JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 111/93

COR: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (AG.)

R. v. CLIFTON ANDERSON

Sylvester Morris for the Applicant

Mrs. Margaret Ramsay-Hale and Ms. Vivienne Hall for the Crown.

21st & 23rd November, 1994
and 13th February, 1995

FORTE, J.A.:

The applicant was sentenced to death on the 9th November, 1993, after he was convicted for capital murder at a trial which commenced in the Home Circuit Court on the 2nd November, 1993. From his conviction and sentence, he now applies for leave to appeal. Having **heard** the arguments of counsel on 21st and 23rd November, 1994, we then took time out to give consideration to their merits, and now record our decision.

On the 3rd May, 1992, Joseph Anderson, a patient in the Spanish Town Hospital in St. Catherine, was shot and killed while lying in the hospital bed, already suffering from a gunshot wound he had received on the previous day. His assailant on this occasion walked into the hospital ward, and in the presence of the nurse, shot him in his head killing him instantly. He had been admitted to hospital on the 2nd May, 1992 suffering from a wound to the left side of his jaw. He was experiencing shortness of breath and was bloody all over. He could speak, but with a slur. It was in those circumstances that Dectective Inspector Errol Grant, having received information at 1:00 a.m. on the 2nd May, 1992, went in furtherance

of his duty to see the injuried, Joseph Anderson. In his words, Anderson "appeared to be very weak and spoke in a weak voice." In order to hear what he was saying, the Detective had to put his head right up to his (Anderson's) mouth. The following is the content of what Detective Grant said the deceased told him:

> "Let me tell you what happen, because I feel a going to dead. Last night I was on Shakespeare Avenue, Duhaney Park when a brown Datsun motor car drive up and Lloyd and Clifton, who dem call 'Junglist' and Roy, who dem call 'Fowl' come out of the car and point gun at me.
>
> Lloyd force me to go into the car and dem drive to Dyke Road where Lloyd tell me to come out of the car and dem rob me of two thousand dollars and one gold chain and Lloyd shot me in my face. Mi run off and mi hear some more shots behind and mi run go a Bernard Lodge where some security guards carry me go a hospital."

This statement was admitted into evidence by the learned trial judge as a dying declaration, despite an objection by learned counsel who appeared for the applicant at the trial. Before us, learned counsel remained consistent in his objection to this evidence. He filed and argued the following ground of appeal:

> "1. Hearsay evidence was admitted by the learned trial judge when he admitted the statement of the deceased to the police while he was in the hospital as a dying declaration which said statement did not qualify as a dying declaration and as such a proper exemption to the hearsay rules."

To deal adequately with this complaint, an examination of the other facts in the case, and upon which the prosecution relied is necessary. It should be noted that the injury which took the life of the deceased in the opinion of the pathologist was most likely the one he received while a patient in the hospital. The doctor, in giving his opinion as to which injury caused the death, testified as follows:

> "Each in itself could have been a fatal wound but number 2 being the most fatal. If one was to survive from this then it would have been number 1, in the sense it is involving less vital organs than injury number 2 which went right through the brain. So of the two injuries number 2 was the most severe but <u>each by itself could have been fatal.</u>"
>
> [Emphasis added]

Asked for an explanation by the learned trial judge, the doctor then added:

> "In other words, of the two injuries number 2 was the most fatal and if one was to survive then he would most likely survive from number 1 than number 2."

Earlier, the doctor had described both injuries as fatal. There was no evidence that the deceased had received surgical treatment for either injury. The doctor explained:

> "There was no surgical, bearing in mind that the injuries are just instantaneously, they are fatal injuries."

Then he described injury number 2, as unsalvageable because "it went into the brain and severe brain damage, severe haemorrhage so there is nothing you could do."

Then in answer to the learned trial judge, the doctor stated:

> "Both injuries contributed, but number 2 was most severe."

The injury described as number 1 by the doctor relates to the incident described by the deceased to the Detective Inspector, as recorded earlier, and which was contained in the statement admitted in evidence as a dying declaration.

Injury number 2 related to the incident which occurred on the following day, while the deceased lay in the hospital bed suffering from injury number 1. This latter incident occurred in the following circumstances, as described by the witness Carmen Lewis who was employed as a nurse at the Spanish Town Hospital on the fateful day. As a result of a strike by nurses Miss Lewis and one ward assistant

were the only persons working in the male surgical ward (ward 2) on that day. On the 2nd May, 1992 she had admitted as a patient, the deceased Joseph Anderson, suffering from a wound to the left side of his jaw. He appeared to be weak, was bloody all over, and was experiencing shortness of breath. He spoke with slurred speech. He was placed in bed number 13, and put on a drip. On the following day, 3rd May, 1992, Miss Lewis was again on duty in the ward, when at 12:50 p.m. a man, later identified as the applicant, entered the ward and said to her, "Good afternoon, nurse I come to visit my brethren." The applicant then said that his brethren was "over there" pointing in the direction of the patients of whom the deceased was one. The deceased at that time was sitting up in his bed, his mouth draining a mucus bloody substance. The applicant was then about three feet from the bed of the deceased and could easily have seen him. The applicant told Miss Lewis that he was going to go to 261 Mona Commons and inform Anderson (the deceased's) mother that he was sick. Miss Lewis realized he was talking about Joseph Anderson, as the information he was giving about the deceased's mother coincided with the information given to her previously by the deceased in respect to his next of kin.

The witness then informed the applicant that the visiting hours were 11:00 a.m. to 12:00 noon and/or 4:00 p.m. to 6:00 p.m. After this, the applicant left the ward. She saw the applicant for a second time that day, sometime after 5:00 p.m. while she was passing along the corridor near her ward, just outside the entrance to the ward. He was standing on the grass, in the company of two ladies. He was then wearing the same clothes as he was wearing when he had come into the ward 12:50 p.m. Later that day she went home, but returned for duties in the same ward at 10:00 p.m. All the lights were on in the ward. The lights were long flourescent lamps - two to each cubicle and one over the nurses' station where she was seated. The deceased was at that time still in bed number 13, lying on his left side with a drip in his arm. He was then much weaker, and spoke in low tones.

At about 10:25 p.m. the witness saw a car enter the hospital compound. Four men came out of the car. The ward is on the ground floor. All four men went under a tree on the compound and urinated, and shortly after two of the men came on the ward. One stood by the door. She recognized the other man as the applicant who had come to the ward earlier that day. He entered the ward, stood in front of her and said "a polite good night." She responded in kind, but then looking at her watch she said to him that "it was 10:25 p.m. and where he going this time to visit". She added, "Haven't I spoke to you today and tell you what time was visiting time?" Not receiving a response she continued "How come you pass security at the gate?" Then, he said, "A come to visit my brethren." She told him "harshly" that he could not visit anybody at that time. The telephone then rang and when she answered it the operator connected her to someone who just said "hello" and nothing else. At that time the man at the door shifted his position, and that attracted her attention to him. She noticed that he had something looking like a gun handle in his pocket. She returned her attention to the applicant who was still standing in front of her about three feet away. She then saw him lift his shirt, take a gun from his pocket, aimed it at Joseph Anderson (the deceased) and fired two shots. The man who was standing at the door then came in and cut the telephone wire. The applicant after firing the shots at the deceased turned towards the witness pointing the gun at her. He stood like that, for a few seconds, and then started on his way out of the ward. While leaving, he however still pointed the gun at the witness who said to him "Whey me do you sah? Whe you a go shoot me fah?" The men then left, and the witness checked on Joseph Anderson. She checked his pulse and he had no pulse. At the back of his head, she saw blood, and she also saw flesh matter on the pillow on which he was lying. She ran out to the operator, who called the Hospital Administrator and the Senior Medical Officer and later on the police came. The Senior Medical Officer came on to the

ward and pronounced Joseph Anderson dead.

Against this background, Mr. Morris, in advancing this ground, contended the following:

(i) that the alleged dying declaration was incomplete;

(ii) that the act that resulted in the death of the deceased was not the act described in the dying declaration; and

(iii) that there was no evidence that the act committed on the Friday, resulted in the death of the deceased.

1. **Incomplete Statement**

Though Mr. Morris advanced this point, he did not persist with it. He was apparently encouraged to put it forward because of the following evidence given by Inspector Grant after he had related what the deceased had said to him i.e.

> "At this point the deceased became very weak, at this point he became so weak that I think it was in his best interest to stop speaking to him."

In spite of this however, an examination of the statement clearly discloses that the statement was in fact complete, as it ended with the deceased saying that he was taken to the hospital, where in fact the statement was being given. The statement in our view in itself discloses a full account of the incident which allegedly took place, and it is difficult to come to a conclusion that there was any additional information that the deceased could have given which would have thrown any doubt or ambiguity on what he had earlier said.

In those circumstances, we are unable to agree with counsel's contention that the statement was incomplete.

2. **Act resulting in death not act described in 'Dying Declaration'**

This contention we will consider together with the contention in (iii) that is to say, that there was no evidence that the deceased died from the injury he received on the Friday.

It is settled law that "the oral or written declaration of a deceased person is admissible evidence of the cause of his death at a trial for his murder or manslaughter provided he was under a settled hopeless expectation of death when the statement was made and provided he would have been a competent witness if called, to give evidence at that time." (Cross on Evidence - 6th Edition - page 575). It may be however appropriate to reiterate the words of Eyre C.B. uttered as long ago as 1789 in the case of **R. v. Woodcock** (1789) 1 Leach 500:

> "The principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."

The following are the conditions set out in the Sixth Edition of Cross on Evidence on which a dying declaration is admissible in evidence -

> "1. Death of the declarant.
> 2. The death of the deceased must be the subject of the charge, and the circumstances of the death the subject of the declaration.
> 3. The statement must relate to the cause of the declarant's death.
> 4. Declarant must have a settled hopeless expectation of death, and
> 5. Declarant must have been a person who would have been a competent witness, had he survived."

The contentions advanced in this appeal addressed the conditions required as stated in 2 and 3 above, and so the opinion of this Court will be confined to those issues.

The death of the deceased is the subject of the charge and therefore the issues are further confined to whether the statement related to the circumstances of, and to the cause of, the declarant's death.

Counsel's contention is that the dying declaration related to the earlier incident, and not to the incident in the hospital, and the latter incident having caused the death of the deceased, the statement cannot therefore be considered as relating to the cause of death of the deceased.

To determine this question, a wider view than that which focuses on the incident in the hospital must be taken. The prosecution presented a case in which it sought to establish, through the "dying declaration", that the deceased was recently the subject of an attack by the accused, acting in concert with others, and that the deceased not having succumbed to the injuries he received as a result of that attack, the accused "visited" him in hospital to complete what was meant to have been completed in the earlier attack.

If this is the view that ought to be taken of the case, then there is no difficulty in concluding that the content of the statement related to the circumstance of the death of the declarant. In so far as to whether it related to the "cause of death" the appellant contends that it was the injury received in the hospital attack that eventually took the life of the deceased, and consequently the stateemnt given prior to that cannot be said to relate to the "cause of death". In our view such a rigid application of the principle, in the circumstances of this case, would make nonsense of the law.

The case referred to by the author of "Cross on Evidence" as the basis for stating that the declaration must relate to the cause of death is **R. v. Murton** 3 F & F 491 reported in the 176 English Report 221. In that case the facts as set out in the headnote are as follows:

> "(The prisoner had seized his wife, a heavy, corpulent woman, and dashed her violently on the brick floor of a kitchen, and then struck her with the tongs on her thigh, inflicting a severe bruise, but no injury in itself fatal. She languished ten days, during which she, at his desire, and in effect driven away by him, sought shelter at a friend's where, at the end of that time, she died; he providing no medical aid, and no doctor visiting her until the

"day before her death, when it was too late. The medical evidence showed that she was diseased, but that she might have lived for an indefinite period; and that the effect of the whole of the violence was to hasten her death, by a shock to the nervous system calculated to aggravate the disease:- Held, that if this were so, he was guilty of manslaughter.)"

During the trial, the daughter of the deceased was called as a witness for the prosecution, and when she came to the part of her evidence which related to the last hours of her mother she was asked after stating that her mother had said she was "going fast" what words she afterwards used. Counsel in objecting to the admissibility of the statement urged that the statements would not be admissible if they related to matters not necessarily connected with the death, or the violence suggested as its cause, but to other and prior matters, and especially if they conveyed the mere impression on the mind of the deceased as to the result of other treatment prior to the particular violence in question. The learned judge, after some discussion and consideration said that he was clearly of the opinion that the evidence was admissible, because although general in its form it might be deemed to embrace the particular violence in question. The witness was then allowed to give evidence that her mother some two or three hours before her death said:

"That wicked man has caused my death,"

and added that her being turned out of the house was the cause of it. She also complained of pain in her back. Another witness was allowed to give testimony that on the night the deceased died she said:

"That wicked man has broken my heart."

The issue in the case revolved around the question whether the injuries she received from the violence by the accused, accelerated her death from the disease with which she had been inflicted at the time. None of the statements admitted as dying declarations made any specific reference to the violent attack upon her by the accused. In fact, the declarations, seemed to have given some other cause for the death,

a consideration which was obviously in the mind of the learned judge as he directed the jury thus:

> "Taken altogether these dying declarations are, perhaps, more in favour of than against the prisoner; for if the woman died of a broken heart, and from anguish at being turned out of her home, it would not be a case of manslaughter. To constitute that crime there must have been some physical or corporeal injury, negative or positive, as a blow or the deprivation of necessaries or the like."

The declarations were admitted, not on the basis that they related to the particular incident of violence, but because they related to the particular circumstances that existed and which might have been the cause of death.

In the Thirteenth Edition of "Phipson on Evidence at paragraphs 24-73, the learned author summarizes the condition of admissibility as follows:

> "The declarations are only admissible to prove the cause of, and the circumstances of the transaction resulting in, death and not previous or subsequent transactions although relevant to the issue."

For this statement of the law he relies on three cited cases - **R. v. Murton** (supra) **R. v. Mead** 2 B & C 605 and **R. v. Hinds** 8 Cox 300.

In **R. v. Mead** (supra) reproduced in 107 E.R. 509 the defendant having been convicted of perjury, a rule nisi for a new trial was obtained and whilst that was pending, the defendant shot the prosecutor and in showing cause against the rule an affidavit was tendered of the dying declaration of the latter, as to the transaction out of which the prosecution for perjury arose.

In ruling the declaration inadmissible Abbot, C.J. stated:

> "...evidence of this description is only admissible where the death of the deceased is the subject of the charge and the circumstances of the death the subject of the dying declaration."

In **R. v. Hinds** (supra) where the dying declaration was admitted in evidence at the trial of the accused for feloniously and unlawfully using certain instruments upon the deceased with intent to procure a miscarriage by the deceased, the Court of Appeal following the dicta of Abbot, C.J. in **R. v. Mead** (supra) ruled it inadmissible and quashed the conviction.

In neither of these two latter cases, was the death of the deceased the subject of the charge, and both were decided on that basis. In fact, none of the three cases relied on by the learned authors has any resemblance to the particular circumstances that exist in the instant case.

In our view, the admissibility of the declaration ought not to be considered on the basis of isolating the incident in the hospital as separate and apart from the earlier attack on the deceased, which is disclosed in the declaration. Viewed on a wider scope, the evidence if accepted, would disclose that the latter attack had a distinct connection with the first and indeed could have been considered by the jury as a continuation of the first with the intention of hastening the death of the deceased, his attackers having earlier failed to accomplish that act. It would therefore be important to place evidence before the jury in an attempt to establish the identification of the appellant as one of the original assailants. The declaration therefore undoubtedly related to the circumstances under which the deceased came to his death. In so far as the injuries which caused the death was concerned, the evidence of the Pathologist already referred to, indicate that there had to be a careful examination to determine which of the injuries eventually caused death. The fact that the Doctor referred to the latter as "more fatal" than the first indicates that both injuries would have resulted in death, a fact emphasized in his opinion that surgical treatment could not possibly save the life of the deceased. In the circumstances, however, given the content of the dying declaration, it mattered not on the Crown's case because they put forward a case in which

they alleged that the applicant was involved in both incidents and would be responsible no matter what injury caused the death. In that sense therefore, if in no other, the declaration did refer to the cause of death. In the same way in **R. v. Hinds** (supra) the dying declaration related not to the violence by the accused on the deceased upon which the prosecution relied, but to an alternative cause of death i.e. a "broken heart" or a mental depression because the deceased had been turned out of her house.

We are of the view, and so conclude, that in spite of the peculiar circumstances of this case, applying the principles governing the admission of dying declarations, the learned trial judge was correct in admitting the statement as a dying declaration.

During the course of his arguments, Mr. Morris sought and was granted permission to argue the following ground:

> "That the learned trial judge failed to advise the jury how to deal with the words that were the dying declaration. In particular he failed to advise the jury that the words uttered by the deceased were not subject to cross-examination, and failed to direct them how to find on the facts before they could rely on the dying declaration."

Two issues arose out of this ground:

> "1. Did the learned trial judge have a duty to direct the jury that in considering the dying declaration, they ought to be mindful of the fact that it was not subject to cross examination? and
>
> 2. Given the circumstances of the case, and the content of the dying declaration ought the learned trial judge to have directed the jury as to the caution they should exercise, assuming they accepted the dying declaration as having been made, in acting upon the identification of the applicant, by the deceased as one of his assailants in the earlier incident, and to guide them as to the strength and weaknesses of the identification, given the circumstances under which the deceased purported to identify the applicant?"

The following passage contains the directions given by the learned trial judge in respect to the manner in which the jury should approach the "dying declaration":

> "Well, that statement that Grant said Anderson made to him was admitted in evidence by me as what we call in law a dying declaration. This is a man who says that he believes he is going to die and he wants to say something before he dies. This is evidence which is an exception to the hearsay rule; it is not evidence that was given on oath; all the other witnesses in the case took an oath before they gave evidence, but this evidence of what was said by Joseph Anderson wasn't said by him on oath.
>
> The general principle on which evidence of this nature is admitted is that they are declarations made in extremity, when the party making the declaration is at the point of death, when the party making the declaration says something in circumstances in which all hope of the world is gone, the party knows he is going to die and his mind is induced by the most powerful considerations to speak the truth. As it is put, a situation which is so solemn and awful is considered by law as creating an obligation equal to that imposed by a positive oath administered in court.
>
> So a dying declaration is equated to the declaration of a person who comes and swears on the Bible. So the prosecution is permitted to bring evidence of a dying declaration before you the jury.
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> The first thing that you have to consider is this. Do we believe Detective Inspector Grant that Joseph Anderson really said that. That's the first thing. If you don't believe Anderson said it, if you believe Grant is lying or making a mistake, or if you have any doubt as to whether Anderson said that or not, that is an end of the matter; you reject that declaration and you consider this case without it. You only use it if you are satisfied to the extent that you feel sure that Joseph Anderson really told Grant these words.
>
> If you feel satisfied to the extent that you feel sure that Anderson said it, then you ask yourselves now, how does this affect this case, what weight can we attach to this declaration?

Nowhere in these directions, did the learned trial judge point out to the jury that the dying declaration had not been liable to cross-examination, an omission which was described in **Rex v. Waugh** (1950) 16 L.T.R. 554 at 557 per Lord Oakley who delivered the reasons of the Board as a "more serious error" than admitting an incomplete dying declaration which itself was described as a serious error. This was again enunciated by Sir Owen Woodhouse delivering the judgment of the Board of the Privy Council in **Nembhard v. The Queen** (1982) 1 All E.R. 183 at page 185:

> "There is the further consideration that it is important in the interests of justice that a person implicated in a killing should be obliged to meet in court the dying accusation of the victim, always provided that fair and proper precautions have been associated with the admission of the evidence and its subsequent assessment by the jury. In that regard it will always be necessary for the jury to scrutinise with care the necessarily hearsay evidence of what the deceased was alleged to have said both because they have the problem of deciding whether the deponent who has provided the evidence can be relied on and also because they will have been denied the opportunity of forming a direct impression against the test of cross-examination of the deceased's own reliability."

Learned Counsel for the Crown, in the circumstances, could not advance any argument in answer to this complaint and quite rightly in our opinion immediately conceded that point. She however contended that such an omission in the circumstances of this case should not be held to be fatal to the conviction, and submitted that this would be a case for the application of the proviso. This submission will be dealt with later in this judgment.

Mr. Morris (see 2 above) submitted that the learned trial judge did not direct the jury as to the approach they should take in considering whether they could act upon the dying declaration in so far as it purported to identify the applicant as a participant in the earlier event. He submitted that this omission was

compounded by the learned trial judge, when in spite of the omission, he directed them that that identification could be used in support of the identification by Miss Lewis of the applicant as the assailant in the hospital. The passage of the summing-up to which Mr. Morris referred is to be found at page 302 of the transcript and is as follows:

> "It is important because if Joseph Anderson said these words he has identified three persons who hurt him, three persons who were obviously acting in concert with each other. One of those three persons, the prosecution is saying, turns out to be this very defendant, who shot him the next day. That is the prosecution's case. If you believe that this statement was made, could it be a coincidence that Joseph Anderson should call the name of Clifton otherwise called Junglist and Miss Lewis could pick out a man named Clifton otherwise called Junglist as the man who shot Mr. Anderson the next day? Could that be just a mere coincidence? That is a question you will have to ask yourself. What a great coincidence that would be?
>
> The prosecution is saying it is not a coincidnece. The prosecution is saying this defendant is the same man that Mr. Anderson told Detective Sergeant Grant about. The prosecution is saying this defendant is the same man who came to finish the job on the 3rd May, Mr. Anderson having spoken to Sergeant Grant the day before, the 2nd of May. So althougn Joseph Anderson didn't give this evidence on oath, it is evidence which you are entitled to consider in this case on the basis as I have described to you."

Having told the jury that they could act upon the identification evidence contained in the dying declaration, the learned trial judge thereafter failed to direct them as to the manner in which to approach such evidence as has now been settled in the cases of **R. v. Turnbull** (1977) 1 Q.B. 224, **Scott v. The Queen** (1989) 1 A.C. 1242, **Junior Reid v. The Queen** (1990) 1 A.C. 363 and several cases that followed. In **Nembhard v. The Queen** (supra), the

Privy Council, though concluding that there was no requirement for identification evidence in a dying declaration to be corroborated, nevertheless, approved the directions by the learned trial judge in that case as "an eminently fair and sensible summing-up - and more than adequate for the purpose of giving every necessary assistance and direction to the jury."

The passages referred to in their Lordships' judgment dealt **inter alia** with the identification by the declarant of the accused in the dying declaration and the manner in which the jury should approach that evidence.

These passages, in our view, are demonstrative of the correct directions that ought to be given in cases such as these. In that case the learned trial judge directed the jury thus at page 185:

> "...Now if you believe her that the deceased did tell her this, you will have to test the statement and say whether you can rely implicitly on it. If you believe the statement was made, Mr. Campbell is saying how he got his injuries and who caused them, if you believe he made the statement and he has described accurately what he said took place, were the circumstances such that he could identify positively the person who attacked him in order to convince you that a mistake has not been made in the identification of the person who shot him? In other words, you have to examine it in the same way as you would examine the evidence if he had come here and said the same thing."

Then on page 186 Sir Owen Woodhouse stated the following:

> "There follows a lengthy and entirely accurate warning concerning the various problems that can and do arise in the area of identification evidence and the circumstances that were relevant in assessing the deceased's identification of the appellant as his assailant."

Then with approval he refers to a summary by the learned trial judge of what he had been saying to the jury:

> "If you feel sure the statement was made to her you have to examine the circumstances which must have existed at the time when Mr. Campbell was shot; you have to take into account his state of mind when he made the statement; was he in a state of mind where you would feel that you could safely rely on what he was saying, as being the truth? You have to take into account the caution that I have given about mistaken identity and whether the circumstances were such, having regard to distance, light and so forth, that you can feel that a mistake was not made in the identity of the accused. And if you are not sure whether a mistake was made or not, or if you do not think that you can safely rely at all on what the deceased is alleged to have said, then you must acquit the accused."

In our view, the circumstances of this case also called for similar directions in respect of the circumstances and the opportunity that the deceased would have had, to identify the applicant as one of his assailants in the previous incident. Learned Counsel for the Crown readily conceded this point also, and again asked that the proviso be applied, having regard to the circumstances of this case.

Any thought that the general directions on identification would have saved this issue, was destroyed, when the learned trial judge gave the warning and then directed the jury thus at page 322:

> "In this case, the witness that I am talking about is Carmen Lewis. It is her evidence that you will have to examine with the care that I have spoken about."

In the result, we must conclude that the learned trial judge did not give to the jury adequate assistance in respect of how to deal with the dying declaration and compounded his error when he gave the jury specific instructions on how it could be used to support the evidence of identification by Miss Lewis, without giving them the necessary warning; and without pointing out that the declaration was not the subject of cross-examination.

Having come to that conclusion, the question of whether the proviso should be applied must be determined. In doing so, it is necessary to look at the evidence for the prosecution, and to discover

whether the evidence was so overwhelming that in spite of the errors of the learned trial judge the jury would nevertheless have convicted the applicant. This brings us then to the quality of the identification evidence of Miss Lewis.

In **Michael Freemantle v. The Queen**, Privy Council Appeal No. 1 of 1993 delivered on the 27th June, 1994 the Judicial Committee of the Privy Council deciding on the appropriateness of applying the proviso in a case where the requisite general warning and explanation were not given in a case of visual identification, and having examined the leading cases dealing with the warning in those cases, per Sir Vincent Floissac stated at page 4:

> "Their Lordships are satisfied that none of these dicta was intended to close the door to the application of the proviso whenever the trial judge has failed to give to the jury the requisite general warning and explanation in regard to visual identifications. On the contrary, the door was deliberately left ajar for cases encompassed by exceptional circumstances and has not been closed by the observations of the Board in **Reid (Junior) v. The Queen** (1990) 1 A.C. 363 at 384C. Their Lordships consider that exceptional circumstances include the fact that the evidence of the visual identification is of exceptionally good quality. Accordingly, the ultimate issue in this appeal is whether the evidence of the visual identifications of the appellant was qualitatively good to a degree which justified the application of the proviso."

In the instant case, the learned trial judge failed to give the requisite warning in relation to the visual identification allegedly made by the deceased in his dying declaration.

Though the learned trial judge invited the jury to use that evidence of the identification of the applicant as the assailant who shot the deceased in the hospital, the evidence upon which the Crown in fact relied for that purpose was that given by Miss Lewis.

An examination of the evidence of Miss Lewis establishes:

(i) That the jury could have convicted the applicant based on her testimony alone. Indeed, if they accepted her testimony, then there could have been no other verdict open to them except one of guilty, and

(ii) As was the case in **Freemantle v. The Queen** (supra), an examination of the

> " circumstances which determine the quality of the evidence of the visual identification of the applicant reveals that the quality of the evidence was exceptionally good."

Although the witness had not known the applicant before she first saw him in the hospital, she in fact had three separate occasions on which to observe him on that day. On the first occasion when he first came into the hospital ward at 12:50 p.m., he remained there for about ten minutes and entered into conversation with her. On the second occasion, however, she would have seen him for a very short time, perhaps seconds, because she passed him while he was talking to two young ladies outside of the ward. Then on the third occasion, that is, at the time the shooting took place, she saw the applicant for a period of 2½ to 3 minutes. In addition, her very expression when she saw him enter the ward at 10:25 p.m. (i.e. didn't she tell him earlier about the visiting hours) indicates that she recognized him then as the same person who came to the ward earlier at 12:50 p.m.

In addition, when she saw him on the first two occasions, it was daylight, and on the third occasion as she described it, there were ample lights there to facilitate her opportunity to identify the assailant. In relation to distances, on the first occasion, the assailant came three feet from her and on the second, again about three feet; so that the distances were very near, the lighting good, and the duration of time, more than adequate. Also the witness described the applicant's face as unusual - the sort of face that nurses would describe as "pronounced", - a 'V-shaped face - a long face, and extended nose, and eyes with a 'sink-in'" appearance, a face she could not miss.

In our view, all the circumstances that existed for the opportunity of making a correct identification were so exceptionally good, that even though the learned trial judge misdirected the jury as to the treatment of the dying declaration, the jury nevertheless would have convicted the applicant

Unlike the case of **Freemantle v. The Queen** (supra) the learned trial judge did adequately direct the jury's mind to the requisite general warning that they should heed before acting upon reliance of the evidence of visual identification of the applicant by Miss Lewis. His omission, to give a similar warning in respect of the identification in the dying declaration, would not, in our view, have affected the jury's finding, given the exceptional quality of the identification by the witness, Miss Lewis.

For those reasons, we conclude that this is an appropriate case for the application of the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act, and consequently apply same.

We turn now to the third ground of appeal which challenges the applicant's conviction for capital murder, on the basis that the evidence does not establish that the killing was done in the process of "terrorism" and that the learned trial judge was incorrect in leaving to the jury, as a possible verdict, capital murder - based upon "terrorism". The ground filed is as follows:

> "That the Court erred in law in ruling and leaving the charge of 'Capital Murder' to the Jury as the facts surrounding the murder does not put it within the category of Capital Murder as defined by the statute."

It appears that the Crown presented its case of Capital Murder on the basis of section 2(1)(f) of the Offences against The Person (Amendment) Act, 1992 which states:

> "Any murder committed by a person in the course or furtherance of an act of terrorism, that is to say, an act involving the use of violence by that person which, by reason of its nature and extent, is calculated to create a state of fear in the public or any section of the public."

In leaving that issue to the jury, the learned trial judge directed that the evidence of Miss Lewis and that of Detective Inspector Benjamin was evidence capable of satisfying section 2(1)(f) of the Act. In order to understand fully the area of the evidence which the learned trial judge directed the jury to consider in determining

this issue, it is important to set out in full, his directions on this point. He directed the jury as follows:

> "...What is the evidence that I speak of? The evidence that I speak of is the evidence of Miss Lewis who told you where the thing happened. It didn't happen in a little private room, it happened in a public hospital, the main public hospital in Spanish Town. It happened at a time when there were thirty-six or thirty-seven patients on Ward Two, ranging in ages between twelve years and fifty years. So there were thirty-six to thirty-seven members of the public as patients on that ward at that time. That is where it happened. Look at the type of weapon that was used. It was a gun. Look at what it caused. Accordingly to Miss Lewis the atmosphere was topsy-turvy, some patients went under their beds for shelter.
>
> The defendant was not alone he came with another man, and that other man cut the telephone wires. So all communications with outside was cut off from Ward Two. There is no way they could call for help on that phone because the prosecution is saying that the other man was acting in concert with this defendant, both of them were together. They had a common design to kill Joseph Anderson, and the other man stood at the door to make sure, according to the prosecution, that this defendant was not interrupted, that he could carry out his mission, and with that when it was all over they could say mission accomplished. So they cut the wire, the other man cut the wire. Where persons act together like this, with a common design to commit crime, the act of one is the act of the other. One stands guard while the other does the shooting. One cuts the wire to make sure that no one can get a message out for help.
>
> Miss Lewis said on the following day, up to the following day there was chaos, that was her word, she used the word 'chaos' on the ward. Some patients wanted to go home, some wanted to be transferred to another hospital, some who were very ill and couldn't go anywhere were asking for police protection.

> "The nurses, the ward assistants, the ward-maids and the porters demanded more security otherwise they said they would strike. According to Detective Inspector Benjamin the following day at the hospital police personnel had to be placed on the compound, at the gate and on the various wards, especially on Ward Two. A number of additional security guards were also employed to man the entire compound. The hospital gates had to be kept locked at all times except when vehicles passed in and out. The atmosphere was tense, very tense, nine policemen had to be deployed to work on each shift for three shifts per day. Most staff members were in fear."

He then assisted the jury as to how they should approach consideraton of the issue based on the facts they would find. He said at page 321:

> "The prosecution is saying isn't that the use of violence, which by its nature and extent was calculated to create a state of fear in the public or in any section of the public. You have to say whether that evidence satisfies that section of the law. In determining whether the use of violence is calculated to create fear, you must consider all the circumstances. Consider the place where it happened, consider the method of the killing, the weapon that was used, the cutting of the wires. This section of the Law encompasses those persons who by the excessive use of violence create extreme fear in the mind of members of the public whether they are present where the incident is taking place or not.
> You as jurors must take a commonsense approach as right thinking members of the public and say whether the public of Jamaica in its widest sense or a part of it would not have been affected by the type of violence that was used in this case. The test is not whether onlookers or witnesses to this incident were put in fear, but whether the impact of the violence that was used is calculated to serve as a warning to the public in general or a section of the public."

This Court in the case of **R v Walford Wallace** S.C.C.A 99/91 delivered on the 18th January, 1993 (unreported) interpreted section 2(1)(f) of the Act, an interpretation which was again reiterated and extended in the case of **R v Esmond McKain,** S.C.C.A. 106/93 delivered on the 31st October, 1994 (unreported). In the **Wallace** case Carey, P. (Ag.) said:

> "First, we do not think that the words - 'state of fear in the public or any section of the public' must be interpreted to mean that the fear can only be created in those who witness the violence. That would be too restrictive a meaning. The section brings within its ambit those persons who by the excessive use of violence create extreme fear in the minds of the citizenry whether near or far. The force used is expected to have the widest impact by reason of its brutality or apparent senselessness. It is not expected that any member of the public would be called to give evidence. It would be for the jury to take a common-sense approach as right-thinking members of the public and say whether the public in its widest sense or a part of it, i.e. a community or even a family unit in that community would be affected thereby. The test is not whether viewers or witnesses to the violence are put in fear, but whether the impact of that violence is calculated to serve as a warning to the public in general or a section of it."

Following upon that dicta this court in **R v McKain** (supra) having reiterated the above passage said:

> "The 'warning' of which Carey, P. (Ag.) spoke is of course a 'warning' that the violence exhibited in that particular incident, could be turned upon or again be visited upon the public or any particular section of the public, given the circumstances."

In my view there was ample evidence as detailed in the summing-up of the learned trial judge, which demonstrated the

fear and upheaval that resulted from the violent attack upon a patient of the hospital. In particular, it created such fear in the hospital community, that patients wanted to be sent home, very sick patients demanded police protection and staff demanded more security, all indicative of the fact that that community accepted the incident as a warning that the violence could again descend upon them. The facts, which the jury must have accepted disclosed not an isolated killing of a patient in a private room, but a display of cold-blooded violence towards a patient in a ward of a public hospital in which there were at the time 36-37 patients. Telephone lines were also cut, ensuring that there could be no communication coming out of the ward.

We have no difficulty in concluding that there was sufficient evidence which required the learned trial judge to leave the issue of whether the murder came within the category of capital murder on the basis of terrorism. In the end, the jury concluded that it did, and we can find no reason for disturbing their finding.

In the result, the application for leave to appeal is granted, and the hearing of the application treated as the hearing of the appeal. However, in the interests of justice the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act is applied. The appeal is dismissed, and the conviction and sentence affirmed.