[2012] JMCA Crim 50

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 171/2005 & 1/2006

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA

JUNIOR EDWARDS
VASSEL DAVIS v R

Barrington E Frankson for the appellant Edwards

Delano Harrison QC for the appellant Davis

Jeremy Taylor and Mrs Ann-Marie Feurtado-Richards for the Crown

29, 30 April 2010 and 5 October 2012

PHILLIPS JA

[1] On 28 October 2005 the appellants were convicted in the Home Circuit Court on two counts of murder of Moses Brown and Jerrine Wilkinson, aka 'Rosie', in furtherance of a robbery, and sentenced on 1 December 2005 to life imprisonment on each count. The court directed that the appellants serve a minimum sentence of 30 years before becoming eligible for parole. The sentences were ordered to run concurrently.

The case for the prosecution

[2] The evidence relied on by the prosecution to prove its case was adduced from seven witnesses. The main witness was Mr Edgar Brown, the brother of the deceased, Moses Brown, who in examination in chief gave evidence that he resided in England, and usually visited Jamaica, once a year, to check on his auto spare parts business, as he put it, to look over, " the stocks, the books and the bank". His brother used to run the business which was situated at 82 East Road, Kingston. He came to Jamaica in September 1995. He said that while in Jamaica, on that visit, he stayed with his brother in his house in Hartease, Saint Thomas. On the day that he arrived in Jamaica, he said that he was wearing a brown pair of trousers, a black pair of shoes, and a black jacket.

[3] Mr Brown testified that on 16 September 1995, at approximately 2:00 a.m., he was awakened from sleep in his bed at Hartease. His brother and his girlfriend, Miss Wilkinson were also in the house, sleeping in the other bedroom. He described the house as being made of block and steel, with a zinc roof, two bedrooms, a bathroom, a dining room, a kitchen, a small verandah and a small passageway from the dining room, between the two bedrooms. The doors and the windows at the front and the rear of the house were grilled. The dining room, he said, was about 12' by 12', his room was about 10' by 8'. He testified further that he heard a crashing noise as though someone was trying to break through the grill, and as he awoke he saw a man at the foot of his bed pointing a gun at him, and cursing him. He rolled off the bed to the left, and the man fired a shot from the gun at him, and the bullet hit his left ear. He grabbed a hold of the gun and his assailant, and held him against the bedroom wall.

Both his assailant and himself were then standing face to face. He could see him clearly, as there were two sets of louvre windows (3' by 4') made of blades of glass (4" to 5" apart) which were open, with curtains drawn apart on either side, each of which had two 100 watt bulb lights on the skirting board under the guttering. He identified this first assailant as the appellant, Davis. Then a second person came in the bedroom, and stuck a gun in his right ear, threatened him with death if he did not release Davis, and so he did.

[4] Mr Brown gave evidence that the appellant Davis asked for money and in particular asked, "where is the black jacket?" He responded indicating that the jacket was in the wardrobe, and he was instructed to get it and hand it over, which he did, and then the appellant Davis turned it upside down and shook the money which was inside of it onto the carpet. There were various currencies in the jacket, viz, £500.00, US$200.00 and JA$3,000.00. The appellant Davis then turned on the light in the bedroom which was a three bulb ceiling light. He was then standing directly beside Mr Brown and directly under the light bulb. The appellant Davis, he said, picked up the money from the carpet, placed it on the bed and instructed Mr Brown to open his briefcase, which he did. The appellant Davis, he said, "stirred up" inside of it. At that time, the second man who had entered the room and stuck his gun in his right ear was standing in the passage way with his back to the bathroom, within touching distance from him. He said that he had seen his face clearly, for over a minute, when he had put the gun in his ear, and whilst in the passage way when he was about a foot away from him. He identified him as the appellant, Edwards. At the same time, he said that he

heard his brother's voice from his brother's bedroom, talking to someone, and shortly after hearing his voice he heard a gunshot coming from his brother's room and then he did not hear his brother's voice again. He realized however, that there was a third man in the house.

[5] Mr Brown then testified that having spent approximately 10 minutes in the room with him, where he said that he was watching his face continuously, the appellant Davis marched him, in front of him into the dining room. Someone turned on the light, which he described as two ceiling lights with three bulbs each, all controlled by one switch, and directly above them all. He stated that all of them were standing around the dining table, the "three robbers and myself, as if we were having a meeting". He said that he was able to see all of their faces, as they were not covered, and the men were only about 2-3' across from him, the width of the dining table. After about 2½ minutes, he said that he was given instructions to lift up the television which was on a side board and also the video, and to open the fridge, all of which he did. He said there was a small amount of money in a cup which one of them took. He was asked to open the grill at the back, which he was unable to do as he did not have the keys to do so. One of the men, he said, went back into his brother's room and brought his brother's girlfriend into the room who opened the grill. The appellant Davis then asked him for the key for the Toyota pick-up and told Mr Brown, "you are going to drive".

[6] It was his evidence that he went with the three robbers out to the car port where the pick-up was parked, and he said that he could easily see them, with the help of the louvre lights which were 4½' from the pick-up, and the street light which was

about 10'-12' away. It was his further evidence that after he got into the motor vehicle, the appellant Edwards and the other man went to open the gate, and the appellant Davis went back into the house. He then heard a gunshot which appeared to be coming directly from his brother's room, then the appellant Davis returned. He testified further that the appellant Davis came and knocked on his drivers door window, and the other two did the same on the opposite window. It was a two seater pick-up with two doors. Mr Brown said that he revved the engine fully, "let go the clutch, reverse and away I go". He said that he didn't bother to wait for them, he went straight through the open gate, and although he saw flashes which he assumed were bullets, he kept going and headed for the police station in Yallahs, St Thomas. He said that he was virtually naked, "I only had my underpants on".

[7] He testified that he returned to the house that night with two policemen, and he entered the house, and saw his brother lying down at his bedroom, but he did not see his girlfriend Rosie, and he had not seen her since he had driven away from the house in a hurry that night. He later attended two separate identification parades and identified both of the appellants.

[8] Mr Brown was cross-examined by counsel for the appellant Davis with regard to the layout of the house as follows:

1. whether there were three bedrooms or two; he said there were two;

2. whether both of the louvre windows were open at the material time, or only the one at the bed head and not to the side wall; he maintained they were open;

3. whether the blades of the windows were made of metal or of glass; he said they were made of glass;

4. whether the gun held by the second assailant identified by Mr Brown as the appellant Edwards was a big gun or a short gun with a white handle; he said that it was a large short gun;

5. whether he turned on the light in the dining room on instructions or it was turned on by one of the assailants; he said the light was turned on;

6. whether the light in the bedroom was turned on by the appellant but during a struggle between him and the appellant in the room; he was unsure whether he had said that the appellant had turned the light on during a struggle, but he was sure that the appellant had turned on the light in the bedroom;

7. whether Rosie had been taken into his brother's room while he remained in the dining room with the other two assailants; he said that he could not remember that at all.

It was clear that his credibility was being attacked, as it was generally put to him that he had made different statements in an earlier trial of this matter.

[9] Most importantly, it was suggested to Mr Brown by counsel for appellant Davis, that on the day before the identification parade, he had been taken to the Central Police Station where the parade was going to be held, by the investigating officer Detective Sergeant Kermit Fairweather. It was further suggested that at the back of the station where there is a shed under which some motor vehicles were parked, Mr Brown was placed in an area which was grilled off and where some police officers were sitting, so that he could see the then suspect, the appellant Davis, with whom the investigating officer spoke. Mr Brown denied the latter suggestions, stating that he found the same to be offensive.

[10] In cross-examination by counsel for the appellant Edwards, Mr Brown was questioned about the description he had given to the police in relation to him, viz, that he was the shorter of the two, he was 5' 7", of a light black complexion, weighed about 150 pounds, was wearing blue baggy jeans and had slightly buffed teeth, to suggest that his opportunity to observe the appellant Edwards that morning was limited, which Mr Brown denied. He was again challenged on the basis of evidence given in an earlier trial, and whilst he was unable to remember saying at that trial that the blades of the louvres were metal, and the transcript was therefore tendered as exhibit one, he strenuously denied that the windows on the left side were closed. He said that they were definitely open, and the transcript of the earlier trial in relation to that evidence was tendered as exhibit two. More importantly, it was suggested to him that prior to

the identification parade on 5 March 2006, which he had attended, the appellant Edwards had been pointed out to him at the Yallahs Police Station, and that he had only been able to point out the appellant Edwards at the parade because he had been assisted in identifying him previously at the station. Mr Brown denied this also.

[11] Dr Tin Htut, the District Medical Officer, attached to the Princess Margaret Hospital, in the parish of Saint Thomas performed post mortem examinations on 20 September 1995, on the bodies of the deceased, at the Princess Margaret Hospital, in Saint Thomas. Detective Sergeant Carlton James identified the bodies at the post mortem examinations as the said bodies seen at the premises in Hartease on 16 September 1995. In respect of Jerrine Wilkinson, Dr Htut indicated that she was 21 years old, and that the body had been identified by her sister, Miss Dian Baker. He described on examination, a gunshot entry wound on the right side of the head, with evidence of gunpowder burning and no exit wound. The bullet was lodged on the base of the skull bone. The cause of death, he testified, in his opinion, was due to brain injury and bleeding inside the skull bone due to the gunshot wound.

[12] The post mortem examination on the body of Moses Brown, whose body was identified by his nephew, Mr Kenneth Jones, revealed that he was 63 years old, with a gunshot entry wound of three inches, on the left side of the forehead, about three inches above the eye brow with powder burns on it. The bullet exited the back of the skull on the right side of the skull by way of a 2½" wound in diameter. There were two stab wounds, (1) in front of the belly and (2) on the right side of the back, at the level of the 10th rib. The cause of death, in his opinion, was due to the brain injury and

bleeding inside the brain caused by the gunshot wound. In Dr Htut's opinion based on the injuries he had observed on examination of the bodies of the deceased, death would have occurred in respect of both persons within 15 minutes of having received the injuries to the head.

[13] Detective Inspector Carlos Bell, attached to the Saint Andrew Central Homicide Unit, but at the relevant time stationed at the Saint Thomas division, in Morant Bay, operating in the capacity of the scenes of crime officer, gave evidence that in responding to a call that he received at 2:30 a.m. on 16 September 1995, he attended the home owned by Mr Moses Brown, in Hartease, Saint Thomas, occupied by him and Miss Jerrine Wilkinson. He said that he saw the bodies of two persons in one bedroom, with what appeared to be gunshot wounds to the head of both bodies. He testified that he examined other areas of the house and noticed that several household items were scattered all over the house. He noticed specifically that in the other bedroom there was a damaged fragment of a bullet fastened in the headboard of the bed in that room. He also noticed bullet fragments on the floor there. He testified that on information received, he attended on a two bedroom apartment in the Easington District in the parish of Saint Thomas, where he had to gain forced entry to the house as the occupants were unresponsive to the request of the police to "open up", where he saw the appellant Davis crouching in a corner. This was someone whom he said that he had known for over five years, as "buddy man". He knew him to be living in a lane at Hartease, but he was visiting this other place in Easington, and he stated that his

residence in the lane in Hartease was about a chain and one-half from the home of the deceased.

[14] Inspector Bell said that on entering the premises he identified himself to the appellant Davis. The transcript disclosed that their discourse proceeded thus:

> "A. I again identified myself to him.
>
> Q. As what?
>
> A. As police, told him I was taking him to the police station. He replied, 'Fi what now Mr. Bell?' I told him when you get there the police will speak with you.
>
> Q. Continue.
>
> A. He replied, 'Mr. Bell, mi noh know nothing 'bout 'Daddyman' killing.'
>
> Q. 'Mi noh know nothing 'bout 'Daddyman' killing?'
>
> A. Because me and him live good."

[15] The evidence had disclosed that the deceased was known as 'Daddyman'. Inspector Bell testified that prior to the above statements made by the appellant Davis no-one had mentioned any killing having taken place, or made any promise or threat to the appellant, or assaulted him in any way.

[16] Deputy Superintendent of Police (DSP) Marlon Nesbeth gave evidence about the conduct of the two idenification parades held at the Kingston Central lock up in respect of the two appellants. With regard to the appellant Davis, he said that the scheduled date for the parade was postponed to the following day, 1 November 1995, as the appellant wished his father Aston Davis to be present, which he was, and he remained

at the parade until it was completed. DSP Nesbeth explained that there were two justices of the peace present to ensure transparency and the proper conduct of the parade. He testified that he and the appellant Davis had selected the other eight persons to stand in line with him of similar height, build, and general appearance, and the appellant was told that he could change positions and clothes with anyone in the line-up as he wished. He stated that he did not change any clothing, and chose the position under number seven. DSP Nesbeth explained the one way mirror system in respect of the conduct of the parade room and indicated that Mr Edgar Brown walked the line on the reverse side of the mirror, and identified the appellant.

[17] It was his evidence that the appellant when told that he had been identified said nothing, and the parade form was thereafter signed, by DSP Nesbeth, his assistant, Detective Corporal Williams, and the appellant Davis, by his mark as he said that he could not write. It was his further evidence that at no time leading up to the parade had the appellant Davis ever made any complaint that he had been exposed to anyone before the parade. Additionally, he said that the appellant Davis had not told him that Detective Sergeant Fairweather had come to Central Police Station and spoken to him and caused him to be exposed to Mr Edgar Brown. Nor had the appellant told him that Detective Sergeant Fairweather had told him that his fingerprints had been found at the crime scene and that he had accused him of lying to the police.

[18] DSP Nesbeth testified that the identification parade in respect of the appellant Edwards was held on 15 March 1996 at Kingston Central Police Station at 2:20 p.m. He indicated that he had spoken to the appellant two days before at the Morant Bay Police

lock-up about the holding of the parade. It was his evidence that Mr Peter Champagnie, attorney-at-law, represented the appellant Edwards, and that he and counsel selected the eight other persons of similar skin colour, height, build and appearance generally, to line-up with the appellant Edwards on the parade. On this occasion, he said that the appellant Edwards was also told that he could change his position, and his clothing, and he did so. He changed from the position under number four to number five and he also changed his shirt. DSP Nesbeth gave evidence that he and his assistant Acting Detective Corporal Young were on the well-lit obverse side of the one-way mirror and the attorney-at-law, the justice of the peace, and Mr Brown were on the other side. Mr Brown identified the appellant Edwards, whose response was that, "a set dem a set mi up". DSP Nesbeth said he signed the ID parade form along with Acting Detective Corporal Young and the appellant Edwards. No complaint, was made to him by the appellant or his counsel about the conduct of the parade.

[19] DSP Nesbeth maintained in his evidence when challenged, that if someone was in the lock-up at Morant Bay in the passage area, one could not be seen from the streets in Morant Bay. Also, that if the gate to the Morant Bay compound was opened, someone passing in the street could not see persons in the cell. He specifically denied there being any rule that persons who were going to be placed on an identification parade were not kept in the Morant Bay police lock up. He testified that the appellant Edwards did not at any time ask him how could they be holding a parade for him when he had been to court four times already. He also did not recall the appellant telling him that he had left Saint Thomas in June of 1995. However, on reflection and having been

shown the ID parade form with his signature, he did accept that the appellant's remarks when told that he had been identified on the parade were, "a point them a point mi out", and not as he had stated previously.

[20] The investigating officer, Detective Sergeant Kermit Fairweather, was stationed in Morant Bay in September 1995. He gave evidence about receiving a radio transmission on the night of 16 September 1995 at about 2:30 p.m., attending on the premises at Hartease, observing the forced entry to the house and seeing the two bodies of the deceased in one of the two bedrooms with what appeared to be gunshot wounds to the head. He noticed the wound to the side of the body of the male person, and that the room that they were in had been ransacked. He noticed that the lights on the windows in the front bedroom were on, and that the window at the bedhead was open, but the other window at the side was closed. He noticed that the street light, in front of the premises was about 10-14' from the house. Although he was familiar with the shed at the rear of Central Police Station, he denied persistently that he had spoken to the appellant Davis when he was in the passage in the grilled area adjacent thereto, and denied that any such discussion had taken place in the vicinity and or visibility of Mr Brown. He said, "I was not there, neither do I know of Mr. Brown being under the shed".

[21] It was the evidence of the Detective Sergeant Fairweather that he informed both appellants separately in the lock-up in Morant Bay that he was investigating the murders of both deceased and that they were going to be placed on an identification parade. Subsequent to the said parades, and having received information from DSP

Nesbeth, he went to the Central Police lock-up, and arrested and charged both appellants for the murders of both deceased.

The case for the defence

[22] Both appellants gave evidence. The appellant Davis stated that he did construction work, lastly in Duhaney Pen, in the parish of Saint Thomas. He stated also that in September 1995, he had been living in Hartease District, and had been at home from 8:30 p.m. the night before until 7:30 a.m. on 16 September 1995 when he came out of his home and noticed a crowd of people in the lane. He said that he spoke to several people and then remained in his home all day, save to go to the shop in the lane. He said that he knew the deceased Moses Brown for over five - six years and they had gotten along very well. He said that he also knew the deceased Rosie but they had only exchanged greetings in passing. He asserted that he had not gone to Moses Brown's house on the night of 16 September 1995. He averred that he did not know Inspector Bell and stated that when six - seven police came to the house in Easington one morning where he was, he opened the door and let in the police. They searched the premises, took him in handcuffs to his home in Hartease, searched his room there, and then took him to the Morant Bay Police Station where he remained in the lock-up until 24 October 1995. He was then taken to the Central Police Station and there told about the identification parade that was to be held in relation to him. He gave evidence about the passage which led into another passage which was enclosed by a grill and which was near a table, a desk and a hard bench where about six police were sitting

and where Detective Sergeant Fairweather spoke to him, when he saw Mr Edgar Brown and other members of the police standing in the carport nearby.

[23] He stated that he had not said anything about what he had observed, as he thought that Mr Brown was one of the police, and he did not know that was not the case until Mr Brown gave evidence against him in the Morant Bay court. He gave evidence about refusing to go on the identification parade, and about not having been given the opportunity to assist with the selection of those who would go on the parade with him. He said that he heard DSP Nesbeth tell him that he had been pointed out on the parade but he had not heard anyone call out any number at the parade. He maintained that he had not gone to Moses Brown's house on 16 September 1995 nor had he killed him, or Rosie or anyone.

[24] In cross-examination he affirmed that he lived on the same lane and on the same side of the road that Moses Brown lived on. In fact, only a yard divided their respective houses. He said that he knew Rosie for about 1½ years before September 1995. He used to pass her in the lane. It was his evidence that he had worked on the front room at the deceased's house with his father to fix a ceiling, in about 1991. He said that although he had seen the crowd at the deceased's house that morning, and he had spoken to some persons, he had not gone to the house to ascertain what had happened there. He also had not gone to work. He explained that he had been at the house at Easington as it is a place where he frequents, as his relative "Punchy" resides there. He said that he had been there from the night before and was not hiding when the police arrived but opened the door for them. He said that he could write which he

had been doing since he was a child, but he could not drive. He was familiar with Mr Brown's Toyota pick-up, as he had seen him driving it in his yard, and driving past on the lane regularly. In fact, he had been driven in the pick up by Mr Brown on more than one occasion. He was adamantine that Mr Brown was telling lies on him. He asserted:

> ".. I wasn't there no time at all in a him premises, in a him house."
>
> "Don't know, know nothing about Mr. Brown's house, money, gun, house, and him affairs inside there."
>
> "I was in my bed that night; don't know nothing about Mr. Brown and him room, money or whatever."
>
> "I don't know nothing about that man inside of the box or no other man."
>
> "M'Lord, from the day mi born, m'Lord, mi never hold a gun in a mi hand; mi never kill a man or woman before, not even fowl mi waan kill."

[25] The appellant Edwards testified that he did fishing for a living in Saint Thomas, but,

> "[w]hen nutten naah go on a sea, me leave St. Thomas and go to St. Catherine goh work with my brother."

He said that his brother Philemon Edwards lived in Old Troja in St Catherine in a two bedroom house which they shared while they worked picking oranges on an orange farm, for which they were paid by the box. He said that he worked five days a week from Mondays to Fridays, from 8:00 a.m. to 4:00 p.m. and thereafter may spend time

at the police youth club playing dominoes until 9:00 p.m. as there was work the next day. He averred that he had left Saint Thomas in June 1995 and had stayed with his brother in Old Troja working until 18 January 1996 when he was apprehended by the police. He maintained that he did not know the district Hartease, in fact, he had never been there; he did not know Mr Moses Brown, or Rosie, or Mr Edgar Brown. He had not been at the house of Mr Moses Brown on 16 September 1995, and he had not known the appellant Davis until he had been taken into custody.

[26] It was his evidence that he had been taken to the Yallahs court four times before he had been placed on the identification parade at the Central Police Station. When he complained about that to DSP Nesbeth, his response was, "[m]y youth, mi nuh business wid that". He said that when he had been told that he had been pointed out on the parade he had told DSP Nesbeth, "seh a cook dem cook mi up", which he further explained meant they were tampering with him having exposed him at the Yallahs court. He stated that when he was at the railing at the Yallahs court, a young man drew his attention to the fact that there was a man staring at him, who was about 40' away from him. He stated that he looked at the man, and was able to observe him from his head and face and the rest of his body. That person, he said, was Mr Edgar Brown. He said that he had not known him before but later saw him in court giving evidence against him.

[27] In cross examination, he stated that although he had been born in Saint Thomas he would go to Saint Catherine and spend a long time there. He had done so in 1991 and remained there for three years. He had not returned to Saint Thomas even to see

his family or other relatives with whom he said he was very close. He said he had returned to Saint Catherine and the picking of oranges at the request of his brother, in June 1995 as the citrus season ran from June to December and not February to August as had been put to him. He maintained that he knew nothing of the incident in Hartease, and if Mr Brown had seen him he would, "a come tell you seh a one broad mouth man him see a him place". He insisted that he had been in Saint Catherine between 1991 - 1994 and between 1995 -1996, and was arrested at the roadside while with his brother there in 1996. He said that one could leave Saint Catherine at 4:00 p.m. and whether traveling either by car or by bus, would reach Saint Thomas by 10:00 p.m.

[28] He affirmed that the first time he had seen the appellant Davis was in the lock-up in Morant Bay in 1996. At that time he had been told that he was being charged jointly with him for the murders of both deceased. He insisted that he had been exposed before the parade, and when queried about the details of the incident, he stated:

> "I don't know about it."
>
> "I couldn't tell you, 'cause me neva deh deh."

And when he was asked specifically,

> "Q. And after the three of unoo commit this crime, you ran away to Saint Catherine."

He responded,

> " A. That is lie, sir."

[29] The appellants filed applications for leave to appeal. On 16 January 2008, a single judge of this court granted the same, and made this statement:

> "It is arguable that the learned trial judge put pressure on the jury by his comment on page 426 of the transcript. 'Now in a case of murder… it will be a thorough waist [sic] of time if you should go in their [sic] and fail, but, let the chips fall where they may'."

The appeal

[30] At the hearing of their respective appeals counsel for the appellants abandoned the original grounds filed and requested leave to argue supplementary grounds filed on their behalf which was granted. Their respective grounds are set out below. Counsel for appellant Edwards also requested leave to abandon ground of appeal one, which was granted.

Supplementary grounds of appeal - Appellant- Edwards

> **"Ground I**
>
> That the inclusion of a member of the jury after an original number of Twelve (12) had been empanelled and participated in the selection of a foreman and one of the members having been withdrawn or stood down, it was a material irregularity of grave proportion to have another jury [sic] empanelled in substitution of the juror who had been withdrawn or stood down.
>
> **Ground 2**
>
> The Learned Trial Judge failed and/or did not expressly and/or adequately warn the jurors of the dangers inherent in acting upon the uncorroborated evidence of visual identification.

Ground 3

The Learned Trial Judge erred in law in that he failed to adequately and/or to properly direct the jury as to the blatant and unexplained contradictions and manifest inconsistencies in the evidence of the sole eyewitness.

Ground 4

The Learned Trial Judge failed to adequately direct the jury on the Defence of alibi which was put forward by the Appellant. Further the directions given in relation to the Appellant's assertion that he was taken to the Yallahs Court on other occasions prior to the Identification Parade were wholly inadequate which rendered the summing-up unfair and may well have tended to hinder them in arriving at a true verdict.

Ground 5

The Learned Trial Judge during the course of his summing up exerted pressure on the jury to come to a Verdict having regard to the length of time that was taken in completing the trial."

Supplementary grounds of appeal- Appellant Davis

"1. The learned trial judge exerted improper pressure on the jury insofar as [it] concerns the deliberation on their verdict (**see page 426 lines 4-21**)

2. The learned trial judge's directions respecting the Appellant's defence of alibi were so inadequate as to have afforded the jury no proper guidance in approaching it (see pages 343-344; 402; 408**; 423 lines 2-4 idid. line 17-page 424 line 17**)

3. The learned trial judge's directions relating to the burden of proof were inadequate, for being incomplete, and confusing and, in the result, cumulatively failed to assist the jury as to how properly to treat with it."

[31] In order to avoid duplication, and for easier reading and comprehension we intend to:

(i) deal with ground **one** of appellant Davis and ground **five** of appellant Edwards together, dealing as they do with the alleged exertion of improper pressure by the trial judge on the jury; then

(ii) ground **two** of appellant Davis and **four** of appellant Edwards, dealing as they do with alleged inadequate directions on alibi; then

(iii) ground **three** of appellant Davis dealing with the burden of proof, and then

(iv) grounds **two** and **three** of appellant Edwards dealing with the alleged uncorroborated evidence of visual identification and the alleged contradictions and manifest inconsistencies of the sole eye witness.

(i) Pressure on the jury

[32] In the summation, the learned trial judge addressed the jury thus at page 426 of the transcript:

> "Now in a case of murder we look for a unanimous verdict, meaning that all twelve of you have to come to the same conclusion before it is a verdict. We have spent since last week Monday, although you didn't hear any evidence Monday, we empanelled Monday and we started the evidence Tuesday and it will be a thorough waist [sic] of time if you should go in their [sic] and fail, but, let the chips fall where they may. All of you go in their [sic] knock heads together, not physically, but exchange ideas and on the point where some of you disagree and talk about it and try and come to one decision. The only offence I am leaving for your consideration is murder, no other offence. They are either guilty or not guilty of murder."

[33] Learned Queen's Counsel for Davis submitted that the words suggested and could have conveyed to the jury that having spent five whole days of the court's time, they would have wasted those days if they failed, *either*, he submitted, as he was unsure, as the statement was unclear, to *convict*, or to *reach a verdict*. Whichever interpretation was given to the words however, would, he submitted, have had the tenor of language which "could suffice to create the seeds of pressure upon the jury", for at the very least to fail to reach a verdict would have resulted in considerable public inconvenience and expense – "scilicet, retrial of the matter".

[34] Queen's Counsel submitted that added to the complaint in the directions concerning the admonition not to waste time, there was also the gambler's language suggesting a chance approach to their deliberations. Counsel for appellant Edwards argued that the comment by the learned judge was most inappropriate as it could also convey that they *must* arrive at a verdict, bearing in mind the days of trial and the fact that the instant case itself was a retrial. Both counsel submitted that once it could be accepted that improper pressure had been exerted on the jury to reach a verdict, that would have constituted a material irregularity, as the case would not have been properly considered by the jury. Counsel referred to and relied on **Watson** (1988) 87 Cr App R 1 and **McKenna** (1960) 44 Cr App R 63.

[35] Counsel for the Crown, Mr Taylor, referred to the cases cited by counsel for the appellants and also cases from this court, viz **Regina v Clive Barrett, Ivan Reid and Linton Barrett** (1994) 31 JLR 221 and **Regina v Tommy Walker** SCCA No 105/2000 (delivered 20 December 2001), and submitted that "[w]hile the language used may

have been blunt, indelicate and unforensic", the words could not in any way be considered to have been exacting pressure on the jury to reach a verdict or coercing them into reaching a decision. He argued that, "he was merely *encouraging* them to reach a verdict". Additionally, he submitted, the jury had retired at 3:10 p.m. and had returned at 6:51 p.m., which meant a consideration of 3:41 hours to arrive at their verdict. The appellants could not demonstrate, he argued, that they had suffered any prejudice by the words spoken.

Analysis

[36] Cassels J in **R v Mckenna et al** in the English Court of Appeal at page 73 stated:

> "It is a cardinal principle of our criminal law that in considering their verdict, concerning, as it does, the liberty of the subject, a jury shall deliberate in complete freedom, uninfluenced by any promise, unintimidated by any threat. They still stand between the Crown and the subject, and they are still one of the main defences of personal liberty."

Later in his judgment in again endorsing the importance of the jury not being pressured while considering their verdict, he said:

> "…it is of fundamental importance that in their deliberations a jury should be free to take such time as they feel they need, subject always, of course, to the right of a judge to discharge them if protracted consideration still produces disagreement."

The Lord Chief Justice, in **Watson**, made a similar statement, he put it this way:

> "One starts from the proposition that a jury must be free to deliberate without any form of pressure being imposed upon them, whether by way of promise or of threat or otherwise.

> They must not be made to feel that it is incumbent upon them to express agreement with a view they do not truly hold simply because it might be inconvenient or tiresome or expensive for the prosecution, the defendant, the victim or the public in general if they do not do so."

In this court Wolfe JA (as he then was) in **R v Barrett et al**, added his view of the obligation of the trial judge when giving directions to a jury, with a small exception, as he said that:

> "Unless a jury indicates that there is no hope of arriving at a verdict, a trial judge is well within the proper discharge of his duties to endeavour to assist the jury in arriving at a verdict. One of the primary objectives of a trial is to ensure that a decision is arrived at if possible without the parties having to go through the ordeal of a retrial."

Panton JA (as he then was), in delivering the judgment of this court, endorsed the above principles in **Regina v Tommy Walker**.

[37] In my view, in the instant case, there is no indication in the directions given by the learned trial judge to the members of the jury, which could have caused them to feel intimidated, or pressured, either to make a decision, or to decide to convict. This was clearly an instance of encouragement by the trial judge, with which one could find no fault. The jury was not being told that time was running out, that they were only being given 10 minutes to arrive at a verdict, or that once sequestered they would be incarcerated for hours, inconveniently, until their decision was given. They certainly were not directed to arrive at a specific conclusion, one to which all of them could not agree. To the contrary, they were merely being told that it would be unfortunate if after the time spent they were unable to arrive at a decision, and were being urged to have

dialogue so that they could try to arrive at a consensus, but if that did not occur, then so be it. They had spent time hearing the matter, but then they continued to take their time, namely 3:41 hours, to arrive at their verdict. They did not appear to be rushed or in any way constrained in their consideration of the verdict, and they were not recalled by the judge before they had completed their deliberations. This ground must therefore fail.

(ii) Alibi

[38] Learned Queen's Counsel submitted that the learned trial judge did not treat adequately in the summation with the defence of the appellant; that he was in his bed from 8:30 p.m. the night before the incident, until 7:30 a.m. the next day. He argued that the learned judge's comments were often that the appellant's position was that he was not there where the offences took place, which did not do the appellant's case justice. It required, he submitted, that the learned judge mention the specific place that the appellant said that he was, simultaneously with mentioning that the appellant had denied that he was at the home of Mr Brown. It could, he argued, unwittingly convey to the jury, that the learned judge attached little weight to the appellant's claim that he had been at home all night. Counsel for the appellant Edwards submitted that the learned judge had failed to inform the jury that if they had a doubt in relation to the alibi of the appellant, which was that he was in another parish picking oranges with his brother, they should resolve it in the appellant's favour.

[39] Queen's Counsel also submitted that the learned judge's summation was inaccurate in his definition of the defence of alibi, and in his failure to address the jury

on their approach if they were to find that the alibi of the appellant was plainly false. In that, the learned judge should have reminded the jury that alibis which were plainly false could be advanced by people who were innocent. He referred the court to **James Pemberton** (1994) 99 Cr App R 228 and **Bernard v R** (1994) 45 WIR 296.

[40] Counsel for the Crown referred to leading cases dealing with the issue of appropriate directions in the summation when the main issue is identification and the defence of alibi is raised, and also the consequence of the failure of the learned trial judge to give directions on the issue of the "false alibi" - see **Oneil Roberts & Christopher Wiltshire v R** SCCA Nos 37 & 38/2000, delivered 15 November 2001; **Peter Campbell v Regina** SCCA No 17/2006, delivered 16 May 2008; and **R v Adams & Lawrence** (1967) 11 WIR 166. Counsel also contended that in the instant case the learned judge had stated often, in reminding the jury, that the appellants had given evidence indicating that they were not at the scene of the crimes, but elsewhere at the time of commission of the murders. Additionally, there was no need for the trial judge to give a direction on false alibi as the alibis of the appellants had not collapsed nor had they been shown to have been riddled with inconsistencies and discrepancies. In fact, counsel argued, the alibis remained unshaken at the end of their respective testimonies. Further, he submitted, this court had already held that the alibi direction need only state that the appellant was saying that he was elsewhere at the material time; that the burden lay on the prosecution to disprove the alibi, the appellant does not have to prove that he was where he says that he was; and that to convict, the jury must be satisfied to the extent that they feel sure of the appellants' guilt. Counsel

referred the court to several aspects of the summation to substantiate his submissions that the directions of the trial judge were neither defective nor deficient.

Analysis

[41] It is important that in each summation the directions are tailored to meet the particular case being tried. In his opening salvo, the learned trial judge stated that the issue in the case was identification. He addressed the jury that if they believed Mr Brown, that the conditions in the house were sufficient for him to identify the appellants, then it was open to them to convict, but if they did not believe that, or they had any reasonable doubt in that regard, then the verdict would be different (page 342 of the transcript). He stated that the defence of each appellant was one of alibi, "I was not there," is how he put it. He said they had no duty to tell where they were, and that as human beings one cannot be at two places at the same time. So, he said, the evidence of Mr Brown was crucial to the outcome of the case (page 344 of the transcript). In his summation, he recounted the evidence in detail of the appellants indicating their whereabouts as set out in paras [22] - [28] herein.

[42] At the end of the evidence in chief of the appellant Davis (page 408 of the transcript), the learned trial judge had this to say:

> "And remember I told you earlier today that the defence of Mr Davis and that of Mr Edwards is what is called an alibi. An alibi defence, really, the person is saying he was not there. I told you then, that the accused has no duty to tell you where he was on that day. However, he did so, he says he was in his bed he had gone to bed from 7:30, 8:30 the previous evening and didn't wake up and come outside until

> 7:30, the next morning. I told you that no human being can be two places at the same time. So, if you believe him or you are not sure whether you can believe him you have to acquit him, but if you believe Mr. Edgar Brown that he was the first man who came in his room and the rest that follows, it is up to you to convict."

At the end of the cross-examination, of the appellant, the trial judge said this (at page 412 of the transcript),

> "...He denied the entire case he said he wasn't there he was at his home."

At the end of recounting the evidence given by the appellant Edwards, including where he said he was at the material time, the learned judge stated (page 420 of the transcript):

> "So here again he has denied all the basic ingredients of the Crown's case and as I have said already and will say again, an accused person has no duty to tell you anything, but where in a case like this, that both accused gave evidence, it is your duty to weigh that evidence in the same scale of justice as you have weighed the evidence of any other witness. The fact that they have raised a defence of alibi, does not put any duty on them to satisfy you. It is for the Crown to satisfy you so that you feel sure, that when Mr Edgar Brown said that these two men were in the house on the early morning of the 16th September, you can believe that and I told you what the result will flow, if you believe and if you don't believe.
>
> If after you have heard the evidence of Mr. Davis, you are not sure whether you can believe him, you are to acquit him, because it would mean that the Crown has failed to satisfy you to the extent that you feel sure. If after you have heard the evidence of Mr. Junior Edwards you are left in a

> state of mind, that is, you are not sure whether you can believe him, it means the Crown has not satisfied you so that you feel sure, you must acquit him. You can only convict either, or both of them, if after you have heard all the evidence that the Crown tendered, especially the evidence of Mr. Edgar Brown you are satisfied to the extent that you feel sure that Mr. Davis was the first man who entered the bedroom and you remember, no doubt, what took place after that…"

On page 423 of the transcript, he continued:

> "I have told you that although the defence is a defence of alibi, the prosecution have the burden of proof and must satisfy you..."
>
> "… it is [sic] matter for you to determine whether you think in those conditions Mr Brown was able to identify these men. They have said they were not there and they [sic] have told you already, in a short while that if you do not believe them you cannot by that alone say there [sic] are guilty. If you don't believe them you have to be satisfy [sic] on the Crown's case, I also said that if you can't determine among yourself whether you are to believe them you have to acquit them. You see, it is like this, everyday we are told of events or stories call it that, some people says [sic] it is not a story, it is an event and the effect it has at [sic] all of us is that you may readily believe it. You may dismiss it as being unbelievable, but there is a third stage where you may say you don't know if you can believe it –- well, if you are in the stage where you believe the accused men that they were not there you must acquit them. If you are in the between stage where you don't know whether you can believe them you must acquit them. You can only convict if you believe the evidence of Mr Edgar Brown, because Mr Brown was the only person who is left alive today who was there in the house with Moses Brown and Rosie and you look at the circumstances."

[43] In our opinion, it is clear from the above excerpts of the summation that the jury could not have been in any doubt as to what their responsibility was, and where the burden of proof lay. Additionally, the judge repeatedly told them of the significance of

the alibi defence, what it was, and that it was for the prosecution to make the jury sure that the defence was not correct. It was also the duty of the trial judge to ensure that the jury did not think that as the alibi had been put forward by the defence the burden lay on them to prove it (**Jason Pemberton** and **R v Adams and Lawrence**). In the instant case the trial judge had complied with that duty. In spite of Queen's Counsel's persistent arguments, we are unable to agree that the learned trial judge did not adequately outline the law on the defence of alibi. Additionally, in our view, he sufficiently juxtaposed the appellants' respective defences as to their whereabouts with his basic statement of the law on alibi, viz " I was not there".

[44] Furthermore, we are also of the view that this was not a case in which the warning in relation to "the effect of the false alibi" as set out by Lord Widgery CJ in **Turnbull** [1976] 3 All ER 549 was, strictly speaking, necessary, as there was no indication that the learned judge felt that the rejection of the alibi was capable of supporting the evidence of identification, and more importantly there were no discrepancies, inconsistencies and contradictions in the alibi defence such that there was a risk that the jury may have concluded that a rejection of the alibi defence would have supported the identification of the appellants. The alibi defence did not collapse in this case, and we are in agreement that in those circumstances where the alibi appears to be, in the main, unshaken, then to give a false alibi warning may not be helpful - (**Oniel Roberts**, **Christopher Wiltshire v R**). The judge did say that even if the jury rejected the appellants' alibi they could not convict, as they had to be sure from their assessment of the case of the prosecution, and that could suggest that a false alibi was

yet consistent with innocence (**Coley v R** (1995) 46 WIR 313). It could perhaps have been fuller stated as directed by the Privy Council in **Bernard v R**, to the effect that there is a possibility that although the alibis may have been manufactured, the appellants may not have been in Mr Brown's house, but in our opinion, on the facts of this case, the failure to do so is not fatal.

[45] In the instant case, it was clearly a matter for the jury with regard to whom they believed, the appellants or Mr Edgar Brown. It was a matter for them, and it was left to them, quite properly in our view by the trial judge, for them to decide, and they arrived at their verdict. This ground therefore must also fail.

(iii) Burden of proof

[46] Queen's Counsel submitted that the learned trial judge's directions with particular regard as to how the jury should resolve the issue as to whether the main witness for the prosecution had seen the appellant Davis at the Central Police Station prior to the identification parade, were confusing, incomplete and therefore inadequate. He referred to the summation of the learned judge at page 387, lines 7-18 of the transcript which reads:

> "Now if you disregard what the accused men said about Edward [sic] Brown being exposed to them, they being exposed to Edward [sic] Brown so he could see them, then you don't have anything to consider further. But if you believe them, it would mean that the purported identification of these men by Brown was aided by some unscrupulous person, perhaps the police who arranged to have them exposed to Mr. Brown near the time of their identification parade. So, it would make the purported identification of these men at Central to be of no value."

[47] Queen's Counsel's complaint was that the case of each appellant was different, and the directions of the learned trial judge did not address the situation of the jury believing only one of the appellants and not both of them. It was necessary, he said, to draw that distinction as each appellant had made a different assault on the aspect of exposure prior to the identification parade. They were not a "package deal" and the directions were therefore wrong as (a) they treated the appellants assault on the value of the parade as a joint one, and (b) the issue was a vital one as it went to the main issue in the appeal viz identification. The jury should have been given directions specifically, he submitted, as to how to approach the issue, that is if in doubt, whether to accept the assault of both or of each separate appellant, with regard to the value of the identification parade.

[48] Queen's Counsel further complained that the directions of the judge set out at page 399, lines 12-24 of the transcript, after he had recounted the prosecution's case, could only have served to confuse the jury as to where the burden of proof lay. This is what the learned judge said:

> "Now, in every case put up by the Prosecution, if at the end of the Prosecution's case you are not satisfied so that you feel sure that there is a case against the both accused men, you need not listen to them. Because it is the Prosecution who must convince you or satisfy you so that you feel sure of their guilt. But I am not going to ask any questions whether you are satisfied, because you haven't heard the defence yet, and we are going to take the adjournment now, and when we come back, I will deal with the defence, and reiterate certain basic instructions, and then send you to the jury room."

[49] The above directions coming at that stage of the trial, he submitted, were tortuous, and not satisfactory. What was required was simplicity which the jurors would understand. Counsel stated that the grounds taken cumulatively required the verdict to be quashed, the sentence set aside and verdict of acquittal to be entered.

[50] Counsel for the Crown pointed out that the trial judge had given extensive directions on the burden of proof and repeatedly told the jury that it was the Crown that must establish the identity of the persons who were on the premises when both deceased were killed. Counsel said that the learned trial judge had also dealt comprehensively with the efficacy of the identification parade and the alleged viewing of the appellants in advance of the parade and he reminded the jury that the question was whether they believed the main witness for the Crown on that issue. Counsel submitted that the appellants had not been able to demonstrate any failure on the part of the directions given by the learned trial judge in this regard.

Analysis

[51] Crown Counsel relied on a passage from the judgment of Stoby C in **R v Adams and Lawrence** which is worth repeating. He stated:

> "One of the essential functions of a judge when he sums up in a criminal trial is to explain the fundamental principle concerning the burden of proof. He must do so in language which admits of no ambiguity.."

[52] At the commencement of the summation, the learned trial judge addressed the jury on the issue of the burden and standard of proof, in this way (page 348 of the transcript):

> "Now in every case brought before these Courts the prosecution has two fundamental duties, we call them burden or duties. One is called the burden of proof and the other is called the standard.
>
> Now, what is meant by the 'burden of proof'. The Crown must establish to your satisfaction that each man, that Davis is guilty and Edwards is guilty. It means that before you can say either of them is guilty, you must be satisfied so that you feel sure of the guilt and it is only when you are so satisfied, beyond a reasonable doubt so that you feel sure, that is when you can return a verdict that is the correct verdict."

[53] The learned judge then went on to tell the jury the various issues in the case which the prosecution had to prove, namely that the appellants were acting together in common design; that Moses Brown and Jerrine Wilkinson were dead; the cause of their deaths; and who killed them. Throughout the summation, he reminded the jury how important it was for them to be satisfied so that they felt sure that the appellants had been correctly identified, and that meant, which he reminded the jury also, a serious scrutiny of the evidence of Mr Edgar Brown.

[54] The learned trial judge recounted the evidence clearly and correctly with regard to the alleged exposure of each of the appellants to Mr Brown and the conduct of each of the identification parades (see as previously set out herein; re exposure, paras [19] and [20] (prosecution), paras [22] and [23] (defence); re parades paras [16] - [18]

(prosecution), paras [23] and [26] (defence)). Additionally, in the summation, he drew to the attention of the jury the time lapse between the day of the killings (16 September 1995) and the respective days of the parades (1 November 1995 and 15 March 1996), the day that Mr Brown came to the island to and did attend the different parades, and the fact that the appellant Davis signed the parade form with a mark, yet he said that he could write, all for their consideration, while dealing with each appellant separately.

[55] As indicated, in our view, the jurors would have had no difficulty recognizing what the burden of proof was, and that it lay on the Crown, and also that the case of each appellant was different, and required them to look at each case separately. It is important to remember that the men and women of the jury approach each matter with their cumulative wisdom, experience and their general common sense. This ground must therefore also fail.

(iv) Uncorroborated evidence of visual identification

[56] Counsel for the appellant Edwards complained that the learned trial judge did not adequately and properly direct the jury on the law of identification and the dangers inherent in relying on the uncorroborated evidence of the sole eye witness, which prejudiced the appellant, especially with regard to the prior sighting of the appellant in Yallahs before the identification was held, and on the strengths and weaknesses of the visual identification, and thereby deprived the appellant of the opportunity of being acquitted. Counsel relied on **R v Oliver Whylie** (1978) 25 WIR 430 and **Farquharson (Barrington) v R** (1993) 43 WIR 305.

[57] Counsel for the Crown submitted that at the very beginning of the summation the learned judge indicated that the core issue of the case was identification, and he had said repeatedly that the jury must look carefully at the evidence of Mr Edgar Brown based on how important his evidence was to the outcome of the case.

Analysis

[58] As stated previously, the learned judge indicated at the outset of the summation that the main issue in the case was identification. He indicated that the prosecutions' biggest challenge was to prove who killed both deceased. He instructed the jury that the prosecution's case relied on visual identification and on page 355 of the transcript stated:

> "You have to approach the issue with great caution, because there are many times when honest witnesses can make mistakes. But the mistake of an honest witness is not less devastating than mistakes of a lying witness. Both of them might have the same effect. And the risks involved is that persons who are sometimes innocent have been wrongly identified. And the witness who has identified the person, the accused may be convincing.
>
> But even a convincing witness can be mistaken too. So, I must warn you of the special need for caution when you come to examine the evidence of Mr Edward [sic] Brown …"

[59] The learned trial judge also set out the lighting in the bedroom, the dining room, and the carport, and the times the witness, Mr Edgar Brown, said that he had the opportunity to observe the appellants, and the length of time that he did so, as set out herein (paras [3], [4], [5] and [6]), and then challenged the jury to determine in their

own mind whether he "was in a position to see and to be able to, on the dates given in evidence, identify these two men ..."

[60] The learned judge reiterated that the evidence of Mr Brown was crucial. He exhorted the jury as follows:

> "If for any reason you, Mr. Foreman and members of the jury, [sic] don't accept his evidence, then that would be the end of the case. Because it is he, upon whose evidence you are asked to rely to say that what took place at Hartease District, on the 16th of September, 1995, took place in the presence of Mr. Edward [sic] Brown and that it was these two men, among the number of men, three or whatever, who were there, and that you would have to find whether Mr, Edward [sic] Brown had the ample opportunity from the circumstances outlined to you, to be able to see and identify them on the parade. That is a matter for you."

[61] In our view, the judge dealt with the issue of identification cogently and comprehensively. He complied with the **Turnbull** guidelines, directed the jury as enunciated in **R v Whylie** to approach the evidence of identification "*with the utmost caution"* and advised them of the "gaps" between the killings and the identification parades. This was not an occasion of a fleeting glance with the attendant ghastly risks associated with those encounters. In our opinion, this ground has no merit.

(v) Unexplained contradictions and manifest inconsistencies in evidence of sole eyewitness

[62] Counsel for the appellant Edwards submitted that there were several "blatant and unexplained contradictions and inconsistencies in the evidence of the sole eye

witness" which the learned judge did not deal with adequately. He set out some of them as follows:

> "i. Whether the windows were made of glass or metal.
> ii. Were both windows to his bedroom open or was one closed?
> iii. When was the light turned on in the bedroom?
> iv. When were the lights turned on in the living room?
> v. Who turned on the lights in the living room?
> vi. The type of gun.
> vii. The position of the Appellant.
> viii. The lighting outside."

He relied on the dictum of Graham Perkins JA in **R v Curtis Irving** (1975) 23 WIR 434, for the proposition that the judge can and in this case ought to have assisted the jury in assessing the credit-worthiness of the evidence given by a witness whose credibility has been attacked.

[63] Counsel for the Crown submitted that the trial judge directed the jury on how they were to deal with inconsistencies and discrepancies, and it was a matter entirely for the jury whether the inconsistencies and discrepancies were profound, inexplicable, and/or central to the case.

Analysis

[64] In this case, one could not say, based on the evidence that the credibility of the witness Edgar Brown had been successfully attacked, or so completely discredited to warrant the intervention by the trial judge, as articulated in **R v Irving,** in which the headnote reads:

> "Although it was the general rule that the credit-worthiness of a witness was a matter to be determined by a jury in a criminal trial, where the sole witness for the prosecution has been so completely discredited by reason of admitted untruths and blatant and unexplained contradictions and inconsistencies as to render his evidence so manifestly unreliable that no reasonable tribunal could safely act on it, a trial judge will be well justified in not leaving the case to the jury."

That principle is therefore inapplicable to this case. Additionally, the learned judge in the instant case advised the jury of the meaning of inconsistencies and discrepancies in the evidence, and how to treat with them, based on whether they were serious or slight, and whether they affected the whole or only part of the witness' testimony. He recounted the evidence as set out herein in paragraphs [3] and [8], with regard to the windows, whether they were made of glass and or metal, and whether they were closed or open. He reminded the jury of what the witness Edgar Brown had said with regard thereto, at an earlier trial, which had been tendered as exhibits one and two. On page 373 of the transcript he said this,

> "I don't know how you are going to find on this whether it is glass window or metal, but whatever your findings may be I remind you that the bedroom was not the only place that Mr Edgar Brown had an opportunity to see his assailants."

On page 385 of the transcript, he said this:

> "And remember here, in the witness box, he is saying that both windows were opened. But it was shown to him that in a previous trial, he did say that the one on the left side was closed. That is the one in front of the driveway. Now, you have been directed as to how to deal with matters such as that."

He concluded his directions on this matter on page 422 of the transcript like this:

> "You remember that there are discrepancies. That there are two windows in the room. At some stage it is either one or both open. At some stage it is either glass or metal, but it is a matter for you. I told you how to treat it."

[65] There were no discrepancies with regard to the quality of the lighting. There were equally no discrepancies as to when the lights were turned on in the bedroom and the dining room. It was of little importance as to who turned them on. The issue was whether the three bulb ceiling light in the bedroom and the two 100 watt bulb lights on the skirting board under the guttering of the windows, and the two ceiling lights with three bulbs each in the dining room, and the street light across from the car port, provided sufficient lighting, over the specific period of time for the witness Edgar Brown to see the appellants clearly so that he could identify them later on the identification parade unassisted.

[66] In our view, the learned trial judge dealt with the inconsistencies and discrepancies in the evidence such as they were, adequately. In the circumstances of this case, one could not say that the verdict was "patently unreasonable" as found in **R v Irving**. This ground also, in our opinion, has no merit.

Conclusion

[67] In the circumstances, there being no merit in any of the grounds advanced, the appeals are dismissed. The sentences are affirmed and are to commence on 1 March 2006.