JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 90/89

COR: THE HON. MR. JUSTICE CAREY, P. (AG.)
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA

VS.

TREVOR WALKER

Berthan Macaulay Q.C., Earl Witter and Lowell Marcus for Applicant

Lloyd Hibbert - Deputy Director of Public Prosecutions for Crown

October 1, 2, 3, 4, and December 20, 1991

CAREY P. (AG):

On the 31st of May 1989 in the Home Circuit Court before Courtney Orr J. (Ag.) and a jury, after a trial which had begun on 6th May, the applicant was convicted of the murder of Hopeton Jackson, a police constable, and sentenced to death. He now applies for leave to appeal that conviction.

Despite the voluminous size of the record comprising some 957 pages of typed foolscap-sized paper, the facts can be stated quite shortly. On the night of 30th May 1987 at about 7:10 p.m., two police officers, Constables Jeremiah Bryant and Hopeton Jackson, were escorting a prisoner to the Olympic Gardens Police Station. The escorts were both armed with hand-guns. The prisoner and Constable Bryant (the sole eye-witness to the crime) walked ahead of the victim, Constable Jackson. Two men approached

them, one of whom was known to the witness as "Jelly" and the other, he recognized as a person whom he had seen on occasions previously in that area. It was suggested that this other man was this applicant. They went towards Constable Jackson who was bringing up the rear. He was heard to exclaim: "Police, a who you bwoy?" When Constable Bryant looked around, "Jelly" was trying to hug the officer who pushed him away. Constable Jackson pulled his firearm where upon the other man intervened, pulled a gun from his waist and fired. Constable Jackson fell. The assailants made off as did the erstwhile prisoner. The witness, Constable Bryant, discharged his firearm in their direction. He made haste to the police station and then, accompanied by Det. Sergeant Thompson, he returned to the scene in an unmarked police car. They used that vehicle to convey their stricken colleague to the Kingston Public Hospital. While there, a blue pick-up van drove into the car-park but immediately drove off. The driver of that van was one Valance James who gave evidence on behalf of the prosecution. He related that on that night at about 8:15 p.m. he was requested by a man named "Jelly" to convey an injured man to the hospital. He collected the injured man at Beatrice Crescent (which is in the vicinity of the shooting). At some point in the journey, the injured man left the rear of the van where he had been placed and came to sit in the cab. The driver parked beside the police car but was required by the injured man to be taken to the P.N.P. Headquarters. He complied and there he left the injured man. He did not ever identify his passenger. The police took him into custody at some time during their investigations presumably in the belief that he knew the injured man and in an endeavour to get him to reveal his identity but released him subsequently.

Det. Sgt. Thompson and Constable Bryant subsequently visited the University Hospital where an injured man was seen lying on a stretcher in the Casualty Department. Constable Bryant pointed him out to his superior as the man who had shot Constable Jackson. That man was the applicant. His response to the accusation was: "Is a man fling a shot 'pan (him) at Seaward Drive." This road, it was explained, is approximately one mile from the scene of the shooting.

The police investigator recovered from the locus in quo - fragments of concrete pavement and a stone which were seen in the driveway of premises at Beatrice Crescent. On that material the Government Analyst found blood in the group A.B. The injured man, this applicant, coincidentially belonged to this blood group.

The prosecution case depended therefore on the visual identification evidence of Constable Bryant and the circumstantial evidence which we have isolated as supporting their case. For completion, we add that a doctor gave evidence confirming that the applicant was at the P.N.P. Headquarters where he examined him to find gun-shot wounds to the chest, being an entrance and an exit wound. He took the injured man to the University Hospital. So far as the slain officer was concerned, the pathologist found an entrance wound just under the left armpit. This wound which was circular, measured ¼" in diameter and was surrounded by denuded margins and powder burns. These burns suggested that the weapon was fired from close range.

The defence was a denial of the charge. The applicant in an unsworn statement, stated that at about 8:00 p.m. he left his home for a bingo party on Coconut Crescent. While there, a black-out took place which prompted his departure. As he walked along a darkened roadway, he saw a group of young men, one of whom shouted: "See P.N.P. boy Trevor deh." He was then shot through his chest but managed to run off. He fell on Coconut Crescent. He was taken in a

pick up to the Kingston Public Hospital by "some youth" who directed that he be taken to the P.N.P. Headquarters because Labourites (i.e. adherents to the J.L.P.) would kill him there.

He called two witnesses in support. First was Thelma Brown, who testified that there had been a black-out on the night that Constable Jackson was shot. She had assisted the police officers who came for him by providing them with a lamp. She also told the Court that there was no lighting fixtures on the side or the roof of her house. Electricity had been disconnected from her house. The other witness was Gloria Lewin. On the night in question, she heard a gun shot. She was then in the area where the offence was committed. She saw a man emerging from the other witness' premises with what appeared to be a firearm in his hand. She chased after this man with five other "youth" but the unknown gunman was too quick for them and escaped. On the way back, she took a path through Thelma Brown's back gate and stumbled against something. It was the fallen constable's body which she was able to discern after she had struck a match. She confirmed the police borrowing a lamp from Miss Brown and taking away their colleague.

Mr. Witter who is undoubtedly an indefatigable and energetic worker produced 14 grounds of appeal. We feel obliged to deal with all by reason of the nature of the charge against the applicant, despite the fact that some are wholly unmeritorious. Moreover we propose to follow the order in which he and Mr. Macaulay argued them before us. We desire to say that counsel has a duty to the Court only to file those grounds which he feels confident are arguable and he should resist the temptation merely to comb the transcript fishing around for every trivial error or seeming error either in the judge's recital of the facts or his directions in law. See R. v. B. R. v. H. [1966] 3 All E.R. 496. The latter approach is hardly advantageous to the interests of his client.

Ground 2:

> "That the learned trial judge erred in law in failing to warn the jury of the dangers of acting on the uncorroborated evidence of the witness VALANCE JAMES on the basis that the Prosecution led evidence from which the jury may reasonably have inferred that he was an accomplice vel non (accessory after the fact)."

Mr. Witter identified for our benefit the evidence which, he contended, should have induced the trial judge to leave the issue of accomplice vel non to the jury in that he was an accessory after the fact:

(i) The witness conveyed the applicant to the Kingston Public Hospital at the request of "Jelly" a participant in the murder.

(ii) He took him from there to the P.N.P. Headquarters.

(iii) He washed the blood of the injured man from his pick-up, and

(iv) He made no report to the police prior to the police interviewing him.

In our view, the facts listed at (i) and (ii) prove that the witness acted the part of a good Samaritan. He had carried out an act of charity, a humanitarian gesture calling for praise not blame or slander we would have thought. The items marked (iii) and (iv) are innocuous. We are not aware of any legal obligation on the part of a citizen to report that he has taken an injured man to hospital and Mr. Witter did not essay any such argument. Seeing then, that there was absolutely no evidence that the witness knew or ought to have known that the injured man (i.e. the applicant) had committed the crime of murder, the trial judge cannot be criticized. Mr. Witter acknowledged that this was not his best point. Plainly it was without any vestige of merit.

Ground 3:

> "That the learned trial judge erred in law in failing to give appropriate warnings to the jury on how to approach and treat the evidence of the witnesses VALANCE JAMES and CONSTABLE JEREMIAH BRYANT on the basis that the jury might reasonably have inferred that they were persons with an interest to serve or whose evidence was tainted by an improper motive."

There is no rule of law that where a person may be regarded as having some purpose of his own to serve, a warning against acting on uncorroborated evidence should be given. See R. v. Stannard & Ors., 48 Cr. App. R. 81. It is true to say that unless there is some basis to show that a witness comes within the category of an accomplice, there is no obligation on a trial judge to give a jury the warning as to accomplices. A warning to approach with caution the evidence of a witness in respect of whom it could be said that he had some improper motive, may in some cases be desirable. In R. v. Beck [1982] 1 All E.R. 807 Ackner L.J. at p. 813 speaking for the Court of Appeal Criminal Division in England said this:

> "While we in no way wish to detract from the obligation on a judge to advise a jury to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an improper motive, and the strength of that advice must vary according to the facts of the case, we cannot accept that there is any obligation to give the accomplice warning with all that entails, when it is common ground that there is no basis for suggesting that the witness is a participant or in any way involved in the crime the subject matter of the trial."

We endeavoured, in vain, to elicit from Mr. Witter the material on which he was contending that the special warning was called for in respect of the two witnesses Valance James and Constable Bryant. He contented himself by asserting that with respect to James, his interest was to avoid arrest on a charge of being an accomplice i.e. an accessory after the fact. With respect to Constable Bryant's interest, that he said could be derived from

his statement that he was determined that someone should be punished for his colleague's death. Plainly, neither of these witnesses were accomplices. We dealt with the charge that James qualified as an accessory after the fact and do not propose to reiterate what we have already said. It is sufficient to say that Mr. Witter was not so bold to ascribe that label to the police eye-witness.

The warning required to be given in respect of visual identification evidence was necessary in so far as the eye-witness Constable Bryant was concerned but that is dealt with in another ground. We are satisfied, in relation to this ground of appeal, that there was no material whatever which would have justified any warning as to acting on accomplice evidence. Further, there was in our view, no material that either of the witnesses' evidence was tainted by an improper motive. We would have thought that any well thinking citizen would wish to see a perpetrator of a crime punished. Indeed that is the aim of justice. The witness did not say nor could it be fairly inferred from his answer that he subscribed to the view: "If you can't ketch Quaco, you ketch him shut." With respect to James, Mr. Witter submitted that he was beaten by the police to confess so as to avoid arrest. But he was arrested by the police and released. If he was beaten and confessed, his confession was that he had performed an act of kindness. We do not think this ground has any substance.

Ground 4:

> "(i) That the learned trial judge misdirected the jury, to the grave prejudice of the Defence, as to how to evaluate the evidence of a witness who had made a material previous inconsistent statement. In <u>particular</u> he failed to direct them (which in the circumstances of the case was highly necessary) that where a witness swore that such a statement was true that it then became evidence upon which the jury could act. Moreover, the learned trial judge wrongly directed the jury that they should put the contents of such statements 'out of (their) minds(s).' (See pp. 877-9)."

"(ii) That the learned trial judge failed, and in so doing erred in law, to give the jury any or any proper or appropriate directions on how to treat contradictions and discrepancies between the evidence of witnesses, whether on direct evidence or arising inferentially. In particular the learned judge failed to direct the jury that such contradictions and discrepancies, if fundamental in nature, were or could be sufficient bases upon which to reject the whole of the evidence of the witnesses concerned."

The directions of the learned trial judge which prompted this complaint appear at p. 877 of the Record. We set them out:

"Now, in most trial it is always possible to find inconsistencies and or contradictions in the evidence of witnesses, especially when the facts about which they speak are not of recent occurrence. They may be slight or serious, material or immaterial. If they are slight, you will probably think they do not really affect the credit of the witness or witnesses concerned. On the other hand, if they are serious, you may say that because of them it would not be safe to believe the witness or witnesses on that point at all, but it is a matter for you to say, in examining the evidence, whether they are such and if so, whether they are slight or serious, bearing in mind the principles above."

At pp. 878 and 879 he said this:

"Now, where a witness is shown to have made a previous statement inconsistent with his statement made here in court at the trial, the previous statement or statements, whether sworn or unsworn, do not constitute evidence on which you act. In other words, if a witness says at the preliminary examination in Half Way Tree, 'the accused was wearing a white shirt' and he comes here at the trial and says he was wearing a red shirt, you can't say that he was wearing a white shirt. So, when you find that a witness says two different things in that sort of situation, you will have to look at the evidence carefully and decide your mind as to that witness's credibility as to how much you can rely on that witness on that point."

> "Now, in this case there have been quite a number of instances where it has been shown that a witness said something elsewhere, and something here at the trial. It is my duty to tell you where you find that a witness has previously made a statement which is inconsistent with evidence given here in court, two things, first is that the statement which was put to him is not in any way part of the evidence at this trial. You must put its content out of your mind when you consider the evidence. Second is the fact that the witness had previously made a statement inconsistent with his evidence, if you so find, it is a matter which you can take into account in considering his credibility as a witness. Later on I will go through the evidence and remind you of the evidence given."

We think there is a typographical omission of one word "or" from those directions. It occurs in the seventh line of the extract from p. 877: "On the other hand, if they are serious, you may say that because of them it would not be safe to believe the witness or witnesses on that point at all." The missing word should be inserted after the word "point" and before "at all". Thus read, it makes sense. In the context in which it appears in the Record, "at all" is meaningless. And we are reinforced in our view that this may well be an error on the part of the Court Reporter because later in his summation, in applying this principle enunciated in these directions to a discrepancy which he helpfully identified for the jury, he made the point that the discrepancy if considered material might incline the jury to disbelieve the witness entirely. At page 920, he expressed himself as follows:

> "Now, that is an instance where the witness had said something other than. Ask yourself whether he is a deliberate liar and as a result you can't trust any of his evidence or whether you think he was trying to pretty up that part of the case. Or whether he has forgotten or what."

We call attention to the penultimate sentence in the final paragraph of second extract where he says:

> "Second is the fact that the witness had previously made a statement inconsistent with his evidence, if you so find, it is a matter which you can take into account in considering his credibility as a witness."

[Emphasis supplied]

The words "credibility as a witness" make it tolerably clear that the reference to credibility is total, that is, not just on the point of the discrepancy.

We cannot therefore agree with the submission that the direction on this point was wrong in law. In the extract given in this judgment, it is true the trial judge did not go on to say - if, of course, the witness admits the truth of the previous statement, it then becomes evidence in the case for their consideration. We note that on one occasion when he came to deal with a situation where the witness did admit the truth of the previous statement, he said this at p. 932:

> "He is saying both things are true. Matter for you, Members of the Jury. You bear in mind the directions I told you about."

'Matter for you' does imply that the matter is for their consideration. To that extent, it could not be said he was withdrawing the matter from their consideration. He also reminded them of the directions he had earlier given. We were concerned to see if a reasonable juror might have been confused by the directions. In the end, although we have come to the conclusion that it would have been preferable for the trial judge to state definitively that where the witness admits the truth of the previous statement, it becomes part of the evidence in the case, we do not think they could have been confused by what he did say. But to ensure that there was no prejudice to the applicant we go on to consider those previous inconsistent

statements which the witness admitted to be the truth and which were brought to our attention by Mr. Witter:

> (a) Constable Bryant gave evidence at the trial that he had fired at the left side of the applicant and Jelly (pp. 266-272).
>
> At a previous trial, he said that he had fired at their fleeing backs.

The trial judge extracted this discrepancy in the evidence and reminded the jury of its existence. He left them to consider as a matter of fact whether the discrepancy was slight or material and according to which they determined it to be, to reject the witness' testimony on that point or generally. The location of the actual site of the injury to the applicant would not seem to affect any important issue in the case. The questions put related to what part of the assailant's body the witness saw when he fired. The question for the jury was the identification of the man who participated in the shooting of the constable. Was that person hit by a police bullet? The applicant admitted he was shot but in his unsworn statement related an incident, wholly unconnected with the offence charged. We do not think that the jury could have been misled or confused when they were asked to consider the two statements. These statements are not diametrically opposed one to the other. The jury would be entitled to regard the variation as of little or no significance in the scheme of things.

> (b) related to the time during which the same witness observed the backs of the two fleeing men.

Before the jury at the trial, the witness Constable Bryant said that it was true that for some time during the incident he was not seeing the backs of these men. He admitted that he had made a previous statement to the contrary and that was true.

In dealing with this example (among others) the trial judge said at p. 934:

> "Mr. Foreman and members of the jury, you decide which you regard as serious and which you regard as slight, or rather how you look at them."

Identification of the actual killer was of course the crucial question. The question of the opportunity for observing his face was important. If a greater time was spent observing a departing back, less time would have been available for scrutinizing a face. The evidence given by this officer as to the duration of his observation of the killer suggested a relatively short time. We are doubtful that this over-subtle cross-examination in any way altered the fact that the period was a short one. We take the view that the directions had no prejudicial effect whatever as they could in no way confuse a reasonably intelligent jury.

(c) This next illustration related to evidence which in the event the witness Constable Bryant stated was true when it was brought to his attention and he had refreshed his memory. He was asked the following questions at p. 278 and replied as shown:

> "Q: ... look at the document that the registrar is going to show you. Did you look at the document the registrar has shown you? Having seen that document do you still say you cannot recall having said before:
>
> 'Whilst I was at the hospital I saw a pick-up van drove up behind the police car'?
>
> A: No.
>
> ...
>
> Q: When you said that was it true?
>
> A: Yes."

But this was not a situation where the witness had given evidence at the trial which was inconsistent with an earlier statement. The witness was really refreshing his memory. Any direction as to inconsistencies and discrepancies would be inapplicable and of course the previous statement accepted by the witness to be true was a matter for the jury to consider.

(d) The last example provided by Mr. Witter is in relation to evidence given by the same police officer as to the time he had seen the blue Transit van arrive at the Kingston Public Hospital. He had stated at trial that the vehicle arrived at 8:10 p.m. and at a previous hearing that it had driven up at 10:00 p.m. He admitted also that his previous statement that the time was 8:10 p.m. was true. He explained the variance on the ground that there could have been a lapse of memory.

The real question for the jury was whether a van which had arrived at the Kingston Public Hospital after the shooting and as hurriedly departed was the same van of which Sergeant Thompson had spoken and of which also Valance James had spoken. There was little room for doubt that an injured man had been taken to the hospital after the shooting. The probable time for its arrival would be 8:00 p.m. rather than 10:00 p.m. But at all events the jury had been told how to deal with discrepancies. If they considered it material, they could use it in relation to the witness' credit. If it were not material, they could ignore it. What they were not told as they should, is that they could use the first statement as evidence in the case. We do not think that failure could be prejudicial seeing that it could properly be used in the case. This is not a situation akin to R. v. Golder, R. v. Jones, R. v. Porritt [1960] 3 All E.R. 457 for there the trial judge plainly indicated to the jury that it was open to them to act on a previous statement which the witness had repudiated.

(e) We do not intend to deal with this final example given by Mr. Witter in support of this ground and which deals with the meaning of "close range". First, it is of absolutely no importance in the case whether an injury caused when a firearm is discharged beyond 24" to 30" from the site can be considered close range or not. Secondly, we are unable to discover any discrepancy in this regard when Dr. Clifford, the pathologist, swore that a previous statement was true, viz. that close range meant between 3" to 12".

Ground 5:

> "That the learned trial judge misdirected the jury and otherwise, did not afford them any or any proper guidance as to how only, they could draw reasonable inferences. It is respectfully submitted that the learned judge's neoteric formulation on the question was confusing and/or incapable of practical application. (see pp. 876, 894 and 948)."

Ground 6:

> "That the learned trial judge failed to give any or any adequate directions to the jury on the most important question of circumstantial evidence. In particular, the failure to relate to the line of approach to, and the evaluation of, this type of evidence. It is respectfully submitted that such directions as purported to address the matter were confusing and one-sided and tended to puff up the Prosecution's case. (See pp. 876, 898, 899, 912, 925-6 and 948-950)."

It is convenient to deal with these grounds together seeing that they deal essentially with the same matter. The neoteric formulation of the trial judge which Mr. Witter urged upon us as confusing or unhelpful appears at p. 876. The trial judge is recorded as saying:

> "It is open to you also, members of the jury, to draw reasonable inferences from such facts as you find proved. Now if from any given set of facts more than one reasonable inferences can be drawn, you as judges of the facts must decide which inference you will draw, having regard to the totality of the evidence that you accept, and please note this Mr. Foreman and members of the jury, there is no rule

> "of law that where you may draw more than one inference you must draw the inference which is in favour of the accused, there is no such law. It does not accord with commonsense. What you do is to draw the inference that you think is more reasonable, having regard to all the circumstances of the case."

We mean no disrespect to Mr. Witter but we gathered from his submissions that by omitting to use the word "inescapable" anywhere in the directions we have cited, there was a misdirection on the judge's part or at all events, no guidance was given by him. Counsel disavowed any suggestion that he was advocating a formulistic approach to summings-up so that if certain rituals were ignored, the Court should hold directions bad. A summing-up as Viscount Hailsham L.C. said: "should be custom-built to make the jury understand their task in relation to a particular case" - D.P.P. v. Stonehouse [1977] 3 W.L.R. 143 at p. 161. Consistent with that obligation to make the jury understand their task, the trial judge was obliged to point out to them that not only were they entitled to find direct facts but they were entitled as well to find other facts the existence of which they could infer from those facts. He explained that where the inferences which could be drawn were more than one, the jury should draw that which on the totality of the evidence, seemed the more reasonable. It would seem to us that if the jury were prompted to draw the more reasonable inference having regard to all the circumstances, they would be drawing an inescapable inference.

His directions at p. 676 must be read in conjunction with those at p. 948 where he directed the jury on the following terms:

> "... Because, Mr. Foreman and Members of the Jury, you are entitled to draw inferences from such facts as you find, and if those inferences from the facts that you find point in the direction conclusively than is the accused, and if you feel sure that it points in that direction and not in another direction, then you may convict the accused."

In these later directions, the trial judge makes it as clear as crystal that the inferences which they drew from the facts they find, must point in one direction, and one direction only, and if in the direction of guilt and provided they were satisfied so they felt sure they pointed only towards the guilt of the accused, then guilt could be found. The directions were even respectful of Hodge's case which this Court has pointed out in R. v. Bailey 23 W.I.R. 393 following R. v. Clarice Elliott 6 J.L.R. 173 is binding on us. In our view the trial judge did not leave the directions in the realms of a "universally applicable definition" but brought the directions home to the jury. For example at p. 894 in applying his directions on inferences, he said this:

> "So what the prosecution is asking you to infer is that neither the gun of Constable Jackson nor Constable Bryant is responsible for Constable Jackson's death. You remember Mr. Marcus was saying yesterday, sideway shot and may be it's Constable Bryant. He didn't even suggest it to Bryant as far as I remember, but Sergeant Thompson wasn't Constable Bryant under investigation. Now this evidence, if you accept, which shows that Constable Jackson was not killed by Constable Bryant using either his own gun or the gun of Constable Jackson. You remember I told you to decide this case on the evidence which you have heard. So that is the significance of the Superintendent's evidence. Both guns were in good firing condition and could fire and the gun, neither gun could accommodate the bullet which killed Constable Jackson."

We do not find the trial judge's directions whether as to inferences or circumstantial evidence, esoteric nor confusing but rather, custom-built, to enable the jury to discharge their task. In our view, the jury could not be even remotely confused.

Ground 6:

> "That the learned trial judge erred in law in failing to give the jury proper or adequate directions on how to assess the evidence of expert witnesses. In Particular:

"(a) the learned judge's undue emphasis on the attributes of training, qualification, experience and supposed skill may well have given the jury the misguided impression that they (the said attributes) were the only essential criteria by which to assess expert evidence or to judge the discharge of an expert's duty to the Court, and

(b) in confining his directions on the importance of a witness' demeanour to the issue of visual identification evidence, the learned judge did not sufficiently alert the jury to the relevance of this question as regards the prosecution's expert witnesses (mainly Dr. Royston Clifford) who, in the result, the jury may well have come to regard as oracles. (See pp. 883-4 and 911)."

We were not altogether clear what was the thrust of the complaint. We were advised by Mr. Witter that the vice in the trial judge's directions lay in his omission to state that the pathologist should provide the criteria he employed in arriving at his conclusion. This explanation regrettably has made us none the wiser. He referred us to Lord Abinger v. Ashton [1872] L.R. Eq. Cas. 358 and observations of Lord Jessell M.R. regarding his distrust of expert evidence. The relevance of all this to the ground of appeal is really difficult if not impossible to appreciate.

The next submission was that the trial judge's directions emphasized the skill of the expert over his demeanour. He maintained that the jury may have felt that demeanour need not be taken into account generally and particularly with respect to expert witness.

The trial judge gave what we would describe as the standard directions with respect to expert witnesses in the extract cited hereunder (from pp. 883-884):

"... I will tell you a little about expert witnesses. As a general rule a witness can only give evidence of facts within his knowledge. You will notice that from time to time I have stopped certain questions because I had ruled that that particular witness could only speak from what somebody told him. So, as a general rule a witness can only give evidence of facts

> "that he knows from himself, that is, things he had seen or heard. But it is permissible, however, for a person who is skilled by a course of special study or experience in a particular subject to give evidence of his opinion on matters related to that subject and based on facts already proved, and you may take that opinion into consideration in arriving at a decision. Such a person is called an expert. And you heard evidence from Dr. Clifford about his study and his experience and about how many dead bodies he has performed post mortem examinations on.
>
> Mrs. Cruickshank told you about her various degrees and how many years she was working in forensic laboratory. Superintendent Linton told you about his various studies and so on. That was to form the basis on which you will decide whether their opinion is one which you will accept. You are not bound to accept the evidence of an expert. He or she is just another witness and his evidence or his opinion may be rejected if you are satisfied that the witness is not properly qualified to express an opinion. Or if for any reason you do not agree with the opinion the expert has expressed. If you are satisfied that he has the necessary skill and experience to express an opinion, you will give due consideration to that opinion, though you are not obliged to accept it."

The jury were given a clear definition of an expert that cannot be faulted. They were not told that experts were oracles. On the contrary, the jury were told in terms that:

> "(i) they were not bound to accept the evidence for the reasons he stated, and
>
> (ii) they were just like any other witness.

It would seem to us logically to follow from the statement that the credit of such witnesses was of importance - as was necessarily the case, with other non-expert witnesses. Both types of witnesses were to be treated in the same way. At pp. 912-913 in dealing with a non-expert, he said:

> "Now, in considering the evidence of identification, you don't only consider the actual words of the witnesses but you consider the way in which the witness gave his evidence, his demeanour, how he answered questions, or hesitated to answer and this sort of thing."

There is, in our opinion, no substance in this ground which therefore fails.

Ground 7:

> "That the defence of the Applicant was not fairly or adequately put or left to the jury by the learned trial judge (particularly as regards the issue of alibi in respect of which there were misdirections and non-directions amounting to misdirections) whereby the Applicant was deprived of a fair chance of acquittal."

This ground rested on Mr. Witter's assertion that the trial judge did not tell the jury that there is a burden on the prosecution to disprove the defence of alibi beyond a reasonable doubt. We set it out to dismiss it. The burden and indeed the only burden on the prosecution is to prove its case so the jury feel sure of the guilt of an accused. The trial judge gave correct directions on the burden of proof. If they do so, they would have disproved the defence of alibi or any other defence raised. This was a thoroughly bad point and we desire to say only that the defence of alibi was clearly and adequately put to the jury.

Ground 13:

> "That taken as a whole, the learned trial judge's directions to the jury on the burden of proof in a criminal case, were inadequate."

We were informed by Mr. Witter that this ground was incorporated in the grounds dealing with the defence of alibi (ground 7) and circumstantial evidence (ground 6). He submitted that the directions were insufficient to bring home to the jury that the prosecution's case looked at globally or in terms of individual constituents had to make them feel sure of the guilt of the [redacted].

In our view the trial judge in adverting the jury's attention to the prosecution view put the matter in its true perspective at p. 948 which we have quoted earlier in this judgment; and do not intend to repeat. That would but prolong this judgment and achieve little : See p. 15 where it appears. Mr. Witter informed us during his presentation that Mr. Macaulay Q.C. would expand on this ground but when Mr. Macaulay Q.C. did attend before us he was gracious enough to say that the ground should be withdrawn. We took the view that we should not heed such a late recantation. We have therefore dealt with it, lest it be thought that applications for leave to appeal are disposed of, summarily or in a cavalier manner. We think the ground is without substance but suspect that this was intended to demorstrate counsel's thoroughness in the performance of his functions as counsel for the applicant.

Ground 12:

> "The learned trial judge erred in law, to the prejudice of the Applicant, in pre-termitting cross-examination by Defence Counsel of Prosecution witnesses, for example on the basis that the evidence of one witness may not be put to another. It is submitted that Counsel's object, in this instance, of drawing the witnesses' attention to matters in respect of which it was proposed to impeach their credit and to afford them an opportunity for explanation, was entirely permissible."

The references to the trial judge's ruling against defence counsel being allowed to comment on another witness' evidence occurred on two occasions. At pp. 503-504, the first exchange was as follows:

> " Q: Did you see any form of lighting, well, there is no verandah there, wouldn't be any lighting on the verandah. In other words, some-one told this court, and I will be very ...

"HIS LORDSHIP: Mr., it's not proper to put the testimony of one witness to another. At the proper time you can draw the inferences to the jury.

MR. MARCUS: I am indeed obliged, sir."

The second at p. 537:

"Q: Sergeant, Valin James has said ...

CROWN COUNSEL: One moment, may I remind my learned friend about reminding one witness' evidence of another.

MR. MARCUS: I wish to get the recollection of the witness to that.

HIS LORDSHIP: Mr. Marcus?

MR. MARCUS: All right, m'lud. I will go by your ruling."

For the proposition that this procedure was entirely proper, Mr. Witter cited R. v. Delroy Grant (1971) 12 J.L.R. 390. In that case, the question was whether it was improper for the defence to put forward their defence for the first time in the accused's unsworn statement and not to put such of the defence to the prosecution witnesses who could give their reaction to the jury to such part as affected them. This Court relied on Browne v. Dunn (1894) 6 R. 67 H.L. in which Lord Herschell L.C. said at pp. 70-71:

> "Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to

> "argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses."

Nothing in that statement allows the views or opinions of one witness' evidence to be canvassed by questions put to another witness under cross-examination. It is the law that any matter upon which it is proposed to contradict the evidence-in-chief given by a witness must, generally speaking, be put to him so that he may have an opportunity of explaining the contradiction and that in our view, is what Browne v. Dunn (supra) decided. We think the observations of Lord Hewart C.J. as to the propriety of certain questions often put by counsel in cross-examination are relevant and merit reminding. They are to be found in R. v. Baldwin 18 Cr. App. R. 175 at pp. 178-179:

> "... One so often hears questions put to witnesses by counsel which are really of the nature of an invitation to an argument. You have, for instance, such questions as this: 'I suggest to you that ...' or 'Is your evidence to be taken as suggesting that ...?' If the witness were a prudent person he would say, with the highest degree of politeness: 'What you suggest is no business of mine. I am not here to make any suggestions at all. I am here only to answer relevant questions. What the conclusions to be drawn from my answers are is not for me, and as for suggestions, I venture to leave those to others.' An answer of that kind, no doubt, requires a good deal of sense and self-restraint and experience, and the mischief of it is, if made, it might very well prejudice the witness with the jury, because the jury, not being aware of the consequences to which such questions might lead, might easily come to the conclusion (and it might be true) that the witness had something to conceal. It is right to remember in all such cases that the witness in the box is an amateur and the counsel who is asking questions is, as a rule, a professional conductor of argument, and it is not right that the wits of the one should be pitted against the wits of the other in the field of suggestion and controversy. What is wanted from the witness is answers to questions of fact.

> "One even hears questions such as: 'Do you ask the jury then to believe ...?' The witness may very well reply: 'I am asking the jury nothing; my business is to tell whatever is relevant that I know and that I am asked to tell, and therefore my answer to your question and to all such questions is 'No, I do not'.' But in practice, both in civil cases and in criminal cases, one finds this line of cross-examination employed. It is a mischievous line and it is never more mischievous than when it has the effect of inducing a witness, inadvertently or, it may be, even in a mood of irritation, to make the kind of attack that, under s. 1 of the statute, lets in certain other evidence which, but for that attack, would not be let in. These matters are not to be ignored by counsel who appear for the prosecution. They are equally not to be ignored by counsel who appear for the defence, because so often questions are asked which are ingeniously calculated up to the very last point to be consistent with abstinence from putting the defendant's character in issue, while undoubtedly the probable, as it is the intended, effect of those questions is to exhibit the man to the jury as a person of good character. Counsel for the defence should refrain from such questions for prudential reasons. Counsel for the prosecution should refrain from them for reasons of fairness, because the Crown has no interest whatever in securing a conviction. Its sole interest is to convict the right man."

If, as the learned Lord Chief Justice indicated, the witness is required to answer questions of fact, then the evidence of another witness being put to the witness under cross-examination is not to elicit any answer of fact, but rather an opinion or comment. In our judgment, the question is impermissible and should never be allowed. We have no hesitation in saying that the ruling of the trial judge was eminently right and we would add, was accepted as such, by counsel who appeared at the trial. This ground too must fail.

Ground 14:

> "That the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, not least in the sense that the said verdict is, on the whole, having regard to everything that took place at the trial, unsatisfactory."

When Mr. Witter came to argue this ground, we had the sense of faint or little enthusiasm on his part for the task. He was content to point to what he described as:

(1) The conflicts between the testimony of Det. Sergeant Thompson on the prosecution side and Thelma Brown on the defence side as to the lighting conditions available for identification at the time of the murder.

(2) The conflict in the circumstances surrounding the arrival of the Transit van at the Kingston Public Hospital.

(3) The conflict in the number of trips made to the hospital as between Constable Bryant and Sergeant Thompson.

With respect to the evidence of the lighting at or about the time of the murder, Constable Bryant spoke of lights in yards and from nearby houses (p. 26). Specifically there was an eave light from a nearby house or shack and lights from houses nearby.

On the other side Thelma Brown testified that the injured officer was removed from her yard. She said there were no electric lights in that house, nor was there any light on the side or roof of the house. Furthermore, she said that there was a black-out at the material time.

This was a stark conflict of fact which the jury were called upon to resolve, and that depended on the creditworthiness of each witness. Both police officers spoke of lights and denied any black-out at the material time. Thelma Brown says she obtained a lamp to enable the police to retrieve their fallen comrade. This formed no part of the police version of events that night. We would have thought that if it were the fact that there was a black-out, the police would have been bound to carry flashlights to enable them to see their colleague's condition after they had alighted from their police vehicle. We have

little doubt that the respective versions would have been dealt with extensively by defence counsel before the jury who would have had the benefit of the arguments. We have no basis whatever for thinking that the jury could have had any difficulty in resolving this matter.

This leads us to discuss the identification evidence in its entirety. The visual identification evidence came from Constable Jeremiah Bryant who was subjected to a prolonged, tedious, tendentious and repetitious cross-examination. The evidence which he gave notwithstanding the conduct of counsel amounted to this. There was street lighting from a distance and an eave-light closer to the shooting. The applicant and "Jelly" would have had to pass close by Constable Bryant to attack the other escort. At the time the officer was observing the grappling behind him, the assailants were four to five feet distant. He was able to see the applicant's face for three to five minutes in total. The applicant was not entirely a stranger to him although it could never be said that he knew the applicant over any significant period nor had he seen him with any frequency. This evidence could not however, we think, be characterized as weak so as to justify the trial judge acceding to a no case submission or, on his own motion, withdrawing the case as is mandated by the decision of R. v. Turnbull [1976] 3 All E.R. 549.

Mr. Witter also pointed to the circumstances stated by Constable Bryant as to the arrival of the blue Transit van at the Kingston Public Hospital. With all respect to counsel, we have not been able to appreciate the importance of this matter. Other witnesses spoke to the arrival of the vehicle at the hospital, viz. Sergant Thompson, Valance James and the fact was corroborated by the applicant.

Finally he said that there was evidence given by Constable Bryant regarding the number of trips he made to the hospital. Again we are not attracted by this argument. The question for the jury

was whether this officer had seen a blue Transit van enter the hospital premises and as precipitately depart. There was ample evidence in support thereof. Neither cumulatively nor individually can any of these points affect the verdict.

As this ground deals as well with "everything that took place", we think it right to consider the trial itself. There was a ground filed relating to the trial judge's conduct of the trial which counsel prudently abandoned. It is abundantly clear to us that both counsel below but particularly Mr. Witter embarked on a deliberate and calculated course of time wasting by frivolous objections, prolonged and prolix cross-examination and grave discourtesy to the Court. The learned judge adjourned on many occasions to have a talk with counsel to see whether counsel would conduct themselves in a more seeming manner, but to little avail. It was plain that the trial judge was loathe to invoke his powers to punish for Contempt of Court having regard to the nature of the case. It was a thoroughly unbecoming and demeaning performance on the part of defence counsel. It unduly prolonged the trial and could not have been calculated to enhance the jury's appreciation of the real issues to be determined by them. The facts of the case were mercifully short however, and uncomplicated. We think that the trial judge acted perfectly, fairly and correctly in suggesting to the jury that they should not visit the sins of the applicant's attorneys on their client. At p. 885 he issued the following caveat:

> "Now, you will recall earlier during the trial I have criticised the conduct of both Mr. Witter firstly and later Mr. Marcus. That is my right. But I must urge you that even if you disapprove of the way the lawyers for the accused man have behaved, you must not fry him in their fat. You must not hold it against the accused. You must base your verdict not on how you feel towards anybody but purely on the law which I give you and on the evidence which you have heard, the facts which you find having applied the law I give you."

These were wise words and very necessary having regard to the course of the trial.

Mr. Macaulay Q.C. having abandoned ground 10 argued the remaining grounds viz., 1, 9 and 11 which contained some arguable points. They were argued together. In the first ground, criticism was directed at the trial judge's directions as to visual identification. Specifically it was said that they were inadequate in the following particulars:

They:

"(a) did not sufficiently adhere to the guidelines laid down in R. Turnbull & Ors. (1977) 1 QB 224, R. v. Oliver Whylie, (1978) 25 WIR 430 and R. v. Junior Reid & Ors. (1989) 3 WLR;

(b) did not analyse the evidence in the case and relate it to the guidelines and/or issues fairly arising on the evidence; nor did he identify and attach due significance to the material weaknesses in the relevant evidence, and

(c) the analogies given were, in the circumstances of the case, unlikely sufficiently to have assisted the jury in appreciating the dangers of acting on this type of evidence."

Ground 9:

"(a) The learned trial judge erred in law by admitting the documentary evidence concerning Questions and Answers allegedly put and given by the Applicant.

(b) In the alternative, the learned judge was in breach of the memory refreshing rule by admitting oral evidence (which is assumed for the purpose of this ground) from the prosecution witness, Sergeant Ivanhoe Thompson, concerning Questions and Answers put to and given by Applicant in the absence of any request by him to refresh his memory from the documented Questions and Answers.

(c) The learned trial judge substantially directed the jury to consider evidence in 9(a) above, along with other evidence given at the trial in order to support the identification of the applicant. This direction brought into relief, the inadmissible evidence and gave it prominence. The result was that it could not be said that

> "improper admission of such evidence, where the rest of evidence was merely circumstantial, did not probably turn the scale against the Applicant."

Ground 11 challenged the judge's ruling that there was a case to answer.

Mr. Macaulay Q.C. contended that there were three aspects to the Crown's case to be considered, viz. (i) the nature of the identification evidence, (ii) the evidence of the similarity in blood-grouping between the applicant's and that found on material recovered from the area of the shooting and (iii) the document with the questions and answers administered to the applicant.

We have already considered the identification evidence of the sole eye-witness and need say nothing further to that which we have already stated. We would add that there was other evidence in the case which supported the visual identification evidence. There was evidence of the events at the hospital regarding the Transit van. That van was traced to the P.N.P. Headquarters where the injured man with a gunshot wound was examined by a doctor. Then it reached the Univesity Hospital where the injured man was identified by the eye-witness as the applicant. The matching blood-grouping of applicant and the material on which blood was spilled were circumstantial evidence, which with other factors could lead to the conclusion that the injured applicant bled at the scene of the shooting and thus put him on the scene. Taken by itself, each piece of evidence pointed nowhere specifically but that is the nature of circumstantial evidence. It is the cumulative effect of the evidence which gives it cogency.

As to the document containing the questions and answers, Mr. Macaulay said its admission was questionable, because it was not the best evidence. There were, he said, special rules governing unsigned documents. He put his argument in this way: if such a document is to be used to the prejudice of an accused person, evidence must be led that he acknowledged the record. Such an acknowledgement

is necessary where the document does not bear a signature. There was he said no sufficient acknowledgement of the document [Exhibit 16] because the acknowledgement must be external and subsequent to the completion of the prepared document. He relied on Driscoll v. The Queen, 137 C.L.R. 517.

In our opinion that case does not support the submissions put forward. Gibbs J. who gave the leading judgment at p. 541 said this:

> "Although as a matter of law a document is admissible against an accused person who has adopted it, that does not seem to me to be the end of the matter. It has long been established that the judge presiding at a criminal trial has a discretion to exclude evidence if the strict rules of admissibility would operate unfairly against the accused. The exercise of this discretion is particularly called for if the evidence has little or no weight, but may be gravely prejudicial to the accused. See, e.g. R. v. Christie [1914] A.C. 545, at p. 560; Noor Mohamed v. The King [1952] A.C. 694, at p. 707; Harris v. Director of Public Prosecutions [1952] A.C. 694, at p. 707; and Kuruma v. The Queen [1955] A.C. 197, at p. 204."

The learned judge went on to consider the question of the exercise of the judge's discretion in the case of unsigned records. It was not suggested in that judgment that the document was inadmissible because it was unsigned. It is admissible if acknowledged or adopted subject to the ordinary discretion of the trial judge to exclude evidence if it would operate unfairly against an accused. That is the law in Australia, in England and in this country - see R. v. Sang [1980] A.C. 402. At p. 489 of the Record, the applicant made an acknowledgement of the contents of the document. Det. Sergeant Thompson read over the contents to the applicant who was told that he could alter or correct anything he wished. Then the evidence continued:

> "He was asked to sign the questions and answers and was asked by the questioner if it were correctly recorded, he said yes. Sergeant Thompson requested Walker

> "to sign the document, he said 'no boss, me nah sign nutting.' The foregoing questions were recorded by me in the presence of Senior Superintendent Hibbert and Detective Inspector Small."

Having acknowledged the contents as correct, we are at a loss to understand what it was which rendered the acknowledgement insufficient. The same evidence could have been given orally with the witness having a sight of the document to refresh his memory.

Mr. Hibbert, the Deputy Director of Public Prosecutions pointed out, correctly, that the Judges' Rules make allowance for unsigned Questions and Answers in Rule IV. Paragraph (f) of this rule, provides as follows:

> "If the person who has made a statement refuses to read it or to write the above mentioned Certificate at the end of it or to sign it, the senior police officer present shall record on the statement itself and in the presence of the person making it, what has happened. If the person making the statement cannot read, or refuses to read it, the officer who has taken it down shall read it over to him and ask him whether he would like to correct, alter or add anything and to put his signature or make his mark at the end. The police officer shall then certify on the statement itself what he has done."

In our opinion the rule was not breached in any manner and the trial judge was entitled in the exercise of his discretion to admit the document.

The value of his cautioned statement was that it placed him in the area of the shooting, placed him in the Transit van which conveyed him to the Kingston Public Hospital, the P.N.P. Headquarters and University Hospital. It therefore confirmed testimony of witnesses for the prosecution. From what we have said thus far, it is plain that there was evidence fit to be left for the consideration of the jury.

In this connection there is one matter which we should mention. There was evidence that Constable Bryant pointed out the applicant at the University Hospital as the man who had shot his colleague. The trial judge characterized that identification as "not the best, it's improper." We doubt very much that there are many judges who would view this identification in that light. It seems to us perfectly reasonable and sensible for the police promptly to check hospitals to see if an injured man had sought medical assistance. We would regard this as efficient police investigation, and hardly a cause for pejorative comments as were in fact made. Howsoever that may be, it cannot be prayed in aid by the defence seeing that any such remarks were in their favour.

This leads us naturally to consider the criticism levelled at the directions on visual identification as set out in ground 1. This can best be done by quoting from the summing-up. In the prefatory stages (at p. 879) the trial judge identified the crucial issue in this case:

> ".... And as counsel have told you, in this case the real issue, the live issue is, was it this man who murdered Constable Jackson."

Then at p. 882, he underlines the issue:

> "Now, Mr. Foreman and Members of the Jury, the real issue here is identity, is this the man. For on the evidence which you have heard to my mind there is no question of self-defence, no question of provocation, so the real issue is it this man or somebody else. So, we have to look in some detail at the whole circumstances, evidence of light, evidence of opportunity to view him and so on, to see the person who killed, so that you can then decide whether it's this man or not."

At pp. 914-915 the trial judge gave the appropriate warning in terms of R. v. Whylie (supra); R. v. Turnbull (supra); Junior Reid v. R. (supra):

> "In this case, the question of identification of the accused is a very live issue. I must warn you, therefore, Mr. Foreman, Members of the Jury, and I am doing so now, that you approach the evidence of identification with the utmost caution. It is always the possibility that a single witness might be mistaken or even several witnesses, in this case you have a single witness giving positive identification. A mistake is no less a mistake if it is made honestly. In all that its the experience of human beings that many honest people are quick to admit their mistakes as soon as they become aware of them, it's also possible that a perfectly honest witness who makes positive identification may be mistaken and not be aware of his mistake. So what matters here is the quality of the evidence. And, Mr. Foreman and Members of the Jury, in order to determine the quality and cogency of the identification; you should have full regard to all the circumstances surrounding the identification."

Between pp. 915-924 he discussed with the jury the questions of opportunity of viewing the assailant by Constable Bryant, the lighting, the physical conditions existing at the time. He put it this way:

> "Now, you have to consider firstly the opportunity to which the witness Constable Bryant had of viewing the person. Secondly, was the person known to him before the date of the shooting. And if so, for what period and in what circumstances. Thirdly, physical condition existing at the time of the viewing of the criminal as to the place, light, distance, obstruction, if any etc., any special peculiarities or any special reason for remembering him, lapse of time between the date of the crime and the time of identification, condition under which identification was made, and any special weaknesses in the identification evidence. And also any other evidence which can support the identification evidence."

He discussed after p. 924 - "The other evidence supporting identification." In our view, the learned trial judge approached his task fully cognizant that identification evidence fell into a special genre and required especially careful treatment. He carried

out his task with admirable clarity and thoroughness. All the factors suggested in R. v. Whylie (supra) and R. v. Turnbull (supra) received his attention. He gave graphic personal experiences which we think, clearly focussed the jury's attention on the possibility of mistake even by honest witnesses. It should be noted that from the tenor of the cross-examination of the eye-witness, it was being suggested that he was honestly mistaken. We did not think it was being suggested that the witness was deliberately lying. The omissions suggested in the ground of appeal are wholly misconceived. We do not think that the summing-up can be faulted on the basis of any of the matters raised in ground 1.

Before parting with this case we would call attention to some expressions of Sir John Megaw which we venture to think might in future be helpful to counsel in relation to the conduct of appeals.

> "Both counsel presented their respective arguments, I thought, with complete fairness, admirable clarity, thoroughness without prolixity, and with firm resistance of any temptation to take bad points or to overstress the significance of marginal points," per Sir John Megaw in Guilfoyle v. Home Office [1981] 1 All E.R. 943 at p. 948.

We have demonstrated that there was no merit in any of the fourteen grounds of appeal. In the result, the application for leave to appeal is refused.