JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 184, 185 AND 186 OF 1999

BEFORE: **THE HON MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

REGINA V. RUDOLPH DODD

KARL WAUCHORPE

BILLY WEST

George Soutar for Rudolph Dodd

Glen Cruickshank for Karl Wauchorpe

Ian Ramsay, Q.C., Deborah Martin and Oswest Senior-Smith for Billy West

Paula Llewellyn, Deputy Director of Public Prosecutions and Gail Johnson, Crown Counsel, for the Crown

May 7, 8, 9, 10, 11; July 2, 30 and October 8, 2001

PANTON, J.A.

The appellants were convicted of murder in the Home Circuit Court on October 29, 1999, and were each sentenced on November 2, 1999, to imprisonment for life, with a specification that each should serve a period of nine years before becoming eligible for parole. At the conclusion of the hearing of the submissions, on July 2, 2001, we reserved our decision.

Leave to appeal was granted by a single Judge of this Court in respect of

(1) the nexus between the acts of the appellants and the cause of the death of the deceased; and

(2) whether manslaughter should have been left for the consideration of the jury.

During the hearing of the appeals, the Crown conceded in respect of (2) above. We agree with the position adopted by the Crown in this regard. The only matter for consideration now is whether there should be a new trial or the proviso should be applied, assuming there is no basis for the other complaints that have been made in respect of the evidence and the summation of Ellis, J., the Senior Puisne Judge.

The facts on which the prosecution relied are as follows: The deceased spent the better part of September 9, 1995, celebrating the anniversary of his birth. He had Messrs Khamal McKoy and Peter Henry as his companions in the celebrations. They ended up at a club in Rio Bueno. There came a time when it was decided that they had had enough. It was time to go home; but they could not do so as the deceased could not find the key for his car. An argument developed. Mr. Henry went to the nearby police station and sought the intervention of the police. He returned in the company of the appellants Wauchorpe and Dodd. A further argument developed between the appellant Wauchorpe and the deceased whom the former had accused of being a "drugs boy". The deceased, in response to this accusation, said that if he were a drugs boy he could work to maintain his habit. Thereupon, Wauchorpe boxed him and accused him of being "feisty". Wauchorpe also instructed the three of them to go to the police station. In the process, Mr. Henry was handcuffed. The deceased

protested the turn of events and pointed out that he feared the police whom he claimed had been responsible for his father's death. While they were walking to the police station a police jeep, driven by the appellant West, came and they were instructed to get into it. They complied, and were taken to the police station.

At the station, the deceased was beaten all over his body by the three appellants. During the beating, Wauchorpe and West were heard saying, "Boy, you fi dead, a long time you fi dead", while the deceased was shouting "murder, lef mi, whey mi do". Finally, the deceased was heard saying, "okay, I give up". After the beating had ceased, the jeep was heard being driven from the compound, apparently by the appellant West who had earlier been seen with a baton, sweating, inquiring whether the deceased had bought drugs earlier in the evening. After about an hour, Wauchorpe returned without shirt, sweating, with his trousers wet and pulled up to the knee, saying the deceased can run and had run away. The deceased was not seen alive thereafter. He, according to the prosecution, had been taken out to sea by the appellants and thrown overboard. He had died either from the beating he had received or from drowning. His badly decomposed body was seen on the 14th September, 1995, floating in the sea about six miles northwest of Falmouth, and eight to ten nautical miles from Rio Bueno harbour. It was towed by a Jamaica Defence Force boat to the Half Moon beach, just outside Falmouth, where it was positively identified. A post mortem examination was performed on the 18th September, 1995.

The Government pathologist found no visible marks or signs of pre-mortem or post-mortem injury on the body or to the organs of the chest. An earlier post-mortem examination had been done, but the result of it was apparently not disclosed at the trial. The body had been bleached out, and burnt out by the sun and salt water, giving it a curing look, according to the pathologist. Not much of the scalp was seen; nor was there any fracture of the skull. Decomposition had been rapid; the pathologist was somewhat "taken aback" by the rapidity. He was of the opinion that the cause of death could not be determined due to the advanced stage of decomposition. However, due to congestion of the lungs, he said that if he had to form an opinion, he would have to give drowning as a possibility, but he could not be certain. Death had occurred, he felt, about three to six days prior to the post-mortem examination.

The appellants denied beating the deceased. In the case of Dodd and Wauchorpe, they stated that they were at the station when Henry made the report. They were despatched to the village square by the station guard, D/C Errol Stephenson. At the square, the deceased made a report to them. The other appellant drove up. The investigations were handed over to him. He directed Dodd and Wauchorpe to remain in the square to guard the deceased's car while he, West, took the deceased and his two colleagues to the station. The appellants Dodd and Wauchorpe were not at the station during the period that the deceased was there and so have no idea what became of him. In the case of the appellant West, he said that he took the men to the station to "rest off" as they were drunk. The deceased, at one time sat on the step to the station door while at another time he was on the driveway. According to the appellant West,

the deceased got up and walked towards the village. He, West, confirmed that he had instructed Dodd and Wauchorpe to guard the deceased's vehicle.

D/C Wauchorpe called D/C Stephenson as a witness. The latter testified that when West returned to the station with the deceased and his companions, they all went inside the recreation room next to the guard room. The deceased, he said, came out of the recreation room, went through the door, and then across to the beach--all this in the presence of himself and Sgt. West. This, he said, was about 4.00 to 4.30 a.m.

D/C Dodd called Miss Rachael McKain as a witness. She said that she saw the deceased at about 4.00 a.m. coming from the seaside saying that he was looking for his car key.

The three appellants filed identical **grounds of appeal**, namely:

> (1) the learned trial judge erred when he overruled the submission of no case made by the defence which was to the effect that in light of the evidence of the pathologist that the body of the deceased revealed no signs of violence or a fatal injury and this was therefore an irreconcilable contradiction in the evidence adduced by the prosecution;
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> (2) the learned trial judge erred when he failed to leave the live issue of manslaughter to the jury and thereby deprived the appellant of a possible verdict of manslaughter.

As already indicated, the second ground is well founded.

At the commencement of the hearing, leave was granted to all the appellants to rely on **supplementary grounds of appeal**. A summary of those grounds may be listed thus:

> (1) Circumstantial evidence- the learned trial judge's directions were inadequate or

incorrect and failed to assist the jury in applying the legal theory to the facts of the case.

(2) Nexus - the learned trial judge failed to direct the jury that there was no connection between the alleged acts of the appellants and the cause of the death of the deceased.

(3) Cause of death - the evidence of the pathologist indicates that the cause of death has not been definitively determined. Accident has not been ruled out.

(4) Failure to adequately instruct the jury as to the defence of each appellant, and the need for separate consideration of each.

(5) Unsworn statement - the learned trial judge undermined the exercise by the appellant West of his right to make an unsworn statement.

It will be observed that the original ground one is incorporated in the supplementary grounds listed at (2) and (3) above.

Circumstantial evidence

The directions given by the learned trial judge in respect of the nature of circumstantial evidence were challenged by all the appellants. These directions were given at several stages of the summing-up, and were not necessarily full at any single stage. It is this style which prompted learned Queen's Counsel, Mr. Ramsay, to say that circumstantial evidence was defined by the judge in a "choppy way". Mr. Ramsay and Mr. Cruickshank described the directions as unhelpful and imprecise. Mr. Ramsay was particularly critical of the statement at page 29 of the summing-up that "circumstantial evidence is drawing the inference par excellence, **putting two and two together**..", and also at page 30

where the learned judge is recorded as saying , "..it is said that circumstances don't lie".

Mr. Ramsay relied on Taylor's treatise on the law of evidence for support for the view that it is false to say, as many judges have said, that "circumstances don't lie". At paragraph 66, it is written thus:

> "Much has been said and written respecting the comparative value of direct and circumstantial evidence, but, as the controversy seems to have arisen from a misapprehension of the real nature and object of the testimony, and can moreover lead to no practical end, it is not here intended to enter into the lists further than to observe, that one argument urged in favour of circumstantial evidence is palpably erroneous. 'Witnesses may lie, but circumstances cannot', has been more than once repeated from the bench, and is now almost received as a judicial axiom. Yet certainly no proposition can be more false or dangerous than this. If 'circumstances' mean--and they can have no other meaning-- those facts which lead to the inference of the fact in issue, they not only can, but constantly do lie, or, in other words, the conclusion deduced from them is often false."

Miss Llewellyn, for the Crown, was also uncomfortable with some of the language used by the learned judge to describe circumstantial evidence. That which was found at page 65 of the summing-up was described by her as convoluted. There, the learned Senior Puisne Judge delivered himself thus:

> "All this, I am reminding you, members of the jury, and we have to take some time with this because circumstantial evidence here has to be carefully examined and you will remember I told you the definition of what is circumstantial evidence, that the facts or the circumstances may be so many and that connection so many, you have to look at all these circumstantial evidence as the conglomeration of undesigned circumstances which goes to the root".

We agree with Miss Llewellyn that elegant language, though desirable, is not binding when a judge is summing up a case to a jury. We think that overall, the important duty is for the judge, in instructing the jury, to use language that is fully understood by them, while at the same time being consistent with the law.

In **Regina v. Everton Morrison** (1993) 30 J.L.R.54, at 56A, Carey, J.A. said:

> "We desire to say that it should be clearly stated to the jury that circumstantial evidence consists of the inferences to be drawn from surrounding circumstances, there being an absence of direct evidence. The jury should be told (1) that if on an examination of all the surrounding circumstances, they find such a series of undesigned and unexpected coincidences, that as reasonable persons, their judgment is compelled to one conclusion; (11) that all the circumstances relied on, must point in one direction and one direction only; (111) that if that evidence falls short of that standard, if it leaves gaps, if it is consistent with something else, then the test is not satisfied. What they must find, is an array of circumstances which point only to one conclusion and to all reasonable minds, that conclusion only. The facts must be inconsistent with any other rational conclusion."

The question for determination on this point therefore is whether it can be said that the learned judge communicated these principles to the jury. Firstly, it is necessary to put in its proper context the statement made by the learned judge in respect of putting two and two together. He was dealing with the drawing of inferences. Commencing at page 8, line 24, and ending on page 9, he is recorded as saying:

> "You members of the jury who are required to find facts, will not in every case find every factual situation coming to you from the witness' testimony; you are not going to find that. The law says if that condition materializes, you as the judges of the facts have the entitlement and competence to draw inference. And I would like to put it in a common

> parlance way. You the judges of the facts are entitled to put two and two together. But any inference which you draw, members of the jury, must be reasonable inference, that is to say it must be able to attach itself to the fact or facts which you have found from the witness' testimony. You cannot just pluck something out of the air and say, 'I am going to draw this inference'. It would not be a reasonable inference. Again, pardon me, I make no apologies for going that way. Remember I told you you are to put two and two together? We all know the reasonable conclusion of putting two and two together is four. If it comes to five, it is unreasonable. That is how you look at it; it must be reasonable in the sense that it is attachable to fact or facts deponed to you by witnesses. And a reasonable inference, members of the jury, may go towards the establishment of a conclusion of innocence or guilt, provided it is reasonable. You heard in this case at the opening and in addresses to you by counsel at the Bar, reference being made to circumstantial evidence. The acceptance of circumstantial evidence is drawing the inference par excellence. You are going to hear some more about this circumstantial evidence".

In the context in which the learned judge spoke, we do not think that he can be properly accused of being unhelpful to the jury.

At pages 29 to 31, he dealt thus with circumstantial evidence:

> "Members of the jury, it is not always possible that an offence can be proven by the evidence of eye-witnesses but the fact that there is no eye-witness to the action which constitutes the offence does not mean that the offence and who did it cannot be legally proved. Proving an offence in the absence of eye-witness can or may be proved by drawing the inference from surrounding circumstances and you remember yesterday I told you that circumstantial evidence is drawing the inference par excellence, putting two and two together and therefore, members of the jury, you can use this working definition, keeping in your mind that circumstantial evidence is evidence from which you may infer the existence of a fact in issue.

Circumstantial evidence, members of the jury, is not inferior to 'I see witness' evidence, you know, not inferior. As a matter of fact, circumstantial evidence is very often superior to 'I see' evidence; and it is a simple reasonable conclusion you can come to by looking at it here. An eye witness may be lying out of sheer malice or spite, may be mistaken. But it is said that circumstances don't lie, or be subject to malice or whatever it is.

Circumstantial evidence consists of a body of facts which may be so conclusive in - the series and body of facts so conclusive that they lead you to a firm belief as reasonable people, firm belief as reasonable people, that there is no other way in which those facts, those bodies or that body of facts can be explained other than the fact that they go to show that an accused is guilty. The facts, members of the jury - we are dealing with circumstantial evidence - may be so many and the connection of the circumstances in which the facts are present, so strong in pointing to guilt, that there can be no other rational explanation. Members of the jury, you may think that the use of circumstantial evidence is a common sense approach. Because if it was always necessary to have eye witnesses, actions could go unpunished or undetected. So the law says that although no eye witness saw the actual commission, or a part of the commission of an offence, if the facts and the circumstances are such that you are satisfied beyond a reasonable doubt that there is no rational mode of explaining them, or of accounting for those series of facts and circumstances other than the conclusion that those facts and circumstances lead to the guilt of an accused, then in that case the circumstantial evidence would have made out a case for conviction. But members of the jury, the circumstantial evidence is like several strands of a rope. Every strand must hold firm for the rope to be safe. Just as in circumstantial evidence, every factual situation or circumstance must be so connected that it leaves no gap. No gap. Must present a composite whole before circumstantial evidence can avail."

Despite the criticism that has been made of the language of the learned judge, there can be no doubt that he has complied with the instructions stated in **Regina v. Everton Morrison** (above).

The prosecution had contended that a boat owned by one Mr. Albert Downer had been used to convey the deceased out to sea. There was evidence that the boat had been beached a short distance from the police station on the Friday morning prior to the disappearance of the deceased. Mr. Downer said that he noticed on Saturday that his boat had been moved from where he had left it. He had washed the boat after coming from sea on Friday, and was of the view that if any blood was found in the boat, it had to be fish blood as no injured person had been in the boat up to Friday. On the 14th September, 1995, the police asked him not to use the boat, apparently because of tests to be conducted by Miss Sharon Brydson, the Government Analyst attached to the Forensic Science Laboratory. The tests revealed that human blood, group A, which is the same group to which the deceased belonged, was found in the boat. Now, there had been no evidence from Mr. Downer that his boat had been moved on the Sunday. His evidence related to the Saturday morning, that is, about 24 hours before the disappearance of the deceased. So, as Mr. Ramsay pointed out, the learned judge was in error when he told the jury that Mr. Downer had said that he had noticed that the boat had been moved on Sunday. This situation, according to Mr. Ramsay, has caused a gap in the prosecution's case and so there is no case to answer.

It should not be overlooked that the Crown has presented direct evidence that the deceased was beaten by the appellants for a period of up to

thirty minutes. There is also evidence from Mr. Astley Downer that the appellant Dodd had told him that he had delivered "a couple of licks" to the deceased because he had been rude to one of his (Dodd's) colleagues, and that he had then been put to "thaw out". The evidence of the deceased being in the custody of the appellants prior to and after the "licks" is direct evidence. There is also direct evidence of the body of the deceased being found several miles out at sea after he was last seen and heard being beaten while in custody at the Rio Bueno Police Station. There was also evidence of the appellant West with a baton, sweating, inquiring if the deceased had been seen by the witness McKoy buying drugs-- this at a time after the deceased had been beaten at the station. Added to this is the appellant Wauchorpe returning to the station, shirt-less, pants wet, saying how the deceased had run away. On the Crown's case, of course, the deceased had been drinking all day and was drunk. When the direct evidence is considered, the gap referred to by Mr. Ramsay is really of no moment. Even if the evidence as to the boat is of no value, given the denial by the appellants as to the beating of the deceased and the striking contrast presented by the Crown witnesses as to what took place at the police station, the jury would have had sufficient reason to conclude that the appellants were not only acting together but were party to the dramatic disappearance of the deceased from custody, and his demise.

Nexus between the acts of the appellants and the cause of death

The appellants contended that there was no evidence as to the cause of death, hence there was no connection between them and the death of the deceased. Indeed, Mr. Ramsay submitted that on the whole there was basis for

an inference that the deceased may have accidentally fallen in the sea while in his inebriated condition. The fallacy of this view is seen when it is considered that the jury had before them evidence that the deceased was in the custody of the police and had been the victim of a thirty minute beating while in custody, and had not been released from that custody. The companions of the deceased who had also been taken to the police station along with the deceased, although not beaten, were not released until daylight. One of them, Peter Henry, had even been manacled. The jury quite clearly rejected the idea of an accidental drowning in those circumstances. That would have been a far-fetched and unreasonable inference for them to have drawn.

It is true that the pathologist was unable to state positively the cause of death. That is not surprising given the condition in which the body was found. However, that is not the end of the matter. The deceased had been the victim of violence. He had no history of illness, and given the circumstances already stated as to his being in custody, a reasonable inference was that he was placed in the water after he had been beaten. It would therefore not matter whether he died from the beating or from drowning. It should be added that in any event a jury is not bound to accept the opinion of an expert such as the pathologist undoubtedly is. This proposition does not require authority. However, no harm is done in referring to **R. v. Lanfear** (1968) 1 All E.R.683 where the English Court of Appeal Criminal Division held that the evidence of a doctor giving medical testimony at a criminal trial should be treated, as regards admissibility and other matters of that kind, like that of any other independent witness, but, though a doctor may be regarded as giving independent expert evidence to

assist the court, the jury should not be directed that his evidence ought, therefore, to be accepted by the jury in the absence of reasons for rejecting it. In the matter before us, there is uncontradicted evidence that the deceased had been drinking alcohol for the better part of the Saturday. Yet, the pathologist found no alcohol in the body. The situation was the same in respect of the analysis done by the Senior Forensic Officer, Mr. Fitzmore Coates. His examination of the stomach contents of the deceased revealed no alcohol. So, it follows that the expert evidence cannot be the final determinant factor in this matter as the undisputed facts as to the deceased's intake of alcohol has confounded the expert evidence.

R. v. Matheson (1958) Cr.App.R 145 has been cited as authority for the submission that there being no evidence from the pathologist as to the cause of death, the jury was not in a position to make a decision as to the cause of death and so the case should not have been put to them for their consideration. In that case, the appellant was convicted of capital murder. Three doctors had been called on his behalf. They were of the opinion that he suffered from an abnormality of the mind which substantially impaired his responsibility for his actions. There was no contrary evidence. Nevertheless the jury convicted. The appeal came before a full court of five judges. The appellants here have sought comfort in the following passage at page 151:

> "What then were the facts or circumstances which would justify a jury in coming to a conclusion contrary to the unchallenged evidence of these gentlemen? While it has often been emphasised, and we would repeat, that the decision in these cases, as in those in which insanity is pleaded, is for the jury and not the doctors, the verdict must be founded on evidence. If there are facts which would entitle a

> jury to reject or differ from the opinions of the medical men, this court would not, and indeed could not, disturb their verdict, but if the doctors' evidence is unchallenged and there is no other on this issue, a verdict contrary to their opinion would not be 'a true verdict in accordance with the evidence'. Here it is said there was evidence of premeditation and undoubtedly there was, but an abnormal mind is as capable of forming an intention to kill as one that is normal; it is just what an abnormal mind might do. A desire to kill is quite common in cases of insanity. We cannot see that the anonymous letters displace the view that the appellant's mind was abnormal or that his responsibility was substantially impaired. They would appear indicative rather of a desire to torture the mother, again a sign of abnormality. The attempts at self-mutilation in a most painful manner are surely acts of a man on the border of insanity and not of a rational person. The revolting nature of the crime itself would cause most people to say it was the work of a maniac, resembling as it did the murders of some seventy years ago which terrorised the East End of London and were known as the 'Ripper murders'. We can well understand that a jury, faced with such an appalling crime ...would think, as would many, that such a creature ought not to live and that consequently a verdict involving the capital sentence was the only one appropriate."

We do not disagree with the reasoning in the passage just quoted. However, there is a difference that cannot go unmentioned. In the instant matter before us, the pathologist has declined to give a positive opinion as to the cause of death. In that situation, it is our view that the jury would then be in a position to form its own opinion based on facts proven to its satisfaction. That there were facts on which the jury could have deliberated, and indeed on which they did deliberate, has already been indicated.

In **R. v. Aaron Scott** (1971) 12 J.L.R. 625, a case in which the cause of death was uncertain, the applicant was convicted of murder. The decomposed body of the deceased was found buried at a spot shown to the police by the

applicant who had given three statements to the police. In the third statement he spoke of an agreement to purchase a car from the deceased. Along with another man, he went with the deceased to Albion in St. Thomas where an argument developed between the applicant and the deceased. The latter advanced on the applicant who struck the temple of the deceased with a stone in self defence. The other man then punched and kicked the deceased who fell to the ground. The deceased was buried by his attacker, the third man. The applicant and the third man returned to Kingston. According to the statement, the applicant went back to Albion to see if the deceased was still alive. He, on being satisfied that the deceased was indeed dead, proceeded to remove the body to another spot where he buried it. In his unsworn statement at the trial, the applicant confirmed the contents of this statement as true. The doctor who performed the post mortem examination on the deceased's body could not say whether the blow to the deceased's temple had caused death. Nor could he say what had caused death. The trial judge overruled a no case submission. On appeal, this Court **held** that there was a clear prima facie case against the applicant because (a) notwithstanding the absence of evidence as to the cause of death, it was clear that the deceased had met his death by violence; (b) the jury were entitled to reject the applicant's assertion that the third man had killed the deceased, and to conclude that even if death did not result from the blow with the stone it was certain to follow from exposure or suffocation; the trial judge was therefore right in ruling against the no case submission.

In our view, this case indicates that there can be a proper conviction for a killing although there is no expert evidence as to the cause of death.

There are several older cases in which the cause of death was not given in evidence. One such is **R. v. Nash** (1911) 6 Cr. App.R.225 where a woman was convicted of the murder of her son aged five years and nine months. At the hearing of the appeal, the Crown was not called upon. The facts are that the appellant left with the child saying she was going to the house of a friend. She had to pass near the well in which the body of the child was found. There was evidence that a woman was seen with a child near the well at the time in question. The child was in perfect health. When the appellant returned, she said that she had left the child with her friend. She packed up the child's clothes and said that she had sent them to her. Later, she said that the child was well. These statements were untrue. It was submitted that there was no evidence of a violent death. This was rejected by the Court presided over by the Lord Chief Justice. The matter was disposed of thus:

> "Mr. Goddard cannot have meant that there must be proof from the body itself of a violent death. His argument means that on the whole evidence the possibility is left so open that it was not safe to leave it to the jury. But the facts which were proved called for an explanation, and beyond the admittedly untrue statements, none was forthcoming. Mr. Goddard suggests that the evidence is consistent with the child having been given to gipsies or such like people, but the jury cannot assume such a hypothesis without evidence. The possibility of accident was referred to in the summing up, which has not been attacked. In view of the facts that the child left home well and was afterwards found dead, that the appellant was last seen with it, and made untrue statements about it, this is not a case which could have been withdrawn from the jury".

Taking all the circumstances into consideration we are of the view that there was sufficient evidence linking the appellants to the infliction of violence

on the deceased while he was in the custody of the police, and that the jury were entitled to infer that the deceased had not voluntarily left that custody. They were entitled to reject as false the unsworn statements of the appellants as well as the sworn evidence of D/C Errol Stephenson, to the effect that they took great care to see to the safety of the deceased's car in the village square, but allowed him, who had been taken into custody, to walk freely out of the station premises.

Failure of the judge to instruct the jury as to the defence of each appellant and the need for the separate consideration of each.

The complaint as to the inadequate way in which the defence was dealt with comes from the appellants West and Dodd. Now, at a very early stage in the summing-up, the learned trial judge had this to say at page 11:

> "Accused persons in our jurisprudence, that is to say, our system of law have no obligation to prove one syllable towards the establishment of his innocence. He has no obligation, doesn't have to prove a thing. This case we are dealing with three accused persons. Each person bears no burden of proving anything. The prosecution bears that burden and must discharge that burden in a criminal case".

And at page 13:

> "Mr. Foreman and members of the jury, you will see that there are three accused persons in the dock there being tried. They are charged with one offence, the offence of murder. In that respect it is called a joint trial. Each man sitting up there is entitled to have the evidence, if any, against him, considered by you separately. Evidence, if you so find against the one is not necessarily evidence against the other. You have to consider the evidence against each accused separately. If you find one guilty, it doesn't follow that you must just, without more, say the others or other would be guilty. Equally, if you find innocence in the one, it doesn't follow that you

> must say the other or others are innocent. You have to consider the evidence separately".

Complaint has been made as to the failure of the judge to indicate to the jury that the evidence of Astley Downer as to a statement made by the appellant Dodd to him was not evidence against the other appellants. It is true that the jury were not so specifically advised. However, a look at the actual words quoted by Mr. Downer as having come from Dodd shows that Dodd had not implicated the other appellants in the giving of "licks" to the deceased. He spoke only of himself assaulting the deceased. It was therefore not obligatory on the learned judge to have added that warning.

So far as explaining the defence of each appellant to the jury is concerned, the learned judge, prior to reminding the jury of what each had said in his defence, said this:

> "The accused case, you remember I told you what the accused persons' case is, the case of the accused is that they did nothing and they were not there".

The appellants Wauchorpe and Dodd called witnesses. The judge said:

> "You will look at the evidence, the sworn testimony which was presented on behalf of Mr. Wauchorpe and Mr. Dodd. There is no other testimony or no other thing on behalf of Mr. West and the evidence of Mr. Wauchorpe comes from Mr. Stephenson. You look at what he says and look at the cross-examination of that witness, because what the witness has said is called an alibi, and if that is correct then Messrs Wauchorpe and Dodd - if the alibi raised or set up by Mr. Stephenson, that they were out at the square. If they were out at the square, they couldn't be at the station at the relevant time. You would have to look at it.
>
> In relation to Dodd, Miss McKain was called and what she tells you, she saw Black alive at about the same

> period this thing is alleged to have happened, you would have to look at that carefully. But you must look at Miss McKain, you know. You heard Mr. Soutar - again experienced counsel - addressed you, says Miss McKain gave her testimony or statement, nobody called her; she was not obliged to say anything on the matter, or volunteer anything in the matter, what she had said or what she had seen. Matter for you, because ultimately what you are looking for is not what she didn't do after giving her statement, is whether the statement is the truth or whether it is the statement which creates in you, judges of the facts, reasonable doubt as to the authenticity of the prosecution. That is how you look at it".

In the light of the above, it is inaccurate to say that the learned judge gave no directions on alibi-as Mr. Cruickshank did say. It is also inaccurate to say, as Mr. Soutar did say, that there was a failure to direct the jury that if the evidence of Miss McKain was accepted, there should be an acquittal of the appellants.

Undermining the unsworn statement

In Jamaica, accused persons are still allowed to make unsworn statements. This is so notwithstanding that the leading countries in the Commonwealth have abolished this provision. To put it mildly, the position in Jamaica is anachronistic. And so, from the comfort of the dock, accused persons, faced with the most serious charges, are allowed to say virtually anything without the possibility of the slightest challenge. In this situation, experience has shown that the truth quite often suffers and injustice is done to complainants who must be sworn, and who are subjected to the rigours of cross-examination.

It is against this background that the complaint is made as to the undermining of the unsworn statement.

There is, however, no need to spend much time on this ground of appeal as we find that the comments made by the learned trial judge were in no way unfair to these appellants and were within the framework of **DPP v. Leary Walker** (1974) 12 J.L.R. 1369 and **Mills v. R** (1995) 46 WIR 240.

Manslaughter

As already noted, we are of the view that the learned trial judge erred when he did not leave the issue of manslaughter for the consideration of the jury. There was evidence that during the beating of the deceased, the appellants Wauchorpe and West were heard saying, "Boy you fi dead, a long time you fi dead." These words connote an intention to kill. However, the appellant, Dodd was not in anyway connected with their utterance. Furthermore, it would have been open to the jury to find that they were used by either Wauchorpe or West.

In any event, the jury should have been instructed that it was open to them to find that the words were used metaphorically, and there was really no intention to kill the deceased or cause him grievous bodily harm. In that case, the proper verdict would have been one of guilty of manslaughter.

Mr. Ramsay submitted that if we were to find that manslaughter should have been left for the jury's consideration a new trial should be ordered. He said that this should be so as there are issues of fact that ought to have been left to the jury with a proper direction. We do not agree with this submission. The issues of fact were substantially left to the jury in a summing up that lasted over four and a half hours. In addition, the cross-examination of the witnesses was very

thorough. It is inconceivable that there is any relevant matter of a factual nature which was not unearthed during cross-examination.

In view of the fact that we are of the opinion that there is evidence to support a conviction, but the issue of manslaughter was not left for the jury's consideration, we allow the appeal against the conviction of murder and substitute a verdict of guilty of manslaughter. For the sentence of life imprisonment, we substitute a sentence of ten years' imprisonment at hard labour in respect of each appellant.