JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 128, 129 & 130/00

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE, J.A. (Ag.)

R.v. **GILBERT FFRENCH**
MARK NELSON
EDWARD MORGAN

Frank Phipps, Q. C. and Norman Godfrey for Edward Morgan.

Robert Fletcher and Gladstone Wilson for Mark Nelson.

Robert Fletcher and Celia Brown-Blake for Gilbert Ffrench.

David Fraser for the Crown.

October 28, 29, 30; November 3, 4, 5, 2003 and February 18, 2004

COOKE, J.A. (Actg.)

At about 10:00 a.m. on the 22nd July, 1998, Racquel Burton was on the main road at Holland Bamboo, in St. Elizabeth. She was there purchasing "liquour" from a "liquour truck". She recounted that she saw a silver van approach from the direction of Santa Cruz. This vehicle stopped at a coconut stall and the driver went and purchased a coconut. As he was returning to his vehicle a motor car drove up, passed the silver van and immediately turned around and stopped, facing this silver van. Three men came out of the car, two from the rear and one from the front. She next heard an explosion. She saw

the three men re-enter the car which drove off towards Santa Cruz. The man who had purchased the coconut ran towards his van but soon fell prostrate. This man was the deceased Carl Larmond. He succumbed to:

> "a gunshot wound to the chest which included damage to the vital organs, his lungs, the peripheral aspect of the heart, accompanied by internal haemorrhaging."

The entry wound had gun powder marks indicating that the fatal bullet had been discharged at close range. Burton described the motor car as:

> "A white sedan" and that "this car had silver tape on the back. The back glass was broken out. It had a silver tape right around where the glass would be."

Five persons were indicted for the non-capital murder of Carl Larmond. They were Gilbert Ffrench, Mark Nelson, Evan Jamieson, Edward Morgan and Adrian Deslandes. They were tried in the St. Elizabeth Circuit Court between June 12 and July 10, 2000. Jamieson and Deslandes were acquitted at the end of the case for the prosecution after no-case submissions were made on their behalf. The others were found guilty and they have now challenged the correctness of their convictions.

The Appeal of Gilbert Ffrench

The prosecution sought to establish by inference that Ffrench was a participant in a common design to murder the deceased. Reliance was placed on the following:

> (i) He was the driver of the car which Burton described as having driven up and turned

> around from which three men came out just before the explosion.

This is based on two sources. Firstly, about an hour after the shooting, Corporal Owen Bryan along with two colleagues in a marked police jeep left Balaclava Police Station. Their mission was to intercept the car which Burton had described. In the Bogue Hill area in St. Elizabeth a car passed them. Bryan noticed that:

> "the rear windscreen was broken and it was wrapped with silvery watery tape."

This, because of prior information, prompted him to turn around his jeep and give chase. It was a 70 mile per hour chase. This did not last long. The car stopped and three men ran from it into nearby bushes. The driver remained. He was Ffrench. Thus, by inference, based on Burton's description of the car in Holland Bamboo the inevitable conclusion was that Ffrench was the driver of the car. Secondly, in a witness statement, in subsequent questions and answers and his unsworn statement, Ffrench stated that he was the driver of the car from which the person who shot the deceased had emerged.

(ii) Ffrench was one of the three men who came out of the car just before the shooting. This is founded on the evidence of Burton that two men came from the rear of the car and one came from the driver's side.

(iii) The inconsistencies in the account given by Ffrench in his witness statement and questions and answers. The significant areas of difference are:

(a) In the former, his passengers were acquired by chance. He was involved in "roboting". At 9:00 a.m. that day he was chartered to go from Niagara to Santa Cruz.

On his way back two men stopped him and chartered him to go to Whitehouse in Westmoreland. He did not know these men. It was all a chance charter. In this statement he said he never came out the car.

(b)In his answers to questions posed to him he said he knew his passengers before. He had picked them up in Grant's Pen in Kingston and he was to take them to New Town in St. Elizabeth. This he did after which he went to visit his brother. He subsequently received a telephone call and he went to pick up his passengers who then told him they wanted to go to Whitehouse. He said the initial arrangements were made the previous Saturday which would have been four days before the shooting. He said he had previously denied knowing his passengers because he was afraid.

(iv) Leading the police on a chase.

(v) The behaviour of Ffrench in the circumstances did not indicate innocent presence as asserted by Ffrench.

Ffrench made an unsworn statement. The relevant portion of this unsworn statement is set out hereunder:

"I got charter . . .

HIS LORDSHIP: Just one minute, please.

ACCUSED GILBERT FFRENCH: ... by three men called 'Waggle' 'Ticks' and Mark ...

HIS LORDSHIP: Just one minute. The second name was?

ACCUSED GILBERT FFRENCH: . . . 'Waggle' 'Ticks' and Mark to Newton, St. Elizabeth. When I reach at Newton, they told me that they were going to Whitehouse. On my way to Whitehouse, on reaching the vicinity of Holland Bamboo where I saw a coconut vendor, in a silver coloured motor Pick-up van, a silver coloured Ford Pick-up van, one of the passenger in the car, one the passenger into the car told me to stop the car and turn around the car because he see the person that he was looking for, I turn around the car and parked before the Pick-up, the silver Pick-up van.

The three passengers came out the car and head towards this stall. I was about to come out the car and buy a coconut when I heard an explosion. It sounded like a gunshot coming from the stall. I got panic and shut the car door. The passenger run back to the car, one with the gun in his right hand, and ordered me to drive off the scene. They gave me instruction of which direction I should drive. I do exactly what they told me to do because I was afraid of dem.

When I reach at Bogue Hill, I saw a police jeep behind the car with lights flashing and siren on. I drive about a mile up Bogue Hill where the passengers told me to stop the car. They all ran out to nearby bushes. I did not run. I then move the car two or three chain from out of the corner.

The police jeep drive down beside the car. The police who was driving the jeep stick me up and told me I must come out of the car with my hands in the air. I do exactly what he told me to do, come out of the car with my hands in the air.

He then handcuff me and searched me and told me that I must remain standing where I was and then go around the other side of the car and search the car. He did not find anything on me or in the car. He put me in the jeep and drive about a

mile, about a chain down the road where he have me waiting until he get back-up. He then put me in a police car take me to the Balaclava Police Station where I met Mr. Cunningham and Mr. Campbell.

They took me in an office and took a witness statement from me. I told him everything that happen. I told him that if I see the one with the gun I could identify him. They have me waiting same place in the room in the office.

At about 5:00 p.m., I then met with Mr. Lawrence where he cautioned me. He told me that I am a suspect in Mr. Larmond's murder. I felt panic, coward. He questioned me. I answer. I give answer to all the questions. He then took me to Niagara where I showed him my mother's home. Met and spoke with my mother, then took me to the Black River Police Station and lock me down. On Sunday, July 26, 1998, at about 10:00 p.m., Mr. Lawrence and Mr. Campbell questioned me again. I answered questions, explained that when they questioned me first at Balaclava, by influence and force from the men that were (sic) chartered me, I was afraid to tell them that I knew the men that were in the car and that it was three of them in the car. He then took me back to the cell and lock me down and I have been in custody until now.

HIS LORDSHIP: Finish? Finish? Are you finished?

ACCUSED: No, My Lord. And I have been in custody until now. My Lord, I do not know nothing about this murder. I am an innocent man. I was always willing to cooperate with the police. That is it, my Lord."

A number of grounds were argued on behalf of Ffrench. This judgment will not deal with these grounds in order of presentation but rather for convenience according to the subject matter from which the complaints emanated. It was submitted that:

> "The learned trial judge failed to direct the jury as to how, in law, they should treat the matter of mixed statements of Ffrench which the Crown admitted into evidence."

R. v. Duncan (1981) 73 Cr. App. R. 359 and **R. v. Sharp** (1988) 86 Cr. App. R. 274 were cited in support of this contention. It is true that the learned trial judge did not give any directions in this regard. But can what Ffrench said be regarded as mixed statements? In both his witness statement and the questions and answers the only aspect which could presumably be regarded as inculpatory was an admission that he was present at the scene of the shooting. He was here admitting that which inferentially had already been established by the evidence: (Burton/Bryan supra). In **R. v. Gorrod** [1997] Crim. L.R. 445 at p. 446 the English Court of Appeal had this to say:

> "Where the statement contained an admission of fact which was significant to any issue in the case, meaning capable of adding some degree of weight to the prosecution case on an issue which was relevant to guilt the statement must be regarded as mixed for the purposes of the rule."

The rule adverted to, pertains to the obligation of the trial judge to give full directions on character evidence. (This is the issue in the next complaint which will be addressed). The formulation as to what amounts to a "mixed statement" is accepted as correct. Accordingly, the admission by Ffrench that he was at the scene did not add any degree of weight to the prosecution's case. Ffrench was making an admission to a fact which was not in issue in this case. Therefore, what he said cannot be categorized as a "mixed statement".

Accordingly, the learned trial judge was not in error in not giving directions to the jury as to how mixed statements should be treated. This ground fails.

There was the complaint that:

> "The learned trial judge's directions on good character were inadequate while he does give a propensity direction upon being prompted by prosecution Counsel (p.953. 21-25) the trial judge failed to give a direction as to the relevance of Ffrench's good character to his credibility. Such a direction is critical in the context of the admission of pre-trial mixed statements by Ffrench."

R. v. Aziz [1996] A.C. 41 and **Newton Clacher v R** S.C.C.A. No. 50/2002 delivered September 29, 2003, (unreported) were cited in support of this submission. Since this attack is based on the false premise that Ffrench gave mixed statements the reliance on **Aziz** is misplaced. **Clacher** does not deal with this issue. Ffrench's statements were entirely exculpatory. Lord Steyn, with whose speech the other Law Lords concurred in **Aziz,** made it clear that the necessity for full directions i.e. propensity and credibility does not arise when the statement(s) are wholly exculpatory. He said at 51 G:

> "The position remains that a wholly exculpatory statement is not evidence of any fact asserted ..."

Consequently, the issue of credibility does not arise. This ground therefore fails.

There was another ground which complained that:

> "The Learned Judge omitted to direct the jury on how they should, as a matter of law, treat with the issues of lies. **R. v. Goodway** 98 Cr. App. R. 11."

The "lies" told by Ffrench were:

(i) About the ownership of the car he was driving.

This is insignificant and quite irrelevant as to whether or not he was a participant in the common design alleged by the prosecution.

(ii) At first he said he did not know the men and subsequently admitted he knew them.

Goodway confirms the principles established in **Lucas** (1981) 73 Cr. App. R. 159 that where lies told by an accused are relied on by the prosecution there should be directions to the effect that:

(a) The lie must be deliberate and must relate to a material issue.

(b) The jury must be satisfied that there is no innocent motive for the lie.

(c) The jury should be reminded that people sometimes lie, for example in an attempt to bolster a just cause or out of shame, or out of a wish to conceal disgraceful behaviour.

There were no directions at all along these lines. Were such directions necessary? For these directions to become necessary there has to be a lie. There must be contrary evidence from which it can be determined that a maintained assertion by an accused is untruthful. This is not so in this case. Here, to put it starkly, is a self-confessed liar, albeit that he said he lied through fear. Hence, there was no necessity to give the directions pertaining to lies. The inconsistency as to Ffrench knowing the men went to his credibility in the circumstances of the shooting when he sought to say that his

presence was innocent. It should be added that the learned trial judge at no time in his summing-up adverted to this aspect of the evidence. This omission was to the benefit of Ffrench. Still he complains. This ground is without merit.

A further ground of appeal was that:

> "The learned trial judge in his comments on the evidence concerning Ffrench raises many arguments against believing Ffrench and de-emphasizes the other possibilities that exist to explain his behaviour. This is particularly so in the trial judge's treatment of inferences that could be drawn."

The passages which were excerpted to illustrate this complaint are set out below:

> "(i) He said he got chartered and at that stage he said sorry about that, the licence number of the car is 0446 BJ. I found that interesting. I don't know what you made of it, you see, because I have a right to comment and perhaps I, hearing him say that and saying "sorry", I was wondering if he was in a recitation, something he has learnt. He has forgotten his line to get back on track but those are matters for you. There was no need for him of telling us at that stage the licence number of that car.
>
> (ii) . . . these are three men who he claims to know. One of them comes back in the car with a gun and you don't even know who had the gun but suddenly you will notice that the men no longer have a name because all we know is that three men come back in the car and one of them had a gun. So here he is. He is panicked and he is frightened, and although he was attempting to come out of the car he is now back in the car. The men are able to

come and get back in the car and shut the car door.

(iii) Now tell me, Mr. Foreman and members of the jury, what does one do when one is in a car with several people? One man has a gun. You are afraid of that gunman. Do you allow the police vehicle to catch you? Do you stop or do you lead the police on a merry chase?

(iv) What him moving the car for if him stop and the passengers gone and the police coming, and he had just been taken hostage by these men. He does come out of the car and goes to the police, but according to him, and this is what he says, he moved the car. Why him go move the car for? The men are now in the bushes. The police are now coming to rescue him.

(v) When he is coming to the end he knows nothing about the murder, when he was there, but that is what he says.

(vi) Please note when he held Ffrench, Ffrench did not say to the police, 'I was a prisoner in the car, forced to drive these persons who had killed anybody.' Now he does not have to say anything, but had he been in that position is that the first thing he would have said?"

Passages (i) – (v) are comments on the unsworn statement of Ffrench. So it is incorrect to say that the learned trial judge was, as regards those passages, dealing with evidence. Nonetheless, this Court has to determine whether or not in the circumstances of this case the observations went beyond the proper bounds of judicial comment to the extent that Ffrench was denied a fair trial. Were these comments unwarranted and had the undoubted effect of neutralising the defence that was put forward? See **Mears (Byfield) v. R**

(1993) 42 W.I.R. 284 P.C. Before the impugned passages (i) - (v) are examined it must be realized that in making an unsworn statement Ffrench put himself at a disadvantage in that he, because of his choice, denied himself the opportunity to clarify and perhaps amplify the position which he was asking the jury to consider and accept. Such clarification and/or amplification would no doubt have been occasioned by cross-examination and may well have precluded the criticised comments.

In respect of (i) these comments seem to be directed at alerting the jury as to the manner in which Ffrench made his unsworn statement. If that is so, it was quite unnecessary for the comments to have been couched in this fashion. These comments would be appropriate for an advocate but not for a judge. There is nothing wrong for an accused person to prepare himself to make his unsworn statement. However, it cannot be said that this passage by itself undermined the defence of Ffrench.

In respect of (ii) this passage must be seen in the context of the learned trial judge dealing with submissions which were made to the jury on behalf of Ffrench that he should have been a witness for the prosecution instead of an accused. The context in which this passage is taken is reproduced below:

> "He said he was about to come out of the car to buy coconut when he heard an explosion sounding like gunshot coming from the stall. And immediately this man who lives on Mountain View Avenue and who hails originally from Niagara, he got panic, he said, so he never even looked to see what happened and as crown counsel tells you, he never sees anything. He does not see anybody fall down. He

> does not see anybody shoot anybody. The next thing he sees are the three men coming back to the motorcar and one of those men had a gun but he does not tell who was the man with the gun although he knows the three of them by name. And you see, I merely point that out to you because painstakingly, the defence has been hammering to you, "This man should be a witness. This man should be a witness How suddenly he becomes an accused?" And crown counsel had said to you, how can you use a man like that as a witness? But these are matters for you. Because certainly, these are three men who he claims to know. One of them comes back in the car with a gun and you don't even know who had the gun, but suddenly you will notice that the men no longer have a name because all we know is that three men come back in the car and one of them had a gun. So here he is. He is panicked and he is frightened, and although he was attempting to come out of the car he is now back in the car. The men are able to come and get back in the car and shut the car door. The passengers run to the car. "One of them had a gun in his right hand and he ordered me to drive off the scene. They gave me instructions." Please note. "They gave me instructions." And those instructions no doubt put him back on the road to Newton." [Emphasis supplied]

These comments cannot be said to be unfair.

As regards (iii) the words "now tell me" do have an adversarial ring. However, the substance of these comments cannot be said to have exceeded the proper bounds of judicial comment. The behaviour of Ffrench was germane to the issue of his being a participant in the murder. Further, immediately following these comments there is the following passage in the summing up:

> "Crown counsel has suggested that any fearful law-abiding citizen would have been the first to stop,

> jump out, run to the police and cry. 'Save me, save me. I am being kidnapped. I am being forced to drive away with these wicked men.'
>
> Defence attorney says, 'Well, you might behave that way. I don't behave that way.' I am so afraid, fearful, that I am going to run and I am going to run as fast as I can. Because the police told you that at one stage he was up at seventy miles per hour. And at another stage he was down to fifty. Forty when he was trying to stop. But these are matters of the evidence, and as I said, and I repeat, and I will keep on repeating, the evidence is entirely a matter for you."

The summing-up has placed before the jury the rival contentions. Thus this particular comment is unobjectionable.

The attack on comment (iv) is centered on the rather inelegantly phrased rhetorical question "Why him go move the car for?" This may tend to suggest that the car was moved because he was trying to evade the pursuing police. However, there was good reason for Ffrench not stopping in the corner. That would have occasioned a traffic hazard. Had Ffrench given sworn evidence this explanation might well have been elicited from him. In any event, the jury, possessed of common sense would, no doubt, have answered the question correctly.

As to (v), this was not an unwarranted comment. What the learned trial judge was drawing to the attention of the jury was that despite the presence of Ffrench at the scene there was this paucity of observation on his part.

Finally, there is (vi) and here this comment cannot be regarded as unfair. It is directing the jury to the behaviour of Ffrench. Since it has not

been established that these excerpted comments singularly or cumulatively had the effect of neutralising the defence of Ffrench, this ground fails.

There were three other grounds which complained of the learned trial judge's treatment of the evidence of Burton and his directions on circumstantial evidence (which were unnecessary) and common design. As these complaints were entirely without substance there will be no consideration of them. The application for leave having been granted and the hearing treated as the hearing of the appeal the appeal of Ffrench is dismissed and his conviction and sentence are affirmed.

The Appeal of Mark Nelson

The case for the prosecution against Nelson was two-pronged. There was the evidence of Lance Miller which was relied on to establish that Nelson was one of the men who ran from the car driven by Ffrench when it stopped following the police chase. Then there is the evidence that Nelson's fingerprint was found on that car.

Miller was at home in Bogue Hill at about twelve noon on the date of the shooting. His attention was drawn by the sound of a police siren. He saw the car driven by Ffrench being pursued by the police jeep. He saw when three men "bailed out" of the car and ran up to his house. One of those men had a firearm. These men wanted to be taken to the nearest bus stop. They took him into the bushes behind his house and thereafter there was quite a journey. Two properties were traversed. In an effort to lose the three men,

Miller took them into a cane piece. Two were lost, but not Nelson. Nelson latched on to Miller. They went to Valley Road and on to a river. Here there was a stop and a conversation took place between Nelson and Miller. The latter wished to know:

"Whats them deed why them running away"

Nelson provided the answer that:

"Them kill a man in Holland."

From the river it was on to Shanty Town, then to a hog pen. By this, night had descended and Miller was exhausted. Both his feet were subject to swelling. He lay down and fell asleep. When he awoke it was still night and Nelson ordered him to move on. They next reached the hills in the vicinity of his house. At this stage according to Miller, Nelson looked scared. The former managed to leave Nelson in the hills and reach his home. He then got a rake and a shovel and with his tracker dog set out to find Nelson for he wanted to tie him up. Eventually, it is the evidence of Miller that Nelson jumped on the back of "Daniel's" truck which was passing on the road. In due course the police took Nelson from that truck, brought him to his home where he Miller identified Nelson as one of the persons who had fled from the car driven by Ffrench and who had been in his company.

Detective Sergeant Devon Harris gave evidence as an expert on fingerprints. He compared the ridge characteristics of the fingerprint of Nelson with a fingerprint found on the car. He found that there were sixteen similar

coincident ridge sequences in both fingerprint impressions. He expressed the view that :

> "When I reach eight ridge points of similarity from a coincident sequence that is one hundred percent."

The defence of Nelson was that of alibi. In his unsworn statement he said that on the 23rd of July 1998, he left Kingston to go to St. Elizabeth to "purchase some ganja." He secured his ganja which he had in a bag. "After 2:00" (p.m.) he saw a truckman passing with marl in the back of the truck. He stopped this truck and offered five hundred dollars for him and his "herb" to be taken to Santa Cruz. This offer was to the sideman, Kenneth Bennett. He was told to wait until the truck returned. He waited and then he saw the truck returning. He got on to the truck which was soon confronted by a police road block. He was taken from the truck and taken up to Miller's house. He said Miller was not present and did not identify him. He was forced to touch the car. (This was to explain the presence of his fingerprint on the car. This was the first time the jury was being made aware of this, as there was no suggestion to this effect to any witness for the prosecution).

There were conflicts in the evidence as to the time when Nelson went on to the truck driven by Daniel Lyn who was accompanied by Kenneth Bennett. This is the "Daniel" to whom Miller made reference. There is no dispute that Nelson went on this truck, he was taken from it and he said so in his unsworn statement.

This is how the conflict arose. Miller gave 9:00 a.m. as the time when Nelson went on to the truck. Lyn's evidence was that he could not recall the time as the heavily laden truck crawled over the hill when Nelson came on to the fender of the truck requesting "to be taken out of the area". Nelson was told to await the return of the truck from depositing its load of marl. He returned to where Nelson was in approximately 30 minutes. By this, the police had been alerted and a District Constable was now in the cab of the truck. A scheme to apprehend Nelson was afoot. The truck stopped and Nelson boarded it. He was in the back. As soon as the truck descended the hill and reached the flat it came to a halt. Corporal Everald Martin arrived almost immediately with two colleagues in a police jeep and Nelson was taken into custody.

Bennett's evidence is that all this happened at about 12:00 noon. If this is accurate, then based on Lyn's estimate of returning to where Nelson waited in 30 minutes (if also accurate) then Nelson would have come on to the fender at about 11.30:a.m. Martin gave the time when he first saw the truck, from which he took Nelson as between 4:00 p.m. and 4:15 p.m. (Nelson in his unsworn statement gave the time of his apprehension as 2:00 p.m.), Thus on the case for the prosecution there are variances in estimates of time, particularly as to when Nelson first encountered the truck.

The precis above gave rise to the following ground of appeal that:

> "The learned trial judge failed to leave for the jury's consideration the huge discrepancy in the time

> sequence concerning when Lance Miller saw a person thought to be Nelson go on the truck and other evidence regarding when Nelson went on the truck. A direction that does not place an analysis of the evidence regarding the time issue before the jury would deny the appellant of a proper consideration of his case."

This ground as framed uses the words "thought to be Nelson go on the truck." The reason for this is that in Miller's evidence there was this exchange:

> "QUESTION: So how you know is the same man jump in the truck and is not somebody else?
>
> ANSWER: Is he alone did in the hills at that time."

So therefore it is by inference that the prosecution relies to say that Nelson was the person who Miller said went on to the truck. It was argued that the discrepancy as to 9:00 a.m. (Miller) and 12:00 noon (Bennett) were critical "to a proper consideration of Nelson's case and the time he says he was present and went on the truck." This "conflicting evidence" it was said "raises the question of whether the man who was with Lance Miller is the same man the police held." There was no complaint that the learned trial judge gave adequate general directions as to the treatment of discrepancies. He, in fact, did advert to instances in the evidence but he made no mention of this particular area. Did this omission result in Nelson not having a fair trial? The submission would seem to have assumed that the various times given were not estimates but were given by witnesses who at the relevant time had consulted an unerring time piece. These were witnesses who were recalling as best they could events which took place approximately two years before. There was only

one person who sought to board the truck and that was Nelson. Inferentially, (through the evidence of Miller) that was the person who was in the company of Miller for a very extended period. Further, there is the evidence of Detective Sergeant Harris, the expert as regards fingerprints. His competence and the integrity of his conclusion as to the presence of a fingerprint of Nelson on the car driven by Ffrench on that day was not challenged in the Court below. In this Court, the appellant was silent as to this aspect of the evidence.

In the circumstances it cannot be said that the omission of the learned trial judge to deal with what the appellant described as "the huge discrepancy in the time sequence" resulted in him being denied a proper consideration of his case. In any event, even if the view prevailed that the learned trial judge could have been faulted for not dealing specifically with the issue of the variance of the respective estimates of time, this would be a proper case for the application of the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act. The test which has guided this court is whether "if the jury had been properly directed they would inevitably have come to the same conclusion": see **Woolmington v Director of Public Prosecutions** [1935] A.C. 462 at page 482. This ground fails.

In his unsworn statement (supra) Ffrench mentioned the name "Mark" as one of the three men who had chartered his vehicle. It was the orders of these men which he said he followed. There was nothing in this statement which indicated that the "Mark" to whom reference was made was Mark Nelson

the appellant. The learned trial judge in dealing with this aspect of the case treated that portion of the unsworn evidence as being solely related to Ffrench. This is what he said:

> "He said he got chartered by three men and he gave you three names, Waddle, Ticks and Mark, so he is telling you that these were men known to him who had chartered the vehicle and the charter was to go to Newton in St. Elizabeth."

In his summing-up, at no time did the learned trial judge in his discussion of the unsworn statement of Ffrench say anything which could be any indication that the "Mark" to whom reference was made was Mark Nelson.

In the questions and answers Ffrench named a "Mark" as being one of his passengers. In that set of answers there was nothing to link "Mark" with Mark Nelson. The learned trial judge made no mention of this part of the evidence. During the conduct of this trial there was never any hint that the "Mark" was Mark Nelson. Despite this, there was a ground of appeal which was thus stated:

> "That the learned trial judge should have directed the jury as to the treatment in law of statements by co-accused against another."

It was sought to fault the learned trial judge for his failure to direct the jury that what is contained in statements by an accused is not evidence against a co-accused. Accordingly, it was said that the jury should have been told that when Ffrench spoke of "Mark" this reference to Mark Nelson was not evidence against him. As already stated, in the context of this case, there was no

evidential connection between "Mark" and Mark Nelson. If the learned trial judge had given the suggested direction the effect would have been to introduce an irrelevant consideration which would have been unquestionably prejudicial to the appellant. This ground of appeal fails as it is without merit.

The next ground of appeal was a follow-up to the last. It was:

> "In the light of the important discrepancies regarding the time sequence, it is critical that a very specific and detailed **Turnbull** direction be given in respect of Lance Miller's evidence."

The "**Turnbull** direction" is a reference to guidelines adumbrated in **R v. Turnbull** [1976] 63 Cr. App. R 132 which should inform the judicial approach when directing a jury in trials where the case against the accused depends wholly or to a large extent on the correctness of the identification of the accused. These directions, which are so well known as to preclude repetition, go to the circumstances and opportunity which concerns the purported identification. The purpose is to guard against mistaken identification, albeit honest and convincing.

It was submitted that "the question as to whom Lance Miller saw (go on the truck) became more urgent because of the discrepancies in the time line". The "**Turnbull** direction" would have been inappropriate in this case. Mark Nelson and Lance Miller had been together for a very long time as they tramped the countryside. The "important" discrepancies have already been discussed. So there is really no merit in this ground.

The appeal of Mark Nelson is accordingly dismissed. His conviction and sentence are affirmed.

The Appeal of Edward Morgan

In the case against this appellant the prosecution relied on evidence of identification given by Corporal Owen Bryan and the fact that the firearm from which the fatal bullet was fired was found in the possession of Morgan.

Bryan purported to have been able to identify Morgan as he fled from the car driven by Ffrench. He had further claimed that Ivan Jamieson also escaped from the same car. The learned trial judge regarded Bryan's evidence of identification as without worth. Hence, Jamieson was acquitted on the basis that the quality of the identification case against him was insufficient to establish a prima facie case. However, the case against Morgan was left to the jury on the basis of his possession of the murder weapon.

A number of grounds were argued on Morgan's behalf, the most substantial of which was that:

> "The learned trial judge erred when he rejected the no case submission of the appellant."

Before there can be resolution of this issue, the circumstances as to Morgan's possession have to be recounted.

On the 6th August, 1998 at about 11:30 a.m. Detective Owen Santo and Constable Gregory were on patrol in a marked police vehicle in the Alligator Pond area in St. Elizabeth. A motor bike was seen approaching which soon diverted its course into nearby premises. The police patrol entered that

premises. The rider of the bike was Morgan. On the pillion was Jamieson. The murder weapon along with ammunition were taken from the person of Morgan who said he had found the firearm and was carrying it "go sea go throw away". At this stage Jamieson said that he knew nothing about the gun. However, at the Alligator Pond police station Jamieson spoke to Santo as follows:

> "Mr. Santo let me tell you the truth. A me and Laddie take the gun from one a wi friend name Adrian up a Newport on Monday evening but me hear say it hot so we a carry it go dash it way."

The 6th of August, 1998 fell on a Thursday, so if the "Monday" to which Jamieson speaks was the "Monday" of that same week that would have been the 3rd August, 1998. Thus, subsequent to the murder on the 22nd July, 1998 both these men had been in possession of the murder weapon.

The learned trial judge appeared to have appreciated the consequence of Jamieson and Morgan being in possession of the murder weapon subsequent to the murder. In an exchange between the Bench and the Bar he said:

> "And that is where the problem lies. That is where the problem lies. If it was possession simplicita (sic). So that if it is possession simplicita (sic) then we have a difficulty in that you are putting them together and because you are putting them together, you are placing them with joint possession and using that joint possession to make the – ask for the inference and that is where there is a great danger. Let me put it that way."

This passage demonstrates that the learned trial judge correctly recognized that if the prosecution was relying on possession of the murder weapon to establish the inference of guilt then there must be evidential material indicating that from the time of the shooting Morgan was in exclusive possession of the linking firearm. In this case there was evidence to the contrary.

This critical evidence that Jameison was in possession of the murder weapon prior to Morgan being in possession appears not to have registered on the mind of the learned trial judge. He said in another exchange:

> "And not only was it recovered from him (firearm from Morgan) but it was recovered from him in a position where when Jamieson says I know nothing about it... ."

Jamieson did at first say he knew nothing about the firearm but subsequently told how he got possession of the firearm. So, while the legal approach of the learned trial judge as to joint possession within the context of this case was correct he fell into error in failing to take into account the evidence of the possession in Jamieson.

His ruling was based on a misconception of the factual circumstances and was clearly inconsistent with that pertaining to Jamieson. Accordingly, there is merit in this ground of appeal. As this ground effectively disposes of the appeal it is unnecessary to deal with the other grounds which where advanced. The appeal of Morgan is allowed. The conviction is quashed and the sentence set aside. Judgment and verdict of acquittal is entered.

In respect of Ffrench and Nelson the learned trial judge sentenced each to imprisonment for life and determined that each should serve a period of twenty-years before becoming eligible for parole. These sentences are to commence on the 10th October, 2000.