ANGUILLA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.1 OF 2004

BETWEEN:

KALLUS ROGERS

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal [Ag.]

Appearances:

Dr. Henry Browne, Ms. Nicole Sylvester and Mr. John Cato for the Appellant
Mr. Evans Welch and Ms. Dawn Richardson for the Respondent

2005: April 11;
June 27.

JUDGMENT

[1] BARROW, J.A. [AG.]: This appeal raises questions as to the circumstances in which it can be fair to try a legally unrepresented accused for murder. The appellant was convicted by the majority verdict of a jury on 11th February 2004 for the murder of Judith Wach and sentenced to life imprisonment.

[2] In the early morning hours of Saturday, 14th September 2002 Beryl Felsher, the owner of a house in Cul-de-Sac, in which her friend Judith Wach was staying with her, woke to find a young male standing over her bed with a gun and asking for money. She went to get her wallet and then started yelling for her friend, Judith. The intruder ran. At no time was the intruder visually identified. Ms. Felsher did not

locate Judith Wach in the house. She went to get help. The police came. The body of Judith Wach was later found in the nearby sea.

[3] The pathologist gave the cause of death as asphyxia as a result of manual strangulation. He testified that there was evidence of forceful vaginal penetration. There was also evidence of multiple blunt force trauma to the head and the back of the body and there was evidence of terminal aspiration of sand and water.

[4] Before mid-day on 14th September 2002 the police brought the appellant to the station. Later that day the police conducted a search at the premises where the appellant lived along with others, including a brother, a sister and her male friend, and his mother. The police took possession of one pair of blue jeans pants the legs of which were rolled to the knee; the pants were wet and had sand in some areas. The police also took a pair of sneakers on one of which appeared to be bloodstains; a greenish T-shirt with brown staining at the front; and a pair of multicoloured short pants[1] with what appeared to be bloodstains just under the front waist- band.

[5] On the following day, Sunday 15th September, the appellant was interviewed. The police made a record of the interview including the alibi that the appellant gave and his answer as to how his jeans pants were wet. He was asked about the shorts that the police took from his place of residence. He became very aggressive at that point, according to the police, and then took out a pair of boxers from his pocket and stated these were the boxers he had.[2] On the Monday morning, 16th September 2002, the police released the appellant from detention. On 27th September, as a result of further inquiries and the report of a forensic analysis, the police arrested the appellant and charged him with murder.

[1] For the sake of clarity these will be referred to as shorts, as distinct from underpants, following the description used by the forensic expert, although some witnesses referred to them as boxers.
[2] For the sake of clarity these will be referred to as underpants.

[6] It is clear that the case against the appellant stood or fell with the evidence of the forensic expert. The evidence of the expert was that she examined the items that the police took from the appellant's residence as well as samples taken from the deceased comprising fingernail clippings and scrapings, pubic hair combings and control samples of pubic hair, different vaginal and rectal swabs, and samples of blood and blood swatches. No sample was taken from the appellant.

[7] On the greenish shirt the expert stated that she found blood, semen and a mixture of blood and semen. On the pair of jeans pants the expert found semen on the front and also on the back. On the shorts the expert stated that she found blood on both the inside front and the outside front and semen on the front. On the underpants the expert stated that she found blood, semen and a mixture of blood and semen on the front. On the foot of sneakers the expert stated that she found blood. The witness clarified that all of the blood that she found was human blood.

[8] The expert testified that she performed DNA testing on all of the samples that she received. She testified that the DNA profile of the deceased was found on the shorts that she tested. The expert also testified that that profile was found in a mixture of blood and semen on the underpants. The expert testified that the probability of more than one person having the same DNA profile would be three persons in a hundred billion persons.

[9] The Grounds of appeal were that the verdict was against the weight of the evidence, that the Appellant was denied a fair trial and that the Appellant was denied his right to be legally represented. The last mentioned being the foundational ground it is appropriate to deal firstly with that ground.

How the Appellant came to be unrepresented

[10] The circumstances in which the Judge proceeded with the trial without the appellant being represented must be set out in some detail. The trial started on

Wednesday 4th February 2004 when the plea was taken.[3] Immediately after the plea was taken Mr. Patterson advised the Court that he had been assigned to represent the appellant, that he had accepted the assignment and that fairly shortly after the assignment he had visited the appellant to take full instructions. Mr. Patterson stated that the appellant informed him that the appellant had had consultations with a lawyer, Mr. Cato, to obtain representation by Dr. Henry Browne, another lawyer, with whom Mr. Cato sometimes works. Mr. Patterson stated that the appellant informed him that Dr. Browne would be representing him and that it was the appellant's desire that Dr. Browne should represent him. Mr. Patterson stated that he took the requisite steps of mentioning the matter to the Registrar and the Prosecution and also, as a professional courtesy, of mentioning it to Dr. Browne. Mr. Patterson then stated to the Court that he needed at that point to have it clarified whether the appellant wished to have Mr. Patterson represent him or not.

[11] The following exchange then took place:

> "THE COURT: Very well. Thank you.
>
> Mr. Patterson. Will you put Mr. Rogers back in the dock. Mr. Rogers, on the charge of murder, this is indictment number 6 of 2003 the very first indictment that was put to you. Do you have a lawyer?
>
> THE DEFENDANT: No Ma'am.
>
> THE COURT: Yes.
>
> Now, Mr. Patterson is willing to accept the assignment to represent you as your Counsel in this matter. Do you consent to Mr. Patterson representing you in this matter?
>
> THE DEFENDANT: No.
>
> THE COURT: Are you then prepared, Mr. Rogers, to represent yourself in this matter?

[3] There is a suggestion from the sequence of the hearings and the adjournments that the trial may have started on the Tuesday

THE DEFENDANT: I can't represent myself, the Government got me in here innocent.

THE COURT: The Government has provided by way of legal assistance by assigning to you a qualified Counsel to represent you. You have just told this Court that you are rejecting that.

THE DEFENDANT: Ma'am, them can't just jump up and give me a lawyer. They got to give me a lawyer who I satisfied with.

THE COURT: Mr. Rogers, if you want a lawyer with whom you personally are satisfied, that is the system whereby you pay to retain those services. That is when the Constitution gives to you that right of selection which you exercise.

At this point what you are telling this Court is that you are not prepared to represent yourself and you are not prepared to accept Counsel that has been provided to assist you. So those are your choices. That you are either prepared to proceed with a lawyer of your choice.

MR. ASTAPHAN: I rise amicus and also I have a third party interest in that I represent the family of the deceased. My rising is amicus, My Lady, to ask your Ladyship whether or not you ought to consider this proposition that crossed my mind. Given the nature of the proceedings whether it would be safe to ask the Accused, given his disposition towards the person assigned by the system, whether there was Counsel at the Bar, other than that Counsel and myself for obvious reasons, with whom he would be comfortable so that that Counsel can be then given the assignment. And I will say why it cross my mind, My Lady, if you would permit me. So that it does not appear on the record that the Accused is being told take it or leave it given the nature of the offence. You see, My Lady, once you have exhausted all of those possibilities then the Accused cannot at any time in the future complain. Maybe you might want to consider that, My Lady.

THE COURT: Yes. Very well Mr. Rogers, is there any other member of the Bar whom you would consent to providing to you legal representation in this matter?

THE DEFENDANT: Ma'am, who I want deal with me is Henry Browne, nobody else. Government got me in there they going deal wid that.

THE COURT: Have you told Mr. Henry Browne that you would like him here?

THE DEFENDANT: Yes, Ma'am.

THE COURT: And he is not here today?

THE DEFENDANT: No.

THE COURT: Has he agreed to represent you, Mr. Rogers?

THE DEFENDANT: He agree yes, but he talking about the money wha them putting up for the case.

THE COURT: So he has not agreed then?

THE DEFENDANT: Well, de man say he ain't getting the money, he ain't dealing wid it.

THE COURT: Very well.

Yes, so the person whom you would wish to select is Doctor Henry Browne, who is not accepting the matter because of money considerations as you say. Is that correct?

THE DEFENDANT: Yes, Ma'am.

THE COURT: An assignment has been made with regard to legal assistance provided by the Government for Mr. Patterson whom you reject, is that correct?

THE DEFENDANT: Yes, Ma'am.

THE COURT: And you tell us that you are not prepared to represent yourself in the circumstances of the nature of the case. Is that correct Mr. Rogers?

THE DEFENDANT: Yes, Ma'am.

THE COURT: And there is no other member of the Bar, this is of the entire Anguilla Bar not only those persons present here today, but no other member of the Anguilla Bar practicing before this Court whom you would consent or request represents you in this matter?

THE DEFENDANT: No, I won't feel satisfied.

THE COURT: Well, Mr. Rogers, I don't know of any other choices which you have left, failing the appearance or Doctor Henry Browne to represent you, who is not here. So precisely, Mr. Rogers, what is it that you are asking this Court to do?

THE DEFENDANT: I say wha I say already. I ain't dealing with none of the lawyers unless it is Henry Browne. I got kids on the street and I in prison innocent and I ain't dealing wid it like that. Government got me here them going deal wid it. Just how them quick to lock me up quick to find the money.

THE COURT: Yes. Mr. Rogers, you may stand down.

MR. PATTERSON: I am grateful for the time. Taking that, My Lady, I trust that I may be released at this moment.

THE COURT: Yes, very well Mr. Patterson.

I am going to rise and resume in about 10 minutes."

[12] When the Judge resumed she informed the appellant that she had considered all of the options that had been put to him for his representation and she summarised the position as being that he had informed the Court that he was unable to represent himself, that he was not prepared to accept any other representation than that of Dr. Browne but that he was not able to pay that lawyer. She further noted that legal aid had been provided by the Government, in collaboration with the Bar, to assist the appellant in his defence and accordingly, she directed:

> "Mr. Patterson who is willing and able to represent you is being assigned to you in this matter by this Court."

In response the Appellant said he needed some time to think. To that the Judge replied:

> "Well I am telling you that the Order of this Court is that Mr. Patterson is being assigned to represent you."

[13] Thereafter the Judge had the jury empanelled. Mr. Patterson assisted the Court by reminding of the need to give the accused charge of the jury. Mr. Patterson then sought and obtained an adjournment until after lunch the following day to allow time for the prosecution to furnish information relating to the scientific evidence.

[14] When the case resumed the following afternoon the Judge inquired (at Mr. Patterson's suggestion) and the Appellant confirmed that Mr. Patterson was representing him. An issue then arose as to the disqualification of a juror who did

not understand English and whether the entire jury should be discharged or only the individual juror. Mr. Patterson again assisted the Court by urging that the safer course was to discharge the entire panel. Thereafter the prosecution's first witness was called and Mr. Patterson cross-examined. The trial was then adjourned until the following day.

[15] On Thursday 5th February when the trial resumed Mr. Patterson informed the Judge that the Appellant had informed him that Dr. Browne was available to him and consequently Mr. Patterson was no longer instructed. The Appellant then informed the Court that he had received a call that morning from Mr. Cato and Dr. Browne, that he (presumably Dr. Browne) let the Appellant know that he was going to deal with the case, that the Registrar was supposed to get back to Dr. Browne and that Dr. Browne did not want the Appellant to go on with the case until they reached him. In response to the Judge the Appellant said that Counsel was to reach him "somewhere through the month" and that he (presumably Dr. Browne) was supposed to call the Appellant again in the afternoon.

[16] To the specific inquiry of the Judge the Appellant stated that he had terminated the services of Mr. Patterson as of that morning and that the Appellant was awaiting a call that afternoon. He said that the lawyers would let him know when his new Counsel would arrive. The prosecution then advised the Court of the difficulties that an adjournment would pose for them in relation to foreign-based witnesses. Ms. Felsher, who had already testified, needed to return to the United States; the pathologist who was then on the island needed to leave the following day; and the prosecution's main witness was available only on Monday and Tuesday of the coming week.

[17] In response to this the Judge asked the Appellant if he had any idea when he would be able to proceed with his new Counsel and the Appellant repeated that he was expecting to receive a call later that day. The Judge then told the Appellant that the Court was aware of the seriousness of the charge and that she was going

to afford him every opportunity but she expected that his Counsel would be present to proceed with the trial the following morning because failing that the Court was prepared to proceed with the trial. The Appellant indicated that he did not think his Counsel would be present the following day. The Judge then adjourned without hearing any evidence until the following day.

[18] On 6th February the Appellant informed the Judge that he was dealing with the case himself. Then came the following exchange:

> "THE COURT: I am asking you a simple question, Mr. Rogers? You are ready to proceed with the matter this morning?
>
> THE DEFENDANT: I ain't answering to nothing.
>
> MR. ASTAPHAN: Young man that's contempt. Behave yourself.
>
> THE COURT: Now, yesterday when you sought the adjournment you said that Doctor Browne and Mr. Cato had contacted you.
>
> THE DEFENDANT: Yes.
>
> THE COURT: Is there any further word on that? Mr. Rogers?
>
> THE DEFENDANT: Yes, Ma'am.
>
> THE COURT: What is their position?
>
> THE DEFENDANT: (No response)
>
> THE COURT: Mr. Rogers, I am waiting on an answer.
>
> THE DEFENDANT: I ain't got no answer.
>
> THE COURT: Will they be representing you or not?
>
> THE DEFENDANT: Well, the lady just bring a paper here to me and tell me he say he ain't coming. And I don't know how true that be because I ain't get no word from him.
>
> THE COURT: And there is no other lawyer apart from Doctor Browne and Mr. Cato whom you wish to represent you?
>
> THE DEFENDANT: No Ma'am."

[19] Mr. Patterson then asked to be formally released. The Judge then addressed the Appellant and told him that she wanted it to be very clear that he no longer wanted Mr. Patterson to represent him and asked him if that was the position. The Appellant replied that he was going to deal with the matter himself. The Judge then released Mr. Patterson.

[20] Next, the pathologist was called. Before he began the Judge addressed the accused and told him to listen carefully to the evidence and that he would have the opportunity to cross-examine the witness. In response to the Judge asking the Appellant if he understood what she said there was the following exchange:

> "THE DEFENDANT: Ma'am, I don't have nothing to ask nobody yu know.
>
> THE COURT: I am merely explaining to you your rights, Mr. Rogers.
>
> THE DEFENDANT: I leave you to know I don't have nothing to ask nobody.
>
> THE COURT: You understand what I have to say?
>
> THE DEFENDANT: I hear wha you said, but I tell you I ain't got nothing to ask nobody. Nobody ask me nothing."

[21] At the end of the pathologist's testimony the Appellant was asked if he wished to ask any questions and he replied that he had nothing to ask and that he had already said so. The Appellant stuck to that position for the remainder of the trial, at times telling the Judge that they could do what they wanted and that he had nothing to say. The Judge asked him repeatedly, at various times, if he wished to object to material being tendered and he consistently answered no. He declined to cross-examine any witness. He was informed as to when he should arrange for his witnesses to attend and he stated that he would not call any witness. He was specifically alerted about calling alibi witnesses since he had given an alibi in his police interview and he declined. At the close of the prosecution case the Judge told the Appellant what were his rights and he declined to say anything, call any

witness or address the jury. It appears that the Judge at all times kept in mind the right of the Appellant to conduct his defence and invited him to do so and the Appellant on every occasion declined to participate in the trial.

Denial of the right to counsel

[22] The submissions for the Appellant on the ground that the Appellant was denied the right to Counsel began with the proposition that the Appellant was entitled under Article 6 (3) of the European Convention on Human and Civil Rights to be given free legal aid because the interests of justice so required. It was then submitted that the interests of justice were not served because the proceedings were complex, the Appellant lacked the capacity to defend himself and the potential sentence was severe. However, the submissions for the Appellant conceded that the Appellant had been provided by the State with Counsel, that the Appellant had rejected that Counsel and that to have aborted the trial at the stage it had reached would have caused great inconvenience and possible expense to the State. That concession left the Appellant with the submission that the Judge should have adjourned the trial "to fully explore and address all issues raised by the Appellant".

[23] There was no identification of anything on the record that fell within the reference to 'all issues raised by the Appellant'. The submissions referred to "various requests of the Appellant" and the fundamental principle of any criminal trial that legal representation must be practical and effective. The submissions also asserted that the mere nomination of Counsel does not ensure effective assistance since in many instances if an accused person is not comfortable or able to effectively communicate with his lawyer legal assistance might be worthless. I do not set out the further development of this point in the submission because there is no evidence of any complaint about the quality of the representation by Mr. Patterson and it is grossly unfair that he should now be subject to inferential criticisms.

[24] In oral argument Counsel concentrated on arguing that the Judge should have adjourned to enable the Appellant to see further about getting Dr. Browne to represent him "even if only as a matter of hope". Counsel relied heavily on the decision of the Privy Council in Mitchell (John) v R[4] the ratio of which is stated in the head note as follows:

> "Where counsel appearing for an accused on a capital charge seeks leave to withdraw during the course of the trial the trial judge should do all he can to persuade him to remain. The trial judge should only permit withdrawal if he is satisfied that the accused will not suffer significant prejudice thereby. If, notwithstanding the judge's efforts, counsel withdraws the judge must consider whether, and if so for how long, the trial should be adjourned to enable the accused to try to obtain alternative representation. If a defendant faces a capital charge and is left unrepresented through no fault of his own the interests of justice require that in all but the most exceptional cases there should be a reasonable adjournment to enable him to try to secure alternative representation.
>
> Accordingly, in such a case where the lack of representation was not due to any fault on the part of the accused, and the trial judge could not properly have been satisfied that the accused would not (or might not) suffer prejudice by the withdrawal of counsel, the conviction would be quashed on appeal on the ground that there should have been an adjournment to enable the accused to try to obtain alternative representation."

[25] The contention of the Appellant in Mitchell[5] was that the Judge should have done more to persuade Counsel to remain in the case and/or should have discharged the jury and adjourned the case to enable the Appellant to seek alternative representation. The Court of Appeal had taken the view that the trial Judge, in allowing Counsel to withdraw, and to continue with the trial in the absence of legal representation, had acted in accordance with the Appellant's own desires, and there was no obligation on the part of the trial Judge to grant an adjournment. The Court of Appeal also concluded that there was no prospect of the Appellant retaining Counsel privately or getting another legal aid lawyer and so an adjournment would have been pointless.

[4] (1999) 55 WIR 279.
[5] See p. 285 a.

[26] The Privy Council decided[6] that it was not correct to say, without qualification, that the Appellant had in fact of his own volition dismissed Counsel. Whether or not justified, the Appellant had not been content with the way the cross-examination had been conducted. That complaint was linked to a more serious matter which was the view of the Appellant that his lawyers wanted him to admit to a statement which he said that he had not made and that his lawyers were not prepared to put forward his case. The Privy Council commented[7] that it was plain that the lawyers did not wish to act for the Appellant and that he was not content to continue with them.

[27] As to the view of the Court of Appeal that an adjournment would have been pointless, the Privy Council considered the relevant legislation governing the provision of legal aid and concluded that it would have been open to the Judge himself to have indicated that in his view different Counsel should be assigned and that it would have been expected that the Judge's view would have been followed. [8]The Privy Council held that in those circumstances the Court of Appeal erred in directing themselves that an adjournment would have been pointless.

[28] That decision led the Privy Council to consider whether in all the circumstances an adjournment should have been granted for the question of other Counsel to be investigated. Their Lordships considered a number of decisions on the point in which a different conclusion was reached. These decisions have also been cited in the instant appeal and so their Lordship's consideration and summaries are especially helpful and I gratefully paraphrase or repeat them.

[29] In Robinson v R[9] the situation was different because there had already been many adjournments, the defendant had not applied for legal aid and had not paid his Counsel, and when an assignment for legal aid was offered the defendant

[6] At 285 h.
[7] At 286 a.
[8] See 286 h.
[9] (1985) 32 W.I.R. 330

declined it. It was also possible that witnesses would not have been available if there had been an adjournment.

[30] In Ricketts v R[10] the defendant had been found mute of malice and had chosen not to instruct his Counsel. As the Privy Council said, "[I]t was thus his own fault that he was unrepresented, and there was no breach of any constitutional right or fairness on the facts of the case."

[31] In R v Pusey[11] the applicant had rejected one Counsel assigned to him. Friends of his sought to obtain the services of another Counsel. Because of the difficulty of getting together the witnesses the defendant was given an adjournment of 43 minutes to contact the second Counsel, but he was engaged in another case. Sir Joseph Luckhoo in giving the judgment of the Court of Appeal said:

> "While we fully appreciate that the Constitution of Jamaica enjoins that every person who is charged with a criminal offence must be permitted to defend himself by a legal representative of his own choice if he so desires, yet the trial of an accused person cannot be delayed indefinitely in the hope that he will by himself or otherwise be able to raise at some indeterminate time in the future sufficient money to retain the services of counsel."

The facts of Pusey were very different from the facts of Mitchell, their Lordships observed in the latter case.

[32] The Privy Council then proceeded to express "the view that in a situation like the present under consideration the approach to be followed is to be found in the judgment of the Board in Dunkley and Robinson v R (1994) 45 WIR 318 at pages 325, 326:

> "In the first place, where counsel appearing for a defendant on a capital charge seeks leave to withdraw during the course of the trial the trial judge should do all he can to persuade him to remain. If the proposed withdrawal arises out of an altercation with the trial judge, he should consider whether it would be appropriate to adjourn the trial for a cooling-

[10] (1997) 55 W.I.R. 269
[11] (1970) 12 Jamaica L.R. 243

> off period. The trial judge should only permit withdrawal if he is satisfied that the defendant will not suffer significant prejudice thereby. If, notwithstanding the judge's efforts, counsel withdraws the judge must consider whether, and if so for how long, the trial should be adjourned to enable the defendant to try to obtain alternative representation. In this case, although the judge did not exactly encourage Mr. Frater to withdraw, he made no attempt to dissuade him and it does not appear that he considered the possibility of the appellant Dunkley trying to obtain alternative representation. Indeed, he allowed the trial to proceed as though nothing had happened, without even so much as an adjournment until the following morning. Their lordships can sympathise with the anxiety of the judge to proceed with a trial whose start had already had to be postponed on many occasions, but where a defendant faces a capital charge and is left unrepresented through no fault of his own the interests of justice require that in all but the most exceptional cases there be a reasonable adjournment to enable him to try to secure alternative representation."

[33] The need for skilled cross-examination in Mitchell was also considered[12] by the Board as was the confusion about procedure from which the Appellant suffered. Their Lordships concluded[13] that more should have been done to seek to ensure that the Appellant was represented. They did not consider that the Appellant's lack of representation was due to his fault and they did not consider that this was a 'most exceptional case' where a reasonable adjournment to enable the Appellant to try to secure alternative representation was not required.

[34] In response, Counsel for the Respondent submitted that the factual circumstances of the instant case bring the case within the scope of the guidance that the Privy Council adumbrated in Robinson v R[14] as to how the right of an accused person, to be permitted to defend himself by a legal representative of his own choice, was to be applied when the accused was seeking an adjournment to enable him to obtain legal representation. Counsel extracted the following four propositions from that decision.

[12] At 289 d.
[13] At 289 f.
[14] (1985) 32 W.I.R. 330.

[35] Firstly, the right of the accused to legal representation is the right to be permitted to defend himself. This means that the accused must not be prevented by the State in any of its manifestations, including judicial, from exercising the right accorded by the Constitution.[15] The right of the accused is not, under the Constitution, the right to be provided with free legal representation if the accused cannot afford the pay for legal representation.

[36] Secondly, the Constitution does not make it absolute that a Judge must always grant an adjournment so that no one is ever unrepresented. The provision was not to be construed in such a way "as to give rise to an absolute right to legal representation which if exercised to the full could all too easily lead to manipulation and abuse."[16]

[37] Thirdly, the Judge therefore has a discretion whether or not to grant an adjournment to obtain legal representation and may take into account other factors, even if it means that the accused would be unrepresented at his trial on a capital charge.[17]

[38] Fourthly, bearing in mind the absence of legal representation, there is a specific obligation on the trial Court to ensure a fair trial and the matter would be reviewed by the Appellate Court to see if a miscarriage of justice had resulted.

[39] Counsel for the Respondent submitted, in reliance upon the decision in Robinson, that in the instant case there had been no breach of the Appellant's rights or any unfairness to him because the trial Judge did not further adjourn the trial. In the instant case there were decisive distinguishing factors. At every stage the Appellant had Counsel available to him until he decided that he would represent himself. Counsel submitted that it was truly ironic that the Appellant, having exercised his right to defend himself as provided by the Constitution, should now

[15] At 338 b.
[16] At 338 g.
[17] At 338 h.

seek to assert that his right to legal representation was breached, he having refused the assistance of a state provided lawyer. Counsel considered applicable in its entirety the following passage from the speech of Lord Roskill in Robinson[18]:

> " … in the present case the absence of legal representation was due not only to the conduct of counsel but to the failure of the appellant, after his decision not to seek legal aid, to ensure that those by whom he wished to be represented were put in funds within a reasonable time before the trial or, if such funds were not forthcoming, to apply in advance for legal aid. If a defendant faced with a trial for murder (of the date of which the appellant had had ample notice) does not take reasonable steps to ensure that he is represented at the trial, whether by legal aid or otherwise, he cannot reasonably claim that the lack of legal representation resulted from a deprivation of his Constitutional rights."

[40] The instant case is even stronger, according to the submission of Counsel. Here, there was no refusal to continue by Counsel who had been appointed to represent the Appellant in contrast with Robinson, where Counsel who had been instructed on behalf of the accused, having been refused permission to withdraw, simply absented themselves. It also emerged from what Mr. Patterson told the Court on the opening day of the trial that he had been appointed some time in advance of the trial, he had been to see the Appellant to take instructions and it was from then that the Appellant had determined that he wanted Dr. Browne to represent him. The Appellant therefore had ample time to make arrangements with Dr. Browne. It was the fault of no one but the Appellant that the lawyer of his choice did not attend to represent him. It is clear that he had no Constitutional or other right to demand that the State pay for him to be represented by Dr. Browne and no one else.

[41] Counsel for the Respondent submitted that an adjournment would have been pointless. It is true that this case had not been repeatedly adjourned before, unlike Robinson where there had been 19 previous adjournments, 6 of which were adjournments of actual trial dates. On the other hand it was clear that the

[18] At 338 h.

Appellant was unable to pay for the services of Dr. Browne and required that the State pay Dr. Browne for him. It was clear that the State was not prepared to meet that commitment. It was also clear that the Appellant would accept representation by no one else.

[42] The situation before the trial Judge therefore was that an adjournment to allow time for the Appellant to seek the services of other Counsel would have been pointless because the Appellant would accept no one else. It would have seemed equally pointless to the trial Judge to adjourn in the hope that arrangements were going to be made with Dr. Browne by the State. It was, apparently, settled that the State would not engage him and it was abundantly clear that the Appellant could not pay him. The following passage from the judgment of Luckoo JA in Pusey[19], a decision that the Privy Council approved in Robinson, speaks directly to the situation before the trial Judge:

> "While … the Constitution of Jamaica enjoins that every person who is charged with a criminal offence must be permitted to defend himself by a legal representative of his own choice if he so desires, yet the trial of an accused person cannot be delayed indefinitely in the hope that he will by himself or otherwise be able to raise at some indeterminate time in the future sufficient money to retain the services of counsel."

[43] In the instant case the absolute position taken by the Appellant – Dr. Browne or no one else – would have justified the Judge in regarding the conduct of the Appellant as amounting to the manipulation and abuse to which Lord Roskill referred.[20] The failure of either Mr. Cato or Dr. Browne to attend Court (or to send another lawyer) to apply for an adjournment would have contributed to that view. It would not have escaped the trial Judge that such an application, to allow time for Dr. Browne to attend, could only be made if it could be stated that Dr. Browne had agreed to represent the Appellant and when he could attend. The record does not show that Dr. Browne or Mr. Cato ever conveyed to the Judge that Dr. Browne had committed to representing the accused and to attending. Absent such a

[19] (1970) 12 Jamaica L.R. 243 at 247.
[20] See paragraph [36], above.

commitment there was no basis upon which to apply for an adjournment. So the Judge was being manipulated to grant what could not be sought. And now the Judge is being blamed for not granting an adjournment that no one requested.

[44] It seems to me that the Judge had no basis upon which to grant an adjournment. At the point when the Judge decided to proceed with the trial with the Appellant unrepresented the accused had exhausted the possibility of getting Dr Browne. That was the only possibility in which he was interested. This is when he refused to tell the Judge the result of his last endeavour and declared that he would not participate in the trial.[21] It would have been the wrong decision to adjourn the trial, in my respectful view. The interests of the Appellant were not the only interests that the Judge had to consider; she had to consider the interests of the prosecution and the administration of justice. She had to consider the availability of the professionals who were witnesses for the prosecution: the pathologist and the forensic scientist were both foreign-based. She had to consider the prospect of securing the return of the witness, Ms. Beryl Felsher, who was also a foreign resident. She had to consider the impact on the relatives of the victim[22] of granting a pointless adjournment. She had to consider that a pointless adjournment undermines confidence in the administration of justice and the competence of the Court. She had to consider that Court time is precious and a pointless adjournment is a waste of time. She had to consider that an aborted trial is a waste of public money. I find that the Judge properly and fairly exercised her discretion in proceeding with the trial notwithstanding that the Appellant was unrepresented and I reject that ground of appeal.

Verdict against the weight of the evidence and denial of right to a fair trial

[21] See paragraph [18], above.
[22] Who were sufficiently interested in the trial to engage counsel to watch the trial; this was Mr. Astaphan who helpfully intervened when the Appellant first rejected his State appointed counsel; see the extract at paragraph [11], above.

[45] Even though it was his own fault that the Appellant was unrepresented, the fact that he was unrepresented placed a greater obligation on the trial Judge to ensure that the Appellant had a fair trial and an appellate Court will be concerned to ensure that obligation was fully met. The Appellant combined Grounds 1 and 2; that the verdict was against the weight of the evidence and that the Appellant was denied the right to a fair trial. The argument of these grounds focused on errors in the summing up. The premise of the attack on the summing up was that the defence of the Appellant was alibi, that he did not wear on the night of the murder the clothes taken from his dwelling place and that the sneakers were not his but his brother's.

[46] On the matter of the alibi defence Counsel for the Appellant argued that the Judge failed to direct the jury on the content of the Appellant's 'alibi statement' to the police and failed to direct the jury that the defence was an alibi. Counsel argued that in those circumstances the Judge failed to give the jury a specific direction on the burden of proof in relation to an alibi defence. Counsel submitted that the Judge should have told the jury that even if they rejected the alibi they must nevertheless consider the prosecution's case and could only return a verdict of guilty if the evidence for the prosecution made them feel sure of the guilt of the Appellant; R v Braithwaite (No. 1).[23] It was essential to give a specific direction to the jury lest they were left to believe that the onus was on the Appellant to prove his innocence.

[47] Counsel for the Respondent agreed that the Judge failed to direct the jury that it was not for the Appellant to prove the defence. However, Counsel argued, the combined direction on where the burden of proof laid would have left the jury in no doubt that it was for the prosecution to prove the guilt of the accused. Counsel submitted that a failure to give a direction in the specific terms of Braithwaite is not necessarily fatal, according to the treatment in Archbold 2003, 4-383. There is no rule of law that in every case where the defence relies on alibi the Judge must

[23] (1969) 15 WIR 263 at 269.

give such a direction, Counsel submitted. Counsel argued that the direction is necessary if the jury would be in danger of thinking that because the Appellant raised the defence of alibi it was for the Appellant to prove it.

[48] In the summing up the Judge gave ample treatment to the content of the alibi statement that the Appellant gave to the police. However, the judge failed to direct the jury on the burden of proof in relation to that defence. After the Judge had treated the alibi in her summing up she summed up the case on the DNA evidence and then returned to the statement that Appellant had made to the police, and told the jury that they could take that into account. The Judge then directed the jury that the fact that the Appellant did not take the witness stand to testify and that he remained silent "cannot by itself provide any additional support for the case for the prosecution. And the burden is on them to prove the case to you." She went on to direct the jury that it was for the prosecution to prove the facts of the killing and it was not for the Appellant to disprove any element. As Counsel for the Respondent admitted, it was not a direction on the burden of proof on the alibi defence. However, it was a direction on the burden of proof given in the context of what the Appellant stated to the police. While the Respondent admitted that the direction did not go far enough, it is a fair argument that it went some way.

[49] On the DNA evidence the written submission of Counsel for the Appellant essentially relied on the proposition that if the alibi defence were accepted then the Appellant could not have been responsible for the crime, despite the matching DNA profile. The submission also contended that the summing up on the DNA evidence was confusing. It may be helpful for me to say at once that I did not find that the summing up was confusing: the material was technical. I found that the Judge helpfully distilled the evidence of the expert on the testing of the samples taken from the deceased, the testing of the items of clothing, and the matching of the DNA profile of the deceased on two garments obtained from the Appellant, one of which he provided himself to the police.

[50] In oral submissions Counsel for the Appellant argued that the tremendous focus that the Judge gave to the DNA evidence blurred her focus on the issue whether it was the Appellant who wore the clothes that night and whether he was in the room that night. Counsel submitted that there was no proof beyond reasonable doubt that it was the Appellant who wore the clothes that night. He also submitted that Beryl Felsher spoke of seeing a male in a reddish shirt that night whereas the shirt taken by the police was a greenish shirt. Counsel made certain observations about the matching of samples the most focused of which was that the Judge misdirected the jury that the DNA profile of the deceased was found on the shorts that the Appellant gave to the police. I have studied the transcript of the testimony of the expert and this was, in fact, her evidence, so I am satisfied there was no misdirection.

[51] The final aspect of the summing up that Counsel for the Respondent criticised was the failure of the Judge to give a direction to the jury that they should not convict on circumstantial evidence unless they were satisfied beyond reasonable doubt that the inference that the prosecution was asking them to draw was the only inference reasonably open to them to draw, and that such evidence excluded every other inference that could reasonably have been drawn. Counsel pointed to the statement that the Appellant made to the police that the sneakers belonged to his brother as an example of a piece of circumstantial evidence that did not point inexorably to the guilt of the Appellant. The Judge, Counsel said, should have directed the jury as to what is not circumstantial evidence of the guilt of the Appellant.

[52] Having considered the criticisms and the relevant evidence and passages I do not find that they lead to the conclusion that the verdict was against the weight of the evidence or that the trial was unfair or that the verdict was unsafe. The forensic evidence proved beyond a reasonable doubt that the DNA profile of the deceased was found on clothing that belonged to the Appellant. He admitted to the police when they were collecting items of clothing from his dwelling that the underpants

belonged to him. The Appellant actually gave the shorts to the police and said those were the shorts that he had been wearing. These were the two items of clothing on which the DNA profile of the deceased was found. That evidence was inescapable. So was the conclusion: that the Appellant had been in physical contact with the deceased's bodily fluid. In the absence of any explanation from the Appellant as to how that contact occurred the only inference left to the jury was that the Appellant had been in physical contact with the deceased.

[53] In light of the strong case against the Appellant the deficiency in the summing up on alibi could not have had a material effect. Neither, in my view, could the failure of the Judge to have given a direction on circumstantial evidence.

[54] I would dismiss the appeal and affirm the conviction and sentence.

Denys Barrow, SC
Justice of Appeal [Ag.]

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Denys Barrow, SC
Justice of Appeal [Ag.]