JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 221 & 222/88 &

16 & 17/89

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

VS

BALVIN MILLS

ARTHUR MILLS

GARFIELD MILLS

JULIUS MILLS

Dennis Daley & Donald Gittens for appellants
Miss Cheryl Richards for Crown

25th, 26th June & 19th July, 1990

CAREY, J.A.:

At the conclusion of submissions on 26th June, we treated the hearing of these applications for leave to appeal as the hearing of the appeals which we dismissed, intimating then, that we would put our reasons in writing and hand them down at a later date. In fulfilment of that promise, we now do so.

On the 16th November, 1988 at the St. Catherine Circuit Court before Rowe, C.J. (Acting) and a jury, these appellants were convicted of the murder of Peter Batchelor and in the case of Arthur and Balvin Mills, sentence of death was pronounced, while the other two appellants (being juveniles) were ordered detained during Her Majesty's Pleasure. Arthur Mills is the father of the other appellants which makes this case most depressing indeed.

The Crown's case depended substantially on the visual identification evidence of a number of witnesses called by the prosecution and the testimony of one of their number as to the utterances of the murder victim at about the time of the incident leading to his death. The defence of all the appellants save Balvin Mills was the usual one of alibi, who asserted that he had defended himself against a felonious attack made upon him by Peter Batchelor. Not unnaturally therefore, the grounds of appeal in respect of the three "alibi defence" appellants challenged the directions with respect to identification and the admission of the statement of the dying victim identifying the appellants as his attackers.

We are obliged therefore to detail the evidence surrounding the death of Batchelor before dealing with the submissions made by counsel in this case.

The incident which gave rise to the charge of murder, occurred in a district called Pennington in St. Catherine. That district does not appear to be served with electricity. At all events, at the time of this incident, a matter of two months after Hurricane Gilbert, the area of Pennington was without that modern adjunct to civilised living. Victim, appellants and witnesses all lived in this country district and were all known to each other. They were born and grew up in this area; they all attended the same school. The relationship between the Batchelors and the Mills was less than cordial. Both families are related. There appeared to be quite a number of quarrels between the families, the reasons for which, never clearly emerged.

On 22nd August, 1987 a number of young men repaired to a Mr. Dennis' bar in their district. Among that company, were Dorant Mitchell, a witness for the Crown and Peter Batchelor,

the slain man. There they remained from 6:00 p.m. to 9:10 p.m. or there abouts. Three of the appellants, the three sons arrived there at the same bar but in a matter of minutes, Basil and Garfield left, having "walked around." Julius however, remained and having surveyed the scene, he too departed. It must have been the Crown's theory that the appellants presence was a reconnoitre to ensure that their victim was at the bar for he lived in the same direction from the bar as they did, and would therefore traverse the same route which they must take to return home.

Upon their withdrawal, the slain man intimated his intention to go home to bed. He then left in the company of one Richard Brailsford, and walked in the direction taken by the appellants. According to Richard Brailsford, as he was within a quarter chain of his gate, Basil and Garfield Mills suddenly materialized from the dark ("from underneath a shade tree"). Garfield Mills then chopped Batchelor who ran off into Richard Brailsford's yard where he fell. The light available emanated from a "well turned up" kerosene oil lamp in a house which was set close to the roadway, and also from a flashlight which Balvin had switched on. These appellants according to Richard Brailsford came quite close to him - "dem did near 'gens me you know." After Peter Batchelor ran off, this witness continued home. Subsequently, responding to shouts of alarm which he heard, he ran to a spot one and a half chains from where Garfield and Balvin Mills had attacked Batchelor to find him lying on the ground on the point of death. It was this scene which greeted Mr. Mitchell who had also heard cries of alarm.

Another witness was Ronald Brailsford, a cousin of Richard Brailsford who at about the material time was gambling at a shop where the injured man complained to him that he had been chopped. He noticed an injury to his leg. Ronald Brailsford ceased playing and helped as he said "to pilot" the injured man home. There was a small incident which took place when they arrived by Brailsford's gate but its relevance to the murder is not altogether clear to us. What is clear is that the injured man continued unaided towards his house while Brailsford remained behind obviously distracted by the incident. Cries of "murder" by Peter Batchelor caused him to rush down the road where he saw "a crowd" armed with machetes chopping Peter Batchelor. That crowd comprised the four appellants ("Jules and his family"). When he was one and a half chains away from them, he scraped his machete on the ground and enquired if they meant to kill the youth. He heard someone say "give him it, give him it." One of the appellants held a flashlight which was focused on Batchelor. That was the only light he used to discern what was taking place. This conflicted with his cousin who said the light from a nearby kerosene lamp helped to illumine the scene.

Another eye witness was Dopson Wynter, a security guard. At the relevant time, he had reached the gate to his home when he heard a shout of "do, no kill me." After it was repeated, he went on to the road and observed a group of men chopping someone who was lying on the ground. He was a half chain off. One of the assailants held a flashlight on the victim. From its light, he recognised these four appellants. He heard the sound of a machete scraped along the ground. The flashlight was turned in the direction of the sound and he did see someone whom he could not then make out. It turned out to be Ronald Brailsford.

Thereafter the men fled, running towards him but turning off into a short-cut. He went up to the injured person and recognized Peter Batchelor. One Leonard Gordon was also on the scene. Batchelor then said - "Jules and his bwoy dem chop me up." Having said that, he died. He noticed that the dead man's left arm was severed. "Jules" is the appellant Arthur Mills.

When the police interviewed Balvin Mills, he admitted chopping Peter Batchelor "fa (for) him call me pussy hole..... and if you tink a lie ask me breda Gary. Him se no fi chop him no more." He handed over the machete he had used.

We have already indicated the defences put forward by the four appellants and do not consider it necessary to rehearse their unsworn statements. We can go straight away to consider the substantive ground, common to Arthur, Garfield and Julius Mills. The ground was expressed in the following terms -

> "1. That the learned trial judge failed to direct the jury adequately in relation to the issue of identification that:-
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> (a) He failed to warn them or make reference in any terms to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken;
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> (b) He failed to remind them that even when a witness is purporting to recognise someone whom he knows, such as a close relative or a friend, mistakes can be made. To the contrary such directions as he gave (see p. 95), erroneously appeared to suggest that prior knowledge of or acquaintance with the accused would obviate the possibility of error;
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> (c) He failed to direct them to examine closely the circumstances in which the identification by each witness came to be made and, in addition, failed to point out to them specific

" weaknesses which existed in the evidence of identification particularly in relation to the issues of -

(i) the absence of any or adequate lighting at the locus in quo;

(ii) the long distances over which the identifications were made;

(iii) the uncertain but brief duration of opportunity for viewing;

(iv) the possibility of obstruction resulting from the particular circumstances."

The function and responsibility of a trial judge called upon to sum up to a jury in a case which depends upon identification evidence has been spelt out in a number of cases beginning with **R. v. Whylie** (1977) 15 J.L.R. 163. The areas upon which that case has been overruled, do not affect that responsibility save in one respect, viz., his duty to withdraw a case from the jury where the case is a "weak" one. In that respect, we have been told quite firmly by the Privy Council that all the principles or guidelines laid down by Lord Widgery in **R. v. Turnbull** (1976) 3 All E.R. 549 applying in this jurisdiction with full force and effect. We would summarize their duties in this way. A trial judge must warn the jury of the inherent danger in visual identification evidence. He should point out the reasons why caution is essential in that regard. Where there is no suggestion that the witness is deliberately committing perjury, but that the witness is honestly mistaken, then there is an obligation to warn the jury of the possibility of inaccuracy on the part of such a witness for the reason that an honest witness is likely to be the more convincing. See **R. v. Horace Cameron** (Unreported) S.C.C.A. 238/88 dated 23rd October, 1989. Then the judge should discuss with the jury the circumstances in which the identification took place.

He should identify any weakness in the identification evidence.

The learned Chief Justice (Acting) gave directions in regard to identification evidence between pp. 94-96 of the Record. He said this -

> " The issue which I come to at this point is the issue of identification where the prosecution's case rests wholly or substantially on evidence of visual identification, then a jury must be careful in how it assesses that evidence because it is possible that a person who says I saw so and so, a perfectly honest witness can make a mistake and a mistake is no less a mistake because the person is an honest person. So a jury has to be warned that it is dangerous to convict persons on 'I see' evidence unless they are satisfied that the people who come along and claim that they have seen the accused have the kind of opportunity to make the identification and to recall the circumstances of the identification, and you the jury can be quite sure that the person is not making any mistake at all. You can be satisfied that it is a true and correct identification. So you will take into consideration a number of things. If one sees somebody for the first time and tries to identify him two or three weeks later on, then that might be more difficult than if he says I am identifying somebody whom I have known for many years and whom I see regularly. So that the more you are acquainted with, the longer you know a person, the better you are able to identify that person, by seeing the person.
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> In your own experience somebody whom you know but you might not see very often you might start off by saying, what a person resemble so and so, but when the person comes near, you say, Oh, its a mistake. But you might have turned off before the person got to you and you might have gone away with the feeling that it was the person, not realizing that you were mistaken.
>
> You will take into consideration the light conditions. In broad day-light one is better able to see somebody than say at night even if you have electric lights and if one has bright electric lights you might have a better opportunity of seeking someone than when you have a small shaded lamp. So the lighting conditions you must take into consideration when you are dealing with whether or not the person had the opportunity to make observation which the person made.

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" Now, you have to take into consideration whether there were any obstructions that prevented the person from making the observation."

He then gave examples of obstructions and continued -

" The distance that the parties are separated that would make a difference; someone who is near to you, the likelihood, you might say, is that you would be able to observe that person more easily than one who is far away.

Now, you will have to consider naturally, whether the witness who you have before you is a credible witness, that is to say, somebody who you can believe, because a person might be right up against another one and tells you, 'I saw so and so," but you say, 'Look, I couldn't believe a word this man has told me, I don't believe him. He seems to have some reason for wanting to tell an untruth, I don't believe him, although he said so and so.' So, his opportunity means nothing to you, if you don't believe him.

In this case, it was never suggested to any of the witnesses who came forward to make the identification that they had any reason whatever to tell you an untruth on any of the accused. It was never suggested that any of the family feud, about which you had evidence, spilled over to any of these witnesses. The suggestion was, you are mistaken, the light was not good enough. They said, we are country people, we don't have any electric light in our area. We go up and down and what we use to see is flashlight and our eyes and if there is a little light we make use of it. We are all up and down the road at 9:00 o'clock at night or 9:30 at night, and we manage to see where we are going.

So, you may take as sensible people, all these things into consideration and say now, 'Well, the distance is too far for them to make any identification? Was the light too poor for the witness to make any identification? Because, if you say, we can't accept the identification in relation to those persons who said they were there, then the case would be gone, against them, those who said we were not there. If you say the identification is not good they would have to be acquitted because the crown would not have proved that they did anything."

In those directions the learned judge, in our view correctly, clearly and accurately carried out the functions and obligations we have summarized. He has

i) given the caution

ii) stated the reasons for the caution

iii) pointed out that the honest witness can be as inaccurate as the deliberate liar

iv) discussed the circumstances of the identification in the present case

and

v) identified what has been described as a weakness i.e. the lighting conditions.

A summing up, we have said on numerous occasions is not an academic lecture or disquisition on general legal principles. It should be designed to bring home to the jury the precise issues which fall to be considered by them, having regard to the particular facts before them. The summing up should be tailor-made to fit the particular case. And consequently, it must cater for the individual judge's linguistic style and habit of thought. This court cannot and should not lay down ritualistic formulae or catechisms to be trotted out by a judge in any given situation. The question should be, has the jury been assisted by the judge in appreciating the legal principles they should apply and have those principles been clearly and accurately stated?

It is perfectly true that the learned judge did not in terms say that "a mistaken witness can be a convincing one." But to say, as the Chief Justice (Acting) did, in this case that"a perfectly honest witness can make a mistake and a mistake is no less a mistake because the person is an honest person" can bear no other meaning than, that a mistaken witness can be a honest witness. We do not think the descriptive word

"convincing" adds anything to honest. We do not doubt that "honest" as applied to witness would connote to a jury that the honest witness is the more likely to appear the more credible. As we pointed out in **R. v. Cameron** (supra) at pp. 2, 3, in dealing with the need for the warning to be given where honest witnesses were concerned -

> "The need for the warning is all the more necessary when the evidence is given by an obviously honest witness because the honest witness is likely to appear all the more convincing to the jury although he might well be mistaken."

In **R. v. Turnbull** (supra) Lord Widgery in his guidelines did say that the judge "should make some reference to the possibility that a mistaken witness can be a convincing one....". He was not there suggesting that that form of words need be used. Indeed he went on to say -

> "Provided this is done in clear terms the judge need not use any particular form of words."

The learned Chief Justice (Acting) was concerned in this case with the "honest" and therefore convincing witness. That was the burden of the defence. This is clear from this direction at p. 96, where he said -

> "In this case, it was never suggested to any of the witnesses who came forward to make the identification that they had any reason whatever to tell you an untruth on any of the accused. It was never suggested that any of the family feud, about which you had evidence, spilled over to any of these witnesses. The suggestion was, you are mistaken, ...".

All the witnesses who purported to identify these appellants, knew them well. All were from the same district living quite close together. The directions given must therefore be considered against that background of fact. So, where the judge speaks of mistakes being possible, it is to be seen in

that context. The learned judge in his endeavour to assist the jury, pointed out three situations in which identifications may be made, ranging from "difficult" to "easier to identify". He said this at p. 95 -

> "So you will take into consideration a number of things. If one sees somebody for the first time and tries to identify him two or three weeks later on, then that might be more difficult than if he says I am identifying somebody whom I have known for many years and whom I see regularly. So that the more you are acquainted with, the longer you known a person, the better you are able to identify that person, by seeing the person.
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> In your own experience somebody whom you know but you might not see very often you might start off by saying, what a person resemble so and so, but when the person comes near, you say, Oh, its a mistake. But you might have turned off before the person got to you and you might have gone away with the feeling that it was the person, not realizing that you were mistaken."

We reject the argument that the jury were not invited to examine the circumstances in which the identification by each witness took place. The summing up was expressed in language that was clear and helpful; it was obviously crafted for the particular jurors in the case. The facts in the case were quite straight forward. The judge reviewed the evidence of each witness and in the directions previously set out, he put forward a number of factors which the jury should consider. For example, he required them to consider -

(i) previous knowledge by witness of assailant (p. 95);

(ii) light conditions (p. 95);

(iii) distance.

Then he said finally (p. 96) -

> "So, you may take as sensible people, all these things into consideration and say now, 'Well, the distance is too far for them to make any identification? Was the light too poor for the witness to make any identification?"

The facts in the case were short, sharp and brutish and altogether uncomplicated. The defence thrust was - the witnesses are honest but mistaken. They are mistaken because the light was not of the best. The learned Chief Justice (Acting) gave every assistance to the jury. As we have previously observed, his directions were relevant, accurate, adequate and fair. Indeed he was faithfully following **R. v. Turnbull** (supra) as we are now bound to do. We have come to the conclusion that the basis for challenge is without foundation and in the result, the ground fails.

Ground 2 which was another common ground, was stated thus -

> "2. The learned trial judge in directing the jury on the issue of the alibi raised by the applicant in his defence (see P. 94) failed to direct them that even if they did not believe the applicant's alibi their rejection of it did not by itself constitute support for the identification."

We have said before in this judgment that directions should be tailor-made for the particular case, and should not be reduced to uttering formulae. There is no dispute that the judge did not use the language set out in the ground. In **R. v. Turnbull** (supra) Lord Widgery had pointed out that false alibis may be put forward for many reasons and then suggested that the jury should be reminded that proving the accused has told lies does not prove that the accused was present at the scene of the crime.

As we understand it, in the United Kingdom an accused person who intends to rely on alibi is required to give notice

of his intention to do so. At trial, he goes into the witness box. It is true then to say that the defence has undertaken to prove an alibi which the Crown can then rebut. Although in this country there is no such statutory requirement, accused persons seldom, if at all, enter the witness box to put forward alibi; they invariably make an unsworn statement. Where the accused goes into the witness box to put forward that defence, then the Crown in cross-examination might well destroy that alibi. The need for the directions suggested by the learned Lord Chief Justice becomes relevant and necessary for invariably the jury are told that the evidence of the accused may have one of three results. It might convince them of his innocence: it might convince them of his guilt or it might raise a reasonable doubt. The judge then would go on to say that even if you find that the accused is telling lies, you, the jury should not, on that account alone, find him guilty. You must consider the Crown's case etc.

Where an accused makes an unsworn statement, no such directions can or should be given. The jury is told to accord to such statement such weight as they fully consider it deserves.

In this case, such a direction was not necessary in the light of the organisation and structure of the summing up. As Crown Counsel rightly pointed out, the jury were told to look to the Crown's case alone which meant no support could be derived from any other source. At pp. 96-97 the learned Chief Justice (Acting) gave the following directions -

> ".....Because, if you say, We can't accept the identification in relation to those persons who said they were there, then the case would be gone, against them, those who said we were not there. If you say the identification is not good they would have to be acquitted

> "because the crown would not have proved that they did anything.
>
> If you are satisfied, having regard to all the conditions which existed on that night, that Dorant Mitchell had the opportunity to see all the three accused at first. That Richard Brailsford had the opportunity to see Basil and Gary. If you are satisfied that Ronald Brailsford had the opportunity to see the accused, Arthur and the three sons, that night, if you are satisfied that Dopson Wynter, the security guard, had the opportunity to see and to recognize, and is speaking the truth when he says that it is the four accused who were among the people who were chopping up the deceased, then you would have evidence on which you could say, 'Yes, they have been properly identified.'"

The implication was clear. Miss Richards also argued that there was no submission either before the jury that the alibi was a fabrication which would call for the suggested direction. We think that to be right. In our judgment, this ground also fails.

The final ground in respect of the appellants Austin Garfield and Julius Mills and the sole ground on behalf of Balvin Mills was in the following form -

> "3. (a) The learned trial judge erred in law in allowing to be led as a 'dying declaration' or as part of res gestae and, consequently an exception to the 'hearsay rule', evidence of words spoken by the deceased to identify the applicant as his assailant.
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> (b) Alternatively, the learned trial judge failed to give any directions as to the possibility of mistaken identification by the deceased and to warn them accordingly in the terms required by the 'Turnbull' and 'Whylie' cases."

The statement with which this ground is concerned, was given in evidence by Dopson Wynter who had testified that after he came on the scene, he heard the slain man say - "Jules and him bwoy dem chop me up."

At trial, no objection was taken by the experienced counsel who appeared then for the appellant. Mr. Daley had sought to suggest that this declaration had been volunteered by the witness. We have no evidence of this fact. Even if it were, counsel who appeared could have, but did not raise any objection. Mr. Daley referred us to the five conditions particularized by Lord Ackner in **R. v. Andrews** (1987) 1 All E.R. 513 at p. 520, but was quite unable to demonstrate in what respect the judge had erred in admitting the evidence. Counsel who appeared below, we would think, was well aware of this case. In that case which overruled **R. v. Bedingfield** (1879) 14 Cox C.C. 341, the House of Lords laid it down that this hearsay evidence was admissible as to its truth if certain conditions were met. Lord Ackner with whom Lord Bridge, Lord Brandon, Lord Griffiths and Lord Mackay agreed, summarized the legal position thus at p. 520 -

> "1. The primary question which the judge had to ask himself was: could the possibility of concoction or distortion be disregarded?
>
> 2. To answer that question the judge first had to consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection.
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> In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.
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> 3. In order for the statement to be sufficiently "spontaneous" it had to be closely associated with the event which had excited the statement, that it could be fairly stated that the mind of the declarant was still in the control of the event.

> " Thus the judge had to be satisfied that the event which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question was but one factor to consider under this heading.
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> 4. Quite apart from the time factor, there might be special features in the case, which related to the possibility of concoction or distortion.
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> In the instant appeal the defence relied on evidence to support the contention that the deceased had a motive of his own to fabricate or concoct, namely, a malice which resided in him against O'Neill and the appellant, because so he believed, O'Neill had attacked and damaged his house and was accompanied by the appellant. The judge had to be satisfied that the circumstances were such that, having regard to the special feature of malice, there was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the accused.
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> 5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection was relied on, that went to the weight to be attached to and not to the admissibility of the statement and was, therefore, a matter for the jury. However, here again, there might be special features that might give rise to the possibility of error. In the instant case there was evidence that the deceased had drunk to excess.
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> Another example would be where the identification was made in circumstances of particular difficulty or where the declarant suffered from defective eyesight. In such circumstances, the trial judge had to consider whether he could exclude the possibility of error."

In the circumstances of this case we are satisfied that the judge must have considered the circumstances in which the particular statement was made. He used language which showed quite clearly that the principles stated in Andrews was to his mind. At. p. 97 he said this -

> ".....the present rule of law is that if the deceased made a statement shortly before his death, in connection with his death, and there is no suggestion that he had

> "a motive to fabricate, then you the jury, can consider the statement as part of the evidence in the case, and give it what weight you know it deserves.
>
> We are told that the deceased had been taken to court, about two years before, by Arthur Mills, and he was put on probation. You will take that into consideration, and you will take into consideration also the relationship which existed. It was about relationships for thirteen years, when you're considering how much weight, if any, to give to the statement, "Jules and his boys dem chop me up."

To reiterate the circumstances in which the statement came to be made - Dopson Wynter who had witnessed the event and recognized the victim and his assailants, overheard the statement made by the victim in response to a question asked by Leonard Gordon, who was also on the scene. We think that the circumstances in which the statement was made, were in fact unusual, startling or dramatic as to dominate the thought of the victim Peter Batchelor. He was suddenly attacked in the dark by a group of men, all armed with machetes. He had just shortly before this ambush, been rendered less than mobile; he had received a chop to his leg. The suddenness, the ferocity of the attack would, we think, dominate the thoughts of the victim. The judge would be entitled to conclude that the statement was an instinctive reaction to the attack. We do not think it could have been seriously argued that the statement was not closely associated with the event.

In regard to malice, as the trial judge pointed out, there was no suggestion of malice or other motive on the victim's part to fabricate. The defence at no time even suggested that any of the prosecution witnesses were prevaricating or were imbued with ill-will against the appellants. There was evidence of the existence of some family feud. Mr. Daley did put this forward as the basis of the

possibility of concoction. But we note that the trial judge did consider it and left it to the jury for their consideration and invited them to consider how much weight to accord the statement in the given circumstances.

Finally, Mr. Daley contended that there was a duty on the trial judge to warn the jury in terms of **Turnbull** or **Whylie** (supra) regarding the dangers of identification evidence.

The learned judge did point out to the jury that the victim who had made the statement, identifying his assailants, was not in court to give evidence before them. The implication of that statement we think, would be plain to any jury of reasonable men. The judge saw the jurors and had observed them over the period of the case and doubtless over the duration of the Circuit and was in an eminently good position to assess their level of intelligence and mental alertness. He had given ample directions in that regard before and we do not think any further warnings was necessary. We are satisfied that the evidence was admissible and correctly left to the jury for their consideration. Further we are quite unable to appreciate in what respect the learned trial judge erred in his treatment of the statement in the light of the authorities of **R. v. Andrews** (supra) and **Ratten v. R.** (1972) A.C. 378.

In the result, the appeals fail on the grounds argued before us. Although there were no submissions that the verdict was unreasonable and could not be supported having regard to the evidence. We did consider the facts in their entirety. We conclude however, that there was ample evidence against these appellants. The appellant Balvin Mills had put forward self defence as his defence. The Chief Justice (Acting) also left provocation as an issue fairly arising on that appellant's unsworn statement. The jury rejected both defences. We are quite unable to fault that decision.