JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 116/00

BEFORE: THE HON. MR. JUSTICE HARRISON, P. (Ag.)
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

R. v JEFFREY SUTHERLAND

Earl Witter for the Applicant
Paula Llewellyn, Senior Deputy Director Public Prosecutions and
Diahann Gordon-Harrison for the Crown.

July 14,15,16,17,18, September 22,23,24,25, 2003
and October 28, 2004

SMITH, J.A.:

The applicant, Jeffrey Sutherland, was charged on an indictment for the murder of Karlene Adams in the parish of St. Andrew on the 20th April, 1998. His trial commenced on May 24, 2000 before Theobalds, J and a jury.

On June 9, 2000 he was convicted of the offence charged and sentenced to life imprisonment. The learned trial judge specified that he should serve a period of twenty-five (25) years before becoming eligible for parole.

On October 31, 2001 his application for leave to appeal was refused by a single judge. He has now renewed his application for leave to appeal before this Court.

The prosecution's case, in a nutshell, is that the deceased Karlene Adams was the mother of the applicant's five year-old son. On the 20th of April, 1998 the deceased was out with another man when she was accosted by the applicant and fatally shot. In support of its case the prosecution called some ten (10) witnesses and had the statement of one Chesley Williams read into evidence.

The defence is a complete denial of any involvement in the death of the deceased. The applicant gave an unsworn statement and called one witness in support of his defence.

The Crown's Case

The first witness called by the prosecution was Mr. Warren Tullonge, an insurance clerk, who at the time of the murder was residing in the United States of America. He had known the deceased for over 15 years. During the last three years they had become intimate friends. On the 20th April, 1998 at about 4:30 p.m. he drove to the parking lot of Life of Jamaica in New Kingston. There he picked up the deceased who worked with Life of Jamaica. From there they drove to the Clock Tower Plaza where the deceased purchased a few items. Thereafter, they drove to a meat shop on Red Hills Road. The witness parked the car in

front of the meat shop. He and the deceased went inside. Mr. Tullonge testified that whilst they were in the shop, the applicant entered and approached the deceased. The applicant touched her and said that he wanted to speak to her outside. The deceased told the witness she would soon be back and went outside of the shop. A short while after the deceased had gone outside a young lady entered the shop and spoke to the witness. The witness hastened outside where he saw the applicant holding the deceased by the scruff of the neck. Her blouse was pulled out of her skirt. The witness went up close to them and asked " What kind of embarrassment that you keeping up on the daughter? Why are you exposing her stomach?". The applicant did not answer. The deceased said, "I don't know why he doesn't leave me alone. I don't know why he is following me up and down. I don't know why him don't leave me alone because I tell him, that me and him not into anything". The applicant turned towards the witness, pointed a gun at him and told him to, "back off". The witness started to move backwards. As he did so, he heard the deceased say "Don't leave me!" The applicant, he said, still had the deceased "by the throat." The witness heard two explosions and saw the deceased fall to the ground. The applicant, with the gun in hand, then moved towards the witness who ran to his car and drove off. He drove around the block, parked his car and walked back to the scene. A crowd had gathered. Karlene was on the ground, dead. There were two

bullet holes in her chest and blood was oozing from the head. The witness went to the Police Station and gave a statement. He had seen the applicant on two occasions before the fateful day. He had not spoken to him before. He had seen photographs of him and Karlene together.

Mr. Chesley B. Williams, now deceased, gave a written statement to the police. This statement was tendered in evidence by the prosecution by virtue of section 31D of the Evidence Act. In the statement Mr. Williams, who was a 49 year old shoemaker, said:

> "About 5:30 p.m., Monday the 20th April, 1998, I was riding my bicycle on Red Hills Road coming from Donmair Close when on reaching the section of Red Hills Road, about five chains from Donmair close intersection, as he (sic) saw a big, thick bloke man about six feet tall about 200 pounds, dressed in a white and black T shirt with a black coloured pants held (sic) on to a woman dressed in a dark blue pants and white shirt.
>
> Based on her dressing she looked like she worked in a business place like a bank or so on.
>
> This big thick man held the woman with his left hand into her shirt front in a choking manner. He had a shine gun in his right hand pointing at her chest area. I then heard three explosions and the woman fell backwards out of the man's hand to the ground. The man who fired the shots then stepped off towards another who was standing close by.
>
> He then turned back towards the woman who was lying on the ground and went over her and held onto her blouse front; lifted her up a couple times; put her back on the ground and put the gun down beside her and walked away.

> I was about two chains from the place where the incident took place. The area is bright and I could see clearly what happened. I rode off back to Donmair to tell my friend whom I had seen. I then went back to the scene. I saw the said man whom I saw shooting the woman going into the Kentucky Fried Chicken place. I turned back immediately and told some police who was on the scene where the man was. I ride in front of the police and pointed out the man whom I saw shooting the woman to them. The police then went into the Kentucky Fried Chicken place and held on to him. I can recall that while the man was shooting the woman she was defenceless and had nothing in her hand..."

Unfortunately, this witness never lived to give **viva voce** evidence at the trial. His written statement was recorded by Constable David Long. His brother, Mr. Vincent Williams, testified as to his death.

Mr. Chester Simms an ex-police officer and a taxi operator also gave evidence for the prosecution. His evidence was to the following effect: On the 20th April, 1998 at about 5:30 p.m. he was driving his taxi along the Red Hills Road. On reaching the Red Hills Road Plaza where there are many business places including a meat shop and Miss Norma's Flower Shop, he saw a group of people gazing at something in the plaza. He stopped his vehicle, got out and walked towards Miss Norma's business place. He saw a man with a gun in hand pointing at a lady who was lying on the ground. He went up to them. He saw 'scratches' on the man's face and neck. The lady was bleeding from a wound to the side. He said to the man "Blood, you all right?" The man replied "Di

bloodclawt woman tek me twenty thousand dollars an' spen' it out pon her man." The man then placed the gun on a wall nearby and before leaving asked the witness to hand it to the police when they arrive.

The crowd was getting large. The witness took up the gun which he later handed to a female police officer who had arrived in a radio car. The witness said he was about 3-5 feet from the man when they spoke. He did not know him and had not seen him before. They faced each other and he saw the man's face for about five minutes. From the time he first spoke to the man to the time when the man left was about ten minutes, he said. The next time he saw the man was on the 23rd July, 1998, when he attended court to give evidence at a preliminary enquiry. He again identified the applicant at the trial as the man whom he saw with the gun pointing at the lady on the ground.

The evidence of Detective Constable Desmond Anderson is as follows: On the 20th April, 1998 after 5:00 p.m. he was at Maverley Police Station when someone made a report to him. Consequently, he and Detective Corporal Ellis went to the Red Hills Road Shopping Plaza. There was a large crowd in the vicinity of a meat shop in this plaza. He saw a lady lying on the ground with "blood marks all over her body". Someone in the crowd, one Mr. Simms, as he later found out, handed a firearm to a female police officer who in turn handed it to Detective Anderson. Another man spoke to Detective Anderson who accompanied him to

the Kentucky Fried Chicken ("KFC") restaurant. There, the man pointed out the applicant who was sitting at a table with a box of KFC before him. Detective Anderson went up to the applicant, identified himself as a police officer and told him he was going to arrest and charge him for a murder that was committed in the Red Hills Road Plaza. The applicant said "Boy, officer a true yuh nuh know, a true you nuh know". A crowd was gathering outside the restaurant; to avoid them, Detective Anderson escorted the applicant to the Maverley Police Station. At the Station he handed over the firearm to Detective Sergeant Edwards. The applicant was searched and an identification booklet taken from him.

Mr. Mark Brown, the cousin of the deceased Karlene Adams, gave the following evidence: he lived at the same address as the deceased. He knows the applicant. He would see him occasionally when the applicant visited the deceased. He also knows Mr. Warren Tullonge. On the 20th April, 1998, about 6:45 in the morning, Mr. Brown left his home for work, leaving behind the deceased, whose Mitsubishi Galant motor car was parked in the driveway. When he returned home in the evening, the car was parked at the same spot. He saw the keys for the car in the cupboard where they were usually kept. Whilst at home he heard something and went to Maverley Police Station. There he saw the applicant in a cell. He said he asked the applicant why he killed Karlene.

The applicant, he said, "began to ramble about money, some money aspect". Mr. Brown described the applicant as being a "solid built, thick, stout guy" about 6ft. 1in. tall. Detective Sergeant of Police Roswell Edwards testified that on the 20th April, 1998 about 5:30 p.m. he was at the Constant Spring Police Station when he received a report. He went to a shopping center on Red Hills Road about two chains from Donmair Close. There he saw the dead body of a female on the ground. The body was identified to him by Mr. Warren Tullonge as that of Ms. Karlene Adams. She was dressed in a blue jacket and pants, a full suit and a white blouse. He examined the body and observed two gun shot wounds – one to the right side of the jaw and the other to the left side of the stomach. Apart from Mr. Tullonge he spoke with other persons on the scene including Mr. Chesley Williams. From the scene the witness went to the Maverley Police Station. There he saw and spoke with Detective Constable Anderson who handed him a .38 Taurus Revolver Serial Number PD341858 and a firearm booklet. The firearm contained three live rounds of .38 cartridges and three spent shells. The firearm booklet was in the name of the applicant Jeffrey Sutherland. The witness said that Constable Anderson also pointed out to him the applicant who was in the "holding area" at of the station. The witness Sergeant Edwards, went up to the applicant, identified himself and cautioned him. He asked the applicant his name then told him he was a suspect in the murder of

Karlene Adams. The applicant replied "Yes Sir". He then arrested and charged the applicant for the murder of Karlene. After he was cautioned ,the applicant made no statement. Before arresting and charging the applicant, Detective Sergeant Edwards said he had showed him the firearm and asked him if he was the owner. The applicant admitted that the firearm was his and said he knew it by the serial number. Detective Sergeant Edwards escorted the applicant to the Constant Spring Police Station. There he placed the firearm, the three live rounds of .38 cartridges and the three spent shells in three envelopes marked "A", "B", and "C" respectively.

On April 23, 1998, Detective Sergeant Edwards attended a post mortem examination of the body of the deceased, performed by Dr. Seshaiah, a Government Forensic Pathologist. He saw the doctor remove from the body one expended bullet which the doctor handed to him. This expended bullet was placed in an envelope which was marked "D" by the witness. The witness subsequently said that he received two expended bullets from the doctor. Both bullets, he said, were taken from the body of the deceased.

On the 6th May, 1998, Detective Sergeant Edwards took the envelopes marked "A"–"D" to the Forensic Laboratory and handed them to Assistant Commissioner Wray, a ballistic expert. On the 15th May, 1998, he retrieved these envelopes from the ballistic expert. The firearm

booklet which had the photograph of the applicant and which referred to a .38 Taurus revolver with serial number PD341858 was received in evidence as exhibit 1. The Taurus .38 revolver bearing the serial number PD 341858 which the witness received from Constable Anderson and which the applicant admitted was his, was received in evidence as exhibit 2. The envelope in which the three live rounds were placed but which when retrieved from the ballistic expert contained two live rounds and one expended shell, with its contents were tendered in evidence as exhibit 3. The envelope with the three spent shells was received as exhibit 4. The envelope containing the bullets taken from the body of the deceased Miss Adams was tendered as exhibit 5.

Dr. Ere Seshaiah, testified that on the 23rd April, 1998, he performed a postmortem examination on the body of 26 year old Karlene Adams. The body was identified by Miss Marcia Gordon, a cousin of the deceased. The deceased was 5ft 9 ins tall. Dr. Ere Seshaiah further testified that he saw two gunshot wounds on the body. The first was an entrance wound to the right side of the face, 22cms below the top of the head and 11cms. from the midline. He observed 1.5cms "powder burnings" around this wound. He traced the trajectory of the bullet and found a deformed copper jacketed bullet embedded in the fifth cervical vertebra and spine. He handed this bullet over to the police. The base of the skull was fractured. Wound number two was an entrance gunshot

wound to the left side of the abdomen, 58cms. below the top of the head and 7cms from the midline. He saw 6cms powder tattooing around this wound. The bullet travelled through the underlying tissues and entered the abdominal cavity. He found a deformed copper jacketed bullet embedded in the fifth lumbar vertebra. This bullet was also handed to the police. The cause of death was multiple gunshot wounds. In his opinion death would have been immediate.

Dr. Seshaiah explained that in relation to wound number one, there was more burning than tattooing. This, he said, indicated that the muzzle of the gun was held about 6 inches from the victim. In relation to wound number two there was more tattooing than burning. This indicated that the muzzle was about 12 to 18 inches from the victim. Exhibit 5, the envelope containing two bullets, was shown to the witness. He identified one of the items as the deformed copper jacketed bullet which he removed from the neck of the deceased and handed to the police. He described the other item in the envelope as a deformed lead bullet and said that this was not one of the bullets he handed to the police.

Mr. Daniel Wray, a retired Assistant Commissioner of Police and Government ballistic expert, testified to the following effect: On May 6, 1998 he received four sealed envelopes from Detective Sergeant Rosewell Edwards. Envelope "A" contained one .38 Special Taurus model

82 revolver bearing serial number PD341858(supra). Envelope "B" contained three .38 special unexpended firearm cartridges. Envelope "C" had three .38 special expended firearm cartridge cases and envelope "D" had one lead fragment of the core of a .38 calibre, fired with a metal jacketed firearm bullet and one .38 fired copper jacketed firearm bullet. He examined the revolver and found that it had been fired. He fired three test shots from the revolver using one of the three cartridges received in (envelope"B") and two other .38 special cartridges. He recovered the bullets and cartridge cases and conducted microscopic comparisons of the three expended cartridge cases in envelope "C" with the test cartridge case fired and discharged from the revolver in Envelope "A". He found matchings and concluded that the three cartridge cases in envelope "C" were fired and the bullets discharged from the .38 calibre Special Taurus model 82 revolver bearing serial number PD 341858. He also conducted microscopic comparisons of the copper jacketed bullet in envelope "D" with test bullets discharged from the revolver in envelope "A" and found matchings of striations. He concluded that the bullet received (envelope "D") was discharged from the barrel of the .38 special Taurus model 82 revolver bearing serial number PD341858. The revolver, he said, was in good working condition. He identified the revolver (exhibit 1) as the one he received in envelope A from Detective Sergeant Edwards. He also identified the other

envelopes and their contents as those which he received from Detective Sergeant Edwards.

The Defence

The applicant gave an unsworn statement from the dock. He told the Court that he was a 27 year old service station manager, that he lived in Linstead, St. Catherine and, that he met the deceased, Karlene Adams, while attending the College of Arts, Science and Technology. They had a relationship which produced Jeffrey Sutherland Jnr.

The applicant further stated that on Monday, 20th April, 1998 at about 1:00 p.m. he and one of his employees were on business at United Gasoline Retailers, Kings Plaza, on Constant Spring Road, when the deceased, Karlene, "beckoned" him and they went for lunch. Karlene told him that she was having difficulty repaying a loan of US$20,000 to an ex-boyfriend. She complained that this ex-boyfriend was accusing her of spending the money on the applicant. They arranged to meet at the KFC outlet on Red Hills Road after work. Karlene then transported him back to the United Gasoline Retailers, in Kings Plaza and left to return to work. About 4:00 p.m. when he and his attendant were leaving United Gasolene Retailers he realized that he had inadvertently left his pouch containing his firearm and owner's booklet in the glove compartment of Karlene's car. He tried to contact her by phone, but to no avail. He then went to the KFC outlet as planned. There he saw a man who was having

a car problem. The applicant parked his pick-up and he and his attendant assisted this man. Before the man drove off the applicant gave him his business card. The applicant then went into the KFC restaurant to wait on Karlene. While in the restaurant, the man whom he had assisted entered the restaurant with another man. The man looked around and then pointed in the applicant's direction. The other man approached the applicant with a red firearm booklet in his hand. He introduced himself as Detective Constable Anderson and asked him his name. The applicant supplied the information. Constable Anderson, the applicant said, showed him the booklet. The applicant told him that he had accidentally left his pouch containing his firearm and booklet in the glove compartment of his girlfriend's car. Constable Anderson told him that he was detaining him for "questioning in the murder of Karlene Adams who was shot and killed about 300 meters from the restaurant". The applicant said, he, began to cry and denied killing the mother of his son.. He was escorted to the Maverley Police Station. Later that day he saw Detective Sergeant Edwards with a gun and a firearm user's booklet. Detective Sergeant Edwards showed him the firearm and asked him if he knew it. The applicant said that he looked in the booklet, and after seeing the serial number, he told the officer that the firearm was his. Detective Sergeant Edwards then charged him for the murder of Karlene Adams. The applicant told the court that "a short big belly man speaking

with an American accent" came in the guard room and said "so, you are the man that took my woman from me and got her pregnant. I am going to make sure that you go to prison." In his unsworn statement he denied being at the crime scene and said that he was " totally innocent".

Mr. Fitz Haughton, a taxi driver, gave evidence on behalf of the applicant. He stated that on the 20th April, 1998 about 4:15 p.m. he was at the KFC outlet on Red Hills Road. The fan belt of his car had burst and had to be replaced. The applicant drove up; they spoke and the applicant gave him a fan belt and assisted him to replace the defective one. That exercise, he said, took about 45 minutes. After that he said he drove off. He saw a crowd at a plaza on Reds Hills Road. He stopped and alighted from his taxi. He saw the body of a woman on the ground. A police officer was in the crowd asking questions. The officer had a little book with a photograph in his hand – it was a photograph of the man who had just assisted him. He spoke with the police officer who followed him to the KFC outlet. They went into the restaurant where the witness pointed out the applicant to the officer. The officer went to the applicant and spoke to him. According to the witness before the officer left the restaurant with the applicant he told the witness that he was taking in the applicant for questioning. The witness said he told the officer that he did not see the applicant do anything wrong.

Grounds of Appeal

Counsel for the applicant sought and obtained leave to argue nine (9) supplemental grounds of appeal along with three (3) original grounds.

Application for Adjournment

In ground 8 the applicant complained that the learned trial judge wrongly refused his application for a postponement of the trial so as to enable him to secure the attendance of a witness Mr. Wesley McLean. As a consequence, the applicant was denied his constitutional right to a fair trial.

On the trial date, the 24th May 2000, before the applicant was pleaded, Mr. Witter, one of two counsel representing the applicant applied for an adjournment based upon the non-availability of "an essential witness". The application was refused by the learned judge and the trial proceeded daily for a period of two weeks. On the 7th June, 2000, the defence witness, when called, was absent. Counsel informed the court that the witness would be available at 10:00 a.m. on the following day. The Court was adjourned at 10:30 a.m. to the 8th June to facilitate the defence. The trial resumed at 10:30 a.m. on June 8, 2000. Mr. Witter told the Court:

> "... The other witness we intend to call is not in direct telephone contact. He lives at Mount Diablo in St. Catherine. The last word that we had was at a quarter to eight this morning and

> communication was being made through a third party. We were told that the witness intended to be here this morning in time for court which I indicated commenced at 10 o'clock. It is now twenty to eleven. May I enquire, how much is my Lord prepared to allow for the witness to get here? The information I had is, he was going to be here in time for court attendance. Frankly, I don't know what has delayed him".

The learned judge observed that it was not difficult to get from Mt. Diablo to Kingston. Mr. Witter agreed; thereafter the following dialogue between Bench and Bar ensued:

> "Mr. Witter: ...May I say, this is how I should have started, that I regret the inconvenience and the loss of time and I apologise to the Court and ladies and gentlemen of the jury for the inconvenience and loss of time.
>
> His Lordship: In view of what I had said yesterday when I granted the adjournment, I had been generous as far as the crown witnesses were concerned. I am not going to name any time within which this witness must be here, but I am going to extend the facility and you must tell me what is the deadline.
>
> Mr. Witter: M'Lord, we have taken a position as counsel in the matter. M'Lord, barring word of misadventure en route, if the witness does not appear by 11:30 we have decided, by M'Lord leave, that we will commence our final addresses. I know how untidy it is but if the witness appears before I sit down, I would crave my Lord's leave to interpose him so that no time will be lost."

The learned trial judge made it clear to Mr. Witter that he would not permit him to call the witness after he had begun his address. He, however, granted a further adjournment to 11:15 a.m. to enable the defence to secure the attendance of the witness. When the Court resumed at 11:25 a.m. the defence witness was still absent. Mr. Witter commenced his final address at 11:25 a.m. The Court adjourned for lunch at 1:06 p.m. and resumed at 2:05 p.m. Mr. Witter concluded his address at 3:10 p.m. Counsel for the applicant told this Court that he could not say whether or not the witness had attended. However, he argued that the real vice was the trial judge's ruling. This complaint is twofold. Firstly, counsel argued that the trial judge erred in refusing his application for an adjournment at the outset. This refusal, he submitted, was in breach of the applicant's constitutional right enshrined in section 20(6)(b) of the Constitution. Subsection 6 (b) of section 20 provides that:

> "Every person who is charged with a criminal offence-
>
> (a) ...
> (b) shall be given adequate time and facilities for the preparation of his defence;
> ..."

There is no evidence before this Court to indicate that the applicant was not given adequate time and facilities for the preparation of his defence. Pursuant to the procedure for setting down a case for trial, counsel for the defence would have agreed the trial date. Certainly, counsel would not

have agreed a trial date if such a date would not allow him adequate time to prepare the defence. Despite the fact that the application for adjournment was refused on the 24th of May, 2000, counsel for the defence had adequate time from then until the 7th June, 2000 to secure the attendance of the witness. If the witness was unwilling to attend, counsel could have asked the Court to issue a subpoena or a warrant. Pursuant to Section 6 of the Criminal Justice (Administration Act) the defence was not entitled to have the trial traversed or postponed. Whether or not an adjournment should be granted was a matter for the exercise of the trial judge's discretion. The learned trial judge was clearly not of the opinion that the defence ought to be allowed further time. We can see no reason to interfere with the exercise of his discretion.

Secondly, counsel for the applicant submitted that the learned trial judge erred in ruling that he would not permit the defence to call the witness after defence counsel had begun his final address. A judge has a discretionary power to allow a witness for the defence to be called during the final address of counsel for the defence. In ***R v Sanderson*** [1953] 1 W.L.R. 392 the Court of Appeal (England) held that it was permissible, if the circumstances warranted it, for a defence witness to be called after the summing-up, and for the judge to add to his summing-up thereafter. However, the Court said that such a practice should not be encouraged. We agree with that ruling. In the instant case, the

learned trial judge, although he had intimated that he would not allow the witness to be called after counsel had begun his address, was not actually called upon to exercise his discretion because the witness did not attend. The learned judge's ruling did not prejudice the defence.

Consequently, this ground must fail.

Mark Brown's evidence

In ground seven the applicant complained that the learned trial judge wrongly exercised his discretion in admitting the evidence of the witness Mr. Mark Brown. The reason for this complaint as stated by counsel is that Mr. Brown's evidence "was received after that of its (the Crown's) "star witness", Warren Tullonge, and constituted "fresh evidence, manifestly designed and/or calculated to buttress and/or fill perceived gaps in the testimony of the said Warren Tullonge".

We must confess that we find this ground unintelligible. The evidence of Mr. Brown is clearly relevant. If believed, it would refute the applicant's assertion in his unsworn statement that the deceased had picked him up in her car during the fateful day, that they travelled together in her car and that he left his pouch containing his firearm and booklet in the glove compartment of her car. Further, Mr. Brown's evidence of his brief exchange of words with the applicant at the police station is also relevant. If believed Mr. Brown's evidence that when he asked the applicant why he killed Karlene "he began to rumble about

money" may go towards establishing motive. We can see no reason in law or in logic for the exclusion of this witness' evidence. The fact that Mark Brown did not give evidence at the preliminary enquiry does not render his evidence inadmissible. Indeed the learned judge had no discretion to exclude it. See ***R v Vernon Mason*** 12 JLR 171 and ***R v Clarke*** 11 JLR 534. This ground is wholly misconceived.

The Statement of deceased Chesley Williams

The reception of the statement in evidence is the subject of ground 9. However, counsel did not pursue this ground before us. This statement is admissible by virtue of statute -- see section 31 D of the Evidence Act. The learned trial judge properly directed the jury as to how they should deal with such a statement – see p.856 of the Record. Earlier he had given them full directions on the "purpose and function of cross-examination".

Inferences and circumstantial evidence

In ground 6 the complaint is that the learned trial judge failed to give the jury any or any proper directions on:

(a) the law of corroboration

(b) how to draw reasonable inferences; and

(c) circumstantial evidence

We make short shrift of (a) by saying that in this case there is no basis either in law or in practice for a direction on corroboration.

In respect of (b) the judge, when dealing with the requisite intention told the jury:

> "The prosecution, however, puts before you facts and invites you to draw what is known as reasonable inferences from those proven facts and those inferences must satisfy that the only intention could have been to kill..."

Later, when dealing with the evidence of the witness Chester Simms who had testified that he saw a man with a gun in hand standing over the lady, the learned judge directed the jury thus:

> "He went on to say he assumed that he was the person who shot the woman. I don't think I will remind you, members of the jury that when you come to the finding of facts about which you are sure you are privileged to draw reasonable inferences from the proven facts. It is comparable, in my view, to this assumption on the part of Simms that the man standing over the lady with gun in hand was the person who shot the lady."

Earlier, the learned judge had given the jury full directions on the burden and standard of proof. He made it abundantly clear to them that before they could convict, the prosecution must by the evidence adduced satisfy them, so that they were sure of his guilt. In the circumstances of this case we are of the view that the directions to the jury on reasonable inferences were fair, helpful and adequate.

Counsel also argued that the learned judge ought to have given the jury directions on circumstantial evidence. In our opinion no direction on circumstantial evidence was required. The prosecution did

not rely solely on circumstantial evidence. The prosecution led evidence from three eye witnesses – Mr. Tullonge, Mr. Chesley Williams, whose statement was tendered, and Mr. Simms. The directions on reasonable inference were enough in these circumstances.

No case submission

In the first of the original grounds, Mr. Witter for the applicant contended that the learned trial judge erred when he refused to withdraw the case from the jury. Mr. Witter's argument is two pronged. In the first place he argues that the evidence of the prosecution witnesses, Mr. Simms, Detective Sergeant Edwards, District Constable Anderson, Asst. Commissioner Wray and Dr. Seshaiah, did not establish a reliable basis for the inference that it was the applicant who shot the deceased. Secondly, he contended that the dock identification of the applicant by the witnesses Messrs. Tullonge and Simms was nugatory. As for the first prong of the applicant's argument it is necessary to outline the relevant aspects of the witnesses' evidence:

(1) Witness Simms said that on the day of the killing he saw a man with a gun in hand standing over the bleeding body of a woman.

(2) He went up to the man and asked "Blood you alright?" the man replied, "the blood-clawt woman tek me twenty thousand dollars and spend it out on her man".

(3) The man placed the gun on a wall and asked him to hand it over to the police when they came.

(4) Simms took up the gun and subsequently handed it to a policewoman.

(5) He identified the applicant, whilst the latter was in the dock during the trial, as the man with the gun. He did not know him before the day of the incident.

(6) Constable Desmond Anderson received a firearm from the policewoman on the scene of the murder. He described this firearm as a. 38 snub-nose Smith and Wesson. He subsequently described it as a .38 chrome Taurus revolver. He had seen Simms hand the firearm to the policewoman. The firearm had 3 live rounds and 3 spent shells.

(7) Constable Anderson said that he took an identification booklet from the applicant's pocket. Later on during cross-examination he said it was Sergeant Edwards who searched the applicant and removed the booklet from his pocket.

(8) Sergeant Edwards said that at the Maverley Police Station Constable Anderson handed him a .38 Taurus revolver, serial number PD 341858 with three rounds and three spent shells and a firearm booklet. The booklet had the name and photograph of

the applicant, Jeffrey Sutherland and referred to a firearm with a serial number 341858.

(9) Sergeant Edwards showed the firearm to the applicant and asked if he was the owner. The applicant examined the serial number and admitted ownership of the firearm.

10) A few days later Sergeant Edwards attended the postmortem examination of the body of the deceased. He saw the doctor remove two bullets from the body. These were handed to him. The bullets as well as a firearm with the three rounds and three spent shells were handed to the ballistic expert, Mr. Wray.

(11) The ballistic expert carried out tests and examinations of these exhibits and concluded that a bullet extracted from the body of the deceased was discharged from the firearm serial number PD 341858.

In our opinion the above, if believed, is powerful evidence that the applicant's firearm was the murder weapon. There is no dispute that there were discrepancies and inconsistencies, some of which could reasonably be described as material. However, the effect of these on the evidence are manifestly a matter for the jury. The learned trial judge correctly and adequately directed the jury as to how they should approach these discrepancies and inconsistencies. Indeed, no complaint has been directed at these directions.

Dock Identification

Although the evidence of the six witnesses referred to above, in our view, clearly identify the murder weapon, of those witnesses only the evidence of Mr. Simms points directly to the applicant as the perpetrator. It brings us to the second prong of Mr. Witter's argument. It concerns the dock identification of the applicant by Mr. Simms and Mr. Tullonge. Mr. Simms identified the applicant as the man whom he saw with a gun in his hand standing over the body of the deceased. He did not know the applicant before the day of the murder. According to his evidence the first time he saw the applicant since the day of the incident was in Court in the dock. Mr. Witter submitted that the mode of identification was improper and that the applicant's conviction should not stand. He relied on ***R v Trevor Lawrence*** 25 JLR 117 among other cases. There is no doubt in our minds that an identification parade should have been held. This unjustifiable failure is certainly undesirable but in our view, not necessarily fatal to the conviction. If Mr. Simms' evidence was the only evidence connecting the applicant with the offence, this Court would be obliged to quash the conviction. However, the case did not depend wholly on Mr. Simms' evidence. There is the evidence of Mr. Tullonge which we will examine shortly. There is also the evidence of Chesley Williams as contained in a written statement and that of Constable Desmond Anderson. Mr. Williams stated that he

witnessed a man shooting a lady. The man then put the gun beside her and walked away. He saw the man enter a KFC restaurant. Shortly thereafter he accompanied a policeman into the restaurant and pointed out the man. Constable Anderson was the officer whose attention was directed to the man. Constable Anderson's evidence is that the applicant was the man to whom his attention was directed. Constable Anderson also testified that when he confronted the applicant with the offence the applicant said , "Boy officer a tru you nuh know". Further, there is the evidence of Mark Brown who said that he asked the applicant why he killed Karlene and that the applicant began to "ramble about money". In ***R v John Cartwright*** [1914] 10 Cr. App. R.219 the Court of Appeal (England) per Reading LCJ upheld a conviction although the prisoner was identified for the first time when he was in the dock because there was other evidence implicating him. That case was referred to with obvious approval by their Lordships' Board in ***Carl Brissett v The Queen*** P.C. Appeal 50/93 delivered on November 29, 1994. In ***R v Trevor Lawrence*** (supra) two of the three eye witnesses had failed to identify Lawrence at an identification parade. However, at the trial they identified him. The trial judge did not alert the jury to the danger of their dock identification evidence. This court quashed the conviction on the ground that it was necessary in the interest of a fair trial, that the jury should be told that the evidence of the witnesses who identified

Lawrence in Court for the first time was suspect because both had been afforded an opportunity to identify him at an identification parade and both had failed to do so. The instant case can easily be distinguished. We are firmly of the view that the dock identification of the applicant by Mr. Simms did not cause a miscarriage of justice.

We now turn to consider the identification of the applicant by Mr. Tullonge. Mr. Witter contends that an identification parade should have been held to test the ability of Mr. Tullonge to identify the person he saw shoot the deceased. It is the evidence of Mr. Tullonge that he had seen the applicant on two occasions in 1997 at the gate of the deceased. He had also seen photographs of the applicant and the deceased together. He said he recognized him when he came into the meat shop and spoke to the deceased. The applicant in his unsworn statement claims that while he was at the police station a man with an American accent accused him of getting his woman pregnant and threatened to ensure that he went to prison. "A man with an American accent" was a clear reference to Mr. Tullonge.

During cross-examination of Mr. Tullonge it emerged that in his written statement to the police he did not state that he had seen the applicant or that he had seen photographs of him before the day the deceased was killed. Mr. Tullonge made dock identifications at the committal proceedings and at the trial. In these circumstances dock

identification is certainly not desirable and is unsatisfactory but not nugatory. Mr. Tullonge's purported identification of the applicant should not have been treated as a recognition of the applicant. An identification parade should have been held (see ***R v. Fergus*** [1992] Crim L.R. 363). However, as we have stated before, where there is other evidence pointing to the accuracy of the identification a failure to hold an identification parade is not necessarily fatal. Further as we will later indicate, Mr. Tullonge's dock identification is not nugatory. As it was in the ***Cartwright*** case (supra), the evidence in this case is of a cumulative character. It is also important to note that, apparently, no request for an identification parade was made. This, no doubt, was because of the claim of the applicant that a man (Mr. Tullonge) had threatened to send him to prison. The suggestion was that Mr. Tullonge was acting maliciously in identifying the applicant. We cannot conclude that the prosecution evidence taken at its highest was such that a jury properly directed could not properly convict on it. The strength or weakness of the prosecution evidence would depend on the view the jury took of the witnesses' credibility. In these circumstances there was no duty on the trial judge to stop the case. This ground accordingly fails.

Failure to direct on dock identification

In the original ground 3, counsel for the applicant complained that the learned trial judge failed to direct the jury as to the dangers inherent

in dock identification. Thus, counsel argued, the trial was rendered unfair and justice was miscarried. At the end of the summing up prosecuting counsel, Miss K. Pyke, politely reminded the judge that he had not directed the jury about the dangers of dock identification. In response the learned judge said:

> "It is in my view, and I have given careful thought about it, that that would not be necessary here because of the uniqueness of the surrounding circumstances."

Before us, Ms. Llewellyn for the Crown, submitted that the failure to give direction on the purpose of an identification parade and the dangers of dock identification did not cause a miscarriage of justice as there was other evidence to support the conviction.

The danger of dock identification is that the very presence of the accused in the dock will suggest to the witness that he is the person who committed the crime. However, in the instant case there were factors which, in our judgment, were capable of minimizing or nullifying the usually grave risks of dock identification:

(i) The prosecution did not rely solely on the dock identification.

(ii) Mr. Tullonge testified that he had seen the applicant before and had seen a photograph of him.

(iii) He also testified that on the day of the killing he saw the applicant in the meat shop when the applicant touched and spoke to the deceased.

Shortly after this Mr. Tullonge saw him outside the shop holding the deceased and spoke to him.

(iv) Mr. Tullonge heard the deceased speak to the person holding her in terms that would identify that person as her ex-boyfriend (the applicant).

(v) Mr. Simms said that when he spoke to the man whom he identified as the applicant – the man said:

> " de bloodclawt woman tek me twenty thousand dollars and spend it pon her man".

He saw the man's face for about five minutes. The man he said, placed the gun on the wall and left.

(vi) The evidence of Chesley Williams (in his statement) is that he pointed out the man whom he saw shoot the woman and leave the gun beside her.

Constable Anderson gave evidence that the applicant was the man pointed out to him by Mr. Williams and that when confronted with the crime the applicant said:

> "Boy officer tru yu nuh know".

Once the jury accept these witnesses as credible it is not possible to say that the absence of the identification parade and the consequent

dock identifications made the trial unfair. In our judgment, in the present case specific directions about the absence of an identification parade and the dangers of the dock identification were not, as the trial judge said, necessary. The credibility of the witnesses was crucial. The judge told the jury:

> "Now members of the jury, you readily appreciate the importance of finding the facts of the case; the reason that it must be (on) a true, accurate, fair and impartial ascertainment of the facts that a true, fair and reliable verdict must rest."

Later, at the end of his review of the prosecution evidence the learned judge said:

> "It has been suggested that not holding an identification parade and not having the witness come and point out the accused, the person, was a grave omission on the part of the police investigators.

After describing the alleged incident the learned judge continued:

> "In these circumstances, you might wish to consider that there was no need for any identification parade. Light was adequate, immediate and close look at the person; talk to him; periods of time under observation. So you have to decide what credibility you attach to this witness' (Simms') testimony and what is the effect of his testimony..."

In so far as the judge stressed the importance of credibility we think he was right. In our judgment this ground also fails.

Visual identification

It was contended in ground 4. that the trial judge's directions to the jury on visual identification was inadequate. We do not agree with counsel for the applicant that the learned judge failed to give the **Turnbull** warning. The judge clearly directed the jury to approach the identification evidence with caution. He warned them of the dangers of mistaken identification. He referred to the various factors that they should take into account in determining the quality of the identification evidence. He reminded them that an honest witness can be a mistaken witness. It should be noted that these general directions were said to be inapplicable to the evidence of witnesses who made dock identification - see ***R v Trevor Lawrence*** 25 JLR 117 at 118 E. This would certainly be so in respect of Mr. Simms' evidence. However, the evidence of Mr. Tullonge is that he had seen the applicant before. The dock identification evidence is therefore not nugatory.

As Counsel for the Crown pointed out the learned trial judge also made reference to the importance of assessing the identification evidence of Mr. Tullonge "through the prism of credibility". In this regard he reminded the jury of that part of the applicant's statement which suggests jealousy as the motive for Mr. Tullonge's identification of the applicant as the person who shot the deceased. We are of the view that

the judge's directions on visual identification in so far as they were applicable were fair and adequate. This ground also fails.

Expert Evidence

In ground 5 the complaint is that the learned trial judge failed to adequately deal with the experts' evidence. Two expert witnesses testified on behalf of the prosecution – Dr. Seshaiah and Assistant Commissioner of Police, Mr. Daniel Wray. The vital aspect of Dr. Seshaiah's evidence is that he extracted two deformed copper jacketed bullets from the body of the deceased and handed them to the police. The prosecution relied on this evidence as a link in the chain which purports to connect the applicant with the offence. This certainly is not opinion evidence. The opinion evidence of the doctor was mainly confined to the cause of death and the significance of the presence of burning and tattooing around the wounds seen on the body of the deceased. Mr. Wray's opinion evidence, if believed, would assist in establishing that a bullet taken from the body of the deceased, was discharged from the applicant's firearm. It was the duty of the trial judge to make it clear to the jury that they were not bound by the experts' opinion and that their evidence should be treated like that of any independent witness (see ***R v Stockwell*** [1993] 97 Cr. App. R. 260 and ***R v Longear*** 52 Cr. App. R. 176).

In directing the jury on expert evidence the learned trial judge said:

> "Now members of the jury, the ballistics expert gives his findings. He is known as an expert. You should unless you have evidence to the contrary treat his evidence, if you are satisfied that he has the experience, as evidence by which you can be guided. An expert is allowed to express an opinion. You as members of the jury should accept that opinion unless you have good reason or knowledge to believe that the opinion is without foundation. An expert is the only category of witnesses who can express an opinion and by whose opinion a jury should be guided."

The learned judge, shortly after the above directions, told the jury that Dr. Seshaiah also " falls into the category of an expert". Although in the above directions the learned trial judge did not make it clear to the jury that they did not have to accept even the unchallenged evidence of an expert we do not regard such failure as crucial in the circumstances of this case. The jury were certainly not given a false impression of the weight to be given to the opinion evidence of the witnesses. Indeed at page 838 the learned judge said:

> "...It is for you to say whether you are satisfied that his (Mr. Wray's) evidence is reliable evidence on which you can act. He said he had given expert evidence for 31 years but in light of that he would not claim infallibility. He just give his best judgment and even he can make errors".

Provocation

Another complaint (supplemental ground 3) of the applicant is that the trial judge erred in withdrawing the issue of provocation from the jury. Counsel for the applicant submitted that the evidence of Chester Simms provided the evidential basis for the issue of provocation to be left to the jury. Simms testified that when he saw the applicant with the gun pointing at the body on the ground he asked him "Blood you all right?" and the applicant replied "de blood clawt woman tek mi twenty thousand dollars an' spen' it out pon her man".

It is the contention of Mr. Witter that provocation, however weak it might be, should have been put before the jury. Among the many cases he cited in support are ***R v Channer*** 28JLR 625; ***R v Stanley McKenzie*** 29JLR47; ***R v Neville Collins*** 29 JLR 263; ***R v Trevor Facey*** 22 JLR 58; ***R. v John Dickie Baillie*** [1995] 2 Cr. App. R. 31; and ***R v. Derrick Wolfe*** 29 JLR 321. The cases clearly show that the statutory effect of section 6 of the Offences against the Person Act is that the judge may not withdraw the defence of provocation from the jury on the ground that in his view a reasonable man would not have been provoked to do as the defendant did. On the wording of the section, provocation only comes into the picture where there is evidence fit for the consideration of the jury that the

defendant was or might have been suffering from a sudden and temporary loss of self-control at the time he committed the fatal act.

It is not always easy to determine whether there is such evidence as would warrant a direction on provocation. The authorities show that where there is evidence of specific provoking conduct and that such provocation caused an accused, on a charge of murder, to lose his self control, the issue of provocation should be left to the jury. In ***R v Derrick Wolfe*** (supra) this court reiterated the probably dubious principle that "a trial judge has a duty to leave to the jury all issues that arise on the evidence even if the evidence in support of these issues is slight or tenuous". Where there is only a "speculative possibility" of an accused having acted as a result of provoking conduct the issue should not be left to the jury – ***R v Acott*** [1997] 2 Cr. App. R 94 H.L. The phrases "however slight" or "however tenuous" have been said to describe the provocation and not the evidence of its existence. In ***R. v. Cambridge*** 99 Cr. App. R. 142, the English Court of Appeal was of the view that for the issue to be left to the jury, there has to be evidence from which a reasonable jury might conclude that the defendant was or may have been provoked. Indeed, in ***R v Jones*** [2000] 3 Archbold News 2) it was stated that where any such evidence is minimal or fanciful a direction on provocation is not appropriate. However as stated before, a defence of provocation should not be withdrawn on the ground that no reasonable jury could

possibly find that a reasonable man would have been provoked to do as the defendant did: ***R v Gilbert*** 66 Cr. App. R. 237. In the instant case we are of the view that the evidence of the provocative conduct relied on by counsel is minimal. Moreso in our judgment there is no evidence of a sudden and temporary loss of self control "rendering the applicant so subject to passion as to make him for the moment not master of his mind" (Devlin J in ***R v Duffy*** [1949] 1 All E.R 932). We are not able to accept the forceful argument of counsel for the applicant.

The Summing-Up

Finally, the applicant through his counsel complained (supplemental grounds I and 2) that :

(i) the comments by the judge in his summing up were unduly weighted in favour of the prosecution, and

(ii) the direction on alibi was inadequate.

Judicial Comments

Mr. Witter submitted that instead of directing the jury on the effect of the failure by the police to hold identification parades the learned trial judge told them "you are not here sitting in judgment on the police system or lack of it. That is not what you are here to determine". This approach, he argued, was inappropriate and would have severely prejudiced the applicant. We have already dealt with the failure to hold identification parades and the resulting dock identifications. The comment by the

judge that it was not the jury's duty to judge the "police system" was unnecessary, if not undesirable. However, this comment was clearly intended to encourage the jury to focus on the real issue, that is, whether or not the evidence before them was adequate to make them sure that the applicant was guilty. The learned judge did not by that comment minimise the importance of proper police procedure. Indeed, at p.817 immediately after the impugned comment the judge said:

> "...but if after I review the evidence, you conclude that they are inconsistent with the police procedure, then you deal with any explanation given by the police and say whether or not you accept that explanation."

Counsel was unable to persuade us that there were other comments by the learned judge that were "unduly weighted in favour of the prosecution." We should say that the major discrepancies and inconsistencies were brought to the attention of the jury by the learned judge with fair and adequate directions.

Alibi

Counsel complained that the case for the defence was neither fairly nor properly put to the jury and that the directions on alibi were inadequate. We do not see any merit in this complaint. The learned trial judge's treatment of the applicant's defence was marked by attentive care. At p. 806 he defined the defence of alibi stressing the point that

the burden is on the prosecution to disprove the albi and that the applicant had no burden to prove it. At p. 811 when directing the jury on the real issue he reminded them: "The accused man is saying 'not me'." At p.871 after reminding the jury of the applicant's unsworn statement and before reviewing his witness' (Fitz Hugh Haughton's) evidence the judge told them that the witness was "called in support of the alibi". During the review of Haughton's evidence the judge said:

> "He was the constant, who could have, if you accept his evidence, served the purpose of strengthening or establishing an alibi which, incidentally, there is no burden on the accused to prove."

This ground also fails.

Conclusion

For the above reasons we have come to the conclusion that the trial of the applicant was fair and that there has been no miscarriage of justice. Accordingly, having treated the hearing of the application for leave as the hearing of the appeal, we dismiss the appeal. The conviction and sentence are affirmed. We order that the sentence commence as of the 9th September, 2000.