NMLS

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 37, 38, 39 & 40/96

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A. (Ag.)

REGINA
vs.
STEVE BROWN
MARLON ELLIS
IRVING GOLDSON
DEVON MCGLASHAN

Dennis Morrison, Q.C. and Mrs. V. Neita-Robertson for applicant Brown

Dr. Randolph Williams for applicants Ellis and McGlashan

Ian Wilkinson for applicant Goldson

Miss Paula Llewellyn and Miss Carol Edwards for Crown

April 30; May 1, 2; June 9, 10 and October 27, 1997

HARRISON, J.A.:

The applicants were convicted at the Home Circuit Court on the 7th day of March, 1996. The applicants Ellis and Brown were convicted for the offence of murder and each was sentenced to imprisonment for life and it was recommended that neither should be eligible for parole until he had served a period of twenty-five years. The applicants McGlashan and Goldson were convicted for the offence of capital murder and each was sentenced to suffer death in the manner authorised by law.

The material facts are that on the 10th day of April, 1993, at about 1:30 p.m. prosecution witness Claudette Bernard was awakened by a slap on her leg, while lying in her bed at 8 Banana Street, Franklin Town in the parish of Kingston. Beside her on the bed was her boyfriend, deceased Donovan Guthrie. Three men with firearms, two long guns and one short gun, broke into her bedroom. She recognised two of the men, namely, Devon McGlashan, whom she knew as "Sector", and Irvin Goldson, whom she knew as "Yogi". There was light from a lamp which was lit and resting on the floor and also from an electric bulb on a streetlight post near the fence to the premises. This light shone through the glass window of the said bedroom. She was thus able to see their faces, as they stood in a semi-circle in front of her bed, an arm's length from her. The applicant McGlashan spoke to her and she replied. He pointed a gun at her and fired it; she felt a burning sensation and closed her eyes, feigning death. Other gunshots were then fired. The men then left the bedroom and the prosecution witness, Claudette Bernard, bleeding, ran to another house for assistance. The police were summoned to the scene and one Sergeant Hemmings, who came at about 1:40 a.m., saw in the room the body of the deceased lying on the bed with gunshot wounds, and the lamp now unlit. He was able to see while in the bedroom with the aid of the light from the streetlight post which he saw near the premises. The police officer searched the room, using his flashlight, and found on the floor one M-16 cartridge case and three 9mm cartridge casings.

The medical evidence revealed that Miss Bernard was shot in her jaw and neck. The deceased received two gunshot wounds to the chest, and the bullets passed through both lungs causing his death. The bedroom measured ten feet by twelve feet. The applicants McGlashan and Goldson were in the room for a period of about ten to fifteen minutes, although Miss Bernard was able to see their faces for some seconds. Later the said day, while in hospital, she wrote the names of these two men on a piece of paper and handed it to the police. Her evidence was that she knew the applicant McGlashan for about three years before the incident. She was accustomed to seeing him "every other day" at the gate to her premises or near to her mother's gate which was in the same locality; she had last seen him the evening before the shooting, walking with some men along the said Banana Street. The said witness grew up in the same area of Franklin Town with the applicant Irvin Goldson and consequently she knew him for about fifteen years. Her evidence in respect of these two applicants is, therefore, based on her visual identification of them, as persons whom she recognized.

The Crown's case against the applicant Marlon Ellis is contained in his signed cautioned statement, exhibit 6. In this statement, the applicant stated that early Saturday morning, the 10th day of April, 1993, he and five other men, all armed with guns, went to Banana Street. He and another man had 9mm automatic pistols, two of them had M-16 rifles and the other two had .38 revolvers. The applicant was told by one of the men that they were going to "mash the works...going down to site

where Chicken was to shoot him up." Three of the men, armed, went into the premises on Banana Street, while he, Ellis, and two others remained outside of the gate. There was a pole streetlight outside the gate. The applicant Ellis stated that he heard shots fired, the three men ran out of the premises and all six of them ran to "top road" where he returned his gun to the man who had issued it to him earlier. In an unsworn statement from the dock the applicant Ellis denied knowing anything about the shooting and denied signing any statement.

The Crown's case against the applicant Steve Brown is contained in his signed cautioned statement, exhibit 7, and the questions and answers document, exhibit 8. In the said statement, exhibit 7, the applicant Brown stated that in March 1993 five of his friends came to him at Norman Gardens, in the night, and said they "had a works fi mash" and he "go from the works...at McIntyre Land." Three of them were outside on the road and two were standing at the gate and one went inside the yard. He heard the door kick off and four to five shots were fired. The man who had gone inside ran out of the yard, said "Oonu come", and they all "ran back up." While running he Brown asked what happened and the man who had gone into the yard said it was a man and a woman, the woman's name was Claudette but he did not know who the man was. The said man told him a "couple days later that the woman "don't dead", but the man was dead. He, Brown, left and went to Fogah, Clarendon, to work. Exhibit 8 consisted of six questions and answers. The applicant stated that when his friends came to him at Norman Gardens, the man who

later went into the yard had a 9mm firearm, he did not know what kind of "move" they were referring to, until he heard the shots fired, that after the said man told him that he had shot Claudette - he Brown could not tell that to the police and that Rockfort Police Station is near to him, "a good little walk to the station."

Mr. Dennis Morrison, Q.C., counsel for the applicant Steve Brown, argued as his first ground of appeal:

> "1. That the learned trial judge erred in law in ruling that a prima facie case had been made out for the applicant to answer, in that the prosecution had not at that stage established that the applicant was part of a common design to commit the offence with which he was charged."

Counsel, while not challenging the admission of the cautioned statement of the applicant Brown, submitted that the evidence was insufficient to give rise to an inference that he was part of a joint enterprise that involved the use of violence, if necessary, and evidence of his mere presence was insufficient.

In his cautioned statement to the police, the applicant Brown stated that:

> "...one night about March ...(his) friends came to check me at Norman Gardens and said they have a works fi mash...we go from the works...five of them..." in addition to himself.

The applicant Brown was questioned by one Superintendent Campbell (exhibit 8):

> "Q. When your friend dem come check you at Norman Gardens did any of them have a gun?

A. Yes, sir, 'h' did have a 9mm, sir."

The applicant, in his said statement, revealed that while "h" with the gun went "inside the yard", he, Brown, and two others waited outside the road, while two other of the men were standing at the gate. After the firing of the shots and "h" ran out of the yard saying "Oonu come", the applicant said "...the whole a we start to run go back up."

The law relative to common design is set out in the headnote to the well-known case of ***R. v. Anderson and Morris*** [1965] 50 Cr. App. Rep. 216. It reads:

> "Where two adventurers embark on a joint enterprise, each is liable for acts done in pursuance of it and also for the unusual consequences of such acts, provided that they arise from the execution of the joint enterprise; but if one of the adventurers goes beyond what has been tacitly agreed as the scope of the enterprise, his co-adventurers is not liable for the consequences of that extraneous act."

It is quite true, as submitted by counsel, that the applicant's mere presence is insufficient evidence that the applicant was a part of the joint enterprise. If, however, the applicant involved himself in the joint enterprise by accompanying the other men going to "mash up the works", and the applicant was aware, as in the instant case, that at least one of the men had a lethal weapon, namely, a 9mm pistol, the applicant would be seen as one with the foresight to contemplate that the possible consequence of the venture was death or serious bodily injury.

As to foresight of and contemplation of the consequences, by a participant in a joint enterprise, Sir Robin Cooke in ***Chan Wing-Siu v. R.*** [1985] 1 A.C. 168, said at page 175:

> "It turns on contemplation or...authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight."

In ***Hui Chi-ming v. R.*** [1992] 1 A.C. 34, the Judicial Committee of the Privy Council in dismissing the case of the appellant who was convicted of murder in that he went along with the assailant in a joint enterprise to "look for someone to hit", and the assailant was visibly armed with a length of water pipe with which he hit the victim who died, referred to Sir Robin Cooke's observation in ***Chan Wing-Siu*** (supra).

The Board acknowledged as correct the dictum of Lord Lane, C.J. in ***R. v. Hyde*** [1991] 1 Q.B. 134, that if an accused realises that the assailant may kill or intentionally inflict serious injury, but nevertheless continues to participate with the assailant in the joint venture, that would amount to a sufficient mental element for the accused to be guilty of murder if the assailant with the requisite intent kills in the course of the venture, and said of the use of the word "authorisation" by Sir Robin Cooke:

> "Their Lordships consider that Sir Robin used this word...to emphasise the fact that mere foresight is not enough; the accessory, in order to be guilty must have foreseen the relevant offence which the principal may commit as a possible incident of the common unlawful enterprise

> and must with such foresight, still have participated in the enterprise. The word 'authorisation' explains what is meant by contemplation..." (per Lord Lowry, at page 53)

The applicant Steve Brown, having been told "we have a works fi mash", willingly accompanied the five other men to the home of the deceased. He was aware of the presence of a 9mm pistol in the possession of his friends. The fact that Detective Hemmings found in the room three 9mm and one M-16 shell casing, is evidence from which the inference may be drawn that the applicant must also have been aware of the presence of an M-16 rifle, approximately eighteen inches (18") long, in the possession of one of the men. The applicant and one of the men remained in the road while three of the men remained inside at the gate while the other man went inside the yard. The jury were entitled to draw the inference that the applicant Brown was in the role of a "look-out" man and who "ran back up" with the men immediately after the completion of the deed. The applicant at no time sought to dissociate himself from the actions of the group of men, his presence was not accidental, he was involved in the joint enterprise; there was ample evidence of the common design - see ***R. v. Steve Shaw et al*** S.C.C.A. 82, 85 & 86/94, (unreported) delivered on the 24th day of July, 1995.

The learned trial judge was correct in ruling that a prima facie case was made out against the applicant Brown; this ground of appeal, therefore, fails.

The second ground of appeal argued was:

> "2. That the learned trial judge did not give the jury any or any sufficient

> assistance on the potential impact on the deliberations of the circumstances in which the applicant alleged that exhibits 7 and 8 were obtained."

In expanding his submissions, counsel suggested that the learned trial judge was obliged to give more detailed directions to the jury in the matter.

The learned trial judge, in directing the jury in respect of exhibits 7 and 8, related in detail the circumstances in which they were recorded (pages 819-824 of the record) in the presence of Superintendent Campbell, Mr. Rupert Davis, the Justice of the Peace, and the fact that the applicant Brown admitted that he signed the said documents, but, that:

> "...he contends that those documents were prepared documents, that they were made up and given to him to sign when the Justice of the Peace arrived."

The learned trial judge directed the jury in this way (p.821):

> "In any case Steve Brown holds that he only signed the statement and the Questions and Answers document first of all because he was hit about the head by some police officer..."

and at page 824:

> "The defendant Steve Brown alleges that he was induced by Superintendent Campbell to sign the statement, Exhibit 7 and the Questions and Answers document and contends that any admissions contained in them are untrue. He only signed them because of the promise, the inducement held out to him.
>
> If you find, members of the jury, that those statements were dictated by him and that answers were given by him as alleged, you must take into consideration all the circumstances in which the statement was made and answers given including the

> allegation of force and promise held out - if you think they were made in truth - in assessing the weight you attach to those - to the contents of those documents, that is to say, in assessing their probative value."

The said judge amply demonstrated by these directions that such evidence was essentially a question of fact for the jury to evaluate and that they should determine the weight they the jury attached to them. We are of the view that this direction was adequate and that ground also failed.

The third ground reads:

> "3. That the verdict of the jury was unreasonable, having regard to the evidence."

As we observed in relation to count 1, there was sufficient evidence showing that the applicant Brown was deliberately present and an active participant in the joint enterprise. The jury rejected the statement of the applicant, had sufficient evidence to convict him of the offence and correctly so found. This ground also fails.

Dr. Williams, counsel for the applicant Marlon Ellis, did not proceed with ground 1. He argued, as his second ground:

> "2. The learned trial judge wrongly admitted into evidence a confessional statement, challenged by the defence as involuntary, without first deciding whether or not it was voluntary."

He submitted that even where the applicant has denied signing and denied being the author of the statement being tendered, but raises the issue of voluntariness, the trial judge should hold a voir dire in respect of any statement being

tendered. In support he relied on ***MacPherson v. R.*** [1981] 147 C.L.R. 512, a decision of the High Court of Australia, allowing an appeal.

The procedural approach of a trial judge relative to a confession statement of an accused sought to be tendered by the prosecution differs, depending on the contention of the accused. If the accused:

> a) denied authorship, but agreed that he signed or alternatively,
>
> b) denied that he signed the statement, but admits authorship, albeit involuntarily,

he is, in each case, rejecting that the statement is his. The trial judge is then obliged to hold a voir dire in order to determine the question of voluntariness as a pre-condition to its admissibility.

In ***Ajodha v. The State*** [1982] A.C. 204, the Judicial Committee of the Privy Council considered the principles governing the treatment of statements, both oral and written, and "...four typical situations most likely to be encountered in practice...". In cases where the accused admits making the statement, but raises the issue of voluntariness or denies authorship, but states that he signed involuntarily or the evidence itself indicates that the circumstances in which the statement was made could lead to the conclusion that it was not voluntary, the trial judge should hold a voir dire, in order to determine its admissibility. However, the Board continued, on page 222:

> "**(4)** On the face of the evidence tendered or proposed to be tendered by the

> prosecution, there is no material capable of suggesting that the statement was other than voluntary. The defence is an absolute denial of the prosecution evidence. For example, if the prosecution rely upon oral statements, the defence case is simply that the interview never took place or that the incriminating answers were never given; in the case of a written statement, the defence case is that it is a forgery. In this situation no issue as to voluntariness can arise and hence no question of admissibility falls for the judge's decision. The issue of fact whether or not the statement was made by the accused is purely for the jury."

In the instant case the applicant Ellis denied that he was the author of or that he signed the statement, exhibit 6, tendered by the prosecution, placing it in the fourth category described in **Ajodha v. R.** (supra). We do not agree, as his counsel argues, that the statement falls within the second category, where the accused:

> "...denies authorship of the written statement, but claims that he signed it involuntarily."

The applicant Ellis claimed that he did sign a statement but not exhibit 6; there is, therefore, no circumstance in which he claims any association with exhibit 6, or that any inducement or influence on his mind in any way affected exhibit 6.

In ***MacPherson v. R.*** (supra) Gibbs, C.J. and Wilson, J. acknowledged, on page 520:

> "Where, however, there is no question whether the will of the accused was overborne, or of unfairness or impropriety, and the only matter in dispute is whether the accused made any confession at all, it will be inappropriate to take evidence on a voir dire. The question whether a confession was made is entirely one for the jury."

In the instant case, the prosecution is required to satisfy the court that the confession statement is voluntary, as a general requirement preceding its admissibility. However, no examination on the voir dire is required where there is an absolute denial of authorship and signing of the statement. Once admitted, it was purely a question of fact for the jury as to whether or not the accused made the statement. The trial judge was correct in the procedure he adopted. This ground, therefore, fails.

The third ground of appeal reads:

> "3. The learned trial judge failed to direct his mind to decide whether or not the confessional statement allegedly made by the applicant should be excluded on the ground that the circumstances in which it was obtained were oppressive and/or unfair."

In his directions to the jury, the trial judge reminded the jury that the applicant had been in the University Hospital two weeks before the statement, exhibit 6, was taken, from which place he was taken by the police; that the applicant had stated in his unsworn statement that he had been in hospital "...for about twenty days, sick and in pain when the police came and took him"; and that they, the jury, should consider the circumstances in which the said statement was taken. In the light of that direction and the reminder of the condition of this applicant then, we cannot agree that the learned trial judge did not address his mind to the circumstances in which it was taken as regards fairness, which is in the exercise of his

discretion - ***R. v. Sang*** [1980] A.C. 402. There is no merit in this ground.

Ground four is that;

> "**4.** The period of 25 years before the applicant can apply for parole as recommended by the learned trial judge is excessive in the circumstances."

We need merely state that on the Crown's case as projected, the applicant Ellis was the "look-out man" giving encouragement and assurance to the others. The jury accepted this. We do not, therefore, find this period in any way excessive and find no merit in this ground.

Two grounds of appeal were argued in respect of the applicant Devon McGlashan. The first of the said grounds, as summarised, reads:

> "Because of the evidence led by and the comments of prosecuting counsel, the jury was left with the impression that a person who was not found, one Byfield had given a statement implicating the applicant and which evidence bolstered the eyewitness' account and the learned trial judge omitted to direct the jury on that inadmissible evidence which being prejudicial may have created a disadvantage to the applicant."

The transcript of the trial reveals that no evidence was led by the prosecution of any contents of a statement made by this person Byfield, nor of the nature of the said statement. Nowhere in the said transcript is there any reference to a statement of Byfield "implicating" the applicant.

In his directions to the jury, the learned trial judge said:

> "...you must come to your verdict in relation to each defendant only on the evidence that has been adduced in the trial...you must not allow your judgment in this case to be affected by rumour or stipulation (speculation) or prejudice against or sympathy for any of the defendants or the relatives or family of the man the prosecution alleged is dead."

and he continued:

> "Examine the evidence but do not speculate about what evidence there may have been. There will be no more."

The learned trial judge, with appropriate caution, told the jury to rely only on the evidence they heard in court and not to speculate, in an effort to avoid any likelihood of extraneous matters being considered. He had in mind, no doubt, the guidance provided by the decision in ***Hopson v. R.*** [1994] 45 W.I.R. 307, the headnote of which reads:

> "In the course of the accused's trial for murder the admission of hearsay evidence of a highly prejudicial nature (which did not fall within any of the exceptions to the rule against the admission of hearsay evidence) without an express and clear direction by the trial judge that the jury should completely ignore that evidence constitutes grounds for the quashing of any subsequent conviction."

We find that no prejudice was created in this regard. The sole eyewitness referred specifically to the applicant McGlashan, and any possible prejudice was amply cured by the directions of the learned trial judge. This ground, therefore, fails.

The second ground of appeal, as it relates to the applicant McGlashan, is that there is no evidence to support the

charges of (a) murder committed in the course or furtherance of an act of terrorism, nor (b) murder committed in the course of or furtherance of burglary.

In respect of the charge committed "in the course or furtherance of an act of terrorism" - section 2(1)(f) of the Offences against the Person Act - we agree with the concession of counsel for the Crown, that there is no evidence to support that aspect of the charge. There is no evidence of the double intent, that is, (a) the intent to murder and (b) the intent to create a state of fear in the public or a section thereof, to qualify as an act of terrorism - see ***Leroy Lamey v. R.***, Privy Council Appeal No. 56 of 1995, delivered on the 20th day of May, 1996.

However, we do not agree that there was no evidence in proof of the charge of "murder committed in the course or furtherance of burglary", but one of "burglary in the course or furtherance of murder", and therefore the conviction should be one of non-capital murder, as Dr. Williams for the applicant McGlashan suggests.

Burglary is a breaking in by night with intent to commit a felony. The felony intended was the murder of the deceased Donovan Guthrie. It was, therefore, clearly a murder committed in the furtherance of burglary. We do not agree that the act of burglary was complete before murder was committed. The commission of that act was the manifestation of that intention, so therefore there was ample evidence to support the contention that the murder was committed in the course of burglary - see ***R.***

v. Jones [1959] 1 All E.R. 411. This argument is, therefore, a distinction without a difference; the ground, therefore, fails.

Mr. Wilkinson for the applicant Goldson argued as his first ground:

> "1. The verdict is unreasonable and cannot be supported by the evidence, as inter alia, there is no evidence that the applicant Irvin Goldson, 'by his own act' caused the death of the deceased."

He was here referring to the provisions of section 2(2) of the Offences against the Person Act; this submission also pertains to the applicant McGlashan. Section 2(2) reads:

> "2.(2) If, in the case of any murder referred to in subsection (1) (not being a murder referred to in paragraph (e) of that subsection), two or more persons are guilty of that murder, it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used violence on that person in the course or furtherance of an attack on that person; but the murder shall not be capital murder in the case of any other of the persons guilty of it."
> [Emphasis supplied]

In the instant case the Crown's case is based on the principle of common design. In order, therefore, to convict the applicant of capital murder the evidence must show that "he by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on the person murdered, or himself used violence on that person."

The evidence before the jury was that of the eyewitness Claudette Bernard, that she was awakened by a slap on her leg in her room, as she lay on her bed at 1:30 a.m. and saw the

applicants Goldson and McGlashan standing arm's length from her. Goldson had a "long gun". She stated that both McGlashan and the third man, Marlon, who was not charged, had short guns. There was, therefore, evidence from which the jury may have inferred that the M-16 cartridge case found on the floor of that bedroom was discharged from that firearm "the long gun" which the applicant Goldson had; this would be evidence to satisfy the provisions of section 2(2) of the Act.

Gordon, J.A. in ***R. v. Peter Blaine et al*** S.C.C.A. Nos. 106 and 107/94 delivered on the 31st day of July, 1995 (unreported), in considering the said section 2(2), said:

> "The common law principle of guilty on the basis of common design of persons acting in concert is thus preserved in respect of the crime of murder but for the crime to amount to capital murder the crown must prove that the prisoner:
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> **(a)** caused the death or
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> **(b)** inflicted or
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> **(c)** attempted to inflict grievous bodily harm on the person murdered, or
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> **(d)** himself used violence on the person murdered in the course or furtherance of an attack on that person.
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> The section plainly excludes from the scope of capital murder a 'look out man' in a common enterprise. All who therefore display violence to the person killed in the course or furtherance of any crime specified in section 2 (1)(d) (supra) could be convicted of capital murder if and only if the violence comes within the categories (a) to (d) above. ...The dictionary meaning of violence is 'the unlawful exercise of physical force, specifically, an act calculated to

> intimidate by causing fear or personal injury'."

Section 2(2) progresses from "caused the death..." to "attempted to inflict...", the latter being actual contact to an attempt. "Himself used violence on the person murdered" does not necessarily include a battery. "Violence" includes an assault.

The medical evidence given by the Government Pathologist, Dr. Clifford, was that there were two entrance gunshot wounds to the deceased's body, one of which was an entrance wound to the right shoulder and had "gunpowder stippling up to three inches wide around it." This indicated that the muzzle of the firearm was between 18" to 24" from the deceased when it was fired. The applicant Goldson, armed with "a long gun", along with the applicant McGlashan and another man, both armed, made an hostile intrusion of the bedroom of Claudette Bernard and the deceased. This was a small bedroom 9ft. by 10ft., a confined space. This act, the jury could infer, could give rise to an apprehension in the minds of the occupants of that room that they were about to be shot. At its lowest, this was an assault - the act of violence as contemplated by section 2(2). Miss Bernard's evidence is that after she was shot she heard the deceased say:

> "No, no, Lord! What is that?"

She then with her eyes closed, heard several gunshots in the room.

In so far as the learned trial judge did not specifically direct the jury on the application of section 2(2), he was in error. However, there was evidence before the jury, of the

discharge of the "long gun" and the short gun by McGlashan and the assault committed, to connect both applicants, Goldson and McGlashan, as satisfying the provisions of the said section. We would have, if necessary, applied the proviso to section 14 of the Judicature (Appellate Jurisdiction) Act. This ground, therefore, fails.

Grounds two, eight and nine were argued together. They are:

> "2. The learned trial judge erred in law in failing to uphold the submission 'no case to answer' made on behalf of the applicant Irvin Goldson, the essence of which was that the visual identification evidence was tenuous and manifestly unreliable and unsafe.
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> ...
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> 8. The learned trial judge failed to direct the jury adequately and/or fairly in respect of the evidence on, and issue of visual identification evidence and in particular the dangers and weaknesses of the visual identification in the instant case.
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> 9. That the verdict is unreasonable having regard to the tenuous and manifestly unreliable identification evidence which, in essence, amounted to no more than a 'fleeting glance' exacerbated by difficult and traumatic conditions.
>
> The overall impact of the summing-up regarding the identification evidence was to convince the jury that if they 'believed' the witness it was safe to find the applicant guilty. The true principle in assessing identification evidence is not the credibility or honesty of the witness but the accuracy or quality of the identification evidence. The trial judge did not give the true principle the required emphasis."

The Crown's case against the applicants McGlashan and Goldson was based on the visual identification of the eyewitness. The guidelines in ***R. v. Turnbull*** [1977] Q.B. 224 obliges a trial judge to withdraw the case from the jury if in his opinion the identification evidence is poor; for example, in the case of a "fleeting glance or on a longer observation made in difficult circumstances."

The prosecution witness Bernard knew McGlashan for about three years and the applicant Goldson for about fifteen years. Although it is a case of recognition, the same strictures apply. She was able to have a question and answer dialogue with the applicant McGlashan. She saw them for some seconds of time before she shut her eyes feigning death, but this was not by any means a fleeting glance. She was awakened suddenly and admitted that she was confused and frightened. However, there was evidence that the lamp was lit and there was some further illumination from the street light adjacent to the premises from which she was able to view her assailants.

The learned trial judge gave adequate directions on the proper manner in which the jury should consider the identification evidence, the appropriate warning and the reason therefor and went on to deal in some detail with the weaknesses in the identification evidence of the eyewitness. That this was the proper approach as to the weaknesses, support is found in ***Michael Rose v. R.*** Privy Council Appeal No. 3/93 delivered on the 10th day of October, 1994. The Board's advice, per Lord Lloyd, was:

> "...nothing in ***Turnbull***, or in the subsequent cases to which their Lordships were referred, requires the judge to make a 'list' of the weaknesses in the identification evidence, or to use a particular form of words, when referring to those weaknesses. The essential requirement is that all the weaknesses should be properly drawn to the attention of the jury, and critically analysed where this is appropriate."

Nonetheless, the trial judge in his directions pointed out to the jury, the question of the credibility of the eyewitness:

> "Now, questions of credibility and indeed reliability of a witness are entirely a matter for you to determine... You may take into account the fact that she had made such and other conflicting statements when you consider whether she is believable as a witness..."

and also the various weaknesses in her testimony, namely, the discrepancies and the manner in which the jury should deal with them, and the overall quality of the identification evidence. As to weaknesses in the identification evidence, he directed the jury's mind to the fact that it was night, the sources of light, namely, the lamp, with the discrepancy in respect of the shade, and the street light, the window towards the street light and the fact that it was curtained, the witness being in the corner of the bed, her non-recollection of when she last saw the applicant Goldson, the insufficiency of the lighting depending on the instances indicated, the judging of distances and time and warned the jury:

> "You must, members of the jury, in assessing the evidence take into account that she was awakened suddenly, that she said she was frightened and that she said this terrible incident took place. Those are again obviously not circumstances that

> would enhance her ability to identify her assailants."

The visual identification evidence in respect of the applicants McGlashan and Goldson cannot be described as poor nor tenuous. This is a recognition case. It is true that the witness Claudette Bernard did not state the length of time for which she observed their faces, although she did say that they were in the room for "...some ten to fifteen minutes." However, by the nature of the evidence, including the conversation between the applicant McGlashan and the witness Bernard, the jury must have accepted that she had several seconds of observation of the applicants, sufficient to be able to properly identify them. This is not a "fleeting glance" case. This ground also fails.

Grounds three and four were not proceeded with by counsel for the applicant Goldson.

Ground five reads:

> "5. The learned trial judge erred in law in allowing the evidence of the prosecution witness Claudette Bernard and Arnold Hemmings to be placed before the jury for its consideration as no explanation was given, by the said witnesses or anyone else, for the material inconsistencies contained in the evidence of the said witnesses."

Inconsistencies in the evidence of a witness or witnesses is a matter for the jury. It is not the function of the trial judge to determine what evidence should be considered by the jury based on his opinion of its quality.

The trial judge directed the jury on inconsistencies in this way:

> "...Members of the Jury, whether there are inconsistencies and or discrepancies in the witness's evidence and if there are inconsistencies and or discrepancies, the nature and extent of them. You may have an inconsistency where the same witness says something on one point and then later on says something different on the same point. If that happens the first thing you look for is whether there is an explanation for it. If there is an explanation you look at that explanation and if you can accept it you can use it. If you are not satisfied with the explanation or if you think it is something that cannot be explained at all, then you discard it.
>
> Then the next thing is you examine the inconsistency to see if it is something immaterial to the case. Because if it is immaterial or slight it doesn't matter, you may say to yourself, well, it doesn't affect the credit of the witness and I can still accept what he or she has said. Or if you find that it is a serious inconsistency you may say you can't believe the witness in that area or you can't believe that witness at all."

This direction to the jury on the manner in which they should treat discrepancies was adequate and in keeping with the law. In so far as counsel submits that the case of ***R. v. Noel Williams et al*** S.C.C.A. Nos. 51 & 52/86 delivered on the 3rd day of June, 1987, decided that where there is no explanation given for the existence of the discrepancy, such evidence should not be left to the jury, we do not agree with counsel. This decision must be read in the context that it was a trial in the Gun Court by a judge sitting without a jury. There is no merit in this ground.

Ground six reads:

> "6. The learned trial judge erred in law, and therefore seriously prejudiced the

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Ground six reads:

> "6. The learned trial judge erred in law, and therefore seriously prejudiced the

> applicant's defence, in refusing to allow counsel for the applicant, Irvin Goldson, to ask the prosecution witness Detective Inspector Charlton Rowe the question: 'Miss Bernard told you there is no electric light?'"

The transcript of the evidence reveals the cross-examination of Detective Inspector Rowe:

> "**Q:** Was that the only statement.
>
> **A:** Whose statement.
>
> **Q:** For Miss Claudette Bernard?
>
> **A:** This is the one I recorded.
>
> **Q:** This is the one you recorded?
>
> **A:** Yes, sir.
>
> **Q:** Miss Bernard told you there is no electric light?
>
> **His Lordship:** No, no ...I will not allow that question."

The witness Bernard had earlier, in answer to a question whether contained in her written statement were the words, "There is no electric light in the premises so I used oil lamp", said:

> "No, it's not true. Light was there but it was switched off."

Counsel then attempted to put in the statement but did not do so.

His Lordship in his directions to the jury on this point said:

> "...she also told you that, in evidence, that her house was at the time of the incident served with electricity. It was proved, you may think, that she had previously said that her house had no electricity and so she used oil lamp. You

> may take into account the fact that she had made such and other conflicting statements when you consider whether she is believable as a witness."

The trial judge disallowed the question, presumably because he was of the view that the discrepancy had already been admitted by the witness as existing. We are of the view that no prejudice was caused thereby, and even if it was, it was amply cured when it was pointed out to the jury as an inconsistency by the trial judge. There is no merit in this ground.

Ground seven was abandoned.

Ground ten reads:

> "**10.** That the learned trial judge erred in law in failing to direct the jury sufficiently, or at all, in relation to the defence of alibi regarding the applicant Irvin Goldson."

The applicant made an unsworn statement from the dock. His defence was one of alibi. The trial judge told the jury:

> "He was not obliged to go into the witness-box but had a completely free choice either to do so or to make an unsworn statement or to say nothing. While you have been deprived of the opportunity of hearing his story tested by cross-examination you must not assume that he is guilty because he has not gone into the witness-box. It is exclusively for you to make up your mind whether his unsworn statement has any value and if so, what weight should be attached to it. You must decide whether the evidence for the prosecution has satisfied you of his guilt beyond reasonable doubt and in considering your verdict you should accord to his unsworn statement such weight as you fully consider it deserves."

Of the trial judge's treatment of the unsworn statement, their Lordships in ***Mills et al v. R.*** [1995] 3 All E.R. 865, held:

> "**(2)** Where an accused was entitled to make an unsworn statement and did so raising an alibi defence, the trial judge was not required to give any directions to the jury about the possible impact of the rejection of the alibi on the identification evidence but should merely tell the jury to accord to the accused's unsworn statement such weight as they considered it deserved. Accordingly, the judge's failure to give a direction that rejection of the alibi did not by itself support the identification evidence was not a misdirection."

The trial judge duly pointed out the defence of alibi to the jury and directed them to consider the weight of the unsworn statement, as he was required to do. The judgment of the Privy Council in ***Mills et al v. R.*** (supra) was followed. The trial judge dealt fairly and adequately with the applicant's defence. This ground of appeal also fails.

Ground eleven reads:

> "**11.** The learned trial judge erred in law, or alternatively, misdirected the jury and seriously prejudiced the applicant's defence in directing the jury as follows:
>
> > 'However, you must note that the contents of those statements, those previous statements, are not part of the evidence in this trial, since she has not told you that those parts of the statements that conflict with her evidence are true'."

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the truth to be considered at the trial. Certainly, if the previous statements were accepted by the witness as the truth, then it would be evidence in the trial on which the jury could act. This was an accurate statement of the law and a proper direction. There is no merit in this ground.

Ground twelve complains that:

> "**12.** The learned trial judge misdirected the jury and seriously prejudiced the applicant's defence by directing the jury as follows:
>
> > **(a)** 'You will remember she told you that the men come towards the bed to about the middle section of it and stood in a semi-circle.'
> >
> > **(b)** 'She said she remained in bed she was looking at the faces of the men as by the demonstration she gave they were standing in a semi-circle in front about an arm's length from her.'
> >
> > **(c)** 'She told you that she was awakened by the slap on her leg. She sat up...'
>
> The above directions misrepresented the evidence and, arguendo, influenced the jury, to the applicant's detriment, on the live issue of identification. The cumulative effect of the aforesaid misdirection went to the essence of the prosecution's case and are fatal."

The trial judge's directions concerning the position of the men in a "semi-circle" is a reference to a demonstration given in court by the witness Bernard and which the jury saw; this cannot, therefore, be viewed as a misdirection.

The statement "she sat up", may well be seen as an incorrect interpretation of the witness Bernard's evidence that she "...jumped out of sleep."

The trial judge did direct the jury that:

> "If I appear to have a view of the evidence or of the facts with which you do not agree, do not hesitate to reject my view. If I mention, rehearse or stress evidence that you regard as unimportant, disregard that evidence. On the other hand, if I do not mention evidence that you consider important, follow your own view and take that evidence into account."

We are of the view that this general direction cured any inaccurate opinion of the evidence expressed by the trial judge.

For the above reasons, the application for leave to appeal in respect of each applicant is granted. The hearing is treated as the hearing of the appeals. The appeal of each appellant is dismissed.