evidence he had been expected to give.

He said that on the night in question he was in the vicinity of Bongo's Lawn when he saw some men pass and go towards the show building. After some difficulty in stating who the men were he finally obliged:

> "I see Collin Francis and a man looking like Freemantle (whom he pointed out as 'the gentleman' in the box there) and I also did see Madurie and another young man."

The person "looking like Freemantle" had "an object like a gun - a long gun" and he went to the wall in the vicinity of the urinal and stooped by a hole in the wall after which the witness heard an explosion. Next, this same person held on to the soursop tree and jumped over the wall into the lawn. After that he heard more explosions inside "the show building". Thereafter, the other persons accompanying the man with the gun also scaled the wall and went into the lawn. He claimed that his recognition of Collin Francis and Madurie was aided by the fact that earlier the same day he had seen them in Lionel Town dressed just as he saw them at Raymonds. The men then jumped back over the wall and ran away.

By this time he heard a bawling for help and noise coming from inside "the show building". Several persons ran from "the building" and when he entered he saw Virginia Ramdas on the ground bleeding profusely from "a section towards her belly". Next he saw one Jimmy bleeding from holes from which he was squeezing gun-shot pellets.

In explaining his turn-about regarding the applicant, the witness said in naming Freemantle as the person whom he had seen with the gun, he was only succumbing to pressure to put the blame on the applicant who was a J.L.P. supporter. The transcript of his evidence tends to suggest that his new stance was explicable on a more plausible basis. As it transpired he was

not testifying as an impartial witness but from the unenviable position of one in custody awaiting trial on a firearm charge himself! In those circumstances his change of attitude and maybe, of vision, is not difficult to appreciate. But it is clear that whatever was the reason for his change the prosecution did not profit thereby.

The medical evidence revealed that rather radical measures were adopted to save the victim's life. The pancreas was removed and so were the spleen and the left kidney but all to no avail. She died of shock and haemorrhage as a result of injuries to the chest and abdomen. She had sustained multiple perforations and fractures and her stomach yielded multiple pellets. However, there were no burn marks, blackening or tattooing which would indicate - a shooting range of within eighteen inches. Concerning the infliction of the injuries on this hapless woman three witnesses who were present in the lawn were called. Mr. Eric Christian, the proprietor was unhelpful. He had been asleep in a chair and was awakened by the gun-shots in time to hear the deceased say: "Lawd Bungo, me dead", and then she fell from a standing position to the ground. He also observed Jimmy's injuries.

The next witness was Dennis McLean, who was conducting the film-show. He put the time of the incident at about 10:45 p.m. when he heard the sound of gun-shot from the side of the enclosure. His response was to "switch off the projector and jooks right underneath the table"; that he heard "two more shots come straight behind one another". His demeanour as he testified was such that it provoked a question from the learned trial judge:

"Q: You still look frighten?

A: Frighten same way, sir."

It is obvious that the effect of his evidence would suffer from such a display.

However, he said that on hearing the first shot the patrons began running about. When he thought it safe he turned on the lights and it was then he discovered that he was bleeding from his chest and both hands. He, too, had been hit by pellets. Until he turned on the lights only the moon-light

shone in the place.

In cross-examination this witness said the three shots sounded like they came from outside the lawn. Further, he testified that from he heard the first shot until he turned on the lights it was just like pure confusion, people just running up and down. Questioned about Wade Campbell, the witness upon whose testimony the prosecution rested heavily, he admitted knowing him and that he attended the shows regularly, but he could not say whether he was present on the night in question because he took no special notice of anyone.

Wade Campbell testified that while he was watching the film-show sometime after 11:00 p.m. he heard an explosion from the right side of the lawn so he left his seat and bent down behind a bamboo column on the left side of the lawn and when he looked in the direction from which the sound had come he saw the applicant coming over the wall at the very point mentioned by Anthony King, i.e. near the urinal. In the applicant's hand was a long gun. After the applicant came over the wall he took two steps further into the lawn and stood up. It was then that the witness, aided by the bright moon-light, recognised that the person was indeed the applicant. He pointed out for the benefit of the Court that the distance between him and the applicant at that point was from the witness box to the door of the Court-room but, unfortunately, an estimate of the distance was not recorded. The witness gave his age as twenty-five years and said he knew the applicant, an older person, for fifteen years, he saw the applicant all the while, the last occasion being only a couple days before the incident. The applicant wore no mask and he saw his full face for about one minute i.e. from the time he came over the wall into the lawn, which he estimated at forty-five seconds after the first explosion, until he left.

He demonstrated for the Court what he saw the applicant do with the gun while it was pointing towards the screen and it was recorded as a pumping action. There were two such actions and each was followed by an explosion and fire from the gun. As the applicant was climbing back over the wall the witness said he bawled out loudly so anyone could hear: "Freemantle, me see you", to which the applicant responded: "Go suck you mumma".

In contrast to the witness Dennis McLean, Mr. Campbell said that there was no general confusion after the first explosion. Said he, a few persons did begin to move about then. He admitted, however, that he did move to what he thought was a safer position from which he could look across to observe what was happening. It was after the second explosion that people began to run but he maintained that from his position the movement of the people did not affect his ability to see the applicant because the people were not moving across his line of vision. They were moving towards the gate in front. He recalled seeing the witness, Anthony King, inside the lawn before the shooting took place and then after the incident he saw him outside but he did not speak to King.

The defence did not lose sight of the importance of Wade Campbell's evidence and sought to impeach his credit on the basis that:

1. He was not present at the lawn at the critical time.

2. If present he could not see what he said he saw.

3. His evidence was mere hearsay being a repetition of what he gathered from persons present.

4. His involvement in the case was activated by a long-standing political difference.

His answers seemed quite forthright and do not suggest any hesitation on his part. He disavowed any political involvement. To the suggestion that he and the applicant used to get on and used to talk good like friends he responded:

"Me and him never was friends, sir. The man a big man to me, sir. Dem man noh talk to me, sir."

Detective Corporal Eglon Davis, then stationed at Lionel Town received a report of the shooting about 12:20 a.m. and arrived at the scene at about 12:30 a.m. He noticed blood on the ground inside the lawn and on searching he found two plastic waddings from shot-gun cartridges inside. Outside the lawn on the western side of the premises about eight yards from where he found the plastic waddings (on the same western side) he picked up three spent shot-gun shells which he said were close together but he did not say how close. In cross-examination he agreed that if the empty shells were not removed after the gun had been discharged the chances are that the shells would be found in the area where the gun had been fired. In describing the different types of shot-guns he demonstrated the firing of one type that is operated by a pump action similar to the demonstration given by the witness Wade Campbell. This is the type used by the police and it carries a maximum load of five rounds. The pump action has the effect of ejecting automatically the expended shell and re-loading the barrel with another cartridge. The three shells recovered were from 12 gauge cartridges and as such could be fired from any 12 gauge shot-gun and these shells carry over two hundred and fifty pellets (bird cartridges). From his knowledge of shot-guns the wadding is always expelled with the pellets.

Detective Acting Corporal Calbert Davis of the Hayes Police Station received a report about 7:00 a.m. on August 30, 1985, and in consequence thereof visited the district of Raymonds where he inspected first, Bongo's Lawn about which he supplies further details. The wall where the urinal was situated was 6-7 feet tall and in the wall directly opposite this wall, which was about four yards away, he saw a number of tiny holes such as would be made by pellets from a shot-gun. The holes formed a circle of about 15-18 inches and from his ten years experience, as a police officer, dealing with shot-guns, he expressed the view that the gun was fired from about three yards away i.e. one yard from the wall with the urinal. He said the pellets begin to spread at eighteen inches from the gun.

The scene now shifts from Bongo's Lawn to the home of Courtney Cardoza, about ¼ mile from Bongo's Lawn in the same district of Raymonds.

Detective Acting Corporal Davis visited this home as well as eight others - all in a cluster within six square chains - all of which had damage to doors, windows, furniture and crockery. Inside Cardoza's house he recovered pellets and a plastic wadding from a 12 gauge shot-gun. Cardoza gave him names and as a result he went in search of the applicant and Eric Madurie and not finding them, he had warrants issued for their arrest. On September 2, 1985, he saw the applicant at the May Pen Police Station, where he arrested him on the warrants for the murder of Virginia Ramdas and other offences arising out of the incidents at Raymonds. Upon being cautioned he replied: "Me wi talk to mi lawyer".

In cross-examination he explained that the wall in which he saw evidence of pellet marks was attached to the dwelling-house and was four yards from the urinal for which it acted as a shield from public view. To the right and left of that wall there was open space - the show area being to the left with a 8' x 7' wall serving as the screen and near to this wall is the entrance.

This latter piece of evidence throws some light on the evidence of Wade Campbell that the persons exiting the show area after the explosions were sideways to him and not moving across his line of vision.

The evidence at this point does not prove anything alleged to have taken place at Bongo's Lawn. Rather the value of this evidence, if accepted, is to establish the presence of the applicant in the district of Raymonds around the time that the prosecution contends he shot and killed Virginia Ramdas and would thus nullify his defence of alibi.

Mr. Cardoza agreed with previous witnesses that there was moon-light at the time. At 11:15 p.m. he heard stones falling on his house. The time was ascertained from his sister's watch. He looked through a window after it had been damaged by the stoning, which was so severe that the front door gave way and flew open, and in the moon-light he saw the applicant, whom he had known for about eight to ten years, with a long gun in his hand. The applicant entered the premises along with Madurie who had a stone in his hand. He had them under observation for about two minutes and saw the applicant's

face. Madurie was also well-known to the witness. He saw the applicant point the gun at the window of his father's bedroom. Then he saw flame issue from the gun and heard an explosion. The window was blown out and many pellets were later seen in the bedroom. In despair the witness went and sat on a settee awaiting the inevitable which, mercifully, did not come. The devastation moved to the neighbour's home from which he could hear the sounds of smashing and cries for help.

Challenged in cross-examination that he had not seen the applicant with any gun that night Mr. Cardoza responded:

> "See him with hit, sar, with my two eye, a moonshine, a see him."

He too shrugged off the suggestion that he had concocted a story because of political bias. He reported his ordeal at the Hayes Police Station the next morning. At the time he was four months away from his eighteenth birthday, he said, and had nothing to do with politics. His time was occupied with tending his father's cows and attending at Caymanas Park.

On September 1, 1985, Detective Acting Corporal Michael Patterson picked up the applicant at Top Hill, Clarendon, where he saw him unloading sand from a truck.

On the officer's arrival the applicant is alleged to have said to him: "Me know sey oonoo a look for me long time", but the applicant denied making any such statement.

In his defence the applicant made an unsworn statement from the dock, the crux of which reads:

> "Well, I am accused of murdering somebody I don't even know or know of the incident that they are talking about. I could tell you where I was. ..... I was at Mineral Heights site - Mineral Heights at the time whenever they say the incident took place. ..... I was there with one man by the name of Eric Madurie and another guy by the name of Manley Francis. There was a project going on. ....."

Thereafter he elaborated how they partook of a meal of flour and chicken prepared by Madurie who was a watchman on the site where the applicant "did a little supervision" and about 12:30-1:00 a.m. he went to bed. Next morning he woke up between 5:30 and 6:00 a.m. He agreed that he was taken into custody while unloading sand but he also stated that between August 30, 1985 and the time of his detention he was in the area - at his work-place and at his home which is just opposite the Police Station at Hayes.

It may be observed that except as may be implied from the portion of his statement quoted (supra) he made no reference to the time of the incidents at Raymonds.

Eric Madurie, who like the applicant, was in custody at the time of the trial of this case testified that he, the applicant and three other fellows, Rohan Grant, "Uppo" and "Skoochi" were at Mineral Heights, where between 11:30 p.m. and 12:00 mid-night they finished cooking and eating in a house next door the site where he worked as a watchman. This he said was after they had finished watching a boxing match. After that both he and the applicant went to the site and he insisted that the applicant was not at Raymonds on the night of August 30, 1985.

Cross-examined he admitted that while in custody he had seen and spoken to the applicant on several occasions but never once about the case, although they were both arrested and charged in connection with the night's incidents - he said he was arrested on September 3, 1985. In custody he had also seen the reluctant witness, Anthony King but he did not say whether he had spoken to King. He disclosed, too, that in respect of the work done by him on the site, his time-keeper was the applicant, who was also his pay-master. He admitted that when he was taken into custody he was told that it was in connection with the incidents at Raymonds but he did not tell the police that he was at Mineral Heights. What he told them was that he did not know anything about it. He testified too that he knew both Wade Campbell and Courtney Cardoza and that he had never had any fuss with either of them.

After a summing-up which occupied roughly three and one-half hours, the case was quite properly left to the jury on a murder-or-nothing basis and after retiring for twelve minutes the jury returned a unanimous verdict of guilty of murder.

The two Grounds of Appeal filed are as follows:

> "1. The verdict is unreasonable and against the weight of the evidence.
>
> 2. The summing(sic) on identification was inadequate and failed to emphasize the inherent dangers and possibility of mistakes."

Despite the looseness of the wording of Ground 1 we treat it as intending to express the Ground of Appeal provided by Section 14(1) of the Judicature (Appellate Jurisdiction) Act, namely: "The verdict is unreasonable and cannot be supported having regard to the evidence." This Ground was not vigorously pursued.

Indeed, the single aspect of the evidence to which Mr. Chuck alluded with reference to this Ground was the finding of the three spent shells outside the wall. But even if the Ground had been properly formulated, it would have been severely weakened when Mr. Chuck conceded that he was not disputing the point that there was evidence on which a reasonable jury properly directed could convict - a concession which of necessity must affect both Grounds. However, despite this concession, he continued to argued.

His contention was that they were not properly directed in the sense that a warning relating to the nature of visual identification was not given, so that there was a real likelihood of there being a miscarriage of justice.

While conceding that a general warning should have been given, Mr. Dennis nonetheless contended that what is important is the effect of the direction given. In this regard he cited the fact that the learned judge pointed out the elements necessary for identification, at the same time calling them critical.

In those circumstances no danger would result from the lack of the general warning. Accordingly this, said he, is a proper case for the application of the proviso to Section 14(1) of the Judicature (Appellate Jurisdiction) Act, on the basis that had the general warning been given, the jury must necessarily have come to the same conclusion.

In dealing with the subject-matter of Ground 1 the learned judge drew the attention of the jury to the difference in the positions assumed by Wade Campbell and Dennis McLean and the effect that factor would have on the opportunity for each to see what was taking place in the lawn. Concerning McLean's impression that the three explosions sounded to him as though they came from outside the wall, the learned judge directed the jury at page 213, thus:

> "And the defence is saying that on the basis of his evidence you could find as a fact that all three shots came from outside the lawn, that the person who was firing the shots was outside the lawn. That is what the defence is saying. Therefore it would mean that Wade Campbell is telling a lie when he says that at least two shots were fired from inside the lawn. .....
>
> Would you be prepared to go as far as to say and to find as a fact on the evidence of Mr. Dennis McLean that these three shots came from outside? The defence is saying you should do so. ..... because the defence is saying that if the shots were fired from inside a lot more people would have been injured than just those three that you heard of; ....."

Then again at p. 215 he said:

> "The defence is saying again that it is reasonable for you to find, and you should find, that the shots were fired from outside, because it was outside that the spent shells were found by the police, not inside.
>
> The waddings were found, Exhibit 1 were found inside the lawn, but the three spent shells were found outside the lawn, and you heard that after the shots were fired, the spent shells are ejected from the firearm, so they may fall on the ground."

Finally on page 219:

> "In order to explain how it is that these shells were found outside, are you prepared to draw the inference and to say that from the fact that these shells were found outside, it means that whosoever fired them was outside? If that is how you look at it, if that is the inference you are prepared to draw that the person

> "who fired the shots relating to the three empty shells which were found outside was outside, when the shots were fired, then you would be bound to find this accused man not guilty of this charge of murder, because it would mean that he never went into the lawn and it would mean that Wade Campbell would have been lying or making a mistake when he says he saw him inside the lawn firing a gun."

The learned judge maintained a balance by juxtaposing the claims of the prosecution based on the testimony of the relevant witnesses, together with the possible inference that having regard to the number of persons in the lawn the shells from within could have been thrown outside, if the gunman did not himself do so. It is our view that there is no shortcoming in the manner in which this issue was presented to the jury. Ground 1 accordingly fails.

In dealing with the evidence of Anthony King the learned judge told the jury at page 198:

> "What I suggest to you Mr. Foreman and Members of the Jury, is that as far as identification of this accused man is concerned, you cannot rely on the evidence of Anthony King."

Then having said that he later told them that the critical issue in the case is the question of identification which would have to be resolved by looking elsewhere. What is abundantly clear is that there could remain no need to give any warning regarding the evidence of Anthony King on this issue. The remaining witnesses on identification are Wade Campbell, in relation to the lawn and Courtney Cardoza, whose evidence if believed, would lend strong support to Wade Campbell's evidence of the presence of the applicant at Raymonds with a long gun at the relevant time. The effect of this would be to destroy the applicant's alibi that he was at that time at Mineral Heights.

During his summing-up the learned judge alerted the jury to the extraneous matters including political bias which could affect their verdict and then just before leaving the case to the jury he consulted with counsel, as to whether he had omitted anything. Whereupon counsel for the prosecution addressed him thus:

> "You were dealing with the question of identification to some extent, now the general warning".

The learned judge thanked counsel then said, "I quite agree", which must have meant that he appreciated the need for warning. Thereafter the learned judge proceeded to give further directions in a manner which, since there are no formal words which must be employed in this exercise, may be seen as his way of conveying to the jury the strength and weaknesses of the identification evidence, as well as, the risks attendant upon mistaken identification by the witnesses. These further directions occupy three pages of the summing-up (pages 243-245) and are as follows:

> "As I indicated to you more than once, Mr. Foreman and members of the jury, the critical issue in this case is one of identification of this accused man. The prosecution is saying you are the man who was in the lawn with the gun and he is saying he was not the man. The prosecution is saying you are the man that was in Cardoza's premises a short distance away after this incident at the lawn occurred. You are the man who had the gun in Cardoza's premises and he is saying he was not the man. So the prosecution have to prove to you, to the extent that you feel sure of it, that he was the man at both places, and certainly that he was the man at the lawn, at Bongo's lawn. They have sought to do so through the mouths of two witnesses: Wade Campbell and Courtney Cardoza, and you have got to be sure that these two people who say that they saw this man, and he was the man that they had a sufficient opportunity to see him. Now, in both cases, in Campbell's case and in Cardoza's case, and you must remember that this incident is taking place late at night, at 11:00 and after 11.00. In both cases, both witnesses say that the light that they had was moonlight, bright moonlight. Well, all of you live in the country and all of you live in Clarendon, you know what moonlight is like at night in Clarendon. You must know whether if you have bright moonlight, if you will be able to see somebody that you know sufficiently to make them out. So each of them had only moonlight and each of them said even in the moonlight, he saw that it was Freemantle, even by moonlight, they were able to see that it was Freemantle, and both of them knew Freemantle for a long time before, so it wasn't a question that night of them seeing a man for the first time. Each of them was seeing a man that they knew for a long time before. I think Campbell said he knew him for about 11 years before. I think that is what Wade Campbell said, and the other witness said that he had known him for some time before. Cardoza said he has known Freemantle for about eight to ten years before, and Wade Campbell said he had known Freemantle for about fifteen years before, not eleven, fifteen years before.

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"So one knowshim for about fifteen years, the other one knows him for eight to ten. Neither of them was looking at a stranger. You may think it is different, if you see a man by moonlight and it is the first time in your life you are going to see him. You may think that in those circumstances you would quicker make a mistake than with a man that you know so long. So both of them saw him by moonlight. You have to think again of the distance at which each one say they saw him. Wade Campbell told you from his position behind that column hiding in the lawn, he saw Freemantle and recognised him when he came into the lawn and stood up and at that time Campbell said that Freemantle was at a distance of about from where he Campbell was giving evidence in the witness box, to that door of the courtroom. So you have to take that into account too to see how near up they were.

In the case of Cardoza, he told you that when he looked through his window and recognised this accused man, the accused man was at a distance from about where he was giving evidence in the witness box to the second bench in court, where the spectators sit. So Cardoza, if you believe him, saw the accused at a even shorter distance than Wade Campbell saw him. So you have to be satisfied that each of them had a sufficient opportunity to see the accused man. Wade Campbell said that he saw him just for about thirty seconds, not long because he told you exactly what happened - man came over the fence, stood up, took two steps forward, fired again, turn back, over the wall again. And he said it was about thirty seconds, a short time, you may think. But you ask yourselves this question, Mr. Foreman and members of the jury, how long a time would any of you need to make out somebody that you have known for fifteen years already? How many seconds you want to make out somebody that you have known for so long? In the case of Cardoza, he told you that he saw this accused man for about - 'I looked at the accused for about two minutes before he left the premises'. So he got even a longer look. He said it was two minutes while he was looking through the window, saw him coming down with the gun and fired into the window, his father's window before he went away. So Cardoza got two minutes to look at him. How long would you need to look at a man that you know for eight to ten years before? So all these things you take into consideration. In the case of Wade Campbell he told you not only did he see the accused, he talked to him - 'Freemantle, I see you' and got some obscenity in return. So Wade Campbell is even saying that 'I not only saw him, I talk to him and he answered me. He tell me about me muma'. So this is it. Do you believe all that? If you believe all that, then it is evidence on which you can say that Wade Campbell is quite right in telling you that the person he saw was this accused man, and Cardoza is quite right, not making any mistake in telling you that the person he saw is this accused man. But all

> "those are matters for you, so I am going to ask you now, Mr. Foreman and members of the jury to go to the jury room, consider your verdict, and when you have arrived at your verdict, you come back and tell me what your verdict is. It can be either guilty of murder or not guilty of murder."

It is fair to say that the effect of this final portion of the summing-up would be that the jury retired with the critical importance of identification ringing in their ears and what were factors by which they should assess the evidence on this vital issue. It is true that the general warning contended for is not among the factors mentioned. But inasmuch as what is at issue is not the incantation of some formula but a focussing upon the quality of the identification evidence - it is important to take a second look at the impugned direction with a view to determining how well it fares when matched against that which it is contended should be done.

The case of R. v. Oliver Whylie (1977) 15 J.L.R. 163; 25 W.I.R. 43 provides the basis for impugning the summing-up. Guidelines were declared by that case the "locus classicus" on visual identification evidence. The headnote to the case reads:

> "Where in a criminal case the evidence for the prosecution connecting the accused with the crime rests wholly or substantially on visual identification the trial judge should alert the jury to approach that evidence with caution as there is always the possibility of mistake. He should direct the jury to consider all the surrounding circumstances and should not confine himself merely to narrating the evidence without explaining its significance. A summing-up which does not deal with all matters relating to the strength and weakness of the identification evidence is unlikely to be fair and adequate."

Comprehensive though this authority appears to be it has been recognised that it is not to be interpreted:

> "..... as laying down as an inflexible rule of law, that in every case where there is evidence of visual identification, a trial judge is obliged to warn the jury of the dangers of mistaken identification. As Rowe, J.A. (Ag.) puts it, 'what matters is the quality of the identification evidence.' Indeed, the issue may be one, not of mistake, but of deliberate falsehood. Nor was it intended that the

> "list of factors and circumstances affecting identification, as set out in the judgment, should be considered exhaustive or of general applicability. Much will depend upon the circumstances of the particular case." [Per Kerr J.A. in R. v. Champagnie et al, S.C.C.A. 22-24/80 (30.9.83)]

In that case there was no general warning but the summing-up was not faulted because there was other cogent evidence implicating the appellant. Again in the more recent case of R. v. Bradley Graham and Randy Lewis, S.C.C.A. 158 and 159/81, no general warning was given but the convictions were upheld because the Court took the view that:

> "..... the identification evidence was of such overwhelmingly high quality that the short-falls in the summing-up did not render it unfair and inadequate especially as we do not overlook the fact that the learned trial judge did tell the jury that if they thought the identifying witnesses were mistaken they should find the appellant Graham not guilty."

In statements from later cases, there is discernible a hardening of judicial resolve that the Whylie Guidelines should be recognised as requiring more than mere lip service. Excerpts from the judgment in R. v. Bradley Graham and Randy Lewis (supra) per Rowe, P. illustrate the point. Emphasising the point that the Whylie Guidelines were deliberately formulated so as to allow for the gradual development of the law he proceeds at p. 17:

> "Somehow, with the passage of the very few years since 1977, this judicial duty seems to have become blurred in the minds of some trial judges.
>
> It is not within the discretion of the trial judge to determine whether or not he will give a general warning on the dangers of visual identification, and to elaborate and illustrate the reasons for such a warning. That is the starting point from which he ought not to swerve. Judges, however, are human and due to an oversight in a particular case a judge might omit to give the general warning although he alerts the jury to the possibility of mistaken identity. Such a lapse might not be fatal if there are elements in the identification evidence which renders the acceptance of the identification evidence inevitable. In the recognition cases where the accused is said to be well-known to the witness for an extended period the true test might be that of credibility rather than of an honest witness making a positive yet mistaken identity. Therefore the language of the general warning to be given in the recognition cases might differ in detail from that which is to be given where the accused was not known to the witness previously."

At page 19 the learned President continued:

> "All the decisions of this Court since the decision in R. v. Whylie, supra, of which those referred to herein are but a small sample, have reiterated the principle that there is a duty on trial judges to issue the warning referred to in Whylie's case where there is dependency upon visual identification by the prosecution in proof of the charges preferred."

It is clear, therefore, that there is no discretion to warn or not to warn. There is a judicial duty which demands compliance. However, a failure to comply will not necessarily be fatal depending upon the quality of the identification evidence. Also a distinction is appreciated in recognition cases where the true test may be one of "credibility rather than of an honest witness making a positive yet mistaken identification". The instant case is one such - a recognition case - in that the applicant is well-known to the witnesses for long periods viz. fifteen years and eight to ten years. The projected factor which could affect the credit of the witnesses is political difference. But it does seem peculiar that while defence counsel expended much effort at demonstrating the political tribalism to which the applicant has fallen victim, the applicant in his unsworn statement did not utter even one single word in that regard. Neither did his witness, Eric Madurie. It was Anthony King, the witness who went back on his deposition, who made the claim on behalf of the applicant. Nevertheless, the learned judge was careful at pages 185-188 and again at pages 220-221 of the summing-up to deal with the danger of politics influencing the testimony of the witnesses, Wade Campbell and Courtney Cardoza, as well as, the verdict of the jury. Again on the question of credit he said at page 190:

> "If you believe any witness lied from beginning to end, then you reject that witness completely. On the other hand, if you believe any witness spoke partly truthfully, partly untruthfully, take the part that you believe to be true and reject the part that you find to be not true and you act upon the part that you find to be true."

It seems fair to say that the learned judge gave the jury the necessary assistance in dealing with the question of credit.

The manner in which the issue of visual identification was finally dealt with has the advantage of concentrating, for the benefit of the jury, the factors relevant to the assessment of the quality of the identification evidence viz. opportunity, the time of the incident (late at night), manner of lighting available (bright moon-light as to which the jury was invited to call upon their own experience of recognition by bright moon-light in Clarendon), the length of time the applicant was known to the witness, mistake by the witness, distance over which the observations were made, length of time the applicant was observed, the fact that Wade Campbell testified that he and the applicant exchanged words. Also earlier in dealing with the evidence of Dennis McLean and Wade Campbell he had dealt with the question as to whether Wade Campbell had had an unobstructed view from behind the column where he sought refuge.

In addition to this, earlier when the learned judge was dealing with a matter which would affect the credit of Wade Campbell, he drew attention to the nature of the wound to the deceased, thus at p. 214:

> "The Prosecution is saying that it hit her before the pellets started to spread wide, because it dug out a big hole in her side; that it wasn't one or two pellets that hit her. She got the full blast of that shot. The Prosecution is saying it made a hole in her side, three inches by two inches, and the Prosecution is saying that when the post-mortem was performed on her dead body the doctor found a whole heap of pellets still in her stomach. So that would be another shot and there was a third shot. So the Prosecution is saying that having regard to the nature of the injury that this girl got, it would mean that she got the bullet before the pellets started to spread wide. She got it full force, so it must have been near up; so the shots could not have been fired from outside the lawn because she was inside."

The learned judge was here dealing with an issue which, while it went directly to credit, also affected the question of identification because if the shot that literally destroyed Virginia Ramdas was not fired from within the lawn, as Wade Campbell testified, that witness' identification evidence would disappear because he would have been afforded no other opportunity to see the person who fired the shot.

Having considered the summing-up as a whole we are strongly of the view that the summing-up was a careful one and that the necessary assistance

was rendered the jury in resolving the relevant issues. Indeed, but for the very strong language employed in R. v. Graham & Lewis (supra), which now puts the need for a general warning beyond dispute, we would have been minded to conclude that, on the basis of the evidence at the scene of the killing supported by the rather cogent evidence of Courtney Cardoza which obviously eliminated the applicant's defence of alibi, the lack of a formal warning would not attract adverse comment. Accordingly, we are strongly of the view while having due regard for consistency in the development of the law on the issue of visual identification, that despite the absence of a formal warning there has been no miscarriage of justice and that had the jury been properly directed in the sense that had they been given the necessary warning they would nonetheless have come to the same conclusion. It is noted that there is no other complaint against the summing-up.

We therefore, treat the hearing of the application as the appeal, apply the proviso, dismiss the appeal and affirm the conviction and sentence.