JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 69/88

BEFORE: THE HON. MR. JUSTICE CAREY, PRESIDENT (AG.)
THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.

REGINA

VS.

LINTON BERRY

Dr. L.G. Barnett, Richard Small,
Miss Millicent Rickman, Gayle A.V. Nelson
and Mrs. Sandra Minott-Phillips for Appellant

Kent Pantry and Brian Clarke for Crown

October 30, 31; November 1, 2, 3,
6, 7, 8, 9, 10, 1989 and March 12, 1990

CAREY P. (AG.):

We now fulfil the promise we made on the 10th November last to put our reasons in writing and to hand them down at a later date.

On 22nd March 1988 after a protracted trial in the Home Circuit Court before Wolfe J. and a jury, the appellant was convicted of shooting to death his former lover Paulette Ziadie. Sentence of death was accordingly passed upon him.

Basically, the prosecution case was, that the appellant shot Paulette Ziadie with whom he had had an intimate relationship prior to and possibly subsequent to her marriage to one Joseph Ziadie, because she refused to

return to him; the motive for the crime was therefore sexual jealousy. The circumstantial evidence led, included threats made by him to kill either her or her husband. These threats were made both to Ziadie and the slain woman's sister, Daphne Matadial, both of whom gave evidence for the prosecution. There was also a statement made by the appellant after the shooting to the husband which could amount to an admission that he had shot Mrs. Ziadie deliberately. The defence, on the other hand, was that the shooting was entirely accidental.

The theme of this human drama is not unfamiliar either in literature or in life as a tragedy which has recurred since time began. It cannot anymore be regarded as remarkable. To the French it is the "crim passionel": we know it as "the eternal triangle." Howsoever that might be, the trial process to determine the criminal liability of the appellant occupied some eleven days of hearings. The reasons for that protracted hearing were manifold. First, there was a great deal of cross-examination to credit especially of one of the main witnesses for the prosecution, Joseph Ziadie. It ranged over his relations with other women, his cruelty to women, his conviction for being "warned off", his trafficking in drugs viz. cocaine and also introducing the drug to his wife. Then there were several objections, submissions and rulings in the course of the trial. It was not an easy trial for the learned trial judge because there was no way in which he could have appreciated from this line of cross-examination what defence was being projected. On reading the transcript as the events told therein unfolded, it seemed to us that Joseph Ziadie was being cast in the role of the murderer for he it was, who appeared to be on trial. We should make it clear that this observation is made not by way of criticism

of the defence which was in the hands of a very experienced junior at the criminal Bar. But we think it important, for reasons which will emerge hereafter, that we indicate our view of the trial, especially as the learned trial judge was severely castigated in the way he conducted it.

We note also that after the learned trial judge ruled that the trial should proceed, a Constitutional motion was moved to circumvent his ruling. That the trial finally got under-way when it did, was in no small measure due to the firmness and resolute determination of Wolfe J. We do not think his task thereafter in presiding over the trial was an enviable one.

Before us, nearly two dozen grounds of appeal which cover almost, if not every aspect of the trial, were argued and everything that could be, was urged in favour of the appellant. But in the result, we were satisfied that most if not all of the grounds were without any vestige of merit. We propose nevertheless to deal with a great many of the submissions, overly academic, abstruse and in some instances even metaphysical though they seemed to be.

We can now turn to consider the essential facts which we think, come within a narrow compass. The slain woman Paulette Ziadie, 35 years of age at the time of her death, married Joseph Ziadie on the 10th December 1986. They lived together at 9 Hope Boulevard. Prior to June of that year, they had lived together as lovers for nine years. In June, when the relationship soured, she moved out to live at an apartment at Surbiton Manor Close in St. Andrew. It was at or during this time that Joseph Ziadie met the appellant for the first time. It appears that although Ziadie had seen the appellant before this, they had not spoken to each other. Their first conversation actually

took place before the separation in early June, at a night club called "Illusions" when the appellant volunteered the startling information that he was having an affair with Ziadie's wife-to-be and threatened to kill him if he were to physically abuse her. Ziadie was so taken aback that he was only able to say that he would have to speak to Paulette about it when he arrived home. He was even more astonished to find the appellant when he did arrive there, publicly displaying a firearm, - arms folded across his chest with the gun resting on them. The appellant then intimated that he had come to remove Paulette and her things. But Paulette when asked her wishes, declined the offer.

The next significant incident occurred on 20th December 1986 when the newly married couple returned from Miami, whither each had journeyed at separate times, the husband preceding his wife. The appellant in a telephone conversation between himself and Joseph Ziadie, apologized for his earlier threats, wished them well and asked for an assurance that he would not be reported to the police for his behaviour.

The 6th January 1987 was the occasion of a curious incident. Mr. Ziadie received a call from the appellant in the early hours of the morning. The appellant commanded his attendance at the slain woman's former apartment on pain of her continued detention there by him. Ziadie did not comply. But at about 1:00 a.m. the appellant drove his car to Ziadie's home. Paulette also arrived; she was driving her husband's jeep. In the course of the ensuing conversation, the appellant reiterated his love for Mrs. Ziadie and expressed his chagrin that Paulette had married Ziadie. When Ziadie told him that the marriage was a fait-accompli, and urged him to cease his molestation and threats, the appellant got into a vile temper and threatened that he would shoot Paulette if he discovered that she had got married while she was still seeing him.

There was one other example of the appellant's jealousy of the slain woman and as well, his attitude towards Joseph Ziadie. This occurred in mid-June at which time the appellant threatened to kill him as he had learnt that Ziadie had hit her. On that occasion, the appellant lifted up his shirt to indicate that he was unarmed.

Evidence of the appellant's jealousy of Paulette Ziadie was also given by her sister, Daphne Matadial. She spoke of a conversation with the appellant in October 1986 in the presence of her sister, Paulette, when the appellant having spoken of his respect for herself and her husband, then admitted to beating, threatening to kill and "terrorising" Paulette by dressing in a mask. The reason for this conduct, he said, was Paulette's reluctance to go out with him. Mrs. Matadial then told the appellant that her sister wished to put an end to the relationship because she could no longer endure his ill-treatment. His response was to speak of his love for her sister. But Paulette was insistent that the relationship end because she was both embarrassed and terrified by his conduct towards her in public. The appellant promised to mend his ways. There were several subsequent conversations with the appellant over specific acts of abuse, such as, beating her, attempting to shoot her, threatening to kill her, standing in her belly and wounding her in her head.

On the 9th January 1987 the appellant visited Daphne Matadial complaining of her sister's going off to marry Joseph Ziadie and bemoaning her failure to intimate those intentions to him, especially as Ziadie could not provide for her as he could. He mentioned that he was willing to have her back nonetheless, and offered to set her up in Miami until the rumours died down.

We come now to the date of the killing, the 11th January 1987. The slain woman left home in a Jeep Wagoneer at 7:00 p.m. to visit her daughter and a friend. At some time between 9 - 10:00 p.m. her jeep and the appellant's car were seen proceeding easterly on the Barbican Road, which would be the direction of her route home having visited her daughter at East Oakridge which is in the Constant Spring area. The jeep which was ahead pulled to the left on Barbican Road and the car drew up alongside. The vehicles were parked closely to each other. At about 9:45 p.m. the appellant was seen on the bonnet of the car and appeared to a witness who was driving by, to be in conversation with someone in the jeep, the driver's door of which was ajar. Some twenty minutes after the vehicles drove up, the sound of a shot was heard and shortly afterwards, there was a sound of another shot. The car then reversed, and moved up Jacks Hill - "like a jet". When the witness who had heard the gun shots and observed the precipitate departure of the car went up to the jeep, he was confronted by a macabre sight. He saw the slain woman, her head bowed over the steering wheel and a gun shot wound to the side of her face.

At about 10:15 p.m. the appellant called Ziadie. He stated that he had just shot Ziadie's wife at the foot of Jacks Hill Road and that he should count himself lucky that he was not present otherwise he would have suffered the same fate. Ziadie who was dumbstruck, asked him to repeat. The appellant obliged, suggesting also that Ziadie go and pick her up. When Ziadie arrived on the scene, he saw confirmed, what had been vouchsafed to him by the appellant.

Paulette Ziadie's face was blown away by a bullet from a .44 magnum revolver which entered below the left ear in the lower cheek, shattering the ramus of the lower jaw-bone, the left carotid artery and the jugular vein and made its exit to

the right side of the mouth in the cheek. The entry wound which was conical in shape measuring 1¼" x 3/4" also showed powder deposits 3" x 2½" extending around and below the internal margin of the wound. The dimensions of the exit wound were stated as 3" x 2". The bullet travelled from left to right, from back to the front of the head with the exit wound a ½" higher than at the point of entry. The pathologist was not asked, and therefore ventured no opinion whether that slight upward flight path of the bullet may have been the result of its deflection having hit the ramus of the mandible. The significance of gun-powder deposits in the entry wound was that the firearm must have been discharged approximately 3" from the site of the wound.

At this juncture, we must say something of this most fearsome weapon which was used, viz., a .44 Magnum Smith & Wesson revolver; the barrel of which alone measured 12½ inches long. The pressure required to discharge this firearm is 2 lbs when cocked and 7½ lbs for mechanical cocking and firing. It was at the material time, in proper working order. The appellant who was described as an expert in the use of firearms, and acknowledged himself that he was, described the weapon as the most powerful hand-gun in the world. It had a powerful recoil. He also said that it was adjusted at the factory for pressure and was fitted with a luminous sighting device which made it a more accurate weapon for night firing.

This somewhat heavy hand-gun (we ourselves tested the weight) was carried in a special holster and gun-belt made of leather which was specially treated with a solution called Rigg WE-40. That treatment softened the leather. The holster was re-adjusted by removing it from the hip position and slanting it in a particular way. Clips which were affixed thereto were removed. All these modifications, adaptations,

and treatment were for the purpose of permitting a rapid withdrawal of the gun from its holster by the appellant. This equipment we have not seen, nor was it tendered as an exhibit in the case. The defence led a deal of evidence with respect to it but did not produce it for the jury's scrutiny.

We now pass to the circumstances in which the defence alleged that Mrs. Ziadie died that night. The appellant gave evidence on oath on this aspect of the matter. He said that as a result of speaking with her, he agreed to, and did meet her at the gas station at Jacks Hill and Barbican Road. He parked his white Honda to the left of her Jeep Wagoneer. At first they spoke to each other from their respective vehicles. Mrs. Ziadie told him she wished to leave her husband that very night but he demurred to her importunings. He suggested to her that she should return home and discuss it with her husband. There came a time when she left her vehicle and he did the same. They met at a point between the vehicles where they embraced. Upon releasing him she said that she intended to get into his car, and as she made to go by him, his arms then still around her shoulders, she grabbed his gun which was then in its holster. He managed to grab her hand on the gun with his two hands and forced the gun down from waist high. His finger was not on the trigger. He heard an explosion. That shot went through the left door of the jeep and was afterwards recovered by the police. He regained possession of the gun which he held in his right hand, picked her up bodily with his left, and forced her behind the steering wheel onto the seat of her jeep. He did correct himself by saying he used both hands but nothing, in our view, turns on that slip, if

slip it were. He was compelled to use force because she was struggling, he said, violently, to get out. Although no direct evidence appears to have been given of her size or weight, the impression conveyed on the appellant's evidence, was that she was slightly built and not of much weight. The photographs in evidence also suggest this.

Having seated her, he then placed his right hand in which he held the gun against the door pillar for support, while he used his left hand to switch on the head-lights and ignition. The gun was held upside down during this manoeuvring on his part. He felt a sudden jerk against him and he heard a second explosion. Mrs. Ziadie was shot in the head. He shook her several times, calling her name but she was dead. He left the scene with the gun. There was some suggestion by him that she was under the influence of drugs but we must confess that we are quite unable to appreciate how that fact, even if true, contributed to her untimely demise accidentally at his hands. He was asked to give a re-construction of his actions at the time of the shooting and doubtless the jury, having observed him, found his story incredulous.

There is one other fact which we must add. The appellant swore that he was neither careless nor negligent in the use of his firearm. He pointed out that he refrained from replacing the firearm in the holster after he had recovered it from her for fear that she would snatch it again. In resting his right hand with the gun against the door pillar, he was careful to hold the gun in a particular position as a safety precaution. This defence put forward for the jury's determination has been described as accident.

The Crown's case rested on motive, viz. sexual jealousy, threats on the lives of both the slain woman Paulette Ziadie and her husband Joseph by the appellant, his admission to the husband to shooting her which made it plain that he had committed murder, and the forensic evidence. The evidence as to various likely incriminating statements was given by the widower, Joseph Ziadie and Daphne Matadial, a married woman and the eldest sister of the slain woman. The strategy of the defence was pinned on destroying the character of Joseph Ziadie. To that end, he was subjected to a wide-ranging cross-examination to show the following defects in his character:

(i) that he had many women;

(ii) that he was prone to assaulting and battering women, including his wife;

(iii) that he trafficked in hard drugs i.e. cocaine and had introduced that drug to his wife;

(iv) that he had been "warned off" for breaching Racing Commission Regulations.

It is against this background of evidence that we propose now to consider the plethora of grounds filed. We think that they may conveniently be subsumed under four main heads or groupings, and we set out the relevant grounds thereunder as follows:

	HEADS	GROUNDS
(i)	Misdirections and/or Non-directions	- 18, 18A, 19, 21, 22 and 24;
(ii)	Unfairness of trial by reason of inadequacies and/or deficiencies in directions	- 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22 and 23;
(iii)	Error in Judge's Rulings	- 3;
(iv)	Irregularities	- 17 and 23.

(i) MISDIRECTIONS AND/OR NON-DIRECTIONS

GROUND 18

It was argued that the learned trial judge misdirected the jury as regard their use of character evidence. The impugned passage appears at p. 638:

> "Well, let me tell you how you approach that evidence as told of character. If the evidence in the case makes you feel sure that Mr. Berry is guilty of murder then good character cannot avail him. If you entertain any reasonable doubt or if you have any doubt about the evidence then of course you may use the good character of the accused man to say well, a man of this type of character is less likely to commit an offence of this nature than a man of bad character. That is how good character operates, but I repeat, if the evidence makes you feel sure of his guilt; if you are satisfied beyond a reasonable doubt that he killed Paulette Ziadie in circumstances which amount to the offence of murder in law, then good character can't avail him."

Dr. Barnett said it was plain from these directions that the jury were being invited to treat character evidence as coming into play only after they had arrived at a conclusion. He cited R. v. Bellis [1966] 1 W.L.R. 234 and R. v. Falconer-Atlee, 58 Cr. App. R. 348 in support of that proposition.

The short question for determination is what is the proper direction for a trial judge to give to a jury, when evidence is adduced to show the prisoner's "good character". Such evidence as we apprehended Dr. Barnett's submission consisted in this - that the appellant who was a quondam District Constable i.e. a member of the Rural Police was a brave, dedicated and hardworking member of the Police Force who was an expert in the use of a firearm.

We think the position at law to be as follows: Evidence of good character is relevant in the jury's consideration of credibility and therefore, its effect on the facts which are in dispute, is to influence them to believe that a person of such estimable worth, would be unlikely to commit the offence charged. The cases cited by Dr. Barnett of R. v. Bellis (supra) and R. v. Falconer-Atlee (supra) confirm that good character is relevant to credibility. It was said by Roskill L.J. (as he then was) in the latter case in which the trial judge had directed the jury that good character becomes relevant when the scales are evenly balanced:

> "It has been said again and again that good character is not only of relevance at the stage which the learned judge suggested. Good character comes in as part of the general question of credibility and in considering whether a person is to be believed or is not to be believed. The possession of a good character is of course an important factor to be borne in mind when considering the credibility of a particular witness. That is the direction which the learned judge ought to have given to the jury and not the direction which he gave."

In our view the learned trial judge fell into error when he directed the jury that evidence of good character operates when there is a reasonable doubt. We suspect that the directions he gave are based on R. v. Bliss-Hill, 13 Cr. App. R. 125. There a trial judge Avory J. had directed the jury in terms which are not altogether dissimilar to those of Wolfe J. Avory J. continued his directions by submitting to the jury the good character together with the other facts and circumstances of the case. The headnote of the case is, we think misleading as it reads:

> "In strict law a jury is only entitled to take into consideration the good character of the defendant when the evidence of the other facts in the case leaves them doubtful of his guilt."

We do not think the case laid down such a principle but Darling J. in commenting on the judge's directions in the terms presently being impugned, said at p. 129:

> "Had the learned judge stopped there, it may be that his direction would have been insufficient - for where the final result of the deliberation of a jury is reasonable doubt they are always bound to acquit the defendant."

The weight of judicial authority is, in our view, against that proposition. Nevertheless we wish to make it abundantly clear that there can be nothing objectionable to directing the jury that "if the evidence in the case makes them feel sure of guilt, then good character cannot avail". Evidence in the case, it seems to us, must comprehend as well, the evidence of good character adduced in the case. Wolfe J. in this case said as much.

In the result although we conclude that the point can be decided in favour of the appellant, in our view no injustice has resulted from the misdirection which we have identified. The case against the appellant was a powerful one. We have respected authority for this course as is illustrated in R. v. Brittle [1965] 109 Sol. Jo. 1028 per Edmund-Davies J. (as he then was).

GROUND 18A

In this ground Dr. Barnett complained that the learned trial judge failed to give a special warning in regard to the evidence given by Joseph Ziadie because he said the witness was shown:

(i) to be of bad character;

(ii) to have an interest to serve;

(iii) to have a bias against the appellant.

The warning which was required to be given is that it was dangerous and unsafe to convict on the uncorroborated evidence of Joseph Ziadie. Dr. Barnett was not unaware that this full warning is only required in cases involving accomplices, sexual cases, and the evidence of children of tender years, but argued that this category was not exhausted. For this view learned counsel relied on a dictum of Lord Hailsham L.C. in D.P.P. v. Kilbourne [1973] 1 All E.R. 440 at p. 447:

> "But side by side with the statutory exceptions is the rule of practice now under discussion by which judges have in fact warned juries in certain classes of case that it is dangerous to found a conviction on the evidence of particular witnesses or classes of witness unless that evidence is corroborated in a material particular implicating the accused or confirming the disputed items in the case. The earliest of these classes to be recognised was probably the evidence of accomplices 'approving' for the Crown, no doubt, partly because at that time the accused could not give evidence on his own behalf and was therefore peculiarly vulnerable to invented allegations by persons guilty of the same offence. By now the recognised categories also include children who give evidence under oath, the alleged victims, whether adults or children, in cases of sexual assault, and persons of admittedly bad character. I do not regard these categories as closed. A judge is almost certainly wise to give a similar warning about the evidence of any principal witness for the Crown where the witness can reasonably be suggested to have some purpose of his own to serve in giving false evidence [(cf. R. v. Prater (1960) 1 All E.R. 298, (1960) 2 QB 464 and R. v. Russell (1968) 52 Cr App Rep 147)]."

Learned counsel does not accept as did counsel in R. v. Beck [1982] 1 All E. R. 807 at p. 812f:

> ".... that an accomplice direction cannot be required whenever a witness may be regarded as having some purpose of his own to serve. Merely because there is some material to justify the suggestion that a witness is giving unfavourable evidence, for example, out of spite, ill-will, to level some old score, to obtain some financial advantage, cannot, counsel for the appellant concedes, in every case necessitate the accomplice warning, if there is no material to suggest that the witness may be an accomplice."

The first question which we think we should decide is how the law stands at present. In our judgment, the true position is as stated by Ackner L.J. (as he then was) in R. v. Beck (supra), 807 at pp. 812 and 813. At p. 813 in rejecting the view now propounded by Dr. Barnett and of counsel in that case he said:

> "While we in no way wish to detract from the obligation on a judge to advise a jury to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an improper motive, and the strength of that advice must vary according to the facts of the case, we cannot accept that there is any obligation to give the accomplice warning with all that entails, when it is common ground that there is no basis for suggesting that the witness is a participant or in any way involved in the crime the subject matter of the trial."

This Court in an unreported decision - R. v. Beverley Champagnie and Ors. S.C.C.A. 22, 23 and 24/80 dated 30th September 1985 accepted as the correct legal position, the opinion stated by the learned Lord Justice at p. 812, a part of which we have already quoted, and continuing that extract said this:

> "But, submits counsel for the appellant, even though there is no material to suggest any involvement by the witness in the crime, if he has a 'substantial interest' of his own for giving false evidence, then the accomplice direction

> "must be given. Where one draws the line, he submits is a question of degree, but once the boundary is crossed the obligation to give the accomplice warning is not a matter of discretion. We cannot accept this contention. In many trials today, the burden on the trial judge of the summing up is a heavy one. It would be a totally unjustifiable addition to require him, not only fairly to put before the jury the defence's contention that a witness was suspect, because he had an axe to grind, but also to evaluate the weight of that axe and oblige him, where the weight is 'substantial', to give an accomplice warning with the appropriate direction as to the meaning of corroboration together with the identification of the potential corroborative material."
>
> [Emphasis supplied]

In our judgment there is no need for a special warning in the instant case but we do recognize that there is a duty on the trial judge in ensuring that the prisoner obtains a fair trial to advise the jury how to deal with the evidence either generally or specifically having regard to the particular issues to be determined. Here there is no question that no particular warning was given as to how the evidence of Ziadie was to be treated. We do not accept there was any evidence that Ziadie was a man of bad character, in the sense that he was shown to be not of a character to make the jury feel he was worthy of belief. The only possible material in this regard was his own admission that he had been "warned off". In our view, there was nothing in the circumstances of this case which showed either that this witness had an interest to serve or bias. Moreover, there was in our view ample corroboration of Ziadie's evidence first by Daphne Matadial and secondly by the appellant himself. With respect to Daphne Matadial,

counsel did not put forward any basis for saying that she fell into any of the categories he had set out. He did not, or was unable to point to any evidence which tended to show that she was of bad character, had an interest to serve, or that she was biased. This ground of appeal therefore fails.

GROUND 19

The learned trial judge at p. 618 gave directions to the jury with respect to inferences in this way:

> "It is not everything which has to be proved that can be proved by direct evidence, that is by someone coming to you in the witness box and saying, 'I heard with my own ears', or 'I saw with my own eyes'. Some things have got to be proved inferentially, that is, by the drawing of an inference, and the law says that you, the judges of the facts are entitled to draw reasonable inferences from facts which you find proved.
>
> But, bear in mind that there are two preconditions to the drawing of inferences, that is, before you draw an inference from proved facts, such an inference must be reasonable and it must be inescapable. If you are satisfied that such an inference can be drawn from a set of proved facts, then you the judges of the facts may draw such an inference either to establish guilt on the one hand or innocence on the other."

This direction was attacked on the ground that the learned trial judge failed to point out that it is the inference which favours the defence which should be drawn if the situation were such that two inferences were possible. Specifically Dr. Barnett said it was wrong for the trial judge to say that if an inference favourable to the defence were being drawn, the inference must be inescapable. Our attention was drawn to a number of cases where language was

used in the judgment to suggest that where two inferences are possible, one in favour of the defence, then the one in favour of the defence must be drawn. We have in mind R. v. Hamilton [1962-63] 5 W.I.R. 361 which is often cited as support for the proposition. In that case Moody J.A. (Ag.) delivering the judgment of the Court, said this at p. 365:

> "The prosecution sought to interpret the words the appellant says he used, viz. 'they beat up mi friend and I have to help him', as meaning help him by fighting and not as the appellant contended by allowing him to rest on him and seeing him to the hospital.
>
> In these circumstances the learned trial judge ought to have directed the jury that if they accepted the appellant's version where the words were equally capable of two inferences, one favourable to the appellant and the other not, they should draw the inference favourable to the appellant."

With all respect to that learned acting Judge of Appeal, we cannot agree that that statement represents the law. A judge is not entitled to tell a jury what facts they must find, and inferences are, of course, facts. At all events, that authority is inconsistent with R. v. Warwar [1969] 11 J.L.R. 370. In that case, the argument before the Court was on the same footing, as it is, before us, viz., where a statement is capable of two inferences, one favourable and the other not, the jury should be told to draw the inference favourable to the defence. The judge's directions in that case were as follows and appear at p. 378:

> "What are you to do in such a situation, where a piece of evidence indicates - is capable of two interpretations? Well, Mr. Foreman and Members of the jury, since the evidence is capable of two interpretations, my duty as judge is to point them out to you, leaving you to see which of them you are going to accept having regard to the rest of the evidence in the case. The argument as I have been hearing over and over that I must direct you, is a matter of law, as I cannot direct you on what facts to find. I cannot direct you what facts you are to find, and whatever inferences you draw are tantamount to finding the facts. When I do leave both to you, you look over the whole picture and see which one you are going to take."

This Court rejected that argument. The Privy Council subsequently refused an application for special leave in that case. We were also referred to R. v. Barker and Page, 11 Cr. App. R. 191. There the only evidence against the appellant Page consisted of an equivocal statement he made to the police. The Court there held that it would not be right to convict the appellant on that evidence alone. We do not find that case particularly helpful. It certainly is no authority for the proposition contended for in the present case.

We ourselves see nothing objectionable in the direction. The jury were being told of their task as judges of facts to find the facts which included drawing inferences from proven facts. In the context of a trial, the prosecution has the onus of proving guilt. If therefore, from a set of primary facts more than one inferences are possible, then the jury should only draw the inference which is both reasonable and inescapable. If it does not satisfy these conditions, the inference should not be drawn. It would mean that a gap would be left in the Crown's case and thus enure to the benefit of the defence - it would thus go in proof of the prisoner's innocence. A jury can only be directed that inferences, the

drawing of which is within their sphere of responsibility, must be reasonable, which means possible, having regard to all the other facts and circumstances which bear on the matter, and which make the inference drawn inescapable. There is never any onus on a prisoner to prove his innocence. Accordingly, in the context in which the term "proof of innocence" is used, that cannot involve any burden or duty on the prisoner's part; it can only mean that in finding facts, the drawing of inferences by the jury can go towards proof of guilt if the conditions are satisfied, that is, as to reasonableness and inescapability or, on the other hand, to the prisoner's benefit, proving innocence if the conditions are not satisfied. We think there is really nothing in the point.

GROUNDS 21, 22 AND 24

In these grounds, it was contended with apparent seriousness that the issues of self-defence, provocation and gross negligence, arose for consideration by the jury and the learned trial judge wrongly withdrew those issues from them. Although Ground 24 speaks of evidence, it would appear that that evidence was said to be derived from "the conduct of the Crown's case, from cross-examination by counsel for the Crown (of the appellant) and from criticisms and comments made by counsel for the Crown".

We find this approach rather novel. In our opinion, there is an undoubted duty on a trial judge to leave to a jury such issues as fairly arise on the evidence in the case. We are not aware that the material suggested in that ground, is apt for that purpose. We did invite counsel to indicate the evidence on which he based his submission, but although we listened to some metaphysical and abstruse disquisition on the case, he was not able to call our attention to any such evidence whatever. In our opinion these issues arose neither from the

evidence adduced on behalf of the prosecution nor the defence. Let us consider self-defence. The issue did not arise on the Crown's case. At the time Mrs. Ziadie was shot, the appellant did not say, nor was there any evidence to suggest that he was defending himself from any actual attack or that he honestly believed he was under any attack. When the gun went off in the first instance, it was the slain woman herself whom he said discharged it. After she did so, he had the gun under his control, power and dominion.

As to provocation, we were told that the act of provocation was the snatching of the appellant's gun from his holster by Mrs. Ziadie and the proportionate reaction was presumably to shoot her. But the appellant denied shooting her intending to kill her. Provocation reduces murder to manslaughter: all the ingredients to constitute murder must be present in such a case.

We have pointed out in not a few cases that:

> "The approach of an appellate court when it is considering whether provocation was properly withdrawn by a trial judge is not to put itself so to speak in the place of the trial judge, because
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> > 'a cautious judge might tend to err on the side of an accused,'"
>
> [per Kerr J.A. in R. v. Johnson, 25 W.I.R. 499 at p. 503].

See also R. v. Pennant (unreported) S.C.C.A. 126/84 dated 15th May 1986. We said this at p. 6 having cited a dictum of Lord Devlin in Lee Chun Chuen [1963] 1 All E.R. 73 at p. 78:

> "If we are to apply the test with as much exactitude as the circumstances permit, then there must exist the three elements which together constitute provocation in law, viz., the act of provocation, the loss of self-control, both actual and reasonable

> "and the retaliation proportionate to the provocation. We can do no more than emphasize the pithy observation of the learned Law Lord in the case just cited (at page 79):
>
> > '... provocation in law means something more than a provocative incident'."

With respect to the issue of gross negligence, we pointed out to counsel that the appellant in giving evidence was at pains to state that he handled the firearm neither negligently nor carelessly, that he had kept it in his possession and not restored it to its holster, and in attempting to switch on the lights and ignition, he had held the gun in the "reversed firing position". He was saying that he had employed such a degree of caution as to make it improbable that any danger or injury could arise from it for the slain woman. We think that if the learned trial judge had left gross negligence to the jury, a ground of appeal was inevitable that he had eroded the defence of accident and deprived the appellant of a chance of acquittal. We think the test of exactitude applies equally to this issue. There were no facts fit to be left to the jury on which they could consider gross negligence. We are of opinion therefore that there was no substance in these grounds which accordingly fail.

UNFAIRNESS OF TRIAL BY REASON OF INADEQUACIES AND/OR DEFICIENCIES IN DIRECTIONS - GROUNDS 1, 5(A), (B), (C), 16, 18(A), 22 AND 23

We do not propose to deal with all these grounds because even if successful, they cannot have any significant bearing on the outcome.

The witness Joseph Ziadie was, of course, an important witness for the prosecution and not unnaturally he was subjected to a prolonged cross-examination. In the course of that cross-examination, counsel for the defence suggested to the witness

that certain damaging portions of his evidence before the jury, viz., threats made by the appellant had been omitted from his evidence at the preliminary examination. The specific pieces of evidence about which the witness testified before the judge and jury, and identified by Mr. Small, related to:

(a) a threat by the appellant to kill the witness if he assaulted Mrs. Ziadie;

(b) a threat by the appellant to kill Mrs. Ziadie if he discovered that she had got married while dating him;

(c) a threat by the appellant to keep Mrs. Ziadie detained unless the witness came to the apartment;

(d) a statement made by the witness himself to the appellant that he should refrain from threats;

(e) a statement by the witness that the appellant became aggressive in speech;

(f) a statement by the appellant that he was going to send to Spanish Town (to obtain a copy of the marriage certificate) being part of (b) above.

The most significant of these threats in the context of the case was (b) of which (e) and (f) were but part of the entire conversation. In that respect the witness explained that he could not remember the ipsissima verba of his evidence at the preliminary examination but he had given the gist of the conversation which was true. He further stated that he might not have related the conversation in the words being suggested to him by counsel. There is a statement in the transcript where the witness, having responded as we have stated, is recorded as saying:

"At the Preliminary Enquiry I was not asked ..."(p. 210).

Now it is not altogether clear if the witness had completed the sentence. The Court Reporter does not seem to have thought so; hence the three dots - "..." which appear in the record. A witness it is well-known, is not allowed to volunteer answers but is confined to answering such questions as are in fact put. When Crown Counsel came to re-examine the witness, he tendered in evidence as Exhibit 3 portions of the witness' statement to the police in which the witness is recorded as saying that the appellant did utter a threat to kill Mrs. Ziadie and in the course of the threat mentioned sending for a copy of the marriage certificate. Counsel also tendered as Exhibit 4 that portion of statement relating to (a) above.

The ruling of the judge to allow the tender of the statement provoked a number of grounds of appeal, one of which relates to the validity of the ruling itself and the others complain of the inadequacies of the learned trial judge's directions as to the implication of omissions, and generally as to the weight to be given to evidence elicited in such a situation.

We begin by observing that the purpose of counsel's cross-examination as to these omissions, was to show the unreliability of the witness. If he omitted such important and damaging evidence at the preliminary enquiry, he must be a lying witness. The questions were so relevant to the charge that they must have been asked by counsel who appeared for the Crown at the preliminary enquiry. Thus the arguments ran. As to the latter argument, it is a reasonable one but our experience is that in the deteriorating climate of prosecuting levels, the learned trial judge was correct to tell the jury in effect that it was the purest speculation to say that counsel for the Crown must have asked those questions (p. 677).

Mr. Small before us, contended that the learned trial judge should have directed the jury that if they found the witness' explanation for the omission was unsatisfactory, it was open to them to reject the evidence being given before them in that regard or to disbelieve the witness' evidence in its entirety. It was further said that the trial judge omitted to say that the jury could not rely on the statement as proof of the contents thereof.

With respect to the former contention, we think that the learned trial judge gave the jury adequate directions in regard to the omissions. In the introductory segment of his summation, the learned trial judge gave correct directions as to the manner in which they ought to treat discrepancies in the evidence of a witness. These appear at pp. 628-631. We think "admissions" at p. 628 should read "omissions". No criticism was levelled at them in any shape or form; they were, in our view, clear. Then when he came to deal with these omissions specifically, he reminded the jury of his previous directions, advising them that they should be dealt with in the same way he had suggested with regard to discrepancies, (see pp. 674-679). Precisely what counsel stated the trial judge had omitted to do, he had, in fact, done.

We are wholly unable to appreciate why the learned judge should have told the jury, as submitted by Mr. Small, that the content of the statement Exhibit 3 could not be relied upon for its truth. A previous consistent statement is not to be confused with a previous inconsistent statement. There is no doubt that where a witness is shown to have made previous statements inconsistent with the statements made by the witness at trial the judge is obliged to direct the jury that the previous statements, whether sworn or unsworn do not

constitute evidence on which they may act. R. v. Golder, Jones and Porritt [1960] 3 All E.R. 457.

In the present case, the previous consistent statement, as the learned trial judge was at pains to point out at p. 679, was to rebut the view that what was said in court could not be true because if it were, it would have been stated at the preliminary examination. Since the purpose of the previous consistent statement was told to them, we do not appreciate how they could use it to prove that the contents of the statement were necessarily true. The statement as to the threat had been said at the earliest possible time viz. when the police took his statement. But they had to make up their minds whether the threat was in truth made by the appellant. This is made clear beyond a peradventure when the judge is reviewing the evidence of Ziadie and contrasts that to the evidence of the appellant. See for example his review of the evidence of Ziadie between pp. 654-679. There could be no assistance to the jury to direct the jury in the terms suggested by counsel viz., that they could not rely on the statement as proof of its contents. Moreover it would have made a difficult trial more confusing. In our view these criticisms are devoid of merit.

Despite our sub-head of "Error in Judge's Rulings", it is convenient at this juncture to dispose of the complaint that the trial judge erred in permitting the prosecution to put into evidence the statement of Joseph Ziadie (Exhibits 3 and 4). The learned trial judge made his ruling in these circumstances: After some discussion between Bench and Bar, Mr. Small said this at pp. 230-231:

"MR. SMALL : The defence is that for instance, not only that portion but other portions, the defence is saying is not true.

HIS LORDSHIP: And?

MR. SMALL : I am just taking it bit by bit, My Lord. The defence is that that portion and other portions are not true. It would have formed part of the defence's case to say that it is not true where the full thing had been said at the preliminary enquiry or part had been said, and it is my submission, My Lord, that where a party contends that the account is not true and demonstrates variations between what was said at the preliminary and what was said here, and also there is a suggestion that what was said at the preliminary also is not true, it is not a necessary implication anymore than if there is an implication against the overall credit of the witness; that would be my response.

HIS LORDSHIP: No, I don't agree with you because if you are saying it is not true, 'put it to you, it is not true', it would demonstrate it is not true, 'you never said it at the preliminary enquiry, it therefore follows that what you are now saying is something that has come after, it is something you think up after', the implication is there clearly.

MR. SMALL : As Your Lordship pleases.

HIS LORDSHIP: Yes, Mr. Pantry."

As we understood Mr. Small, he maintained that the only method of showing an omission is to establish that the witness was asked. Assuming without agreeing with that proposition, there was no evidence that the witness was asked. Indeed the witness was saying or said he was not.

It was further said that the form of the question did not suggest recent fabrication and the establishment of omissions in evidence between preliminary enquiry and trial would always permit the tender of the witness' statement in rebuttal.

For our part, we do not see what counsel envisages as being an evil precedent. When cross-examination shows that there has been an omission in evidence in the circumstances we have stated, the argument must be that the witness is putting forward for the first time at the trial what was omitted before. In other words, such evidence is not entitled to credit because it is a recent concoction. And implicit in that argument must be the suggestion or thought that the witness cannot in any event, be believed. The prosecution must, as it seems to us, be able in all fairness to show that the particular statement may be more reliable because it has been said at the earliest opportunity. It removes from the jury's consideration one basis for the defence asserting that the evidence is unreliable i.e. that it is a recent concoction. The prosecution are entitled to rehabilitate a witness so long as the course they adopt is permissible.

Counsel for the defence cross-examined Ziadie with great subtlety as to these omissions and the learned trial judge was entitled, having regard to the conduct of the defence, to rule as he did. It was a matter for the exercise of his discretion.

The cases that bear on the matter are not apparently to the same effect. In R. v. Coll [1889] 25 L.R. (Ir. 522 at p. 541) Holmes J. said:

> "It is I think clear that the evidence of a witness cannot be corroborated by proving statements to the same effect previously made by him, nor will the fact that his testimony is impeached in cross-examination render such evidence admissible. Even if the impeachment takes the form of showing a contradiction or inconsistency between the evidence given at the trial and something said by the witness on a former occasion it does not follow that the way is open for proof of other statements made by him for the purpose of sustaining his credit. There must be something either in the nature of the inconsistent statement or in the use made of it by the cross-examiner to enable such evidence to be given."

The Court of Appeal (Criminal Division) in R. v. Oyesiku, 56 Cr. App. R. 240 followed R. v. Coll (supra) and also the Australian case of Nominal Defendant v. Clements [1961] 104 C.L.R. 476 applying a statement of Dixon C.J. at p. 479 therein as representing the true principle of law. This court in R. v. Neath et al (unreported) S.C.C.A. 57, 58, 59 and 60/81 dated 14th March 1985 also accepted as correct the law as stated by Dixon C.J. In R. v. Oyesiku (supra) it is to be noted that the suggestion put to the witness was that of colouring her evidence. In Neath, the suggestion was direct, that the witness was mentioning the fact for the first time.

The law was stated with less stringency by Diplock L.J. in Ahmed v. Brumfitt (1965) 112 Sol. Jo. 32 thus:

> "..... it was clear law that, when a witness in cross examination had put to him a statement which was said to conflict with what he said in examination in chief, it was always admissible to put to him in re-examination an earlier statement consistent with what he said in examination in chief as rehabilitating his credit in respect of the evidence he had given. The words at the end of

> "para 1573 of Phipson on Evidence, 10th ed (1963), did not in his lordship's view correctly express the law and Flanagan v Fahy [1918] 1 Ir R 361, and Gillie v. Posho Ltd [1939] 2 All ER 196, cases which were relied on to support the statement in Phipson, could be distinguished."

Lord Denning M.R. agreed with that view of the law as expressed by the learned Lord Justice. The significance of this approach is that there would be no need for any actual suggestion of recent concoction. Indeed Dixon C.J. recognized the difficulty in appreciating whether counsel is laying a foundation for impugning "the witness' account of "a material incident or fact as recently invented, devised "or reconstructed story. Counsel himself may proceed with a "subtlety which is the outcome of caution in pursuing what may "prove a dangerous course." Indeed a basis for this view may be observed in two Australian cases viz. Woodward v. Shea [1952] V.L.R. 313 and Franklin v. Victorian Railways Commissions (unreported) but referred to by Menzies J. in The Nominal Defendant v. Clements (supra) at p. 490. There Sholl J. said in the first case at p. 317:

> "I think I cannot exclude the possibility of a suggestion by counsel upon the basis of that evidence, or an inference by the jurymen or one of them on the same basis that those answers might indicate recent invention."

and in the latter case:

> "....that it is sufficient to render admissible in re-examination a prior statement consistent with the witness's testimony if the cross-examination may reasonably have been taken by the jury or by one or more of them to suggest recent invention."

In our view counsel embarks upon a perilous course if he cross-examines to show omissions in the witness' evidence, as it may result in letting in the witness' previous consistent testimony. The fact as Mr. Small stated to us that he assured the trial judge that he was not suggesting recent fabrication, is not in our view a relevant consideration. A trial judge must exercise his discretion on the conduct of the case bearing in mind the real likelihood of a juror taking the cross-examination as suggesting recent fabrication. If he wishes to suggest that the omission may be due to faulty recollection, then he would be well advised to make that suggestion abundantly clear.

Finally we would say that even upon the strict approach to which we have previously referred, the remaining conditions for the admission of Exhibits 3 - 4 were met viz.:

> "That the contents of the statement are in fact to the like effect as his account given in his evidence and that having regard to the time and circumstances in which it was made, it rationally tends to answer the attack."

We think we have said enough with regard to the criticisms of the learned trial judge's treatment of Ziadie's evidence to show our view that he tailor-made his summation to suit the facts in issue and refrained from giving disquisitions on the minutiae of evidence adduced through this witness. The jury could not have failed to understand the importance of the evidence of this witness, especially where it was in conflict with the evidence of the appellant himself. They were directed that it was their responsibility as judges of fact to resolve those conflicts. We do not think his treatment of the evidence of Ziadie can fairly be regarded as leading to any unfairness in the trial. The jury understood quite clearly that Joseph Ziadie's morals were not on trial but his veracity.

GROUNDS 2 AND 6

In these grounds, complaints were levelled at the learned trial judge's treatment of the evidence of Daphne Matadial as respects her credit and at a ruling in which he refused a defence application to be shown the statement of the witness and at his refusal to examine the statement himself.

The significant evidence of this witness was as follows:

(a) a conversation with the appellant in October 1986 in which he admitted beating her sister, terrorising her and threatening to shoot her because she wished to end the relationship. He expressed his love and promised to correct his behaviour;

(b) conversations on other occasions in which the witness spoke with the appellant regarding his violence to her sister;

(c) specifically a conversation on 9th January in which he complained of her sister going off to get married and not giving him any notice and adding that he was willing to have her back and put her to live in Miami.

The purpose of this evidence was to show the appellant's jealousy for Paulette Ziadie.

In the course of cross-examination, it was shown that she had made previous statements inconsistent with her testimony before the jury. In her evidence at trial she said that when the telephone rang on 11th January 1987 her husband had answered the telephone. However she admitted that in the statement taken by the police she had said that she received a call from Mr. Berry. The contents of the call were never divulged to the jury and we are quite unable to understand how this discrepancy can be erected into a matter of profound importance. It was

plainly peripheral. But counsel pressed this matter for a prolonged period in the trial. Finally, the witness explained that she had told the police in her statement that she had indeed received a call from the appellant but when she realized subsequently that she might have been misunderstood, she attempted to correct the error by contacting a police officer - McKay.

Cross-examination was also directed at the conversation (a) above. The suggestion put was, that she had given no evidence on that matter at the preliminary examination. Her response was that she was not asked. She had said at first, responding to the same question that when she was attempting to report the matter in her statement, she was told it was not important. Then the officer to whom she had given her statement had the following question posed to him at p. 399:

> "Q: She said that while her statement was being taken down by the police in your presence she was trying to tell the police that she had spoken to Mr. Berry about his threatening and beating the deceased and that she was told that that was not relevant, that should not be included in the statement. Is that true?
>
> A: Whatever Miss Matadial said is in the statement."

In respect of that evidence, it has been urged on us that the learned trial judge erred in:

> "a. Failing to relate the evidence of Det. Hubert Miller at page 643 to the credit of the witness Daphne Matadial and failing to assist the Jury to relate this contradiction between the Crown witnesses to the important questions raised by the Defence concerning the overall credibility of Daphne Matadial;

> "b. Not leaving to the Jury's consideration the evidence that the witness Daphne Matadial had not testified at the Preliminary Inquiry concerning the alleged threats that she testified to at the trial."

It was perfectly true that the learned trial judge did not relate the officer's statement to what Mrs. Matadial had said. But he did remind them of the statement. Having regard to the structure of the summation, which he adopted, we do not see how that failure affects the matter. More to the point, is that nothing of importance turned on it. The statements made by the two witnesses are not necessarily incompatible, one with the other. The fact that Mrs. Matadial was told a portion of her report was unimportant does not mean she did not so state. The witness had said that she "attempted to give" - not that she gave the report about threats. The police officer's response was a standard guarded response. Police officers taking statements write what they consider important and not of course, everything the witness gives utterance. However that might be the statements were left to the jury and they were told that it was their responsibility to resolve conflicts, discrepancies and the like. We do not think that this failure could have the slightest effect on the trial. The fact that counsel chooses to cross-examine lengthily on some matter as to credit, does not erect the particular matter into one of importance. It is for the jury to make up their minds in the light of the assistance given by a trial judge. What matters is not whether the captious critic would approve the judge's directions but whether this court thinks that matters of significance are left to the jury fairly. In none of the welter of grounds of appeal filed has any complaint been made that the trial judge usurped the jury's function.

Counsel made other complaints with respect to the learned trial judge's treatment of Mrs. Matadial's evidence. It is enough to indicate our view that what we have said thus far is sufficient to dispose of the remainder.

GROUNDS 7 AND 23

These grounds provoked some debate on an accused's right to silence. One of the arguments put forward related to evidence given by Det. Assistant Superintendent Reynolds who having cautioned the appellant, then volunteered the information that he asked the appellant why he killed Paulette Ziadie? The appellant made no answer. He bent his head, shook it and cried. Dr. Barnett said that the officer acted in breach of the Judge's Rules although the evidence was probative of nothing. Nevertheless, he said, the jury could have believed that the assertion could prove that the killing was deliberate. He added that the trial judge should have told them to disregard the evidence of the question asked and the appellant's failure to reply.

We do not think this argument is a serious one. If the evidence is probative of nothing, we are not altogether clear what is the point. The appellant had in fact shot Mrs. Ziadie albeit accidentally. That was the evidence he put before the jury. The question posed by the police officer to which the appellant made no reply, took the case no further. It was not suggested that it was prejudicial. We would think it amounted to nothing more than inexperienced prosecuting technique. The trial judge made nothing of it except to mention it in his review. It was not necessary for him to do so for it had no significance whatever; it merely wearied the jury. A trial judge ought not to act like a tape-recorder but should confine himself to the review of significant evidence in proof of guilt or of course, innocence or capable of creating a reasonable doubt. We think it is right to add that in the circumstances of this case, no accusation was

being made against the appellant. The point of leading evidence of an accusation made by a police officer to a suspect is usually to obtain some admission either from his words in reply or from his conduct.

The appellant made no admission, he made no denials; he was silent. R. v. Christie [1914] A.C. 545 is authority for saying that where:

> "..... no evidence has been given upon which the jury could reasonably find that the accused had accepted the statement so as to make it in whole or in part his own, the judge can instruct the jury to disregard the statement entirely."
>
> [per Lord Atkinson at pp. 554-555]

We do not think this was the situation here for the reason we have already stated, i.e. the statement was not in the circumstances an accusation of murder and the appellant made no admission or denial. If the appellant had responded with a denial, the trial judge would have been obliged to tell the prosecution that that evidence should not be led. We do not think the fact of the appellant crying was conduct demonstrating an acceptance of any accusation. No one has suggested it. It would be nonsensical to hold any such notion. Finally the learned judge expressly stated that:

> "So an accused man having been cautioned is under no obligation to say anything. The law gives him that right and if he exercises that right you cannot use it adversely against him."

This leads us to the question of the accused's right to silence. We were shown extracts from the summing-up as examples of the trial judge's attack upon that right. Before quoting them, it may be helpful to express our view of the law

applicable. We think we should begin by quoting the direction of Cave J. in R. v. Mitchell [1892] 17 Cox C.C. 503 at p. 508 and cited with approval by Lord Diplock in Parkes v. The Queen [1976] 3 All E.R. 380 at p. 383:

> " 'Now the whole admissibility of statements of this kind rests upon the consideration that if a charge is made against a person in that person's presence it is reasonable to expect that he or she will immediately deny it, and that the absence of such a denial is some evidence of an admission on the part of the person charged, and of the truth of the charge. Undoubtedly, when persons are speaking on even terms, and a charge is made, and the person charged says nothing, and expresses no indignation, and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true.' "

Silence may be used as some evidence of an admission by an accused person and of the truth of the accusation where the person making the charge and the accused are on even terms. Plainly, this rules out a situation where an accusation is made by a police officer or perhaps a person in some position of authority vis-a-vis the accused. In general, silence simpliciter is insufficient to allow any inference to be drawn adverse to an accused person, nor is the position altered because no caution was administered. We think Hall v. R [1971] 1 All E.R. 322 supports that view. See also R. v. Latty and Smith (unreported) S.C.C.A. 57/87 dated 14th March 1988 per Campbell J.A. at p. 8.

We can now examine extracts from the summing-up in which counsel complains that the trial judge had attacked the appellant's right to silence. The first example which Dr. Barnett identified, occurs at pp. 623-625 where the trial judge points out that a crucial question for the jury is:

What did the appellant say to Joseph Ziadie when he informed him of his wife's death? He then reminds the jury of the rival versions and continued in this way:

> "You are at home, you get a telephone call. Let us say that your husband, for the purposes of this now, we just have to regard you as one person, a lady, for that matter, whose husband is out, and you get a call from a voice that you recognise, 'Hello John, Paulette got shot.' In human affairs what is the next question. How? Common sense. You hear that your wife or your husband got shot, what is the next question you ask; how? And what is likely to be the next question; and where? Or you might be saying first, you might even say first, 'Where? How it happened?' Common sense.
>
> What would you expect at that stage from the caller - somebody you know well, you know - what would you expect. 'My God, man, the thing nuh accident it happen, man!' The first opportunity to tell the world at large that is an accident, Mr. Berry did not avail himself of it. He just, according to him, hung up the phone and depart. The first opportunity to make it known that from the outset he is saying it's an accident, he failed to avail himself of that opportunity. Ask yourselves this question, if he had called, as he did say and as Mr. Ziadie said, you think he would have just said - you think Mr. Ziadie would have allowed him to say, 'Paulette get shot', and just hang up the phone and nothing more? Of course, it can be argued that that is what happened why Mr. Ziadie had to phone back the place, but Mr. Ziadie said he engaged him in a conversation."

The applicability of the principle of an accused's right to silence, scarcely seems appropriate in a situation where an accused has vouchsafed information which is in conflict with the receiver's evidence of that information. The question must be who is to be believed and an eminently

reasonable question which prompts itself, is if as the appellant was asserting, the slain woman died accidentally, why not say so then to her husband? We would think that if information is volunteered by an accused person, the jury would be entitled to interpret it and give to it the meaning which the facts warrant.

The second example relates to a comment made by the learned trial judge in regard to the credit-worthiness of the appellant. At p. 705 the learned trial judge is recorded as observing:

> "Now, Mr. Foreman and members of the jury, Mr. Berry is a D.C., a man who would seem to be well known by the police, and what you have? The lady is accidentally shot, he phone the husband. He don't say anything about accident. The next thing: he is at home trying to find a lawyer all over the place. Matilda's Corner Police Station just around the corner. He is a D.C., and Half Way Tree is just around the corner, and Mr. Berry don't think about going to any of these two places, to go and say, 'Well Officer, you know me, I was a D.C., Mr. Berry. A lady just accidentally get shot round the corner, just round by Barbican Road.' Nothing of the sort. That is a comment I make. I have already advised you as to how you deal with those comments."

In this example, the appellant remained silent. But it is not the case that some accusation was made in his presence and he claimed what the Americans refer to as the 5th (Amendment), and therefore kept silent. Not only did he keep silent, he did nothing except seek the services of a lawyer. What was being brought to the jury's attention was conduct which was capable of amounting to a corroboration of the Crown's case that he had indeed deliberately shot Mrs. Ziadie to death: it was conduct inconsistent with accident. We entertain not the least doubt that this ground is without substance.

GROUND 8

It was stated thus:

> "The Learned Trial Judge erred in not relating the evidence of Dr. Royston Clifford concerning the effect of Cocaine on a user to the evidence by the accused concerning his observations of the deceased's conduct at the time of the incident."

This ground is without vestige of merit. There was absolutely no evidence that Mrs. Ziadie was under the influence of cocaine at the time of her death. We do not appreciate even if she were in some drugged condition, how it contributed to her accidentally being shot by the appellant.

GROUNDS 9 AND 10

We do not propose to deal in any detail with the criticisms adumbrated in these grounds. We consider them unwarranted, especially as the facts on which they were based were of minimal significance and not relevant to any live issue in the case. The learned trial judge was entitled to make comments on the evidence. He was entitled to make even strong comments. He was obliged however to avoid crossing the border line of fairness into dispargement of the defence or usurping the jury's function. In R. v Mears (unreported) S.C.C.A. 5/88 dated 14th November 1988, we said this at p. 4:

> "The law is usefully stated in R. v. Delroy Grant [1971] 12 J.L.R. 390 where this Court speaking through the mouth of Fox, J.A., at page 394, said this:
>
> > 'A Judge is entitled to express his views strongly in a proper case, but the facts must always be left to the jury to decide. The stronger the comments the greater is the need to make it abundantly clear to the jury that if they do not accept the judge's view of the facts, they must discard it and substitute their own.'

> "The comments of the judge, especially an experienced judge, can be of great assistance to the jury in appreciating the significance of the evidence adduced before them. But a judge should always bear in mind that he is not the trier of facts and therefore he should not in any way convey the impression that his view is paramount. The duty on this Court, thereafter, will be to determine whether the judge's comments are far stronger than are warranted on the facts. Plainly, the fact that a judge expresses himself strongly, is not enough. But if the comments of the trial judge amount to a usurpation of the judge's function, the result is that the accused would be deprived of the substance of a fair trial."

Later in the same case, we said at p. 8:

> "But the test which we must adopt is to see whether the comments were such as to deprive this applicant of the substance of a fair trial."

We must reiterate that it was never urged before us that the trial judge had usurped the jury's function. We desire to add that the trial judge in his comments was not required to leave for the jury's consideration every possible permutation in inter-personal relationships as argued. The jury are as qualified to deal with the problems that flesh is heir to, as the judge. They are twelve ordinary intelligent adult Jamaicans perfectly qualified to understand the respective character of the important dramatis personae in this human tragedy.

There was no evidence whatever that the factory adjustment of the appellant's firearm, made an accidental discharge more likely. Indeed the adjustment of the pressure on the trigger was reduced to 7 lbs which is still considerable pressure. The appellant himself stated that the trigger had to be pulled for the firearm to be fired. The Ballistic Expert testified to the fact that the firearm was in perfect working order. There was no evidence either that at the material time

> "The comments of the judge, especially an experienced judge, can be of great assistance to the jury in appreciating the significance of the evidence adduced before them. But a judge should always bear in mind that he is not the trier of facts and therefore he should not in any way convey the impression that his view is paramount. The duty on this Court, thereafter, will be to determine whether the judge's comments are far stronger than are warranted on the facts. Plainly, the fact that a judge expresses himself strongly, is not enough. But if the comments of the trial judge amount to a usurpation of the judge's function, the result is that the accused would be deprived of the substance of a fair trial."

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> "But the test which we must adopt is to see whether the comments were such as to deprive this applicant of the substance of a fair trial."

We must reiterate that it was never urged before us that the trial judge had usurped the jury's function. We desire to add that the trial judge in his comments was not required to leave for the jury's consideration every possible permutatation in inter-personal relationships as argued. The jury are as qualified to deal with the problems that flesh is heir to, as the judge. They are twelve ordinary intelligent adult Jamaicans perfectly qualified to understand the respective character of the important dramatis personae in this human tragedy.

There was no evidence whatever that the factory adjustment of the appellant's firearm, made an accidental discharge more likely. Indeed the adjustment of the pressure on the trigger was reduced to 7 lbs which is still considerable pressure. The appellant himself stated that the trigger had to be pulled for the firearm to be fired. The Ballistic Expert testified to the fact that the firearm was in perfect working order. There was no evidence either that at the material time

the firearm was cocked or could be cocked to enable a lesser degree of pressure to discharge it. The appellant is an expert and stated that he was not careless in handling the firearm. His evidence recounting the manner in which he said Mrs. Ziadie was shot by him, was faithfully set out for the jury's assessment by the learned trial judge. We consider these grounds hopeless.

GROUND 11

Evidence was led by the appellant by way of cross-examination of Joseph Ziadie regarding two women with whom he may have had liaisons. This evidence was entirely irrelevant to any issue in the case. How could Joseph Ziadie's violence to women or his promiscuity affect the issue whether Paulette Ziadie was shot accidentally or for that matter deliberately by the appellant. We are content to say that all this evidence had no bearing on the real issues before the jury.

We are not suggesting that that fact allowed the judge to be unfair in presenting the case for the defence but we are quite unable to find any basis for what could only be described as carping criticism.

GROUNDS 12 AND 13

These grounds concern themselves with the learned trial judge's treatment of some aspects of the forensic evidence. Mrs. Paulette Ziadie was undoubtedly shot by the appellant. The significant forensic evidence was the presence of gun powder deposits on the site of the entry wound and the path of the bullet. Evidence regarding the handling of the slain woman's shirt, patterns of gun powder either on the shirt or in the wound could be and were of no significance whatever in the trial.

The Ballistic Expert had given evidence of the test he had carried out to demonstrate that the appellant's gun had been

fired at the material time. But he was unaware of the technical name of the reagent he had used to ascertain the result. Thus a chemist was called. He opined that he would have carried out additional tests to confirm the result. It was said that the trial judge was wrong in preventing the chemist from stating the reason why he would not fault another chemist if he failed to carry out other confirmatory tests. At the end of the day, there was no question that Mrs. Ziadie had been shot by the appellant from close range. None of the matters about which criticisms are being raised bear on the defence which was said to be accident. The arguments in this regard can only be regarded as academic.

GROUNDS 14 AND 15

But for the great experience of counsel we would have thought these grounds quite unarguable.

In the first place the learned trial judge did not err in suggesting that the slain woman had fallen after the discharge of the first shot. He was careful to say 'apparently had fallen' because the appellant had not stated she had. But he did say he lifted her.

The trial judge was entitled to use the careful language he did and to leave it to the jury to determine whether the appellant had in fact lifted her.

A great deal of evidence led by the defence was, strictly speaking, inadmissible. A cross-examiner is bound by the answers he obtains in regard to questions as to credit and he is not permitted to call evidence to rebut the answers. This applied to the evidence of Bryan Young, a bartender who gave evidence for the defence as to his observations of the association between the appellant and the slain woman and Joseph Ziadie. He was not cross-examined.

Clive Smith, a painter, who testified to an incident which occurred at Mrs. Ziadie's apartment and involved both Mr. and Mrs. Ziadie before their marriage. The purpose of that evidence was intended to show that Joseph Ziadie was a violent man.

The final witness as to credit was Paul Rhoden who was an attendant at the Illusions Night Club. He spoke of Joseph Ziadie's violence to women. The appellant himself spoke of these incidents but the fact of the matter was that Joseph Ziadie's violence to women in general and to his wife (prior to their marriage) in particular was an irrelevant issue in the case. The defence chose to introduce that dimension but that did not make it an issue nor relevant to any issue. The real issue in the case was: In what circumstances did Mrs. Ziadie meet her death? Was it deliberately at the hands of the appellant as the prosecution alleged or was it by accident as the defence sought to show? The credit of Joseph Ziadie was at issue. Could he be believed on his oath? But neither his trait for violence nor promiscuity would assist the jury to determine whether he was a liar or a truthful witness with respect to the incriminating evidence he gave against the appellant.

In our view, not only would there have been no necessity to challenge those aspects of the violence, a fortiori, there was no duty on the trial judge to give any direction to the jury that where the prosecution has not challenged evidence, then it must be taken to be accepted. The significance of the unchallenged evidence was of the order of zero. All that evidence prolonged the trial and provoked side issues the effect of which could only be to deflect the focus of the jury from the important issue. The learned trial judge indulgently

allowed all that evidence in. We feel sure that Mr. Small addressed the jury on it. It seems to us counsel ought not to complain in the face of that bounty.

GROUND 16

This ground sought to use grounds 5 - 15 as particulars of the unfair trial contended for. We do not think it is necessary to repeat what we have said in any detail as respects those particulars.

We have examined with great care certain other passages which Dr. Barnett brought to our attention. In effect, he complained of unbalanced, over-powering and adverse comments against the defence and pilloring the defence. We desire only to say this: These further passages do not in any way alter our view that the trial judge was at all times, careful to make it clear to the jury that the comments he made were his and of course he had correctly told them how to deal with comments from any source. He did not at any time withdraw any issue from the jury, and as we have earlier observed, he did not usurp the jury's function. Indeed none of the twenty-five odd grounds suggested he had done so in any shape or form.

A summing-up must be seen as a whole. It must be seen also in the manner in which it is structured. It cannot be supposed that there were not other methods of structuring the summation. We cannot pretend that the learned trial judge's structuring of his summation was the most desirable. But summings-up are by nature individualistic. We do not sit to adjudicate on stylistic imperfections. The test to be applied has previously been stated. We are satisfied that, viewed as a whole, the issues were left to the jury fairly and clearly and where comments were made, no attempt was made to usurp the jury's function. The almost wholesale condemnation

levelled, we think to be entirely unjustified.

ERROR IN JUDGE'S RULINGS - GROUND 3

It was said that the learned trial judge prevented cross-examination on "numerous issues that were of importance to the conduct of the Defence." The numerous issues were identified as:

> "(a) The extent of the relationship between the appellant and the deceased and Joseph Ziadie;
>
> (b) Joseph Ziadie's treatment of women;
>
> (c) Joseph Ziadie's involvement with Cocaine and making more probable the Defence's contention as to his treatment of the deceased."

We would note that despite the judge's rulings a deal of cross-examination was permitted in these respects and that evidence was before the jury. That evidence would only be permissible on the ground that it went to the witness' credibility. The learned authors of Archbold's Criminal Pleading Evidence and Practice (37th Ed.) at para. 1347 state, inter alia that:

> "The credibility of a witness depends upon (1) his knowledge of the facts to which he testifies; (2) his disinterestedness; (3) his integrity; (4) his veracity; ....."

We think their view is correct.

Any evidence at category (a) above would not be testing Ziadie's knowledge of the facts to which he testified viz. facts incriminatory of the appellant. Nor were questions in relation to either (a) or (b) capable of showing his disinterestedness. The witness' involvement with drugs was not a proved fact. There was no evidence whatever that he

had any previous conviction whether in relation to drugs or otherwise. Further the witness could not be compelled to answer questions which might tend to criminate him i.e. to expose him to a criminal charge or to a penalty or forfeiture of any nature.

The jury were concerned with the character of the witness for habitual veracity and evidence led or projected for the purposes set out at (a), (b) or (c) could not assist in that regard.

We think it must be clear that it follows that the learned trial judge was correct in preventing the adduction of evidence for the purposes set out below viz.:

(i) The deceased's use of Cocaine and Joseph Ziadie's involvement therewith;

(ii) Joseph Ziadie's treatment of the deceased;

(iii) Joseph Ziadie's relationship with other women.

The general rule is that a party is not allowed to call witnesses to prove facts which merely tend to discredit the opponent's witnesses and are not otherwise relevant to the matters in issue. Such collateral probings are rejected on the obviously sensible ground that they would unduly complicate and prolong the trial by a multiplicity of issues. It is our view that this rule was breached in this trial. We think therefore that a judge who is endeavouring to be as indulgent as he can be in a trial where the charge is a capital one, does not err when he is not as indulgent as counsel would wish. We are not persuaded that there is any substance in this ground which accordingly fails.

IRREGULARITIES - GROUND 17

We are not clear what is the irregularity being complained of in this ground. We gather the suggestion is that the judge by telling the jury that they must return and continue their deliberations in a spirit of give and take, amounted to "pressure".

What had occurred was this. Precisely, one hour after the jury first withdrew to consider their verdict, they returned to say they had not arrived at a verdict. The learned trial judge assumed that the jury were in some problem. He thereupon enquired whether the problem was one of fact or of law. The foreman replied that he was not sure and enquired whether he was allowed to speak. Pressed by the judge he said he thought it was in relation to the evidence.

The judge then encapsuled the rival versions of prosecution and defence and then he gave what counsel described as the Walhein direction. See R. v. Walhein [1952] 36 Cr. App. R. 167. Thereafter he asked them "to retire again and to continue your deliberations".

This "pressure" which it was stated the learned trial judge exerted, resulted in the jury retiring for five minutes shy of one hour. In our judgment, there was no pressure. We do not consider what took place an irregularity nor did that incident in any way affect the trial. We really do not think anything of this ground; it is wholly without merit.

Although there was no ground that the verdict was unreasonable and could not be supported having regard to the evidence, we have examined the evidence. We are satisfied that the jury came to a correct decision on the facts. There is no doubt in our minds that the appellant's version of the shooting was not only far-fetched but incredible. The length and weight of the firearm made it impossible to be discharged

in the way sworn to by the appellant. At a distance of 14½" being the length of the weapon plus 3" from muzzle to site of wound, the handle of the gun could not be against the door pillar. From that position, the muzzle would be beyond the position of Mrs. Ziadie seated behind the steering wheel. It could not have escaped the jury's view that the slain woman despite her alleged ill-treatment at the hands of Joseph Ziadie nevertheless chose to marry him and shortly thereafter she died, not at his hands but at the appellant's. The case against the appellant was a powerful one.

Finally we would mention two grounds which we have not discussed: these are ground 4 for which leave to argue was refused and ground 20 which was abandoned.