SAINT VINCENT & THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 8 OF 2000

BETWEEN:

MARK PETERS

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Sir Dennis Byron	Chief Justice
The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Albert N. J. Matthew	Justice of Appeal

Appearances:

Mr. R. Williams for the Appellant
Mrs. S. Bollers and Miss Fraser for the Respondent

2001: April 3;
June 18;
September 17

JUDGMENT

[1] REDHEAD J.A.: On 26th May, 2000 the appellant was indicted for the murder of Durrell Jacobs on 3rd July, 1999. He was tried for that offence but was convicted by the jury for the offence of manslaughter on 20th July, 2000 and sentenced to a term of 10 years imprisonment by the presiding judge. He now appeals to this court against his conviction.

[2] Five grounds of appeal were filed on his behalf.

1. There was no proper identification parade.

2. The learned trial judge erred in law when he did not allow a prosecution witness who had given evidence at that P.I and whose name had appeared on the record and who was not called by the prosecution to be put up for cross examination.

3. The learned trial judge erred in Law when he allowed the prosecution to cross examine a Prosecution witness who had given evidence at the P.I and whose name had appeared on the record but was not called by the Prosecution but by the defence.

4. There being no evidence to support a charge of manslaughter, the learned trial judge having asked the Jury to consider manslaughter deprived the accused of the opportunity of being acquitted.

5. The verdict is unsafe and unsatisfactory.

[3] At the trial, leave was granted to Counsel, for the appellant to add an additional ground 6 – The cause of death was not strictly proved.

[4] Learned Counsel argued ground 6 first.

[5] Learned Counsel, for the appellant contended that "it is an essential ingredient in a case of murder that it is proved that the accused cause the death of the deceased and this must be strictly proved."

[6] Mr. Williams then submitted that the crown failed to prove strictly that it was the accused who caused the death of the deceased.

[7] Learned Counsel referred to the doctor's testimony. Mr. Williams then contended as follows:-

> "The doctor goes on to state that the cause of death of the patient was due to haemathorax and cordial tamponade."

[8] He then went on to make this startling submission:

> "The doctor however speculates as to what has caused this condition he does not say with any certainty that it is the stab wound allegedly inflicted by the accused that caused this condition, for all one may know it may have been accused by falling on a step, it could have been caused by shock or fright or a myriad of other things."

[9] The evidence led by the prosecution of one of the witnesses, Austin Fraser who testified before the judge and jury that on 3rd July, 1999 he went to Knights Building where there was a dance. He testified that the hall where the dance was kept was about 80-85 percent full. He said about 1.00am he saw the appellant and the deceased. They were together when he saw them. They were having an argument but he was unable to hear what the argument was about. He said that he was about 20-25 feet away from them. Continuing this witness said on oath:

> "I saw the accused clutching the deceased and the deceased clutching him back. Then I saw Accused pull something from his pocket. It looked like a knife. I saw Accused chuck the deceased (witness demonstrates). Accused had first stabbed the deceased in the area of forehead. Deceased fell on the ground. Accused then fled the scene with another darkish guy. Deceased was on the floor asking for help. I ran to his assistance. Me and three other guys took him up and brought him downstairs. I saw blood coming from chest of deceased and also from forehead."

[10] The post mortem examination was done by Dr. Mallanpally Ranjani. Dr. Ranjani testified that she carried out an external examination which revealed that there was a 1 inch laceration on the left side of the chest, 2 inches from the sternum just below the left clavicle. A 1 inch superficial laceration on the right parallel region of the scalp. Her internal examination revealed that the scalp and brain was normal. There was a ½ laceration to the pericardial sack, a laceration to left atrium of the heart. There was blood in the thoracic cavity of the heart i.e. haemothorax.

[11] The doctor went on to explain that one simple external injury (penetrating injury) may cause the lacerations. She said that one stab wound could lead to all of this, and gave as her opinion that a sharp instrument such as a knife could have caused the injury. The doctor said that the cause of death of the patient was due to haemothorax and cardiac tamponade that is blood in the thorax cavity.

[12] Having regard to the totality of the evidence in this case it is a specious submission by Counsel that the crown failed to prove strictly that it was the accused who caused the death of the deceased and that the doctor speculates as to what has caused this condition. He argued that the doctor did not say with any certainty that it was the stab wound allegedly inflicted by the appellant that caused this condition.

[13] The evidence of Austin Fraser is, inter alia:

> "……that I saw Accused pull something from his pocket. It looked like a knife. I saw Accused chuck the deceased (witness demonstrates). Accused had first stabbed the deceased in the area of forehead. Deceased fell on the ground. Accused then fled the scene…… I ran to his (deceased's) assistance…… I saw blood coming from the chest of deceased and also from forehead."

[14] The doctor described the injuries which she found on the body of the deceased which injuries were not inconsistent with the evidence and the description of the incident as given by the eye witness, Austin Fraser.

[15] The doctor says that a sharp instrument, such as a knife, could have caused these injuries and more particularly because the doctor uses the word 'could' thereby cause learned Counsel to devalue her evidence to level of speculation is to my mind a lack of comprehension of the import of the doctor's evidence and what the prosecution is required to prove.

[16] It is startling submission too, in my view, for learned Counsel, Mr. Williams, to describe the injuries received by the deceased (laceration of the left lung, laceration to the pericardial sack, laceration to the left atrium of the heart) which led to haemothorax and cardiac tamponade could have been caused by falling on a step, by shock or fright. There is not one iota of evidence to support any of these suggestions. Moreover for learned Counsel to even suggest that these injuries as described above is, in my view, for Counsel to be engaged in a flight of fantasy.

[17] In my view the conjoint effect of the doctor's evidence and Austin Fraser's evidence is that the appellant stabbed the deceased on the left side of the chest which resulted in injuries from which he died.

[18] This was in my view cogent evidence which if the jury accepted was proof that the appellant caused the death of the deceased.

[19] This ground of appeal is wholly without merit. I therefore dismiss this ground of appeal.

[20] I now consider ground one of the appellant's appeal. The appellant complained that the identification parade was conducted unfairly and therefore was prejudicial to a fair hearing of the appellant. Learned Counsel for the appellant, for example, drew attention to the evidence that the persons taking part in the parade were so totally different from the appellant for example, he drew attention to the fact that one person was blind. He also drew attention to the fact that the identifying witness told the police that the man who did the stabbing wore earrings. On the parade the defence contended that the appellant was the only person wearing earrings. Having regard to the evidence that was led at the trial it is not clear whether or not the appellant was wearing earrings at the identification parade.

[21] In State v. Hodge 22 W.I.R. 303

> "At the trial of the appellant there were three different versions as to how he was identified at the identification parade. The first given by Violet Ramadan. She identified him by his appearance, but in order to make doubly sure, she asked him to open his mouth. The second was by Inspector Troyer who conducted the parade. Troyer said Ramdan asked him to cause the men on parade to open their mouths and that when they did so she then touched the accused on his shoulder. The third version was given by the accused was substantially the same as that given by Inspector Troyer with this difference: that whereas Troyer said there were others with gold teeth, the accused insisted he was the only man on parade with gold teeth……"

[22] It was held inter alia, that the jury should have been directed that if they believed the accused was the only man on parade with gold teeth, the parade would have been unfairly conducted.

[23] The Appellant in the instant case is saying that he was wearing two earrings on the identification parade. He was the only one wearing earrings on the identification parade.

[24] He also said that whereas he is of fair complexion there was tall "rageddie", hair person, a short black rasta, a short guy with a flat hair cut" and a man that was partially blind. The learned trial Judge told the jury -

> "It would have been wrong form them to put the accused alone with earrings. I mean that is a matter of common sense, it is not a big complex law that is to be within the knowledge of lawyers only."

[25] He also told the jury:

> "Now, whilst the identification parade plays an important part in the whole process, even though you may think it does not carry the value, this parade didn't carry the value in evidence that it should, you are quite free to convict the accused if you are sure about what the man, Fraser is saying on the night in question. I must remind you about that, if you think that the identification parade was not fair one, then that may, it is a matter for you, reduce the weight of the evidence that you attach to young Austin Fraser. It is a matter for you."

[26] The learned trial Judge also told the jury that they had to decide whether Fraser's evidence was accurate. He reminded the jury that Fraser may be honest but inaccurate. The learned trial judge exhorted the jury to bear in mind all of these things. The learned trial judge after referring to the lighting condition in the hall on the night in question, then gave an impeccable direction on Turnbull (R v Turnbull 1976 3 ALL. 349).

[27] In R v Long 57 C.A.R. 821.

This was a case which depended on visual identification by a witness who did not know the appellant.

[28] Lawton L.J. at page 878 said:

> "The trial judge is in the most advantageous position to decide what kind of direction is best suited for the case he is trying. This court will not interfere with the exercise of his discretion in this respect unless there is good reason for thinking either that the jury may not have appreciated that they had to be sure about the accuracy and reliability of the visual identification before convicting or that the summing-up was unfair."

[29] However, notwithstanding, the complaint about the identification parade, I am of the view that there was other cogent evidence if the jury accepted could have and was entitled to find that the appellant was the person who was involved in the stabbing of the deceased.

[30] I now refer to that evidence -

The witness, Hilton Andrews said that about 12 midnight on 2nd July he was by Geest Shed helping to sell alcohol. The appellant came to the shed he was drinking. The appellant left the bar. He returned about an hour later.

[31] Continuing this testimony this witness said:

> "When the accused came back he said to me "Scrapa they kill a man up deh by Ricks…… the same place I was standing is the same place the man drop. The accused went on to say "I frighten when drop in front of me……".

[32] The appellant denied to the police and at his trial that he was ever inside of the dance hall when the killing took place.

[33] The evidence of the witness, Hilton Andrews if believed by the jury is capable of lending support to Fraser's evidence when he said he identified the Appellant in the dance hall and as the assailant of the deceased.

[34] Moreover, Fraser gave evidence of the Appellant's dress that night. He said:

> "Accused had on a cap marked "Guess…… It was a jersey that the accused was wearing. The upper position was grey silver and had the figures 05 on the front. The lower position was like a "net." Accused had on a brown looking cadroy pants, knee length."

[35] Corporal of Police, Errol Keir said in evidence on oath that the appellant took him to his (the appellant's) home and handed over to him one black "guess" cap a brownish short pants, one grey blackish 05 jersey.

[36] The prosecution contended that having regard to Fraser's evidence, his description of the clothing worn by the appellant and the subsequent handing over of articles of clothing which, to say the least, approximate very closely to that as described by the witness

Fraser; the witness, Fraser therefore could not have been mistaken in his identification of the Appellant.

[37] I entertain no doubt that the summing-up as a whole was fair. This ground of appeal is therefore dismissed.

[38] I deal with grounds 2 and 3 together.

Under ground 2 complaint is made that the learned trial Judge erred in law when he did not allow the prosecution who gave evidence at the P.I. and who had appeared on the record and who was not called by the prosecution to be put up for cross examination.

Under ground 3 the learned trial Judge erred in law when he allowed the prosecution to cross examine a prosecution witness who had given evidence at the P.I. and whose name had appeared on the record but was not called by the prosecution put by the defence.

[39] In Archbold 40th edition paragraph 44

Witness prosecution chose not to call. The prosecution must have in court the witness whose names are on the back of the indictment but there is a wide discretion in the prosecution whether they should call them and, having called them, either examine them or merely tender them for cross-examination…… The discretion of the prosecution must be exercised in a manner calculated to further the interests of justice and at the same time be fair to the defence. If the prosecution appear to be exercising their discretion improperly it is open to the judge and in his discretion to invite the prosecution to call the witness.

[40] In R v. Edwards 1848 3 Cox 82

The head note reads:

> "It is in general a matter entirely within the discretion of counsel for the prosecution whether all the witnesses at the back of the bill should be called on behalf of the crown or not; and although the judge has the power to interfere, he will only exercise in extreme cases."

[41] (See also R. v Oliva 1965 49 C.A.R. 298)

If Counsel for the prosecution, at the instance of the defendant's counsel, called a witness, but does not ask him a question, the former is entitled to re-examine the witness. After he has been examined by the defendant's Counsel.

[42] Although it is not quite clear from the way the ground of appeal is framed however, it seems to be apparent that the prosecution exercised their discretion not to call a witness whose name appeared on the back of the indictment. This they were entitled to do on condition that witness was made available to the defence for cross-examination. It seems to me that was the course adopted at the trial of this appellant.

[43] I am of the opinion that these two grounds were not pursued with any enthusiasm. Learned Counsel gave no indication who the witness was or whether what was done resulted in unfairness to the appellant or whether the prosecution improperly exercised the discretion. These grounds are therefore without merit and I accordingly dismiss them.

[44] I now turn to ground 4.

There being no evidence to support a charge of manslaughter. The learned trial Judge deprived the accused of the opportunity of being acquitted.

[45] In Mancini v Director of Public Prosecutions 1941 3 ALL.E.R. 273.

Viscount Simon L.C. at page 276:-

> "Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self defence – a defence which, if it had been accepted by the jury would have resulted it in his complete acquittal it was undoubtedly the duty of the judge, in summing-up to the jury to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter the fact that a defending Counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the judge from the duty of directing the jury to consider the alternative, if there is material before the jury which would justify a direction that they should consider it."

[46] In Bullard v The Queen 1957 (42) CAR 1

> "Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence on which such a verdict can be given. To deprive him of that right must of necessity constitute a grave miscarriage of justice……"

[47] In the instant case the appellant's defence was alibi. It would have been incongruous and prejudicial to his main defence to say that he was provoked.

[48] The witness Austin Fraser testified that the appellant and the deceased were engaged in a quarrel and that they were "clutching" one another before the stabbing. Although it is not known what was said by deceased to the appellant, however, I am of the view that the learned trial Judge was justified in the circumstances to consider whether or not the appellant was provoked.

[49] Moreover it is beyond doubt that the jury by their verdict rejected the appellant's alibi and accepted the prosecution evidence that he stabbed the deceased. If the issue of provocation was not left to the jury in my view it was inevitable that the jury would have found him guilty of murder. It was therefore to the appellant's benefit that the issue of provocation was left to the jury. This ground of appeal is also dismissed.

[50] There is no merit in the allegation that the verdict of the jury was unsafe and unsatisfactory.

[51] For these reasons I would dismiss the appeal and affirm the conviction and sentence of the learned trial judge.

Albert J. Redhead
Justice of Appeal

[52] MATTHEW J.A.: This appeal is in respect of a conviction for manslaughter of 19 year old Durrell Jacobs on July 13, 1999 at Kingstown Saint Vincent where the 27 year old appellant was sentenced by Adams J. to 10 years imprisonment.

[53] The Prosecution depended to a large extent on their star witness, Austin Fraser, who testified that in the early hours of July 3 at Knight's place he saw the appellant inflict two blows on the body of the deceased, one to the forehead followed by the fatal blow to the chest region.

[54] The incident occurred at Carnival time past midnight where a dance was going on and a Disk Jockey in attendance. Fraser assisted in carrying Durrell Jacobs to the police barracks from which place he was transported to the Kingstown General Hospital. A male nurse on duty said that the doctor on duty tested the victim's heart and spoke to him. Nurse Maurice Davis testified that there were no signs of life and no treatment was administered as there was no need for any. Davis saw the deceased at about 2.20 a.m. on July 3.

[55] An identification parade was held on July 12, 1999 and the appellant was later charged for murder. As stated above he was convicted of manslaughter.

[56] On July 24, 2000 the appellant filed a notice of appeal containing five grounds of appeal. New grounds of appeal were later substituted and are contained in the appellant's skeleton arguments.

[57] The grounds of appeal that were argued before this Court are as follows:

1. Cause of death was not strictly proved;
2. The verdict is unsafe and unsatisfactory -
    (a) the identification parade was unfair towards the accused;
    (b) the trial judge erred in leaving the fairness of the identification parade as a matter for the jury to decide;
    (c) failure to give requisite warning in relation to false alibi;

(d) the judge's summing up was unfair.

I shall with these in turn.

[58] Cause of death not strictly proved. Dr. Mallanpally Ranjani did the post mortem examination on July 6, 1999. On external examination she found a 1 inch laceration on the left side of the chest two inches from the sternum just below the left clavicle. On internal examination there was a half inch laceration to the left lung. There was a laceration to the pericardial sac, a laceration to the left atrium of the heart. The laceration inflicted on the pericardial sac also injured the left atrium which is one of the chambers of the heart and also injured the left lung.

[59] Dr. Ranjani testified that one simple external injury (penetrating injury) may cause the lacerations she spoke about. The external injury described as a one inch laceration on the left side of the chest, two inches from the sternum below the left clavicle could have caused the injury to the sac and atrium. She said the external injury i.e. the one inch injury led to the heart and left lung.

[60] Dr. Ranjani gave the cause of death as being due to haemothorax and cardiac tamponade that is, blood in the thorax cavity. She said cardiac tamponade is a serious condition which involves rapid accumulation of blood in the intra pericardiac space. It causes the compression of the heart and interferes with the functions of the heart, causes hypertension and death.

[61] The doctor stated that the pericardial space is to be found between the heart and the sac in which it is resting. When fluid such as blood occupies that space the functions of the heart deteriorate and hypertension and death may result. One stab wound could lead to all of this. A sharp instrument such as a knife could have caused these injuries. I would say that a great degree of force was used to inflict the stab wound which brought about these injuries.

[62] I understand the submission of learned Counsel for the appellant to be that the evidence of the doctor which constitutes the sole evidence with relation to the cause of death, does not strictly prove that it was the stab wound which caused the injuries to the atrium that caused the death. Counsel submitted that her consistent use of the words "may" and "could" leads to speculation or that she was not sure that it was the stab that caused death. I do not agree.

[63] The doctor gave positive evidence that the laceration inflicted on the pericardial sac also injured the left atrium and that the one inch external injury directly led to the heart and left lung. The use of the words "may" and "could" in the context in which they were used gave no indication of speculation or uncertainty.

[64] When questioned by the Court the doctor said: "This patient would have required immediate surgery……. In the circumstances of the patient emergency surgery would have been required within seconds. In the absence of surgery death would have take place almost immediately. Death would be almost instantaneous." This evidence of the doctor is supported by the evidence of Nurse Maurice Davis which suggested that when the police officers brought the body of the deceased to the hospital at 2.20 a.m. on July 3, 1999 there were no signs of life.

[65] There is no merit in this ground of appeal which accordingly fails.

[66] The other ground of appeal is that the verdict is unsafe and unsatisfactory. It is dealt with in four parts by the appellant and so I shall deal with the parts in the order presented by learned Counsel for the appellant.

[67] The identification parade was unfair towards the accused. This is based partly on evidence which states that only the appellant had on earrings at the identification parade. The main witness for the Prosecution, Austin Fraser, said so in examination in chief although he said the contrary when he was cross-examined by Mr. Arthur Williams and re-examined by Mrs. Bollers. Lance Wilson who gave evidence for the defence and was

himself one of the nine persons on the parade also said that only the appellant had on earrings at the parade. The appellant himself gave evidence to this effect.

[68] There was also the allegation that the men on the parade were not of similar size and build. Fraser said that in the parade that he was asked to identify there were about four fair skinned males and about the same number of dark males. The evidence reveals that the Appellant has a fair complexion, slimly built and has straight features. He is about 5 feet 10 inches tall. Fraser also said that all the men in the parade were not roughly the same height.

[69] Lance Wilson in his evidence in chief supports that allegation and so did the appellant. Theophilus Prescott who was put on parade that day is not able to see properly. The learned trial Judge in his summing up made several comments which tend to support that allegation. On one occasion he said: "It is for you to decide whether you consider that the two men who came in here, the tall blind man with the beard and the short dark man with a conspicuously shaped head; it is for you to decide whether they bear resemblance, not for the Judge. I am only telling what the law is, you will have to decide whether they bear resemblance to the Accused in any way."

[70] In relation to one of the men on the parade the learned Judge said on another occasion. "Lance Wilson was one of the men on the ID parade. He is the little fellow, short you saw him and it would seem dark, you saw him, a matter for you." And on two other occasions he said that the Prosecution may have been embarrassed by the presence of the men who came to Court and were described as being of a certain complexion.

[71] Learned Counsel for the Appellant submitted that the trial Judge should have excluded the evidence of the ID parade as it was grossly unfair to the appellant and he further should have dismissed the case on the principles set out in Turnbull's case. I shall deal with this submission after considering the next subsidiary ground of appeal where a similar submission was made.

[72] The trial judge erred in leaving the fairness of the identification parade as a matter for the jury to decide. Learned Counsel for the appellant submitted under this subhead that "the question of whether an ID parade is a fair one is a question of fact and one that should not be left up to the jury to decide, the trial judge should have excluded this evidence as the ID parade was grossly unfair to the accused and have dismissed the case on the principles set out in Turnbull."

[73] In the course of his summing up the learned Judge told the Jury that one of the basic requirements of an identification parade is that the men must be or ought to be as possibly as it can be easily achieved persons who bear a similarity in description. I agree. In the light of the evidence referred to above and the Judge's own comments it cannot be safely said that was achieved. I agree with Mr. Williams that the identification was not properly done. I also agree that it is for the Judge to decide the fairness of the identification parade and not leave it for the Jury to decide.

[74] However I do not agree that the case should have been dismissed. In the course of his summing up the learned Judge correctly told the Jury that the identification parade serves the purpose of reinforming what the single eye witness in the case had to say and that they are the ones to decide that the identification parade was effectively done and in terms of evidential weight is of value.

[75] I agree with the direction given by the learned Judge when he told the Jury: "Now, whilst the identification parade plays an important part in the whole process, even though you may think that it doesn't carry value, this parade didn't carry the value in evidence that it should, you are quite free to convict the Accused if you are sure about what the man Fraser is saying on the night in question.

[76] Failure to give warning in relation to false alibi. Under this subhead Counsel submitted that "the jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was or did what the identifying witness said he did."

[77] In at least two passages of his summing up the trial Judge dealt with alibi and told the Jury that a man who makes an alibi and says he was not there might be a very honest man suspected of a crime but innocent as he might be because of panic or fright or fear he might call upon people to help him although he is innocent and comes up with a false story; so there are times when an innocent man may behave in a way which suggests he is guilty.

[78] On one of the occasions the Judge said: "What the Prosecution is saying is this is part of an attempt on the accused to fabricate an alibi. As I have said to you an innocent man may do that; a man in panic may do that, a man in fear may be innocent and do those things. You have to consider that; but if you are sure the accused does not fall into the description of an innocent man who out of fear or shame or whatsoever has made up a false alibi. If you think that that is not the case, the only reason that he has made up a false alibi in an attempt to deceive you; you can use it as evidence against him. But bear in mind what I said how you are to approach the question of an alibi." I think those directions effectively answer the submission made under this subhead.

[79] Further towards the latter part of the summing up the learned Judge said "His defence is an alibi. He is saying he is not there….. He is saying that he was not at Rick's bar when any stabbing took place involving him and Durrell Jacobs. In fact, he is saying he hadn't really gotten up to the bar where the stabbing took place…… He doesn't have to prove that. He could sit down there and say that I am not the man, you prove that I was there. He doesn't have to prove a thing. If his alibi that he was not the man at the night spot involved in the killing, if that defence finds favour with you, you must acquit him of anything at all; you have to acquit him of anything at all. If it leaves you in a state of reasonable doubt you must acquit him. If you reject his alibi, you do not automatically say guilty. You go back to the Prosecution's case and you say all right now, let us examine Austin Fraser's evidence.

As I have indicated above this subhead fails. I shall now turn to the final subhead.

[80] The Judge's summing up was unfair. Learned Counsel for the appellant submitted that the whole of the summing up was unfair, he concentrated heavily on the Prosecution's case and the evidence of Austin Fraser, but did not give the defence case the same amount of weight. Further he also made several unfair comments.

[81] I shall first dealt with the two passages where it is alleged the Judge made unfair comments. Complaint is made of a passage where the learned Judge stated that the defence was suggesting and later on it was supported by evidence from the Accused and others that there seemed to be another fight. This comment arose out of cross examination by Counsel for the Accused at the trial who was suggesting to Fraser that the fight he saw was between the deceased and some other persons, but not the appellant.

[82] The other complaint is in the words of the summing up commencing on a discrepancy between the evidence of the appellant and the witness Marcella Wilson. The learned Judge said: "Well, he and Marcella are at daggers drawn because Marcella is saying from the position of this dead man that she saw, she is speaking of some dead man, he was bound to see that dead man."

I find the complaints are unwarranted as they did not go beyond the bounds of judicial comment.

[83] On the wider issue of imbalance I have looked at the summing up as a whole and I find that the defence of the appellant was adequately and fairly put by the learned trial Judge. The Judge began the case for the defence at page 57 of the record. The appellant's defence of alibi was put on more than one occasion, his denial that he committed the killing and his denials about speaking to Vin Simmons and Hilton Andrews on the fateful evening were also put to the Jury. The reason he gave for Andrews lying on him was also put to the Jury. The evidence of his many witnesses who testified that he did not or could not do the stabbing were also well articulated. The very last direction in the final paragraph of the summing up was the fact that the appellant does not have to prove where

he was and that it is for the Prosecution to prove he is the killer. This subsidiary ground of appeal fails.

[84] In considering whether the verdict is unsafe and unsatisfactory one must necessarily take into account the principles of R v Cooper 1969 1 A.E.R.32. Can it be said there is a lurking doubt in the mind of the Court? The learned Judge gave exhaustive directions pertaining to the visual identification of the appellant by Austin Fraser on the morning of July 3, 1999. And that identification can be corroborated by the evidence of Hilton Andrews who said the appellant told him the dead man fell at the feet of the appellant. This would mean that the appellant was present at the time of the killing.

[85] Further there was the evidence of Vin Simmons which in my view supports the guilt of the Appellant. "Accused and I had an argument. He told me that he now see somebody dead. I left and then came."…… Good thing Vin left him. Vin confirmed his evidence upon cross-examination by Mr. Arthur Williams. What else could the Appellant mean by those words but expressing a predisposition to kill.

[86] I am content to let the conviction stand as I have no lurking doubt which makes me wonder whether injustice has been done. I would therefore dismiss the appeal and affirm the conviction and sentence.

Albert N. J. Matthew
Justice of Appeal

I Concur

Sir Dennis Byron
Chief Justice