JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 73 & 74/1998

BEFORE: THE HON MR. JUSTICE BINGHAM, J.A.
THE HON MR. JUSTICE HARRISON, J.A.
THE HON MR. JUSTICE SMITH, J.A.

REGINA V EVERTON GORDON
PAUL HOLDER

Alonzo Manning for Everton Gordon

Patrick Atkinson for Paul Holder

Herbert McKenzie and Christine Morris for Crown

May 21, 22, 24, 2002 & June 12, 2003

HARRISON, J.A:

Both applicants were convicted in the Circuit Court for the parish of Trelawny on June 16, 1998 for the murder of Webster Thompson on March 9, 1997. Each applicant was sentenced to a term of life imprisonment at hard labour and it was ordered that they be ineligible for parole before the period of twenty years in the case of Gordon and fifteen years in the case of Holder, had passed.

The facts are that on Saturday March 8, 1997, several persons were attending a "singing" at the home of Astley Hall at Windsor Castle in the parish

of Trelawny. At about 1:30 a.m. the Sunday morning the witness Steadman Williams was spoken to by one Esau Cunningham, and as a result he ran to the back of the kitchen which was itself behind Hall's house. He saw the deceased Webster Thompson, his brother, lying on his back on the ground, as if he was dead. The applicant Everton Gordon was sitting on the deceased's legs stabbing him with a knife while the applicant Paul Holder was holding the deceased backwards. The witness Williams took up a stick and hit the applicant Gordon in his side. The applicant Holder let go of the deceased's head and ran, but the applicant Gordon continued "working on" the deceased. The witness Williams hit the applicant "a might blow" in his head. The applicant Gordon then jumped off, and with a knife in his hand stabbed at the witness Williams who ran to the front of the kitchen. The applicant Gordon followed and said "Boobus (referring to the witness Williams) whe you lick me for". The applicant Gordon flung a bottle at Williams and then stabbed at him with the knife. Williams ran into Hall's house and remained there. About one hour after, he went to one Smith's yard to the back of Hall's kitchen and saw the body of the deceased, on the ground. The witness had known each applicant for about twenty years. Both were at the "singing" the night and the applicant Holder had been "tracking" the songs from the hymn book.

The area was well lit. There were electric wires, attached to which were lighted bulbs in sockets. One bulb was in the area of the verandah of the house, the second bulb was in the booth where the singing was being held and the third

bulb was at the kitchen. Another prosecution witness Rupert Smith who was also at the singing saw one Cunningham and the applicant Gordon go to the back of the kitchen. Afterwards, the applicant Gordon emerged and said:

> "Whe Boobus, I want to kill him, come lick me in me head".

The witness had already seen Steadman Williams run into Hall's house. Smith also indicated where the light bulbs were placed, but said that around the back of the kitchen was dark.

Dr Semiv Giwa performed the post mortem examination on the body of Webster Thompson on March 20, 1997. He observed, externally:

(1) an extensive laceration to the left front of the chest between the 7th and 8th ribs;

(2) a 2 cm by 1 cm laceration to the left armpit between the 3rd and the 4th ribs;

(3) a 2 cm by ½ cm laceration also to the left armpit.

Internally, there was a laceration 8 cm by 3 cm of the left chest wall exposing the subcutaneous tissues and clots. The left lung was extensively bruised with haemorrhage and congestion and there were two penetrating wounds of the heart in the right ventricle. The cause of death was extensive intrathoracic haemorrhage from the stab wounds to the heart. A knife could have caused those injuries. A sample of the deceased's blood was collected and handed by the doctor to Det. Sgt. Calbert Bowen, the investigating officer present.

Det. Sgt. Bowen received a report on March 9, 1997 at about 5:00 a.m. and went to Astley Hall's home at Windsor. Steadman Williams, Astley Hall,

Rupert Smith and Esau Cunningham, made reports to him. He saw the body of the deceased lying in Smith's yard which is behind Hall's, with wounds to the chest and armpit. In an area behind the kitchen in Hall's premises, he saw blood on the ground and on some leaves, and found a blue and white cap and two grey buttons. The kitchen was 8 ft from the house, there was a shed about 30 ft from the house and there were electric wires with bulb sockets attached, in the area of the shed, at the right side of the kitchen and at the verandah. Remains of broken bulbs were in the sockets at the kitchen and verandah. He went to the house of the applicant, Holder, at Sherwood Content and saw there a wash pan with "bloody water". Det. Sgt. Errol Williams had gone to the said house and the applicant Holder's mother took from the wash pan a water soaked blue and grey long sleeved shirt which she gave to him, who in turn gave it to the witness Bowen. The latter, having observed that there were three buttons missing from the said shirt, returned to the scene behind the kitchen in Hall's yard where he searched and found a third grey button, all three of which matched the buttons remaining on the shirt.

On March 10, 1997 Det. Sgt Bowen arrested the applicant Holder who after caution said:

> "Me never have notting to do with the man."

Shown the shirt, the applicant Holder admitted that it was his and that he was wearing it at the scene at Hall's house. The witness took from the applicant Holder a pair of black trousers he was then wearing. On July 13, 1997 he

arrested the applicant Gordon. He sent to the Government Analyst at the Forensic Laboratory, the said shirt and trousers, the leaves with blood, the trousers, the cap and samples of blood taken from the deceased and the applicant Holder.

Miss Sharon Brydson, Government Analyst, received and analyzed the articles. She found that the sample of blood taken from the deceased was group 'B' classification. The blood sample taken from the applicant Holder was group 'O' classification. The blue and grey shirt of the applicant Holder, had blood of group 'O' on several areas and also group 'B' blood on two areas. The buttons were similar to each other and similar to the buttons remaining on the shirt. On the dried leaves the analyst found human blood of group 'B' classification. She also found group 'O' human blood on the black trousers.

The applicant Gordon in an unsworn statement in his defence, said that he was at Hall's premises on the said night of the singing. The applicant Holder was also there "tracking" the songs. Later he was at the right side of the kitchen talking to Esau Cunningham, from whom he had taken Fifty Dollars and who had in return taken back from him Gordon, more than the Fifty Dollars. About four men, including the witness Williams and his son, came to the back of the house where they were. It was dark but he could see them. One of them hit him on his shoulder. He was also hit in his mouth and in his head. He was knocked out. When he regained his senses, all the persons in the yard except one man, had gone. He complained to Astley Hall about having been hit down and started to

leave when stones were thrown at him from the bushes. One caught him on his foot. He walked home. Later he was told about the death of the deceased, but he knew nothing of it.

The applicant Holder also gave an unsworn statement. He admitted being at Hall's premises on the said night "tracking" the songs. He saw Cunningham and the applicant Gordon having a dispute. At the singing he heard a loud noise and started walking away. Stones were flung and he and others ran. He denied being behind the kitchen on that night and denied holding anyone.

On the 2nd day of the trial, Mr. R.A. Salmon counsel for the applicant Gordon, advised the Court that the applicant did not wish him to represent him any longer, having lost confidence in his ability to defend him. The applicant confirmed this to the Court, stated that he would defend himself and that he was prepared to do so. The Court afforded him an opportunity of a half hour adjournment to read the depositions and the trial continued.

Both counsel Mr. Alonzo Manning for the applicant Gordon and Mr. Patrick Atkinson for the applicant Holder, argued several grounds of appeal.

Mr. Atkinson on behalf of Holder opened his arguments with ground six. The essence of this ground is that the applicant was denied a fair hearing within a reasonable time as guaranteed by section 20(1) of the Constitution of Jamaica, in that the prosecution caused a delay of eleven months between the holding of the preliminary examination and the trial. The effect of this delay was that a witness Esau Cunningham who gave evidence at the preliminary examination

died prior to the trial. The jury was and thereby deprived of the opportunity to hear his oral testimony before them and consequently the applicant Holder was denied the opportunity of a possible acquittal.

Mr. Atkinson submitted that the deposition of the witness Cunningham revealed that there was an earlier incident at a shop between the applicant Gordon and Cunningham concerning money, followed by a further dispute between them in the area of the kitchen. When the stabbing took place, he submitted the applicant Holder, far from holding the head of the deceased, he was not at the scene of the stabbing.

Section 20(1) inter alia, of the Constitution, reads:

> "**20.-(1)** Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> **(2)** Any court or other authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

Although the viva voce evidence of a witness at a trial is preferable and desirable, in order that the jury may see and assess the credibility of the witness, this is not always possible, due to intervening circumstances. The statutory provisions of the Justice of the Peace Jurisdiction Act contemplates such an eventuality and permits the deposition of a witness to be used as evidence at the

trial in certain circumstances, for example, where the witness is dead. Section 34, in part, reads:

> "**34.** ... if upon the trial of the person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, or is absent from this Island or is not of competent understanding to give evidence by reason of his being insane, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he, or his counsel or solicitor had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the Justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof ..."

(See ***R v Scott and Walters*** SCCA 153 and 154/80 delivered December 20, 1982). The prosecution is not obliged to call all the witnesses who gave evidence at the preliminary examination (***R v Fuller*** (1966) N.Z.L. R 865). However, in the event that the witness will not be called at the trial, he or she must be made available to the defence (***Dallison v Caffery*** [1964] 2 All E.R. 610, 618). In the instant case because of the particular circumstances, the deposition of the witness Esau Cunningham, was adduced as evidence in the case of the applicant Holder.

Mr. Atkinson himself pointed out that in 1997, the witness Cunningham was 85 to 90 years old and very ill. The deceased met his death on 9th March, 1997, the preliminary examination was held on July 14, 1997 and the trial commenced on June 10, 1998. The witness Esau Cunningham died on June 12

1998. Although eleven months is a long period of time to elapse between the time that a preliminary examination is held and a trial, ordinarily, it is not unusually long, in the context of the numerous murder trials in Jamaica. It is less than ingenuous to argue that it was due to the delay by the prosecution, that caused the jury not to have had the benefit of the viva voce evidence of the said witness. The statutes themselves make provision for the untimely intervention of death.

The learned trial judge gave adequate directions to the jury on the manner to treat the deposition of a witness whom they had not seen or heard. The learned trial judge said at page 323 of the transcript:

> "Bear in mind that in addition to his statement, the defendant, Holder, had admitted to evidence on his behalf, the deposition of Mr. Esau Cunningham, who it is alleged was an eyewitness to the incident, and who unfortunately died on Friday of last week, in which he gave an account of what took place behind the kitchen and which he stated that Holder was never present there at the time. This evidence, if you accept it, would support what Mr. Holder is saying, that he was never there, and that he was not involved in any joint enterprise with Mr. Gordon to commit an offence. But, we will come back to the evidence in more details later on.
>
> In dealing with the question of the tendering of the deposition in evidence, I must warn you, that where the deposition of an absent witness is admitted in evidence, you must be warned that you have neither had the benefit of seeing this person give evidence, nor of hearing his evidence tested in cross-examination, and you must take that into consideration when you are evaluating the reliability of the evidence contained in that deposition."

The jury therefore considered the said deposition in the context of the defence of the applicant Holder. There was no breach of the constitutional rights of the applicant in that regard complained of. This ground therefore fails.

Grounds 2 and 3 were argued together. They read:

> "2 Identification/Recognition
>
> That the learned trial judge erred in failing to grant the applicant/appellant Holder's no case submission on the basis of irreconcilable weakness in the identification or recognition evidence that applicant/appellant Holder was at the scene of the killing.
>
> 3. Credibility/reasonable doubt
>
> That the learned trial judge erred in failing to grant the applicant/appellant Holder's no-case submission when the evidence contained a fundamental unexplained and unreconciled contradiction concerning the presence of the applicant/appellant at the scene during the killing. This was compounded by the learned trial judge directing the jury that the issue was one of identification rather than credibility."

Mr. Atkinson submitted that the evidence against the applicant Holder which came from Steadman Williams, that the area behind the kitchen was "as good as daylight" conflicted with the evidence of the prosecution witness Rupert Smith who said that the "area (was) dark". Furthermore, the evidence of the latter witness who said he saw the applicant Holder running conflicts with the evidence of the witness Williams. The learned trial judge should have seen these discrepancies as so severe, that she should have upheld the submission of no case to answer, in respect of the applicant Holder. Alternatively, the learned trial

judge should not have taken away the credibility aspect of the identification from the consideration of the jury.

The evidence which was before the Court at the close of the case for the prosecution was that the witness Smith saw the applicant Gordon going with Esau Cunningham to the back of the kitchen. Cunningham subsequently went and spoke to the other prosecution witness Steadman Williams, who ran to the back of the kitchen where he saw the applicant Gordon, sitting on the legs of the deceased "working on" him while the applicant Holder held the deceased's head backwards. Having twice hit the applicant Gordon, who stabbed at him, the witness Williams ran to Hall's house. The applicant Holder had run when the first blow was struck by the witness Williams. The witness Rupert Smith saw the applicant going through the garden, saw the applicant come from the back of the kitchen and heard him say:

> "Where Boobus (Williams), want to kill him, come lick me in my head."

He had already seen the witness Williams run into Hall's house.

There were in fact some discrepancies in respect of the evidence in support of the case for the prosecution at the close of its case. However, discrepancies are essentially a question of fact for the jury in considering the reliability of the witnesses for the prosecution. The proper approach of a trial judge is that, where there is evidence upon which a jury could properly find the accused guilty, the case ought to be left to the jury. **(R.v. Galbraith** [1981] 2 All E.R. 1060).

In the circumstances, the case was properly left to the jury to consider the issues of fact. These grounds therefore fail.

Ground 1 reads:

> "That the learned trial judge erred in withdrawing manslaughter from the jury in a case where the killing was the result of fight and in the heat of passion in a case where there is evidence of provocation to the applicant Everton Gordon."

Mr. Atkinson for the applicant Holder argued that provocation arose in the case of the applicant Gordon, in that, more than Fifty Dollars was taken from him by the witness Cunningham. Manslaughter due to provocation should have been left to the jury in the case of the applicant Gordon, thereby extending the benefit of such a verdict to the applicant Holder who was, on the facts, aiding and abetting the applicant Gordon in the stabbing.

Counsel referred to the deposition of Esau Cunningham, tendered as evidence in the case of the applicant Holder. It reads, inter alia, at page 300 of the transcript;

> "I said, Jesus Christ, have mercy Ratta B., mean say you leave Sherwood come ina Windsor fi thief? Ratta B shoob his hand in his pocket and take out a Fifty Dollars and I grab it from him. Ratta B. then hold my hand and take me off the step and say come Cunny, mek we go round here so go reason. He draw me round to the bathroom side – kitchen side, sorry. He said I must give him back the Fifty Dollars that I took from him. I said you naw get it, you know, a fe me this, you know sah. He then pawned me in yah so (witness indicating that accused held on to the front of his, witness' shirt and chest areas with one hand) and he was pulling to go around the darkness in the coffee walk. I then holler out for Frennie. I thought

> Ratta B. was going to kill me, strangle me and I am a sick man."

Counsel also referred to the unsworn statement of the applicant Gordon, at page 251 of the transcript:

> "I went down to Mr. Esau and ask him, I asked him if he was vex about the fifty Dollars. Him reply, him say, "Cho from you take up the money you mek me salt. The man dem win out the whole a me money". I say to him say, all right I going to give you back the Fifty Dollars.
>
> I go into me pocket and I tek out money I had in me pocket. This money was a lot more than Fifty dollars, my Lady. As fast as I tek it out a me pocket Esau grab it from me. I said, ""Esau, is more than Fifty Dollars you grab from me. Give it to me mek me give you the fifty Dollars". Him say him not going give me.
>
> At that time, my Lady, him start to mek a whole heap a noise. I said to him, "Stop make the noise in the people dem yard and mind you mash up the people dem singing". I moved to the right side of the kitchen and I say, "Esau, come here so mek me and you talk bout the money".
>
> While we was there, my Lady, about four or five men came from around the back of the house. Around that side was very dark. I recognize two of them, my Lady. One of them was Mr. Williams who we call Bubus. The other one that I recognize was one of his son who dem call Evan. None of dem don't say anything to me. One of dem hit me in my shoulder. I got another lick in me mouth which break me teeth and I got another lick in me head, Your Honour, which knock me out to the ground.
>
> When I came back to my senses all the people was gone from the yard".

In respect of the issue of provocation, the learned trial judge told the jury, at page 321 of the transcript:

> "The killing must be unprovoked and this does not arise in this case ..."

A trial judge has a duty to leave for the consideration of the jury every issue fairly arising on the evidence although the defence is not relying on it: (***R v Muir*** (1995) 48 W.I.R. 262 following ***R V Bonnick*** [1978] 66 Cr. App. R. 266). If therefore there is insufficient evidence of provoking conduct to cause the loss of self-control, there is no issue to be left to the jury: (***R v Robert Smalling***, Privy Council Appeal No. 45/2000 delivered March 20, 2001 (unreported).

In the instant case, there is no evidence of any provocative conduct that could possibly give rise to a loss of self-control sufficient to raise the issue of the defence of provocation. It is the applicant Gordon who is stated to have taken the money of Esau Cunningham and who re-took money at Hall's house. I agree with Mr. McKenzie for the prosecution that the deposition of Esau Cunningham revealing that the applicant Gordon said;

> "...Come Cunny mek we go round here so go reason"

is evidence of a measured, friendly and deliberate act of the said applicant revealing no lack of self-control. It should also be noted, that the applicant Gordon's unsworn statement reveals that Gordon was hit on the shoulder, mouth and head, after which he "passed out" and having "come back to (my) senses" observed that all the people had left. The applicant Gordon is not saying that he had inflicted any blow or wounds. He is maintaining that he inflicted no

wounds. There is no basis on which the defence of provocation could arise sufficient for the learned trial judge to have left it to the jury. There is no merit in this ground.

Ground 4 (Holder) reads:

> "**4** That the learned trial judge failed to adequately direct the jury as to common design in the context of the case".

Counsel argued in support of this ground that in the context of the case the directions on common design were deficient in view of the evidence of the witness Steadman Williams who, at page 17 of the transcript, said:

> "Him (applicant Gordon) sidung same way and was working and I hit him in his head ...
>
> After I lick him in him head him jump sideway towards me with a knife".

It is significant to remember that the said witness Williams had said earlier in evidence that when he went to the back of the kitchen he saw the applicant Holder, holding back the head of the deceased as he lay on the ground while the applicant Gordon was sitting on the legs of the deceased. The witness at page 16 of the transcript said:

> "I saw Rattabee (applicant Gordon) with his hand was working this way on my brother ... (demonstrates) ... When I saw that ma'am I was so frightened I started to spin until I saw a piece of stick. I knock him in his side ... Rattabee ... Dog Heart (applicant Holder) let him go and run into the yard".

Despite this evidence, Mr. Atkinson for the applicant complained that it was the jury who should decide whether or not there was an agreement

between the applicants Gordon and Holder but instead the learned trial judge took away from them the determination and told the jury what to find.

The learned trial judge in the directions to the jury on the issue of common design, at page 321 of the transcript, said:

> "Now the prosecution in this case, is saying that Everton Gordon and Paul Holder acted together in concert to kill Webster Thompson. In other words, that the two of them joined together in a joint enterprise either to kill Mr. Webster Thompson or to cause him serious bodily injury. A joint enterprise is where two or more persons agree or join together to commit an offence and that agreement is carried out and the offence is committed, then each person who takes an active part in the commission of the offence is guilty of that offence. Such persons cannot, however, be convicted of the full offence unless present at the commission of the offence and actually aids and abets and assists in its commission.
>
> In this case the evidence of Mr. Steadman Williams, if you believe him, is that he ran to the back of Mr. Hall's kitchen where he saw the accused, Mr. Everton Gordon, Ratta B, sitting on Webster Thompson's legs and working wringing something in his body and you will recall the demonstration he gave to you.
>
> He also describes that Paul Holder was holding Mr. Thompson's head backwards while Mr. Gordon was sitting on him, and using the knife, working on his body. If this evidence is accepted by you, then it is possible for you to find that these men, by their actions were acting together in furtherance of an agreement to either cause Mr. Thompson serious bodily harm or to kill him. Mr. Gordon, by sitting on Mr. Thompson's legs and Mr. Holder holding his head backwards would have totally immobilized Mr. Thompson, and while this was happening, Gordon was in full view of Mr. Holder, using the knife to work away at the deceased's body, as described by Mr. Williams.

> You also heard the evidence of Detective Sergeant Bowen about the injuries he saw to Mr. Thompson and the evidence of Dr Giwa of the injuries he saw when he performed the post mortem examination. If you accept the evidence that both these men acted in the way described by Mr. Williams, then each of them would be acting together in furtherance of an agreement to kill or to cause serious bodily injury to Mr. Thompson.
>
> However, if you accept what Mr. Holder is saying, that although he was present at the singing, that at no time was he ever at the back of the kitchen involved in any altercation with the deceased or Everton Gordon, then you would have to dismiss the whole issue of common design, and acquit him of the charges".

The learned trial judge went on to tell the jury that the applicant Holder introduced into evidence the deposition of Esau Cunningham who said that Holder:

> " ...was never present there at any time".

The learned trial judge with reference to that evidence, then said to the jury, at page 323:

> "This evidence, if you accept it, would support what Mr. Holder is saying, that he was never there, and that he was not involved in any joint enterprise with Mr. Gordon to commit an offence."

It is evident from the nature of the evidence that the prosecution's case was not based on any agreement between the applicants to commit the offence of murder to constitute the fact of common design. Instead, it was the fact of the applicants immobilizing the deceased by means of the applicant Holder

holding back the deceased's head whilst the applicant Gordon sat on the deceased's legs and stabbing him with the knife. On this evidence the applicant Holder could have been seen as an active participant with the applicant Gordon. They were acting together in the attack on the deceased. Their actions, on the evidence, could satisfy the test of common design. The learned trial judge gave full and proper directions to the jury on that issue in the case; those directions cannot be faulted. This ground also fails.

Ground 5 reads:

> "The learned trial judge failed to adequately direct the jury as to the law relating to circumstantial evidence in the context of the case".

Counsel argued that the learned trial judge should have related the directions to the jury with more specific reference to the place where the items, such as the buttons and leaves, were found. Further they should have been told that if they rejected the evidence of the eyewitness Williams, considering the circumstantial evidence remaining, they should find the applicant Holder, not guilty.

The prosecution's case rested both on the accounts of the eye-witnesses and the circumstantial evidence in respect of the items recovered. On the issue of circumstantial evidence, the learned trial judge told the jury, at page 361 of the transcript:

> "Now the prosecution in addition to relying on direct evidence, that is 'I see' evidence, also sought to rely on circumstantial evidence. There are two types of evidence, 'I see' direct evidence or circumstantial evidence. The circumstantial evidence that the prosecution is relying on is by way of scientific

evidence. You'll recall Mr. Bowen telling us that when he went to the premises that night a spot was pointed out to him as the area where the incident had taken place. He made a search of that area and he found certain things, and you'll recall that four leaves with blood were found, more significantly three. Well, initially he found, two grey buttons and a later search revealed a third button. The shirt was later recovered, a grey and blue shirt was later recovered which the accused, Mr. Holder, admitted was his shirt, if you believe what Mr. Holder says that that was the shirt he was wearing on the night of the singing. The evidence says that when that shirt was recovered, when Mr. Bowen got it he observed that three buttons were missing from it; when he looked at the buttons that were still on the front of that shirt they were similar to those that he had recovered at the scene. As a result, he went back and when he searched further he found a third button. You have to look at that evidence.

Of course, on the other side, Mr. Douglas, you'll recall cross-examining the expert, and the expert saying, although she said it, you know, it could have, those buttons could have come from that shirt. She also said there was nothing unique about those buttons. She said it could have come from any other shirt, but the prosecution is saying that by putting these bits and pieces together they are linking a chain, they are linking certain evidence together to show you why they are saying that Mr. Holder was on the scene. That same shirt, if you accept the evidence, that it was his shirt, that he was wearing it on the night of the incident, also contained bloodstains, its bloodstain the grouping which was similar to his blood grouping on the shirt, but in addition there was blood on the collar and on the back of that shirt which was similar in grouping to that of the deceased, Mr. Thompson.

Now, is it just coincidental that all these things are there or is it because he was there at the time holding Mr. Thompson and when Mr. Thompson got injured that is how that blood grouping, group 'B' got on to his shirt? Madam Foreman and members of the

> jury, that is something that you will have to determine". (Emphasis added).

The learned trial judge went on to give an accurate definition of circumstantial evidence for the benefit of the jury. She said, at pages 363 - 4:

> "Well now, let me tell you that it is not always that every charge will be proved by direct evidence, evidence of 'I see' witnesses. Sometimes you can prove a charge by inferences from surrounding circumstances. This is what is called circumstantial evidence. Circumstantial evidence is as valuable in proof of a charge as a direct or 'I see' evidence. Circumstantial evidence goes to the proof or the guilt of an accused; one witness may prove one thing and another proves another thing, and when these things are taken together they prove the charge to the extent that you feel sure of it, but none of them, when they are separately taken, proves quilt of the accused. Taken together, they must lead to prove one inevitable conclusion of guilt, and if that is the result of circumstantial evidence, it is of such that it is safe to come to a conclusion that the evidence given is proper evidence, it is good evidence. You see, they say circumstantial evidence is almost as accurate as Mathematics, it doesn't lie. 'I see' witnesses may be mistaken or they may tell false stories. Circumstantial evidence, you must look at all the surrounding circumstances. If all the circumstances relied on point in one direction and one direction only, that direction must be the guilt of the accused. However, if the circumstantial evidence falls short of that standard and it doesn't satisfy the test that it points in one direction and one direction only, then you'll have to reject it and give the accused the benefit of whatever doubt exists".

The prosecution's case against the applicant Holder was, that he was holding the head of the deceased backwards, while the applicant Gordon was stabbing him. The blood group "B", on the clothing of the applicant Holder and

the buttons allegedly from his shirt found in the area where the leaves with the deceased's blood group type group "B', were found, is real evidence of contact of the applicant Holder, with the deceased. This was damning evidence in view of the case of the applicant Holder that he was not there. The learned trial judge, on page 365, told the jury:

> "In the case of Mr. Holder, he said he was not there, it is a case of mistaken identity. If you accept what he has told you, that he was not there and it is a case of mistaken identity then you must acquit him. If you are left in some doubt as to whether he was there or not, then that doubt must be resolved in his favour."

The directions of the learned trial judge on circumstantial evidence as it concerned the case of the applicant Holder, was more than generous. It certainly was adequate in the circumstances. This ground also fails.

Mr. Manning for the applicant Everton Gordon, with the leave of the Court, argued three supplemental grounds:

Ground 1, as amended, reads:

> "**(1)** That the summing up was defective, in that it was inadequate in directing the jury as to the law relating to manslaughter, circumstantial evidence and identification".

In advancing his arguments in support of this ground, counsel for the applicant Gordon adopted the arguments of Mr. Atkinson in respect of grounds 1, 2, 4 and 5, for the applicant Holder: in respect of grounds 1, 2 and 5 relating to manslaughter, identification and circumstantial evidence. It is sufficient to state that for the reasons given above, this ground fails.

Grounds 2 and 3 read:

> "**(2)** Failure to give adequate directions to the jury when the court decided to continue the case when the appellant was unrepresented, exposing him to great dangers resulting in his conviction by this jury.
>
> **(3)** That the court ought to have discharged the jury when the attorney, Mr. R.A. Salmon was released from representing the appellant".

When the trial commenced on June 10, 1998 the applicant Gordon was represented by Mr. R.A. Salmon of counsel who had been assigned to represent him. On the morning of June 11,1998 the following dialogue took place:

> "Mr. SALMON: May it please you, m'Lady. I have a very unhappy announcement to make to the court before this matter proceeds any further. The accused, Everton Gordon, for whom I appear, has indicated to me, m'Lady, that he no longer wishes me to appear in the matter, that he is prepared ...
>
> HER LADYSHIP: Just one minute.
>
> MR. SALMON: I beg your pardon. ... that he is prepared to undertake his own defence, m'Lady. I very much regret the inconvenience that this situation might cause but I certainly would be happy to be relieved of this assignment. Mr. Gordon has no confidence in my ability to defend him. I will not say much more, m'Lady.
>
> HER LADYSHIP: Please stand up, Mr. Gordon. You have heard what counsel has just indicated to the court?
>
> ACCUSED: Yes, madam
>
> HER LADYSHIP: And that is what you are saying at this point in time ...
>
> ACCUSED: Yes, my Lady.

HER LADYSHIP: ... that you do not wish him to appear on your behalf?

ACCUSED: My Lady, I pointed out to him ...

HER LADYSHIP: I am just asking you.

ACCUSED: Yes, my Lady, that's what I am saying to him.

HER LADYSHIP: Well if he is relieved of the assignment at this point in time, Mr. Gordon, you will have to be prepared to conduct your own defence...

ACCUSED: I am ready.

HER LADYSHIP: ... for there is no one available now to be assigned at this 11th hour. We are in the middle of the trial and the only thing I can say is that I will have to try and give you whatever assistance the court can give in the conduct of your defence.

ACCUSED: Thank you, my Lady.

HER LADYSHIP: Well if that is your wish, sir, then so be it. Have you thought about it carefully?

ACCUSED: Yes, my Lady.

HER LADYSHIP: And you are still of that mind?

ACCUSED: Yes.

HER LADYSHIP: Mr. Salmon ...

MR. SALMON: Yes, m'Lady.

HER LADYSHIP: ... the defendant having indicated, as he has, that he does not wish you to appear, at this stage I will relieve you of your obligations to continue any further.

MR. SALMON: I am most obliged. May I be permitted to hand over the depositions.

HER LADYSHIP: I thank you. Mr. Gordon, will you kindly stand, sir. Have you had a chance to read the depositions in this case?

ACCUSED: Not as yet, m'Lady.

HER LADYSHIP: Well, I suppose I will have to take a short adjournment to afford you sufficient time to read the depositions so that when we start you will be in a position to conduct your own defence. You will recognize, Mr. Gordon, that this is a very serious offence.

ACCUSED: Yes, my Lady

HER LADYSHIP: And your decision is a very grave decision but I will not try to persuade you otherwise. So, I am going to take an adjournment and give you sufficient time to read the depositions and we will proceed with the case.

ACCUSED: Thank you, my Lady.

HER LADYSHIP: It is now five minutes to, ten minutes to eleven. I will resume at twenty minutes after eleven. That will give you an half an hour to read the deposition.

Madam Foreman, ladies and gentlemen of the jury, you have heard what has transpired. The accused, Mr. Gordon, wishes to conduct his own defence and I will have to give him an opportunity to read the depositions so that he will be in a position to conduct his own defence."

The Court took an adjournment at 10:54 a.m. and resumed at 11:20 a.m. thereby affording to the applicant Gordon twenty-six minutes in which to read the depositions. The following dialogue then took place:

"HER LADYSHIP: Mr. Gordon, please stand. Gordon, have you had a chance to read the deposition, sir?

A. Yes, ma'am.

HER LADYSHIP: You understand it clearly?

A. Yes.

HER LADYSHIP: You need some paper and pencil to make notes?

A. I have.

HER LADYSHIP: And, you are still of the same mind as you were when we took the adjournment?

A. Yes, miss.

HER LADYSHIP: Okay, and you are quite prepared to proceed at this time?

MR. GORDON: Yes, miss.

HER LADYSHIP: Yes, Miss Palmer, may we proceed."

The trial thereafter continued and both applicants were convicted. The learned trial judge, in her directions to the jury, had specifically directed the jury to the fact of the applicant Gordon having conducted his own defence, page 312 of the transcript:

"Madam Foreman, Ladies and Gentlemen of the Jury, you must carefully consider the evidence adduced in this court, bearing in mind the submissions that were made to you by counsel for the prosecution, Miss Lisa Palmer, and counsel for the defence, Mr. Winston Douglas, and by Mr. Everton Gordon, on his behalf.

> Here, I would just like to point out to you that Mr. Gordon was assigned a counsel, the person of Mr. Salmon, and during the course of the trial he chose to terminate the services of his attorney and to conduct his own defence. You will have to bear that in mind when you are dealing with this case and you would have heard him and you would have seen him when he gave his unsworn statement. Not because he was not represented by counsel you'll treat him any differently from Mr. Holder who was defended by counsel."

Having rejected the services of counsel who was assigned to provide him with legal aid, the applicant Gordon was obliged to defend himself, as was his choice. The learned trial judge ascertained that the applicant Gordon had had sufficient opportunity to read the depositions and was prepared to conduct his own defence. The applicant sought no further time or adjournment. Section 20 (1) and (6)(c) of the Constitution of Jamaica recognizes the right of every man to be represented at his trial, by counsel or to represent himself if he chooses. The section reads:

> "**20.** – (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

and subsection (6) (c) reads:

> " (a) ...
>
> (b) ...
>
> (c) shall be permitted to defend himself in person or by a legal representative of his own choice."

This point was considered and settled by this Court in **R.v. Glenford Pusey** (1970) 12 JLR 43. The applicant, charged with the offence of murder, was assigned counsel under the Poor Pensioners' Defence Act to defend him at his trial. Such counsel interviewed him and took instructions for his defence. Another counsel was approached by the applicant's relatives to defend him. At the trial the applicant told the court that he did not wish the assigned counsel and that the other counsel retained by his relatives would represent him. The latter counsel declined. The trial judge told the applicant that he would have to defend himself and the trial continued. He was convicted. On appeal it was complained that the applicant was denied counsel in breach of his constitutional rights. It was held that there was no breach of his right under section 20 of the Constitution of Jamaica. The right of an accused does not include the delaying of the trial indefinitely until he is able to employ counsel. He having sought and obtained legal representation and rejected it cannot afterwards complain. (See also **R.v. Robinson** (1985) 32 WIR 330).

In the instant case, the applicant Gordon, having sought and obtained legal representation, subsequently rejected the services of counsel and chose to defend himself, not much unlike the applicant in **R.v. Pusey**, supra. The applicant Gordon was assisted by the learned trial judge, he cross-examined the witnesses, gave a detailed relevant unsworn statement, and addressed the court, in his defence. There was no evidence that he was disadvantaged or prejudiced

in any way. There was no breach of his rights under section 20. This ground therefore fails.

For the above reasons, the applications for leave to appeal are refused in respect of both applicants. The sentence of each applicant shall commence as from the 16th day of September, 1998.