JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 168 & 170/88

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

R. V. BERESFORD ROBINSON
ERROL DUNKLEY

Howard Hamilton, Q.C. for Robinson

Donald Gittens & Mrs. Pamela Gayle for Dunkley

Hugh Wildman & Robert Brown for Crown

3rd, 4th, 5th October &
16th November, 1990

CAREY, J.A.

The appellants who stood their trial in the Circuit Court Division of the Gun Court between 11th and 21st July, 1988 were both convicted of the murder of one Orville Wright and sentenced to death. They now apply for leave to appeal their convictions. We have treated the hearing as the hearing of the appeal because points of law are involved.

One of these which was debated touched and concerned the situation where a fleeing felon, faced with imminent capture and believing his life to be in danger, thereupon kills a pursuer. The question which arose, was - is he guilty of manslaughter or murder? Mr. Hamilton on behalf of Robinson argued that the trial judge in this case should have left manslaughter for the jury's consideration on the footing that where felons are met with excessive force, they would be entitled to strike pre-emptively and effectively and if they kill, such killing amounts to manslaughter.

Although Mr. Gittens filed some seven grounds of appeal on behalf of the appellant Dunkley, we propose to consider only those which we think deserve some treatment. We may say at once that no complaint was made of the trial judge's directions on identification evidence nor was it argued that the verdict was unreasonable and could not be supported having regard to the evidence.

In order to appreciate the issues, we now summarize the case against these appellants: On 10th January, 1986 at 3:00 a.m. some six men, one of whom was armed with a "strainer gun" i.e. Sub-machine gun, broke into a house-cum-shop-cum-bar in Mountainside, a rural district in St. Elizabeth where they stole, among other things cash, cigarettes and jewellery including a bracelet, the property of an occupant Sharon Rose. These appellants were identified as participants in the raid. A hue and cry was raised by the villagers which resulted in four of the intruders fleeing into a swamp. There they were pursued. One of the pursuers Orville Wright, who was armed with a machete, charged ahead of his colleagues and went at the appellant Dunkley one of the fleeing felons. One of them then said - "shoot him, you nuh see the man a go chop we" (p. 62). Thereafter three shots were fired, one of which found its mark in Wright's heart and another in another villager's belly. Fortunately, he survived to tell the tale.

The appellant Dunkley was identified by the householder Sharon Rose as being present at the time of the burglary and further in the swamp by one of the pursuing villagers Kerrol Allwood. The evidence implicating the other appellant was his possession of a bracelet stolen from Sharon Rose and the muddy condition of his trousers when he was picked up by the police in a road-block after the shooting. He also gave a

cautioned statement in which he acknowledged his presence in the swamp and at the robbery.

So far as Dunkley's defence went, he said from the dock that he knew nothing about the crime, while Robinson explained that he went down to St. Elizabeth where he overnighted at a friend's, left early the following morning for Kingston and was picked up in a police road-block. He asserted that he was coerced into signing a confession by police third-degree methods. He called a witness to corroborate his story of ill-treatment at the hands of the police.

We consider it appropriate at this stage to deal with the law relating to "hue and cry." At common law, a citizen may, without warrant, arrest and detain until they can be taken before a magistrate, all persons found committing or attempting to commit a felony. The principle of "hue and cry" places on the citizen the positive duty of preventing the escape of a fleeing felon. The law is as old as Hale that the county upon hue and cry raised, are authorized by law to pursue and apprehend the malefactors; and although there was no warrant of a justice of the peace to raise hue and cry, nor any constable in the pursuit, yet, the hue and cry was a good warrant in law for the pursuers to apprehend the felons. If the felon killed a pursuer, that constituted murder: Jackson's Case [1674] 1 Hale 464. All persons who if fresh pursuit were made, joined in pursuit, were held to be within the protection of the law: 1 Hale 498, 490. The law was quite strict and rigid. Thus the law also permitted the citizen, by using even great force, to resist an arrest that was not legal. In those circumstances, the killing was held to be manslaughter on the footing that the killing was committed under circumstances of provocation. That provocation is not however to be confused with the modern day defence of provocation -

for that development had not yet taken place.

We give as an illustration of the old approach, Hugget's Case [1660] Kel. (J.) 59; 1 Hale 465. The facts as reported were these -

> "B and two other constables impressed a man without a warrant for so doing; to which the man quietly submitted, and went along with them. The prisoner, with three others, seeing them, instantly pursued them, and required to see their warrant. On this B showed them a paper, which the prisoner and his associates said was no warrant, and immediately drew their swords to rescue the impressed man, and thrust at B; whereupon B and his two companions drew their swords, and a fight ensued, in which Hugget killed B. But this case is stated very differently by Lord Hale, as having been under the following circumstances: --A press-master seized B for a soldier; and, with the assistance of C laid hold of him. D finding fault with the rudeness of C, there grew a quarrel between them, and D killed C; and by the advice of eight judges against four, it was ruled that this was but manslaughter."

See also R. v. Tooley [1710] 2 Ld. Raym. 1296, where the seven judges held that the circumstances amounted to manslaughter because if one was imprisoned on an unlawful authority it is a sufficient provocation to all people out of compassion, and much more when it is done under a colour of justice; and that where the liberty of the subject is invaded, it is a provocation to all the subjects in England. The basis of that proposition was Hugget's Case (supra).

In a number of cases relating to the killing of police officers or of persons with like powers, the question which determined whether the killing constituted murder or manslaughter often depended on the legality of the manner in which the authority was exercised. According to East, the principle was that the illegality of an attempt to arrest puts the officer on the same footing as any other wrongdoer. 1 East P.C. 328.

Thus in R. v. Patience 7 C. & P. 775 a constable who had a warrant to apprehend A gave it to his son, who, in attempting to apprehend A, was stabbed with a knife which A had in his hand, the constable being in sight, but a quarter of a mile off. It was held that the son had no authority to apprehend A who was guilty of manslaughter only. Another illustration of this approach is where a sherriff's officer attempts to execute a writ out of the proper county, and is resisted and killed, it is manslaughter only for he has authority within the proper county only. 1 Hale 458 et. seq.

Another case worthy of note, is R. v. Allen [1867] 17 L.T. 222. In that case K and D had been arrested on suspicion of felony, and were remanded on a warrant charging them generally with felony but not specifying any particular offence. When they were being driven in a police van to prison, a rescue was attempted in the course of which a constable was killed. On an indictment of A and others for the murder of the constable, it was contended that K and D were not in legal custody and that consequently the killing of the constable in the attempt to rescue was manslaughter only. Blackburn and Mellor JJ., directed the jury to convict of murder and on conviction, after consulting the other judges refused to reserve a case. In the course of their reasons, they distinguished (inter alia) R. v. Huggyet (supra) and R. v. Tooley (supra) on which the defence relied, as applicable only in a case of a sudden or unpremeditated affray where the fact of an unwarranted i.e. illegal arrest might be a sufficient provocation and the parties might be said to have acted without any previous malice or intention to harm. "We think," they said, "it would be monstrous to suppose that under such circumstances even if the justice did make an informal warrant,

it would justify the slaughter of an officer in charge of the prisoner or reduce that slaughter to the crime of manslaughter." By this time, provocation in the sense that we know it, was beginning to be developed. In the earlier case of **R. v. Osmer** [1804] 5 East 304 however Ellenborough C.J. said, "If a man without authority attempts to arrest another illegally, it is a breach of the peace, and any other person may lawfully interfere to prevent it, doing no more than is necessary for the purpose." In the event he overstepped the mark, the accused would properly be guilty of manslaughter.

From what has been so far stated, we are of the opinion that if a fleeing felon killed his pursuer, he could scarcely rely on his arrest being illegal as justification for his act because the hue and cry itself supplied the validity of the arrest. But we would think that if the pursuers employed illegal force in an endeavour to apprehend the felon, who then killed the pursuer, he might well be guilty of manslaughter only on the basis of the developing concept of provocation.

The law has however changed to meet the needs of today's society. By Section 4 (2) of the Offences Against the Person Act -

> "A killing done in the course of or for the purposes of resisting an officer of justice or of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, shall be treated as a killing in the course or furtherance of an offence."

Section 4 (1) which abolishes "constructive malice" states as follows -

> "Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence."

Murder is constituted by the deliberate unprovoked and unjustified killing of another person with the intention to kill or cause serious injury to that other person. The intention is fundamental. Manslaughter, on the other hand, arises where there is no such intention or where there is provocation so as to reduce the charge of murder. The cases in which manslaughter was found where an officer of the law or a person (participating) in a hue and cry, (which amounts to the same thing), was killed because of some defect in a warrant or because the officers of justice adopt some unauthorized mode of arrest, would as we have shown, not be decided now as they were then. See also Marnan J, in **DeFreitas v. R** [1960] 2 W.I.R. 523 at p. 530 -

> ".....The law relating to such provocation as may reduce murder to manslaughter as we now know it only emerged in the nineteenth century. Referring to R. v. Hayward [1833] 6 C. & P. 157; 15 Digest (Repl.) 939, 8996 Russell (op. cit., p. 580) states -
>
> > 'It thus appears that in 1833 the law as to provocation was comprehensible and settled.'
>
> It is significant that in the case of R. v. Allen [1867] 17 L.T. 222, 15 Digest (Repl.) 948, 9151, which concerned the killing of a constable, Blackburn, J. (17 L.T. at p. 225), said:
>
> > ' But when the warrant under which the officer is acting is not sufficient to justify him in arresting or detaining the prisoner, or there is no warrant at all.....the crime may be reduced to manslaughter when the offence is committed on the sudden, and is attended by circumstances affording reasonable provocation.'
>
> We have here travelled a long way from the rigid technicalities of Tooley's case (1709), 2 Ld. Raym. 1296; 11 Mod. Rep. 242; Fost. 312, 315; 92 E.R. 349; sub nom. reforming Constables Case, Hold, K.B. 485; 15 Digest (Repl.) 949, 9158.

> "There is no rigid ruling of manslaughter when a constable is killed while effecting an unlawful arrest. It is only manslaughter if the circumstances afforded reasonable provocation."

As we will show later, manslaughter did not arise on the ground of provocation under the modern law. The result of that change in law is that to amount to murder, the evidence must show that, independent of the felon's purpose of escaping capture, he intended to kill or cause serious bodily harm. One might say that the duty of a fleeing felon is not to resist his lawful apprehension but to surrender. On the other hand, we do not suppose that there is any doubt today that a citizen is entitled to resist an unlawful arrest and accordingly he may use such force as he honestly believes to be necessary to achieve that end. If he kills, he is not guilty of any offence.

We conclude as well that manslaughter cannot be constituted by the use of excessive force in circumstances of self-defence. The question of excessive force in self-defence was discussed in **Palmer v. R.** [1971] 1 All E.R. 1077. Lord Morris adverted to two Australian cases of **R. v. McKoy** [1957] V.R. 560 and **R. v. Howe** [1958] C.L.R. 448 and came to the view that the common law of Australia is not the same as the common law of England and declined to follow the Australian view that -

> "If the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felony, but the person taking action acts beyond the necessity of the occasion and kills the offender, the crime is manslaughter - not murder."

In that case, Menzies J had expressed the law in this way -

> " I consider that in law the only effect of a determination that the process was not lawful was to deprive the officer of his 'peculiar protection' and put him in the same position as any other person who makes

> "a violent and unlawful attack on another. On this basis, the authorities which I have considered do support the view that it is manslaughter if an assailant is killed by the person attacked while resisting with excessive force an unlawful and serious attack."

The learned Law Lord declared as follows at p. 1068 -

> "A jury will be told that the defence of self-defence where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence."

Palmer v. R. (supra) is a Jamaican case which went to the Privy Council. The common law of England is the same as the common law of Jamaica in this regard.

In this country therefore, there is no doctrine of excessive force which will reduce murder to manslaughter. There is no halfway house. If a jury are of opinion that what an accused person did, having regard to all the circumstances, was to defend himself, then he is entitled to be acquitted. Where the jury reject the defence of self-defence, then it is eliminated from the case and if the circumstances warrant it, then other issues which fairly arise, fall to be considered. Indeed, in the present case, both counsel for the appellants argued that the issue of provocation arose and ought to have been left for the jury's consideration.

In the present case, we do not think that on the facts self-defence could succeed. It was plain that the man who called down the heavy artillery in the form of the resort to an automatic firearm could have adopted other measures to avoid capture. Plainly he alone was at risk from the imminent attack by the pursuer armed with a machete. The man who fired could have discharged his weapon in the air or he could have called out, warning that he was armed and would fire. The term self-defence seems oddly inappropriate to the facts and

circumstances of the case. Machetes against an automatic firearm! In historical terms - the Zulu impis against an imperial army, spears against machine guns. On which side was the excessive force? But, the fact of the matter was, that the learned trial judge treated the case as a straightforward case of an attack being resisted by another man, both armed, for he left self-defence in terms of Beckford v. R. [1987] 3 All E.R. 425 to the jury and gave directions which plainly were in favour of the appellants. Counsel did not seek to challenge, as we think rightly, these directions which were impeccable. He preferred, he said, that the appellants should rather have been given a chance of conviction for manslaughter rather than a clean acquittal on the basis of self-defence. We were neither attracted to nor persuaded by that argument which we think to be unsound. In our judgment, the trial judge acted eminently fairly and correctly even if unduly generous to the appellants and we are therefore quite unable to appreciate what prejudice the appellants could have suffered by his directions.

There is, we would suggest, another reason which inclines us to the view that the defence of self-defence would be unlikely to succeed. The Crown's case was based on a common design, an agreement to carry out a robbery, to use a firearm to effect that robbery successfully and to escape with and by the use of that firearm. It was open to the jury to find that the intention then must have been to kill if that became necessary, because it is hardly conceivable that men having committed a successful robbery, would tamely submit to capture and arrest especially at the hands of some villagers armed with machetes.

With respect to the appellant Dunkley, Mr. Gittens endeavoured to argue that the trial judge erred in withdrawing the issue of provocation from the jury and -

> ".....in failing to direct the jury that the same evidence which may be inadequate to support the defence of self-defence may be adequate to support the defence of provocation."

We desire to say this. The defence of this appellant was a denial of the charge. Provocation could only then arise on the Crown's case. Learned counsel was quite unable to show the three pre-conditions to constitute such provocation. We could hardly countenance the submission that it is an act of provocation to "attack" a fleeing felon for the purpose of apprehending him. We understood counsel to mean that it was highly provocative to raise the hue and cry and dare to pursue the gun-men. We entirely agree that there are some cases where provocation masquerades as self-defence usually and understandably for purposes of defence strategy but we are content to say this was not such a case. The facts of the instant case altogether excluded provocation. That ground, we think, to be devoid of merit.

Ground 4 stated -

> "4] "That the learned trial judge erred in law in failing to direct the jury that there was evidence on which they could find the applicant guilty of manslaughter on the basis that while he knew that a gun was involved in the joint enterprise the joint enterprise as contemplated by him may not have been to kill or cause grievous bodily harm and on the basis but that the intention to kill or cause grievous bodily harm may have developed during the course of the attack by the pursuers in the swamp and was not shared by the Applicant."

As stated earlier, the Crown's case was based on the concept of common design, viz, that these men, one of whom was armed with an automatic weapon would use the firearm to rob and use it, if it became necessary, to escape capture. The fact that they stayed together after their nocturnal raid on a householder is explicable on the ground that they relied on the weapon to protect them from capture. There was no material from any source whatever on which the directions contemplated by this ground of appeal, could have been given. Had the appellant for instance, made a statement or given evidence as to the limited scope of the plan or that he was no part of the resort to violence, different considerations would apply. This appellant, from the sanctuary of the dock was content to assert nothing more than that he knew nothing of the crime. This ground fails.

Another ground of appeal (No. 5) impugned the trial judge's order refusing an adjournment to allow the appellant to seek alternative representation after his attorney withdrew with the permission of the trial judge thereby depriving the appellant of his constitutional right under Section 20(6) (c) of the Constitution.

That section states as follows -

> "Every person who is charged with a criminal offence.....(c) shall be permitted to defend himself in person or by a legal representative of his own choice."

The circumstances which provoke this complaint are these. This appellant was represented at trial by Mr. Frater. All went well until Inspector Flavius Henry, who had conducted identification parades in which the appellant was the suspect, was giving evidence. He had testified that a witness Shenriffe Smith had failed to point out the appellant but

having left the room, had returned and then identified the appellant. Crown Counsel then tendered the Identification Form for admission, the officer having explained that the witness had not been required to sign the form when he had first entered, but on the second occasion of his return. The judge enquired of Mr. Frater if he had any objection, thereafter the following interchange took place -

"MR. FRATER: Well, I would make an overall objection, that this is an irregular.....

HIS LORDSHIP: Mr. Frater, I am not asking you to make any speech, I am asking....

MR. FRATER: No. M'Lord, please. You have asked me if I had any objection.

HIS LORDSHIP: Mr. Frater.....

MR. FRATER: You can't say I am making a speech, M'Lord. How else can I make an objection?

HIS LORDSHIP: You said you are going to make an overall objection.

MR. FRATER: Yes, I am making an overall objection.

HIS LORDSHIP: Your objection must be in relation to the admissibility of this form.

MR. FRATER: This is in relation to that.

HIS LORDSHIP: All right.

MR. FRATER: I am saying it is so obviously irregular to have two identification parades.

HIS LORDSHIP: Is that the basis....

MR. FRATER: Will you please hear me?

HIS LORDSHIP: Mr. Thompson, any objection?

MR. THOMPSON: No, M'Lord.

HIS LORDSHIP: Any objection, Mr. Morris?

MR. MORRIS: No, M'Lord.

HIS LORDSHIP: Very well. The form is.....

"MR. FRATER: Is Your Lordship not hearing me?

HIS LORDSHIP: Mr. Frater, what you are saying does not make sense to me.

MR. FRATER: I am very sorry for that, M'Lord.

HIS LORDSHIP: The form is admitted in evidence as Exhibit 7.

MR. FRATER: I am objecting very strongly; and if Your Lordship is not hearing me on my objection, I ask that I be withdrawn from this case.

HIS LORDSHIP: You may do as you please.

MR. FRATER: I certainly will do that. You can't say I must not make a speech in my objection, that is what I am doing.

MR. McBEAN: Inspector.....

HIS LORDSHIP: You are going to tell me about irregularity, I am speaking about the admissibility of the form.

MR. FRATER: Does Your Lordship want to hear me?

HIS LORDSHIP: You have indicated that you are withdrawing, and I say you may do as you please.

MR. FRATER: That, I will do then: I certainly will do that.

We do not think that counsel's regrettable and unfortunate withdrawal could be regarded as "with the judge's permission." "Do as you please," is hardly approval for counsel's going. Be that as it may, the question is whether the appellant was denied any constitutional right. It is now the law that there is no absolute right to counsel so that an accused is entitled to an adjournment to enable him to have one of his choice: Robinson v. R. [1988] 1 A.C. 956. He was not prevented by the judge from having the counsel of his choice. It was counsel of his choice who exercised his right to freedom of movement by abdicating his responsibilities to his client. The basis of his objection did not affect the admissibility of the identification form which is a statutory

form. His plain duty, if he thought he had a valid point, was to reserve it for an appeal, if, in the event, one was called for.

Wolfe J, had a discretion to exercise. As the trial judge, he would have been in possession of material on which he could act. Counsel was able to obtain that material which showed that the case was before the court no less than thirteen occasions. The problem was the difficulty in obtaining counsel under the Poor Prisoners' Defence Act for the appellant. Plainly there would have been absolutely no point in granting an adjournment to re-start the formidable task of securing another legal aid assignment in necessarily a short space of time and at such a point in the proceedings. At this time, the majority of the Crown's witnesses had been called, already given evidence and been cross-examined by Mr. Frater.

That factual background, Mr. Gittens submitted was not cogent enough to justify the refusal to grant an adjournment. He suggested that the trial judge took into account the convenience of the court rather than any other factor. We were not told on what basis this assertion could be supported. But the convenience of the court cannot be ignored. The court must consider the dangers and problems posed by adjourning a jury trial for what would have to be some significant period, that the strain on the already strained "Privy Purse" would be onerous, that this was a Gun Court trial and the possibility of the elimination of Crown witnesses could occur. In our view, there was more than adequate material on which the learned trial judge could act to refuse the adjournment. Our conclusion is that there was no deprivation of any constitutional right secured

by Section 20 (6) (c) of the Constitution.

The real question, given the absence of counsel for part of the trial, was whether the appellant was thereby prejudiced. Mr. Gittens dealt with this aspect in his ground 6 which we think we should set out in extenso -

> "6) That the learned trial judge failed to assist or to assist adequately the applicant while he was unrepresented:
>
> (i) to decide whether he should call on his behalf a witness JOHN HALL who gave evidence at the preliminary enquiry and whom counsel for the crown during trial had promised to but did not make available (see page 106 of the transcript).
>
> (ii) to obtain the Mandeville Police Station diary for November and December 1984 and to identify and/or subpoena the "INSPECTOR SMITH" or MR. MULLINGS whom (sic) could have assisted the applicant's defence:"

Upon Mr. Frater's regrettable and, as we think, misguided exit, the trial judge explained the situation to the appellant and intimated that he would afford him every assistance he could. To deal specifically with counsel's complaint regarding the witness John Hall, we were not told what evidence this witness could have provided on behalf of this appellant. At the trial, Mr. Morris who appeared then for the other appellant rose and requested the judge to strike from the record, all reference to John Hall as he was not being called by the Crown. There had in fact been no reference to such a person in evidence. We must assume that this witness who, we were told, gave evidence at the preliminary examination, had provided nothing of assistance for surely it would have been brought to our attention. If indeed, the deposition did assist, this experienced trial judge would have suggested what appears so obvious to counsel.

The assistance which a judge is called upon to render to an unrepresented accused stems from his duty to secure a

fair trial. But the judge is not defence counsel. He is not required to call the accused person into his chambers and take instructions nor to interview witnesses. The best person to know who can be of assistance to him, is the accused himself. A judge would be very loath to call some stranger to give evidence on behalf of an accused, in the belief that, because the Crown did not wish to call him, he is ipso facto, a good witness for the defence. Our experience has not demonstrated the inexorable efficacy of that course. In R. v. Weir (unreported) S.C.C.A. 47/89 dated 24th September, 1990, we suggested areas in which a trial judge could justifiably render assistance. This specific complaint we consider, unjustified.

With respect to the Mandeville Police Station diary, the trial judge gave instructions for the diary to be produced. The diary requested was produced and shown to the appellant. He then said he had made an error in indicating which diary was required. The appellant then stated that he wished the diary which followed immediately upon the diary in court. The judge gave the necessary instructions at p. 343. He said this -

> "HIS LORDSHIP: All right. I am going to -- Mr. Gause and Superintendent, see if you can phone to Mandeville now and ask them to find the diary up to the end of December, 1986. Bring all of them come.....put them in a truck and bring them."

On the next day the trial judge was told that the diaries could not be located and he so advised the appellant. Mr. Thompson, counsel then appearing for another co-accused, asked if he could be allowed to tender advice to the appellant, and did so. In the event, the appellant, after he was asked what he wished done at that stage said that he was prepared

to close his case. In order to make it clear beyond all doubt that the appellant was free to make another attempt to get the diaries, the judge expressed himself in these terms at p. 353 -

> "HIS LORDSHIP: So what is your position now? I want you to understand you know, that the court is not hurrying you to do anything that you do not wish to do. Very well?"

and the appellant responded -

> "ACCUSED DUNKLEY: Yes, sir. But if them say them cannot find the diary then it is not going to be here, so I am prepared to close my defence."

The learned judge took as much pains with a witness whom the appellant intimated he wished to call, viz -

> "a guy down by G.P. who went on the parade." (p. 340)

Shortly after this, the judge again asked the appellant to provide the name of every witness. (p. 342). The appellant confessed that "he did not know his name nor did he remember his name." At this point Mr. Morris intervened, and requested and obtained permission to speak with the appellant. Then the appellant stated that he no longer wish the witness' presence. But the learned trial judge was not content with that response and addressed the appellant thus at p. 342 -

> "HIS LORDSHIP: No, be careful now, you know. I am willing to give you every opportunity to bring the witness. I don't want you to feel that the Judge don't want to bring your witness. So, please do not think that because of what I have said about that you don't want to call the witness. You think about it carefully. You want to call the witness?
>
> ACCD. DUNKLEY: No, sir, I don't want the witness again."

Then Mr. Morris as amicus curiae spoke up again -

> "MR. MORRIS: For the record, My Lord, let me say it is not because of anything Your Lordship said that he does not want the witness. We discussed certain situation and he understands. And in fact I take it on my advice, what he tells me, why he doesn't want the witness. I advised him."

It did not end on that note, the learned trial judge consistent with his promise of assistance, continued -

> "HIS LORDSHIP: All right, apart from that witness now, you have any other witness that you want to call?
>
> ACCD. DUNKLEY: No, My Lord."

We would point out that after Mr. Frater deserted the appellant, the trial judge ensured that he gave the appellant a precis of any evidence adverse to him by the remaining witnesses and asked him if he wished to cross-examine the witness. The cross-examination of Inspector Henry was, we think quite professional. In his summing-up, the jury were told to ignore the evidence of identification given by the witness Shenriffe Smith. The result of that was that the officer's evidence of the parade was directed to be treated as of no worth.

The interests of this appellant were in our judgment, very well protected by the assistance of the trial judge.

However, we are constrained to record our perturbation at the treatment of counsel by the judge. We have already stated what we thought was the proper course for Mr. Frater to have adopted. We must say something with regard to the appropriate conduct of a trial judge faced with what he may consider misguided conduct on the part of counsel. In the interests of justice, it is preferable for an accused person to be represented by counsel than to be unrepresented and to rely for

assistance, however fair, on the judge. The judge should do everything reasonably possible to maintain a calm and dispassionate attitude, keeping himself above the dust in the arena so that his rulings will be acceptable and thus conduce to, at least the appearance of a fair trial. Doubtless the judge may wish to get on with a trial expeditiously but it is better to conduct a fair trial. Counsel in his zeal to protect his client or through inexperience, may act intemperately. We take the view that it is no part of the judicial function to imitate counsel. We think to tell counsel that "he may do as he pleases" when he asks leave to withdraw, can properly be so categorized. We regret very much the need for these comments but we would not wish it to be thought that we approve or countenance such un-judicial conduct.

We have reviewed the evidence in its entirety and are firm in our conclusion that there was a strong case against both appellants. There was circumstancial evidence against the appellant Robinson and the cautioned statement which spoke for itself. The identification of Dunkley in the swamp took place in daylight hours at a distance of half chain which rendered observation and recognition possible. Although the time was not prolonged, the opportunity was adequate: it was not a fleeting glance case. Both Dunkley and Robinson were identified as two of the raiders at Miss Rose's establishment. Robinson was also found in possession of recently stolen property. Because we are conscious of the possibility of a miscarriage where convictions depend on visual identification, we have taken the opportunity to examine the evidence adduced in the case. We have done so despite the absence of any ground challenging this aspect of the case. We see no reason therefore to interfere.

The appeals are accordingly dismissed, the convictions affirmed.