JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 65, 66, 67 & 134/90

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

R. v. BYRON YOUNG
LORENZO SHARPE
SAMUEL THOMAS
HEXFORD MORRISON

Dennis Daly, Q.C., for Byron Young

Carlton Williams instructed by Mr. A.J. Nicholson for Lorenzo Sharpe

Barry Johnson for Samuel Thomas

Jack Hines for Hixford Morrison

Lancelot Clarke Jnr., for Crown

February 24, 25, 26 & March 16, 1992

FORTE, J.A.

On the 25th April, 1990 in the Clarendon Circuit Court, the applicants were convicted for the murder of Elijah McLean committed on the 24th January, 1989. The matter now comes before us as an application for leave to appeal the conviction.

The Crown alleged that the applicants were among seven men who entered the two-room house of the deceased on the early morning of the 24th January, 1989, woke him, while he was in bed with his commonlaw wife, and his baby, pulled him out of the room, and took him outside, and using machetes chopped him in several places on his body thereby killing him. At the post mortem examination the doctor found nineteen wounds on the body of the deceased, all of which he testified could have been inflicted by a machete. Death was caused by shock and asphyxia as a result of multiple injuries. Of significance, were the following injuries both of which in the doctor's opinion were

delivered by a great degree of force.

1. An incised wound on the right cheek and the nose bridge, length 3 inches, in depth one inch, cutting through the bones.

2. An incised wound on the left wrist almost completely severing the wrist through the joint. It was attached only by the skin and subcutaneous tissues.

The other wounds were throughout the whole body, several to the head, neck, the thorax, and the flank. On internal examination the doctor found -

1. Both lungs were collapsed with petechiae ecchymosis on the surface i.e. pin-point haemorrhages.

2. In the abdomen and contents there was a fatty liver. There was a retro-peritonal haematoma on the left. It was bleeding into tissues and it was caused by a punctured wound on the left flank posterior. It had caused internal bleeding.

Several grounds of appeal were filed by counsel for each of the applicants, most of which were directed at the treatment by the learned trial judge, in his direction to the jury, of the identification evidence. The major complaint however concerned certain discrepancies that existed in the evidence for the prosecution and the effect that they could have had on the credibility of the identification of the applicants.

In order to understand the complaint, it is necessary to record a summary of the evidence upon which the prosecution relied in proof of its case.

On the fateful morning, the three witnesses for the Crown, Clement Howell, Desmond Taylor and Beryl Page, were asleep in one of the rooms of the two-room house in which the incident occurred. They were all awakened by sounds emanating from the other room, in which the deceased was in bed with his commonlaw wife and their baby. All three witnesses, came out of their

bed, and went to the doorway, which leads into the other room. There they saw, the applicant Byron Young with a flashlight in one hand and a gun in the other. The six other men each had a machete in his hand. Young was standing by the external doorway with the gun pointed at the deceased who was then in his bed. The other men including, the applicants Thomas, Sharpe and Morrison, were standing by the bed of the deceased. The witness Howell testified that while the deceased sat on his bed, one of the men chopped him on his forehead. All seven men then pulled him off the bed, and proceeded to lift him bodily out through the external door. The deceased, however held unto the door, and was then chopped on his hand by the applicant Lorenzo Sharpe (o/c Ringo) thereby causing the injury described by the doctor (No. 2 supra). The men then took the deceased some distance out into the yard, where he was seen to be chopped several times by six of the men, while Young stood in their midst with his gun still in his hand. Having done so, the men departed, leaving the deceased dead, and in a pool of blood.

All the applicants, in unsworn statements maintained that they were not present at the scene and had no knowledge of the murder of Elijah McLean.

The issue was therefore one of identification and the defence was solely directed at the witnesses' credibility and their ability, given the circumstances that existed, to correctly identify the applicants. It is not surprising therefore that before us, the applicants, for the most part, advanced complaints concerning the manner in which the learned trial judge dealt with certain aspects of the evidence, which counsel contended, would necessarily affect the jury's determination of the identification.

The contentions which arose from the arguments are adequately set out in the grounds of appeal filed by counsel for the applicant Thomas, which are set out hereunder, and will be used to deal with the arguments led by Mr. Daly, Q.C., for Young and which were adopted by counsel for the other applicants. The grounds of appeal read:

1. The question of identification was a live issue in the case and the learned trial judge failed to highlight the discrepancies in the evidence of the Crown witnesses as to the lighting in the room at the time of the incident and consequently failed to give the jury adequate directions as to how they should treat such evidence.

2. The learned trial judge failed to highlight the discrepancies in the prosecution witnesses' evidence as to the chopping which took place both inside and outside the deceased's room and accordingly his direction amounted either to a misdirection or no adequate direction in all the circumstances.

In addition two other grounds argued, were as follows:

3. (i) That the learned trial judge fell into error when he advised the foreman and members of the jury who had failed to arrive at the unanimous verdict that their verdict must be unanimous one way or the other.

   (ii) That the effect of this direction was to have cajoled the jury into the verdict of guilty.

4. That the learned trial judge's direction to the jury on the issue of the unsworn statement made by the applicants was misleading to wit -

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   "Now, all four of them elected to make an unsworn statement. They did not come into the witness box and give evidence on oath like the prosecution witnesses and I will tell you this about that. The absence from the witness box cannot provide evidence of anything, but when you are assessing the quality of the identification

> "evidence you may take into consideration the fact that it was uncontradicted by any evidence coming from anyone of them."

Ground 1 - Discrepancies re Lamp Light

The discrepancies which arose on the evidence arose in the following instances.

(i) The witness - Beryl Page, one of the eye-witnesses who was present at the doorway, testified that at the time the men were in the room there were two lighted lamps in the house. One in the room in which she slept, and the other in the room of the deceased, into which the appellants had come. In cross-examination it was suggested to her that she had said at the preliminary enquiry that no light was in the room of the deceased. Her answer was treated by the learned trial judge as an admission that she had in fact said so.

(ii) The witness Taylor, who was also in the house at the time, did not testify that the lamp in the room was lit whereas the other witnesses Page (if her evidence at the trial was accepted) and Howell, maintained that the lamp was lit.

(i) Inconsistency - Page

It is unchallenged that the learned trial judge in his general directions, gave the jury adequate instructions on how to deal with discrepancies and inconsistencies which may have arisen in the evidence. He stated thus at page 150:

> "... Now, when you consider the evidence, if you find these discrepancies, these inconsistencies, these contradictions, you will have to consider whether they are slight or serious, whether they are material or immaterial. If they are slight you will probably think they do not really affect the credit of the witness or witnesses concerned at all. On the other hand, if they are serious you may say that because of them it would not be safe to believe the witness on that point

> "at all. It is a matter for you to say, in examining the evidence, whether there are any such inconsistencies, discrepancies or contradictions and if so, whether they are slight or serious, material or immaterial and you will bear in mind what I have just told you, the principles that I have just told you about. ... You have seen and heard the witnesses and it is for you to say whether the inconsistencies are profound and inexplicable or whether the reason which has been given for the inconsistencies are satisfactory."

Immediately after these general directions the learned trial judge proceeded to deal with the discrepancy which has formed the basis of complaint before us. This is, how he dealt with it:

> "Much has been said about the testimony of the last witness for the Crown, Beryl Page, the little girl, and you were told that at a preliminary enquiry held in Chapelton she said something different then from what she said here on oath. Mr. Foreman and members of the jury, I will have to deal with that. First of all, let me remind you of what the difference was.
> You will recall that she said that in this room on that night, the room that the deceased was in, there was a lamp and that the lamp was lit. It was put to her - well she said that she was able to recognize the persons that she saw inside there by the light that was inside there, which consisted of flashlight, moonlight and lamplight. It was put to her that at the preliminary enquiry she said she saw the men as the moon was shining and from the flashlight and the lamp was out, and further she said, 'Light was not in my uncle's room. The house had no light. I could see from moonlight and flashlight.' She admitted to you, Mr. Foreman and members of the jury, that she did say that; both of these statements, she did say so at the preliminary enquiry hearing and you may

> "think that what she had said previously, the statement she made then was inconsistent with the evidence she gave in this court.
> Now, I have to tell you two things about that matter. The first is that the statement which was put to her, save for those parts of it which she has told you are true, are not in any way part of the evidence in this trial. You must put its contents out of your minds when you consider the evidence.
> The second is that the fact that she has previously made a statement which was inconsistent with the statement or the evidence she has given here is a matter which you can take into account in considering her credibility as a witness.

These directions, contrary to the contention of the applicants, do indicate that the learned trial judge did remind the jury of this discrepancy. Mr. Daly, Q.C., however, contended further, that the learned trial judge should have directed the jury that the discrepancy had the effect not only of discrediting the witness generally but also had effect upon the issue of the reliability of her identification.

It ought to be noted however, that the witness' testimony, except for an account of the incident as it unfolded, was directed solely to the identification of the applicants, and the discrepancy being in relation to one of the sources of light which gave the opportunity for identification, any finding which discredited her testimony, would necessarily affect her evidence of identification. To put it another way, if the jury, as a result of the discrepancy found that her testimony was unreliable then it would necessarily follow that her identification of the applicants would be unreliable, that being the gravamen of her testimony. The learned trial judge's direction (supra) taken in context therefore, dealing as it did with the area of the identification evidence, namely lighting - in which the inconsistency occurred, must have been understood by the jury to have been a direction as to the effect of that inconsistency on

the witness' credibility in so far as her identification of the applicants was concerned.

The learned trial judge in dealing with the question of identification however returned to the question of lighting - making special reference to the discrepancy in the evidence of Page.

> "Next thing you have to consider Mr. Foreman and Members of the Jury, whether there was any lamp in the room and here Mr. Foreman and Members of the Jury, you have to draw on your experiences. I told you yesterday about the inconsistent statement made by the witness Beryl Page, what she said on a previous occasion, which differed from what she said here. Her evidence in this court is that the lamp was in the room burning and the evidence of Clement is that the lamp was in the room burning. Mr. Foreman and Members of the Jury, you will have to say whether that was so or not; whether you can accept that evidence."

Here then he deals specifically with the discrepancy in the context of a review of all the evidence in relation to the issue of identification. Indeed his introduction to his analysis of the evidence demonstrated to the jury the care with which they were required to approach such evidence. He commenced thus, at page 164:

> "The live issue in this case is one of identification and you have heard both from learned counsel for the crown and learned defence counsel that the issue of the light on that night is most important. This is a case where the case against these four accused men depends substantially on the correctness of one or more identification of each defendant which the defence says is mistaken. I must therefore warn you of the special need for caution before convicting in reliance on the correctness of the identification."

He then proceeded to inform the jury of the reasons for this caution, and to assist them by reviewing the evidence in relation to the circumstances of the identification with a special review of the evidence in relation to the opportunity for identification. Of this, no complaint has been made.

In addition, the learned trial judge also gave a special warning as he was required to do, of the dangers of acting upon the evidence of Page without corroboration, she being a young girl of tender years.

At the end of the day the jury must have understood that their approach to the evidence of Page had to be very cautious, given the discrepancy, the fact that it related to visual identification and that she was a young person of tender years. In those circumstances, we are unable to say that the jury were not properly directed in this regard.

Mr. Hines, however, in advancing his arguments on this ground contended that the duty on the learned trial judge is not just to point out generally that there are discrepancies but in addition, he ought to point out to the jury that where there are material discrepancies and if they are left unexplained or unresolved, they cannot make a positive finding of fact and that the resolution cannot be a matter of conjecture but must come from the mouth of the witness. For this proposition he relied on **R. v. Noel Williams and Joseph Carter** S.C.C.A. 51 & 52/86 (unreported) dated 3rd June, 1987. The dicta of Kerr, J.A., reflects the submission of Mr. Hines at page 7:

> "It is clear that the judge was impressed by the witness Morris. However, having in his own words admitted the inconsistency, then unless it is immaterial some explanation is essential before the evidence in Court can be accepted and relied on in relation to that particular point. ... There may be a credible explanation but the explanation must come from the witness: it cannot be supplied by well meaning conjecture."

Mr. Hines then maintained that in the instant case no explanation for the discrepancy was given by the witness Page, and the learned trial judge, erred in not directing the jury that in the absence of an explanation, they ought not to accept her testimony on that point i.e. that the lamp in the deceased's bedroom was lit at the relevant time.

During the arguments, however, it appeared to us that the witness may not have specifically admitted giving the inconsistent evidence at the preliminary enquiry and in any event in our view gave an explanation, which neither the learned trial judge nor defence counsel seemed disposed to allow her to give.

In order to demonstrate this, some references from the transcript of the evidence is necessary.

The issue arose in the cross-examination of the witness by defence counsel as follows:

Page 111- Q. "Miss Beryl, listen good yuh nuh. Didn't you tell the judge at Chapelton, 'I saw the men as the moon was shining and from the flashlight. The lamp did out.' You never tell the judge that?

A. The lamp did out?

HIS LORDSHIP: Have you looked at the original?

MR. NICHOLSON: We will look, m'Lord.

Q. Yes. Let me put to you again, didn't you tell the judge - yuh listening? Listen good yuh nuh. Didn't you tell the judge at Chapelton, 'I saw the men as the moon was shining and from the flashlight. The lamp did out.' Nuh suh yuh tell the judge at Chapelton?

A. Yes, sir.

Q. Go little further to.

Q. HIS LORDSHIP: What she said? Yes?

WITNESS: Mi nuh say yes, like yuh talking to me and mis: say yes, sir.

Q. All right, tell me, Did you tell ...

A. Mi tell him sey a Moon and flash-light and lamp.

Q. You never tell the judge suh?

A. No.

Q. You never tell her suh?

A. No sir. ...

Page 112 - Q. Yes, man. Suggesting to you that you tell the judge on a second occasion, in answer to this gentleman, Mr. Johnson here, when he was questioning you down at Chapelton, you told the judge: 'The light was not in my uncle's room. The house had no light. I could see from the moonlight and the flashlight.' You never tell the judge suh at Chapelton?

HIS LORDSHIP: What's the answer to that?

WITNESS: Yes, sir.

HIS LORDSHIP: Answer loud let the lawyer hear what you are saying.

WITNESS: Yes, sir. The lamp did light first.

Q. 'The light was not in my uncle's room. The house had no light. I could see from moonlight and flashlight.'

A. Yes. ...

Page 113 - Q. Will you listen. Listen, a don't finish yet. I am not talking about no moonlight or flashlight, talking about other light. Why you come here and tell the judge and the jury that the lamp did on both in your room and your uncle room?

A. But the lamp did on.

Q. Then why you tell the judge at Chapelton ...

A. Then afterwards it out."

It appears that the witness as she explained during the course of the above extract, used the word <u>yes</u> not as an affirmative answer, but to indicate that she was hearing what counsel was saying. In addition she was consistent in her denial, until pressed, she seemed to have given a qualified admission indicating that 'the lamp was on and then it was out.' In re-examination, she explained that the lamp was lit when the men

came in and went out when they were leaving. Assuming then, that she admitted that she used the words alleged at the preliminary enquiry, she did offer an explanation. In those circumstances, it was incumbent on the learned trial judge to leave that explanation for the consideration of the jury in the determination of her credibility. Not having done so, it must have been to the benefit of the defence.

Unlike the case of **R. v. Williams and Carter** (supra) the witness did offer an explanation, which the jury having heard were entitled to take into consideration in determining whether to accept that fact to which she had testified. In this regard, we reiterate that the learned trial judge did direct the jury in words already referred to above, as follows:

> "You have seen and heard the witnesses and it is for you to say whether the inconsistencies are profound and inexplainable or whether the reason 'which has been given for the inconsistencies are satisfactory'."

The facts in this case are clearly different from those in the case of **R. v. Williams and Carter** (supra) and consequently the dicta in that case relied on by Mr. Hines, would be inapplicable.

(ii) Inconsistency - Taylor

The discrepancy complained of arose in this way. The witness Taylor, asked by Crown Counsel, how he got to see the men in the room replied in the following words:

> "Yes, 'One Drop' did have a flashlight shine pon mi uncle."

Then the following occurred:

> "Q. Anything else?
>
> A. No."

Thereafter Crown Counsel asked no other questions of him, as to the possible lighting in the room, and defence counsel did the same. Counsel before us, submitted that that was impliedly, an

assertion by the witness that there was no lighted lamp in the room. Indeed, that was the stand taken by defence counsel at the trial, as this was specifically referred to in the learned trial judge's summing-up. He directed the jury as follows:

> "Mr. Foreman and Members of the Jury, heavy weather was made in the addresses to you by learned Counsel for the Defence, that Desmond Taylor didn't mention anything about any lamp and that is so, but Mr. Foreman and Members of the Jury, you sat there and you must say whether you heard anybody ask him any questions concerning lamp. I didn't hear anybody ask him about lamp, and he didn't say anything about any lamp. He was asked what Byron Young had and he said he had a flashlight, so Mr. Foreman and Members of the Jury, you must say what you make of that."

The other witnesses, Howell and Page had said in their evidence that there was a lighted lamp in the room by which, in addition to the light from the flashlight in the hand of the applicant Young and the moonlight, they were able to identify the applicants. It is correct as the learned trial judge said that there was no express conflict in the evidence, the witness Taylor merely stating that he was able to see by the light of the flashlight and by nothing else. The above passage from the learned trial judge's summing-up occurred in the course of his directions to the jury in respect of the lighting available to the witness and he did, in our view, in that passage bring to the attention of the jury the position contended for by the applicants, reminding them that the witness had been asked no questions in that regard and thereafter left it with them "to say what they made of it".

In those circumstances, we cannot agree that the learned trial judge omitted to tell the jury how to treat that evidence.

Ground 2 - Discrepancy re Chopping

The discrepancy upon which this ground is based relates to the testimony of the witness Taylor as opposed to that of the other two witnesses Howell and Page.

Taylor had stated that he saw each man chop the deceased more than once while they were in the room, and that while they were taking him out, he held unto the door and was chopped on his hand. He did not see any chops take place after the deceased was taken outside, the men taking him to the mango tree dropping him on the ground and leaving him there. On the other hand, the witness Howell testified that inside the room, one of the men chopped the deceased on the forehead, and he was chopped on his hand when he held unto the doorway. In his account, he did not see any other chop take place in the room, but saw the men chopping the deceased while he was on the ground under the mango tree. The witness Page, saw the chop at the doorway, and then saw the men chopping the deceased under the mango tree.

Mr. Daly, Q.C., who advanced the argument on this point, contended, that this conflict was not brought to the attention of the jury, and that the learned trial judge fell into error by not telling the jury that this conflict could have affected the credibility of the witnesses particularly with regard to whether they 'could see what they said that they saw'. He submitted that the jury might well have concluded that the witness Taylor was not a credible witness especially having regard also to the evidence of the investigating officer Cpl. Lloyd Scott, who found no blood in the room of the deceased. In those circumstances, the evidence of his identification may well have been rejected, were the jury instructed to take it into consideration in determining the question of the identity of the assailants.

Mr. Clarke, in answer, conceded that no specific directions were given to the jury, as to how to treat this discrepancy in resolving the question of identification. He however submitted that the real issue in the case was one of identification and the case for the defence was mounted by an attack upon the opportunity of the witnesses to identify the assailants, given the state of the lighting that existed at the time. The learned trial judge, he stated, dealt extensively with the issue of identification, dealing with all the matters necessary in that regard. The question of the discrepancy, in relation to the chopping was not made an issue at the trial, and in fact could not affect the question of identification. In the alternative he submitted, the discrepancy, given the evidence of Cpl. Scott, could only result in a rejection of the evidence of Taylor, and there was ample evidence existing in the testimony of Howell and Page which could nevertheless result in a verdict of guilty.

We need to observe once more that the learned trial judge did give general directions on how to treat discrepancies. Whether all the chopping took place inside the house, was indeed a material factor in recalling the sequence of events that occurred that morning. It must be implied, however that the jury would have followed the directions of the learned trial judge in determining the credibility of the witness.

This however was, as Crown Counsel has submitted, a case in which the only real question for the jury was whether or not the applicants were the assailants.

Indeed, the learned trial judge spent most of his summing-up giving careful directions on the manner in which the jury should approach that question. As has already been noted, he warned the jury of the dangers of acting upon the evidence of visual identification and the reason therefor. He analysed for them, all the evidence relating to that issue, the fact that all the applicants

were known before by the witnesses, and the period of that knowledge, the last time before the incident that they had seen them, the duration of time that the witnesses had for recognizing them, the distances between the witnesses and the assailants, and in particular the evidence of lighting.

In relation to the latter, he invited the jury to determine where the truth lay, in respect of whether there was a lighted lamp in the room, and that if there was, that the two witnesses, Page and Howell had said that it was not shining brightly. In addition, he instructed them to draw upon their experience to determine whether, if the flashlight was shone in the room which was 10' X 10' the light would be sufficiently diffused to enable someone to see around the room. Further, they were asked to determine whether it was full moon, as the witnesses said, and if it was, whether the moonlight would shine through the glass window to give sufficient light for a correct identification to be made.

He assessed the defence in the following manner:

> "... The defence is saying given the conditions that existed that night the witnesses could not have recognized anyone, they could not have seen any of the persons who killed the deceased and it is either that they are telling a deliberate lie on these four men or that they did not recognize any of them or that they are mistaken when they say they recognize these men. ..."

And later -

> "... But, again I must warn you that a number of honest witnesses can all be mistaken. It does not follow that because three witnesses have said that they saw these four accused men there that night they cannot all be mistaken. Given the conditions as you find them to be that night and with special reference to the light you must decide if all three witnesses were, or anyone of them was mistaken or may have been mistaken as to the identity of the persons they saw there that night."

In reviewing the evidence, the learned trial judge did remind the jury that the witness Taylor spoke of several chops being delivered in the room. The above extracted passages from the summing-up indicate that the jury was invited to assess the evidence carefuly to determine whether the witnesses were lying or mistaken, and were instructed that one or all could have been mistaken. Given the learned trial judge's directions on how to treat discrepancies, the jury must necessarily have assessed Taylor's evidence on the basis of the discrepancies that existed in his evidence and in the context of the defence which challenged strongly the circumstances under which he purported to identify the applicants, and against the background of the warning in relation to the approach to such evidence.

We are of the view therefore that though there was no specific direction as complained of, the summing-up taken as a whole must have made it clear to the jury that that was a matter for consideration in determining the credibility of the witness Taylor, and a fortiori the correctness of his identification of the applicants. We should add, however, that were it necessary, we would express agreement with Crown Counsel that without the evidence of Taylor, there was ample evidence upon which the jury could have convicted.

Ground 3 - Directions to Jury re Unanimous Verdict

At the end of the summing-up the jury retired at 2:31 p.m. and returned at 3:14 p.m. to announce that they had not arrived at a unanimous verdict. The learned trial judge told them that he could not at that stage accept anything but a unanimous verdict, and the jury retired again at 3:16 p.m. They returned at 4:27 p.m. and again announced per the Foreman that they had not arrived at a unanimous verdict. The learned trial judge then gave directions, which are now the

subject of complaint; specific complaint being made of the fact that he told the jury:

> "... this is a murder case and your verdict must be unanimous one way or another."

Mr. Daly, Q.C., contended that by over-stressing the need for unanimity, and by failing to advise the jury of their right and duty to disagree, the learned trial judge was guilty of pressuring the jury into arriving at a unanimous verdict. He relied on the following dicta of Lord Lane in **R. v. Watson** [1988] 1 All E.R. 888 at page 903:

> "One starts from the proposition that a jury must be free to deliberate without any form of pressure being imposed on them, whether by way of promise or of threat or otherwise. They must not be made to feel that it is incumbent on them to express agreement with a view they do not truly hold simply because it might be inconvenient or tiresome or expensive for the prosecution, the defendant, the victim or the public in general if they do not do so."

We cannot agree that the words used by the learned trial judge in this case amounted to any form of pressure and express the opinion that, contrary to exerting any pressure on the jury, the learned trial judge, used words that have already been approved as proper in those circumstances. Ironically, the very case on which Mr. Daly, Q.C., relied gives a model direction which in general terms is the same as that used by the learned trial judge in this case.

Lord Lane in **R. v. Watson** (supra) at page 309 states:

> "In the judgment of this court there is no reason why a jury should not be directed as follows:

> " 'Each of you has taken an oath to return a true verdict according to the evidence. No one must be false to that oath, but you have a duty not only as individuals but collectively. That is the strength of the jury system. Each of you takes into the jury box with you your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of the others. There must necessarily be discussion, argument and give and take within the scope of your oath. That is the way in which agreement is reached. If, unhappily, [ten of] you cannot reach agreement you must say so."

Compare this with the words used by the learned trial judge:

> "Now, each of you have taken an oath to return a true verdict according to the evidence. ... But, of course, you have a duty, not only as individuals, but collectively, you the twelve jurors have a duty collectively, ... None must be false to the oath that he has taken to return a true verdict, ... There will be arguments, I know there must be argument, but at the same time there must be certain give and taking and certain adjustment of views. Each of you must listen to the views of the other and don't be dogmatic about it, listen to the views and see if it makes sense. ... If any of you have a strong view, or you are in a state of uncertainty, you are not obliged or entitled to sink your view and agree with the majority, but what I will tell you to do is to argue out and discuss the matter together and see whether or not you can arrive at a unanimous verdict."

In our judgment therefore this ground is without merit and unworthy of any further consideration.

Ground 4 - Judge's Direction re Unsworn Statements

The passage complained of, though set out in the ground of appeal (supra) is again recorded here for convenience. At page 183 the learned trial judge directed the jury as follows:

> "Now, all four of them elected to make an unsworn statement. They did not come into the witness box and give evidence on oath like the prosecution witnesses and I will tell you this about that. The absence from the witness box cannot provide evidence of anything, but when you are assessing the quality of the identification evidence you may take into consideration the fact that it was uncontradicted by any evidence coming from anyone of them."

Mr. Carlton Williams who argued this ground contended that the directions were misleading and incorrect. With this submission we disagree. An unsworn statement is not evidence though the jury must consider it and give to it what weight they think it deserves. **D.P.P. v. Leary Walker** [1974] 1 W.L.R. 1090; **R. v. Hart** [197 27 W.I.R. 229 **R. v. Channer** S.C.C.A. 5/91 delivered 4th December, 1991 (unreported). The learned trial judge must have been mindful of the dicta of Lord Widgery in the case of **R. v. Turnbull** [1976] 3 All E.R. 549 at page 553 in which the same words were used. The Learned Chief Justice said in discussing identification evidence:

> "The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstance which the jury might think was supporting when it did not have this quality the judge should say so. A jury for example might think that support for identification evidence could be found in the fact that the accused had not given evidence before them. An accused's absence from the witness box cannot provide evidence of anything and the judge should tell the jury so. But he would be entitled to tell them that when assessing the quality of the identification evidence they could take into consideration the fact that it was uncontradicted by any evidence coming from the accused himself." [emphasis added]

The learned trial judge was therefore correct when he stated that an accused who gives an unsworn statement cannot provide evidence of anything. In the same way, the applicants not having given sworn testimony, could not have been said to have contradicted the quality of the identification by evidence. In any event, even in relation to their unsworn statement there was no contradiction as to the quality of the evidence of identification except to say that they were not present at the scene. When the learned trial judge spoke of the quality of the identification - he obviously meant e.g. no contradiction of the evidence that the witnesses knew the applicants before, that there was a flashlight, a lamp, or that it was a moonlight night etc. The learend trial judge nevertheless correctly directed the jury as to how to treat the unsworn statements given by the applicants in these words:

> "... You should consider the content of the unsworn statement in relation to the whole of the evidence presented by the prosecution and it is exclusively for you to make up your mind whether the unsworn statement has any value and if so, what weight should be attached to it. Remember, it is for you to decide whether the evidence of the prosecution has satisfied you to the extent that you feel sure of the accused's guilt and in considering your verdict, you should give the accused's unsworn statement only such weight as you may think it deserves.
> An unsworn statement, one not tested by cross-examination, has less cogency and weight than sworn evidence."

In conclusion, this ground like the others must fail. The applications for leave to appeal are treated as the hearing of the appeals. The appeals are dismissed, and the convictions affirmed.