C.A. CRIMINAL LAW - Murder - Trial - message from judge to jury during evidence - admission of photographic enlargement of fingerprints - visual identification - directions on inference to be drawn from evidence - standard of proof - unsworn statement, unanimity, common design, unsworn statement. Application of proviso - JAMAICA Appeals dismissed Cases referred to

✓ Comp (Case prepared)

Evidence
Criminal Practice

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 21, 22 & 23/87

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA

VS.

NOEL PHIPPS
SHAWN TAYLOR
PHILLIP LESLIE

Mrs. M. Macaulay and Mrs. Patience White
for Taylor and Leslie

Mr. B. Macaulay, Q.C. and Miss Portia Nicholson
for Phipps

Mr. L. Hibbert, Director of Public Prosecutions
and Miss Y. Sibble for Crown

April 25-27; May 2-3 and July 11, 1988

ROWE P.:

It was an evening of apparent domestic bliss. Kenneth Witter, his wife and three children spent an unremarkable evening together on November 10, 1985 and retired to bed at about 10 p.m. Husband, dressed in his undershorts, shared a bed with his wife. Sons, Kenneth and Sean occupied separate bedrooms. This was the picture presented by the Crown in the trial of the appellants for the murder of Kenneth Witter before Malcolm J. and a jury in the Home Circuit over a period of ten days culminating in their conviction and sentence to death on February 13, 1987.

Counsel, at considerable personal sacrifices, conducted these appeals in a manner most helpful to the Court.

Kenneth Witter Jr., an 8 year old Sixth-Grader in an established Preparatory School, had a toothache at 12:30 a.m. on November 11, 1985 and he sought solace in his parents' room. They medicated him and relieved, he returned to his room and fell asleep. This mundane incident was important to the Crown's case because if it was believed, Kenneth Witter Sr. was alive and well up to 12:30 a.m. on November 11. Mrs. Witter gave evidence of comforting her young son and sending him back to sleep.

The broad sweep of the prosecution's case was that after 1 a.m. Mrs. Witter awoke to observe a most bizarre scene. There was a man standing in the bedroom on her husband's side of the bed with a gun in his hand pointing at her husband who was trussed up with both hands tied behind his back and his feet tied together. He was later gagged. A second man whom she identified as the appellant Phipps ordered her to put her hands behind her and using some 'bras' and neckties he tightly fastened her hands and her feet. A demand was made for money by the gunman beside her husband. When her husband denied that they had any money at home, the gunman gun-butted him in the head. This was repeated three times. Mr. Witter Sr. told the assailants to take such jewellery as they possessed and leave them alone. Mrs. Witter, could hear the motions of men searching in the room but could not see who did what.

Kenneth Witter Jr. was brought into the parents' bedroom, then trussed up, hands and feet and placed to lie on the bed. The older boy Sean, was also brought into the bedroom, then tied up and placed on the bed. The demand for money continued. These robbers threatened to shoot the children if the parents did not disclose the whereabouts of the money. Kenneth Jr. offered them the savings in his piggy-bank which they spurned. To add further terror to the householders, one man tore the telephone wire from the wall and said:

"Well, this can't help you, so you better tell us where the money is or we are going to shoot your pickney them and rape your wife and kill you too."

This threat got them nowhere. Then one of the men, identified as the appellant Leslie, took an electric clothes iron, plugged it into an electrical socket and when it had heated used the iron to burn Kenneth Witter Sr. over his back. He next attempted to burn Kenneth Sr. in his face with the iron. Enraged, Kenneth Sr. kicked out at the man with the iron knocking him against the wall and in shuffling to escape he fell off the bed. The appellant Leslie, recovered his balance, came up to Mr. Witter and shot him in the left side of his abdomen. The bullet passed through the muscles of the abdomen and subcutaneous diaphram, the pericardium and posterior wall of the left ventricle of the heart, the upper part of the lower lobe of the right lung and embedded itself in the muscles in the right fourth intercostal space. Death was due to shock and haemorrhage as a result of the injuries caused by the bullet from the firearm. After the shot was fired the men ran away.

On the Crown's case at least three men were present in the house on that night but from the diffused activity in the house there could have been a fourth intruder. Indentification parades were held for all three appellants. The appellant Phipps was identified by Mrs. Witter; Taylor was identified by Kenneth Witter; Leslie was identified by both Kenneth and Sean Witter.

Scientific Officers of the Police Department tested for finger-prints. Evidence was placed before the jury that a latent finger-print impression on the electric iron which the Witters said was used to burn the deceased when developed and compared was identical with the finger-print impression of the left little finger of the appellant Leslie. On the inner portion of a telephone receiver found in the open drawer of the bedside table, the finger-print expert found and developed a latent finger-print which was identical to the finger-print impression of the left ring finger of the appellant Taylor. From the open drawer of a

dresser in the Witters' bedroom, the finger-print expert took a chocolate tin on which was found a latent finger-print, identical with the left thumb print of the appellant Phipps.

The third plank of the Crown's case consisted of statements allegedly made by the appellants Taylor and Leslie, which statements were admitted into evidence.

Each appellant gave sworn testimony.

The appellant Phipps denied that he visited the home of the deceased on November 11, 1985 and denied that he was a party to his killing. He challenged the integrity of the identification parade on the basis that the police had taken away his identification card which carried his photograph. In his defence Taylor said he did not know his co-defendants before his arrest, he did not participate in the killing of Mr. Witter and that he was cruelly assaulted by the police before he signed a paper - writing, the contents of which were unknown to him. He called as a witness an Assistant Commissioner of Police in an endeavour to show that a firearm recovered from the body of one Narry Campbell was the weapon used to kill Mr. Witter. The Police Officer had no knowledge of this weapon.

Phillip Leslie said he visited the home of Mr. Witter on a Saturday in November 1985 immediately prior to November 11, in company of one Narry Campbell o/c 'Wasp' and offered cocaine valued at $25.000.00 to Mr. Witter for sale. He said that Mr. Witter took the drug and asked them to return for the money. This they did at 10 p.m. on November 11. 'Wasp' and himself were let into the house by Mr. Witter and were escorted through the living-room, where Mrs. Witter and the two sons were watching television, to Mr. Witter's bedroom where he entertained them to drinks. Upon their request for payment Mr. Witter refused saying that the cocaine was not worth $25,000.00. Their request for the return of the cocaine was denied, Mr. Witter telling them that he had sent away the stuff already. On Leslie's account Mr. Witter opened a drawer, took out a firearm and pointed it at both of them. 'Wasp' took two steps backward as if to run and he,

Leslie, turned to go away, when he saw 'Wasp' suddenly pull a gun from his waist and shoot Mr. Witter. They both ran from the room, passing Mrs. Witter and the two boys still in the living room. Leslie said that on the day of his detention, the police went to the home of Narry Campbell, 'Wasp', shot and killed 'Wasp' and recovered a firearm from his body.

Leslie testified that he was severely beaten by the police and in consequence he signed a statement which he did not make and had no opportunity to read, and that the contents thereof were not true. He denied handling an electric iron in the Witters' household and denied that he took part in any incident at those premises at or after 1 a.m. on November 11, 1985.

A ground of appeal common to all three appellants was that there was a grave irregularity in the trial in that during the summing-up, a written message passed between the trial judge and a juror, the contents of which were not communicated to defence counsel or to the appellants.

At 12:30 p.m. on the final day of trial, when the trial judge had almost completed his summing-up and was about to take the luncheon adjournment, he addressed counsel for the prosecution and for the defence thus:

> " Mr. Andrade, Mrs. Macaulay, I have a message for Miss Bernard about her mother, it's written on this. I am going to pass it to her.
>
> MR. ANDRADE: Your Lordship pleases.
>
> HIS LORDSHIP: I just indicated that I .....
>
> MRS. MACAULAY: Yes, sir."

The message was then passed to the juror through the foreman. Then the trial judge addressed the juror:

> "HIS LORDSHIP: All right?
>
> JUROR : Yes, sir."

Counsel for the appellants submitted that this communication to the jury could have affected the due consideration of the appellants' case

by that juror or any other juror to whom the contents of the note were revealed and therefore the appellants could not be said to have had a fair trial. They contended that although counsel knew the nature of the document they were unaware of the contents thereof and argued that the fundamental rule that no communication should be made between judge and jury without the same brought to the attention of the accused and counsel was for the protection of accused persons and anybreach would lead to a miscarriage of justice.

Two reported cases were relied upon by the appellants. In R. v. Samuel Green (1949) 34 Cr. App. R. 33, after the jury had retired they sent a communication to the trial judge who received it in his Chambers and sent an answer to the jury without coming into Court and letting the parties know what the question and the answer were. By the time the case reached the Court of Criminal Appeal the Recorder had forgotten what the question was which he had received from the jury and his only recollection that it was a simple question which he had already dealt with in his summing-up, was of no real help to the appellate tribunal. In delivering the judgment of the Court, the Lord Chief Justice said:

> "This Court and the Divisional Court has said on more than one occasion that any communication between a jury and the presiding judge must be read out in Court, so that both parties, the prosecution and the defence, may know what the jury are asking, and what is the answer."
>
> [The appeal was allowed].

Augustine Kachikwu, an Ibo, was convicted of assaulting a police officer occasioning to him actual bodily harm. In the course of his trial he denied the assault. After retiring, the jury returned with a written note which was read out by the Foreman. There was a misunderstanding by the Court as to the purport of the note, which had not been shown to the judge or to counsel. Winn L.J. made it clear that immediate steps should always be taken when a note is received from the jury, to show the terms of the note to both counsel in the case. R. v. Kachikwu (1967) 52 Cr. App. R. 538 at 541. The decision in this case did not turn upon the irregularity of

the note not having been passed to counsel or the Court.

Mr. Hibbert, sought to answer the applicants' contention by submitting that there is no general rule that a communication between judge and jury in the course of a trial would create such an irregularity that any verdict delivered during that trial would amount to a miscarriage of justice. He submitted that communications passing between judge and jury concerning matters directly affecting the verdict to be returned by the jury were all part of the trial and such communications could not properly be made in the absence of the accused and without allowing counsel to comment upon such communications. He said the instant case was distinguishable from R. v. Green and R. v. Kachikwu supra, as the communication between the judge and the juror had nothing to do with any aspect of the case and could not affect the verdict of the jury, and he relied upon R. v. Lamb (1974) 59 Cr. App. R. 196 and R. v. Furlong (1949-50) 34 Cr. App. R. 79 in support of his submissions.

Dealing first with R. v. Furlong, a case in which the communication arose after the jury's retirement, Goddard L.C.J. set out the right practice to follow in these words:

> "If a jury, when they are considering their verdict, wish to ask a question or to have more information or to make any request about the case, they should do so in open court, and the judge should answer in open court in the presence of the prisoner. A jury may, of course, put the request into writing or be asked by the judge so to do, but the communication should always in such a case be read and answered in open court."

The irregularity complained of in R. v. Furlong was that the jury's written question was answered by the judge in writing without the jury being summoned back to Court or the question and answer being shown to the accused and counsel before verdict. The Court held that that particular question could only have been answered in one way, not admitting of any argument to the contrary and immediately after verdict the trial judge had read out both question and answer in open Court.

The Court agreed that it would have been better if the trial judge had read out the question and answer before verdict, but went on to consider the consequence of that failure to act strictly in accordance with recognized procedure. Lord Goddard said:

> "It is impossible to say that every irregularity is a ground for quashing a conviction ....., the Court must consider whether it is an irregularity which goes to the root of the case ....."

[Furlong's appeal was dismissed].

In R. v. Lamb supra, the jury having retired sent a note to the trial judge saying that they could not reach a unanimous decision. The Clerk of the Court on the instructions of the judge entered the jury room and instructed the jury that they should continue to try for a unanimous verdict. It was held by the Court of Appeal that this method of procedure was a material irregularity in the case and the appeal was allowed. In delivering judgment James L.J. said:

> "It is necessary as a matter of practice for the jury to be able to send a communication through the jury bailiff to the judge. What is of great importance is that any communication should be made known in open court in public in the presence of the accused person, his legal representatives and the prosecution so that there is no secrecy."

Many of the earlier cases were considered by the Court of Appeal in R. v. Rose and Others (1982) 2 All E.R. 537. After a very long trial, the jury retired for several hours in the course of which they sent a note to the trial judge asking for an A-Z Directory of London. The trial judge refused to reassemble the Court and instructed his Clerk to advise the jury that the answer to their request was "No". It was submitted on appeal that the actions of the trial judge infringed the principle that all communication between judge and jury relevant to the issues should take place in open Court. Of this submission Lord Lane had this to say:

> "So far as this court is concerned, we are quite clear in our mind that the correct course for the judge to have adopted was to inform counsel what had happened, of the request that had been made and, if

> "necessary, as it would have been in these circumstances, to reassemble the court to hear what counsel had to say about this request. On the other hand, if this particular irregularity had stood on its own, we do not think that this court would have interfered. We doubt that it was of sufficient materiality. If it was material, then it probably would, on its own, have been a case for the application of the proviso to s. 2 (1) of the Criminal Appeal Act 1968."

Both Lord Goddard and Lord Lane have expressed the view that the Court must take into consideration the materiality of the communication between judge and jury which did not come to the notice of the accused and counsel in order to determine the effect of the irregularity. But as Mr. Hibbert rightly pointed out, all the cases reviewed herein have arisen out of communications after the jury have retired and all were relevant to the verdict which the jury were required to return. A communication which has no bearing on the case, which is personal to a juror, and is made openly in open Court, without a tinge of secrecy, cannot be given equal materiality to one which is directly connected with the case. Counsel in the instant case were aware that the trial judge held in his hand a note concerning the juror's mother. They did not seek to see the contents thereof, they assented by their replies to the trial judge, to the course he proposed to adopt and did adopt in passing the note to the juror. Defence counsel did not then remotely conceive that any prejudice to the applicants' case could be involved. We are of the opinion that the communication the subject of complaint was totally immaterial, did not and could not have prejudiced the interests of the appellants and did not lead to a miscarriage of justice. Accordingly, we find no merit in this ground of appeal.

Evidence was tendered that Det. Insp. Harrison and Woman Constable Williamson attended at premises 177 Tara Crescent, Edgewater, at 8:00 a.m. on November 11, 1985. Det. Insp. Harrison dusted several articles in those premises for latent finger-prints. On his instructions and in his presence W. Cons. Williamson photographed the latent finger-print

impressions. She produced negatives and the photographs developed therefrom at trial which were admitted in evidence. The finger-prints of each appellant were taken by Det. Sgt. McCalla on C.I.D. 2-1 Forms in accordance with the provisions of section 3 of the Finger Prints Act. These Forms which each appellant signed were tendered in evidence. Det. Insp. Harrison who had for twenty-two years prior to trial been engaged exclusively in the study and practice of identification by means of finger-prints compared the photographic enlargements of the latent finger-prints with the finger-prints taken on the C.I.D. 2-1 Forms by Det. Sgt. McCalla and determined that the left thumb print of the appellant Phipps was identical to the latent print on the chocolate tin; that the finger-print of the left ring-finger of the appellant Taylor was identical to the latent finger-prints developed on the telephone receiver and that the left little finger of the appellant Leslie made a finger-print impression identical to the latent print developed on the electric iron.

The comparison having been done, the developed latent print, as well as the matching finger-print, in respect of each appellant were photographically enlarged and mounted on a cardboard. The several points of similarity were identified and numbered on each photographic enlargement. On the top right hand corner of each photograph was a printed legend naming the person from whom the finger-print was taken and the particular finger represented in the photograph. Over on the top left of each photograph is a legend identifying the object and the place from which it was taken. Each of the three exhibits was headed: "Murder Committed 177 TARA CRESCENT 11-11-85".

A common ground of appeal was that the trial judge erred in law in admitting the photographic enlargements without first editing the documents to remove the appellations and descriptions therefrom. Defence counsel submitted that the appellations and descriptions amounted to hearsay evidence and directly pointed to each appellant as a perpetrator or co-perpetrator of the murder allegedly committed on November 11, 1985. It was submitted further that the witnesses who produced the exhibits with the

mounted photographs were not present when the deceased was shot nor were they present when Det. Sgt. McCalla took the finger-prints of the appellants on the C.I.D. 2-1 Forms and that the effect of this hear-say evidence which was available to the jury upon their retirement was that the jury could have been influenced by the appellations and descriptions at the top of the enlargements.

The argument is a novel one in the face of a practice which has existed in Jamaica throughout the professional life of each member of the Court. The appellations and descriptions placed on each cardboard mount for the purpose of identifying the document, were not referred to in evidence. No argument was put forward in respect of them, and no application to edit was made. A chain of evidence had to be established to show that what was found on the crime scene was faithfully represented before the Court. Similarly a chain had to be established that the person who rolled the finger-print on to the C.I.D. 2-1 Form had handed that Form to the photographer and the photographer had faithfully photographed from that document. All these procedures were meticulously executed and sufficiently proved. In our view the appellations and descriptions formed no part of the substantive exhibit, they were necessary identification marks and no jury which had been taken through the strange world of "ridge-endings, bifurcations, enclosures and islands" to find sixteen ridge characteristics in co-incident sequence would pay any attention or give weight to the identification marks on top of the exhibits.

A major complaint on behalf of all three appellants was that the evidence of visual identification was worthless. It was said that the witnesses had no credible opportunity to observe the strangers in the room that night, that they made mistaken identifications on the identification parades and that in his summation the trial judge did not deal fairly with the weaknesses in the identification evidence. In fact, it was said, he upgraded weak and worthless evidence of visual identification.

The prosecution alleged that a bathroom opens into the bedroom of Mr. & Mrs. Witter. On that night the bathroom door was left ajar and the electric light in the bathroom was left on when the Witters retired to bed. That light shone into the bedroom. Mrs. Witter said she was able to see Phipps because he was standing in the bedroom directly across from the bathroom and the light shone on him. When Phipps told her to put her hands behind her, she turned and looked at him. He had a handkerchief tied across his mouth but she was able to see his face from his nose upwards. Mrs. Witter said she did not see the face of the man who held the gun. Kenneth and Sean corroborated her account as to the bathroom light. All three withesses said that there were two bedside lamps in the room and that one of the intruders turned on the bedside lamp near to Mr. Witter. This lamp was later plugged out so that the electric iron could be plugged into that socket. It was unclear at what stage the second bedside lamp was switched on but the witnesses maintained that when the electric iron was plugged in there was light in the room other than from the bathroom.

Kenneth's evidence was that when he was taken into the bedroom of his parents he saw the face of the gunman as that man was standing right in front of the bathroom light. In the course of the incidont, the saw the face of that man three times. On the first two occasions this man had a handkerchief tied over his mouth but when he shot Mr. Witter the handkerchief fell from his mouth exposing his whole face.

Kenneth said he saw the face of the appellant Taylor on three occasions for approximately two, eight and five seconds respectively. On these occasions Taylor was standing in the bedroom and lights were on in the bathroom and in the bedroom.

Sean Witter said he was asleep in his room when a man woke him up and said: "Shut up, this is a stick-up." That man ordered him to turn on the lights and he switched on bright fluorescent lights in his room. He saw a man whom he identified as the appellant Leslie with a gun in his hand.

Two other men were in the room but he could not identify them as they had handkerchiefs tied up to their noses, while Leslie had no covering on his face then.

On the evidence there was a sufficiency of light in the bedroom for the witnesses to observe the features of their assailants. There was, however, no continuous viewing of these men as the witnesses were all placed on the bed facing downwards and at least one witness was ordered not to look at the man who was immobilising her. In all, each witness had a matter of seconds to make his or her observation although the men were with them for protracted periods of time, estimated by Mrs. Witter to be more than one hour.

Descriptions were given to the police of the men who invaded the Witters' home. Kenneth in the course of cross-examination, said he described the gunman as black, with a sort of long nose and bulging cheeks. The man who stole the jewellery box, whom Kenneth identified as Taylor, was described by him as very black with a long nose and about two feet tall. If Kenneth's estimate of height was accurate, then Taylor could not have been the man. However, that may be, at an identification parade held fifteen days after the killing, Kenneth identified the appellants Leslie and Taylor.

Mrs. Witter maintained that she told the police she saw one man clearly but could not be sure of the others. She attended three identification parades on November 26, 1985. On the first and third parades she pointed to a man on the parade, saying at the same time that she was not sure that he was one of those who had entered her home on the night of November 11. Those two men were not suspects in the case. Kenneth Witter attended three parades and pointed out someone on each parade. In making the identification on the second parade he pointed to someone of whom he then said he was not sure. That man was not a suspect. Sean Witter gave an account of what transpired when he attended the identification parades, which explains the attitude of the officer conducting the parade. When Sean was being cross-examined this passage appears:

"Q: What description, you gave a description of another man?

A: Well, the police officer, he asked me if I could identify any of the men, so, I told him I could identify one and he said identify him and try to see if you can, you could identify the other two."

If Sean is believed on this aspect of his evidence, that would explain why both Kenneth and Mrs. Witter were called on to parades where having regard to their earlier statements to the police they had little or no chance of making a proper identification.

An Inspector of Police on the verge of retirement from the Constabulary Force conducted the three identification parades and gave evidence concerning them. He contradicted himself hopelessly on what transpired in respect of Phipps and Leslie.

The learned trial judge in his general directions to the jury told them that identification was a critical issue in the case and that they must be satisfied that each accused was positively identified. At pages 800-802 of the Record he is reported as directing the jury ~~that~~:

"Mr. Foreman and Members of the Jury, the crux of this case is identification. The case turns on it; literally turns on it. Because if you feel satisfied in your minds so that you feel sure that you can rely on the evidence of Mrs. Witter, of Kenneth Jr. and Sean that these were the men in the house that night all together tying up, ransacking, if you are satisfied as to their identification of these men, then you would no doubt say this is good enough to make me feel sure.

As I said the critical issue is identification. And, you know, I daresay it's a matter for you, but I daresay you will think that the little boy's evidence, Kenneth, is very important. Some attorneys described him as cute, as bright, intelligent; a matter for you; not interested in the cuteness, but don't, I say, underrate youngsters; not telling you how to look at the evidence.

So, I go back to identification. Where the evidence of the prosecution connecting the accused to the crime rests wholly - in this case not wholly - wholly or substantially on the visual identification of one or more witnesses and

> "the defence challenges the correctness of that identification, it is my duty to tell you that you should approach the evidence of identification with the utmost caution as there is always the possibility that a single witness or several witnesses might be mistaken. A mistake is no less a mistake if made honestly. Mr. Thompson read nearly the same words to you from the same case that we have in mind. In every case like this one what matters is the quality of the identification evidence. To determine the quality of the identification you should have full regard to all the circumstances surrounding the identification. These may include the opportunity which the witness had of viewing the criminal: was the person known to him before the date of the commission of the crime, and if so, for what period and in what circumstances.
>
> The witnesses say that they didn't know the accused, none of them before. So, you bear that in mind. If the person was unknown to the witness, what description, if any, did he give to the police; the physical conditions existing at the time of the viewing of the criminal as to place, light, distances, obstructions, if any. And the lighting in this case is very important; the question of lighting; bathroom light; evidence is that it reflected into the bedroom and that you could see quite clearly. Even one police officer came afterwards and said when he came that light was on and it was quite bright; other lights were on."

Counsel for the appellants complained that the learned trial judge's method of a colourless reading out of the evidence without reference to the several weaknesses in the identification evidence rendered the summing-up inadequate and unfair. Proof through visual identification has become a centre-piece in most serious criminal trials in Jamaica. This is necessarily so as in so many cases there is no prior connecting link between the victim and the criminal. Where visual identification is an important factor in a particular case the trial judge has a duty to bring home to the jury the fact that a perfectly honest witness might be hopelessly mistaken and the jury must therefore approach identification evidence with a great deal of caution. In a series of cases beginning with R. v. Oliver Whylie (1978) 25 W.I.R. 430; 15 J.L.R. 163, and repeated in R. v. Graham & Lewis S.C.C.A. 158 and 159/81, this Court has

said that a trial judge should, whenever the evidence contains weaknesses in the identification evidence, specifically point out these weaknesses to the jury and that the jury should be told that these weaknesses detract from the strength of the prosecution's case. In other words, weaknesses in opportunity, in lighting, in description, in time, can all go to make a purported identification completely worthless or at the least unreliable.

Malcolm J, in the instant case, did not group the so-called weaknesses together and array them against the other evidence of identification. It was a long case and he adopted a method of reading out the evidence and asking the jury to have regard to the criticisms made by counsel in their final submissions. Identification was indeed a critical issue in these appeals but visual identification was only one of the components on which the prosecution relied and when compared with the finger-print evidence, it cannot be said to be the major component. In the result therefore, in the context of this case, the learned trial judge having alerted the jury to the dangers of visual identification and the reasons therefor, his directions on visual identification were adequate and fair.

Another ground, common to all three appellants, was that the learned trial judge failed to direct the jury that if there were two inferences which can be drawn from the totality of the evidence, they must not draw the inference which is adverse to the appellants, because if there are two inferences to be drawn, adverse and favourable, the Crown would not have proved the case, in which event the appellants would be entitled to an acquittal. It was said in argument that a distinction must be made between an interpretation and an inference. An interpretation, it was said, connotes the meaning of the evidence and the evidence may to some jurors mean one thing or another. Jurors, therefore, may not be unanimous on their understanding of the evidence or the meanings given. If the jurors are unanimous in their interpretation of

the evidence, so the argument ran, then it becomes a question of law whether or not they have drawn the correct inference from the evidence. It was submitted that on the assumption that the jury were unanimous, if there are two inferences to be drawn, then the judge must direct the jury not to draw the inference adverse to the accused.

The learned trial judge directed the jury at p. 791 of the Record that they were entitled to draw reasonable inferences from proved facts and ended by saying:

> "Many a judge has come amok by giving examples, so I just tell you that you are entitled to draw reasonable inferences; you must not draw inferences unless you draw them from proved facts and as I said, you must not draw an inference unless it is a reasonable one."

As we understand it, the complaint is that the trial judge should have gone further and should have dealt with the situation in which there are two competing or conflicting inferences. In the first place this was a general direction not specifically related to any aspect of the case. In the second place, what is being contended for by the appellants does not accord with the decision of this Court in R. v. Warwar (1969) 11 J.L.R. 370. Parnell J. had directed the jury that:

> "The argument as I have been hearing over and over that I must direct you, is a matter of law, as I cannot direct you what facts to find. I cannot direct you what facts you are to find and whatever inferences you draw are tantamount to finding the facts. When I do leave both to you, you look over the whole picture and see which one you are going to take."
>
> [He then applied that principle to certain facts].

On appeal counsel for the appellants submitted that the remark made to the yard-boy was equivocal and capable of two interpretations, the one favourable and the other unfavourable, and that the trial judge failed to direct the jury that in those circumstances they were obliged to adopt the interpretation of the remark which was most favourable to the accused.

In rejecting this submission, Waddington P. (Ag.) said:

> "Clearly, the correct interpretation to be placed on the statement would depend on which of two conflicting sets of fact the jury accepted. If they accepted the facts on which the crown's case was based, viz., that Sergeant Graham had never gone on top of the out house, then the only inference that could be drawn was that the accused was endeavouring to get Cawley to tell a lie in order to support the defence. If on the other hand, they rejected the facts on which the Crown's case was based and accepted the accused's unsworn statement, then the only inference they could draw would be that he was merely telling Cawley to state the truth.
>
> In our view, the directions of the learned judge on this piece of evidence were correct."

While accepting the authority of Warwar as entirely correct, the appellants argued that Warwar was not dealing with inferences but rather with interpretations, that is to say, the meaning to be given to primary evidence. We do not comprehend the distinction which is sought to be drawn. Parnell J. used the terms "interpretation" and "inference" inter-changeably and was so understood by the Court, which also made use of both terms in rejecting the submissions. We can find no merit in this ground of appeal.

Complaints about directions as to general burden and standard of proof resting on the prosecution have become rare. Nevertheless the appellants complain that although the trial judge initially gave correct directions on the standard of proof which the jury should apply, he eroded it in his subsequent directions and failed to correct the erosion specifically. At pages 791-2 of the Record the trial judge told the jury that:

> "You heard mention made of the burden of proof. The charge of murder has been brought against the accused men by the prosecution and the duty is on the prosecution to prove the guilt of the accused men to your satisfaction so that you feel sure. When I say 'feel sure' naturally I do not mean a hundred percent sure because that is not possible. For you to feel

> "a hundred percent sure you would have to be witnesses there that morning and then you would be in the witness-box telling us how it went."

It is undesirable to explain or expand to a jury the simple concept that the prosecution must prove the case to their satisfaction so that they can feel sure of the guilt of the accused. If, however, a trial judge finds it necessary to give an explanation, he has a duty to use such language as will not water down the burden or the standard of proof. Counsel complained that the meaning of less than 100% used by the trial judge did not have a minimum score and could leave the jury to adopt any percentage of certainty less than 100%. These comments are not entirely fair. The trial judge was right to tell the jury that in human affairs one need not be 100% certain in order to be sure. In other words the Crown does not have to prove its case beyond all doubt but rather beyond reasonable doubt, or so satisfactory that a jury can feel sure. In Waltersv. R. (1968) 13 W.I.R. 354, Lord Diplock rejected the notion that a judge must use particular words in directing the jury on burden of proof. He said at p. 356 of the Report.

> "By the time he sums up the judge at the trial has had an opportunity of observing the jurors. In their Lordship's view it is best left to his discretion to choose the most appropriate set of words in order to make the jury understand that they must not return a verdict against a defendant unless they are sure of his guilt."

The distinction between eye-witnesses and jurors is a valid one and in making use of that analogy, the trial judge was not in our view giving an imprecise direction as to the standard of proof. This ground of appeal also fails.

Immediately before the jury retired, the learned trial judge gave them a final direction on the necessity for unanimity in their verdict. He said:

> "Before I ask you to retire, I'm going to read something I have here before me. Each of you have taken an oath to return a true verdict according to the evidence, that means that each of you as an individual, must decide what you consider to be a true verdict, but of course, you have a duty not only as individuals, but collectively. This means that it is the collective verdict of you all that is to be given. No one must be forced to the oath he has taken to return a true verdict, but in order to arrive at a collective verdict there must necessarily be argument and a certain amount of give and take and adjustment of the views within the scope of the oath that you have taken. None if somebody is unwilling to listen to the argument of the rest."

It is apparent that there are at least two errors in the transcription of what the learned trial judge said to the jury. He must have used the word "false" and not "forced" in the sentence which now reads in part: "No one must be forced to the oath he has taken ....", and the final sentence quoted above is incomplete. The learned trial judge was reading from a prepared document and it is unlikely that he would have delivered himself of the final sentence quoted above in that form.

A complaint is mounted by all three appellants against this directive on unanimity on the ground that it was defective in that although the learned trial judge purported to follow the direction approved in Shoukatallie v. The Queen [1968] A.C. 81; [1964] 4 W.I.R. 111, he failed to direct the jury that if any of them cannot honestly bring himself to the view of the majority then it was his duty, according to his oath, to differ from the majority view.

The focal point in Shoukatallie's case was the complaint that the learned trial judge had improperly coerced the jury to return a verdict. It is instructive to see what happened before Bollers J. (as he then was) and the jury. The trial of two brothers for murder had lasted fifteen days. On the final day's hearing the Court sat from 9 a.m. to 4:50 p.m. when the jury retired for the first time. At 8:40 p.m. they returned to

Court and informed the judge that they had not yet agreed upon a verdict but wished no further directions. The trial judge could not fathom the cause for any difficulty in the return of a verdict and so he addressed the jury further. First he read to them the oath they had taken and continued:

> "I want to direct your attention to the last two sentences in that oath that you have taken - 'And a true verdict give according to the evidence. So help me God.'
>
> Well, the evidence that has been led in this case by the Crown and by the accused persons is clear and I can see no difficulty at all why you should not arrive at a final conclusion in this matter.
>
> When you get into that jury-room you must put all extraneous matter away from your deliberations. If you take extraneous matter and improper matter into your deliberations in deciding whether the case has been proved or not proved against the accused persons, then you will not be acting in according with the oath which you have taken.
>
> It appears to me that this Colony is reaching a stage, or wants to reach a stage, when it can manage its own affairs. Well, this kind of thing that is going on amongst the jury would not help. In my very humble submission I cannot see how it will help one way or the other.
>
> Now, you must return to that jury-room and consider the matter again and then make up your minds one way or the other. If you feel one way and another member of the jury thinks another way, then you must examine the arguments of each other and accept reason. You must not be pig-headed. Not because you may feel one way or the other does it mean that you must never give way, even though sound commonsense and good reason are placed before you.
>
> The community is looking to you to return a verdict in accordance with the evidence and in accordance with your own conscience. If you fail to do that you will not only be bringing disgrace upon the community but you will be bringing disgrace upon yourselves, which is perhaps even worse.
>
> Gentlemen of the jury, I am now going to order you to return to that jury-room and consider the matter calmly and dispassionately, and give you an opportunity of arriving at an honest verdict in this case. Please see that you do not besmirch the fair name of your country. Please return to the jury-room."

These further directions were upheld by the Federal Supreme Court and by the Privy Council. In delivering the opinion of the Board, Lord Denning said in part:

> "If they (the jury) should return and say they cannot agree, the judge usually explains to them that it is their duty to agree if they can honestly and conscientiously do so. He tells them that they must be unanimous but he explains what unanimity means on the lines of the direction of Finlay, J., in R v Klein [1932] unreported which was followed in substance in R v Walhein [1952] 36 Cr. App. R. 167; and R v Creasey [1953] 37 Cr. App. R. 179. He reminds them that it is most important that they should agree if it is possible to do so: that, with a view to agreeing they must inevitably take differing views into account; that if any member should find himself in a small minority and disposed to differ from the rest, he should consider the matter carefully, weigh the reasons for and against his view, and remember that he may be wrong; that if, on so doing, he can honestly bring himself to come to a different view and thus to concur in the view of the majority, he should do so; but if he cannot do so, consistently with the oath he has taken, and he cannot bring the others round to his point of view, then it is his duty to differ, and for want of agreement, there will be no verdict."

It was submitted in the instant case that the judge failed to direct the jury that it was the duty of a dissenting voice to act according to his oath and that the juror had a duty in such circumstances to differ from the majority view. It was said that Malcolm J.'s direction on unanimity may have left the jury with the impression that although they are not forced to accept the majority view, they ought to take a democratic view and go in with the majority. There was no indication of dissent amongst the jury when Malcolm J. delivered his benign academic flourish about unanimity. Indeed the jury had not commenced the task of deliberating and there was no way of knowing whether they would encounter difficulty in arriving at a unanimous verdict. What he said was a pure statement of fact, a reminder to the jury that they should be true to their oath to return a true verdict according to the evidence. There was no element of exhortation or coercion in the mild passage read out to the jury and they could never have been left with the impression that a dissenting voice was obliged to join the majority against his own conscientious view.

In the same way that in practice a judge ought not to give a direction on majority verdict until the necessity for such a direction arises due to the passage of time and an intimation that the jury are hopelessly divided, it seems desirable that a direction on unanimity can be most effectively given when a problem arises in the return of a verdict.

We do not find any substance in this complaint by the appellants.

On behalf of the appellant Taylor it was argued that the learned trial judge omitted to tell the jury that they must firstly consider whether the appellant Taylor was acting in concert with the murderer and secondly, whether in fact the appellant Taylor knew or had reason to know that the murderer was possessed of a gun, and that this omission deprived the appellant Taylor of a possible verdict of manslaughter or an acquittal. Counsel conceded that the general directions on common design were correct but concentrated her attack upon the complaint that the judge did not relate the facts to Taylor's case. Now Taylor's defence was that he had never been to the Witters' residence and that he did not give a voluntary statement to the police. If what Taylor is alleged to have said in his statement was accepted by the jury as being true, then he could not be found guilty of murder as he had not gone into the Witters' house at all. He placed himself in the geographical area but in the capacity of a conveyor of passengers about whose mission he had no particulars. That statement was wholly self-serving and of no probative value. One wonders why it was ever tendered in evidence by the prosecution. The evidence connecting the appellant Taylor to the crime was visual identification and the presence of his finger-print in unexplained circumstances. Against that background and in the light of the evidence that the gun was always brandished, that there were repeated threats to shoot, that the gun was used to hit the deceased several times, that the deceased was burnt with an electric iron, that the four occupants were tied hands and feet, the picture of an atmosphere of violence and terror was indelibly painted. In that setting the learned trial judge directed the jury at page 800 of the Record that:

> "So, Members of the Jury, assuming you can infer from the evidence and you feel sure that there was a common design between all these men, then the act of one becomes the act of any other persons engaged in the common design. As I say, the fact that only one man had the gun wouldn't help the other two if you find that there was an agreement to enter there and commit the offence; all persons engaged in a common design to commit felony involving the use of violence, because as Mr. Andrade mentioned, it must have been contemplated, if you accept the crown's case, that they were going in there to rob and if a necessity arose then violence would ensue; they would be all guilty of murder although only one fires the shot. That is common design. They were all there part of a plan, ready to assist if called on, to help each other; all part of an agreement; well, they would be all equally guilty."

In returning a verdict of guilty the jury must inevitably have rejected the defence and accepted the evidence of Kenneth Witter Jr. and the finger-print evidence in relation to the appellant Taylor.

The trial judge gave no specific direction on alibi in relation to Taylor. We are of the opinion that he was not obliged to do so as Taylor's defence consisted of a general denial. Direction on the burden of proof generally was an entirely sufficient treatment in this case.

A large quantity of jewellery was stolen from Mrs. Witter. A diamond stone without the setting was recovered and shown to Mrs. Witter. It was complained that the evidence relating to the discovery of the diamond stone was irrelevant to the case and ought not to have been admitted. Such evidence had the merest probative value as Mrs. Witter could say no more than that the diamond-stone resembled that which was fashioned into her engagement ring. Tendering such evidence of inconsequential value lengthened the trial unnecessarily and provides gratuitous grounds of appeal. However, we find no substance in this ground.

In the caution statement purportedly given by the appellant Leslie, reference is made to one 'Robin'. The appellant Taylor denied that he was called 'Robin'. The learned trial judge correctly directed the jury that what is contained in the unsworn statement of one accused cannot be used as evidence against a co-accused. But at page 845 of the Record when he was reviewing the defence of Taylor, the trial judge eroded his earlier direction when he said:

> "He said, 'I was not called Robin'. You remember the caution statement about 'Robin'. You will have the opportunity to read it when you retire, if you wish to."

This reference must have been to the caution statement of the appellant Leslie which had been tendered in evidence and which contained the most damaging allegations against 'Robin'.

We think that the direction to have regard to Leslie's statement when considering Taylor's case was a misdirection in law. We are of the opinion however, that this was a very strong case against Taylor and that the jury would inevitably have convicted the appellant Taylor without the introduction of the inadmissible evidence against him. We are, therefore, prepared to apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act and to dismiss his appeal.

In all other respects we find no substance in any of the grounds of appeal argued on behalf of the three appellants. The applications for leave to appeal are treated as the hearing of the appeals and the appeals are dismissed.