

11.12.09

BARBADOS.

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeals Nos. 17 & 16 of 2006

BETWEEN:

DAMIEN GOLLOP

AND

ISHMAEL HINKSON

Appellants

AND

THE QUEEN

Respondent

Before: The Hon. Sir David Simmons, K.A., B.C.H., Chief Justice, the Hon. Peter Williams, Justice of Appeal and the Hon. Sherman Moore, Justice of Appeal

2008: September 29 and 30; November 14 and 17

2009: January 8 and 9; 11 December

Mr. Hal Gollop and Mr. Steve Gollop for appellant Gollop

Mrs. Angella Mitchell-Gittens and Mr. Andrew Pilgrim for appellant Hinkson

Ms. Manila Renée for the Respondent

DECISION

Introduction

SIMMONS CJ: On 8 June 2001, Cephas George alias 'Vincey' (the deceased), was severely beaten at Ellerton, St. George. He died in the Queen Elizabeth Hospital two days later. The appellants, Gollop and Hinkson, were indicted for manslaughter. On 23 October 2006 they were

convicted of the charge and, on 21 November 2006, *Kentish J* sentenced Gollop to 3 years' imprisonment and Hinkson to 4 years. They have appealed against their convictions.

The Evidence for the Prosecution

[2] On the evening of 8 June 2001, the deceased boarded a minibus in Bridgetown to go to Ellerton. According to the driver of the minibus, Ryan Mayers, the deceased appeared to be intoxicated and behaved aggressively and in an unseemly manner in the minibus. Antoine Newton, a passenger in the minibus, saw the deceased slap a female passenger on her buttocks. When the minibus reached "Love Rock Corner" in St. George, the deceased and other passengers disembarked. He had two Guinness bottles in his hands.

[3] Somewhere on the road, the deceased stopped and urinated. Stephanie Clarke was on the road going to visit her boyfriend. When she got near to the deceased, he turned towards her, asked her to wait and let loose a torrent of abuse upon her. He had a Guinness bottle in one hand and was holding his trousers with the other. He came towards her using expletives. She became afraid and ran all the way to her boyfriend's house. She said that she thought the deceased wished to rape her but he did not touch her.

- [4] Near to a street light was a fruit vendor's stall where some young men were gathered. An altercation ensued between some of the young men and the deceased. Two women, Wilma Blenman and her niece, Marla Applewhaite were on the road on their way to a supermarket. Blenman's evidence-in-chief was to the effect that, when she reached the area where the men were gathered, she saw Hinkson take up a piece of wood and hit a man (the deceased) on the back of his head. The man fell to the ground. She said that she recalled seeing a second person behind the man but she did not recognise this second person. However, she saw Gollop hit the man with a piece of wood to the side of his face. She saw the man's face begin to swell and she ran away to the supermarket. She knew Gollop well. She estimated that she was about 40 feet from these incidents.
- [5] Blenman's cross-examination was replete with answers demonstrating an inability to recall the events of the evening and even the date. She confessed to "having difficulty remembering" but she insisted that she did see Gollop and Hinkson strike the deceased with a piece of wood.
- [6] Marla Applewhaite said in her evidence-in-chief that she could not clearly say who first hit the deceased behind his head but she said that Gollop and Hinkson both hit him with a piece of plank. She said that before the man was hit, he was apparently quarrelling with a person

who hit him and she heard Hinkson ask: "You for real, you for real?" Both Hinkson and the man were flinging off their hands. She was unable to say where Hinkson was in relation to the man who was struck. Like Ms. Blenman, she too seemed to have difficulty in recalling the details of the incident. She said that she could not say what happened exactly because it was not clear in her mind. And in cross-examination, she said that she could not remember the incident very clearly. The passage of time had affected her memory.

The Medical Evidence

- [7] The medical evidence led by the prosecution is material to at least one issue in these appeals. Dr. Christopher Warner, senior registrar in the department of surgery at the Queen Elizabeth Hospital, saw the deceased, aged 31, on 9 June 2001. He said that the right side of the deceased's neck and face were swollen and painful and there was blood in his left ear. X-rays were taken and showed fractures of the right mandible. A brain scan, however, revealed no intracranial abnormality. In Dr. Warner's opinion, the injuries which he saw were consistent with severe blunt force trauma.
- [8] A post-mortem examination was performed by Dr. Stephen Jones, consultant pathologist. The body was identified to him by Adrian Beckles, a friend of the deceased. Dr. Jones noted a contusion of the

tissue on the right frontal area of the scalp measuring 11 x 2 cms. and extending from the corner of the right eye down and across the cheek and backwards to the mandible. This injury was associated with comminuted fractures of the right mandible and a fracture of the zygoma. Upon examination of the deceased's head, Dr. Jones found a fracture of the base of the skull and dry blood in the right auditory canal. The bony injuries were associated with contusion and subarachnoid haemorrhage of the basilar surfaces of the frontal and temporal base on both sides. Dr. Jones concluded that death was the result of severe traumatic injuries. Under cross-examination, he did not rule out the possibility that a man who had been drinking alcohol and had fallen and hit his face on a concrete wall, could have sustained the types of injury he found.

The Police Evidence

[9] The prosecution case also relied upon the evidence of police officers. Sgt. Ricardo Phillips was on duty at Oistins Police Station on 18 June 2001. He saw Gollop. He told Gollop of his intention to interview him in connection with a criminal matter and informed him of his right to communicate with or retain an attorney-at-law. P.C. Cameron King was present. Sgt. Phillips said that when he told Gollop of his right, Gollop replied:

"Mr. Phillips, I safe. My lawyer, Mr. Tull, bring me here."

Sgt. Phillips also testified that Gollop said he wished to speak to his father or mother and was allowed to use a telephone. On completion of the telephone call, Gollop said to Sgt. Phillips:

"You can talk to me now."

[10] About 2.29 p.m., according to Sgt. Phillips, he told Gollop about the incident of 8 June 2001 and the subsequent death of the deceased. He told Gollop that he was suspected to be one of the persons who injured the deceased and he wished to interview him. He cautioned Gollop who replied:

"Officer, I sorry 'bout it, but Vincey did doing bare foolishness 'pon de block. He did running down de woman and saying that the men 'bout here is shites and can't defend themselves."

[11] When asked whether he would give a written statement, Sgt. Phillips said that Gollop said:

"Mr. Phillips, Mr. Tull *din really tell* me wha to do but I feel I gine give you de statement and clear me head, cause it bothering me now."

[12] Gollop gave a written statement which was admitted into evidence after a *voir dire* in which it was argued that the statement had been taken in breach of s.13(2) of the Constitution. We deal with this matter later upon a discussion of the grounds of appeal.

[13] P.C. King supported some of the evidence of Sgt. Phillips but there were discrepancies in their evidence. For example, according to P.C. King, Gollop said:

“Mr. Phillips, Mr. Tull *done already* tell me.....now.”

And whereas Sgt. Phillips said that he and P.C. King did not collaborate on Gollop’s oral statements, P.C. King admitted that they did collaborate. There was also an internal contradiction in Sgt. Phillip’s evidence. At the preliminary inquiry he had said that he did know that Mr. Louis Tull Q.C. (as he then was) was Gollop’s attorney-at-law, but at the trial he said that he did not know that Mr. Tull was Gollop’s attorney-at-law.

Gollop’s Written Statement

[14] Appellant Gollop’s written statement was as follows:

“I, Damian Gollop, wish to make a statement. I want someone to write down what I say. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence. I have also been told that I have a right to an attorney-at-law, and the right to hold private communication with him. That evening I came home from work, I went home and I bathe, press a pants and a shirt, from there I ketch a van and went down town. I was walking up and down through town and killing time. I went in the arcade and play the machines. I come out in there. In fact, I din know wuh time it did but it did night. I ketch a taxi and come up the road, the taxi swing through the gap there and I get off ‘cross the road by the breadfruit tree and I went back ‘cross the road pon de block by the fellows. I

was out there just chilling, drinking Guinness, so after I saw this woman running and coming up the road. This man, I really couldn't pick out his face until he did there keeping nuff noise, interfering wid the woman. So he come out there pon de block keeping nuff noise, the men warn he, more than one body warn he, he get warn more than eight times plus my head did hurting me and I had my head down in a way. He and the men did just 'bout there keeping nuff noise. He did saying that the men 'bout there did shites, saying nobody can't do he nutting, he does fly all over, that two men come up there pon the block and rob the men, we couldn't do nutting. I get vex, and Anthony, Brew and some a the other fellows surround he. I ain't see how it start but Brew get up and start hitting the man wid a piece of board that the men did sitting down pon. Then after I get up I geh he a lash in he back. Anthony lash he after but I in know weh he hit he and when he fall down from there I shift 'bout there. A couple days later I hear he dead. I sorry 'bout it cause I din looking fuh he to dead either. He cause it pon he self because he did doing bare foolishness. I have read the above statement and I have been told that I can correct, alter or add anything I wish. This statement is true. I have made it of my own free will."

- [15] So far as the case against Hinkson is concerned, the police evidence was principally that of Sgt. Peter Barrow and Sgt. Clifford Bridgeman. On 8 June 2001 Sgt. Barrow went to the scene and saw a man lying on the road. He observed injuries. He spoke to the man who gave his name as Cephias George. On 18 June 2001 Sgt. Bridgeman saw Hinkson at Oistins Police Station and told him that he intended to interview him in connection with a criminal

matter. He informed Hinkson of his right to an attorney-at-law and

Hinkson said:

“I would like to consult with my attorney-at-law,
Mr. Tull.”

[16] Hinkson was allowed to use the telephone but was unable to make contact with Mr. Tull. However, later that day, Mr. Tull came to the police station and communicated with Hinkson in private. About 6.40 p.m., after Sgt. Bridgeman told Hinkson that, *inter alia*, he was seen hitting the deceased on his head with a piece of wood, Hinkson replied:

“I left home and went down the road to buy something and when I went down there I see a man in the road.”

Hinkson declined to give a written statement saying that:

“My lawyer tell me don't give any statement or don't say anything.”

The Defence Case

[17] Gollop and Hinkson both gave short unsworn statements from the dock. Gollop said:

“I did nothing to cause that man's death. That's all I have to say.”

Hinkson's statement was:

“I say from the very beginning that I leave and went down the road to buy something that night. I saw a man lying in the road. I had nothing to do with the injuries

that was upon him, and I don't even know the man.
That's all I have to say."

Summary of the Cases

[18] The prosecution case was that Gollop and Hinkson acted in concert to do dangerous and unlawful acts which resulted in the deceased's death. So far as the prosecution case went, there was no room for the defences of self-defence, acting in the prevention of a crime, or accident. Gollop and Hinkson acted deliberately and intentionally. Gollop's oral and written statements were evidence of his participation in the crime. On the other hand, the three defences mentioned were advanced by counsel for Gollop. Hinkson's defence was that he was not on the scene at the time of the crime. We hesitate to characterise it as an alibi since it did not comply with the requirements of ss.157 and 158 of the *Evidence Act, Cap.121* (the Act) – see paras.[68] to [75] *infra*. It was also the case of the defence that the prosecution had not established that the body on which Dr. Jones performed a post mortem examination was in fact Cephas George.

The Grounds of Appeal

(A) Gollop

[19] For convenience we discuss Gollop's grounds of appeal and the argument in a different sequence from the Notice of Appeal because we prefer to deal first with those grounds which raise issues of law. As a consequence, we have re-numbered the grounds during the discussion.

Ground 1 - Identification of Deceased

[20] On this ground it was contended that the trial judge erred in law in failing to uphold a submission that the prosecution had not established a positive identification of the alleged victim. The issue arose in this way. After only five prosecution witnesses had given evidence and, soon after Dr. Christopher Warner began his evidence-in-chief, Mr. Hal Gollop objected and submitted that, as the evidence stood "we have no identifiable person" (p.82). Counsel's point was that there had been no identification of the deceased to whom previous witnesses had referred as "the guy", "the fellow" or "the person". The Court overruled the objection, holding that it was premature since all the evidence for the prosecution had not been adduced.

[21] At the trial and on appeal, counsel relied on *R. v. Florence Bish* (1978) 16 JLR 106 in which the Court of Appeal of Jamaica held that

on a charge of murder, in order to support the charge, it is the duty of the prosecution to prove that the body of the deceased was the person actually murdered by the defendant. In *Bish*, the Court of Appeal found that the body of the deceased on whom a post-mortem examination was performed was not identified as the person who was stabbed by the defendant.

[22] In this appeal, the record reveals that the trial judge was careful to assist the jury by marshalling, collating and pointing out the evidence on this issue. The prosecution evidence showed that a man was struck by pieces of wood at Ellerton. Sgt. Barrow went to the scene, saw the man lying in the road and spoke to him. He gave his name as Cephas George. Sgt. Barrow saw an ambulance come and take this man to hospital. Gregory Parris, an emergency medical technician, saw the man lying in the road, treated him and took him to the Q.E.H. There, he handed him over to hospital personnel. That very night, Dr. Warner examined the man at the hospital. He was identified to Dr. Warner by hospital staff as Cephas George and he was admitted to the hospital. Under cross-examination by Mr. Gollop, Dr. Warner said that "Cephas George was talking, his vital signs were normal and he appeared 'alright' up to the night of 10 June 2001".

[23] Dr. Stephen Jones, who performed the post-mortem examination, said that Adrian Beckles identified the body to him as that of Cephas George, and Beckles said that he was a friend of George. This evidence was not challenged. Moreover, in his written statement to the police, Gollop said that “the deceased man did there ‘pon de block keeping nuff noise” and the deceased was warned by the young men on the block. He, Gollop, gave him a lash in his back.

[24] It is true that there was a discrepancy in Beckles’ evidence. Dr. Jones said that Beckles identified the body on 14 June 2001 whereas Beckles’ evidence was that he last saw the deceased alive in July 2001. The trial judge highlighted this discrepancy in her summation and gave the jury clear and appropriate directions as to how to treat it. Ultimately, it was for the jury to determine whether Beckles was lying or mistaken as to a date.

[25] In our judgment, at the close of the prosecution case, there was a sufficiency of evidence to enable the prosecution to discharge the onus on this issue. From the evidence of primary facts, the inferences deducible were reasonable and logical and pointed to the deceased’s being Cephas George who was badly beaten at Ellerton on 8 June 2001. The cumulative effect of the evidence for the prosecution was that the body identified to Dr. Jones was that of Cephas George, the

same man who was seen by Dr. Warner on 9 June 2001. We find no merit in this ground of appeal.

Ground 2 – Right to Attorney-at-Law

[26] This ground of appeal raised an issue relating to s.13(2) of the Constitution. It was here submitted that the trial judge erred in law in admitting the written statement of Gollop into evidence. It was the contention of counsel that the statement was taken in breach of s.13(2). This subsection, so far as material, provides –

“(2) Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention and shall be permitted, at his own expense, to retain and instruct without delay a legal adviser of his own choice, being a person entitled to practise in Barbados as an attorney-at-law, and to hold private communication with him;

[27] The gravamen of counsel’s submission is that Sgt. Phillip’s interview of Gollop and the taking of a statement in the absence of Gollop’s then attorney-at-law were unlawful. Counsel submitted that the underlying purpose of s.13(2) is to protect individuals against self-incrimination and, in so far as the subsection is part of the fundamental rights of an accused person, it must be given a liberal and purposive construction and application. We accept the soundness of this submission but, in every case, whether the subsection has been

violated or not depends upon the particular factual matrix. However, before examination of the facts, we think it convenient to state the legal principles extracted from the case law.

[28] The Court of Appeal of Barbados has considered the applicability of s.13(2) in the two unreported cases of *Chow v. R. (Criminal Appeal No.78 of 1994, unreported decision of 30 June 1998)* and *R. v. Coronell and Nagles (Criminal Appeals Nos. 6 and 7 of 1995, unreported decision of 21 July 2000)*, and in the reported cases of *Chase v. R. (1997) 55 WIR 53* and *Ian Gill v. R. (2003) 66 WIR 40*. Following the advice of the Privy Council in *Attorney-General v. Whiteman (1991) 39 WIR 397*, it is well settled in Barbados that the time at which an arrested or detained person is to be informed of his/her right to consult with a legal adviser of choice is at a stage before the commencement of “in-custody interrogations”: *Gill* at para.46.

[29] Very recently this Court discussed in considerable detail the matter of an accused’s right to counsel in *Kenny Lavonne Mascoll v. R. (Criminal Appeal No.33 of 2004, unreported decision of 17 December 2008)* at paras.[64] to [78]. It is therefore unnecessary to repeat many of the dicta and observations expressed in that appeal. However, we wish to emphasise that *Whiteman* was decided in the

context of a constitutional provision that is different from its Barbadian counterpart whereas, in the Bahamian case of *Simmons and Greene v. R.* (2006) 68 WIR 37, the relevant section of the constitution of the Bahamas (Art.19(2)) is *in pari materia* with s.13(2) of the Constitution of Barbados.

[30] This Court accepts that the right to consult with a legal adviser of choice is considered to be of such importance as to warrant inclusion in Chapter III of the Constitution. And as this Court has said before, such rights are neither theoretical nor illusory – *Cumberbatch v. R.* (2004) 67 WIR 48. However, we are mindful of the observation of Lord Steyn in *Allie Mohammed v. The State* (1998) 53 WIR 444 at 454 and 455 that -

“[I]t is important to bear in mind the nature of a particular constitutional guarantee and the nature of a particular breach. For example, a breach of a defendant’s constitutional right to a fair trial must inevitably result in the conviction being quashed. *By contrast, the constitutional provision requiring a suspect to be informed of his right to consult a lawyer, although of great importance, is a somewhat lesser right and potential breaches can vary greatly in gravity. In such a case, not every breach will result in a confession being excluded.*” (*Emphasis supplied*).

[31] Lord Steyn also took the opportunity of affirming in *Allie Mohammed* that, in respect of a confession obtained after a breach of a defendant’s right to communicate with his lawyer, it is only the trial

judge who can rule on the question whether a confessional statement is admissible in evidence. *Lord Steyn* relied upon *King v. R. (1968) 12 WIR 268* and certain *obiter dicta* of *Lord Diplock* in *Thornhill v. Attorney-General of Trinidad and Tobago (1976) 31 WIR 498* for the proposition that, in such a case, the trial judge has a discretion to admit or exclude the confession. *Allie Mohammed* is an important case for Commonwealth Caribbean jurisprudence because, *inter alia*, the Privy Council refused to follow the well-known decision of the United States Supreme Court in *Miranda v. Arizona (1966) 384 US 436*. That case held that a confession taken in breach of a suspect's constitutional rights is always inadmissible.

[32] *Lord Steyn* said in *Allie Mohammed* that, in exercising the discretion, the trial judge must of course weigh all of the circumstances. The court must pay due regard to the interests of the community in securing relevant evidence bearing on the commission of the crime; and, on the other hand, the court has to weigh the interests of an individual whose rights have been violated.

[33] During the trial, after lengthy submissions by Mr. Hal Gollop and Mr. Anthony Blackman, *Kentish J* gave a considered ruling in which she admitted the written statement on two grounds. She found that, on the facts, s.13(2) had not been breached and, secondly, she ruled the

statement admissible upon an exercise of her discretion in accordance with the principles adumbrated in *Allie Mohammed*.

[34] We turn now to the facts relating to the issue. Gollop was informed of his s.13(2) right to an attorney-at-law by Sgt. Phillips prior to the interview and during the course of it. He had been brought to the police station by Mr. Tull. The interviewing officers knew this. The procedures in the *Judges' Rules* were followed and the statement was not obtained in an oppressive manner. It was not argued that the police conduct was at variance with the Judges' Rules.

[35] The issue turns upon a construction of Gollop's oral statement. When Sgt. Phillips told him of his intention to interview him in connection with a criminal matter and told him of his right to an attorney-at-law, Gollop replied: "Mr. Phillips, I safe. My lawyer Mr. Tull bring me here." He was then asked if he wanted to speak to a friend or have someone present and he replied: "I would like to call my mother or father." He used the telephone and then said: "You could talk to me now." This exchange took place at 2.20 p.m. Nine minutes later, he was asked if he wished to give a written statement after being cautioned and he did so. Immediately before giving the written statement, Gollop said:

"Mr. Phillips, Mr. Tull *din* really tell me wha' to do, but I feel I gine gi' you de statement and clear me head, 'cause it bothering me now."

[36] It is important to note that P.C. King's version of the first part of that oral statement differed from that of Sgt. Phillips to the extent that, according to P.C. King, Gollop said:

"Mr. Phillips, Mr. Tull *done* tell me wha' to do....."

[37] However, whether "Mr. Tull *didn't* tell" him what to do or whether "Mr. Tull *done* tell" him what to do (meaning that Mr. Tull had already told him what to do), it seems to us that Gollop was clearly intimating to the officers that he felt able to give a statement and get the matter out of his mind since it was bothering him. This part of Gollop's oral statement immediately before he gave the written statement was not challenged by counsel.

[38] It seems to us that he freely and voluntarily gave the statement after Mr. Tull had accompanied him to the station and after being told of his right to counsel before in-custody interrogation began. We also think it important to observe that at the top of the statement and before the start of the actual statement, Gollop signed a declaration to the effect that he had been told of his right to an attorney-at-law and his right to hold private communication with him. Again, there was no

challenge to this declaration in counsel's cross-examination of the police officers.

[39] In our view, the law does not require that retained counsel should be present throughout an interview. It requires no more than that the defendant be informed of his right to counsel. Where a defendant is told of his right and chooses of his own volition to give a statement in the absence of counsel in circumstances where the exercise of that choice was free, the law does not prohibit the admission of a statement freely made. Of course the intent and spirit of s.13(2) is to enable a defendant to avoid self-incrimination.

[40] But how often is a defendant cautioned of his right to remain silent and how often has a defendant gone ahead and made a statement, the caution notwithstanding? In our judgment, before a statement can be excluded from evidence on the ground of a denial of access to an attorney-at-law, the trial judge should be satisfied that after the defendant was informed of his right, he, for example, made a request to see counsel and it was refused or the conduct of the police evinced an intention to frustrate the defendant in exercising his right – see, for example, *Simmons and Greene v. R.* (*supra*).

[41] The facts here show that the evidence regarding the right to counsel was unchallenged. The trial judge was entitled to conclude that the

police had acted in good faith. Apart from the linguistic or dialectal discrepancy, it was reasonable to infer from the remainder of the oral statement that Gollop wished to give a statement, his retention of Mr. Tull notwithstanding. We therefore hold that the trial judge properly admitted the statement on the two grounds already mentioned. This ground of appeal is accordingly rejected.

Ground 3 – Mistrial

[42] This ground is related to the previous ground. Here it was contended that the trial judge had erred in law in failing to declare a mistrial “after it became clear that there had been a material irregularity committed in the recording and reproduction of the statement of a witness, which naturally altered the substance and meaning of the statement and could have led to prejudice against the accused.” Counsel relied on the discrepancy in the evidence of Sgt. Phillips and P.C. King to which we have referred at para.[35]. We do not consider that there was a material irregularity properly so called. There may have been a material discrepancy certainly but not a material irregularity in the trial such as to lead to a quashing of the conviction under s.4 of the *Criminal Appeal Act, Cap.113A*.

[43] During the *voir dire*, counsel and the trial judge first became aware of the discrepancy in the two officers’ versions of Gollop’s oral

statement. The statements were admitted into evidence and the jury heard them. Mr. Hal Gollop submitted that the court should have declared a mistrial. He submitted that the discrepancy could have prejudiced Gollop and he sought to connect the discrepancy to the trial judge's ruling to admit the written statement. We do not agree with counsel. Whether Mr. Tull did not tell his client what to do or whether he had already told him what to do was of little account. The inescapable constant fact was that Gollop decided to give the statement to clear his head and he freely gave the written statement. Resolution of the discrepancy was a matter for the jury after a proper direction. In this case the trial judge explained to counsel (at p.334):

“What we have is a cross-examination conducted on the basis of a misapprehension, through nobody's fault, of what the evidence actually was.”

[44] The trial judge was of the opinion that proper directions to the jury would remedy the situation especially since the discrepancy, the objection and the arguments took place in the absence of the jury. Accordingly, the trial judge drew the jury's attention to the discrepancy at p.546, having given them the standard direction and left the resolution of the issue to them with these words:

“So this is a matter for you to determine whether it is a material discrepancy which affects the credibility of the witness, bearing in mind the direction I have given you

on discrepancies. And I have also given you a direction in relation to the oral statements and how you treat oral statements.”

[45] The trial judge cannot be faulted in her approach to this issue. She identified the discrepancy for the jury, gave them the appropriate directions in respect of oral statements and the treatment of discrepancies and left the issue for their determination. The fact that there was a material discrepancy in the police evidence did not warrant a declaration of mistrial as counsel had argued. This ground is rejected.

Ground 4 - Causation

[46] On this ground it was submitted that the trial judge erred in failing to deal with the issue of causation adequately and for the jury's benefit. Counsel submitted that both of the doctors “agreed that the injuries received by the deceased person were trivial and both of them agreed that they were surprised when he died”. Mr. Gollop's précis of the medical evidence is not precise. Dr. Warner gave evidence of fractures of the mandible on the right hand side. These fractures were revealed from the x-rays. However, a brain scan did not at that time reveal any intra-cranial abnormality but the deceased was “assessed as having mild injury to the brain with fractures of the jawbone in two places”. He was of opinion that those injuries were consistent with

severe blunt force trauma. Severe force was required to break the bones. According to Dr. Warner, up to the night of 10 June 2001 the deceased's situation was uneventful. His vital signs were normal. Dr. Warner's assessment of "a mild head injury" was based on the brain scan. When the deceased was seen on the ward there was no cause for alarm. However, the deceased died suddenly within minutes of appearing to be 'alright'. This evidence led Mr. Hal Gollop to argue that there must have been a *novus actus interveniens*.

[47] Dr. Jones found fractures of the base of the skull, fractures of the mandible and other contusions. His conclusion was that death was the result of severe, traumatic head injuries. These injuries were "severe blunt force injuries".

[48] In counsel's submission, no proper cause of death was established. At p.514 the trial judge directed the jury as follows:

"[A] specific issue of causation arises and I will now give you a direction on causation. In law, it is enough that the accused's act contributed significantly to the death of the deceased. It need not be the sole or principal cause thereof."

[49] Then she went on to review Dr. Warner's evidence and explained to the jury that the defence were saying that since the deceased's death was sudden and came as a surprise to Dr. Warner, "then it appears to have been caused by some supervening event". The trial judge

pointed out that there was no evidence in the case of any supervening event and the jury should not speculate.

[50] As we see it, the law is quite clear and was adequately explained to the jury. Causation is generally a question of fact for the jury although, in determining whether a defendant's act was the cause of a particular consequence, they must apply legal principles. And "the first principle is that [a defendant's] act cannot be the cause of an event if the event would have occurred in precisely the same way had that act never been done. It must be proved that, but for, [the defendant's] act, the event would not have occurred" – *Smith & Hogan, Criminal Law (9th Edn) 1999 p.335*. In *R. v. Smith [1959] 2 Q.B. 35* Lord Parker CJ said at p.42:

"It seems to the court that if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating."

[51] *Archbold, Criminal Pleading, Evidence & Practice 2008* at para.19-6

states the law thus:

"In homicide cases, it is rarely necessary to give the jury any direction on causation as such. When such direction is needed, they should be told that in law it is enough that the accused's act contributed significantly to the death; it need not be the sole or principal cause thereof."

[52] In *Jeffrey Adolphus Gittens v. R. (Criminal Appeal No.10 of 2007, unreported decision of 3 April 2009)* this Court said at para.[20] –

“The law on causation for murder requires that there must be a factual link between the act complained of and the death as well as a legal link in that the act must be a significant, sometimes described as an operating and substantial, cause of the death.”

[53] The case of *Jordan [1956] 40 Cr.App.R. 152*, cited by counsel is distinguishable from the factual situation in these appeals. In *Jordan*, the defendant stabbed the deceased. He was taken to hospital where he died. The defendant was convicted of murder. On appeal new evidence was admitted to show that, at the time of the deceased’s death, his wound had virtually healed and that he died as a result of being given antibiotics to which he was allergic. The Court of Appeal of England and Wales held that, if this evidence had been before the jury, they would have concluded that it was the medical treatment and not the stab wound which caused the deceased’s death.

[54] In these appeals there was no evidence of any *novus actus interveniens* of the nature and quality of that in *Jordan*. At its highest, there may have been inferential evidence of a wrong diagnosis but this is counterbalanced by Dr. Warner’s evidence that at the time of the brain scan, no evidence of brain damage was seen. In any event, the

cross-examination did not adduce sufficient evidence from which a satisfactory inference could be drawn of a wrong diagnosis.

[55] In the circumstances, we hold that the trial judge's directions were ample and since the issue was one of mixed law and fact for the jury, it seems evident from their verdict that they were satisfied that the injuries which the deceased received, contributed significantly to his death. Accordingly, this ground of appeal fails.

(B) Hinkson – Ground 2 – Joint Enterprise

[56] Mrs. Mitchell-Gittens submitted on behalf of Hinkson that the trial judge did not adequately outline the legal principles governing joint enterprise and failed to assist the jury in analysing the evidence. The direction which the trial judge gave was as follows:

“Mr. Foreman and members of the jury, the prosecution's case is that accused Gollop and accused Hinkson together unlawfully killed Cephas George. Where a criminal offence is committed by two or more persons, each of them may play a different part, but if they are acting together as part of a joint plan or agreement to commit the offence, they are both guilty.

It is the law that where two or more persons form a plan to commit a crime and are proved to put the agreed plan into execution, those who are party to the plan and who participate in the execution of the agreed plan, become responsible for the acts of each other, done in the course of the furtherance of the plan.

The words 'plan' and 'agreement' do not mean that there has to be any formality about it. They do not have to sit

down and draw up a plan and say this is what we are going to do. An agreement to commit an offence may arise on the spur of the moment. No words may be spoken at all. The plan or agreement can be made with a nod of the head, or a wink, or a knowing look or it can be inferred from the behaviour of the parties. The essence of joint responsibility for a criminal offence, is that each accused shared a common intention to commit the offence and played his part in it, however great or small, so as to achieve that aim.

Your approach to this case, therefore, should be as follows: If, looking at either the case of accused Gollop or accused Hinkson, you are sure that he did an act or acts as part of a joint plan with others to commit the offence of manslaughter as charged, then he is guilty. Put simply, Mr. Foreman and your members, the question for you is this: Were accused Gollop and accused Hinkson in it together? It is open to you to convict one and acquit the other, to acquit one and convict the other, or to convict both of them or to acquit both of them.”

[57] The foregoing direction followed closely the specimen direction on joint responsibility published by the Judicial Studies Board of England and Wales. Counsel was unable to highlight in a convincing manner any deficiency of substance in the direction. In our opinion, not only was the direction adequate but the trial judge also made an analysis of the evidence relevant to the issue of joint enterprise in order to assist the jury in their application of the evidence to the directions on the law – see, in particular, pp.509-513 of the record. Both Gollop and Hinkson were seen to use a piece of plank to inflict injury on the deceased. No questions arose as to their use of different

weapons, or the one acting outside the scope of the plan such as to lead the trial judge to make the fine distinctions set out, for example, in *R. v. Powell*, *R. v. English* [1997] 3 WLR 959 and *R. v. Uddin* [1998] 3 WLR 1000. The ground of appeal is accordingly rejected.

Hinkson - Ground 3 – Treatment of Defence Cases

[58] On this ground, counsel for Hinkson submitted that the trial judge did not adequately separate the cases against the respective appellants. At p.507 the trial judge directed the jury properly that they were required to consider the cases of the appellants separately. She said:

“You have to keep the evidence against accused Gollop and accused Hinkson in separate compartments as it were. If one accused makes a statement, oral or written, that is not evidence against another accused. The oral or written statements attributed to an accused are evidence for or against that accused only.”

[59] The trial judge referred to oral statements made by Gollop and his written statement and directed the jury that these statements were evidence for or against Gollop only and *vice versa* in respect of Hinkson. However, Mrs. Mitchell-Gittens’ criticism was directed to a passage in the summation at p.560 where the trial judge, having repeated her earlier direction as to separate consideration of the respective cases, nevertheless said the following while discussing the contents of Gollop’s written statement:

“So do you find in the statement...any suggestion that the deceased was attacking accused Gollop or accused Hinkson? You may well ask yourselves whether in that statement and, taking into account all of the circumstances, *either accused Gollop or accused Hinkson honestly believed or could honestly have believed that either of them was under attack from the deceased, so that it was necessary for each of them to defend himself.*” (Our emphasis).

[60] The trial judge was clearly inviting the jury to draw inferences against Hinkson from the contents of Gollop’s written statement *which was evidence inadmissible against Hinkson.* In other words, the passage complained of not only failed to avoid the risk of an inference being drawn from evidence inadmissible against Hinkson but served to invite the jury to draw inferences from inadmissible evidence and evidence at variance with Hinkson’s case. This was an error. The comments were an unfortunate blemish in the summation and were at variance with the proper direction given earlier – see para.[58].

[61] At p.561 the trial judge purported once again to join the respective cases of Gollop and Hinkson in putting the defence cases to the jury.

The following passage was criticised by Mrs. Mitchell-Gittens:

“The defence further say, that if you conclude that accused Gollop and accused Hinkson were not acting in self-defence, then they were acting in the prevention of the commission of a crime against Stephanie Clarke by the deceased, and used no more force than was reasonable to prevent the deceased from committing that crime.”

[62] We consider that when the trial judge gave the jury directions on the law in relation to all of the defences canvassed, she may have confused the jury. By way of example, we have noted that, at p.516 of the record, the trial judge told the jury that it was for the prosecution to make them feel sure that –

“Accused Gollop and accused Hinkson were not acting in lawful prevention of a crime. Accused Gollop and accused Hinkson do not have to prove that there were acting in prevention of a crime.”

But on the evidence, this defence was not open to Hinkson. He said that he was not at the scene. Similarly, at p.526, the trial judge gave this direction when dealing with the issue of accident.

“It is for the prosecution to make you feel sure that the injuries were not caused accidentally. Accused Gollop and accused Hinkson do not have to prove to you that those injuries were caused accidentally.”

Hinkson’s counsel at the trial, Mr. Marlon Gordon, did not cross-examine to suggest that the deceased may have received injuries accidentally. Accident was no part of Hinkson’s case. It was Mr. Hal Gollop’s cross-examination of Dr. Jones on behalf of appellant Gollop that suggested the possibility of accident. It was Gollop who had raised the issues of self-defence, prevention of crime and accident. There was no attempt by the trial judge to separate the respective

cases and analyse the evidence relating to each appellant's defence. In our judgment, it was crucial that the jury should have been given this kind of assistance to enable them to determine whether the prosecution had discharged the burden of proof in respect of each appellant. We do not think that the approach of the trial judge in marshalling the evidence relevant to the defences, assisted the jury in coming to a proper determination on the respective defences.

[63] In the passage quoted at [61], the trial judge made the error of uncritically rehearsing part of the closing address of defence counsel without making a distinction between the respective cases for the defence and seeking to compartmentalise them. In so far as the trial judge had previously impressed upon the jury the need to treat the cases of Gollop and Hinkson separately, it may have been at least confusing to the jury to hear the trial judge lump the two cases together. This confusion may well have been compounded by the apparent attribution to Hinkson of defences which he had not run. Hinkson did not raise self-defence or accident as issues. His oral statement to the police and his unsworn evidence were to the effect that he was not at the scene of the crime on the evening in question.

[64] We have been unable to find any direction or warning from the trial judge advising the jury not to approach their duties in the manner

advanced by counsel. All that was required was a clear statement from the trial judge that they should not seek to determine their findings in respect of each appellant by a consideration of the evidence of Gollop and Hinkson together. Then, she should have demonstrated to the jury with reference to the relevant evidence in respect of each appellant, what was the proper approach to the case of each appellant.

[65] Ms. Manila Renée, on behalf of the respondent, submitted that the trial judge's directions were proper "in the light of the close inter-relationship of the evidence." She disagreed with Mrs. Mitchell-Gittens that Hinkson's case was significantly different from Gollop's. In fact, she contended that the two cases were "practically identical although the evidence against Gollop was a bit stronger." We cannot accept these submissions. Hinkson's case was indeed different from that of Gollop and required to be treated separately and differently in the summation. Moreover, since the trial judge invited the jury to consider the defences of the two men together, it is entirely possible that Gollop's defences may also have been prejudiced by their erroneous linkage with Hinkson's. The jury may have been deprived of the opportunity to consider Gollop's defences on their own merits.

[66] Where, on a trial of multiple defendants, a trial judge summarised a part of the evidence in a manner which may have led the jury to draw unfavourable inferences from inadmissible evidence against one defendant, the English Court of Appeal held that the verdict was unsatisfactory and allowed the appeal: *R. v. Groom* [1976] 2 All ER 321. There, *James LJ*, giving the decision of a Bench of five judges, including *Widgery CJ*, said at page 326:

“Counsel for the Crown, whilst not conceding that the summing-up was defective in any way, argued that such criticisms as can be made of it are not of such weight as to render the verdict unsafe or unsatisfactory. We are unable to take that view. We think there is a possibility that the jury may have been influenced in the appellant’s case by evidence inadmissible against him and we think that the jury did not receive a proper reminder of his defence. For these reasons we allowed the appeal against conviction.”

[67] To the extent that the trial judge did not leave the defences of Gollop and Hinkson to the jury clearly and properly and purported to discuss the defence cases together, she erred in law.

Hinkson - Ground 4 - Alibi

[68] Counsel for Hinkson contended that the trial judge did not adequately leave the defence of alibi to the jury or point out to them the relevant parts of the evidence. There is no merit in this ground of appeal. At p.536 of the record, the trial judge distinctly addressed the matter of

alibi, as she said, “out of an abundance of caution”. Having explained to the jury what is an alibi and having given the standard directions pertaining to alibi, the trial judge pointed out the relevant evidence to the jury. She said:

“In this case, accused Hinkson in his unsworn statement told you, that he said from the beginning that he leave and went down the road to buy something that night. He saw a man lying in the road. He had nothing to do with the injuries that was upon him. So he is saying that he was not at the scene when the incident occurred; he was somewhere else. So, if you believe accused Hinkson was somewhere else then your verdict will be a verdict of not guilty. If you are in doubt as to whether he was somewhere else or not, your verdict will be likewise a verdict of not guilty.”

[69] We think that the time has come for this Court to issue guidance to trial judges in respect of the defence of alibi. The correct approach to the defence of alibi was explained in *Robert Walker v. R. (Criminal Appeal No.12 of 2004, unreported decision of 18 March 2008)*, but it seems to us that the defence of alibi is being raised in many cases where there is no evidence to support an alibi within the meaning of s.157 of the Act and where the procedural requirements of the Act have not been complied with. Yet, “out of an abundance of caution”, trial judges feel constrained to give full blown directions when the same are not warranted.

[70] The Act lays down the evidential requirements for raising the defence of alibi. Section 157 provides –

“[E]vidence in support of an alibi “means evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.”

[71] Section 158(1) enacts the procedure for raising a defence of alibi at a trial on indictment. It is there stated –

“158. (1) On a trial on indictment the accused shall not without leave of the court

- (a) adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi; or
- (b) call any person to give such evidence at the trial unless
 - (i) the notice under paragraph (a) includes the name and address of the witness or if the name and address is not known to the accused at the time he gives notice, any information in his possession that might be of material assistance in finding the witness;
 - (ii) if the name or the address is not included in that notice, the court is satisfied that the accused, before giving the notice, took and thereafter continued to take all reasonable steps to secure that the name or address would be ascertained;

- (iii) if the name and address is not included in that notice, but the accused subsequently discovers the name or address or receives other information that might be of material assistance in finding the witness, he forthwith gives notice of the name, address or other information, as the case may be; and
- (iv) if the accused is notified by or on behalf of the prosecutor that the witness has not been traced by the name or at the address given, he forthwith gives notice of any such information that is then in his possession or, on subsequently receiving any such information, forthwith gives notice of it.”

By subsection (2), the court shall not refuse leave under this section if it appears to the court that the examining magistrate did not inform the accused of the requirements of this section.

[72] It is clear that the effect of the procedure contained in s.158 is to ensure that a genuine defence of alibi is properly notified to the prosecution well in advance of a trial. In this regard the “prescribed period” referred to in s.157 means a period of 7 days from the end of proceedings before the examining magistrate.

[73] Moreover, as was pointed out in *Robert Walker*, the Practice Direction re: Plea and Directions Hearings No.1/2003, also requires

the prosecution and the defence to inform the court of any alibi which should be disclosed – para.10(c); and the accompanying questionnaire requires the defence to state whether an alibi defence is to be presented – question 9.

[74] In this case *none* of the statutory or practice requirements was followed. In our judgment no direction on alibi was necessary. In future, where the statute and the Practice Direction are not complied with, trial judges should not condescend upon giving directions appropriate to the defence of alibi properly so called although, of course, the jury must be reminded of the defence case in accordance with the duty to leave the defence case such as it is to the jury.

[75] Hinkson cannot now complain that he did not receive proper directions on alibi in circumstances where none was merited. The directions were generous to him albeit that they were unnecessary.

Ground 5 (Gollop) and Ground 2 (Hinkson) – Handling the Evidence

[76] These grounds of appeal alleged that the trial judge erred in law in failing properly to assess, analyse and evaluate the evidence for the benefit of the jury. Counsel cited the well-known dictum of *Ibrahim*

JA in Fuller v. The State (1995) 52 WIR 424 at 433:

“Great care should be taken in identifying to the jury all the relevant criteria. Each factor or question should be separately identified and when a factor is identified all

the evidence in relation thereto should be drawn to the jury's attention to enable them not only to understand the evidence properly but also to make a true and proper determination of the issues in question. This must be done before the trial judge goes on to deal with another factor. It is not sufficient merely to read to them the factors set out in *Turnbull's* case and at a later time to read to them the evidence of the witnesses. That is not a proper summing-up. The jury has heard all the evidence in the case when the witnesses testified. It will not assist them if the evidence is merely repeated to them. What they require from the judge in the final round is his assistance in identifying, applying and assessing the evidence in relation to each direction of law which the trial judge is required to give to them and also in relation to the issues that arise for their determination. How that is done is best left to the discretion of each individual judge but, howsoever it is done, what is required is that the jury must be given in clear language the assistance that they need to enable them properly to discharge their function."

[77] Both Mr. Gollop for appellant Gollop and Mrs. Mitchell-Gittens for appellant Hinkson were critical of the way in which the trial judge dealt with the evidence of the witnesses Blenman and Applewhaite. This Court has warned on several occasions that it is not a proper discharge of the judicial function in an indictable trial merely to rehearse the evidence in an uncritical way to the jury. Indeed we endorse all of the advice given by *Ibrahim JA* in *Fuller* and commended to judges by the Privy Council in *Langford and Freeman v. The State of Dominica (2005) 66 WIR 194*. But the question in these appeals is whether this Court is satisfied of the

approach of the trial judge. We have scrutinised the summation carefully and are bound to say that we cannot fault the trial judge's approach. Both counsel focused on her treatment of the evidence of Wilma Blenman and Marla Applewhaite. Their evidence went to identification of the appellants and their respective roles in the beating of the deceased. The trial judge not only reviewed their evidence with care but she particularly examined it in light of the decision in *R. v. Turnbull [1977] 1 QB 224* and the directions therein provided.

[78] For example, she warned the jury to be careful as to the truthfulness of Blenman and Applewhaite (p.529); then she married the evidence to the relevant *Turnbull* guidelines (pp.529-535) and in the course of such evaluation, she pointed out the weaknesses, as she saw them, in the identification evidence and she gave the jury a direction in accordance with s.102(2) of the Act. The trial judge reminded the jury of the deficit in the memory of Blenman and Applewhaite and expressly said at p.530:

“But in evaluating the evidence of Marla Applewhaite, you must ask yourselves whether you can safely rely on her evidence given the reluctant and hesitant manner in which she gave her evidence and what seemingly was her poor recall of the incident.”

[79] In our judgment, the trial judge adequately assessed, analysed and evaluated the identification evidence for the benefit of the jury. The

credibility of the witnesses was ultimately a matter exclusively for the jury as the tribunal of fact. We find no merit in this ground of appeal filed on behalf of both appellants.

Conclusion

[80] The trial judge fell into error in her treatment of the cases for the defence as we have illustrated at paras.[58] to [67] above. In the case of *Smith and Smith v. R. 25 Cr.App.R.119*, the Court of Criminal Appeal of England and Wales quashed the convictions of a father and son in circumstances where no distinction was drawn between their cases in the summation. In our judgment these appeals must be allowed.

Disposal

[81] We shall not order a retrial since the crime took place more than 8 years ago and, at the trial, key witnesses were shown to have very vague memories or recollections of the events. Moreover, since the appellants were being retried for manslaughter, it would be inappropriate and unjust to order a second retrial. Accordingly the convictions are quashed and the sentences are set aside.


Justice of Appeal


Chief Justice


Justice of Appeal