JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 117 & 118/93

BEFORE: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE WOLFE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

REGINA

VS.

HORRIS HYLTON

AND

BILLY VERNON

Lord Gifford, Q.C. for Hylton

Sylvester Morris for Vernon

Miss Kathy Ann Pyke for Crown

April 24 - 27; and July 5, 1995

RATTRAY P.:

On the 27th of April 1995 at the conclusion of the submissions in respect of the applications for leave to appeal we treated the applications as the appeal and in respect of Billy Vernon we allowed the appeal, quashed the

conviction, set aside the sentence and entered a verdict of acquittal.

In respect to Horris Hylton we reserved our decision.

Before embarking upon the facts there are two grounds of appeal which may conveniently be dealt with at this stage.

In the course of the trial a report was made to the judge in the absence of the jury that a person, subsequently called as a witness for the appellant Hylton, had witnessed words passing between a female juror and a male prosecution witness. The trial judge in the absence of the jury embarked upon an enquiry in which the defence witness, Joan Vernon, gave sworn evidence of seeing a male witness speak to a female juror. The witness said something and the juror responded. She did not hear what was said. The encounter was very brief. The female juror was identified as the Foreman of the jury and the witness as Horace Shields. The Foreman after being sworn stated that a gentleman had asked another juror, Mr. Lodge, whether court was in session and that the juror said, yes it is going on. The Foreman having heard this turned and said to the witness: "We cannot speak to you, we are not allowed." It had also been said by Miss Vernon that a male juror had spoken briefly to the arresting Constable. The juror on oath admitted saying hello to the Constable and passed: "I did not have no argument with him or anything." He did say to a gentleman who asked if court was still going on, that he should direct his question to

the Clerk of Courts. The trial judge found the exchanges to be innocent and the jury were recalled to continue their duties.

Lord Gifford, Q.C. submitted to the trial judge that he should discharge the jury in the interest of obtaining a fair trial. The information concerning the exchange between juror and witness was given by a person who was later to be a witness for the appellant Hylton in support of his alibi and the jurors were aware that she was the informant, and were therefore likely to be resentful of her for having given the information.

When the jury returned after the trial judge had completed his enquiry the judge determined that the trial should proceed. He instructed the jury in relation to the prospective witness thus:

> "Now this young lady came and said she saw and she described two of you who had this conversation but I am satisfied that Mr. Lodge was not doing anything wrong. It was as I have said, don't even talk to anybody. I am satisfied that he was not doing anything and I am also satisfied that Madam Foreman not only was not doing anything improper but was doing exactly what I told her to do. That is, when anybody approaches you give them not even the time of day and that she is to be commended for telling the other juror and Mr. Shields, look don't talk to us, talk to the Clerk of the Courts.
>
> ...

> "You saw a lady in the witness box when you came in and sat there. Now she was the person who you might realise said she saw what she saw. Anybody who sees a juror talking however brief to somebody who is on the case has a duty to report it so I am asking you not to hold anything against this lady. She never said she heard anything, she was quite honest, she just said that she saw Mr. Lodge talking to the policeman and said she saw somebody taking to the foreman. I asked her and she said one sentence. She did not hear exactly what was said so please if she comes to give evidence later on do not hold it against her because she had not done anything dishonest. If she had been dishonest, if she wanted to be spiteful and upset the case she could have said, I heard one of them said, give him a chance or something like that."

The jury therefore were specifically warned against coming to an adverse conclusion in relation to the evidence to be given by Joan Vernon on the basis that she had carried out her duty to report that which was in fact that she witnessed a passage of words between juror and witness. In the circumstances in my view the trial judge's failure to discharge the jury and thus leaving the verdict for their determination could not create a danger of prejudice to the defendant's right to receive a fair

trial as Lord Gifford Q.C. has submitted before us. This ground of appeal therefore fails.

The other ground of appeal relates to a no-case submission.

At the end of the crown's case Lord Gifford, Q.C. made a submission in the presence of the jury that there was no evidence to support the charge of Capital Murder against the appellant Hylton and therefore there was no case for him to answer on this charge. His submission was rejected. Before us he submitted that the appellant was prejudiced by the presence of the jury during this submission "since inevitably they involved arguments being directed upon the assumption that the prosecution evidence was to be believed." He relied upon the recent judgments of the Board in **Nigel Neil v. R.**(Privy Council Appeal No. 22/94) and **Rupert Crosdale v. R.** (Privy Council Appeal No. 13/94) (unreported) delivered 6th April, 1995.

In **Rupert Crosdale** the judgment of the Board delivered by Lord Steyn with respect to a question posed by this court - "Whether there are any circumstances in which a no-case submission should be made in the presence of the jury" - elicited the following response:

> "For these reasons their Lordships' response is that irrespective of whether the defence ask for the jury to withdraw or not the judge should invite the jury to withdraw during submissions that a defendant does not have

> "a case to answer. All the jury need to be told is that a legal matter has arisen on which the ruling of the judge is sought. Any contrary practice in Jamaica ought to be discontinued. And their Lordships' ruling applies equally to the trial of a single defendant and joint trial."

However the judgment further reads:

> "In failing in the present case to ask the jury to withdraw the judge committed an irregularity albeit that in the light of prevailing practice in Jamaica the judge's ruling was an understandable one. Given the fact of an irregularity, the question arises whether there was any significant risk of prejudice resulting from the irregularity in the circumstances of this case. This is the question to which the fourth point certified by the Court of Appeal is directed."

This is the question which we must determine in respect to this ground of appeal.

The no-case submission related to the question of whether or not the crown's case, if accepted, on the facts placed the murder in a category as set out in the Offences against the Person (Amendment) Act 1992 which would classify it as Capital Murder. This did not entail any submission before the jury as to the sufficiency of

evidence against Hylton to hold that a prima facie case of murder had been made out against him. The question being canvassed was as to whether on the facts given in evidence a jury could possibly find that the case fell within one of the categories legislated as Capital Murder in the statute. The risk therefore that a jury may conclude that the judge's ruling of a case to answer on Capital Murder as against Non-Capital Murder could be interpreted to mean that the judge was satisfied of the guilt of the appellant would not in my view arise.

As Lord Mustill in the judgment of the Board in **Nigel Neil v. R.** (supra) stated:

> "This is not to say that in every instance where the jury has remained in court, whilst a submission of this kind has been made and rejected, an appeal on this ground will be allowed. Far from it. The appellate court may well conclude, after examining a transcript of what passed between the judge and counsel, that there was no harm serious enough to imperil the fairness of the verdict."

In my view the making of the no-case submission in respect of Capital Murder in the presence of the jury in this particular case could not be said to have caused any harm serious enough to imperil the fairness of the

verdict. Consequently this ground of appeal must also fail.

We now proceed to the facts of the case. On the 24th July 1991 at about 9:30 p.m. Everette Robinson, the deceased, Horace Shields, Christopher Meikle and two other male friends were in a bar at Greenvale Road, Kingsland, in Manchester conversing and having drinks. A man walked into the bar, went up to the counter and ordered three cold beers. From here on the story varies according to the witnesses.

Horace Shields gave evidence that two other men came in after and the man who had ordered the beers spun around and said: "This is a hold up, nobody move!" The appellant Hylton was the man who had first entered the bar. At this stage Mr. Shields noticed that he had a gun in his hand as also the other two men who came in afterwards. Everette Robinson, the deceased, jumped off the bar stool on which he was sitting and ran towards the entrance of the bar. In his rush he hit down Mr. Shields who fell on his back and heard guns being fired. The men asked Mr. Shields for his car keys, but he said he had none. They took off his bracelet, and he handed them his ring. Everybody was pleading: "Don't shoot! don't shoot." He could not say who took the bracelet or the ring. The deceased Robinson was lying at the entrance to the bar obviously injured but still breathing. Mr. Shields who had been injured in the rush out of the bar by Robinson took Robinson to the Hargreaves Memorial

Hospital where he later died. Shields was treated as well at the hospital and admitted.

On the night of the 9th of August Mr. Shields attended an Identification Parade at the Negril Police Station and pointed out Hylton as one of the men in the hold-up, in fact the man who had ordered the beers. He was able to recognise him because when Hylton entered the bar the place was well lit by fluorescent lights. He had noticed him for about three minutes while he was awaiting the beers. Asked whether he was able to see his face again before he left, his answer was:

> "I could but while I was on my back I wasn't looking at him very much. In other words, I had held up my head while he was pulling off my chaperitta. I did not want to look at him. I looked away."

He identified his ring at the Montego Bay Police Station. There was no evidence as to how the ring came to be at Montego Bay Police Station or from whose possession it came or by whom it was retrieved.

In his statement to the police Mr. Shields gave no description of any of the men who came into the bar on that fateful night. He had however, given to the police a description when he was in the hospital room but could not say whether it was taken down in writing. The witness gave no evidence involving the appellant Billy Vernon.

Christopher Meikle was one of the men in the bar in Kingsland, Manchester, at the time of the incident. He related the entry of the man who ordered three cold beers. "After that another man came in and he fired a shot and I heard somebody say `this is hold-up'." The man who ordered the beers "popped off" his chain and the man with the gun came in and took his bracelet and his ring. He, Mr. Meikle, took out his wallet and gave to that man. He stooped down and while doing so he heard three explosions like gunshots. He identified the man who came into the bar and ordered the beers, as well as popping off his chain as the appellant Hylton. His observation of this man lasted about ten seconds, when he came into the bar and about one minute when he was popping off the chain. He pointed out the appellant Hylton at an Identification Parade at Negril Police Station. He had never seen any of these two men before. He had described the man who first came into the bar as having low cut hair, black complexion, slim built, about 5 feet 8 inches tall. He Mr. Meikle is 6 ft. tall. Looking at the appearance in the dock he would not describe Hylton as a slim built man. The man was not the same build on the Identification Parade as he was now. The Identification Parade was a little over two years before the trial.

A demonstration appears to have shown the appellant to be about 1 1/2 to 2 inches shorter than the witness. He was asked as follows:

"Q: Now, thinking about it and looking at it and bearing in mind that you described a five foot eight inches man, now you see this man standing beside you, I suggest that you are mistaken in saying that that man came into that bar?

A: At the height I estimate.

Q: Now, looking at it now two year later, you now say you are mistaken?

A: I am not mistaken, sir.

Q: You say you are mistaken about the height but you are right about the face, aren't you?

A: I am right about the face.

Q: If you are right about the face you are wrong about the height?

A: That night."

Mr. Meikle never saw the appellant Hylton with a gun.

Constable Owen Santo gave evidence of his having gone to the scene of the murder at about 9:20 p.m. that night and speaking to the owner of the bar, one Sylvia Daley. He found two spent .38 bullets on the floor of the bar. He interviewed Mr. Shields at the Hargreaves Memorial Hospital in Mandeville. Mr. Shields gave him a description which he took down, prepared a radio message and circulated it island wide. He returned to the police station and handed to Det. Sgt. Walker the two spent shells along with a

sheet of foolscap paper on which he had written the description of the men he had been given and also the facts of the report he had received. The foolscap paper which was given to Det. Sgt. Walker, the piece of paper on which he noted the particulars for the purpose of the radio report and the radio operations book in which radio messages are noted could not be found.

Sgt. Wayne Bowen at the relevant time attached to the Negril Police Station conducted there an Identification Parade on the 9th of August 1991 in respect of three suspects, the two appellants and one Dorian Hinds. On the Parade the appellant Hylton was identified by the witnesses Mr. Shields and Mr. Meikle. The appellant Vernon was not identified by anyone on the Parade. The height of Hylton was placed on the two identification forms as 5 ft. 8 inches. The practice as given in evidence was that the subjects are measured before the Parade and that was done in the instant case by Sgt. Bowen and Det. Sgt. Clarke. Cross-examination of Sgt. Bowen on this aspect ran as follows:

"Q: He is a grown, big man. He hasn't lost height? He hasn't gained any height since then?

A: I don't know.

Q: It is the same height now as he was then?

A: I wouldn't know.

"Q: You don't see any difference from what you recall two years ago?"

After an intervention by crown counsel the answser was:

"A: You were asking me if he has gained any height.

Q: Yes, that is what I am asking.

A: It does not appear so.

Q: You put his built(sic) dowm as medium?

A: Yes.

Q: Again, I suggest his built(sic) has not changed.

A: He was not that stout.

Q: I suggest he was more stocky.

A: No.

Q: You don't remember that?

A: I can remember that.

Q: I suggest this measuring exercise wasn't serious at all. That you put down a man who, if you measured him, was five feet eleven as five feet eight.

A: The measuring was done correctly and all the members were of similar height to that of the suspect.

HIS LORDSHIP: Do you have the measuring rod here, Sergeant with you?

WITNESS : No, M'Lord."

Det. Sgt. Alson Walker was at the relevant time attached to the Mandeville Police Station as the officer in charge of the investigation. He gave evidence of receiving the report from Constable Santo and having gone to Miss Daley's bar at Kingsland and spoken to her. After his investigation he arrested the appellant Hylton and charged him with the murder of Everette Robinson. On cautioning him the appellant said:

> "A Billy dem go inna di shop
> a nuh me. A him shoot man!"

He was again cautioned and asked whom he called Billy. His reply was:

> "A Billy Vernon in a cell
> ya wid mi."

On the 29th August 1991 Det. Sgt. Walker escorted Billy Vernon from Negril to Mandeville Police Station. He told Vernon "that Hylton told me it was he who went into the shop and shot the deceased." Vernon's response was: "Mi never have no gun. A Zarro them do it." The name Zarro referred to the appellant Hylton. He then arrested and charged Vernon with murder, and for the first time cautioned him.

Vernon had been placed on two Identification Parades and was not identified by anyone. It was clear that he was in custody because he was a suspect. Counsel for Vernon at the trial objected strenuously to the evidence being given

of what Vernon said without any caution being administered to him. He relied on the Judge's Rules which inter alia state:

> "As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions relating to that offence."

The trial judge ruled that what the Sergeant did was not to ask the accused any question "he merely made a statement, obviously to elicit a response and he got a response."

In our view whether a direct question is asked or a statement is made with the purpose of eliciting a response those situations create the same mischief which the Judge's Rules are designed to prevent. Mr. Vernon's response was not spontaneous. The trial judge therefore was in error in allowing in as evidence against Vernon a statement which clearly should not have been admitted.

In his direction to the jury the trial judge said:

> "... and then he said, `me never have no gun.' Now what does that mean? The context is, that you were in the shop, you shot the man, and the response is, `I had no gun. Somebody else did it.' Is he admitting that he was there? But at the same time excusing himself from being involved in

> "the shooting? If that is so, members of the jury, if he is admitting that he was there, then you can act upon this statement and you can find that he was not only there, but that the prosecution witnesses say he had a gun."

The no-case submission in respect of Vernon should have succeeded because the statement relied upon as the only evidence against him should not have been admitted in evidence. In any event an alternative explanation which was never put to the jury by the trial judge was that Vernon could have obtained information contained in his statement not necessarily by being present but by what he was told by someone else.

In the circumstances we allowed the appeal in respect of Vernon.

With respect to Hylton Sgt. Walker gave evidence that he received a description of the man who first entered the bar (allegedly Hylton) from Sylvia Daley, the bar owner, when he went to see her the day after the murder. She also gave him a signed statement. The description by Sylvia Daley given to him was taken down by him in his note-book, but alas as occurred in this case with too regular a frequency the note-book was lost and could not be produced. Although Horace Shields had given him a description of one or more of the attackers, he discovered sometime after that he had not put it in the statement which he had taken from Shields.

Cpl. Al Daley who took a statement from the bar owner Sylvia Daley gave evidence that she gave him a description of the man who came into the bar and ordered beer. The description given was of a man in his upper twenties about 140 lbs. dark complexion, short hair cut and about 5 ft. 7 inches tall.

The prosecution did not call Sylvia Daley to give evidence at the trial. However in the proper performance of the prosecutory role and the requirement of fairness as established by the authorities counsel for the crown provided a copy of the statement taken by Corporal Daley from the bar owner which contains the description given by her of the man who had entered the bar and ordered the beers. The crown also called and put up the police officer as a witness for the crown so that he could be cross-examined by the defence. The description given was admitted into evidence and in my view properly so. In admitting the evidence the trial judge stated:

> "You can ask the policeman what description he got from the witness. If it is one feature of identification that the judge must draw to the attention of the jury any description given to the police and what is given in court."

Evidence of a statement is not excluded as hearsay if it is tendered for a purpose other than to show the truth of the statement. [**Subramaniam v. Public Prosecutor** (1956) 1 W.L.R. 965 at p. 970]. What this statement showed was

that someone who was present at the scene of the murder had given to the police investigating the murder a description which the defence was saying did not match the appearance of the accused person and also supported the description given by a witness who gave evidence on oath at the trial. It was relevant evidence.

The United States Federal Rules of Evidence, Rule 401 defines "relevant evidence" as being "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." With this definition I would agree.

Essentially the rule against the admissibility of hearsay evidence rests upon the basis that it is being tendered for the purpose of exculpating the accused by someone who cannot be cross-examined as to the truth of the content of the statement but only as to the fact that it was made. The court then will naturally be concerned in relation to the credibility of the witness giving evidence that the statement was in fact made. If the witness has an interest in misrepresenting the fact that the statement is made it is unlikely that the court will admit the statement. The credibility of the investigating police officer in relating the statement given to him by the bar owner at the scene does not come under any challenge. It is only in comparatively recent times from **Turnbull** (1976) 3 W.L.R. 445, onwards that identification evidence has

emerged as a class of its own and we cannot say that all the safeguards for fairness and a cautious approach that may arise on the facts of a particular case have yet been identified and exhausted.

In my view in a case in which the crucial issue is one of identification the fact that a person not called to give evidence admittedly present at the scene and witnessing the murder gave to an investigating police officer shortly after the murder was committed a statement in writing, describing the person who committed the murder is relevant and the trial judge properly admitted the statement.

The defence of Mr. Hylton was an alibi. On the night of the 24th of July, 1991, which was the date on which Mr. Nelson Mandela visited Jamaica he was at Rosemount in St. James, at his girlfriend's home watching the televised show at the National Stadium put on for Mr. Mandela. He called his girlfriend Joan Vernon, the sister of Billy Vernon, to support his alibi. He denied being in Kingsland at all. He also called as a witness one Raymond Barclay, a Correctional Officer at the St. Catherine Correctional Centre whose job it was to document the admission and discharge of inmates. Mr. Barclay gave evidence that the appellant Hylton was admitted to the institution on the 3rd of November 1991, and that he weighed as recorded by him at the time 205 lbs. The weighing was done on a bathroom scale kept in the institution for that purpose. His

height was not taken. He had among other things noted a scar on his cheek.

It was necessary for the trial judge to give a very careful direction to the jury in his summing-up, particularly with regard to the question of identification. Such a direction must analyse carefully the identification evidence against each accused person. The trial judge gave the required caution in respect of identification evidence and with regard to description he said:

> "You have to look at the description given by the witness to see how it tallies with the person who is charged. So, that evidence must be looked at with great caution, says the law."

He pointed out the conditions evidenced by the two eye-witnesses which should have favoured a proper identification and as one of the weak points reminded them that this was the first time that these witnesses were seeing the men. He referred to the height differential between that measured by the police 5 ft. 8 inches and estimated by the witnesses, and the appearance of Mr. Hylton before the court. He referred to the description by the witnesses of the appellant Hylton as a slim man and asked them to ask themselves whether the description fitted the man before the court. He referred to the description given by the bar owner, Sylvia Daley, the man 5 ft. 7 inches tall, 140 lbs.

He referred to the scar which was not mentioned by any of the witnesses. He further directed:

> "So then, you should look particularly at the facts as regards that. The accused man was not known to them, secondly the question of the height, the question of the built(sic), and fourthly the question of time. Those are areas where the evidence of the prosecution is not strong. You decide, as regards the other factors what you make of it."

He should have added to this the fact that the record of the Correctional Centre showed the appellant to be a man of 205 lbs. which would not fit the description of a slim man.

There is a presumption that official records are correct unless shown to be otherwise. Furthermore the evidence was given by the very Officer who took the appellant's weight on admission. A careful direction to the jury in respect of this would have assisted the jury in relation to the reliability of the identification evidence of Mr. Shields in respect of whose evidence the trial judge said:

> "He said he wouldn't describe the accused as a man of slim built(sic) but he says at that time, two years ago, he was. That is what he said and he further said he was not the

> "same built(sic) on the identification parade as he is now."

The inability of the crown to produce the description given by Mr. Shields to Det. Constable Owen Santo written down by him on a piece of paper given to Det. Sgt. Walker and the recorded message with these particulars to be circulated and the book in which the particulars were written and the paper with particulars given to Det. Sgt. Walker deprived the jury of assistance which might have been determinant of the identification of the persons committing the crime. Sylvia Daley also gave a description to Det. Sgt. Walker which was written in a note-book and which having been transferred from Mandeville he could not find. Fortunately however her description was recorded in a statement taken from her by Cpl. Al Daley to which reference has already been made. Mr. Shields gave a description to Det. Sgt. Walker which he thought he had put in the statement taken by him, but realised that he had inadvertently left it out of the statement.

The trial judge gave the jury no direction as to how to deal with the evidence of the Correctional Officer, Mr. Barclay. Indeed he erroneously told the jury that the Correctional Officer "had told Hylton to read the scale and it said 205 lbs." The evidence is that the Correctional Officer read the scale himself and it showed 205 lbs.

The identification of the appellant rested solely upon the pointing out of him at the Identification Parade by the two witnesses, as the man who entered the bar and ordered the beers and was involved in the murder of Mr. Robinson. There were material discrepancies between the description of the appellant given by the witness, as well as, in the statement of Sylvia Daley not called as a witness and the actual appearance at the trial and indeed shortly after the event when he was on remand at the St. Catherine District Prison.

Although it cannot be said that the witnesses had only a fleeting glance the quality of the identification evidence must fall under the category of being poor when the description given so conflicts with actual appearance. There was no supporting evidence to strengthen the actual identification. The circumstances very much fall within the category of cases exampled by **Regina v. Roberts** considered in the judgment of the court given by Lord Widgery **in R. v. Turnbull, R. v. Whitby, R. v. Roberts** [1976] 3 W.L.R. 445 at p. 454:

> "No suggestion was made that the identifying witnesses were dishonest. It is conceded that Miss Kennedy in particular was an impressive witness. But the quality of the Identification was not good, indeed there were notable weaknesses in it and there was no evidence capable of supporting the identifications made.

> "We think it would have been wiser for the trial judge to have withdrawn the case from the jury."

The determination of this application would have been made much easier had we in Jamaica legislated the provisions of Section 2 of the Criminal Appeal Act 1968 (U.K.) which charges the Appellate Court to allow an appeal against conviction and set aside the verdict of the jury if the Appellate Court feels that under all the circumstances of the case the verdict is unsafe and unsatisfactory. The interests of justice require that such a provision be legislated in Jamaica.

Section 14 of the Judicature (Appellate Jurisdiction) Act sets out as one of the grounds on which this court can set aside the verdict of the jury is that such a verdict is unreasonable and cannot be supported having regard to the evidence.

On the evidence in this case the finding of the jury that it was left in no reasonable doubt that the appellant Hylton was guilty of the offence flies in the face of the fragility of the identification evidence, particularly the conflict between the description given by the witnesses and the actual appearance of the appellant. The failure of the trial judge in his summing-up to give a direction as to the effect of the evidence of the Correctional Officer left the jury in an important aspect of the identification evidence

without judicial guidance. His error in telling the jury that the appellant read the scale and announced 205 lbs. when the evidence in fact was that both Correctional Officer and appellant read the scale, was exacerbated by a further error on his part when he told the jury:

> "Now, the prosecution is also saying that on the basis that all were armed on the evidence of both eye-witnesses, and that a shot was fired, first of all, announcing the hold-up, as it were, that it was a concerted attack on the persons by all the accused there."
>
> [Emphasis supplied]

In fact Mr. Shields gave evidence of all three men who entered the bar being armed but the evidence of Mr. Meikle was that he only saw two men come into the bar and that it was the other man who came in after the man whom he identified as the appellant who had ordered the beers, who had a gun. He gave no evidence of the appellant having a gun at all.

If a trial judge in his summing-up erroneously misstates the evidence on material matters and in addition fails to offer any guidance to a jury as to how to assess the evidence of a witness who gives material evidence of a record made by him in his official capacity of matters relevant to the issue of identification the combination of

these factors exposes the foundation upon which the jury would have arrived at an unreasonable verdict.

In **R. v. Whylie** [1978] 25 W.I.R. 430, Rowe J.A. (Ag.) delivering the judgment of this court extracted at p. 433 a principle from the cases that:

> "... a summing-up which does not deal specifically, having regard to the facts of the particular case, with all matters relating to the strength and the weaknesses of the identification evidence is unlikely to be fair and adequate."

The summing-up in this case suffered from this deficiency.

This leads me to the final consideration. Following an observation from the Bench Lord Gifford Q.C. has submitted that the wrongful admission by the trial judge of the evidence of Det. Sgt. Walker that he said to Vernon:

> "Horace Hylton say it was you who enter the shop and shot the deceased,"

and which elicited the response from Vernon:

> "Me never have no gun. A Zarro (meaning Hylton) them do it,"

created a real prejudice to the appellant Hylton even though the trial judge gave the appropriate direction that the evidence of one co-accused could not implicate the other co-accused.

In **Dennis Lobban v. The Queen,** Privy Council Appeal 23 of 1993,(unreported) their Lordships of the Privy Council in a judgment delivered by Lord Steyn examined carefully the situation arising when one co-defendant in a joint trial implicates the other co-defendant. And the judgment reads:

> "Inevitably, the legal principles as their Lordships have stated them result in a real risk of prejudice to co-defendants in joint trials where evidence is admitted which is admissible against one defendant but not against the other defendants. One remedy is for a co-accused to apply for a separate trial. The judge has a discretion to order a separate trial. The practice is generally to order joint trials. But their Lordships observe that ultimately the governing test is always the interests of justice in the particular circumstances of each case. If a separate trial is not ordered, the interests of the implicated co-defendant must be protected by the most explicit directions by the trial judge to the effect that the statement of one co-defendant is not evidence against the other."

The discussions in cases like **Dennis Lobban v. The Queen** (supra), delivered by the Board on 6th April 1995, in which counsel for the appellant was maintaining that the trial judge should have edited the statement given by the co-accused by deleting the section of the statement

which referred to the appellant and indeed was not evidence against him revolve around the discretionary power of a trial judge to exclude relevant evidence on which the prosecution intends to rely "where prejudice outweighs relevance." "It exists" said Lord Steyn:

> "To ensure a fair trial to the defendant without seeking to differentiate between the quality of justice afforded to each defendant."

All this is said within the context of a statement which is admissible and the possible effect of an implicatory part of that statement and its possible prejudice (because the jury has heard it) to a co-accused against whom it is not evidence. The situation clearly must be different in a case where the jury should never have heard the statement at all because it was inadmissible and was in evidence only as a result of an erroneous ruling of the trial judge.

Whilst the duty of giving explicit directions as to the status of Vernon's statement in relation to Hylton was fulfilled by the trial judge in the instant case it was done with respect to statements which should never have been before the jury at all because they were inadmissible. However explicit in this regard may have been the directions given by the trial judge they do not in my view erase the mischief created by the fact of the inadmissibility of the statement. If the statement is admissible an explicit direction that it is not evidence against the co-defendant

who did not make it may indeed suffice. When the statement is inadmissible the mischief and likely prejudice arises from the erroneous ruling of the judge in admitting the statement. In this event applying the "governing test", the interest of justice in the particular circumstances of this case, the prejudicial effect of the statement wrongly admitted could have contributed to the verdict of the jury adverse to the appellant.

Looking therefore at "matters in the round" the approach advised by Lord Steyn in **Dennis Lobban v. The Queen** (supra) the totality of deficiencies already adumbrated compel us to the view that the inadmissible statement of Vernon, the co-accused, wrongly admitted created a prejudice against the appellant Hylton, not ameliorated or curable by any judicial warning, and resulted in a substantial miscarriage of justice.

For these reasons I would allow the appeal, set aside the conviction and enter a verdict of acquittal in respect of the appellant Hylton.