JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 133/04

BEFORE THE HON MR JUSTICE PANTON, J.A.
THE HON MR JUSTICE KARL HARRISON, J.A.
THE HON MRS JUSTICE HARRIS J.A.

OVANDO ANDERSON V R

Lord Gifford, Q.C. & Thalia Maragh for the appellant

Mrs. Caroline Williamson Hay, Asst. Director of Public Prosecutions (Ag.) and Mr.Vaughan Smith, Asst. Crown Counsel (Ag.), for the Crown

March 7, 8, July 31, and November 8, 2006

HARRIS, J.A:

On July 31, 2006 we made the following order in this matter:

"The application for leave to appeal is granted. The hearing of the application is treated as the hearing of the appeal. The appeal is dismissed. Conviction and sentence are affirmed. The sentence is to commence from September 25, 2004".

The appellant was convicted on June 26, 2004 in the Circuit Court for the parish of Hanover for the non-capital murder of Gregory Daniels. He was jointly charged with one Mark Campbell for capital murder of the deceased. Campbell pleaded guilty to manslaughter and was sentenced

to a term of 20 years imprisonment. A term of imprisonment for life was imposed on the appellant with the recommendation that he may not become eligible for parole until he has served 30 years.

On August 22, 2003 the deceased was killed at his home in Eaton District and his body was found in the vicinity of his gate. He was gagged and his hands bound behind his back by shoelace. He sustained multiple injuries over his body which were consistent with being inflicted by a machete.

Four panes of louvre blades of a window at the back of the house were torn out leaving a space large enough to accommodate an adult. The drawers of a dresser in the master bedroom were found on the floor and the room was in disarray.

The appellant was taken into custody on August 25, 2003 released and taken back into custody on September 5, 2003 on which date Campbell and himself were arrested.

It was the prosecution's case that the appellant together with Mark Campbell and another man called "Official," killed the deceased. The main witnesses for the prosecution were Miss Lucinda Washington, the common-law wife of the deceased and Mark Campbell, the co-accused.

The evidence of Miss Washington was that the appellant was known to her. He worked as a gardener for the deceased and assisted in doing some construction work on their house. She first met him in 2000. She

worked in Bermuda but would see him infrequently, on her visits to Jamaica. She had never held a conversation with him but had spoken to him by way of a cursory greeting.

On the evening of the incident, she was sitting on a balcony at the back of her home awaiting the return of the deceased, who had gone to close the gate after a male and a female visitor had driven off. They left in a white car. It was getting dark. The lights on the outer area of the house were on. Between fifteen and twenty minutes elapsed when two men came to the side of the house, and stood on a tank in the yard, about eight to ten feet away. One of these men, without shirt, clad in a pair of "cut jeans " and wearing a cap, asked for the deceased. Miss Washington told him he had gone to lock the gate. He repeated the question and she gave him the same response. She viewed his face for about thirty seconds.

As she responded, the man walked towards the step and suddenly leapt upon it. A dog which was lying at the top of the step stood up. The man retreated and went back to the other man who was dressed in a baggy shirt and dark pants with a cap pulled over his face. The shirtless man ran back towards the porch where Miss Washington and her granddaughter were. They both ran inside the kitchen, followed by the dog. She tried to lock the kitchen door but experiencing some difficulty in so doing, stood behind it and braced it.

Soon after the kitchen door was kicked repeatedly and the kitchen window chopped. Following this, she, along with her granddaughter, ran to the bathroom and locked themselves in. While there, someone said, " Where is the money dem?" Her response was that it was in a locked drawer in the bedroom and she did not have the key. Soon after, she heard commotion in the house. Thereafter, the bathroom window was chopped and someone said that he would be coming back to kill her.

About ten to twelve minutes later, she ran to her neighbour's house. He was not there. She returned home, got into a pick up, drove to the police station and made a report. On her way back from the police station she noticed a car behind her which was being driven by the brother of the appellant. She stopped, got into his car and went back to the police station. On her way there, she saw the appellant who entered the car and accompanied them there. He kept looking back and forth. At that time, he was dressed in a maroon coloured top and dark pants. Upon returning home, she discovered that a sum in excess of US$ 4,000.00 as well as cameras, jewellery, a cellular telephone and a silver box relating to the television were missing.

It was Campbell's evidence that sometime between twelve noon and one o'clock in the afternoon of the day of the incident, he accompanied someone whom he knew by the name of Official to Official's home in Lucea. There, Official introduced the appellant to him

as "Flour." Official cooked a meal of which all three men partook. They spent the afternoon "reasoning about some business" and remained there until about 6 p.m. At that time, the appellant announced that they were going on some business and directed Official that he should take a machete with him. He carried out the instruction.

Official was dressed in a pair of black pants with his shirt tied around his waist. The appellant was clad in a blue T shirt, blue jeans pants and a pair of sneakers. He, Campbell was dressed in a brown shirt and blue jeans pants.

All three men proceeded to the home of the deceased, first, walking on the main road and later through some bushes. On arrival there, on the appellant's instruction, they stooped behind the columns at the gate. By this time it was dark. The appellant told them that he intended to deal with some business in the deceased's yard. Campbell inquired of Official the nature of the business. He told him "weed business". While hiding behind the column he, Campbell, observed the deceased, a man and a woman standing beside a white car. The man and woman left in the car and the deceased came to close the gate. The appellant walked over to him, pointed a gun at his head and told Official to remove the deceased's shoe laces, use them to tie his hands behind his back and his merino to tie his mouth. This was done by Official.

He, Campbell, asked the appellant not to kill the deceased but the appellant told him that it was none of his business and went on to say, "the man dis me long time." The deceased told the appellant that he had brought his friends to kill him. The appellant pushed the gun in his waist, took the machete from Official and gave the deceased several chops. He fell to the ground. While on the ground, on the directive of the appellant, Official gave the deceased two chops.

They then went to the back of the house. A blue pick up was there by which two dogs were standing, one of which the appellant called by name. All three men stood beside the pickup. A lady and a child were standing on the verandah. The appellant ran on the verandah, the lady retreated into the house with the child and a dog. Thereafter, the appellant kicked the door several times and chopped out window blades. He then went through the window, opened the door and invited Official and Campbell to enter the house.

The lady was in the bathroom screaming and the appellant asked her where was the money. She told him it was in the centre drawer. Official began to search the house. The appellant kicked open a drawer and took from it United States dollars from which he gave him $6000. He also took a camera and a "dish receiver." They left the house and walked back to Lucea. The appellant gave him some money and the camera and under threat forbade him to tell anyone about the matter.

Later that night he saw the appellant at the "Clipper" dressed in the same clothes which he was wearing when they went to the home of the deceased.

He told others about the incident but did not tell the police because he was scared. He made a report to the police on September 4, and gave a statement to them on September 5, 2003. The appellant and himself were arrested and charged on September 5. At the end of the Crown's case the attorney-at-law for the appellant made a 'no case' submission. To this the learned trial judge did not accede.

In an unsworn statement, the appellant denied knowing Campbell or that he participated in the killing of the deceased. He declared that on the day of the incident he had first gone to Savanna La Mar. On his return, he went to visit his girlfriend. He then went back to Lucea and while he was in a taxi, he saw his brother. He got out of the taxi and went into his brother's car in which he saw Miss Washington and her granddaughter. They all went to the police station. Thereafter he went to Eaton. The police came. He then went to his father's house, then to his girlfriend's house, after which he learnt of the deceased's death. This the jury rejected.

Reliance was placed on four supplemental grounds of appeal. It is convenient to consider grounds 1 and 2 simultaneously.

Ground 1

> "That the learned trial judge erred in law in not accepting the submission of no case to answer made on behalf of the Appellant, since the testimony of the witness Mark Campbell who alone implicated the Appellant, taken in the context of the rest of the prosecution evidence, was such that a jury properly directed could not properly have convicted."

Ground 2

> "The learned trial judge erred in failing to give any or any adequate warning as to the dangers inherent in a dock identification"

Lord Gifford, Q.C., argued that the witnesses had been discredited, in particular Mark Campbell, as, his evidence was self contradictory devoid of reason and common sense. It was his further submission that he was the only person who implicated the appellant, and on analysis of the discrepancies in his evidence and those of Miss Washington, it was incumbent on the trial judge to have withdrawn the case from the jury.

A trial judge has an inherent power and duty to withdraw a case from the jury if he is of the opinion that the evidence of a witness or witnesses is thoroughly discredited rendering reliance on it nugatory. However, such power should only be exercised in circumstances where there is no evidence upon which a prima facie case has been made out. A judge ought only to withdraw a case from the jury if there is no

evidence upon which, a reasonable jury properly directed could properly convict ***R v Galbraith*** [1981] 2 All ER 1060.

Where there is sufficient evidence to justify a case being left to the jury, then, it is for them to determine the weight to be attached to such evidence even if the trial judge is of the opinion that inconsistencies in the evidence would be unsupportive of a conviction. Prior to the advent of ***Galbraith,*** Lord Widgery C.J., in ***R v Barker*** (1975) 65 Cr. App R 287 at 288 Lord Widgery C.J. said :

> "Even if the judge has taken the view that the evidence could not support the conviction because of inconsistencies, he should nevertheless have left the matter to the jury. It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury"

The Court of Appeal in ***Galbraith's*** case expressed their approval of the view expressed by Lord Widgery in ***Barker's*** case. Although ***Galbraith*** is very well known, it is apt to allude to the facts of that case, as, it is one in which conflicts and weaknesses in the evidence touching the issue of the identification of the appellant were overwhelming, yet, his conviction was upheld.

The appellant, Galbraith was among several persons in a club when a fight started. His defence was that although he was in the club, he was not in the area of the fracas. Three witnesses were called by the prosecution. The first attended an identification parade but failed to point out the appellant notwithstanding that he had given the police a description that matched the appellant. Under cross examination, the second witness who testified that he could have been mistaken, was treated as hostile. The third witness stated that the appellant was not the little guy he had seen near the affray. There was evidence that the witnesses had agreed to change their testimonies. The trial judge having left the case to the jury, the appellant was convicted. The appeal was dismissed notwithstanding the blatant and obvious weaknesses in the prosecution's case.

In outlining the principles governing the approach to be adopted by a trial judge with respect to the withdrawal of a case from the jury, Lord Lane C.J. at page 1062, declared:

> "How then should the judge approach a submission of "no case" (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed

> could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

Lord Gifford, Q.C., further argued that in light of ***R v Shippey*** 1988 Cr. LR 767, ***Galbraith*** is applicable. In ***Shippey's*** case, it was held that taking the prosecution's case at its highest does not mean that regardless of the state of the evidence if there is some evidence to support the charge, then it is enough to leave the matter to the jury. ***Shippey*** was charged with rape. The evidence given by the complainant was fraught with inherent weaknesses. There were "significant inherent inconsistencies" in her evidence which were "striking" and "wholly inconsistent with the allegation of rape." The trial judge upheld a submission of "no case."

Galbraith's case establishes that a case ought not to be withdrawn from the jury merely because it is the opinion of a trial judge that the main prosecution witnesses may be lying. If he does, he would be usurping the jury's function. He should only withdraw the case if, in his view, on the evidence presented, no reasonable jury could find that the witnesses are credible. In ***Shippey,*** the manifest contradictions in the complainant's evidence dictate that the judge would have been bound to have

withdrawn the case from the jury, as, no reasonable jury, on proper directions, would have convicted the accused.

In a case which admits of discrepancies and inconsistencies, it is incumbent on a trial judge, to point out to the jury, the fact that discrepancies and inconsistencies exist in the evidence and direct them as to the manner in which they ought to be treated. However, he does not have to bring to their attention every discrepancy or inconsistency. Once there is sufficient evidence on which a reasonable jury could make a determination on the reliability of witnesses, then they ought to be accorded the opportunity of deliberating on the case.

Before embarking on an analysis of the evidence, the learned trial judge dealt with discrepancies and inconsistencies, in some detail, by clearly pointing out to the jury the nature of discrepancies and inconsistencies. He directed them as to the manner in which they should deal with them. The matter of drawing of inferences was also addressed by him. There can be no doubt the jury would have appreciated how to treat discrepancies and inconsistencies.

It was further contended by Lord Gifford, Q.C., that it was impossible for the jury to have reconciled Miss Washington's evidence with that of Campbell's as to how many persons were present at the home of the deceased that evening. He argued that Miss Washington said she saw two persons while Campbell asserted that three were present.

This discrepancy was brought to the jury's attention by the learned trial judge. Miss Washington indicated that she had seen two men come to the back of the house and stood on the tank. Campbell said there were three of them standing at the back of the house by the pick up when he saw the lady (Miss Washington), a child, and a dog on the porch. It was for the jury to say whom they believed or whether they found the reconciliation of this conflict in the evidence of the witnesses incomprehensible or unfathomable.

Lord Gifford, Q.C., sought to reinforce his submissions by asserting that the appellant was well known to Miss Washington yet she did not identify him as that person who had advanced towards her while she was on the porch.

In dealing with this aspect of evidence, the learned trial judge said at pages 327 and 328 of the record:

> "But he went on, Mr. Reynolds, to say that what Mark Campbell said in relation to what transpired at the entrance of the house, the person went up the stairs, is so different from what Miss Lucinda Washington has said, that it is a serious thing and as a result, you must not, you cannot believe Campbell. It is a matter for you whether that is a slight or a serious thing and I have told you how you deal with the slight discrepancy or the serious discrepancy. A matter for you, Mr. Foreman and your members."

Then at pages 353 and 354 he stated:

> "Now, what Defence Counsel is saying now, this lady had known the accused man before that

> day. We are going to look at the evidence more closely. She had known him for approximately two years albeit she had never had any prolonged conversation with him. He would come there as an employee and he would tend the garden. She was in the habit of sending money remittances to him to run the house. I suppose her husband wouldn't be there, I don't know. But, the fact is that she knew him and, this is it, a few minutes after the men came there, he is there. She is seeing him and she is making no complaint. She is making no complaint. In addition, what the Defence is saying, if one accepts the testimony of Mr. Mark Campbell, this is the man that she would have seen. The accused man is the man, if one understands his testimony properly, who would have gone up the stairs. Why is it then she did not recognize him? Is he wrong on that point? Is he wrong on that point? Is he that intelligent - because remember she did not see all the persons who were there. We are going to look at the rest of her evidence and I think this is very important. She was only able proper to see one of those persons. The prosecution is saying that he must be one of the other men, one of the other two men other than the man who came up and, if that is so, the witness on whom they rely, Mark Campbell, is not to be accepted on that point. It is a matter for you, Mr. Foreman and your members."

The learned trial judge did not only give directions but also highlighted submissions presented by the defence relating to this discrepancy about which Lord Gifford, Q.C., complains. Campbell said that the appellant was wearing a shirt and jeans but Official was shirtless. Miss Washington's evidence reveals that the man who rushed on the step was shirtless. The person who went up the step retreated when the dog

stood up. The dogs were accustomed to the appellant. It would therefore be for the jury in evaluating this portion of the evidence, to determine who went up the steps. They could have very well concluded that if it were the appellant who had approached Miss Washington, she would have recognized him, he being known to the dogs, would not have retreated when the dog stood up.

A further complaint of Lord Gifford, Q.C., was that after Miss Washington made the report to the police, she saw the appellant on the night of the incident dressed in maroon top and dark pants, while Campbell said he was wearing blue shirt and a pair of jeans at the time of the incident and when he had seen him later that night at the "Clipper". This, he submitted, prompted the prosecutor to venture into the realm of speculation to which comment the learned trial judge asked: "He changed it and changed back?"

The question was asked by the learned trial judge with reference to the prosecutor's suggestion that the appellant could have changed his clothes. His inquiry is not capable of being prejudicial to the appellant, as, it was asked by the learned trial judge during the course of the presentation of the " no case" submission, obviously, during the absence of the jury.

In cross-examination Campbell was asked whether in a cautioned statement, he had told the police that he had seen the appellant run up

the step with a machete, the lady (Miss Washington), asked him where he was going and after asking him for the "ras" (the deceased), he told her that he was dead. Miss Washington, Lord Gifford, Q.C., contended, made no reference to such conversation. When pressed by defence counsel Campbell admitted that he had made the statement. His initial response was to deny that the appellant was involved in this conversation with Miss Washington but later claimed that he did not remember whether this was so. This is a matter to which the jury would have given consideration in evaluating his credibility.

It was also Lord Gifford's, Q.C., contention that the appellant denied knowing Campbell and an identification parade ought to have been held as a safeguard to ensure that the appellant was the man Campbell had seen at the time of the incident, the appellant being identified for the first time in the dock.

In light of the inherent danger of miscarriage of justice, evidence of visual identification must be approached with scrupulous care. The often cited and well known case of ***R v Turnbull*** [1976] 3 All E R 549 establishes the general guidelines to which a trial judge should adhere in dealing with cases of visual identification.

In ***Turnbull,*** Lord Widgery C.J, at pages 551 and 552, said:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be

> mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words."
>
> "Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? ... Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence."

He continued by saying:

> "All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened, but the poorer the quality, the greater the danger."

At page 553 he remarked:

> "When it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other

> evidence which goes to support the correctness of the identification."

He further said:

> "The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification."

In support of his complaint, Lord Gifford, Q.C., referred to the cases of ***R v Reid, Dennis and Whylie*** and ***R v Reece, Taylor and Quelch v R*** (1989) 37 WIR 346. In those cases there was failure to follow the ***Turnbull*** guidelines, the convictions of the appellants resulted in significant miscarriage of justice and the appeals were allowed. The case under review is distinguishable. In this case the learned trial judge, in compliance with the ***Turnbull*** principles, gave the jury the appropriate warning of caution before conviction. He outlined to them the opportunities which Campbell had to observe the appellant. He also addressed the question of Miss Washington's viewing of that person who went on the step. He did not fail to emphasize the risk of the witnesses being mistaken He also highlighted the fact that an honest as well as an apparently honest and convincing witness is susceptible to error.

The present case is one in which the correctness of the identification of the appellant was paramount. Where the identity of an accused is disputed, the reliability of the evidence is within the province of the jury while its adequacy is within the jurisdiction of the trial judge.

See ***R v Daley*** (1993) 43 W.I.R. 325. The learned trial judge recognized that the issue of the identification of the appellant was to large extent crucial to the Crown's case. He ruled that the evidence of identification could have been addressed by resorting to the ***Turnbull*** guidelines and called upon the appellant to answer the case.

It was further argued by Lord Gifford, Q.C., that the learned trial judge failed to give adequate or other warning to the jury as to the danger of the unsupported dock identification of the appellant as this required careful warning and the case ought to have been stopped. In support of his contention, he cited the cases of ***R v Thomas, Hanson and Bailey*** (1978) 15 JLR 264, ***R v Cartwright*** (supra) [1914] 10 Cr. App R 219 and ***R v Gregory Johnson*** SCCA (unreported) delivered June 3, 1996.

In the case of ***Thomas Hanson and Bailey***, the appellants Thomas and Bailey were known to the witness prior to the commission of a murder for which all three men were convicted. Hanson was not previously known to him. The witness gave no recognizable description of the participants in the murder. The appellants were pointed out by him at the trial. General directions relating to identification evidence were given by the trial judge, however, the requisite warning as to dock identification was not given with respect to Hanson. On appeal, it was held that dock identification required careful and positive directions from the trial judge

and in relation to Hanson he failed so to do, which warranted setting aside the conviction.

The cases of ***R v Cartwright*** (supra) and ***R v Johnson*** (supra) also speak to the undesirability of a witness being invited to identify an accused in the dock. Cartwright's conviction was upheld notwithstanding a dock identification, as, there was independent compelling evidence in support of his identification.

In ***R v Johnson*** (supra) the appeal was allowed, as, the lapse of time between the witness sighting the appellant and the murder, the period of time between the sighting and the dock identification and the failure to hold an identification parade rendered the evidence of identification unacceptable.

Dock identification has always been regarded as distasteful. This mode of identification has repeatedly been recognized as unsatisfactory. In ***R v Hunter*** (1986) Crim. L.R. 262 Davis L.J said "such method of identification should be avoided if possible" Salmon L. J., in ***R v Horwick*** (1970) Crim. L. R. 403, said:

> "It is usually unfair to ask a witness to make an identification for the first time in court because it is so easy for the witness to point out the defendant in the dock."

Such evidence is suspect where the accused is unknown to the witness and there is no previous identification of the accused.

A distinction must be drawn between the cases of ***R v Thomas et al*** (supra), ***R v Cartwright*** (supra) and ***R v Johnson*** (supra) and the case under consideration. In the present case, the learned trial judge did not treat the identification of the appellant by Campbell as one in which the witness had the opportunity of observing the appellant for the first time in court. It would have been manifestly irregular if the appellant was being identified in the dock for the first time. This is not so in this case. It is patently clear from the evidence that although Campbell had not known the appellant before the date of the incident, he had ample opportunity of having a close, extended, unimpeded view of him, as, they spent the entire afternoon eating, smoking and communicating. Immediately thereafter, they journeyed together to the home of the deceased.

However, in cases of visual identification, the holding of an identification parade is desirable. Where an identification parade is not held, a jury must be warned of the dangers of identification without a parade and the possible advantage inuring to an accused should the parade prove inconclusive ***R V Graham*** (1994) Crim. Law R 212 C.A. The right to hold a parade is not only required in cases of disputed identity as stated in ***R v Palmer*** (1994) 98 Cr. App. Rep. 191 but also where "such a dispute may reasonably be anticipated" See ***R v Graham*** (supra).

In the instant case, it does not appear that an identification parade could have been held. Campbell was a suspect in this case. A report was made by him to the police on September 4, 2003 and he had given a written statement to them on September 5, 2003. The appellant was taken back into custody on that date. Campbell was also in custody then. He saw the appellant at the police station, in a room where questions and answers were being administered with respect to the appellant, who would have been exposed to him at that time. In the circumstances, the integrity of an identification parade would have been impugned.

The foregoing notwithstanding, Campbell was a witness and the learned trial judge ought to have explained to the jury not only the inherent danger in the failure to hold an identification parade but also the reason for the non observance of holding the parade and inform them of the potential benefit accruing to the appellant should the parade prove inconclusive. He should also have directed them that failure so to do was in breach of the requisite procedure testing the witness's ability to identify the appellant. This he omitted to do. Although this was not done, it is reasonable to conclude that the identification of the appellant in the dock by Campbell would not have operated on the minds of the jury adversely. The omission would not have amounted to a miscarriage of justice, vitiating the conviction.

At the end of the prosecution's case, the evidence on which the Crown essentially relied was that of Campbell. Although Miss Washington's evidence was of some assistance, she was not a witness to the murder but Campbell was not only a witness to but also a participant in the killing of the deceased. The question therefore, before the learned trial judge would be whether the evidence of Campbell and Miss Washington, taken at its highest, if accepted by a reasonable jury, properly directed, was capable of belief.

We have examined the various discrepancies arising from the evidence and are of the opinion that the learned trial judge brought to the jury's attention the major ones. We are of the view that the incongruities were not so inundating that it would have been unsafe for him to have permitted the jury to deliberate on the evidence. The discrepancies were clearly matters for them to consider on the totality of the evidence as the learned trial judge rightly told them. He pointed out matters affecting the credibility of the witnesses. The jury was in the best position to assess the reliability of the evidence adduced from Miss Washington and Campbell, rejecting such evidence which they wished to reject and accepting such as they found proved. These grounds fail.

Ground 3

> "The learned trial judge erred in his summing up in his treatment of the evidence of Mark Campbell, in that (a) emphasized to the jury on divers occasions that his evidence was supported by other evidence; (b) suggested that he had

> no reason to lie; and thereby nullified or weakened the force of his direction as to the evidence of an accomplice, and/or diverted the jury from the real issue, namely whether Mark Campbell as a principal actor in the murder was seeking to improve his position by falsely accusing the Appellant of the crime."

Lord Gifford, Q.C., although acknowledging that the learned trial judge gave warning about convicting on the evidence of an accomplice as well as directions that there was no corroborative evidence , contended that Campbell had an interest to serve and the warning was undermined by suggestions not only that he had no reason to lie on the appellant but also that his evidence was corroborated by other evidence, in particular, that of Miss Washington.

It is indisputable that a party who is a participator in a crime in which a defendant is also accused and is called as a witness, has an interest of his own to serve. A jury in the circumstances, must be directed to treat the evidence of an accomplice with utmost caution in view of the fact that it originates from an accomplice who has an interest to serve and that such evidence could possibly be detrimental to the co-accused. See ***R v Knowlden & Knowlden*** [1983] 77 Cr. App. Rep. 94 and ***R v Cheema*** [1994] 98 Cr. App. Rep. page 195. A trial judge, in instructing the jury on the evaluation of the evidence, should tell them of the desirability for corroboration, identify the evidence capable of corroboration and if there is no such evidence, so advise them ***R v B (M T)*** 2000 Crim. L.R. CLR 181. What is required is a careful warning by a trial judge on the evidence

of an accomplice and the potential fallibility of that witness should be put fairly to the jury ***Chan Wai-Keung*** [1995] 2 Cr. App. R. 194 (P.C.).

The learned trial judge at various points of his summation, gave very strong directions in relation to the evidence of accomplice.

At pages 351 and 352 he remarked:

> "Now, there was a strange bit of evidence because you will recall that Mr. Campbell had said that they used the machete to chop the drawer. Now, I don't know, it is a matter for you, she is saying that the drawer was locked and she did not have the key. "I don't have the key." So is that the way that access was gained? This is how you make these connections, if you think that makes sense, to see whether, in fact, what weight you can place on Campbell's evidence, if any. Because remember, and I am going to look at his evidence closely, that he may very well have reasons, as an accomplice in this matter, for giving false testimony in this case because we are going to look at that."

At page 360 he said:

> "Now, you heard Mr. Campbell said that he went along with the two other men to these premises and he was, up to a certain point, acting with them. He said they were going there on weed business, according to him. So that makes him an accomplice and I give you this direction in law as to how you treat the testimony of an accomplice. There may be all sorts of reasons for an accomplice to tell lies and to implicate other people. So it is dangerous to convict in reliance on the evidence of an accomplice unless it is corroborated. But, if you bear in mind that danger, you may convict in reliance on the uncorroborated evidence if you are, nevertheless, convinced that the accomplice is telling the truth, you are convinced that he is

> speaking the truth, Mr. Mark Campbell, and you bear in mind the warning that I gave you, that he may have all sorts of reason to tell lie. What the Prosecution is saying about this reason to tell lie? You haven't heard them suggest to him any reason, well, bad feelings or whatever."

He continued at page 361 by saying:

> "Now, I told you that it is dangerous to convict in reliance on the evidence of an accomplice unless it is corroborated. What is corroboration? Corroboration, a big word, means simply independent evidence, that is, evidence which does not come from Mark Campbell which confirms in some material particular not only the evidence that the crime has been committed, but also the evidence that the defendant committed it, and there is no such corroboration in this case. There is no such corroborative evidence in this case. So that is the evidence we are going to look at now, Mark Campbell. As I told you, the Prosecution's case - this is a crucial witness and the Prosecution's case rests or falls on his testimony."

Certain comments were made by the learned trial judge in the course of his summation which Lord Gifford, Q.C., characterized as suggestions by him to the jury that Campbell had no reason to lie, thereby implying that there was evidence to support his credibility.

At page 341 the learned trial judge stated:

> "What the Prosecution has said is, you must use your common sense and your experience. Why would Campbell, a man he had never seen before, select, the accused? Why would he do that? Is he mistaken? Or is he just wicked? Because Defence Counsel is telling you, you know, the suggestions that have been put here is, Campbell as a youngster, a young man at

> school got into altercations with persons whom he said were bullying him; tussle, and, unfortunately, this is something which is happening with greater frequency in our schools these days."

At page 346 he said:

> "Now, what the prosecution is saying, is that when you compare the evidence of Mark Campbell, you test his credibility by certain things that happened, because remember he said when we come to look at his evidence again, that he noticed this white car and there were persons there. You look at it to see if he saw this or is he making it up and to what extent you can rely on him. She said she didn't know the make of the car but it was a white car and the car, to exit the land - the house is on the hill side and the car travelled down."

He went on to say at page 348:

> "You remember again, the evidence of Mark Campbell – and we are going to look at it. This accused man gave himself an Official directive to go to one column of the gate and he stood on the other side. What the prosecution is saying, this level of detail, does it show that it happened or is it again something that he has made up. It is a matter for you, Mr. Foreman and your members."

At page 370 he said:

> " Flour went to the back of the house he turned to 'Official' and say is him run di yard, he knows everything about the yard. "I saw a blue pick-up in the yard." Another thing Crown counsel said, how would he know that? How would he know of 'Flower's connection with this place. Did you hear any suggestion that anybody coached him? But then, remember what I say about accomplice? You know, you have to be carefull, (sic) you can't

> read the mind and say why he did it. An accomplice can tell lies for all sort of reasons. So you assess the matter in that way. It's a matter for you, Mr. Foreman and your members."

The foregoing comments cannot be construed as the learned trial judge's expression of his view of the evidence. The context in which they were made was clearly with reference to submissions made by counsel for the Crown.

A considerable part of the learned trial judge's summation was devoted to the evaluation of the cross examination and submission of defence counsel as to the vulnerability of Campbell's evidence in his role of an accomplice. He impressed upon the jury the need for caution and the desirability of corroboration emphasizing that there was no corroboration. He repeatedly admonished the jury to consider whether Campbell was speaking the truth or had manufactured evidence to lie on the appellant. In addition, he specifically reminded them of a submission of counsel for the defence that Campbell had on a previous occasion been convicted for the offence of manslaughter and because of discrepancies in his evidence, it would be dangerous to convict on it. He impressed upon them the fact that Campbell's evidence could have been fabricated, he being an accomplice.

There can be no doubt that the learned trial judge's charge to the jury was in terms of their taking into consideration that, as an accomplice, the witness Campbell may have lied on the appellant. No fault can be

attributed to him as imposing any prejudicial view of the evidence to influence the jury to draw favourable conclusions in support of Campbell's credibility. We are of the view that he dealt fairly with the evidence.

It was a further submission of Lord Gifford that Campbell would have been advised that by his entry of a plea of guilty to manslaughter and giving evidence for the Crown, he would secure a lighter sentence, which, would have given him reason to lie on the appellant. Mrs. Williamson Hay, submitted that as a matter of law, Campbell, having pleaded guilty, would have been entitled to a lighter sentence than he would have ordinarily received. She argued that there was no evidence that he would have had an interest to serve, as, he had already been sentenced when he gave evidence.

Generally, where a co-accused who has pleaded guilty gives evidence on behalf of the prosecution, his sentencing is deferred until after the case has been concluded so as to enable the trial judge to garner a full appreciation of the facts and assess them on the totality of the evidence ***R v Weekes and Ors*** 74 Cr App R 161, 166. However, the matter as to whether he is sentenced prior or subsequent to his giving evidence is within the discretion of the trial judge.

Further, it is a settled rule that a co-accused may acknowledge his guilt and give admissible evidence against a co-accused and may

expect to secure a "discounted" sentence from the court ***Chan Wai-Keung v R*** (supra). In that case, in delivering the advice of the Privy Council, Lord Mustill at pages 200 and 201 declared:

> "It has been recognised for centuries that the practice of allowing one co-defendant to "turn Queen's evidence" and obtain an immunity from further process by giving evidence against another was a powerful weapon for bringing criminals to justice, and although this practice "has been distasteful for at least 300 years to judges, lawyers and members of the public", and although it brings with it an obvious risk that the defendant will give false evidence under this "most powerful inducement", the same very experienced court which so stigmatised this practice was willing to accept that it was in accordance with the law: ***Turner (Bryan)*** (1975) 61 Cr. App. R. 67, 79.
>
> The logic of this practice, which places the interests of the public in the detection and punishment of crime above the risk which must always exist where a witness gives evidence for the prosecution in the hope that he will obtain a benefit thereby, must also apply to situations where the "powerful inducement" takes the shape not of a promised immunity from prosecution, but of the expectation that he will be granted the "discount" from sentence which the courts accord to those who, not infrequently at physical risk, give evidence against their co-defendants. This logic is carried into effect. No authority is needed to illustrate the widespread practice of calling as a witness for the prosecution, a co-defendant who has pleaded guilty."

Although the practice of granting "discounted" sentence to a co-accused who is a witness for the prosecution is frowned upon, it is

nonetheless permissible. However, there is nothing to show that Campbell's testimony was secured by a promise that he would have received a "discounted" sentence. The maximum sentence for manslaughter is life imprisonment. The frequent practice in the courts is to impose a term of years imprisonment for manslaughter. Although there is no evidence whether Campbell was sentenced before the trial commenced or at the end, in our judgment the term of 20 years is normal and fair. His evidence therefore, could not be coloured by any suspicion that he would have received a lighter sentence in exchange for his testimony.

This ground is unsustainable.

Ground 4

> "The learned judge erred in directing the jury that as a matter of law it is recognised that the observation, recollection and expressions of individuals vary."

Lord Gifford, Q.C., submitted that the learned trial judge's reference to discrepancies and differences of recollection as matters of law raises the implication that people's recollection vary as a matter of law and this would influence the jury to gloss over a prominent discrepancy in relation to Campbell's evidence, namely, that the appellant rushed up the steps but Miss Washington did not so state.

This ground is devoid of merit. The fact that the learned trial judge referred to discrepancies and differences of recollection of persons as

matters of law would in no way impact on the decision of the jury. He pointed out the discrepancy with respect to the conflict in the evidence of the witnesses as to the person who went up the steps of the house. With clarity and particularity he impressed upon them the nature of discrepancies and inconsistencies. He expressly outlined to them the manner in which the contradictions and differences in the evidence should be treated.

The foregoing are our reasons for the decision we made.