JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL 16/91

COR: THE HON. MR. JUSTICE CAREY, P. (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

R. v. ASTON WILLIAMS

Carlton Williams for the Appellant

Miss Carol Malcolm for the Crown

9th & 30th November, 1992

FORTE, J.A.

The appellant was tried and convicted on the 29th January 1991, in the Circuit Court for the parish of Manchester for the murder of Huzel Facey committed on the 6th June, 1988. He was sentenced to death.

Having regard to our conclusion, there is no necessity to set out in detail the facts of the case. It is sufficient to state them summarily. On the 6th June, 1988 the day on which the deceased met his death, the appellant was seen at about 6.00 p.m. in the district called Good Intent, by a witness Robinson when he held unto Robinson's "collar" demanding that he (Robinson) take him to Whitby district, and call his cousin Douglas Facey from his house. It was conceded on both sides that about two days previously, the appellant had had an altercation with Douglas Facey who had succeeded in inflicting two injuries to his (the appellant's) arm with a machete. Robinson, insisted that he would not answer the request of the appellant, who was then in the company of four other men. At that time, the witness observed Huzel Facey, the brother of Douglas, in the distance, on the said road. The appellant then stated "A mus kill somebody tonight," then letting

go of Robinson, proceeded in the direction of Huzel Facey. Before departing however, he stated "Tomorrow I dont want nobody fe call me name in a anything."

The evidence for the Crown, then shifted to 8.00 p.m. that same night, in Whitby District, where the witness Elvie, was at home, just about to have a bath when he heard the voice of Huzel Facey whose voice he had known before and could identify, saying "Lumsie you kill me." The voice came from across the road. He nevertheless, had his bath, and thereafter came out of his house, and in the area from which the voice had come, he observed Huzel Facey, lying on the street apparently dead and with "cuts all over his body". There was evidence that the appellant was known in the area as "Lumsie."

The application for leave to appeal, which we grant and the hearing of which we treat as the hearing of the appeal, concerned solely with the nature of the statement attested to by Mr. Elvie, and the manner in which the learned trial judge treated it in his directions to the jury. This statement "Lumsie you kill me" was incorrectly dealt with by the learned trial judge, as a dying declaration, and accordingly his directions were consistent with that type of evidence. The circumstances in which the statement was made, disclosed that it was made as part of the res gestae and should have been admitted on that basis. The evidential basis for this principle was settled in the case of **R. v. Andrews** [1987] 1 All E.R. 513 since cited with approval in this Court in the cases of **R. v. Hankle** S.C.C.A. 163/90 dated 23rd March, 1992 and and **R. v. Osbourne** S.C.C.A. 61/91 dated 23rd November, 1992.

In the **Andrews** case (supra) it was held that:

> "Hearsay evidence of a statement made to a witness by the victim of an attack describing how he had received his injuries was admissible in evidence, as part of the res gestae, at the trial of the attacker if the statement was made in conditions which were sufficiently spontaneous and sufficiently contemporaneous with the event to preclude the possibility of concoction or distortion. In order for the victim's statement to be sufficiently spontaneous to be admissible it had to be so closely associated with the event which excited the statement that the victim's mind was still dominated by the event. If there was a special feature, eg malice, giving rise to the possibility of concoction or distortion the trial judge had to be satisfied that the circumstances were such that there was no possibility of concoction or distortion. However, the possibility of error in the facts narrated by the victim went to the weight to be attached to the statement by the jury and not to admissibility."

In his speech Lord Ackner, in the following words which were cited with approval by this Court in the case of **Hankle v. R** (supra), stated the duty of a trial judge in such cases:

> "Where the trial judge has properly directed himself as to the correct approach to the evidence and there is material to entitle him to reach the conclusions which he did reach, then his decision is final, in the sense that it will not be interfered with on appeal. Of course, having ruled the statement admissible the judge must, as the Common Sergeant most certainly did make it clear to the jury that it is for them to decide what was said and to be sure that the witnesses were not mistaken in what they believed had been said to them. Further, they must be satisfied that the declarant did not concoct or distort to his advantage or the disadvantage of the accused the statement relied upon and where there is material to raise the issue, that he was not activated by any malice or ill-will. Further, where there are special features that bear on the possibility of mistake then the juries' attention must be invited to those matters."

The learned trial judge did not treat the statement as part of the res gestae, and so could not have addressed his mind to the conditions which needed to be satisfied before it could be admitted into evidence. As a result, he gave no directions to the jury in this regard. The opportunity for concoction, or the question whether the deceased might have been activated by malice when he made the statement was not left for the jury's consideration. In addition, and of far greater significance, the jury were never directed, in what by virtue of the statement, was visual identification, as to the caution that must be exercised in acting upon such evidence in the absence of some other evidence supporting it. In our view in such circumstances, the jury ought to have been adverted to the fact that the statement though admitted in evidence was not subjected to cross-examination, and be reminded of the particular circumstances under which the identification was made and the opportunity that existed to facilitate an accurate identification, or which might have resulted in a mistake (see **R. v. Osbourne** (supra)

The only indication that the learned trial judge had this in his mind when delivering his summation was in the following:

> "It was night as well. Defence Counsel makes the point, it is a matter for you, that in the darkness was it possible that the deceased could have been mistaken?"

In our view, this was insufficient, and fell far short of the careful directions as indicated above, which must be necessary in such circumstances as existed in the case.

In the event, the conviction cannot stand. We considered, whether having regard to the other evidence in the case, we should apply the proviso, but as we cannot say that the jury, having been properly directed, would have come to the same conclusion, we have decided that in the interest of justice a new trial should be ordered. The appeal is therefore allowed, the conviction quashed,

sentence set aside and a new trial ordered. Having regard to the passage of time, since the offence was committed, we order that the trial takes place in the next session of the Manchester Circuit Court.