JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 29/05

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.

GREGORY GRANT V R

Lord Anthony Gifford Q.C. and Rudolph Francis for the applicant.
Ms. Joan Barnett, Crown Counsel (Acting) for the Crown.

January 29, 30,31, February 2 and May 4, 2007

SMITH, J.A.:

On February 25, 2005, the applicant was convicted of murder in the Hanover Circuit Court before N. McIntosh J. and a jury. The particulars of the offence were that the applicant on the 15th November, 2002, in the parish of Hanover, murdered Everald Miller. He was sentenced to life imprisonment and ordered to serve 20 years before becoming eligible for parole. His application for leave to appeal his conviction and sentence was refused by the single judge on July 7, 2006. He has now renewed his application for leave before this Court.

The Prosecution's Case

Ten witnesses gave evidence for the prosecution. Miss Vashti Trench, a housewife, testified that on November 15, 2002 at about 1:30 p.m. she was at Mr. Miller's (the deceased's) "feed shop." This was in

fact a metal container which the deceased adapted for use as a store. The deceased was on the seller's side of the counter. Two other persons were on the buyers' side along with Miss Trench. The shop had two doors; one was to the back of the shop and the other to the front. She saw two men enter the shop through the back door. Each of the men pulled a gun and said "It's a hold up." Miss Trench said that she was about to hand the money for the things she had purchased to the deceased when someone - a third man – came up behind her and "dragged" the money out of her hand. She turned around grabbed back her money and said "It's my money, its not yours." One of the two gunmen who had entered through the back door told the man who had taken her money to leave her alone. The third man hit Miss Trench on the shoulder with a gun. The two gunmen on the seller's side shot the deceased. They then went to the till and removed money therefrom. The third gunman, who was behind Miss Trench, shot the deceased twice. The witness said she heard about four shots. The deceased fell bleeding and the three gunmen ran out of the shop. The witness was asked to say what time passed from the time the two men entered the shop through the back door to the time when all three ran out and she replied "about say five, ten minutes, I didn't check. I know it was so fast." Counsel for the Crown asked her to indicate the period of time between the men's arrival and their departure by tapping twice. She did and the interval between the

tapping was 18 seconds. In cross-examination Miss Trench said that from where she was inside the shop she could not see outside. One could only see outside by looking through the doors.

Mr. Linton Martin, a maintenance worker, testified to the following effect. On November 15, 2002 at about 1:00 p.m. he was at the deceased's "farm and feed store". He spoke of the seller's door to the back of the store and the customers' door in the front. Two men came in through the back door. Each had a gun. A third man came in through the front door. He too had a gun. All three men pointed their guns at the head of Mr. Martin who was standing beside the deceased on the seller's side of the counter. One of the men told him to lie on the floor. Mr. Martin did not. "Boy you waan dead? Mi say lie dung !" one of intruders shouted, Mr. Martin lay on the floor. "Whey di money deh?" the gunman asked. "See it here" the witness replied. The question was repeated and so was the reply. The gunman stepped over Mr. Martin took up the money and then shot the deceased. When he fired the shot he said "Suck you madda now". After they left, Mr. Martin got up and he shouted for help. With the help of others he placed the deceased in a car and took him to the hospital. At about 5:00 p.m. the same day he identified the dead bodies of the three gunmen who had entered the deceased's store. When asked about the length of time the incident took,

Mr. Martin said "about seven minutes or five minutes". He was cross-examined.

Dr. Murari Sarangi, a consultant forensic pathologist performed a post mortem examination on the body of the deceased. The body was identified by Miss Olive Walcott, a sister-in-law of the deceased. The doctor saw three gunshot entrance wounds on the body. In his opinion death was due to haemorrhagic shock consequent upon gunshot wounds to the chest and injuries to the heart and left lung.

Detective Constable Calbert Forrester testified that on November 15, 2002 at about 1:55 p.m. he was on mobile patrol with Detective Constable Delroy Scarlett in the Seaview area. They were stopped by a taxi driver who gave them the licence plate number of a certain vehicle. They proceeded in the Sandy Bay direction in search of the vehicle which was described to them. They saw the vehicle with registration number 2259DU in the vicinity of Bosung Construction. Detective Scarlett who was driving the police vehicle engaged the siren and the flasher lights to signal the vehicle to stop. Instead of stopping, the vehicle accelerated. Constable Forrester said he contacted Sgt. Bernard and sought assistance. A chase ensued. The driver of the car while being chased lost control and the car left the road and entered a ditch at the side of the road. Constable Scarlett stopped the police vehicle about 1 chain from the car. Shots were fired from the car at the policemen who took cover.

The driver of the car manoeuvred the car back onto the road and continued to drive in the direction of Sandy Bay. The police continued the chase. Having traveled one half mile the driver of the car made a U-turn. Detective Scarlett stopped the police vehicle on the soft shoulder. As the Toyota Corolla car drove towards the police vehicle, shots were fired from the car at the police vehicle. The police took cover and returned the fire. The car passed the police vehicle and turned on the Jericho road. Constable Forrester said he was able to see the driver of the car. He identified the applicant as the driver. About 15 minutes thereafter other police officers came to the assistance of the Constables and together they proceeded to Jericho. At the Jericho square the applicant was handed over by citizens to the police. Constable Forrester said that he saw the car that was being chased in Jericho on the premises of a church.

Constable Scarlett's evidence as to what took place up to the handing over of the applicant is more or less the same as that of Constable Forrester. However, thereafter they were not together at all material times in Jericho.

Constable Scarlett said he went to a church compound in Jericho where he saw a Toyota Corolla motor car which was being driven by the applicant during a chase. He identified the applicant to

Detective Sgt. Bernard and Detective Cpl. Cockburn, as the driver of the car. The applicant was taken to the Sandy Bay Police Station.

Detective Sgt. Paul Bernard who was stationed at the Area One Police Headquarters, Montego Bay stated that on November 15, 2002, he received a report and went to the Seaview Farm store in Lucea. From there he went to the Noel Holmes Hospital. There he saw the apparently dead body of Everald Miller whom he knew before. Whilst at the hospital he spoke to Detective Delroy Scarlett on the telephone. He along with other police personnel went in search of a Toyota Corolla motor car bearing registration number 2259DU. In the vicinity of Elgin Town, Hanover, he saw and spoke with Detectives Forrester and Scarlett. They all proceeded to Jericho district. On arrival at the Jericho square they were met by a group of citizens who pointed out a car registered 2259 DU which was hidden behind a church. Shortly after the car was shown to Sgt. Bernard, Constable Scarlett and Cpl. Cockburn took the applicant to him. They were instructed to take him to Sandy Bay Police Station.

Small groups of policemen and citizens went in different directions in the bushes in search of the men who were in the car. Sgt. Bernard stated that when he was in the bushes he heard gun shot explosions on two occasions. After a while he returned to the square. There he saw three men who appeared to be dead. Two of them had gunshot injuries and one had wounds apparently inflicted by the use of machetes. These

bodies were removed to the Noel Holmes hospital. At the hospital Mr. Linton Martin identified the bodies as those of the three men who had earlier that day robbed and killed the deceased. These bodies were also identified by the applicant as those of the three men whom he had taken to Lucea that day and who had entered the deceased's store and thereafter returned to his car.

On November 16, 2002, a party of police officers including Sgt. Bernard and Cpl. Cockburn escorted the applicant to Jericho square. Sgt. Bernard testified that Cpl. Cockburn and three other police officers went with the applicant into the bushes on the church premises. They returned with two firearms.

On November 25, 2002, Sgt. Bernard attended the Cornwall Regional Hospital Morgue. There he witnessed the post mortem examination of the body of the deceased by Dr. Sarangi.

On January 2, 2003 at about 5:30 p.m. Sgt Bernard interviewed the applicant. An attorney-at-law represented the applicant during the interview. The caution administered and the questions and answers were recorded. The document containing the questions and answers were received in evidence and read in open court. During the interview the applicant admitted ownership of the Toyota Corolla motor car 2259DU and that he was the driver at the material time. Thereafter Sgt. Bernard

charged the applicant with the murder of the deceased. After he was cautioned the applicant said "Mi nuh know nutten bout it."

During cross-examination by counsel for the defence, discrepancies between the evidence of Sgt. Bernard and that of Cpl. Cockburn were ferreted out. It is not necessary to refer to these as no complaint was made about the judge's directions in this regard.

Det. Corporal Orrett Cockburn was at the time attached to the Lucea Police Station. At about 2:30 p.m. on November 15, 2003, he received a telephone call. He said that along with Sgt. Bernard and another officer he journeyed to Mosquito Cove in a marked police vehicle. From there they proceeded to Jericho district in the company of other police officers. The police and citizens began to search the surrounding area. He told the Court that he went to the premises of the United Church of Jamaica and Grand Cayman where he saw a Toyota motor car with registration no. 2259DU. No one was inside the car. Back at the Jericho square citizens handed over the applicant to the police. Cpl. Cockburn said that as he held onto the applicant Constables Scarlett and Forrester identified him as the driver of the car from which shots were fired at the police during a chase. He escorted the applicant to the Sandy Bay Police station.

Later the same day he took the applicant to the scene of the murder at Seaview Drive. There he met with Sgt. Bernard and other police

officers. The police officers with applicant went into the deceased's feed store. The police found three 9mm spent shells and two expended bullets in the store.

Detective Cockburn returned with the applicant to the Lucea Police Station. He placed in an envelope the items found at the crime scene. The marked envelope was later handed to Corporal Caleb Anderson. Thereafter Detective Cockburn took the applicant to the Noel Holmes Hospital. There the applicant identified three bodies as those of the three men who were in his car earlier that day. He returned with the applicant to the Police Station.

The following day - November 16 - Detective Cockburn cautioned the applicant and told him that he would be charged with the offence of shooting with intent. The applicant said "A charter di man dem charter me and dis happen, mi don't know weh di gun dem hide". With the assistance of the officers he transported the applicant to Jericho district. The applicant he said, told him to stop the vehicle, in front of the United Church of Jamaica and Grand Cayman. Thereafter the applicant directed them along a pathway to a rock. The applicant rolled away the rock and exposed two pistols. Det. Cockburn took up the pistols. One of the firearms had a magazine with three live 9mm cartridges. There was also a 9mm cartridge in the breach of this firearm. The other firearm had a magazine with one live 9mm cartridge and one live 9mm

cartridge in its breach. The appellant's conduct in directing the police to the guns does seem inconsistent with his earlier statement, to wit, "mi don't know weh di gun dem hide".

The detective escorted the applicant back to the police station. In the presence of the applicant Det. Cockburn placed the firearms into separate envelopes which he sealed and labeled. The envelopes with contents were subsequently handed to Detective Cpl. Anderson.

Cpl. Caleb Anderson gave evidence that he took the envelopes with items found at the crime scene and the guns which the applicant assisted the police in recovering to the Ballistic Expert. Constable Lloyd Broadie testified that he retrieved them from the Ballistic Expert. Det. Inspector Carlton Harrisingh, the Government Ballistic Expert testified that he received the sealed envelopes from Cpl. Anderson. He tested the expended cartridges which were found in the deceased's feed store and the two firearms recovered with the assistance of the appellant. From these tests he concluded that the cartridges (found at the crime scene) were discharged from the guns (found on the church premises).

The Defence

The applicant made an unsworn statement to the following effect. He is a 32 year old building contractor of Portbella, St. James. He did not plan to rob or kill Mr. Miller. He adopted his statement in the recording of the questions and answers. He denied picking up the guns or giving them

to Det. Cockburn. On Saturday he was taken to Jericho there he saw a large number of police officers searching (for the guns). Sgt. Bernard asked him where were the guns. He replied, "mi nuh know bout no gun", however he pointed in the direction where the gunmen ran. He was in the police jeep when he heard someone shout "Bingo! Bingo!". He then saw an officer with two guns wrapped in a shirt. He was taken back to the station. He added:

> "I purposely ran the car off the road. The police did not come down there. They forced me to start back the car which I did. I am innocent of these charges."

Grounds of Appeal

Lord Gifford, Q.C. sought and obtained leave to argue the following supplementary grounds of appeal:

1. The appellant having advanced a credible defence both in the interview and in his unsworn statement, the learned trial judge erred in failing to sum up the defence fairly to the jury and/or in interspersing repeated adverse comments which tended to undermine the defence.

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(i) The appellant had claimed in his interview, which he adopted in his unswom statement, that he was a taxi operator; that he had taken the assailants as passengers in

good faith and without knowledge that they were armed; and that once he knew that they were engaged in a criminal enterprise he was unable through duress and fear to escape from their company.

(ii) On the evidence before the jury the appellant was not himself armed at any stage of the episode, and he did not attempt to escape into the bush with the assailants. Further he co-operated with the police in the recovery of two firearms.

(iii) When the learned trial judge reminded the jury of the appellant's account given in interview she adopted a prosecutorial role in repeatedly asking 'why was he still there?' (i.e. at the murder scene while the attack was taking place). The said comment was unfair in that (a) on the evidence of one of the prosecution witnesses the attack lasted 18 seconds and so there would have been little or no opportunity to escape; (b) the appellant had given an explanation in interview which merited fair consideration; (c) the comment was repeated over and over again.

(iv) In the premises the appellant was deprived of the benefit of an even-handed and balanced summing up to which he was entitled.

2. The appellant was a man of 30 years with no previous convictions. He was employed as a construction worker and taxi operator and had a reputation as a hard working man. However defence counsel failed for no good reason to elicit these facts and thereby the appellant was deprived of the benefit of a good character direction. A character witness was available and his evidence will be rendered before this court.

Ground 1- the summing-up

Lord Gifford Q.C. made no criticism of the trial judge's directions on law. His first complaint was that the trial judge did not put the questions and answers into a coherent narrative. The questions he contended were asked in a jumbled way. It would have been fairer, he submitted, if the learned judge had rearranged the answers in a logical narrative order as to the sequence of events as she did in respect of the evidence of the prosecution witnesses. The summing –up should at least summarise the main points made by the defendant he submitted. He relied on ***R v Akhtar*** [2000] 1Archbold News 2.

In reply to this criticism, Miss Barnett, Counsel for the Crown, submitted that the duty of the learned judge was to review the essential features of the evidence. The structure of the summing-up, she argued, cannot be impugned simply because the defence would prefer a special format.

We agree with counsel for the Crown. Indeed the submissions of Miss Barnett are based on dicta in ***R v Richardson*** [1994] 98 Cr. App R 174 at 178 where it was also said that the pattern of the summing-up, in what order and under what headings the evidence is marshalled are matters worthy within the trial judge's discretion.

The learned trial judge in the instant case faithfully and accurately placed before the jury, the applicant's defence. At the beginning of her summing-up she told the jury:

> " Now the accused has pleaded not guilty to this charge. He has told you that he was not a part of any plan to murder Mr. Miller. He did not participate in the murder of Everald Miller. The men were in his vehicle because they hired him to take them to the place, and he had no knowledge of their mission."

Lord Gifford Q.C. agrees that this is a fair and accurate summary of the defence. Near to the end of her summing-up the learned judge faithfully reminded the jury of the applicant's unsworn statement. At the end of this exercise the learned judge told the jury that the applicant had adopted

the answers to the questions put to him during the interview. She told them:

> "Along with the statement which the accused man made, he said the answers that are in the questions and answers are true. Because that is a part of his defence, remember he is not obliged to say anything, but he may attempt to prove his innocence. It is for you to make of it what, if any weight you give to his unsworn statement. This is evidence in the case. The answers which he gave to the police questions. So it is like a part of what he says in his unsworn statement and a part is evidence (sic) because this is in evidence before you."

Having thus directed the jury the learned judge told them that she would not be going through all the questions and answers and that they would have the opportunity to peruse all of them when they retire. The learned judge then proceeded to identify those answers which were essential to the issues in the case. In our view the structure of the judge's summing up cannot be impugned. In ***R v Soames-Waring*** The Times, July 20, 1998, a decision of the English Court of Appeal, it was said that where the judge had invited the jury to read the whole of the summary of an interview with a defendant who had not given evidence, and had then referred them to the salient parts in relation to each count, he had done all that he could reasonably be expected to do in placing before the jury what was being advanced as giving rise to a defence – see **Archbold Criminal Pleading, Evidence and Practice** 2003 at para 4-376.

In the instant case the learned judge at the outset summarized in clear terms the applicant's defence, then she reminded them of his unsworn statement, she invited them to read the whole of the interview and referred them to the salient questions and answers in relation to the issues raised. In our view no more could reasonably be expected of her.

The second complaint of the applicant is that the judge interlarded her presentation of the defence case with a series of comments, so that the defence was never presented to the jury as a coherent story. This criticism is directed at the judge's comments on the answers given by the applicant during the interview.

The first passage to which Lord Gifford Q.C. drew our attention is at p.346 of the transcript. The learned judge made reference to the answer to question 9 which reads:

> "**Q. 9:** On the 15th November, 2002 did you park this car along Main Street, Lucea, Hanover in front of the container?
>
> **A:** Yes, but a never no long time."

Then followed the impugned passage:

> "Then again you will recall what I said to you about the evidence of Miss Trench and about how you must look at he time, when you are seeking to assess time, in this incident. And you look at what Mr. Martin said that was not challenged. He said five to seven minutes. You

> look at the situation and see what you make of it."

The judge had earlier reviewed the evidence of Miss Trench and Mr. Martin in regards to the interval of time from the time the two gunmen entered the store to the time they left. Mr. Martin's evidence was that they were in the store for about 5-7 minutes. Miss Trench at first said 5-10 minutes. However, when she was asked to make two taps to indicate this period, the interval of time between taps was 18 seconds. The judge told the jury that they were entitled to take into account what Miss Trench said took place in the store, whilst the gunmen were present, in determining whether it was 18 seconds or 5-10 minutes. Lord Gifford Q.C. contended that what the learned trial judge told the jury in effect was that they should not rely on Miss Trench's tapped time of 18 seconds. He complained that the judge made strong comments when dealing with the "time" aspect and invited the jury to consider that the five to ten minutes was a more accurate assessment. Further, he complained that the judge failed to remind the jury that the applicant had said that it happened quickly and that he did not move because the third man was close to the car and he did not know that he had a gun. The judge, he said, undermined one of the important points of the defence.

The learned judge in reviewing the evidence relevant to this aspect referred to Miss Trench's evidence as to what took place after the third

man entered the store. Her evidence is that he "dragged her money away." She "dragged it back"; he hit her on the shoulder; someone said "leave the woman alone"; the two gunmen who first entered the store shot at the deceased; they went up to the till and took the money; they shot the deceased who fell; the men then ran out of the store. After referring to the above the learned judge continued:

> "Those are the circumstances; if you accept that is what happened in that store, which you need to look at and come to your own determination as to whether the five to ten minutes was a more accurate assessment and that as she is standing in the witness box and being put on the spot, to tell you when the five to ten minutes are up, that she just tap one time to begin and (tap), the other time to end."

We agree with Miss Barnett that the learned trial judge was not inviting the jury to conclude that Mr. Martin's estimate of the time was the more accurate. The learned judge was clearly assisting the jury by telling them to adopt a commonsense approach in assessing the evidence of Miss Trench. It was certainly her duty to assist the jury in relating the evidence to the issues to be resolved. She reminded the jury of the applicant's defence by repeating and commenting on answers to questions 9, 10 & 11. Although the judge had a duty to review the evidence fairly and accurately this does not mean that she must rehearse it "blandly and uncritically." As Simon Brown LJ said in ***R v Nelson*** [1997] Cr. L.R. 234 the

judge "has no duty to cloud the merits either by obscuring the strengths of one side or the weakness of the other."

It is true that the judge did not specifically direct the jury that the critical time was when the third man entered the store. However, the relevant time would not have escaped the jury. Moreover, the learned judge in her directions referred to what took place after the third man entered the deceased's store as critical in the jury's consideration of the "time" issue. In our view the judge's directions on this aspect of the case were balanced and adequate.

The next passage which attracted the criticism of Lord Gifford Q.C. concerns question 14 and is at p.347 of the transcript. Question 14 is as follows:

> "Did you see any of these three men with firearms?

The answer:

> "The only time I see them with gun is when them point it at me and tell me to pull over."

In her comment the judge said:

> "Pull over where? And when at the container, when he is in front of the container he does not tell you of anything happening there. Is that where he was told to pull over? There is no evidence of him pulling over anywhere else. But that is what he said now."

We think that with proper punctuation this should read:

> "Pull over where? And when? At the container? When he is in front of the container? He doesn't tell of anything happening there..."

The only complaint in respect of this passage is that "it seems to be weakening the defence of duress". We think that this comment is favourable to the applicant. It could in no way weaken his defence of duress. Although the applicant did not in his answer state where he was told to pull over and did not in his unsworn statement seek to clarify this, the learned judge was suggesting to the jury that this might have taken place in front of the container (the store). It is fair to say that Lord Gifford Q.C. did not seek to make much of this point.

Learned Queen's Counsel also criticized the judge's comment on the answer to question 15.

> "**Q. 15:** Why did you drive your car to Lucea in the first place?
>
> **A:** I was at Gully bus stop when I saw the one they call Orville who I know because of football. Him ask me fi go a Lucea and I said $1,500.00 Him tell mi fi pick him up a Catherine Hall at the second roundabout second left. Him no give no time. Him say by the time mi reach over I (sic) will be there. When mi reach over deh a three a dem and mi just carry them."

The judge's comment was:

> "You need to look at that and ask yourself whether this agreement was formed. You are not to speculate. You use the evidence that you have before you and see what inferences you may draw from it, and later on when other things are said, you may want to put that together and see whether that is what you think happened?

Lord Gifford's complaint is that the summing-up suggests that a plan was formed in Montego Bay. There is no evidence, he submitted, that this plan must have been formed in Montego Bay. The judge was inviting the jury to speculate, he complained.

We do not think this criticism is well founded. The learned judge did not suggest that the plan was formed in Montego Bay. The learned judge, in our view, was simply directing the jury that in deciding whether or not the agreement on which the Crown's case was based, was established, they should look at all the evidence and determine what inferences they may draw. She clearly warned them against speculation. The critical issue before the jury was whether or not the applicant was a party to a plan to rob and kill. The learned judge in her comment on the applicant's answer to this question did no more than direct the jury that they should look at the statement in the context of the evidence and ask themselves whether there was an agreement involving the applicant.

We are not convinced that the judge was inviting the jury to speculate about the agreement.

The judge's comments on question 16 bore the brunt of Lord Gifford's criticism. Question 16 reads:

> "**Q:** Why didn't you drive away when the men came out and went into the container?
>
> **A:** He was close to the car and mi nuh know if him have gun."

The judge's comments which are criticized by Lord Gifford Q.C. start at page 348 of the transcript:

> "You might find that curious, Madam Foreman and members of the jury. What does that answer mean? Up to this point unless it was when they came to the container, as I had pointed out before, unless it is when they came to the container, that they pulled the gun on him. Why would he think that it is possible that this man might have a gun he has only gotten a charter to take these men to Lucea, and he has come to Lucea."

Lord Gifford Q.C. complains that this statement completely destroys the point the applicant was making, namely, that he saw two men with guns at Lucea. He did not drive away because he was scared that the man close to him might have a gun. We have examined the applicant's unsworn statement and his interview by the police. We are unable to

agree with learned Queen's Counsel that the judge's statement could have the effect complained of.

In his unsworn statement he made no mention of the gunmen pointing guns at him and telling him to pull over. In his answer to question 14 (supra) he said :

> "The only time I see them with gun is when them point it at me and tell me to pull over".

However, as Crown Counsel correctly pointed out there is no evidence as to when they told the applicant to pull over. It was the state of the evidence which prompted the judge to make the statement complained of. In any event, any unfavourable effect that the passage might have had was dispelled by the judge in the passage which immediately followed. Indeed Lord Gifford Q.C. agreed that in the succeeding passage the defence was "put back on the right track."

Learned Queen's Counsel also criticized the following passage which starts at line 13 of page 349:

> 'He is in the vehicle, the man is out. All of them are out and he still remains there. Does that mean as the prosecution is asking you to infer that he knows well what is going on and that his part is to remain in the car to wait until they come out to make an escape?
>
> They are coming from Montego Bay. This is a robbery. He is still in the car. He is waiting for

> them to come out. A matter for you. Up to now, its just a charter and he parks in front of the container and then he tells you later on that while he is there he heard gun shot and it sounded to him like it was coming from the container, but he is still there. He is still in the car and he is able to move but he is still there. Why was he still there?"

The learned judge reminded the jury of the applicant's statement that he heard gun shots "up where the container was." Then she continued:

> "Why is he still there? That's a matter for you, Madam Foreman and members because you see, this is what the prosecution is saying, You look at the evidence and you try to put it all together and ask yourselves these serious questions. Use your commonsense and your experience and wisdom."

Lord Gifford's criticism is that the learned judge turned herself into a prosecutor and lost the balance which a judge should show. She went far beyond the bounds of permissible comment, he complained. According to Lord Gifford Q.C. the refrain "he is still there" , "still in the car" was repeated no less than eight times. "Still there," he complained , would still be ringing in the ears of the jury when they retired. The comment, he said, would not be fair at all if the time span was very short. The applicant, he contended, might well have been in fear that the third man would see him drive away and shoot him. He referred to ***Mears v R*** [1993] 97 Cr. App. R 239 and ***R v Bentley*** (deceased) [2001] 1 Cr. App. R. 327 in support of his contentions.

In ***Mears*** (supra) at page 243 their Lordships expressed the view that comments which fall short of a usurpation of the jury's function, may nevertheless be so weighted against the defendant at trial as to leave the jury little real choice other than to comply with what are probably the judge's views or wishes.

In ***Bentley*** (deceased) (supra) the English Court of Appeal emphasized the necessity to strike a fair balance as between the prosecution case and that of the defence. In that case the Court held that the language used by the judge in denouncing the defendants and their witnesses was not that of a judge but of an advocate.

Miss Barnett for the Crown, submitted that the comments were not made in such a way as to make the summing up fundamentally unbalanced. She relied on ***R v Nelson*** [1997] Cr. App. R 234 and **Archbold** (supra) paras. 4 – 376 and 7-67. In ***Nelson*** (supra) it was contended that the judge's summing up was fundamentally unbalanced. In dismissing the appeal the Court of Appeal (England) held that although every defendant had the right to have his defence whatever it might be, faithfully and accurately placed before the jury, he was not entitled to demand that the judge should conceal from the jury such difficulties and deficiencies as were apparent in his case. We accept this as a correct statement of the law. As the commentary

indicates, if in putting the defence absolutely accurately, the trial judge also necessarily exposes the logical deficiencies of the defence case, it can hardly be said that the judge has behaved with impropriety. The point is also made in the commentary, with which we agree entirely, that where there is a straight contest between the versions of events testified to by the prosecution witnesses and the defence, "the judge must aim to construct the summing-up in such a way as to remind the jury fairly of both versions". However, where "the prosecution's version seems to bear the hallmark of a plausible real-life incident, while the other is "riddled with implausibilities inconsistencies and illogicalities" the contrast between them cannot help but operate against the defendant's interests."

In ***Bentley*** (deceased) (supra) the Court quoted with approval the following statement of Channell, J. in ***R v Cohen and Bateman*** [1909] 2 Cr. App. R. 197 at 208:

> "It is not wrong for a judge to give confident opinions upon questions of fact... It is necessary for him sometimes to express extremely confident opinions. The mere finding, therefore, of very confident expressions in the summing up does not shew that it is an improper one. When one is considering the effect of a summing up, one must give credit to the jury for intelligence, and for the knowledge that they are not bound by the expressions of the judge upon questions of fact.

> No doubt the learned judge did express himself very strongly. But on the main question we think him right."

In the ***Cohen and Bateman*** case (supra) the indictment contained ten counts. It was argued, inter alia, that the judge's summing-up was wrong upon the facts and that the judge did not state ***Cohen's*** case upon a single one of the charges. One of the complaints was that when counsel was cross-examining Cook (a witness) the learned judge said he was wasting time, and that every topic he introduced went against his client.

The English Court of Appeal in dismissing the appeals said at p. 210:

> "The real grounds of complaint assigned by each appellant are that the learned judge did not put their respective cases so far as they were in their favour; that he assumed facts which did not exist; that he did not put the facts fully and sufficiently; and that he interrupted the prisoners and their counsel. Do these grounds of complaint amount to a miscarriage of justice? We are all of the opinion that the summing-up is not what it ought to have been. If the learned judge could have revised it, he would probably have corrected it. If it had led to a miscarriage of the justice it would be different. But we all think that the facts were such that if the verdict had acquitted either of the prisoners it would not have been a reasonable verdict."

It was clearly the Court's view that a faulty summing-up was not necessarily a ground for quashing a conviction. In a very recent case, ***Bruce Howse v The Queen*** P.C. Appeal No. 9 of 2005 delivered the 19th July, 2005, their Lordships' Board by a majority dismissed the appeal in

spite of "undeniably very serious errors" on the part of the trial judge. In that case the judge in explaining to the jury why she was not leaving manslaughter as a possible verdict, described the killings in terms which were unduly emotive and capable of fuelling prejudice. In addition to that she admitted a large body of inadmissible hearsay evidence and she failed to direct the jury that evidence of complaints was not to be treated as proof of the truth of the allegations, but only as proof that the allegations had been made and that the appellant was aware of them. Their Lordships concluded that "the errors were not radical or fundamental enough , nor were they such a departure from the essential requirements of the law as to deprive the appellant of a proper trial..." Their Lordships held that the conviction was not "fundamentally flawed".

In the instant case, as we stated before, the judge reminded the jury of the entire unsworn statement of the applicant. She made his statements given during the interview available to the jury and referred specifically to certain questions and answers. Her comments on the applicant's answers to those questions were for the most part a rehearsal of the points made by the prosecution. On at least two occasions during this exercise she told the jury: "This is what the prosecution is saying". In the general directions to the jury the learned judged made it abundantly clear to the jury that they were not bound to accept any comments she made on the facts.

We are clearly of the view that the learned judge's comments did not bring about the verdict of the jury. Further we hold that they were not fundamentally unbalanced.

The final complaint concerns the judge's comments on the applicant's answer to question 30:

> **"Ques.30:** When the men came out of Mr. Miller's business place did you see them with money in their hands?
>
> **Answer:** No, but when them in a the car one ask the next one if them get money and wah mek kill him the man and one said mi see him a dip fi something.
>
> What mek you no tek him gun."

The judge's comment on this is (pp.353-4):

> "Well the evidence that you have heard from the prosecution witnesses that all three of them fired so which one of them would have asked the question? In any event lets say the question was asked. Remember my direction of (sic) common design. <u>You may find it easy to infer that it must have been in their intention that the gun would come into play. All four would be fixed with the intention of killing</u> or anything that transpire as a result of that mission."(emphasis added).

The underlined words were criticized by Lord Gifford Q.C. as unfair. He complained that the judge used a conversation between the three men as reported by the applicant as a basis for commenting that it was easy to infer that all four were fixed with the intention of killing.

We agree with Lord Gifford Q.C. that the comment of the learned judge might have led the jury to think that the judge was saying that the conversation as reported supports the prosecution's contention that all four men were involved in the murder. In this regard the comment is unfortunate.

However, the cases we have already referred to clearly show that a mistake of the judge as to fact is not by itself fatal. It must be shown that as a result of such a mistake there was a miscarriage of justice. In our judgment this error, neither by itself nor cumulatively with the other comments complained of, was not radical or fundamental enough as to deprive the appellant of the substance of a fair trial. We are clearly of the view that the judge's summing up to the jury read as a whole was not unfairly adverse to the applicant. Accordingly this ground fails.

Ground 2

Lord Gifford Q.C. did not argue this ground as pleaded. He was permitted to argue instead that the requirement that the applicant should serve at least 20 years before becoming eligible for parole was in all the circumstances manifestly excessive. We were asked to consider the applicant's good character evidence contained in an affidavit by a Reverend Dixon.

We accepted the arguments of Lord Gifford Q.C. that in the circumstances of this case the time to be served before parole may be considered, should be at the lower band of the range. We therefore vary the sentence by substituting 15 years for 20 years.

Conclusion

The application for leave to appeal against conviction is refused. The hearing of the application for leave to appeal against sentence was treated as the hearing of the appeal against sentence. The appeal against sentence is allowed. Sentence varied as follows: Imprisonment for life. Prisoner not to become eligible for parole until he has served at least 15 years. Sentence is to commence as of May 25, 2005.