**JAMAICA**

**IN THE COURT OF APPEAL**

**CRIMINAL APPEAL NOS: 3, 4, 5 OF 2000**

**BEFORE: THE HON MR. JUSTICE HARRISON, J.A.**
**THE HON MR. JUSTICE WALKER, J.A.**
**THE HON MR. JUSTICE PANTON, J.A.**

**R v CARLETTO LINTON**
**OMAR NEIL**
**ROGER REYNOLDS**

**Gayle Nelson and Dwight Reece for appellants Linton and Neil**

**Robert Fletcher for Reynolds**

**Miss Kathy Pyke and Miss Stephanie Jackson for Crown**

**October 29, 30, 31, November 1 and 2, 2001,**
**and December 20, 2002**

**HARRISON, J.A:**

The appellants were convicted at the Home Circuit Court on the 29th day of December, 1999, of the offence of murder and each was sentenced to imprisonment for life with the condition that he would not be eligible for parole before serving twenty (20) years imprisonment.

The facts are that on the 14th day of September 1997 at about 5:00 a.m. the witness Dionne Larmond who lived in a house in 19 Lane off Seaward Drive in the parish of St Andrew, was asleep with her baby's father Orville Matthews and her baby son. She heard her mother, the deceased, Veronica Nation, also called Madgie, call her, causing her to go outside of her house. Looking through a 5 inch wide hole created by prising apart a section of a zinc fence bordering her premises and the lane, the witness saw the three appellants and another man in the lane about 14 ft away. The deceased, calling out, complained "Carletto! Carletto! whey you a follow me fah, whey you a follow me fah?"

She, the witness, had known the appellant Carletto Linton "all her life" for 25 years and also knew his relatives. He was then 14 ft away from her wearing jewels and with a gun in his hand. The witness then heard six shots and saw her mother fall to the ground, the appellant Linton and appellants Neil and Reynolds then ran past 10 feet away from where she was behind the fence and ran into an open lot. The incident lasted for about one minute. The witness then ran through the gate to her mother, who was then lying in 17 Lane on her face with blood coming from the back of her head. She felt no pulse. The witness returned to the house. Her baby's father and the baby were still sleeping. The witness said that she did not go back outside, did not speak to the police on the scene and left the area the said day. She gave the police a statement eleven days after, but she signed it without reading it over.

When she first saw the appellant Linton that morning, he was wearing gold chains as he usually did, and she was able to see him with the aid of the illumination of a street light on Seaward Drive, 45-50 ft away. The appellant Roger Reynolds was then standing in front of the deceased talking to her and the appellant Omar Neil was leaning on a wall 5-6 ft from the deceased. All three men were talking to the deceased.

The witness Larmond knew them all well. She knew Linton all her life and also knew his relatives. She went to school with the appellant Reynolds and saw him often during the previous 9 months and last saw him the evening before. She would see the appellant Neil near her mother's house and knew his father and his other relatives.

A second prosecution witness Aaron Gayle, whose statement to the police was admitted in evidence under the provisions of the Evidence Act and read to the jury because he was deceased at the time of the trial, was at the entrance to 17 Lane which runs into and adjoins 19 Lane, positioned behind some hibiscus plants and grass. He supported the testimony of Dionne Larmond, that the deceased was surrounded in the lane by four men, including the appellants Linton and Neil, both of whom he knew for a period in excess of three years. A fifth man named Nicketo McMasters was standing nearby, with a 9 mm pistol in his right hand. The appellant Linton also had a 9 mm pistol pointing at the back of the head of the deceased. He also heard six gunshots, saw the appellants Linton and McMasters pointing their firearms at the deceased, who eventually fell

to the ground. The four men surrounded the deceased then all ran down 19 Lane and McMasters after picking up a spent shell ran down 17 Lane. This witness was able to observe the men for about four minutes by means of a street light nearby, in addition to which "the day was breaking".

Detective Inspector Derrick Knight on September 14 1997, having received a report went to the scene at about 5:20 a.m. and saw the deceased's body lying in 19 Lane. He recognized her as someone he knew as "Madgie". He saw the witness Larmond there and they spoke. He spoke to and recorded the statement of the witness Aaron Gayle, subsequently. Detective Inspector Knight was also shown certain positions along the lane. He also visited the scene at a later date at ten minutes to five in the morning. As a result of his investigations, Det Insp. Knight obtained warrants for the arrest of the appellants Linton, Neil and McMasters. No warrant was issued for the appellants Reynolds then. The witness Det. Inspector Knight was looking for the appellant Reynolds since September 29 1997, and went for that purpose to 2 Olympic Avenue although Reynolds is known to live at Balcombe Drive. The appellant Reynolds was arrested on November 8 1997 after the case of the appellants Linton and Neil had been committed for trial.

The defence of each appellant was one of alibi. The appellant Linton testified that at the time of the incident he was at home with his girlfriend, defence witness, Audrey Irving. They had locked up the shop they operated and gone home. Before retiring for the night the appellant Linton placed a chain and

padlock on the gate and closed the door placing a dresser behind it. Witness Audrey Irving stated that she awoke the following morning at 6:00 a.m. and Linton was in bed. There were contradictions between the evidence of the appellant Linton and his witness Irving who disagreed that he fell asleep before midnight and that the following morning he left her in the room and went up the lane to look. The appellant Linton knew the deceased from whom he would buy cigarettes for their shop.

The appellant Neil testified that on the morning of September 14 1997, he was at home. He had moved out of the area 3 months earlier. Defence witness Ena Blackett, confirmed his alibi.

On behalf of the aappellants Linton and Neil the defence called two witnesses Susan Gayle and retired Senior Superintendent Carl Major to prove that the statement of Aaron Gayle, exhibit 16, is a forgery. Susan Gayle, the sister of Aaron Gayle, deceased, produced a receipt with his signature thereon, as exhibit 17, and a national identification card, with the photograph and signature of Aaron Gayle, exhibit 18. On both exhibits 17 and 18, she identified the signatures as the genuine signatures of Aaron Gayle, who she admitted wrote his name in a particular way, but also has a second type of signature. She said that the signature on exhibit 16 was not that of Aaron Gayle. Senior Superintendent Major, retired, was then the document examiner and handwriting analyst in charge of the Questioned Document Section of the Government Forensic Science Laboratory, St Andrew. He was trained both locally and abroad

at the Home Office Forensic Science Laboratory in Birmingham, England. He examined the signatures on the statement of Aaron Gayle, exhibit 16, and found that all the signatures thereon were made by the same person. He examined the receipt, exhibit 17 and the national registration card, exhibit 18, and said that the signatures on both were made by the same person. However, he concluded that the latter person was not the author of the statement, exhibit 16.

The appellant Reynolds, also testified that on September 14 1997, he had lived at 17 Lane for about 4 months. He was awakened by his girlfriend. He walked to the scene, saw the police there, he viewed the deceased and returned home.

Counsel for the appellants Linton and Neil filed on their behalf the following grounds:

> "(1) That the learned trial judge erred in admitting the statement of Aaron Gayle.
>
> (2) That the learned trial judge erred in not upholding the no case submission at the end of the Crown's case.
>
> (3) That the learned trial judge erred in not expunging from the record the statement of Aaron Gayle which the evidence of Suzanne Gayle and Superintendent Carl Major, the handwriting expert, made clear was a forgery.
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> (4) That the learned trial judge erred in not inviting the jury to stop the case after hearing the evidence of Superintendent Carl Major.
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> (5) The learned trial judge erred in allowing the Crown to call a rebuttal witness after the defence had closed its case when there was in

fact no basis for the proposed rebuttal and the said witness provided no rebuttal.

(6) That the verdict is unreasonable and cannot be supported having regard to the evidence.

(7) The appellant will crave leave to add, delete or amend his Grounds of Appeal at any time up to the hearing of the Appeal.

(8) The learned trial judge in the course of the summing-up made many material mis-directions and non-directions in respect of the identification evidence, common design, witness' credit and other central issues which very likely resulted in the jury not being able to arrive at a verdict in accordance with the evidence."

Counsel for the appellant Reynolds argued the following ground:

"(1) That the learned trial judge erred when he refused to accept the no case submission that insufficient evidence of identification existed to justify leaving the matter to the jury.

(2) That the learned trial judge failed to remind the jury of the specific weaknesses in the identification evidence as required by **R v Turnbull**."

**Ground 1.**

On behalf of the appellants, Linton and Neil, Mr. Nelson argued that the learned trial judge erred in admitting the statement of Aaron Gayle.

He submitted that the said statement was not the only evidence, concerned with the identification and did not satisfy the requirements of the Evidence Act, as to its admissibility. The jury would not be able to determine the credibility and demeanour of the witness and give to the statement its

appropriate weight. It was at variance with the eyewitness evidence at the trial and accordingly it was unreliable and its prejudicial effect outweighed its probative value.

Section 31(a) of the Evidence Act, inter alia, reads:

> "... a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person ... is dead . . ."

Having satisfied the requirements in proof of the death of the maker of the statement, it was admissible in evidence. Despite the statutory provision authorizing the admissibility, the learned trial judge has a discretion to exclude the said statement on the ground of unfairness to the appellant and particularly if its prejudicial effect outweighs its probative value, and if it was the only evidence in the case. However, there was other eyewitness evidence against the appellants and therefore the undesirability of his trial being based on the statement of Aaron Gayle only, did not arise. In addition, the learned trial judge prudently edited the statement, thereby excluding any prejudicial material against the appellants: (See **R v Lobban** S.C.C.A. 148/88 delivered June 4 1990). The learned trial judge further in his direction to the jury, at page 1266 of the record, said:

> "... in assessing the weight to be to be attached to Aaron Gayle's statement, you need to remember that it is a statement, it was not sworn to. That means his conscience was not bound by any religious belief to tell the court - you did not get the opportunity to see his demeanour, that is, how he gave evidence,

> because he never gave evidence. You never heard him being cross-examined so that a searchlight could be turned on to what he was saying, so that if there were any discrepancies or anything that could be explained, you did not have that benefit".

With this reservation and caution by the learned trial judge, he properly left the statement for the consideration of the jury.

In all the circumstances, the said statement was clearly admissible. The learned trial judge cannot be faulted. The ground therefore fails.

**Ground 2**

Counsel submitted that at the close of the case for the prosecution, the prosecution witnesses were not seen to be credible, the identification evidence was unreliable and the appellant Neil, on the evidence of the prosecution witness Larmond was merely present and not a part of the common design. Accordingly, on the basis of the dicta in **R v Turnbull** [1976] 3 All E.R. 549; [1977] A.C. 224 the learned trial judge ought to have withdrawn the case from the jury and to have upheld the no-case submission.

The eyewitness account of Dionne Larmond identified the appellants Linton and Neil as well as the appellant Reynolds, all of whom she knew before as being present and participants in the incident. The statement of Aaron Gayle, which was admitted and read to the jury, identified both Linton and Neil, both of whom he knew for a period in excess of three years. There were admitted discrepancies in the prosecution's case, a circumstance which was a fact for the jury. There was sufficient evidence at the close of the prosecution's case, for the

learned trial judge to call upon the appellants to answer the charge. The discrepancies that arose did not reach the level to cause the evidence to be described as weak, as counsel contended, to attract the **Turnbull** direction, [1977] A.C. 224, at page 229, namely:

> "When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

The evidence before the jury was that the eyewitnesses, Larmond and Gayle, apart from knowing the appellants for some years before, were able to see them by the aid of a street light and the light of the approaching dawn for a period of 1 minute and 4 minutes, respectively, and from distances of 10-14 feet. In addition, the witness Larmond was able to identify the deceased's voice identifying the Linton as one of her assailants.

This latter bit of evidence given by the witness Larmond that the deceased had said, "Carletto, Carletto, whey you a follow me fah, whey you a follow me fah?" is strong evidence which supports the identification evidence and may be classified as a part of the res gestae. A statement linked in point of time with the incident in question, and made contemporaneously with such an event is admissible as evidence, in the case against an accused, as a part of the res gestae. In **Ratten v R** [1972] A.C. 378, the emotional call of the deceased woman to a telephone operator while crying "Get me the police, please," was

held by the Judicial Committee of the Privy Council to be correctly admitted as original evidence and not hearsay, to rebut the defence's contention that no such call had been made and explained the reason for her call. In addition, it was evidence that the caller was asserting the truth of a fact, namely, that she was being attacked. Lord Wilberforce at page 398, said:

> "The test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction . . . As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded."

In the instant case, the statement of the deceased identifying the appellant Linton was made in the presence and hearing of the appellants. In fact it was questioning the appellant Linton, ". . . Whey you a follow me fah?" The statement was contemporaneous and had all the marks of spontaneity and properly supported the identification of the appellant Linton, as evidence being part of the res gestae.

The guidelines laid down in **R v Galbraith** [1981] 2 All E.R. 1060, governed this case at the close of the prosecution's case, namely, when the strength or weakness of the prosecution's case relies on the view to be taken of the witness' reliability and where on one possible view of the facts there is evidence upon which a jury could properly find the accused guilty, the case ought to be left to the jury.

The actions of the appellant Neil, at the scene, standing at a distance of about 4-5 ft talking to the deceased, along with the other appellants, and running off with them after the gunshots were fired, is clearly indicative of a voluntary non-accidental presence continuously, without any dissent by the appellant Neil, fixing him as a party acting in concert with the others: See (**R v Denny Chaplin et al** S.C.C.A. 3 & 5/1989 delivered July 16, 1990, (unreported) following **R v Anderson and Morris** (1966) 50 Cr. App. R. 216). The learned trial judge was correct in ruling that the appellant Neil had a case to answer. Thereafter, it was a matter for the jury as a question of fact.

The learned trial judge quite correctly ruled against the no-case submission. This ground also fails.

**Grounds 3 and 4**

The acceptance or rejection of expert evidence is a matter for the jury as a question of fact. The expert witness is one who due to his particular knowledge and expertise on a particular subject matter may give his opinion on such matter. However, the jury is not bound to accept such opinion evidence as truth of the fact in issue. In the case of **R v Blake** (1967) 10 J.L.R. 66, the jury rejected the medical evidence led to support the defence of diminished responsibility and convicted the appellant of murder. This evidence was uncontroverted. The trial judge had directed the jury that they were not bound to accept the expert medical opinion if there was other material which they accepted that they could rely on. This Court of Appeal held, applying the

principle in **R v Matheson** [1958] 1 All E.R. 87, that the directions of the trial judge were correct. The headnote to **R v Blake** reads:

> "... the trial judge had correctly directed the jury and as there were other facts in the case which they had to consider, they were not bound by the medical opinions of the found facts which showed in their good judgment that they should reject or differ from the medical opinion."

In discussing the status and effect of expert evidence, the author of Phipson on Evidence, 14th edition, at page 807 said:

> "Even where such testimony is received, the trier of fact, judge or jury, retains the power of decision. This is so even when the decision turns on a matter on which the tribunal would be unable to understand the evidence without the assistance of experts. Thus, expert testimony is essential for the purpose of identifying the patterns and characteristics of a set of fingerprints, but it remains for the jury to decide whether two sets of fingerprints are identical. **R v O'Callaghan** [1976] V.L.R. 676."

The evidence led by the defence concerned the handwriting of the deceased prosecution witness Aaron Gayle, whose statement was admitted in evidence. Defence witness Suzanne Gayle, the sister of Aaron Gayle, at the time that she gave evidence at the trial, was living with the appellant Carletto Linton's brother. Suzanne Gayle produced documents, exhibit 17, a receipt and exhibit 18, an electoral registration identification card, and identified the signature on each, as made by her said deceased brother, whose handwriting she knew. She said further, that the signature on exhibit 16, the said statement of Aaron Gayle, was not his. Senior Superintendent Carl Major, the handwriting expert,

examined exhibits 16, 17, and 18 and concluded that, in his opinion, exhibits 17 and 18 were written by one and the same person. He said further, that five of the eight signatures on exhibit 16, the statement, were written by one and the same person, but they differed from the signatures on exhibits 17 and 18.

The learned trial judge in his direction to the jury carefully pointed out the dissimilarities and similarities, in detail, as brought out by the evidence of Senior Superintendent Major, and the evidence of Suzanne Gayle. He further directed the jury:

> "If you accept that evidence, Mr. Foreman and your members, if you accept that the card is genuine; if you accept the senior superintendent's opinion as to whose signature appear on exhibit 16, that is the statement purported to be Aaron Gayle's, and the signature on the card and the receipt, exhibits 18 and 17 respectively, then you can conclude that the commissioner was right in his finding. What it would mean that the defence is contending that exhibit 16 taken is bogus.
>
> Mr. Foreman and your members, it is a matter for you, that none of the men was present; that they took no part in the murder; that the prosecution witnesses were lying. If you so find, you are obliged to find the accused not guilty. If it were to leave you in reasonable doubt, Mr. Foreman and your members, as to whether that statement attributed to Aaron Gayle was genuine or not, you still have to resolve that in favour of the accused."

However, the jury, in addition, had for their consideration the evidence of Inspector Knight who said definitively that it was he who recorded the statement given by the deceased Aaron Gayle, and that he saw the said deceased witness

attach his signature to the said statement. The learned trial judge properly left the matter as a question of fact for the consideration of the jury.

Apart from the statement of the deceased witness Gayle, the jury had for their consideration the eyewitness account of Dionne Larmond. The said statement, exhibit 16, was relevant and admissible. The learned trial judge had no power to" expunge it from the record" as counsel for the appellants Linton and Neil argued. This ground also fails.

Ground 5 was abandoned by counsel and consequently, no arguments were advanced for our consideration.

**Ground 6**

Counsel for the appellant Linton argued that the verdict was unreasonable because evidence of the principal witness Larmond and that of Inspector Knight were not credible and therefore could not support the central issue of identification. In addition, the statement of Aaron Gayle was a forgery and the entire prosecution's case was a concoction.

It is our view that there were several discrepancies in the evidence of Dionne Larmond. The principal contradictions were whether or not she saw three men or four men, two of whom she knew, and said "I do not know the names of the others because they are imports, they are not from the area." The witness Larmond also said that she did not speak to the police at the scene, although Inspector Knight said that she did. The witness Larmond said that she heard her mother calling at about 5:00 a.m. and went and peeped through the

zinc fence. Later, in cross examination she denied that she heard the shots shortly after 5:00 a.m. and then said that she went to where her mother was lying about 6:00 a.m. and a crowd was there.

Discrepancies occurring in the evidence of a witness at a trial ought to be dealt with by the jury after a proper direction by the trial judge as to the determination of their materiality.

The duty on the trial judge is to remind the jury of the discrepancies which occurred in the evidence instructing them to determine in respect of each discrepancy, whether it is a major discrepancy, that which goes to the root of the case, or a minor discrepancy to which they need not pay any particular attention. They should be further instructed that if it is a major discrepancy, they the jury, should consider whether there is any explanation or any satisfactory explanation given for the said discrepancy. If no explanation is given or if the one given is one that they cannot accept they should consider whether they can accept the evidence of that witness on the point or at all: (**R v Baker et al** (1972) 12 J.L.R. 902). Carey, P (Ag.) as he then was, in **R v Peart et al** S.C.C.A. 24 and 25/1986 delivered October 18 1988, said of discrepancies, at page 5:

> "We would observe that the occurrence of discrepancies in the evidence of a witness, cannot by themselves lead to the inevitable conclusion that the witness' credit is destroyed or severely impugned. It will always depend on the materiality of the discrepancies."

We agree with Miss Pyke that the learned trial judge did point to the jury in detail the material discrepancies in the case, referred to instances where there

was no explanation given by the witness explaining the said discrepancy and gave them adequate directions on the manner of dealing with them and the issue of credibility.

The learned trial judge told the jury, at page 1403 of the record of appeal:

> "In most trials it is always possible to find inconsistencies or contradictions in the evidence of witnesses, especially when the facts about which they speak are not of recent occurrence. These may be slight or serious, material or immaterial.
>
> Mr. Foreman and your members, if you find that they are slight, it is for you to probably think that they do not really affect the credit of the witness concerned. On the other hand, if these are serious, you may say that because of them it would not be safe to believe the witness on that point at all. It is entirely a matter for you the jury to say, in examining the evidence, whether there are any such in this particular case, and if so, whether these discrepancies or inconsistencies are slight or serious, bearing in mind what I have just indicated.
>
> You should take into account the witness' level of intelligence, his ability to put accurately into words what he or she has seen. His powers of observation and any defect that the witness may have.
>
> Now, the occurrence of discrepancies in the evidence of a witness cannot by themselves lead to the inevitable conclusion that the witness' credibility is destroyed or severely damaged. It would always depend on the materiality, that is the importance of the discrepancy. So Mr. Foreman and your members, please bear this in mind."

This, in our view, was a proper direction to the jury in relation to the manner of dealing with discrepancies. In all the circumstances, this ground also fails.

**Ground 8**

(Ground 7 concerned the option to apply for leave to amend the grounds filed).

Counsel for the appellants Linton and Neil argued that the learned trial judge omitted to remind the jury as to the reasons for the directions on mistakes in identification, and that a number of witnesses may be mistaken; failed to point out the specific weaknesses in the identification; failed to follow the guidelines in the **Turnbull** case, and, to deal with the credit of the witness Larmond.

It is necessary to re-state that as long as the learned trial judge sufficiently warns the jury of the inherent dangers in convicting on visual identification pointing out weaknesses and discrepancies, he may not be faulted because he did not follow a certain pattern or incantation or use specific words [**R v Turnbull,** (supra)]. The learned trial judge highlighted to the jury several discrepancies that arose on the evidence of the witnesses for the prosecution and gave them adequate directions thereon, as we earlier observed. Having told the jury at page 1260, that:

> "... an honest and convincing witness may be a mistaken witness"

he indicated that mistakes in recognition of close relatives are sometimes made in identification, and invited the jury to consider, at the said page 1260 that:

> "... I am quite sure that nearly all, if not all of you, have had the experience of either being mistaken for somebody else, or you yourselves may have seen somebody who is somebody you know very well and you thought it was that person and then you go up to

> the person, and after you have spoken you remember that it is somebody completely different."

This direction was sufficient to indicate the nature of the human element involved in the mistakes in identification and the care required to be taken by the jury. In addition, the learned trial judge did tell the jury in respect of the credibility of the prosecution witnesses, at page 1255:

> "... in the light of what the defence seem to be saying by virtue of questions put in cross-examination to witnesses for the prosecution, and in light of evidence that they have subsequently called, this is a case of credibility and also of identification. So those are two important issues which you are going to have to contemplate in your assessment of the evidence."

Later at page 1276:

> "Now Dionne Larmond, the daughter of the deceased, she came and gave evidence in this case. You remember, Mr. Foreman and your members, that suggestions were made to her that she was telling lies upon lies because she had not seen what she said she saw; that her story was a story given to her.
>
> So in assessing her evidence, Mr. Foreman and your members, you will have to decide whether you find Dionne Larmond a credible witness, whether she struck you as telling you a story which was given to her to say."

The learned trial judge did therefore deal with the credibility of the witness Larmond, and in pointing out to the jury the discrepancies arising, he was thereby indicating the areas of weakness in the identification evidence. There is no basis for complaint in that respect. The ground therefore fails.

**Roger Reynolds**

The essence of the argument of counsel for the appellant Reynolds was that the evidence of the circumstances of the identification was weak, contained irreconcilable fundamental and material discrepancies and as a consequence the case should have been withdrawn from the jury at the close of the prosecution's case.

The prosecution witness Dionne Larmond, in examination-in-chief, pointed out the appellant Reynolds, as the person speaking to her mother, at the scene. She had known him since she was nine years old, when they both attended the Drews Avenue Primary School, for three years. She did not see Reynolds often after they left primary school but from June to September 1997, she would see him every day in 19 Lane along with the appellants Linton and Neil, her baby's father and others. She had last seen him on Seaward Drive on the Saturday night before the morning of the incident.

In cross-examination by Mr. Fletcher, counsel for the appellant Reynolds, the witness Larmond in answer to suggestions, said that the said appellant and the deceased were very good friends and would talk ". . . to each other all the time." He was also a friend of Freeze, her baby's father and both the appellant and Freeze went to a dance the Saturday night before the killing. She knew the appellant's girlfriend; she would see the appellant ". . . up and down in the area . . . ;" and she would describe him as ". . . an area youth . . . recently." She admitted that she did not attend any identification parade to identify the

appellant Reynolds nor anyone else. The cross-examination, on page 287, was in this form:

> "Q. Now, when you told the court . . . you told the court at Half Way Tree Gun Court that you saw Omar and you saw Carletto there that morning, eh?
>
> A. Yes, sir.
>
> Q. That was the truth?
>
> A. Yes, sir.
>
> Q. When you said, and you agreed that you said this, "I do not know the names of the others because they are imports; they are not from the area," that was the truth?
>
> A. Yes, I said that.
>
> Q. That was the truth."

This witness Dionne Larmond agreed that she had previously said that she saw four men at the scene.

The learned trial judge in his directions to the jury, at page 1307, said:

> "Mr. Foreman and your members, she was asked this question, "Did you say, I do not know the names of the others as they are imports. They are not from the area?
>
> Yes sir.
>
> Now Mr. Foreman and your members, this witness has said that she could well recognize the four men. She recognized all of them but three of the four men are people whose names she knew. And then she agreed to having said on another occasion, "I do not know the names of the others as they are imports. They are not from the area.

> Mr. Foreman and your members, as ordinary Jamaicans with common sense, what does that mean to you? Because she is saying that she saw four men. That she recognized three she know by name but then she is agreeing to having said, "I do not know the names of the others as they are imports. They are not from the area.
>
> Mr. Foreman and your members, what this suggests to me, and it may to you, I say it is a matter entirely for you, is that there were more than one of four persons who she claims to have recognized whose names she does not know as they are imports."

The learned trial judge here expressed his opinion on that aspect of the witness' evidence, leaving the jury with the direction, "it is a matter for you." We are of the view that he should correctly have pointed out to the jury that they should consider whether or not this was a major discrepancy which amounted to a weakness in the identification evidence as it affected the identification of the appellant Reynolds. One compelling conclusion is that the witness having said that she saw Carletto and Omar and that "the others were imports . . . not from the area," was pointedly saying that "the others" did not include the appellant Reynolds. That is because she knew the appellant Reynolds very well and had said that he was an "area youth."

Inspector Knight, the investigating officer spoke to the witness Aaron Gayle on September 16 1997, and took a statement from him. Consequently, he obtained warrants for the appellants Linton and Neil and a third man named "Pow." The statement of Aaron Gayle, read in evidence, did not name the appellant Reynolds as one of the men.

Inspector Knight said that he spoke to the witness Larmond on September 12 1997, the day of the incident, but did not take a written statement from her until September 25 1997. Her evidence was that she had left and gone off to the country on the very day of the incident. Inspector Knight said further that he had been looking for the appellant Reynolds "since September 29 1997." It was the duty of the learned trial judge to have directed the jury to consider that the probability was that Inspector Knight was not looking for the appellant Reynolds from either September 12 1997, or September 25 1997, because the appellant was not named by the witness Larmond to the said Inspector, on either date. Consequently, the jury may well have concluded, if properly directed, that Inspector Knight may have received the name of the appellant Reynolds from sources other than the prosecution witnesses Larmond and Gayle. This would have been hearsay and clearly a wrong basis on which to ground the issue of a warrant in the name of the appellant Reynolds.

The identification of the appellant Reynolds by the witness Larmond was in essence a dock identification, although it was a case of recognition. Dock identification is not valueless, although unreliable. On the principle laid down in **R v Galbraith** (supra) the learned trial judge was not incorrect to rule that there was a case to answer. However, there was no explanation from the witness Larmond of the discrepancy that of the four men apart from the appellants Linton and Neil, "... the others were imports," and the learned trial judge failed to allow either counsel for the defence or the prosecution, to elicit such an

explanation from the said witness. Being a major discrepancy on the issue of the weakness of the identification of the appellant Reynolds, the learned trial judge thereby inadequately assisted the jury by failing to direct them to consider "whether they could believe the witness on that point or at all." This failure of the learned trial judge in respect of the said inconsistency deprived the appellant Reynolds of his chance of an acquittal. For those reasons we are of the view that his appeal succeeds.

In all the circumstances, in respect of the appellants Linton and Neil, the appeals are dismissed and the sentence of each affirmed. The period to be served before the appellants are eligible for parole is to commence as from the 29th day of March 2000.

In respect of the appellant Reynolds, his appeal is allowed, his conviction and sentence are quashed and a judgment and verdict of acquittal is hereby entered.