JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 105/86

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.

REGINA

VS.

ROY THOMAS

Richard Small and Lowell Marcus for Appellant

E. Usim for the Crown

November 2, 3, 4, 1987 and January 29, 1988

ROWE P.:

Counsel on both sides argued this appeal on eight separate grounds in a manner most helpful to the Court. Thomas was convicted of the murder of Everton Allen in the St. Thomas Circuit Court before Ellis J., and a jury on December 12, 1986 and he was sentenced to suffer death in the manner authorised by law. The trial lasted for three days during which five persons gave evidence and this was followed by a summing-up of twenty-eight pages. Although all but one of the grounds of appeal relate to the summing-up, it is necessary to set out the evidence in some detail.

Everton Allen, otherwise called Hulk, aged twenty-nine years, was a diver and a fisherman, and he lived at White Horses in St. Thomas. It was the case for the prosecution that on the night of June 12, 1986 at about 9:30 p.m., Allen and another man Deston Harrakh, were standing on the public road at White Horses which is situate on the main road leading from Kingston to Morant Bay. Mr. Harrakh faced Kingston direction while Mr. Allen's back was turned to the Kingston direction. Mr. Harrakh saw the appellant Thomas, known to him as "Jay Roy" approaching them from the

Kingston direction. The appellant walked with both hands in the pockets of the top section of the sweat-suit he was wearing. He came between the two men, Allen and Harrakh, drew a knife from his pocket and stabbed at Allen. At that very moment Allen spun around and the knife caught him in the left side of his neck. Allen ran off and bawled: "Whao, whao you no see Jay Roy chop off mi hand". Another witness, Hugh Ingram, who did not see the stabbing incident said that he saw Allen and Harrakh walk in the direction of the shop and that shortly after Allen ran back and said: "The bwoy chop off mi shoulder". Allen fell about half-a-chain from where he was stabbed and was rushed to hospital by a passing motorist. At about 10 p.m. that same night Detective Inspector Martin saw the dead body of Everton Allen, who had been known to the police officer, in the Casualty Department of the Princess Margaret Hospital. It was then that the Detective Inspector observed the stab wound to the left side of the neck from which blood was oozing.

Harrakh said that the appellant pushed back his knife in his pocket and walked away after he had stabbed Allen. Det. Insp. Martin said that he saw the appellant at the Morant Bay Police Station on Monday, June 16, 1986 at 9 p.m.; that he cautioned him and asked him why he stabbed "Junior" Allen in the manner that he did, and that the appellant responded: "Me no know 'bout no stabbing, me did deh a town".

Det. Insp. Martin did not reduce into writing the reply which he alleged that the appellant gave to him at their meeting on June 16 and he was challenged by the defence who suggested to him that the appellant had said nothing about being in Kingston at the time of the stabbing. The witness Harrakh was closely cross-examined in an endeavour to set the scene for a plea of self-defence. It was suggested to Harrakh that there was talk between the appellant and the deceased prior to the stabbing and this he denied. It was suggested to him that Allen had a knife in his hand and Harrakh said that Allen did possess a knife but it was at all material times in his pocket. The following suggestions were all denied by Mr. Harrakh:

(a) that Allen said he was going to kill the appellant tonight;

(b) that Allen spat in the appellant's face;

(c) that Allen pulled a knife from his waist;

(d) that Allen attacked the appellant with the knife and that it was then that the appellant stabbed him;

(e) that the knife which Allen had fell to the ground after he was stabbed.

The appellant gave sworn evidence in his defence and he was cross-examined by Counsel for the Crown. There the defence rested its case. The appellant said that he and his girlfriend, Caroline Lucas, were walking along the road at White Horses. He saw Allen approaching from the opposite direction. When Allen reached down to where he was, Allen said to him: "Bwoy, you a go dead tonight, you know". The appellant said: "I looked right in his face and I see him very serious and him spit in mi face". He said further that the deceased pulled a knife from his waist and when he saw that he took out his own knife from his pocket and "stabbed him sir and run". Then he was asked:

"Q: Before you ran did you see what happened to his knife?

A: His knife dropped."

Defence Counsel wished to re-inforce the sequence of events as testified to by the appellant and there followed these questions and answers:

"Q: When he pulled his knife where was your hand?

A: In my pocket.

Q: Was that the pocket in which you had your knife?

A: Yes, sir.

Q: Now, when he pulled his knife did you do anything with your knife?

A: He was right up to me.

Q: What did you do?

A: I pushed my own right up on him and I hear him get stabbed".

Parts of the cross-examination formed the basis of specific Grounds of Appeal and to these I will return later. The only admission for what it is worth, made by the appellant in the course of cross-examination was that the knife he used to stab Allen was a board handle kitchen knife.

Crown Counsel addressed for twenty-five minutes, Defence Counsel addressed for thirty-nine minutes, the summing-up lasted one hour and twenty-six minutes and after a brief retirement of eighteen minutes the jury returned a verdict of guilty of murder.

Ground 1 of the Grounds of Appeal complained that:

> "1. The Learned Trial Judge failed to adequately assist the jury on the law in relation to self defence, in that:
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> (a) the Learned Trial Judge ought to have directed the jury that the protection of the law of self defence was available to the accused if he had an honest apprehension of an attack being made by the deceased or about to be made by the deceased and that it was not necessary for the accused to await the deceased striking the first blow;
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> (b) the Learned Trial Judge was in error at page 76 in directing the jury that the law required 'reasonable apprehension of loss of life or bodily harm' for self defence to arise. The Learned Trial Judge thereby sought to lay down an objective test for the assessment of the state of mind of the accused;
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> (c) the Learned Trial Judge laid down an objective test for the jury's assessment of intention in directing at page 79:
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> > 'you have to put two and two together and draw the inference that if a sane and rational man behaves in a certain way, he must have intended the results of his act, because he would have known or he ought to have known that if you take a sharp machete and chop off a man's neck he is going to die, he intended to cause death or serious bodily harm'."

Mr. Small submitted that whenever self-defence is an issue in a criminal case, the prosecution has to prove (a) that the accused was not being attacked and (b) that the accused did not believe that he was being attacked. He culled these principles from the decision of the Privy Council in P.C.A. 9/86 - Solomon Beckford v. The Queen (unreported). There the judgment of Lord Lane, L.C.J. in R. v. Gladstone Williams (1984) 78 Cr. App. R. 276 was expressly approved. It was decided in Gladstone Williams that the defence of self-defence depends upon what the accused honestly believed the circumstances to be and not upon the reasonableness of that belief.

This is how Lord Lane explained this concept. He said:

> "The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant. Were it otherwise, the defendant would be convicted because he was negligent in failing to recognise that the victim was not consenting or that a crime was not being committed and so on. In other words the jury should be directed first of all that the prosecution have the burden or duty of proving the unlawfulness of the defendant's actions; secondly, if the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken view of the facts; thirdly, that is so whether the mistake was, on an objective view, a reasonable mistake or not.
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> In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury came to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If however the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected.
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> Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely upon it."

Solomon Beckford's case concerned a policeman who admittedly shot and killed a man whom the policeman maintained was in the act of shooting at him. A telling fact in that case was that the shot man died on the spot,

yet the police party which did an immediate search failed to find the firearm the deceased was alleged to have had. It is now commonly believed that there was no snail in the ginger beer bottle which gave rise to the great case of Donoghue and Stevenson (1932) All E.R. 1 and it can be reasonably inferred or honestly believed that the dead man in Beckford's case had no gun. Be that as it may, the law is now settled that it is a misdirection for a trial judge to direct the jury that a person relying upon self-defence must have reasonably believed that he was under attack before he can retaliate. In the instant case the learned trial judge directed the jury as follows at p. 76 of the Record.

> "..... In this case the accused man is saying, ... I acted in self defence because 'I saw the deceased pull a knife from his side and was over me and I stab him and run'.
>
> Now, what he is in fact saying, because self defence is a complete defence, what he is really saying, when he says I acted in self-defence, is not guilty, he is saying I am not guilty because Mr. Foreman and Members of the Jury, in commonsense and in law where a man is attacked so that he apprehends or is put in fear, reasonable apprehension of loss of life or bodily harm, serious bodily harm, where a man is attacked in those circumstances, he is entitled to defend himself, even if he does so to the death; and he is not guilty of anything."

The general direction quoted above and especially the words underlined offend against the decision in Beckford's case where it is expressly stated that it is the honest belief of the accused which is the relevant factor and not the reasonableness or unreasonableness of that belief.

It is necessary to refer to two other passages from the summing-up before considering further the submissions on behalf of the appellant. These passages appear at pages 93 and 76-77 of the Record.

At page 93 the Judge said:

> "Mr. Foreman and members of the jury, if having looked at the accused testimony and how he stood up to his cross-examination, if you are convinced that he is speaking the truth, that the deceased attacked him, because you must first find there was an attack, a man does not defend himself unless there was an attack; if you find that there was this attack by 'Hulk', in the circumstances that the accused tells you, then you have to say the Crown

> "has not negatived self-defence and if that is how it goes, the accused has committed no offence, you have to acquit him. If it leaves you in any doubt that he was acting in self-defence, reasonable doubt, I don't mean any fool fool doubt or any airy-fairy doubt, because none of us were at White Horses that evening, we don't know what happened, you will have to take it from the evidence, but if on the evidence you are in reasonable doubt as to what happened, you are in a reasonable doubt, then you have to acquit him too. But if you don't believe the story that he tells you about this attack, then you have to reject this thing about self-defence and go on to look now at murder clearly. When you reject, if you reject his story as to self-defence, that does not allow you to say he is guilty, that of itself does not allow you to say he is guilty, because no burden is cast on him."

At pages 76-77 the Judge said:

> "I am going to relate the concept of self defence in that respect. One of the cases here Mr. Foreman and Members of the Jury, listen to the case, simply put, the prosecution says the deceased was walking up the road at White Horses with his friend; they stopped, the accused came down, pulled out a knife, stabbed him in his left clavicle, up in that area and went his way. Simple, that is the case. The prosecution is saying that when this happened, the deceased had nothing in his hand, he was not attacking anybody. The prosecution is saying also that when this happened, the accused was not acting in self defence. The prosecution is also saying that when this happened, the accused did not suffer any provocation, he was not provoked. And the prosecution is saying in all the circumstances, therefore, it is murder.
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> The defence says no, I was walking with my girlfriend, going to look about 'partner', when I came to this place at 'Fatman's place or 'Fat D's' place, whatever it is, the deceased came up to me, said to me 'you going dead tonight'. In addition to that, he spit in my face and I looked in his face and I saw that he was going to do me harm; then I saw him pull a knife from his right side, come over me, coming down on me and I pull out my knife and jook him and then I run because I 'fraid of him.
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> Those are the two cases; you will have to look at the evidence in support of the two cases and then come to your conclusion, subject to the directions which I will give you Mr. Foreman."

Certain strictures were levelled by Mr. Small against the directions at p. 93 quoted above. He said that the Court was in error to describe the events outlined by the appellant as "an attack" upon him but that even if the Court was correct in describing what the appellant said occurred as "an attack" the trial judge ought to have gone further and ought to have directed

the jury that the prosecution had to satisfy them that if the accused honestly believed that he was being attacked he should be acquitted. He said the effect of the directions to the jury at p. 93 of the Record was that if there was no attack self-defence would not arise and it would not matter what the accused thought. Mr. Small said that the trial judge was in the quoted passage making "attack" a pre-condition for self-defence to arise and if the jury found that there was no attack self-defence would fail. The judge, he said, concentrated on the factual evidence and lost sight of the mental element.

In the clearest possible terms the learned trial judge told the jury that if they found that there was an attack upon the appellant by the deceased "in the circumstances that the accused tells you, then you have to say the Crown has not negatived self-defence and if that is how it goes, the accused has committed no offence, you have to acquit him". He went on to deal with the situation of reasonable doubt as to which direction no complaint has been made.

This appellant did not at his trial put forward a situation where for one reason or another he honestly apprehended danger although no danger in fact existed. He stated categorically that he was attacked: he was, he said, threatened with death by a man whose countenance suggested that he meant to carry out his threat, and that he was spat upon by this man, who then drew a knife from his waist. The fact that the trial judge did not elaborate by saying that a man in those circumstances was entitled in law to resort to a pre-emptive strike, cannot avail this appellant, because the trial judge in express language told the jury that if the appellant then used his knife to cut the deceased he would not be guilty of any offence. True, he did not direct them as to the legal basis for such pre-emptive conduct but he guided them to what would be the legal result of such conduct in language which they could not fail to understand.

Mr. Usim for the Crown submitted that the direction of the trial judge in the instant case about reasonable belief was not fatal to the conviction and was on the facts of this case of academic interest only. He relied upon the passage from the judgment of Lord Griffiths in Solomon Beckford's case at p. 11, where the learned Law Lord said:

> "If on the facts as they appear from the summing-up the judge had left the matter to the jury on the basis of a choice between the two accounts then any misdirection as to the reasonableness or otherwise of the appellant's belief would have been of only academic interest."

We think that Mr. Usim is plainly right in his submissions. In the passage quoted from pages 76-77 of the Record, it is clear that the judge left the rival contentions to the jury as a choice between the prosecution's version of the facts and that of the defence. The concluding passage from p. 77 is most telling, as there the trial judge said:

> "Those are the two cases, you will have to look at evidence in support of the two cases and then come to your conclusion, ..."

This was not an 'honest belief' case. This is a case in which the positive assertions of the appellant included what happened to the weapon which the deceased had subsequent to the stabbing. It would be putting an impossible strain upon a trial judge to require him in all circumstances of self-defence to say: "Well although the accused has described the attack made upon him in graphic detail, if you reject that account, you must nevertheless consider whether he honestly believed that those circumstances he has so graphically described existed, even if he was mistaken." This appellant has not relied upon mistaken belief and we do not think that the facts warranted any direction on the subject of honest belief. In our opinion there is no merit in Grounds 1(a) and 1(b) of the Grounds of Appeal.

The decision of the English Court of Appeal in R. v. Satnam & Kewal (1984) 78 Cr. App. R. 149 is illustrative of the way the Sexual Offences (Amendment) Act 1976, (U.K.) works. That Amending Act gave statutory recognition of the decision in D.P.P. v. Morgan (1975) 61 Cr. App. R. 136. The statute declares that if at a trial for a rape offence the jury has to consider whether a man believed that the woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.

We do not think that that decision can be helpful in the instant case as in our opinion the question of honest but mistaken belief was not a live issue in the case.

At page 79 of the Record the learned trial judge directed the jury as to the necessity for the Crown to prove intention as an essential feature of murder. Those directions gave rise to the complaints in Grounds 1(c) and 2. The passage to which Ground 1(c), quoted above, relates forms part of a larger passage which we will now set out:

> "So if a sane, rational individual pick up a sharp machete and come up and chop somebody at his neck you don't known what he intended. But he is sane and rational, you have to look at what he did and you have to say, if this man is not mad he must have intended the result of his act, so that is how you look at it. You have to put two and two together and draw the inference that if a sane and rational man behaves in a certain way he must have intended the results of his act, because he would have known or he ought to have known that if you take a sharp machete and chop off a man's neck he is going to die, he intended to cause death or serious bodily harm."

The inclusion of the phrase "ought to have known" in the latter part of the direction, although out of line with the simple commonsense illustration which the learned trial judge had used to explain intention, does not in any way detract from the two essentials of intention, viz., (a) the presumption of sanity and (b) that the intention of the accused was to be inferred from what he did or said or both together. It is

regrettable that the trial judge had recourse to the unforensic use of "putting two and two together" which Mr. Small quite rightly categorised as "loose" but that judicial indiscretion does not touch the substance of the direction. This Court held in R. v. Loxley Griffiths, S.C.C.A. 31/80 - that the test of intention is always a subjective one, that is to say, that a jury must always be concerned with the intention of the physical person before the Court and not that of the legal abstraction, the reasonable man. This Court expressly approved the direction of Ross J. The important part of which was:

> "Now, in the absence of evidence to the contrary you are entitled to regard the accused as a reasonable man, that is, an ordinary, responsible person capable of reasoning. And in order to discover his intenion in the absence of an expressed intention - and there is no evidence here that he expressed an intention to kill or to cause serious injury to Joy Griffiths - so what you've got to do here is to look at the evidence which you accept as to what he did and at all the surrounding circumstances and ask yourself whether as an ordinary, responsible person he must have known that death or serious bodily injury would result from his actions. And if you find that he must have known that then you may infer that he intended the result and this would be satisfactory proof of the intention required to establish this charge."

The complaint in Ground 2 was to the effect that the judge's general directions on intention to kill or cause grievous bodily harm did not contain an express statement that when self-defence is an issue the accused may have either or both intentions and yet be acting quite lawfully. At page 78 the trial judge was dealing with what the prosecution had to prove in order to establish murder. When he came to deal with self-defence at p. 80 he told the jury that self-defence is a complete defence and if the jury found that the accused was acting in self-defence they would be obliged to acquit. There was no issue in this case of excessive force which would require some specific direction as to reasonableness of the force used and probably also the intention of the accused in inflicting the injury. The jury were left in no doubt as to the potency of the plea of self-defence, if they believed or were in doubt, in relation to the accused's evidence.

Ground 3 as to which the Crown was not called upon for an answer, contained the complaint that the trial judge erred in law in failing to apply the principles set out in Solomon Beckford v. The Queen, as the test which ought to be used in assessing the reaction of an accused person when considering whether or not provocation arose. The learned trial judge left the issue of provocation to the jury and told them that they should judge the reaction of the accused against the standard of the reasonable man who was similarly provoked. The direction given faithfully follows the provisions of Section 6 of the Offences Against The Person Act, which provisions were introduced into Jamaican Law in 1958. That Section provides:

> "When on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

Ground 4 was not pursued by Counsel. Ground 5 was that the learned trial judge elicited from the witness Ingram inadmissible testimony concerning what the deceased is alleged to have said to him against the clear advice of Counsel for the Crown and further that the learned trial judge failed to direct the jury to disregard this evidence.

It will be recalled that the witness Ingram had not seen the stabbing but he saw the deceased who ran towards him and upon enquiry, the deceased said: "The bwoy chop off mi shoulder". This evidence was clearly hearsay and under the old rule in R. v. Bedingfield (1879) 14 Cox C.C. 341, Assizes, would have been inadmissible. It is sufficient to say that Bedingfield was over-ruled in R. v. Andrews (1987) 1 All E.R. 512; (1987) 2 W.L.R. 413. We quote from the headnote of that case in the All England Report:

> "Hearsay evidence of a statement made to a witness by the victim of an attack describing how he had received his injuries was admissible in evidence, as part of the res gestae, at the trial of the attacker if the statement was made in conditions which were sufficiently spontaneous and sufficiently contemporaneous with the event to preclude the possibility of concoction or distortion. In order for the victim's statement to be sufficiently spontaneous to be admissible it had to be so closely associated with the event which excited the statement that the victim's mind was still dominated by the event."

The statement of the deceased to Ingram was wholly innocuous and that seems to be why the prosecutor was not anxious to lead it in evidence. However, that statement was made within seconds of the infliction of the injury, to a man within half-a-chain from where the incident occurred, and there was absolutely no suggestion of concoction or fabrication on the part of the victim or error in the narrative of the witness. The statement made by the deceased to Ingram was spontaneous and contemporaneous and was properly admitted into evidence.

There was no medical evidence of the cause of death and this led the appellant's counsel to complain and argue that the judge's directions on the nature of the victim's injuries were inadequate inasmuch as the judge erred in reviewing the medical evidence. This aspect of the Crown's case was put to the jury in the trial judge's commonsense-style. He said:

> "All he said is, 'the boy cut off mi shoulder', but Ingram saw him come back with the whole of here blood up (indicating) and you don't get blood unless you get cut - you are commonsense people and Ingram said the man dropped down and him stretch him out and him dead. So you will have to put two and two together and say what kill him, is it pneumonia? As reasonable people, is it pneumonia? Plus when you look at that too, Inspector Martin saw him the very evening with blood coming out of the wound that afternoon, dead. Ask the question, is it bee kill him or motor vehicle knock him down in the road and kill him. What would you as twelve reasonable people say kill him? I suggest, Mr. Foreman and members of the jury, you don't have to take it from me, the only thing that could have killed him or he could have died from is this stab wound. So that area you will have to put two and two together because the doctor in his wisdom chose not to come."

No theory had been advanced in the case to contradict the prosecution's evidence as to the location of the injury and the evidence of Harrakh that the deceased spun around to face the appellant immediately before he was stabbed was not inconsistent with the evidence as to the site of the injury. Furthermore, as the learned trial judge urged upon the jury, it was beyond a peradventure that Allen died as a result of the stab wounds. There is no merit in Ground 7.

Mr. Marcus, in support of Ground 8, submitted that although a judge has a discretion to comment upon the absence of a witness, he must approach his task with discretion and caution so as not to leave the impression with the jury that failure of the defence to call a particular witness would indicate guilt on his part. He said that at pages 91-92 of the Record the trial judge phrased his language in imperative terms and in so doing fettered the jury in their consideration of the facts. The appellant had said in evidence that he was in the company of his common-law wife, Miss Lucas, at all material times and that she had witnessed the entire incident. Miss Lucas was not called as a witness and as to her non-appearance the trial judge commented as follows:

> "He said his girlfriend was with me (sic) that evening when Doughie pulled the knife and she was right there and I run and leave her. Mr. Foreman and Members of the Jury, remember that accused man is not obliged to say anything in his defence, he is not obliged to call any witness, but you are the judges of facts, and you will say to yourselves, this is the man's girlfriend, we call it in Jamaica commonlaw wife, and she was right there and you are entitled to consider where is Miss Lucas, nobody else can't say it, but I can leave that to you, because you have to look at all the surrounding circumstances. Miss Lucas was there, so he said, but we don't see Miss Lucas, Miss Lucas could throw some light on the thing, but you must also remember that the accused man is not obliged to call any evidence in his favour, but as reasonable twelve persons there, you must consider what happened to Miss Lucas. Anyhow, she is not here."

On the evidence for the prosecution the appellant came on the scene alone and he ran away alone. Harrakh was asked in cross-examination whether the appellant was walking with a female companion and he said no.

Ingram said in examination-in-chief that the appellant was alone and he was not cross-examined, to suggest that there was present with him a female companion. As in the case of R. v. Gallagher (1974) 3 All E.R. 118, the first time the prosecution knew that the appellant was saying he had a corroborating witness was at trial. The dicta in Gallagher's case is apposite to the instant case. There it was held that in an appropriate case it was permissible for the judge to tell the jury that they were entitled to take into account the fact that a potential witness who might have been called had not in fact been called. In particular that was the case where the prosecution had no possible means of knowing that the potential witness had any relevant evidence to give until the accused himself came to give evidence at the trial.

Ellis J. had a difficult discretion to exercise and in my view he made it clear that the appellant was under no obligation to call any witness. He did not trespass into the forbidden territory of inviting the jury to draw adverse inferences from the mere non-attendance of Miss Lucas. He could, of course, as Mr. Marcus said, have gone on to say nobody has given an explanation for the absence of Miss Lucas and there might well be a number of very good reasons why she had not attended Court. Be that as it may, we are of the view that the comments of Ellis J. were appropriate in the circumstances.

The final Ground of Appeal had sought to complain that the learned trial judge applied wrong principles of law in refusing to permit the Defence to tender in evidence the statement given by the accused under caution. In fact the statement was sought to be tendered by someone who did not write the statement and when this fact was brought to the attention of Defence Counsel he resiled from his earlier determination to tender the statement in evidence. Mr. Small did not offer any submissions in support of Ground 9.

We are of the view that the trial was regularly conducted, the summing-up was fair and adequate and free from defects and that there is no merit in the several Grounds of Appeal advanced by Defence Counsel. The application for leave to appeal is treated as the hearing of the appeal. The appeal is dismissed and the conviction and sentence affirmed.