## CASES JUDICIALLY CONSIDERED

# THE
# GUYANA
## LAW REPORTS

This volume of the
Guyana Law Reports
is dedicated to the memory of
J.O.F. Haynes
Chancellor of the Judiciary
of Guyana
1976 - 1980

U.G. PRINTERS

**2000**



Typeset & Artwork by: HarrisArt Productions Guyana

Printed by: University of Guyana Printery

**ACKNOWLEDGEMENT**

The permission granted by Butterworths and Co. to reproduce extracts from cases reported in the *All England Reports* and *West Indian Reports* is gratefully acknowledged.

# A LIONS - ROTARY

# JOINT SERVICE PROJECT

# THE

# GUYANA

# LAW REPORTS

**1976**

**Volume 1**

**GEORGETOWN**

**U.G. PRINTERS**

**2000**

## SCOPE OF THE REPORTS

These Reports cover cases decided in the Court of Appeal and High Courts of Guyana listed under the heading of "Citation" below.

## CITATION

The Reports in this volume are cited thus:

[1976] 1 G.L.R

# *Editors*

**DIRECTING EDITOR**

THE HON. MR JUSTICE AUBREY F.R. BISHOP, OR, C.C.H., B. Sc. (HONS) L.L.M CHANCELLOR OF THE JUDICIARY

**EDITOR-IN-CHIEF**

A ROXANE GEORGE L.L.B. (HONS.) (U.W.I.)

***EDITORS***

ALEXIS DOWNES-AMSTERDAM LL.B. (HONS.) (U.W.I.)

SANDRA BART LL.B. (HONS.) (U.W.I.)

JENNIFER BRANCHE L.L.B. (HONS.)(U.W.I.)

DELA A BRITTON LL.B. (U.W.I.)

CHRISTOPHER BULKAN LL.B. (HONS.) (U.W.I.)

ROSEMARIE CADOGAN LL.B. (HONS.) (U.W.I.)

MELANIE CLARKE LL.B. (U.W.I.)

LILIAN CRAWFORD - ABBENSETTS LL.B. (HONS.) (U.W.I.)

YONETTE CUMMINGS LL.B. (HONS.) (U.W.I.)

JAMES BOVELL-DRAKES LL.B. (U.W.I.)

TIMOTHY JONAS L.L.B. (HONS.) (U.W.I.)

ROSEMARY BENJAMIN- NOBLE LL.B. (HONS.) (U.W.I.)

MAXINE ALEXANDER-NESTOR LL.B. (U.W.I.)

KAREN PERREIRA LL.B. (HONS.) (U.W.I.)

ADRIAN THOMPSON L.L.B. (HONS.)(UWI.)

**JUDGES OF THE**
**SUPREME COURT OF JUDICATURE OF GUYANA**
**1976**

## COURT OF APPEAL

| | | |
|---|---|---|
| THE HON. MR. JUSTICE J.O.F. HAYNES | - | Chancellor, O.R |
| THE HON. MR JUSTICE G.L. PERSAUD | - | Justice of Appeal |
| THE HON. MR JUSTICE P A CUMMINGS | - | Justice of Appeal |
| THE HON. MR JUSTICE V.E. CRANE | - | Justice of Appeal |
| THE HON. MR JUSTICE R.H. LUCKHOO | - | Justice of Appeal |
| THE HON. MR JUSTICE D.JHAPPAN | - | Justice of Appeal |
| THE HON. MR. JUSTICE K. S. MASSIAH | - | Justice of Appeal |
| THE HON. MR JUSTICE KM GEORGE | - | Justice of Appeal |

## HIGH COURT

| | | |
|---|---|---|
| THE HON. SIR HAROLD BRODIE SMITH BOLLERS | - | Chief Justice |
| THE HON. MR. JUSTICE FRANCIS VIEIRA | - | Puisne Judge |
| THE HON. MR JUSTICE LINDSAY L. COLLINS | - | Puisne Judge |

| | | |
|---|---|---|
| THE HON. MR JUSTICE CHARLES ETHELWCOD FUNG-A-FAT | - | Puisne Judge |
| THE HON. MR. JUSTICE HORACE MITCHELL | - | Puisne Judge |
| THE HON. MR JUSTICE M.A. CHURAMAN | - | Puisne Judge |
| THE HON. MR JUSTICE RUDOLPH H. HARPER | - | Puisne Judge |
| THE HON. MR JUSTICE CLAUDE A MASSIAH | - | Puisne Judge |
| THE HON. MR JUSTICE GEORGE A.G. POMPEY | - | Puisne Judge |
| THE HON. MR JUSTICE AUBREY F.R. BISHOP | - | Puisne Judge |
| THE HON. MR JUSTICE IVAN O. CHURAMAN | - | Puisne Judge |

**LEGISLATION JUDICIALLY CONSIDERED.**

**LEGISLATION JUDICIALLY CONSIDERED.**

## LIST OF CASES REPORTED

Page

Page

**R**



**S**



**T**



**W**

**The State v. Vibert Hodge**

**VIBERT HODGE**
**Appellant**
**v.**

**THE STATE**
**Respondent**

[Court of Appeal (Haynes, C., Crane and Massiah, JJ. A.) May 11, 25; June 23, 1976]

*Criminal Law-Robbery under arms-Criminal Law (Offences) Act. Cap. 8:01, s. 222 (c)-Conflict of evidence on identification-State witness' testimony tended to support accused on identification-Duty of trial judge to point out this fact to jury-Defence not adequately put to jury-Duty of judge in summing-up.*

*Identification Parade-Whether unfairly conducted-Weight and value to attach to identification in court.*

*Taking other offences into consideration-After verdict pleas of guilty to six charges on five outstanding indictments accepted-Concurrent sentences imposed on each-Validity of.*

The appellant armed with a knife, attacked and robbed one Violet Ramadan of a wrist-watch and a finger-ring. When removing the ring he opened his mouth as if to bite her finger to get it off. It was then that she saw he was wearing gold teeth. Some five weeks later Ramadan identified the accused at an identification parade as the robber.

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

In his summing-up the trial judge did not bring to the jury's attention the apparent conflict between Ramadan's and Inspector Troyer's evidence, nor the fact that Troyer's evidence that the accused was identified after he had opened his mouth.

tended to support the evidence of the accused. The judge merely left it to the jury to find as a question of fact, if they were minded to believe Ramadan and Troyer, whether the identification parade had been properly conducted.

The accused also said in defence that the charge against him was a trumped-up one: that he had been "framed" by the police because he and the policeman who charged him had an altercation over a girlfriend, and that the policeman threatened "to throw the book at him". Nothing was said about this important aspect of the defence to the jury.

On appeal.

**HELD:** (1) That the apparent conflict between Ramadan and Troyer's evidence should have been pointed out to the jury who ought to have been advised to be cautious about accepting Ramadan's testimony that she had primarily identified the accused apart from his gold teeth.

(2) The jury should have been told that if they accepted Troyer's evidence then Ramadan's identification at the parade was unsatisfactory; hence they should attach little weight to her identification in court.

(3) The jury should have been directed that if they believed the accused was the only man on parade with gold teeth, the parade would have been unfairly conducted and they should attach little weight to it.

(4) The defence was not properly left to the jury. The accused was alleging oppression and victimization on the part of the police and the judge should have told the jury to acquit if they believed this was so.

(5) The trial judge was in error when he allowed the accused after conviction to plead to six other charges forming the subject of five outstanding indictable offences with a view to having them taken into consideration, and to proceed to sentence him in respect of those charges.

(6) The correct procedure is for the judge merely to ask the accused whether he admits his guilt on the outstanding offences. The accused must be sentenced only once. i.e., in respect of the offence for which he was tried and found guilty. The idea of taking other offences into consideration is merely to measure the appropriate sentence.

**Appeal allowed.**
**Conviction and sentences set aside.**

**The State v. Vibert Hodge**

**Editorial note:** This case is also reported in (1976) 22 W.I.R. at p. 303

**Cases referred to:**

(1) Kirpaul Sookdeo *et al.* v. The State (1972) 19 W.I.R. 407
(2) R. v. Dwyer, R. v. Allen Ferguson (1925) 18 Cr. App. R. 145
(3) The State v. Ken Barrow (1976) 22 W.I.R. 267
(4) R. v. John [1975] Crim. L.R. 456
(5) R. v. Bundy(1910) 5 Cr. App. R. 270
(6) Arthurs v. A.G. for Northern Ireland (1971) 55 Cr. App. R. 161; 114 Sol. Jo.824. H.L.
(7) R. v. Samad and Others (1970) 15 W.I.R. 35.
(8) R. v. Totty (1914) 10 Cr. App. R. 78
(9) R. v. Immer (1919) 13 Cr. App. R. 22
(10) Frank Sookram v. The State (1971) 18 W.I.R. 195.
(11) Samaroo and Ezaz v. R. [1953] L.R.B.G. 150
(12) R. v. Dinnick (1910) 3 Cr. App. R. 77
(13) R. v. Hill (1911) 22 Cox C.C. 625
(14) R. v. Waters [1954] Crim. L.R. 147.
(15) R. v. Tillman [1962] Crim. L.R. 261. CCA.
(16) R. v. Finch (1917) 12 Cr. App. Rep. 77
(17) James Henry Mills & Edith Mills (1936) 25 Cr. App. R. 138
(18) Julian v. R. (1969) 13 W.I.R. 66
(19) R. v. Nicholson (1948) 32 Cr. App. R. 98.
(20) R. v. McLean (1911) 6 Cr. App. R. 26.

M. Taharally for the appellant.
N. Kissoon, Senior State Counsel, for the State.

**MASSIAH, J.A. (delivered the judgment of the court):** The appellant was indicted with and convicted of robbery under arms, contrary to s. 222 (c) of the *Criminal Law (Offences) Act, Cap. 8:01*. The allegation of the State was that while armed with a knife he had robbed one Violet Ramadan of a wristwatch and a ring. There was evidence that while she was in the Le Repentir Cemetery with her husband on March 30, 1975, at about 4.15 p.m., the appellant went up to her, placed a knife to her chest, pulled her wristwatch from her left hand and opened his mouth as if to bite her finger to get off the ring. Ramadan told him not to bite her and in fear handed the ring to him. Five weeks later, on May 4, 1975, at an identification parade conducted at Ruimveldt Police Station. Ramadan identified the appellant as the person who had taken her watch and ring. Counsel for the appellant contended in this court, as the appellant had complained in the court below, that the identification parade was unfairly conducted.

At the trial, three different versions were given as to how the appellant came to be identified. Ramadan said that she identified the appellant and then asked him to

open his mouth "to be doubly sure" and that "the gold teeth in (his) mouth made (her) doubly sure". Inspector Hubert Troyer, who conducted the identification parade, said something different. He testified that Ramadan "looked at the parade and asked (him) to cause the men on the parade to open their mouths", and that when they did so. Ramadan "then touched the accused on his shoulder". The appellant, in his statement from the dock, said that the men on the parade were first asked to show their teeth and that he was the only man who had gold teeth. He was clearly saying that he was identified by his gold teeth.

The sum total of Ramadan's evidence on this issue is that she identified the appellant partly by his gold teeth, whereas Troyer's evidence suggests that she identified him wholly by them. What must be noted is that Troyer's version was the same as the appellant's save that whereas the appellant claimed that he was the only person on the parade with gold teeth. Troyer said that there were others.

So much has been said, particularly in recent times, by this court as well as by courts of other Commonwealth jurisdictions, about visual identification and mistaken identity and the necessity for the police to hold identification parades and to ensure that such parades are always fairly conducted, that no one can seriously claim to be unaware of the importance of these matters and the anxiety that they have engendered on all sides. So strong is the feeling in some quarters, that STOBY, J.A., expressed himself as follows at p. 12 of his judgment in Kirpaul Sookdeo *et al* v. The State (1972) 19 W.I.R. 407; at p. 443):

> "My view is that in cases of visual identification by one witness who never saw the suspect before a rule of practice should be formulated whereby a judge should warn the jury not to convict unless there is some evidence in support. This does not mean corroboration as legally understood, but refers, for example, to the fact that the accused was within the vicinity shortly before or after the offence was committed. Such a rule of practice would, in the course of time, crystallise into a rule of law."

In the United Kingdom a committee headed by LORD DEVLIN was appointed specifically to enquire into these very matters: and it has recently made its proposals known. Again, some persons have suggested that there should be corroboration of the evidence of visual identification, perhaps in cases where the accused was previously unknown to the witness. Others consider that photographs should be taken of persons on the identification parade so that their faces and physical appearance generally could be seen by the jury who could judge thereby for themselves whether persons similar in appearance to the accused were indeed chosen for the parade as police witnesses invariably assert. But over a half century ago LORD HEWART, C.J. drew attention to the necessity for fair and proper identification in the cases of R. v. Thomas Dwyer. R. v. Allen Ferguson (1925) 18 Cr. App. R. 145 when he said (p. 147):

> "The trial was perfectly satisfactory except in two respects, each of which was crucial. In the first place, it was made plain that the witnesses who were to identify the defendants, witnesses who had seen them in the dusk or in the dark, had been shown extremely good photographs of them before they were invited to enter on the task of identification."

The Court of Criminal Appeal held that this was unfair and improper allowed the appeals and quashed the convictions. And very recently in The State v. Ken Barrow (1976) 22 W.I.R. 267, this Court commented adversely, in the clearest terms, on the irregular manner in which an identification parade was conducted. A gang of men had raided the home of one Beharry and stolen his jewellery; one of the men wounded Beharry on his head. Beharry told the police that one of the men had a scar on the left side of his face and that he could identify that man. The appellant was subsequently identified by Beharry at an identification parade, but on that parade he was the only man with a scar on the left side of his face. It is clear that that was highly improper and unfair. Apart from telling the police that the man had a scar on his face, Beharry said only that he was "a short, dark Negro man." It does not require much imagination to realise that Beharry must have been looking out at the identification parade for a man with a scar on the left side of his face, and having found such a man he "identified" him. There was no evidence that he had a good look at the appellant face to face. At p. 276 of his judgment the learned CHANCELLOR described the identification parade as "manifestly unfair". The appeal was allowed and the conviction quashed.

In this matter, therefore, where the appellant alleged that he was identified merely by his teeth at an identification parade held five weeks after the offence was committed, where the appellant alleged further that he was the only person on the parade with gold teeth and the victim herself admitted that she had asked the appellant to open his mouth, it is patent that careful and adequate directions to the jury were a matter of the highest importance. The facts of this case, in my view, are hot similar to those in R. v. John [1975] Crim. L. R. 456, where the appellant was convicted of wounding on the evidence of three witnesses who said the appellant was wearing a leather jacket when he committed the offence. It was contended for the appellant that the identification parade was not fairly conducted because on that parade he was the only person who wore a leather jacket. The situations are different in the respective cases because in John's case, the witnesses had based their identification of the appellant not on his dress but, rather, on what they were able to remember of the assailant's features, so that the element of the leather jacket played no part in their identification. The appeal was accordingly dismissed. But in this matter, Ramadan admitted that she asked the appellant to open his mouth because she wanted to be "doubly sure" and that "the gold teeth made (her) doubly sure."

Whatever connotation she may have intended by the employment of the phrase

"doubly sure", it seems clear that the appellant's teeth played some part in Ramadan's identification of him. Her evidence suggests that she was not completely satisfied that he was her assailant, though she may have felt that he was, but what assisted her to make up her mind about him and put the matter beyond doubt was the appellant's gold teeth. This is how I understand Ramadan's evidence. Troyer's evidence and the appellant's statement from the dock were quite different.

Let us see, therefore, how the trial judge dealt with this crucial issue. There is no doubt that he appreciated the significance of the appellant's gold teeth in relation to the identification parade: whether he adequately directed the jury in relation thereto, is another matter. It must be pointed out, however, that he repeatedly told the jury that if they believed the appellant's version as to the manner in which the identification parade was held, or if they were in doubt about it, they must acquit him. In the record he said as follows:

> "You will also consider the statement that the accused gave from the dock. You will recall that he told you that he was among other boys in this room and the people who came didn't identify him. They went out and came back and then they were asked to open their mouths. Everybody opened their mouths and he was identified and he said that he was the only person in that parade who had gold teeth.
>
> Now, if you accept what he said to be the truth or, if you have any doubt as to whether or not that really happened, then, members of the jury you may very well feel that the identification parade was not properly conducted."

Up to that point there can be no complaint. But immediately thereafter, the judge directed the jury as follows:

> "If, on the other hand, you accept the evidence of the witness, Violet Ramadan, and the Inspector of Police, then, it is for you to say whether or not the identification was properly conducted."

It is here that the judge fell into error. Inspector Troyer's evidence, it will be remembered, was essentially different from Ramadan's in an important respect, for he had said that she identified the appellant only after he and the other persons on the parade had opened their mouths. If this were so, then, clearly, the appellant was identified by his gold teeth and nothing else. Troyer's evidence, in my view, tended to support in great measure the story which the appellant told. The judge should have pointed this out to the jury and alerted them to the risks attendant upon an acceptance of Ramadan's evidence in the light of the evidence of Troyer who conducted the identification parade. Despite this sharp divergence

in the evidence of the respective witnesses, the trial judge lumped the evidence of Troyer with that of Ramadan as if they were both saying the same thing-he put their evidence together on one side and against it. on the other side, he put the appellant's version and then invited the jury to decide which version they were prepared to accept, and this despite the fact that he had recognised that the evidence of Ramadan was in conflict with that of Troyer. The trial judge, in my view, should have directed the jury to be cautious about accepting Ramadan's evidence because of the conflict.

To ask the men on parade to open their mouths, as Troyer said, suggests that Ramadan was looking for something therein, whereby to identify the person, and that she could not, without that aid, identify anyone at all, for Troyer's evidence was not that she asked the appellant to open his mouth, but rather, that she asked all the men to do so. The judge should therefore have specifically drawn this to the jury's attention and explicitly directed them that if they accepted Troyer's evidence it meant that the appellant was identified in a very unsatisfactory manner and that they could therefore attach little weight to Ramadan's identification in court. This, the trial judge failed to do. It is my own conviction that it is unsatisfactory to identify a person by his gold teeth even if, as Troyer said, other persons on the parade also had gold teeth. The position becomes worse when it is remembered that there was no evidence that the appellant's gold teeth bore any significant features or peculiarities that would set them apart from those of other persons and fasten themselves upon Ramadan's memory, making it easy for her to identify him. And it must be remembered that Ramadan identified the appellant five weeks after the offence was committed.

On this aspect, therefore, the trial judge did not afford the jury the assistance and guidance to which they were entitled and which it was his duty to supply, and his failure to do so, robbed the appellant of the benefit which he would otherwise have derived from Troyer's evidence. It is worthwhile in this regard to reflect on the injunctions of the learned CHIEF JUSTICE in Kirpaul Sookdeo & *et al* v. The State (*supra*). Having considered several authorities, he observed as follows when dealing with the question of the identification of accused persons (p. 29):

> "Those authorities show that where the evidence of identification of the accused person is weak or of an unsatisfactory nature it is the duty of the trial judge to give a careful direction as to the unsatisfactory nature of the evidence and to bring prominently before their minds the unsatisfactory points revealed in the evidence impressing upon them that where the defence of the accused person is an alibi it might well be a case of mistaken identity."

Another telling portion of evidence to which the trial judge directed no attention that Ramadan had described her assailant to the police as "not so tall, not so

fat and highish in complexion". I take judicial notice of the fact that in Guyana to describe a person possessing "a high complexion" is a colloquial way of indicating that he is fair-skinned, self-contempt apparently dictating that the fairer you are the "higher" and the better off you are complexion-wise. Be that as it may, the appellant was in court during the hearing of this appeal and it is clear that he is nothing if not dark-skinned. He is certainly not fair-skinned. It is therefore exceedingly strange that having described her assailant as "high in complexion" Ramadan should have picked out at the identification parade someone who, no matter how one stretches one's imagination, cannot be described as fair-skinned. The trial judge should have adverted to this situation and directed the jury that it tended to attenuate the value of Ramadan's identification and to support the appellant's claim that he was identified merely by his teeth.

At p. 277 of his judgment in The State v. Ken Barrow (*supra*), the learned CHANCELLOR in dealing with the assistance which he considered a trial judge should give the jury, said, *inter alia* as follows:

> "In the eyes of the jury, counsel on each side might appear biased so they would look and are entitled to look to the judge for a full and clear analysis of the material evidence and an impartial and helpful summation on the crucial issues of fact on which the verdict depends. If the trial judge had given adequate directions a court might not have interfered even though the identification parade was not a fair and reliable test". [Underscoring mine].

The judge's functions in this respect cannot be too highly emphasised. It is true that the jury are the sole judges of the facts and to them falls the duty of resolving all such issues. But it must never be forgotten that they are laymen. To say this, is not to question their intelligence but to appreciate and emphasise the difficulties of their special role and to understand why they require careful and adequate guidance. Some of them have perhaps never sat on a jury before and know nothing about evaluating evidence. Some again, perhaps, may have missed certain important portions of the evidence, or if they heard them, might not have grasped their true significance, or, if they grasped it, might have forgotten about it in their concentration on other aspects. Then again, the ability to concentrate on details does not come easily to all and certainly cannot be acquired at the criminal assizes. Adrift, therefore, upon these turbulent and rather unfamiliar seas, the jurors require judicial captaincy to see them safely home. That is not to imply a usurpation of their functions by the judge who can go no further than express his own views on the facts. That is well known. What is meant, however, is that the judge must not, as is so often done, content himself with a mere recitation of the evidence adduced, but rather, should analyse that evidence and draw to the jury's attention the material issues that are required to be considered and on which the verdict depends. The range and depth of that analysis and, more fundamentally.

the need to analyse at all will of course depend on the facts and circumstances of each particular case.

In Joseph Bundy (1910) 5 Cr. App. R. 270. the evidence of identification was unsatisfactory but the trial judge never pointed out to the jury that it therefore had very little value. This was held to be wrong. At p. 272 P1CKFORD. J. referred to the weak aspects of the identification. He then continued as follows (p. 273):

> "If all this were true the evidence of identification was wholly valueless, because it is an admission that, until he was told by the police officer that the appellant very much resembled the man they suspected, he was quite unable to identify the man. It was an extremely improper thing to do .... If all that had been pointed out to the jury we might not have interfered with the verdict. But it was not pointed out at all. The jury were therefore not directed by the learned Deputy-Chairman to the vital point .... In all the circumstances, it is clear the trial was not satisfactory, and the case was not put to the jury in a way to insure their due appreciation of the value of the evidence."

There is, however, another aspect of this matter that caused me much disquiet. Nowhere in his summing-up did the judge direct the jury, as he should have done, that if they found that the identification parade was unfairly conducted then they could attach little weight, if any, to Ramadan's identification in court. The two things are inseparably bound up. Identification at the parade is not proof that an accused person committed the offence if there is no identification of the accused in court, but identification at the parade may lend strength and weight to the identification in court. If the parade is fairly and properly conducted its probative value must be high; if, on the other hand, it is unfairly conducted, then little weight, if any, can be given to the identification in court. As the learned CHANCELLOR said (p. 274 of his judgment) in Ken Barrow (*supra*)*:*

> "The identification at the parade is to my mind the crucial test and not the identification in court. What the witness does in court is just to identify under oath, the person he identified not under oath, at the parade". [Underscoring mine.]

The trial judge should therefore have directed the jury's attention to the relevance of the unfairness of a parade to the identification from the witness-box, and impressed on them that if they believed that the identification at the parade was not fair, then they could hardly rely on the identification at the trial. The jury not having been, thus directed might well have felt, quite wrongly, that although the identification parade was unfair, nevertheless Ramadan had identified the appellant in court, and that that was sufficient proof that he had committed the offence, without realising the importance and significance of the relationship between the

identification parade and identification from the witness-box. Had they been told of the relationship, they might well have decided the matter differently, or they might have found the appellant guilty in any case, but this is not for me to say. Suffice it to say that the failure of the trial judge to afford the jury adequate guidance on the issue of identification was a fatal flaw. As LORD MORRIS of BORTH-Y-GEST said, at p. 168 of Arthurs v. Attorney-General for Northern Ireland (1971) 55 Cr. App. R. 161:

> "Where conviction will involve the acceptance of the challenged evidence of one or more witnesses in regard to identification, a summing-up would be deficient if it did not give suitable guidance in regard to identification."

And as LUCKHOO, C., pointed out at p. 37 of R v. Samad *et al* (1970) 15 W.I.R. 35:

> "One of the functions of an appellate court is to ensure not only that what is stated by the learned trial judge had been fairly stated, but that what it was necessary and fair to state was not omitted, lest the result of the jury's verdict might be affected thereby."

But if I am wrong in my approach to that aspect of the matter, it appears that the appeal should nevertheless be allowed because of another omission on the part of the trial judge in relation to the defence of the appellant. The appellant made a statement from the dock and closed his case without calling any witnesses. His defence is contained in that statement. In brief, the appellant alleged that sometime before he was charged there arose an altercation between the policeman who charged him and himself over a girl, during which the policeman had threatened that he would "throw the book" at him, meaning no doubt, that he would institute a variety of charges against him. The implication is that all those charges would be false: moreover, the appellant stated that he had been charged in relation to seven other matters, showing thereby that the policeman had begun to translate his words into deeds. The gravamen of his complaint was that the charge was concocted. He was alleging oppression and vindictiveness on the part of the police stemming from the quarrel over the girl. The trial judge was under a duty to deal adequately with those matters and to direct the jury that if they believed what the appellant had said, or, were in doubt about it, they must acquit him.

But nowhere in his summing-up did the trial judge deal with this aspect of the matter. It is true that he dealt with the identification parade about which the appellant also complained in his statement from the dock, as if it were the only thing that mattered, but the story of the quarrel with the policeman and the allegation of the concoction of the false charge were the central pillars on which the appellant rested his defence, and about this the trial judge said nothing at all. In

my view that was wholly wrong.

It need hardly be stated that it is the duty of a trial judge not only to deal with the defence in his summing-up but also to deal with it adequately. When an accused person is unrepresented, as the appellant was, that duty becomes even more important, for a layman lacks the forensic skill to put his defence properly before a jury. [See John Samuel Totty (1914) 10 Cr. App. R. 78. at p. 79. and John Immer (1919) 13 Cr. App. R. 22. at p. 24.] Not to put the defence at all constitutes, therefore, a grave omission since a miscarriage of justice may have occurred. There are any number of views that the jury may have taken about this aspect of the matter: they may have thought that the trial judge not having mentioned it to them may have considered it a matter of no consequence: or, if they were in doubt about what the appellant said, they may not have known that they should resolve that issue in his favour; or, it may be, that they completely overlooked and forgot this aspect focusing attention only on the identification parade to which their attention was specifically drawn.

In Frank Sookram v. The State (1971) 18 W.I.R. 195, where the trial judge did not appear to appreciate that the issue of self-defence arose from the appellant's statement from the dock. LUCKHOO, C. said as follows at p. 202:

> "In conclusion, I would say this: that the case for the defence was not properly put in matters which were essential to a fair assessment of the issues ... it would be impossible to say whether a reasonable jury properly directed would have inevitably come to the same conclusion."

And at p. 208 CRANE. J.A., was moved to declare as follows:

> "In my judgment there should be a remit of this case to the High Court and a fresh trial ordered there. The defence was misconceived by the trial judge. I think it is only fair that the jury should have the opportunity of having it properly explained to them."

The appeal was allowed.

The same approach was taken by the Court of Criminal Appeal of British Guiana (as it then was) in Samaroo and Ezaz v. The Queen [1953] L.R.B.G. 150. In that matter, the appellants were convicted of robbery with aggravation. Their defence was an alibi. During his summing-up the trial judge referred to statements made by the appellants but for purposes other than putting the defence to the jury. The appellants complained that their defence was not adequately put to the jury. The appeal was allowed and the convictions and sentences quashed. At p. 150 BELL, C.J., who delivered the judgment of the Court, observed as follows:

> "Now, it is a clearly settled law that it is of paramount importance that the summing-up must fairly put the case for the defence, whatever it may be. No matter how trivial or stupid, or unlikely the defence may be, it is of paramount importance that the judge in his summing-up must fairly put that defence to the jury."

At p. 151 he continued thus:

> " ... we have come to the conclusion that in an otherwise meticulous and careful summing-up by the learned trial judge, who is careful and meticulous, it cannot fairly and reasonably be said that the defence of either of the appellants was put to the jury clearly or in such a way that their attention was sufficiently and emphatically drawn to the nature of that defence. It cannot be enough, we feel, merely to assume that because the jury have heard both sides of the case they are cognisant of the defence which is put forward. Something more than that is necessary. Something must be done to emphasise to the jury the defence which an accused person is offering."

In Benjamin Henry Dinnick (1910) 3 Cr. App. R. 77. the appellant appealed against a conviction for "wilfully and maliciously disquieting and disturbing a religious meeting." The prosecution's case was that the appellant, a deacon of a religious organisation, had entered a church during a service with his hat on and called out in a loud voice: "People of Bristol, this is the abomination of desolation spoken of by Daniel the prophet." His defence was that he had a right to express his prophecies and to have spoken as he did, but the Recorder did not think it necessary to deal with that defence. It was held that he was wrong. At p. 79, the LORD CHIEF JUSTICE said:

> "There is a principle of our own criminal law which we think has been violated in this case-namely, that when a defence, however weak it may be, is raised by a person charged, it should be fairly put before the jury. The appellant, during the trial, raised the defence that he had a right, as an officer of this church, to object to the proceedings which were going on. It may have been very foolish and unfounded, but that defence ought to have been put before the jury-this is a paramount principle of our criminal law."

The appeal was accordingly allowed.

The same principle was applied in R. v. Hill 22 Cox C.C. 625. In that matter the appellant was charged with felonious wounding. He was found guilty of the offence but insane at the time he committed it. During his trial, the appellant admitted the wounding but contended that he did so in self-defence. In the course

of the trial, the judge introduced the suggestion that the appellant may have been insane when he wounded the complainant, and in summing-up, left only this question for the jury's consideration. The Court of Criminal Appeal held that he was wrong to have withdrawn from their consideration the issue of self-defence. DARLING, J. said as follows at p. 626:

> "We have come to the conclusion that this conviction must be quashed ... It is immaterial whether that defence was a thoroughly bad one. It ought to have been left to the jury. When the Recorder raised the question of insanity, no doubt he thought he was finding a better defence for the appellant than had been already advanced ... it is a miscarriage of justice if a prisoner's defence, however weak, is not left to the jury. We think the conviction must be quashed."

There are, of course, several other cases in which the same principle has been articulated. [See R v. Waters (1954) Crim. L.R. 147: R v. Tillman (1962) Crim. L.R. 261: Thomas Finch (1917) 12 Cr. App. R 77; James Henry Mills & Edith Mills (1936) 25 Cr. App. R. 138: Julian v. The Queen (1969) 13 W.I.R. 66]. All these authorities emphasise the cardinal principle of our criminal law that the trial judge is under a duty to put adequately before the jury for their consideration whatever defence an accused person chooses to offer, and that the duty is in no wise diminished by any arrogation on the part of the trial judge that the defence is weak or far-fetched or foolish or for some other reason is unworthy of serious consideration. Furthermore, cases like Totty (*supra*) and Immer (*supra*) stress the especial need for care and caution in that regard when an accused person is unrepresented.

I would, for the foregoing reasons, allow the appeal and quash the conviction and sentence, with no order for a retrial.

But a further point arises for consideration. When the appellant was found guilty of the offence on 3rd December, 1975, he asked, perhaps at the allocutus, that five other charges be taken into consideration, whereupon sentence was postponed and the matter adjourned to 5th December, 1975, perhaps to give the State an opportunity to obtain particulars of those charges. On 5th December, 1975, the appellant was sentenced to imprisonment for five years and ordered to receive a whipping often strokes in respect of the offence for which he was convicted. He was also required to plead to six charges contained in five indictments. Of the six charges, three were for robbery under arms, two for robber, with aggravation and one for robbery with violence. The appellant pleaded guilty to all the charges and was sentenced to ten years' imprisonment in respect of each of them, but the trial judge ordered that those terms of imprisonment as well as the term of five years aforesaid shall all run concurrently.

In my judgment, the convictions and sentences in relation to the other five indictments required to be taken into consideration cannot be allowed to stand for two reasons. First, it appears plain that the appellant admitted them and asked that those charges be dealt with only because he was found guilty on the original charge. If the appellant had been acquitted of that charge it is equally plain that he would not have invited the course he sought as regards the outstanding charges at all, preferring, of course, to have them tried, no doubt with the hope of acquittal again. Certainly he would have had nothing or little to lose by a trial in each case. Justice would not appear to be done if in these circumstances these convictions should remain.

Since the motivating factor was the conviction in respect of the offence for which he was tried, it would be manifestly unfair and unjust, the appeal in relation thereto having been allowed, to sustain the convictions and sentences in relation to the outstanding charges which the appellant admitted only because of that first conviction, now quashed.

The second reason is that it is clear that the appellant never intended to plead guilty to and be sentenced separately in respect of any of the outstanding charges. The trial judge stated in his Reasons for Sentence, that the appellant said that he wished to plead guilty to other charges and have them all taken into consideration. Clearly, he was not seeking individual sentences but, rather, one sentence that would take account of all the outstanding charges, for if he could not achieve this, then he would in no way be benefiting from the exercise, and indeed would be losing. What he obviously wanted was merely to have the outstanding charges taken into consideration. He must have learnt from somewhere that he could benefit from this exercise; he was seeking that benefit.

The trial judge could have refused to take the outstanding charges into consideration, but if he intended to refuse he should have made this clear to the appellant. But he was wrong to require the appellant to plead to those charges without explaining to him, unrepresented as he was, the implications thereof. Doubtless, if the position had been carefully and fully explained to the appellant, he would have declined to plead and would not have pursued the matter further.

Not having refused to take the outstanding charges into consideration, the trial judge was enjoined to proceed to consider and deal with them as the law provides, but this he failed to do.

Provision enabling the Court to take other offences into consideration when sentencing and accused person, is to be found in the *Criminal Law (Procedure) Act, Cap. 10:01*. s. 168 of which reads thus:

> "The Court may, if it thinks fit, take into consideration, when sentencing

> a person who has been convicted of an indictable offence any other offence which such person admits that he has committed and which he asks to be taken into consideration as aforesaid; and any certificate issued as to such sentence shall contain a statement of the offence or offences taken into consideration as aforesaid."

It was under that provision that the trial judge should have acted in order to meet the wishes of the appellant. Since there is no statutory provision for the procedure to be followed when acting thereunder, a judge in Guyana is obliged by virtue of s. 16 of the Act aforesaid, to follow the procedure in force in English Courts.

In England there appears to be no statutory provision at all for this matter. At para. 616 (p. 189) of *Archbold. 36th Ed.,* there appears the following statement:

> "The practice of taking other offences into consideration is based on convention and has no statutory foundation. A sentence which the court states takes other offences into consideration is still in law only passed for the offence with which the court is actually dealing. The taking into consideration by the court of outstanding offences does not mean that there has been a conviction in respect of any of those offences and therefore does not entitle the prisoner to plead *autrefois convict* if he is subsequently indicted in respect of any of them."

The correct practice appears to be also that the prisoner is asked merely whether he admits his guilt with regard to the outstanding charges, so that he is not called upon to plead to them.

Not only was it wrong to require the appellant to plead to the charges he wished to be taken into consideration, but it was also wrong to proceed to sentence him in relation to them. He should have been sentenced only once and that should have been in respect of the offence for which he was tried and found guilty, but that sentence by its measure should have reflected that account was taken of the charges he admitted.

It was contended for the State that the pleas, being unequivocal, should stand and the convictions and sentences flowing therefrom should remain. But that argument overlooks the fact that the law does not require or allow pleas to be taken or sentence to be passed in relation to outstanding charges "taken into consideration." There is therefore no legal basis for sustaining them.

The practice of taking outstanding charges into consideration and the reason for the practice were explained thus by SINGLETON, J. in James Kessack Nicholson (1948) 32 Cr. App. R. 98, at p. 101:

> "That practice was adopted largely to enable an accused person to start with a clean sheet when he was released from prison. It also avoided multiplicity of proceedings. Sentence is passed on the count or counts on which there has been a conviction, and no matter how many offences are taken into consideration the sentence cannot exceed that prescribed by law for the offence upon which there has been a conviction. There is no conviction in respect of any of the outstanding cases, nor is there am separate sentence in respect of any of them. In the normal case, no proceedings would follow upon any of them, for the reason that they had been taken into consideration, not because there had been convictions in respect of them."

I would adopt that as a correct statement of the law. It should also be borne in mind that the judge's decision to take outstanding charges into consideration should not be automatic. Indeed, he should first be satisfied that the State consents to the accused's proposal for there may be cases which require public investigation, and even where there is that consent, the judge must still satisfy himself that the public interest does not require any further investigation of the outstanding charges before deciding to take them into consideration. See Alexander McLean (1911) 6 Cr. App. R. 26 at page 28.

It is clear that the proceedings herein were wholly wrong and should be treated as a nullity. There has been a palpable miscarriage of justice. The convictions and sentences in respect of the charges required by the appellant to be taken into consideration must be quashed. It will remain a matter for the decision of the State as to whether they will proceed with those outstanding charges.

**HAYNES, C.:** I concur.

**CRANE, J.A.:** I concur.

**Appeal allowed.**
**Conviction and sentences set aside.**

**Ram v. Ramdas**

**TULA RAM, Det. Const. 7325**
**Appellant**
**(Complainant)**

**v.**

**VISHNU RAMDAS**
**Respondent**
**(Defendant)**

[Court of Appeal (Haynes, C., Persaud and Crane, JJ. A.) October 22, 27, 1975; January 29, 1976]

*Summary Jurisdiction-Magistrates' Court-Proof of locality to found jurisdiction same in Guyana as in England-By direct statement or inference-Whether inference ought properly to be drawn from leading question-Summary Jurisdiction (Magistrates) Act, Cap. 3:05, ss. 31, 32-Magistrate Districts (Boundaries) Order 16/1965, Subsidiary Legislation, Cap. 3:05, p. 34.*

Sursattie Ramnauth, age 12, complained to the magistrate of the East Demerara Magisterial District that the respondent/defendant had threatened to kill her. In her attempt to prove, as she necessarily had to do, that the offence took place within the magistrate's jurisdiction. Sursattie replied to a leading question from the police prosecutor that the incident "took place at Strathspey, East Coast Demerara, in the East Demerara Magisterial District".

**Ram v. Ramdas**

It was, however, clear that from questions put to her in cross-examination, that she did not understand what magisterial meant, nor did she know the place where offenders were tried when charged for committing offences at Strathspey. At the close of the case for the prosecution counsel for the defence submitted there was no evidence to show that the alleged offence was committed within jurisdiction, but the learned magistrate overruled the submission. He considered there was no evidence that Strathspey was anywhere else than in the East Demerara Magisterial District, and that the inference was compelling that the offence took place within that district because; "the witness was unshaken that Strathspey is on the East Coast of Demerara." The defendant was accordingly convicted and fined $100 with an alternative of two months imprisonment for having made use of threatening language to Sursattie whereby a breach of the peace might be occasioned.

On appeal, the Full Court did not agree with the Magistrate's reasons and set aside the conviction and sentence. The Police Prosecutor then appealed to the Court of Appeal.

**HELD:** (1) That proof of locality to found jurisdiction has always been the same as it is in England and continues to be the practice in the Magistrates' Courts in Guyana.

(2)That there is no set formula of words to be used in so doing, but proof may be simply established, either by a direct statement that the locality is within the magisterial jurisdiction or inferentially within it. But whatever accompanying words are used, it will always be a question of fact whether proof has been established to the magistrate's satisfaction so that he can safely infer from the description of the place given that the complainant or plaintiff has brought the offence or suit within his magisterial district.

(3) That in the instant appeal, the magistrate had no right to allow vitally essential words of proof to be put in the mouth of the witness and at the close of the case for the prosecution he ought to have acceded to the submission of learned counsel that jurisdiction had not been proved and dismissed the complaint.

(4) That the magistrate ought not to have permitted the leading question in the first place, but then, having admitted it, he could not properly reject the direct part of it and accept the indirect or descriptive part of the statement.

(5) That the vice in the question which "led" the witness to give the answer desired by the prosecutor must have vitiated the whole and not a part of her answer.

Boston v. Jagessar [1920] L.R.B.G. 82 and Stoll v. D'Oliviera (1968) 13 W.I.R 208 approved.

Strahan v. Darrell (1864) 29th October, 1864 explained and distinguished.

**Appeal dismissed with costs.**
**Decision of the Full Court affirmed.**

**Editorial Note: See report of this case in (1976) 22 W.I.R. at p. 242.**

**Cases referred to:**

(1) Sadler v. Wight [1938] L.R.B. G. 1
(2) Humphrey v. Crook [1914] L.R.B.G. 41
(3) Stoll v. D'Oliviera (1968) 13 W.I.R. 208
(4) Strahan v. Darrell (1864) 29th October, 1864
(5) Peacock v. Bell (1666) 1 Saunders 74
(6) New Building Society Ltd. v. Carlton Weithers [1965] L.R.B.G. 358
(7) Boston v. Jagessar [1920] L.R.B.G. 82
(8) Monick v. Soloman (1883) 13th January, 1883
(9) Powers & Anor v. Ruch (1885) 18th September, 1885
(10) Nascimento v. Leefmans [1923] L.R.B.G. 40
(11) Nero v. Galloway [1944] L.R.B.G. 83
(12) Moor v. Moor [1954] 2 All E.R. 458; 98 S.J. 438; 22 Sol. Jo. 145;104 L.J. 659. C.A.

G.H.R. Jackman, Assistant Director of Public Prosecutions, for the appellant.
R. Ramkarran, for the respondent.

**CRANE, J. A. (delivered the judgment of the Court):** The point for decision in this appeal is a matter of everyday importance to Magistrates and to all those who practice before them. Shortly put, it is: In what circumstances can a magistrate be justified in inferring from the facts of a case before him, that the matter has been proved to be within his jurisdiction?

In the administration of justice a magistrate is statutorily enjoined to have regard to the law which invests him with both civil and criminal jurisdiction. That law is to be found in ss. 31 and 32 of the Summary Jurisdiction (Magistrates) Act. Cap. 3:05, and, insofar as relevant to the question under consideration, it provides as follows:

> "31. The court in each district shall, in civil causes and matters within that district, have the jurisdiction and powers prescribed in, and shall exercise such jurisdiction and powers in the manner provided by the Summary Jurisdiction (Petty Debt) Act.
>
> 32. (1) Subject to the provisions of this and of any other written law, the

court of each district shall, within its district, have full jurisdiction and power -

(a) to hear and determine all complaints or informations for summary conviction offences, including complaints or informations for the recovery of fines, penalties, or forfeitures not specially assigned by written law to the High Court: ..."

It will be observed from the above that magisterial jurisdiction in Guyana is territorial and that, with us, a magistrate has no common law jurisdiction (see Sadler v. Wight [1938] L.R.B.G. 1): he has only such jurisdiction as the law confers on him which he must exercise strictly within the confines of his district as delimited by the *Magisterial Districts (Boundaries) Order.* (See *0. 16 1956, Subsidiary Legislation Cap. 3:05* at p. 34)

The facts in this case are quite simple. They were provided by the sole prosecution witness, the virtual complainant, a 12-year-old girl called Sursattie Ramnauth. In her attempt to prove that the commission of the offence fell within the court's jurisdiction, she replied to a leading question from the police prosecutor that the incident which caused the defendant respondent to make use of threatening language (to kill her) "took place at Strathspey, East Coast, Demerara, in the East Demerara Magisterial District." In this answer, there is an obvious attempt to establish jurisdiction by both indirect and direct proof

Under cross-examination, however, Sursattie was forced to admit, as one can well understand, that she did not know what 'magisterial' meant, nor did she know where the cases of offenders were tried when they were charged for committing offences at Strathspey. As I said, she was the only prosecution witness, and after her testimony was concluded, counsel for the defendant submitted there was no evidence to show the offence was committed within jurisdiction. The magistrate did not agree, however. He convicted the defendant and lined him $100 with an alternative of two months' imprisonment for having made use of threatening language to Sursattie whereby a breach of the peace may be occasioned.

In his reasons for decision, the magistrate referred to the prosecution's attempt to prove jurisdiction by means of a leading question, *i.e.,* by a mode that is admittedly uncommendable to anyone reading the record of these proceedings. The means was by a question put to Sursattie whereby (in the words of the magistrate), she was "led to say that Strathspey is in the East Demerara Magisterial District." Surprisingly, in spite of this, he considered jurisdiction proved for two reasons, viz., (i) that there was no evidence that Strathspey was anywhere else than in the East Demerara Magisterial District, and (ii) that the inference was compelling that the offence took place within that district because "the witness was unshaken that Strathspey is on the East Coast of Demerara".

On appeal, the Full Court did not agree with the above reasons, and after reviewing local authorities from Humphrey v. Crook [1914] L.R.B.G. 41, to Stoll v. D'Oliviera (1968) 13 W.I.R. 208, that court concluded, *inter alia* that the conviction of the defendant/respondent must be set aside since the inference that jurisdiction had been proved ought not to have been drawn in the particular circumstances of this case.

Humphrey v. Crook (*supra*) was a decision of a single judge, SIR CROSSLEY RAYNER, C.J., setting aside a Magistrate's order of non-suit when there was a failure to prove that the cause of action fell within jurisdiction. In so doing, the learned Chief Justice considered it unnecessary at the present day for a plaintiff or prosecutor to establish jurisdiction in the Magistrates' Courts of British Guiana, and he doubted the propriety of the inveterate practice which had grown up in our courts of requiring proof that a matter was within jurisdiction. Judging from the extent of his researches and the industry he displayed in the matter, the learned Chief Justice must have expended a great deal of time and thought comparing and distinguishing local and English authorities on the subject of the requirement of proof of jurisdiction as a condition precedent to magisterial adjudication before arriving at the conclusion that astounded the legal profession of the day, *viz.*, that "if no evidence is given of jurisdiction, it must be taken that the court has jurisdiction." Accordingly, the sum-total of his studies of both local and English cases showed that all that was necessary to establish proof within jurisdiction, was an averment of the locality in the charge, but not in the evidence. This, he stressed, was English practice, a knowledge of which he had acquired from his personal experience and practice at the English Bar. So whatever was the position in Guyana before 1893, he was certain as from that year, when the reorganisation of both the Supreme and Magistrates' Courts in the Colony of British Giuana took place, and when practice in them assimilated to English forms, it became unnecessary as from that time to prove jurisdiction as a matter of fact in the Magistrates' Courts of this country. As far as local authorities were concerned, RAYNER, C.J. referred, in support of his viewpoint, to the old local case of Strahan v. Darrell (29th October, 1864), in which BEETE, J., on a review dealt with a case in which a defendant was charged for exposing goods for sale in a shop without having a licence, and said that:

> "There is nothing in the charge or in the evidence to show that the alleged offence was committed within the jurisdiction of the magistrate. The offence is stated in the charge to have been committed in Bentick Street, North Cummingsburg, and the only reference to the *locus in quo* in the evidence is by the witness, one John Thomas Davis who speaks of the 'the defendant's shop in Bentick Street'. So in that case, neither in the charge nor in the evidence was jurisdiction disclosed and for that reason, together with the fact that the case came within the rule in Peacock v. Bell 1 Saunders 74, that is to say. 'The rule for jurisdiction is.

> that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; nothing shall be intended to be within the jurisdiction of an Inferior Court, but that which is so expressly alleged.' "

The appeal was allowed and the conviction was set aside.

I find it is not possible to agree with the reasoning of CHIEF JUSTICE RAYNER as to what he considered to have been the *ratio decidendi* of Strahan v. Darrell. I think he obviously erred in concluding by implication from that decision, that had jurisdiction been disclosed in the charge alone, that would have sufficed to sustain the conviction. On the authority of Strahan v. Darrell he said the Magistrate ought to have held that the cause of action in Humphrey's case was properly within his jurisdiction. But, as we shall presently see, Humphrey v. Crook (*supra*) was overruled. It was a bold attempt by a single judge to state and compare the local law with English law and practice from the Chief Justice's personal experience as a former member of the English Bar: but, it is obvious, he went too far when he attempted to disturb practice and precedents in both civil and criminal cases which had become firmly rooted in the judicial system of this country for close on 100 years. And, contrary to what RAYNER, C.J. thought, it is not at all necessary for a formal statement to be made in a plaint in a Magistrate's court, that the matter is within the jurisdiction of the trial magistrate. It is sufficient if it emerges from the evidence that the matter is one within his jurisdiction. (See New Building Society Ltd. v. Carlton Weithers [1965] L.R.B.G. 358.) Of course, being seized with a civil case concerning the recovery of a balance due on an account, what RAYNER, C.J. said in relation to criminal cases was merely *obiter* strictly speaking.

In Boston v. Jagessar [1920] L.R.B.G. 82, however, the then Full Court of the Supreme Court of British Guiana overruled Humphrey v. Crook (*supra*) in respect of what was said in relation to proof of both civil and criminal jurisdiction and, in so doing, the Court conclusively showed it is erroneous to hold it is unnecessary or superfluous for the prosecution to prove in evidence that an offence is committed within the jurisdiction of a magistrate. In reaching that conclusion, opinions and authorities were cited from distinguished textbook writers such as *Archbold* and from *Hawkins' Pleas of the Crown'*. Allusions were also made to Paley's well-known work on *Summary Convictions* and decided cases, in order to show that the law concerning proof of locality to found jurisdiction had been rightly decided and acted upon in Guyana from as long ago as the year 1883 in the case of Monick v. Soloman (13th January, 1883). There, it was held that "the proof of locality to found jurisdiction does not differ in its nature from the facts constituting the offence." which means that proof of locality to found jurisdiction and proof of the facts of any case are indispensably necessary: both require evidence before any inference to establish either can legitimately be drawn by a

magistrate. Thus, from the decision of Boston v. Jagessar, we learn that although it is quite permissible for a magistrate to draw an inference from proof of locality that the matter is within his jurisdiction, he should do so only when there is on record, cogent evidence from which he may reasonably draw that inference.

And herein, I think, lies the point on which the decision in this appeal must ultimately turn-the weight of the evidence derived from the means or method of proof employed, *viz.*, the leading question which enabled the Court to draw the inference that the village of Strathspey was within its jurisdiction, i.e., the East Demerara Magisterial District. It is evident DALTON, J., realised the importance of this aspect of the matter when he essayed an answer to the problem in Boston v. Jagessar (*supra*). It appears to me the present appeal is an admirable example of how relevant the mode or the method of proof can be in the context of jurisdiction, and how well DALTON, J., had anticipated and evaluated the precise situation such as now presented itself for consideration when he observed (*ibid.* 86):

> "What then, it is asked, is the method of proof? It has been suggested by the Solicitor General that, if given, it can only be given in set formulae. With that I cannot agree. The method of proof must in practice undoubtedly be varied. A parrot-like repetition of the words that so and so happened 'in this judicial district' from a witness who possibly obviously uses words which have no meaning to him or her may be of no value at all. On the other hand, let us take the case of a charge which states an offence was committed at 'Camp Street, Georgetown' and was tried before the magistrate of the Georgetown Judicial District. I fail to see how under the circumstance, assuming a witness proved the offence in 'Camp Street, Georgetown', but failed to add the words 'in this judicial district' it could be said that jurisdiction was not proved. If the words are added, so much the better, but the omission of the words could not debar the magistrate if he was satisfied with the evidence from finding that the locality of the offence was within his judicial district."

DALTON, J., also went on to quote CHALMERS, C., in Powers & Anor, v. Ruch (18th September, 1885) in another decision of the old Supreme Court of British Guiana on the point he was emphasising as follows:

> "There is no doubt as to the principle that the territorial jurisdiction of the magistrate must be proved by proving that the offence occurred at some place within his district, but there is no ground for holding that the mode of proof must necessarily be by direct statement, although when sufficient proof can be thus given it is most convenient to make use of it."

> It has been contended by counsel for the appellant that jurisdiction must be

proved beyond reasonable doubt and that nothing short of that standard ought to suffice. But, as it seems to me, jurisdiction being a fact must be proved like any other; the standard of proof in relation to it must depend on the nature of the proceedings before the court. In all criminal trials, the general standard is proof beyond reasonable doubt: whereas, in civil cases it is proof on a balance of probability. I, for myself, can see no good reason why these two standards of proof should not obtain. In the case of Nascimento v. Leefmans [1923] L.R.B.G. 40, the Full Court obviously applied the civil standard when it inferred there was jurisdiction in a magistrate to hear and determine a civil case in which it was sought to prove that the cause of action arose wholly or partly within his jurisdiction, and I think they had rightly done so.

In that case, there was an appeal to the Full Court from the decision of the Magistrate of the Bartica Judicial District awarding the respondent $15 damages for wrongful dismissal. When the point was made that there was no proof that the respondent's cause of action arose in the Bartica Judicial District. SIR CHARLES MAJOR, C.J., disagreed and dismissed the appeal saying:

> "The plaint having set forth that the service of the respondent was rendered to the appellant at Bartica, where the court for the Bartica Judicial District is held, when the respondent, in answer to the appellant's cross-examination, said, 'I remember that Mr. Nascimento and child were coming up, and that you required the room I was occupying for a few nights whilst your family were here', he fixed his service as having been given in Bartica and showed where the cause of action arose, he thereby proved jurisdiction."

So, although jurisdiction had not been proved *"in totidem verbis"*, yet it was held that the use of the word "here" in the evidence taken together with the context, sufficiently, i.e., inferentially, connected the place of the respondent's cause of action with the judicial district in question.

The conclusion which must be drawn from both principle and the decided cases then is, that proof of locality to found jurisdiction has always been the same as it is in England and continues to be the practice in our magistrates' courts: there is no set formula of words to be used in so doing, and such proof may be simply established either by a direct statement that the locality is within the magisterial jurisdiction, or inferentially, as above demonstrated, by the decided cases. In Boston v. Jagessar (*supra*) Plantation "Sisters" was described by the defendant as situate on the "West Bank Demerara." These facts were held to have sufficiently described the situation of Plantation "Sisters" so as to enable the magistrate to infer that Sisters was within his jurisdiction.

But there is no absolute requirement for a direct statement that the locality is

"within this or that magisterial district". No hard and fast rule can be laid down as to what words should be used. Of course, the name of the locality must be stated; although, as the old case of Strahan v. Darrell (*supra*) shows, the mere use of a place name in the evidence without a description would be fatal. The name of a place alone cannot confer jurisdiction on a court by taking judicial notice of it: rather, the place must be proved and adequately described by the evidence. (See Nero v. Galloway [1944] L.R.B.G. 83). The place must be accompanied by some descriptive word or words so as to prove to the magistrate that the offence was committed within his district. But whatever accompanying words are used, it will always be a question of fact whether proof has been established to his satisfaction so that he can safely infer from the description given, that the complainant or plaintiff has brought the offence or suit within his magisterial district.

In Stoll v. D'Oliveira (*supra*) BOLLERS, C.J., in the Full Court also appeared to have anticipated a situation like the present when he said (*ibid* at p. 208), that "the court should, however, be wary of finding proof of jurisdiction by any form of inference where issue has been joined on the question and great care should be given to the examination of the evidence on the point before concluding that jurisdiction has been proved."

One has only to reflect on the circumstances of the present appeal to see what has transpired in order to appreciate the wisdom of the caution advised by the learned Chief Justice. Instead of the prosecution in this case ensuring there was cogent proof that the offence charged was committed within the magisterial district-and this could have been done by calling on any nearby policeman, like the court orderly to supply it, since Sursattie had obviously failed to do so-they deliberately, as it would appear, chose to allow, the evidence to remain on record in its present state. Therefore, they only have themselves to blame for presenting the case in the most casual way imaginable, and must abide by the consequence.

In my view, it is impossible to separate into two parts, as the trial magistrate evidently sought to do, the answer to the leading question on which the prosecution relied to prove that the offence was committed within jurisdiction, and to say Sursattie was "unshaken" under cross-examination with respect to the descriptive part of the answer, viz., that "Strathspey is on the East Coast of Demerara". The admissibility of leading questions is a matter entirely within the discretion of a trial court. As a matter of fact, it is commonplace that many leading questions are asked and properly permitted in examination-in-chief on introductory and other matters not in dispute. But, although answers to such questions are not inadmissible in evidence, the method by which they are obtained, as DALTON, J., observed in Boston v. Jagessar, (*supra*), may rob them of most of their significance. (See Moor v. Moor [1954] 2 All E.R. 458.) In this case, although the Court of Appeal did not rule that the leading questions were inadmissible, yet it declined to interfere with a trial judge's discretion when he refused to grant a decree *nisi* in

an undefended divorce suit, on the ground that the mode of felicitation, being in response to leading questions directed to the petitioner, did not give an automatic right to the decree.

From his reasons for decision, the magistrate has confessedly inferred there was proof that the offensive threats uttered by the appellant to Sursattie occurred within his jurisdiction. But clearly, this finding must mean that Sursattie's direct statement was rejected in favour of her indirect statement by description, i.e., that Strathspey was on the East Coast of Demerara. But, as I see it, the plain fact of the matter is, that the vice in the question which "led" her to give the answer desired by the prosecution must have vitiated the whole and not merely, a part of her answer. The learned magistrate could not, in the circumstances, properly reject one part without doing the same with regard to the other. If by reason of the leading question and her explanation of it under cross-examination, it became clear Sursattie knew nothing about the word 'magisterial' and for that reason it was found unsafe to accept her direct statement as proof that the matter was within jurisdiction, then *pari ratione*, ought the court not to have also considered it unsafe to infer jurisdiction from the descriptive part of the same statement, *viz.*, that "Strathspey was on the East Coast of Demerara?" It seems to me, having been derived directly from one common source, namely, the same leading question, both parts are equally objectionable: if one is found to be unreliable, the other can hardly be otherwise. Both are tainted with evidential irregularity, and no inference ought legitimately to have been drawn, they being both concerned with vital ingredients of proof that sprung from an injudicious exercise of a magisterial discretion and thus wrongly admitted into evidence.

So, unlike in Moor v. Moor (*supra*), here, there was practically no exercise of such a discretion to admit into evidence a leading question, the answer to which concerned so fundamental a matter as proof of jurisdiction. In my view, the magistrate doubly erred: first, in admitting the leading question and the answer to it into evidence; secondly, in drawing an inference from that type of evidence, *viz.*, that from which he had wrongly exercised his discretion to admit. I think when the prosecutor was endeavouring to "lead" Sursattie in the way he did, objection ought then to have been taken by counsel for the defence. Alternatively, it was the court's duty to do so, notwithstanding counsel for the defendant did not, for it was a vital part of the case for the prosecution on which a leading question ought never to have been permitted, and though, as I have observed, every trial court has an admitted right to permit leading questions, it certainly has no right to allow vitally essential words of proof to be put into the mouth of a witness.

I must therefore conclude that the impropriety of the suggestion of the existence of facts which were not in evidence was therefore no basis on which an inference could justifiably have been drawn that Strathspey was within the magisterial district in question. I am decidedly of the opinion that at the close of the case for the

prosecution, the magistrate ought to have acceded to the submission of learned counsel that jurisdiction had not been proved and dismissed the complaint.

For these reasons, which are not altogether on all-fours with the Full Court's, I will support the conclusion of the Court that the magistrate's decision be reversed and agree that this appeal be dismissed with costs.

**HAYNES, C:** I concur.

**PERSAUD, J.A.:** I concur.

**Appeal dismissed with costs.**
**Decision of the Full Court affirmed.**

**Hazari v. Burnett**

**MONERAM HAZARI**
**Appellant**

**v.**

**PAUL BURNETT, Officer of Customs & Excise**
**Respondent**

[In the Full Court of the High Courts (BOLLERS, C.J., MITCHELL, J.) May 24, 1976]

*Criminal Law-Appeal against decision from Magistrates' Court-Statutory Offences-Bringing currency notes to an airport for the purpose of exportation-Proof that notes legal tender-Whether evidence adduced sufficient to prove offence-Exchange Control Ord. 1958, s. 24. para. 3 of Part III, Fifth Schedule (now Exchange Control Act, Cap. 86:01).*

On Saturday 29th September, 1973, it was alleged by the respondent that the appellant was observed in the departure lounge of Timehri International Airport with a black briefcase and a black handbag in his possession. While the appellant was proceeding to the departure door, a Customs Officer halted him. After the Officer identified himself to the appellant, the appellant was asked by the Officer as to his destination. The appellant responded that he was on his way to Canada. Further dialogue ensued and the Customs Declaration Form as signed by the appellant was inspected. The appellant was thereafter searched. A plastic jar containing American and Canadian currency was extricated from the black bag and there were also two other jars containing such currency.

The appellant was thereafter charged with the offence of bringing currency notes to an airport for the purpose of exportation, contrary to s. 24 (1) of *the Exchange Control Ordinance, 1958.*

At the trial of the matter, the issue was raised by counsel for the appellant that there was need to prove that the money found on the appellant was legal tender in Guyana.

The learned magistrate believed and accepted the case of the respondent and found the appellant guilty of the offence of bringing currency notes to an airport for the purpose of exportation contrary to paragraph 3 of Part III of the Fifth Schedule to the *Exchange Control Ordinance, 1958.* The appellant was convicted accordingly, of the offence.

The appellant appealed against the decision of the magistrate.

Section 24 (1) of the *Exchange Control Act, Cap. 86:01* provides as follows:-

> "The exportation from Guyana of (a) any notes of a class which are or have at any time been legal tender in Guyana or any part of Guyana or in any other territory ...
>
> is hereby prohibited except with the permission of the Minister".

**HELD:** (1) That for the purpose of the Ordinance the currency notes found on the appellant could be deemed legal tender as such notes would be considered acceptable legal tender in the country from where they would be issued.

(2) That the words "in any other territory" are disjunctive and they refer to notes of a class which have been legal tender in any territory outside of Guyana and accordingly were referable to the notes in the circumstances of this case as *prima facie* evidence of the nature and character of the notes adduced.

(3) That having regard to all the circumstances, there was evidence on which the learned magistrate could have reasonably come to the conclusion that the defendant intended and attempted to export money from Guyana.

(4) That the magistrate did not err in finding the defendant guilty of the offence as complained against him, and in imposing the penalty in the circumstances of the case, as he did.

**Appeal dismissed with costs.**
**Conviction and sentenced**
**affirmed. Costs to respondent.**

Sir Lionel Luckhoo, S.C., for the appellant.
L. Ganpatsingh, Assistant Director of Public Prosecutions for the respondent.

**MITCHELL, J.: (delivered judgment on behalf of BOLLERS, C.J.):** This is an appeal from a decision of the magistrate of the Georgetown Judicial District in which the appellant was convicted and fined fifteen thousand, five hundred and nineteen dollars and forty-five cents ($15,519.45), in default six (6) months' imprisonment and certain currency notes confiscated for that he, on Saturday 29th September, 1973, at Timehri Airport, within the Georgetown Judicial District, brought currency notes amounting to one thousand nine hundred and forty-five United States of America dollars ($1,945.00 U.S) which are legal tender in the United States of America; five hundred and sixty-nine Canadian dollars ($569.00) which are legal tender in Canada to Timehri Airport for the purpose of exporting same. This offence was stated as bringing currency notes to an airport for the purpose of exportation, contrary to para. 3 of Part III of the Fifth Schedule to the *Exchange Control Ordinance, 1958.*

It was against the decision of the learned magistrate to convict the defendant and to fine him the sum of fifteen thousand five hundred and nineteen dollars and forty five cents ($15,519.45), in default six (6) months' imprisonment and to order that the currency be confiscated, that the defendant has appealed.

Paragraph 3 of Part III of the Fifth Schedule to the *Exchange Control Ordinance, 1958,* provides:

> "If anything prohibited to be exported by any provision of the said Part IV is exported in contravention thereof, or is brought to a quay or other place, or water-borne, for the purpose of being so exported the exporter or his agent shall be liable to the same penalty as to which a person is liable for an offence to which section 218 of the Customs Act applies."

Section 218 of the *Customs Act, Cap. 82:01* to which reference is made states:

> "Every person who:
>
> (a) imports or brings or is concerned in importing or bringing into Guyana any prohibited goods or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the same be unloaded or not... shall be liable for each such offence to a fine of treble the value of the goods or one thousand dollars at the election of the Comptroller: and all goods in respect of which any such offence shall be committed shall be forfeited."

The case for the prosecution was given in the evidence of Police Constable 7085

Gregory Younge and Ronald Hunte, an officer of the Customs and Excise Department.

Gregory Younge gave evidence of having processed the travel documents of the defendant-the passports, tax clearance, travel tax certificate, air line tickets and currency declaration. The currency declaration form was tendered as Exhibit 'A' and according to the witness, Gregory Younge, he gave that form "back to Hazari who gave it to Customs Officer Hunte."

Customs Officer Hunte told of having gone to the departure lounge of the Timehri Airport where he saw the defendant, Moneram Hazari. At the time, the defendant had a black briefcase and a black handbag in his possession. There was an announcement of the departure of the B.W.I.A, aircraft and he saw the defendant proceed towards the departure door. Customs Officer Hunte told further, of having stopped the defendant as he was going towards the tarmac at the airport. He identified himself to Hazari and asked him (Hazari) where he was going. Hazari said that he was going to Canada, and told him that he was going by the B.W.I.A., Aircraft, Number 465, which had just arrived from Trinidad.

There was some further dialogue between Hazari and Customs Officer Hunte in which Hazari said that he had made out the currency declaration form, Exhibit 'A'.

Hazari was subsequently searched by Customs Officer Hunte and from the black bag which he had, in a plastic jar he found some Canadian and American currency which Hazari said he had. There were two other jars which appeared to have currency also. Customs Officer Hunte listed the currency. Hunte said further in the evidence and I quote from the record of proceedings:

> "I asked defendant if all the currency was good currency. He asked me what I meant by that. I said, 'are all the currency legal tender of America and Canada'. He said 'all is good money'."

The defendant Hazari, for what it was worth, elected to make an unsworn statement from the dock. He stated and I quote from the record of proceedings as recorded by the magistrate:-

> "On the 29th September, 1973, my passport was not processed and I was handed over to the Customs Officer by the Immigration. I was kept in the office of the Customs until the evening. I never went to the departure lounge. I am innocent.

The learned magistrate believed and accepted the evidence of the witnesses Hunte

and Younge as to what transpired on that day at the airport. He found that the case against the defendant was proved, according to him, "beyond any shadow of doubt" and he overruled the legal submissions made on behalf of the defendant and found the defendant guilty of the offence.

Paragraph 3 of Part III of the Fifth Schedule to the *Exchange Control Ordinance, 1958* is concerned with the prohibition imposed by any provision of Part IV of the *Exchange Control Act, Cap. 86:01.*

Section 24 (1) of Part IV of *Exchange Control Act, Cap. 86:01* states:

> "The exportation from Guyana of (a) any notes of a class which are or have at any time been legal tender in Guyana or any part of Guyana or in any other territory;...
>
> is hereby prohibited except with the permission of the Minister".

When this appeal came up for consideration before this Court, counsel for the appellant referred to para. 3 of Part III of the Fifth Schedule of the *Exchange Control Ord., 1958,* and also to s. 24 of the *Exchange Control Act, Cap. 86:01.* Counsel for the appellant accepted the evidence as on the record of the proceedings for the purpose of his arguments. He said there was no evidence that the notes were legal tender in Guyana. He contended that the prosecution had to prove the notes were legal tender in Guyana.

Counsel for the respondent in reply, stated that the offence was created by para. 3 of Part III of the Fifth Schedule of the Act and that the notes in question fall within the scope of s. 24 (1) of Part IV of the Act. He contended that the prosecution did not set out to prove that those notes were legal tender in Guyana. He said that the prosecution had set out to prove that they were legal tender in the U.S.A. and Canada and referred particularly to the words of the said s. 24 (1). I quote "in any other territory".

Having regard to the arguments advanced before us, the record of the proceedings as reflecting the state of the evidence led in support of the complaint and the submissions made, we are of the view that the words "in any other territory" are disjunctive and that they refer to notes of a class which have been legal tender in any territory outside of Guyana, e.g., in the United States of America or in Canada.

Accordingly, in our opinion the words "in any other territory" were referable to the notes in the circumstances of this case and also in so far as the defendant himself, in evidence which had not been refuted or rebutted, had said to the witness Ronald Hunte, Customs Officer, that he did have some Canadian and American currency in the glass container which was in his possession and also that all

the currency were legal tender of America and Canada, that all were good money. In our opinion, the evidence led was acceptable *prima facie* evidence of the nature and character of the notes.

Paragraph 3 of Part III of the *Exchange Control Act, Cap. 86:01* refers to the prohibition against export and then there is also reference to the *Customs Act, Cap. 82:01*. In the *Customs Act, Cap. 86:01* in the Interpretation Section, s. 2, "export" means to "take" or "cause to be taken out of Guyana".

We were satisfied that having regard to all the circumstances, there was evidence on which the learned magistrate could have reasonably come to the conclusion as he did, that the defendant intended and attempted to export money from Guyana.

We were satisfied that there was evidence that the place where the defendant was found in possession of the notes which were legal tender in the United States of America and Canada and, which he intended and was attempting to export, was an airport-and that the airport satisfied the requirement for "other place" in paragraph 3 of Part III of the Fifth Schedule for the purposes of exportation from Guyana.

We were satisfied also, that there was evidence on the basis of which the magistrate could have reasonably come to the conclusion, that there was a prohibition against the export of notes in question, in terms of s. 24 (1) of the *Exchange Control Act, Cap. 86:01*.

Accordingly, and for the reasons given, we were satisfied that the learned magistrate, apart from and in addition to what he had written in his reasons for decision, because this is not merely an appeal from his reasons, did not err in his finding the defendant guilty of the offence as complained against him, and in imposing the penalty in the circumstances of this case as he did.

We, therefore, dismiss the appeal, and affirm the conviction and sentence of the learned magistrate with costs to the respondent, fixed in the sum of twenty-two dollars and twenty cents ($22.20).

**Appeal Dismissed.**
**Conviction and Sentence**
**affirmed. Costs to respondent.**

**Chester v. Hardatt aka Ghandie**

**HENRY CHESTER**
**Appellant**
**v.**
**HARDATT aka GHANDIE**
**Respondent**

[Court of Appeal (Crane, Luckhoo and Jhappan, JJA.) February 19, April 9, 1976]

*Evidence-Admissibility-Documentary hearsay-Report by medical practitioner of complainant's injuries-Report made within 48 hours of examination receivable in evidence-Report of injuries of defendant not so receivable as injury not subject of prosecution for criminal offence-Evidence Act, Cap. 5:03. s. 43 (4).*

*Statute-Interpretation-Natural and ordinary meaning as expressed by Parliament.*

The respondent was charged with the offence of unlawfully assaulting one Mari Muthoo so as to cause him actual bodily.

During the course of the trial the magistrate admitted in evidence the medical report of a registered medical practitioner issued within forty-eight hours of his examination of the injuries found on Mari Muthoo.

In order to rebut the story of Mari Muthoo that the assault on him was unprovoked, counsel for the respondent tendered in evidence a document from the same doctor, which purported to be a report made by that doctor and issued within forty-eight hours of his examination of injuries found on the respondent. Proceedings were never instituted against Mari Muthoo.

The magistrate ruled that the document was inadmissible as the injuries sustained by the respondent were not the subject of a prosecution for a criminal offence and thus not caught within the ambit of s. 43 (4) of the *Evidence Act, Cap. 5:03.* The magistrate therefore excluded the contents of this report from his consideration and found the respondent guilty.

On appeal to the Full Court it was held that the document was within the ambit of s. 43 (4) and the appeal was allowed and the conviction and order set aside. The State appealed from this decision of the Full Court to the Court of Appeal.

**HELD:** (1) That only a document purporting to be a post-mortem report of a duly

registered medical practitioner, and a document purporting to be a report made by a duly registered medical practitioner within forty-eight hours of his examination of any injur, or condition of a person, and which said injury or condition is the subject of a prosecution for a criminal offence, can be admitted in evidence under s. 43 (4) of the *Evidence Act, Cap 5:03*, and accordingly the ruling of the learned Magistrate was right.

(2) That there is no ambiguity or lack of clarity in the words used in s. 43 (4) which must therefore be given their ordinary natural meaning.

(3) That although the Court has the power to develop the common law in certain cases, this was not such a case which would justify a judicial extension.

(4) That since the respondent's injuries were not the subject of a prosecution for a criminal offence, the respondent's medical was inadmissible, and accordingly, the judgment and order of the Full Court would be set aside and the decision of the Magistrate restored.

**Appeal allowed.**
**Decision of the**
**Magistrate restored.**

**Editorial Note:** This case is also reported in (1976) 24 W.I.R. 22

**Cases referred to:**

(1) Richards v. Sanders and Sons (1912) 5 B.W.C.C. 352

(2) Kammins Ballrooms Co. Ltd. v. Zenith Investment (Torquay) Ltd. [1971] A.C. 850; [1970] 3 W.L.R. 287; 114 S.J. 590; [1970] 2 All E.R. 871.

(3) Re a Debtor (No. 335 of 1947), *ex parte* R. v. The Debtor [1948] 2 All E.R. 536; 64 T.L.R. 446.

(4) Lord Advocate v. de Rosa and Anor. [1974] 2 All E.R. 849; [1974] 1 W.L.R. 946.

Appeal by D.C. 7294 Henry Chester against the decision of the Full Court setting aside the conviction and order by the Magistrate of the respondent, Hardatt aka Ghandie.

G.H.R. Jackman, Assistant Director of Public Prosecutions, for the appellant.
K.A. Juman-Yassin for the respondent.

**R.H. LUCKHOO, J.A. (delivered the judgment of the Court):** The only point which calls for consideration in this appeal is one of construction of the language used in s. 43 (4) of the *Evidence Act. Cap. 5:03.* with respect to the admissibility

in evidence of a document purporting to be a report made by a duly registered medical practitioner.

The facts giving rise to this appeal are briefly these: The respondent was charged with the offence of having on the 30th June, 1973, at Leonora, West Coast, Demerara, unlawfully assaulted Mari Muthoo so as to cause him actual bodily harm, contrary to s. 30 (a) of the *Summary Jurisdiction (Offences) Act, Cap. 8:02.* During the course of the trial the magistrate admitted in evidence the medical report of Dr. Sahai, a registered medical practitoner, issued by him within forty-eight hours of his examination of the injuries found on Mari Muthoo. During cross-examination of Sergeant of Police Primo, a witness for the prosecution, counsel for the respondent caused to be tendered in evidence through that witness a document, also uplifted by the police from the same doctor, which purported to be a report made by that doctor and issued within forty-eight hours of his examination of injuries found on the respondent. The object of the defence was to show that, far from the story of Mari Muthoo of an unprovoked assault on him being true, it was Mari Muthoo and his family who had unlawfully assaulted the respondent. Neither the police nor the respondent instituted proceedings against Mari Muthoo for any assault alleged to have been committed by him on the respondent. This document tendered under cross-examination was admitted by the magistrate in evidence and marked as Ex. 'B'.

The respondent was found guilty, and in his reasons for decision the magistrate said with respect to this latter medical report, Ex. 'B', that it was inadmissible as the injuries sustained by the respondent were not the subject of a prosecution for a criminal offence and thus the document was not one caught within the ambit of the provisions of s. 43 (4) of the *Evidence Act. Cap. 5:03.* which reads as follows:

> "The provisions of this section shall, with the necessary modifications, apply to a document purporting to be a post-mortem report of a duly registered medical practitioner, and to a document purporting to be a report made by such medical practitioner within forty-eight hours of his examination of any injury received by, or the condition of, a person which is the subject of a prosecution for a criminal offence."

The magistrate, therefore, excluded from his consideration the contents of Ex. 'B'.

In the Full Court, on appeal, the learned judges there disagreed with the view taken by the magistrate and held that he had misdirected himself when he stated that the medical report, Ex. 'B', was inadmissible. The Full Court came to the conclusion that it was admissible in evidence under the section of the Act, and that the exclusion by the magistrate from his consideration of the medical report relating to the injuries which the doctor had found on examination of the respon-

dent amounted to a grave miscarriage of justice rendering the entire trial a nullity. The appeal was, accordingly, allowed by that Court and the conviction and order of the magistrate set aside.

It is our view that the section under review is a statutory exception to the hearsay rule. At common law, a medical certificate was inadmissible to prove the facts stated in it, as the best evidence of those facts was the oral statement on oath of the person who gave the certificate. [See Richards v. Sanders and Sons (1912) 5 B.W.C.C. 352 C.A.]. As a general rule, hearsay evidence is not admissible. It is not given on oath, and cannot be subjected to the tests and safeguards provided by cross-examination, which alone can either confirm and enhance its cogency and value or expose it as unworthy of credence and devoid of any probative value.

Many exceptions have from time to time over the years been introduced, chiefly by statute, to overcome the rigidity of the hearsay rule in order to meet the needs of expanding social and economic conditions. But it is necessary for these exceptions to be kept within well-defined limits and that there is due compliance with the conditions prescribed for their admission: otherwise their value of conviction would be considerably diminished.

In the matter under review, statute has made an inroad into the common law position by allowing certain documents to be admitted in evidence where hitherto they could not have been admitted. But in doing so the legislature has prescribed the conditions and limits for their reception. It is not for us to say that these limits or conditions have unfairly put the complainant in a case in a more favourable and privileged position by making it possible for him to have such a document put in evidence without calling the maker, whilst a defendant, who has not instituted a complaint, is compelled to call the maker as a witness to testify on oath. It is also not our function to extend those limits and the scope of the enactment to embrace other documents if the language of the enactment does not so warrant. We are here to interpret and administer the law as enacted and in force. If there is need for further change to ameliorate the position of other litigants in regard to medical reports, that would be a matter for the consideration, and wholly within the province of, the legislature. Though this Court has the power to develop the common law in certain cases, this is not such a case which will justify a judicial extension.

An analysis and construction of the words used by the legislature in s. 43 (4) of the *Evidence Act* taken in their ordinary natural meaning compel us to take the view that a document purporting to be a post-mortem report of a duly registered medical practitioner, and a document purporting to be a report made by a duly registered medical practitioner within forty-eight hours of his examination of any injury, or condition, of a person, which said injury or condition is the subject of a

prosecution for a criminal offence, are the only documents qualified for admission in evidence within the purview of that subsection. There seems to us no ambiguity or lack of clarity in the words used by the legislature to convey its intentions. If, perchance, Parliament meant to include other medical reports, as, for example, those relating to injuries received by a defendant, but which injuries were not the subject of a prosecution, it has not said so, and in accordance with well-established rules of construction we have to ascertain the meaning of what Parliament has said, and not what Parliament has meant to say. The intention of Parliament is to be ascertained from what is expressed in the section. We adopt as sound, what VISCOUNT DILHORNE said in Kammins Ballrooms Co. Ltd. v. Zenith Investment (Torquay) Ltd. [1970] 2 All E.R. 871 H:L., at p. 883: "Our task is to interpret s. 29 (3) 'according to the intent of them that made it'. As LORD GREENE, M.R. said in Re a Debtor (No. 335 of 1947) *ex parte* R. v. The Debtor [1948] 2 All E.R. 536: 'If there is one rule of construction for statutes and other documents, it is that you must not imply anything in them which is inconsistent with the words expressly used.'"

The Courts are always on safe ground when they keep constantly in view the golden rule of construction, that is, that if a statute is couched in language that is plain and intelligible, it must be given its natural and ordinary meaning. As LORD SIMON OF GLAISDALE has so elegantly put it in Lord Advocate v. de Rosa & Anor. [1974] 2 All E.R. 849 H.L. at p. 863: "Justice is more likely to be served, as well as constitutional propriety to be observed, if Parliament is given the credit for meaning what she has said."

We regret we have to differ from the learned judges of the Full Court in their construction of the section under review. The appeal is allowed; the judgment and the order of the Full Court are set aside and the decision and the order of conviction made by the learned magistrate are restored, save that we propose to set aside the penalty imposed and to substitute a reprimand and discharge in its place.

**Appeal allowed.**
**Decision of the**
**Magistrate restored.**

**The State v. Adams & Poole**

**PRINCE ADAMS**
**and**
**EON POOLE**
**Appellants**

**v.**

**THE STATE**
**Respondent**

[Court of Appeal (Haynes, C., Crane and Luckhoo, JJ.A.), January 28 and February 3, 1976]

*Criminal Evidence-Robbery with aggravation-Three co-accused on joint charge-Plea of guilty by one in presence of jury-Guilty accused left in dock to await sentence at conclusion of trial with other two-Failure of trial judge to caution jury with respect to guilty plea of accused-Necessity for trial judge to tell jury such plea is not evidence against co-accused-Criminal Law (Offences) Act, Cap. 8:01. s. 222 (b)-Proviso-Court of Appeal Act, Cap. 3:01. s. 13 (1).*

*Criminal Evidence-Identification-Suspects identified when seated together on bench in public view in station's reception room shortly after commission of crime-Reasonable anticipation that victim would shortly call at same police station to make complaint-Whether identification could be relied on in circumstances.*

The two appellants with one Lyte who pleaded guilty, were charged jointly with robbery with aggravation, in that they together robbed Oswald Ramsammy of one wrist-watch, one gold ring and $25.

Some fifteen minutes later, the three accused who were acting in a suspicious manner, were arrested in Camp Street. A wrist-watch, a gold ring bearing initials "O.R." and the sum of $10.04 were found by the arresting officers on Lyte, Adams and Poole, respectively.

In the presence of the jury, Lyte pleaded guilty and Adams and Poole not guilty, to the charge on which they were jointly arraigned. At the conclusion of the trial they were all convicted and sentenced. Adams and Poole appealed.

On appeal, objection was taken in the case of Adams, that the trial judge failed to direct the jury on the manner they were to consider Lyte's guilty plea and on the point that it was no evidence against his co-accused. In the case of Poole, objection was taken to the manner in which he was identified by Ramsammy at the police station as one of his robbers. Poole was put to sit on a bench in the public

reception room alongside the two other suspects and identified by Ramsammy who arrived at the station a few minutes later to lodge a report about the robbery.

**HELD:** (1) In some cases, a person pleading guilty to an offence for which another person is jointly charged, may have a prejudicial effect on the trial of that other person. In such cases, the trial judge must direct the jury that they must not use that guilty plea as evidence against the other person.

(2) There was need for a direction to the jury on the effect of Lyte's plea, particularly in view of the allegation in the indictment that all three accused, together robbed Ramsammy.

(3) Without a direction from the judge that Lyte's plea of guilty affected only him and must not be taken into account against the others, the jury might well have used the fact that Lyte acknowledged his guilt and participation in the crime on a joint charge in a manner prejudicial to the appellants.

(4) There were some cases in which the need for such a direction from the trial judge was not necessary. For example, where the evidence against the co-accused is very damning so that the harm of prejudice in the absence of a caution will not be damaging; and therefore, the proviso must be applied to Adams' appeal since he was found in possession of Ramsammy's initialled gold ring very shortly after the robbery.

(5) The court was not happy over the manner in which Poole was identified. The police ought to have anticipated Ramsammy's making a report at the station in view of the fact that it was the nearest station from the scene and taken precautions against his seeing the three accused seated together in the public reception room.

(6) Interrogation ought never to take place in public view, particularly when, in circumstances similar to the present, an identification parade was the only proper means of securing the accused a fair trial.

(7) It was unsafe to apply the proviso in Poole's case because the $10.04 found on him could not be identified as Ramsammy's property, unlike the gold ring.

**Appeal dismissed in respect of Prince Adams.**
**Appeal allowed in respect of Eon Poole and conviction set aside.**

## The State v. Adams & Poole

**Editorial Note:** See report of this case in 23 W.I.R. 252
**Cases referred to:**
(1) R. v. Moore (1956) 40 Cr. App. R. 50, C.C.A.

Appellants in person.
N. Kissoon, Senior State Counsel (ag.), for the State.

**LUCKHOO, J. A. (delivered the judgment of the Court):** This appeal was heard on the 3rd day of February, 1976, on which day Adams' appeal was dismissed and judgment reserved in Poole's appeal.

The two appellants along with the one Lindon Lyte were charged jointly with the offence of Robbery with aggravation, contrary to s. 222 (b) of the *Criminal Law (Offences) Act, Cap. 8:01* in that they, on the 11th day of June, 1974, together robbed Oswald Ramsammy of one wrist-watch, one gold ring, and twenty -five dollars in cash. At the Demerara Assizes in June, 1975, Lyte pleaded guilty and Adams and Poole not guilty. The trial proceeded with Lyte remaining with the two appellants in the dock, all three being sentenced at the conclusion of the trial.

In substance, Ramsammy's evidence was that when he was leaving the urinal in the Strand-de-Luxe Cinema at about 2.30 p.m. on the 11th June, 1974, he saw the three accused. Poole passed him and from behind held him around his neck with his left hand and at the same time called out to Adams and Lyte, "Run him through." Lyte came up with a knife, held it in front of him and said. "Don't holler." He became afraid. Lyte pulled off his wrist-watch, pushed his hand inside his trousers and took out twenty-five dollars. Adams took off his ring. They pushed him down and went away.

Ramsammy reported this incident to the manager of the cinema and at about 2.55 p.m., that is, twenty-five minutes later, he went to the Brickdam Police Station where he said he recognised his assailants and pointed out the three accused to the police as the persons who had robbed him. The police showed him a watch and a ring both of which he identified as the articles stolen from him. He further said in evidence that the attack on him in the cinema lasted for about two minutes.

Police Constable Edwards testified that he and PC. Lildharie were on mobile patrol duty id Camp Street on the 11th June, 1974, and observed the three accused running and looking back at about 2.45 p.m. He became suspicious and stopped and searched them. He found a wrist-watch on Lyte. He arrested and took them to the Brickdam Police Station where Poole was searched and $10.04 found on him. He also searched Adams and found in his pocket a gold ring with the initials 'O.R.'. Both the watch and the ring were claimed by Ramsammy as his property when he went to the station at about 3 p.m. PC. Lildharie was put up for

cross-examination and testified that the three accused were arrested in Camp Street at 2.45 p.m.

Poole gave evidence on oath. He denied that he had robbed Ramsammy and his defence was an alibi. He said he was held up by PC. Edwards in John Street on approaching Bent Street, and denied he was arrested in Camp Street along with Lyte and Adams. The sum of $10.04 found on him was claimed by him as his money. Adams made a statement from the dock denying the story told by Ramsammy and stating that he was not arrested in Camp Street along with the other accused. He said he was stopped by the police in Bent Street and taken to Brickdam Police Station. He denied he was searched and also denied that the gold ring claimed by Ramsammy was found on him. His defence was also an alibi.

The learned trial judge, in a careful review of the evidence, dealt quite properly with the defence of alibi and the correct approach to be taken by the jury in regard to that defence. He also cautioned them, that although the appellants were charged jointly, their cases must be considered separately, and he repeated his caution in this way: "You see, although they are tried together you must consider the evidence against them separately." These directions were not only proper but they were necessary, as it might have seemed to a lay jury such a natural and permissible thing for them to use evidence affecting one accused, in their consideration of the case against another accused where they were on a joint charge for having committed an offence. In much the same way, must such a safeguard be taken should one accused in his statement to the police implicate in some way, another accused arraigned on a joint charge with him.

We feel, however, that in this case there was an omission on the part of the learned trial judge to caution the jury with respect to the plea of guilty entered by the accused, Lyte, the person on whom the wrist-watch was found. It must be remembered, that the three accused were on a joint charge for having 'together robbed Oswald Ramsammy', and Lyte's guilty plea was to this joint charge, as laid. Without a direction from the trial judge that Lyte's plea affected only Lyte and must not be taken into account in their deliberations, the jury might well have used the fact that Lyte acknowledged his guilt and participation in the crime on a joint charge in a manner prejudicial to the appellants. This danger was all the more real, not only because of the fact that Lyte's guilty plea was taken in the presence and hearing of the jury, but also because he remained seated in the dock along with the appellants throughout the trial.

It is not in every case that the fact that a person pleading guilty to an offence on which another person is jointly charged with him, can have a prejudicial effect on the trial of that other person. There may well be cases in which the need for a direction from the trial judge is not necessary even though persons are on a joint

charge but, in the circumstances of this case, and having regard to the particulars of the charge to which Lyte pleaded guilty, the harm of prejudice was real without the judge's caution and direction. The effect of Lyte's plea to the charge was that he was admitting having robbed Ramsammy together with Adams and Poole.

GODDARD, L.C.J., in the Court of Criminal Appeal case of R v. Moore (1956) 40 Cr. App. R. 50, adverted to the danger of a guilty plea of one defendant insofar as a co-defendant was concerned when he said (p. 53):

> "When two people are indicted together for a criminal offence and one pleads guilty and the other does not, it is the commonest thing in the world to tell the jury, as was done in this case. 'You must not pay attention to the fact that the other man has pleaded guilty.' Even if the plea has not been taken in the presence of the jury, it is very difficult to avoid telling the jury in some way that the other person has pleaded guilty, but the fact that he has pleaded guilty is no evidence against his co-prisoner. That was laid down by both Hale (*Pleas of the Crown*, Vol. 1. p. 585 n.) and Hawkins (*Pleas of the Crown*, Book 2 c. 46. s. 34) and also in *TONGE* (1662) 6 St. Tr. 225: the accepted principle being that a man's confession is evidence only against himself and not against his accomplices. If a person pleads guilty, it does not affect his co-prisoner."

We should not lose sight of the fact, that although all three accused were on a joint charge, the crime charged was one in which each accused was, in effect, charged with having himself robbed Ramsammy. No accused could have been found guilty, unless the evidence relating exclusively to that particular accused showed him to be guilty. To put it another way, each accused was to be adjudged guilty only in so far as the evidence relating solely to him, established his guilt.

In the circumstances of this case, the danger of the jury using the guilty plea of Lyte as evidence against the appellants, or construing it in a manner prejudicial to them, was indeed grave, and only a caution or direction to them by the trial judge that they must not use Lyte's plea of guilty as evidence against either of the appellants could have afforded a proper safeguard against that danger. Unfortunately, that caution was not given.

We have applied the proviso insofar as Adams' appeal is concerned, as there was against him the very damning evidence of having been found in possession of Ramsammy's ring, so shortly after the robbery. With respect to Poole, the position is different. Nothing found on him was identified as belonging to Ramsammy. The sum of $10.04 found on him was claimed by him as his. It is true that Ramsammy identified him some twenty-five minutes after the incident as being one of the three persons who robbed him, but we are not altogether happy over the manner in which he was identified: He was placed with the two other accused in

the police station to be seated together on a bench, and as Ramsammy entered the station, he saw them all together and identified them. Having regard to the fact that the robbery incident took place only a few minutes before, we feel the police ought to have anticipated the likelihood of Oswald Ramsammy's calling at the Brickdam Police Station to lodge a complaint of the robbery there, and therefore taken precautions against his seeing the three accused seated together on a bench in the reception room. We are of the opinion that anticipating Ramsammy's arrival was not out of the realms of probability, in view of the fact that Brickdam Police Station was the nearest Police Station and only some two hundred yards away from the scene of the crime.

Accordingly, we think that whenever the police are cognisant of a crime or have reasonable cause to suspect that a crime has just been committed, and it may reasonably be expected that a complainant would be likely to call at a police station to make a report there, in circumstances where it may become necessary to hold an identification parade, particular care should be taken not to interrogate suspects in the station's reception room where anyone entering could see them, and the exhibits which, according to Poole, in this case, were lying openly on a table. Interrogation ought never to take place in public view, particularly when, in circumstances similar to the present, an identification parade was the only proper means of securing the accused a fair trial.

For the above reasons, we feel it unsafe to apply the proviso in Poole's appeal. His appeal is accordingly allowed and his conviction set aside.

**HAYNES, C:** I concur.

**CRANE, J.A.:** I concur.

**Appeal dismissed in respect of Prince Adams.**
**Appeal allowed in respect of Eon Poole and conviction set aside.**

**The State v. Neil Daniels**

**NEIL DANIELS**
**Appellant**

**v.**

**THE STATE**
**Respondent**

[Court of Appeal (Haynes, C., Persaud and R.H. Luckhoo, JJ.A.) December 9, 1975, January 30, 1976]

*Criminal Law-Evidence-Robbery with violence-Consistent reports of details of robbery by victim to two witnesses shortly after in absence of accused-Admissibility of such reports-Whether, if admissible, reports support victim's credibility by demonstrating consistency of his conduct with his sworn testimony-Criminal Law (Offences) Act, Cap. 8:01. s. 222 (a).*

*Criminal Law-Evidence-Robbery with violence-Victim's prior consistent statement to witnesses-Answers of witnesses under cross-examination testing credibility of victim on prior consistent statements-Necessity for direction of trial judge-Whether answers of witnesses confirmatory of truth of victim's evidence or only evidence affecting his credit.*

The appellant was charged with robbing the complainant, Parbhu Dyal Singh of $30 in the following circumstances:

The appellant, a police constable, was driving a patrol jeep when he observed the complainant riding his bicycle without a light. On perceiving he was detected and followed, Singh tried to enter the locked gate of one Sukhdeo. When Sukhdeo came out, Singh told him in the appellant's presence that he had $30 on him, part of his weekly wages and asked that it be kept in safe custody. Sukhdeo, however, did not do so because Singh was being pursued by the appellant and there was no opportunity to take the money. There then followed a discussion between the appellant and Singh who was arrested for riding without a light and taken away in the jeep along with his cycle. Later Singh told Sukhdeo, in the appellant's absence, that the appellant had robbed him of his $30.

At the trial, Singh told the jury how the appellant stopped the jeep on a lonely part of the road, robbed him of the $30, then released him and his cycle and how within a short time afterwards he made a report to P.C. Munroe in the appellant's absence about the incident positively asserting he was robbed of $30. Munroe's evidence was however, to the effect that Singh's complaint to him was that he had been robbed of $32 and not $30. The jury convicted the appellant of robbery with violence.

**The State v. Neil Daniels**

On appeal, complaint was made that in summing-up, the trial judge erred in commending to the jury as a matter entirely for them, the "consistence of Singh's behaviour" to be considered by them as evidence of the truth, *viz.*, Singh's two reports to Sukhdeo and P.C. Munroe that he was in possession of the sum of S30 and that he was robbed of it by the appellant. Complainant was also made that the trial judge was wrong in treating the conflict of evidence on the *quantum* of which Singh was alleged to have been robbed merely as a matter for the jury; also, about the admissibility of P.C. Munroe's testimony under cross-examination, in the respect that Singh told him that he was "just robbed of $32" and about the alleged failure to direct the jury adequately or at all as to how they should approach the two portions of Sukhdeo's evidence i.e., in the presence and absence of the appellant, assuming those two portions were admissible as answers given under cross-examination as to credit.

**HELD:** (1) (*per* LUCKHOO, J.A., PERSAUD, J.A., concurring) That the trial judge went too far in telling the jury that Singh's behaviour was consistent with the truth. He ought to have warned them that if they should believe Singh and Munroe in their replies under cross-examination on the matter of the report, they could properly consider that evidence as going to Singh's credit, but such evidence must not be taken as proof of the truth of the facts of the report. The way in which that passage was put to the jury they might well have understood it to mean that if they accepted the submission made by the prosecution, they could find the contents of the report by Singh to Munroe were evidence of the truth of the complaint.

(2) That the evidence of P.C. Munroe under cross-examination to the effect that Singh told him he was just robbed of $32., though objected to on appeal, was admissible in evidence, not in proof of Singh's story of the robbery, but on the important question of his credibility.

(3) That it is true the trial judge did not direct, and ought to have directed the jury that Sukhdeo's evidence must not be used by them to confirm the fact, or as proof of the truth of the fact that Singh did have $30 on him and that he was robbed of it and that such evidence had no probative value; however, this non-direction did not in any way prejudice the appellant and affect the outcome of the case.

(4) (*per* HAYNES, C.) That the evidence of Singh and P.C. Munroe in examination-in-chief that Singh told Munroe he was robbed a few minutes after the incident and the more detailed accounts elicited under cross-examination from them, infringed principles if led or elicited as confirmatory or corroborative testimony.

That the jury were invited to do what the common law disallowed, i.e., to use Singh's previous consistent statements made in the absence of the appellant, to confirm or strengthen his credibility at the trial.

(6) That the trial judge gave a clear direction that Singh's "behaviour" (in making the two prior consistent statements of a robbery to Munroe and Sukhdeo) showed "consistency" which, in the absence of direct corroborative evidence, could help them to decide whether or not he (Singh) was truthful.

(7) That it is plain there was, in the summing-up, grave misdirection. Assuming, without admitting, that the particular evidence of Singh and Munroe in examination-in-chief was, as a matter of practice, admissible as part of a report or as part of the history of the matter, and assuming that their answers and that of Sukhdeo under cross-examination were admissible as answers given to questions directed legitimately to test the credibility of Singh, as all of it involved prior consistent statements, such evidence could not be used by the jury to confirm Singh's evidence in the witness-box, and the jury should have been so warned.

(8) That the appeal will be allowed, the conviction set aside and a new trial ordered.

**Appeal allowed. New trial ordered.**

**[Editors' Note:** See report of this case in 23 W.I.R. 236.]

**Cases referred to:**

(1) D.P.P. v. Christie [1914] A.C. 545; 10 Cr. App. R. 141; 24 Cox. C.C. 249; 83 L.J.K.B. 1097; 111 L.T. 220; 30 T.L.R. 471;
(2) R. v. Spring [1958] N.Z.L.R. 468.
(3) Myers v. D.P.P. [1964] 2 All E.R. 881; [1964] 3 W.L.R. 145; [1965] A.C. 1001; 48 Cr. App. R. 348; 128 J.P. 481; 108 Sol. Jo. 519;
(4) Luterell v. Reynell (1670) 86 E.R. 887.
(5) R. v. George Parker (1783) 99 E.R. 634
(6) Jones v. South Eastern and Chatham Rly. Co. (1887) 11 B.W.C.C. 38
(7) R. v. Lillyman. [1896] 2 Q.B. 167.
(8) Gillie v. Poshe Ltd. (In Liquidation) [1939] 2 All E.R. 196 PC.
(9) Corke v. Corke and Cooke [1958] 1 All E.R. 224; [1959] 2 W.L.R. 110; [1958] P. 93; 102 Sol. Jo. 68.
(10) R. v. Hardy (1794) 24 St. Tr. 199
(11) Nominal Defendant v. Clements (1960) 104 C.L.R. 476.
(12) R. v. Oyesiku (1972) 56 Cr. App. R. 240; [1972] Crim. L.R. 179
(13) R. v. Coll (1889) 25 L.R. Ir. 522.
(14) R. v. Gibson (1887) 18 Q.B.D. 537.
(15) Teper v. R. [1952] 2 All E.R. 447; [1952] A.C. 480; [1952] 2 T.L.R. 162; 116 J.P. 502; 96 Sol. Jo. 493; 70 S.A.L.J. 82; 68 L.Q.R. 433. PC.
(16) R.v. Springer (1968) 12 W.I.R. 446
(17) R. v. Jimmy Weeks (1960) 2 W.I.R. 184
(18) R. v. Henry Grills (1910) 11 C.L.R. 400

(19) Balenzuela v. De Gail and Another (1959) 101 C.L.R. 226
(20) R. v. Brown (1971) 55 Cr. App. R. 478
(21) R. v. Pilcher *et al*(1975) 60 Cr. App. R. 1
(22) R. v. Zielinski [1950] 2 All E.R. 1114n.; [1950] W.N. 494; 34 Cr. App. R.193; 66 T.L.R. (Pt. 2) 956; 114 J.P. 571; 49 L.G.R. 45. C.C.A.
(23) Omar Khan v. The State (1968) Guyana Court of Appeal Crim. App. No. 106 of 1968 (Unreported).
(24) Subramaniam v. Public Prosecutor [1956] 1 W.L.R. 965; 10 Sol. Jo. 566
(25) R. v. Arthur Benjamin (1913) 8 Cr. App. R. 146
(26) Lloyd Adonis v. R. (1968) Guyana Court of Appeal Crim. App. No. 96 of 1968 (Unreported).
(27) Ashraf Alli v. Moses [1957] L.R.B.G. 169

Appeal from the Berbice Assizes.

Michael Hamilton for the appellant.
G.H.R. Jackman, Assistant Director of Public Prosecutions, for the State.

**HAYNES, C:** The trial of the appellant commenced with the evidence of the alleged victim, Parbhu Dyal Singh-the sole witness-to support a verdict in favour of the prosecution. At the close of his re-examination, it was clear that the issue of fact the jury had to decide was, whether after his arrest and detention in the police car, Singh was just warned and released, or, he was robbed and released. It was fairly open to the jury on Singh's evidence to find that his arrest was the first step of a planned robbery, or that it was *bona fide* and the felonious act was an afterthought, in either of which situation, they might properly convict him; or that no robbery took place at all, or, they were in reasonable doubt whether it happened, in either of which situation, it was their duty to acquit him. There was no issue of identification. The crucial issue was: Did the appellant with violence steal money, whatever the amount was, from the pockets of Parbhu Dyal Singh?

The jury unanimously found that he did. On appeal, this verdict was challenged on several grounds, only one of which, in my judgment, invited thoughtful consideration. This ground related to certain evidence given by the witnesses. Thomas Sukhdeo and P.C. Munroe, as to what Singh told Sukhdeo in the presence of the appellant shortly before the alleged incident (the robbery), and what he told both witnesses very shortly after it, in the absence of the appellant. In his judgment, my brother Luckhoo has set out the details of this evidence, and I shall not repeat them. Counsel for the appellant, however submitted, firstly, that all this evidence was inadmissible as hearsay: and, secondly, that if it was admissible, there was non-direction amounting to misdirection on it. He invited this Court, on these submissions, to adjudicate that the trial was not fair, and that the verdict should not stand.

First, as to the question of admissibility. The law as to the admissibility and probative value of an oral statement made in the presence or absence of an accused, is not a mysterious esoteric doctrine. It is founded on broad principles of common sense and fair play. It is an elementary rule of law subject to rare exceptions, going to the very foundation of justice, that no man shall be adjudged to be guilty of a crime upon evidence of another person's unsworn assertions made out of court. It matters not to this principle whether the assertion be made in the presence or absence of the accused, as such a mere assertion cannot be regarded as any proof or evidence of his culpability. But it is evident that, upon such an assertion being made in the absence or presence of the accused, upon hearing it or of it, he may admit its truth expressly or impliedly; and, if he does, then it may become evidence against him, not because another has said it, but because he admits it. Such a statement and admission might be an assertion and admission of guilt or of some fact or circumstance material to prove guilt. When the assertion is made or reported to him, the accused may admit, he may deny, he may correct, he may qualify its effect, he may remain silent: whatever course he takes, his conduct on hearing it, is the only fact which the evidence can establish against him, and this would be evidence against him only so far as it indicates his acceptance of the statement or part of it so as to make what is accepted in effect, his own assertion. The speeches of their Lordships in D.P.P. v. Christie (1914) 24 Cox C. C. 249, include useful guidance to judges presiding at criminal trials, as to the admissibility and probative value of evidence to which this principle is applicable, and also as to the exercise in practice of a discretion to exclude it in certain circumstances. In this last regard, see also R. v. Spring [1958] N.Z.L.R. 468.

But here, the statement by Parbhu Dyal Singh to Thomas Sukhdeo in the presence of the appellant-that he (Singh) had $30 on him-could not be admissible against the appellant on this ground. For this principle to apply to make evidence against an accused by way of an admission, the statement must relate to some fact which he is in a position to accept or deny. Here, the appellant could not, from the nature of things, accept or deny the truth of Singh's assertion. He could only believe or disbelieve it. So this evidence-if admissible at all-must be so on some other ground. It is not a rule of common law that a statement is admissible, merely and just because it is made in the presence and hearing of an accused. In addition to being so made, another condition must be satisfied, *viz.*, that the making or hearing of the fact asserted must itself be relevant, directly or circumstantially, to the proof of some fact in issue at the trial; for, although not all evidence that is logically relevant is admissible, any evidence that is not probatively relevant is inadmissible. The evidence here was not admissible to prove that in fact Singh did then have $30 money in cash on him. It would have been a form of hearsay, self-serving and so inadmissible if tendered for this purpose. In my opinion, it was original evidence of the fact that Singh was claiming to have this sum on him; and this fact itself was relevant circumstantially to prove the guilt of

the appellant, in that it established knowledge (from the appellant's viewpoint) that Singh had money on him, and could have provided a reason or motive for the alleged subsequent felonious attack on Singh, after what might well have been originally a lawful arrest made *bona fide.* I therefore reject the contention that this evidence was inadmissible.

The evidence of P.C. Munroe that Singh reported to him-after the incident-that he "just get rob $32" would not have been admissible in examination-in-chief. It would have been objectionable as said in the absence of the appellant. At a criminal trial evidence in examination-in-chief must be admissible on some ground: and generally it is not at common law a ground of admissibility *simpliciter* that what was said was a part of a report to the police. All that was legally permissible at that stage for the witness to say was that a report was made to him, without the details fully or in *precis.*

But from the start of the case a trite common law rule of evidence was violated. In examination-in-chief, Parbhu Dyal Singh was allowed, apparently without objection, to say that after the incident. "I then stopped him" (meaning P.C. Munroe), "and reported to him what happened to me." The words underscored were then technically inadmissible, even if subsequently receivable. Under cross-examination, he said he told Munroe he was robbed of $30. Munroe, in his examination, said: "He" (meaning Singh) "stopped me and made a report of robbery." Munroe should have stopped at the word 'report', because to state the nature of the report was to disclose what Singh said to him. This was in relation to the appellant *res inter alios acta,* irrelevant and so, then inadmissible. And under cross-examination, he (Munroe) said that what Singh said was: "Me just get rob of $32." He repeated this answer in reply to some question by the jury who obviously were interested in this aspect of the events. Finally, on recall at the request of the defence, Sukhdeo said: "He" (meaning Singh) "told me on his return that he was robbed of his $30." Pausing at this stage, these were all bits of evidence by witnesses in the case about what other witnesses said out of court, bearing not on any irrelevant matter but upon the crucial issue in the case: whether or not a robbery happened all behind the back of the appellant, so to speak.

As I indicated earlier in this judgment, what was said in every instance in examination-in-chief, I think, was clearly inadmissible for the reasons given. It could not in law prove the robbery or, (as I shall show later), confirm Sukhdeo's account of it. As regards the answers in cross-examination, 1 am willing to assume-without specifically admitting it-that they were elicited under legitimate cross-examination directed to test the reliability of the main witness Singh in his story of a robbery, and were admissible for this purpose. In the depositions, (which I have read since the hearing of the appeal) P.C. Munroe had testified of a report of the loss of $32, not of $30, as Singh was saying. Armed with this apparent contradiction, counsel for the defence sought to get it in evidence before the jury.

Hence the cross-examination of Singh, about what Singh told Munroe shortly after his admitted arrest and release, and that of P.C. Munroe on the same point. His effort succeeded. Singh maintained that he told Munroe that he (Singh) was robbed of $30; Munroe insisted Singh reported the robbery of $32. This put the defence in a position to suggest to the jury that either he had, or lost no money at all, and that was why he mentioned two different amounts at different times: or for the same reason, if he did receive and lose his pay that evening, he had been drinking and really could not reliably tell how the loss occurred and how much he had lost. In some support of this position, the defence could point to another, aspect of the evidence: Singh swore that the appellant tore his (Singh's) pay envelope and removed the money ($30) in it, and that he had handed the torn envelope to the police who, strangely enough, returned it to him. It was not tendered in evidence.

To meet this approach, and uphold the evidence of Parbhu Dyal Singh, the record shows that the State relied heavily on two points: (1) the evidence of P.C. Munroe and Sukhdeo in re-examination, that Singh appeared sober at all material times when he spoke to them; and (2) his consistency throughout in asserting he was robbed, from immediately after the appellant released him to the time he testified in court at the trial. The main evidence of such consistency was what Singh said to the same two witnesses the same night in the absence of the appellant. Apart from this, there would have been no evidence that shortly after his release, the same night he alleged he was robbed, and robbed of money.

The argument for the State in this Court was that since, if it was proved that Singh had made no such report to Munroe or Sukhdeo, or (as the defence tried to prove) that he had made a conflicting or different one to the said witnesses, the evidence of such failure or variation would have been admissible to contradict Singh and damage his credibility, the contrary evidence that he had made early consistent reports must be admissible in his favour. I positively dissent from the proposition that in this case such evidence could be admissible to be used to support Singh's credibility by demonstrating the consistency of his conduct at all material times, with his sworn testimony of a robbery. Such a proposition can find no acceptable modern authority or common law rule to buttress it. It has two serious flaws: Firstly, it is a legal *non-sequitur* as a logical converse proposition is not *ex necessitate* the law; and, secondly, the contention overlooks the important consideration that these two situations involve the application of two different rules of evidence. On the one hand is the statutory rule (originally a common law principle) allowing the proof of an inconsistent statement to affect the credibility of a witness. On the other hand, is the firmly established common law; rule against the admission of self-serving statements, and disallowing a witness to confirm his credibility or corroborate his own story in court by reference to consistent statements made by him out of court. In other words, as I understand it, inconsistency between the oral evidence given from the witness-box and oral

statements made out of court can be used to impeach the credibility of a witness in court; but consistency between his evidence in court and his extrajudicial oral statements cannot be used to strengthen or support his credibility or corroborate his testimony in court. On the face of it, this might appear in conflict with common sense. But there is sound reasoning and purpose underlying the common law position. For, if a witness is permitted to strengthen his own credibility and evidence in court in this way, justice can easily be defeated. All a dishonest witness would have to do, would be to make oral statements consistent with a fabricated story to a number of other witnesses out of court and so enable the party calling him to establish his credibility by reference to these allegedly consistent statements.

It is clear from the speeches of some of their Lordships in Myers v. D.P.P. ([1964] 3 W.L.R. 145), that there was a time in the history of the common law of evidence when what was said in the absence of the appellant by Parbhu Dyal Singh to P.C. Munroe and to Arnold Sukhdeo would have been admissible and usable by the jury to confirm the testimony of Parbhu Dyal Singh on the ground of consistency with such evidence. LORD HODSON said (p. 164): "Historically, it appears that in the early days of the development of the hearsay rule, there was a recognised doctrine that a hearsay statement might be used as confirmatory or corroboratory of other testimony. ... The limited doctrine as to use of hearsay to supplement other good evidence already in, is said to have survived for a long time, that is, in the rule that a witness's own prior consistent statements could be used as corroboration of his testimony on the stand." And LORD PEARCE said (p. 170): "There is not now and never has been a rule for the total exclusion of hearsay without exception. Originally, hearsay was usual and admissible. ... But in the later seventeenth century objections to it grew and by the early eighteenth century there was a general exclusion of hearsay evidence, with certain exceptions. There was a transitional period when such evidence was accepted as confirmatory though not as sufficient by itself. And during the eighteenth century some hearsay, namely, evidence of prior statements by a witness, might be accepted to confirm the testimony of that witness." (See Lutterell v. Reynell (1670) 86 E.R. 887; and *Hawkins' 'Pleas of the Crown"*, Vol. 2 Cap. 46. p. 597, s. 46)

This doctrine of the law of evidence ruled the courts for over a century until the Court of the King's Bench (LORD MANSFIELD, BULLER and WILLES, JJ.) in R. v. George Parker ((1783) 99 E.R. 634) ruled (p. 635) that: "... it was now settled that what a witness said not upon oath would not be admitted to confirm what he said upon oath; and that the case of Lutterell v. Reynell and the passage cited from Hawkins were not now law." It is significant to remark that the judgment states that WILLES, J. was at first inclined to think the evidence admissible in that case 'having come out of cross-examination' of a prosecution witness but he afterwards retracted this opinion. Here, the evidence excluded was material to the defence as it tended to rebut *mens rea* on an indictment for perjury. And so the

law stands today.

In Jones v. South Eastern and Chatham Railway Co. ((1887) 11 B.W.C.C. 38), a charwoman contended that she had pricked her thumb at work and her employers alleged that she had done so at home. In support of their contention, the employers cross-examined her on statements she was alleged to have made to other wit-nesses to that effect. She wished to call witnesses to testify to her assertions to others after the event, that she had sustained her injury at work. The judge refused to allow this. The Court of Appeal held unanimously that the statements in the appellant's favour were rightly rejected as inadmissible although the issue of consistency or inconsistent was raised by the respondent in cross-examination, just as the appellant did here in our case. SWINFEN EADY. L.J. said (*ibid,* at p. 43):

> "... Then it is urged that there is in certain cases a rule under which a witness may be asked to repeat particulars which a person has given shortly after an occurrence. ... not as being evidence of the facts complained of, but as being evidence of the consistency of the story of the complainant from beginning to end, and it is said that such a question ought to have been admitted in the present case on that principle. Of course the answer is twofold: first, that the principle has no application to a case of this kind. No doubt in cases especially of violence upon women and girls the rule is established under which a question of that kind is allowed to be put, and a recent statement is allowed to be given in evidence (R. v. Lillyman). [1896] 2 Q.B. 167) ... That is a special class of case in which such evidence has for a very long time been allowed to be admitted, but it has nothing to do with such a case as the present."

NEVILLE, J. said in his judgment (p. 45):

> "... The applicant ... was cross-examined to show that she had made statements after the happening of the accident inconsistent with her story there, and the point made, as I understand it is, that that being so, it is permissible to call evidence to show that she had made statements to persons consistent with the story which she told in the box so as to negative an idea suggested by the cross-examination of her story being a made-up affair. ... I think that we have simply to apply here the general rule of evidence that statements may be used against a witness as admissions, but that you are not entitled to give evidence of statements on other occasions, by the witness in confirmation of her testimony."

In Gillie v. Posho Ltd., (In Liquidation), ([1939] 2 All E.R. 196, P.C.), the plaintiff claimed from the defendant the arrears on the purchase price of a farm. The defendant counter-claimed for damages for fraud on the footing that he had been

induced to enter into the contract of sale by a misrepresentation in an advertisement issued under the authority of the plaintiffs agent. The plaintiff called the agent who testified that the defendant had agreed to buy the farm before the advertisement was published, and the witness produced a letter written by him to the Company's solicitors before the appearance of the advertisement, stating that the farm had been sold to the plaintiff. The letter was admitted in evidence. The trial judge attached considerable importance to it in reaching a decision on the credibility of the witness. The Privy Council advised that there should be a new trial because the letter ought not to have been admitted in evidence. LORD PORTER, in stating what should happen at the new trial, said (p. 202):

> "It", (meaning the Court) "should not admit, or pay any regard to, the contents of the letter ... either as evidence of the truth of its contents or as evidence of the consistency of Mr. Hunter's story."

Then in Corke v. Corke and Cooke, ([1958] 1 All E.R. 224), a judgment of the Court of Appeal, it was held that a telephone conversation in which a couple challenged with recent adultery denied it and requested a medical examination was, rightly, excluded at the trial in disproof of such adultery LORD HODSON, L.J., expressed the view (*ibid* p. 230) that "the fundamental basis of the rule is that such evidence has no probative value:" then. MORRIS, L.J., although dissenting, observed that (*ibid.* p. 232): "The accumulated experience of the past coupled with knowledge of the obvious possibilities of fabrication of any such evidence would direct the rejection of the evidence as lacking in the qualities which assist proof and so as being valueless and irrelevant." And SELLERS, L.J., opined (*ibid.* p. 235) that "a skilful witness might well embark on circumstantial matters to bolster up his or her story"; and, "Whether or not this rule is strictly logical, it is one which keeps the evidence to the main issues in dispute and tends to avoid deception of the court by a resourceful witness." And finally (p. 236): "Evidence is not a matter of mere logic. Evidence which is hearsay might well be relevant to the issues and of probative value but is excluded and made inadmissible for practical considerations." These are all civil cases. But the law would be applied even more strictly in criminal cases. (See judgment of EYRE, C.J. in R. v. Hardy (1794), 24 St. Tr. 199 as reported in Corke v. Corke & Cooke, [1958] 1 All E.R., at p. 229 *per* HODSON, L.J.)

In The Nominal Defendant v. Clements ([1960] 104 C.L.R 476) in the High Court of Australia there are relevant observations bearing on the issue here. WINDEYER, J. said (at p. 495): "Simply because a witness is shown to have made a statement inconsistent with his testimony, evidence that he had also made consistent statements does not become admissible." Earlier, he had given a jurisprudential basis for the evidential differential. He had said (*ibid.* p. 491) that "a more strict analysis of probative values showed that, although inconsistent utterances may undermine credibility, mere repetition of a statement does not tend to

show it to be true." I adopt this rationalism. And in Charles Oyesiku ([1972] 56 C.A.R. 240), the Court of Appeal (Criminal Division) approved of a passage in an Irish case as a correct statement of the law in the judgment of the Court set out in the following passage (*ibid.* p. 245):

> "In Coll (1889) 25 L.R. Ir. 522 at p. 541, HOLMES, J. said: 'It is I think clear that the evidence of a witness cannot be corroborated by proving statements to the same effect previously made by him: nor will the fact that his testimony is impeached in cross-examination render such evidence admissible. Even if the impeachment takes the form of showing a contradiction or inconsistency between the evidence given at the trial and something said by the witness on a former occasion it does not follow that the way is open for proof of other statements made by him for the purpose of sustaining his credit. There must be something either in the nature of the inconsistent statement, or in the use made of it by the cross-examiner, to enable such evidence to be given."

These authorities from R. v. Parker (1783) to Charles Oyesiku (1972) can be said fairly to establish, at least three relevant principles in relation to a criminal trial for a non-sexual offence: (1) the prosecution (or the defence), in putting on their case, cannot as a part of the proof lead evidence of any previous oral statement of a witness consistent with his testimony in court, to strengthen his credibility or corroborate his story: (2) if the opponent should impeach the veracity of the witness under cross-examination generally as untruthful or concocted or in particular as uncreditworthy on the basis or suggestion that the witness made an earlier inconsistent statement, this still *per se* does not entitle the prosecution either in re-examination or through another witness, to reply with and rely on proof of any earlier consistent statement of the witness to establish his credit: and (3) for evidence of this kind to be admissible (for these purposes) there must be something either in the nature of the inconsistent statement or in the use made of it by the cross-examiner, to make it relevant to admit it, as for instance, to rebut a suggestion of a recent fabrication.

The evidence of Parbhu Dyal Singh and P.C. Munroe in examination-in-chief that Singh told Munroe he was robbed a few minutes after the incident, and the more detailed accounts elicited under cross-examination from them infringed these principles, if led or elicited, as confirmatory or corroborative testimony. But I doubt whether either counsel had this purpose in mind. The evidence-in-chief was of a kind put in often as part of a report without objection or unlawful prejudice: while the answers under cross-examination were elicited to contradict, not to confirm evidence. Similarly, as regards the answer of Sukhdeo under cross-examination about what Singh told him. I believe the question was asked in the hope of obtaining an answer to destroy the credit of Singh and not to confirm anybody's evidence. Although the object in the mind of counsel in leading the

evidence by putting those questions in cross-examination might have been relevant to admissibility, once the evidence was in, the only use the jury could properly make of it was the use the law allowed to be made of it.

The record reveals that counsel for the State in his final speech stressed the "consistency" of Parbhu Dyal Singh in maintaining at all times that he was robbed. If he was relying-as I think he was-on the "consistency", the oral statement to P.C. Munroe and Sukhdeo established, then, in the light of the authorities cited, counsel was inviting the jury to do what the common law disallowed, that is to say, to use Singh's previous consistent statements also made in the absence of the appellant, to confirm or strengthen his credibility at the trial. As was said by SELLERS, L.J. in Corke v. Corke & Cooke (*supra*), the law on this point might not be strictly logical, but it is based on sound reasons of caution. It is one of the many rules of the criminal law introduced into the common law to reduce the risk of conviction of an innocent person. In this case, this was a line of reasoning and approach to a verdict which was not open to the jury. They were not entitled on such evidence to say: "We believe Singh because within a few minutes after he and the accused separated, he told two people that he was not only arrested for riding an unlighted bicycle but was also robbed." whether this fact was led in examination-in-chief or elicited in cross-examination. This was what counsel for the State urged the jury to do. It was therefore, the duty of the trial judge to warn them against such an impermissible use of prior consistent statements.

His Honour told the jury this:

> "... Singh is alleged to have told Munroe that he lost thirty-two dollars... and throughout his evidence in this box the witness Parbhu Dyal Singh said thirty dollars ($30.00). Munroe said thirty-two dollars ($32.00). It is a matter for you, whether he made a mistake or not, but the man is saving thirty dollars ($30.00) and the evidence of Sukhdeo is that the man said thirty dollars ($30.00). ... The important thing is, did the man lose any money? Was he robbed? (Underscoring mine).

Here, the judge was dealing with the question of the amount of the alleged loss. He referred to the conflict between the sum Singh swore to in the witness-box-$30.00 and what he was said to have told P.C. Munroe-$32.00. Then he charged them in words which meant or might reasonably have been understood to mean that they were entitled to use what Singh told Sukhdeo before and after the incident, to confirm or corroborate Singh's figure as the correct one. The jury would, or might reasonably have understood this direction to mean that they could properly use this evidence of Sukhdeo, that Singh told him (Sukhdeo) that he (Singh) had been robbed of $30.00, to help them to resolve not only the amount Singh said he was robbed of, but also whether Singh was robbed at all. If it was usable to prove the one fact, it must appear to them usable to prove the other fact with

which it was inseparably connected. It is a misdirection so to tell a jury that in relation to a vital issue at a trial, they can use and act on evidence inadmissible for that purpose. (See R. v. Gibson (1887) 18 Q.B.D. 537; Teper v. R. [1952] 2 All E.R. 447; R. v. Spring [1958] N.Z.L.R. 468; and R. v. Springer (1968) 12 W.I.R. 446.) In my view, this was a defect in the charge.

Then the trial judge, quite properly, proceeded to discuss the credibility of Parbhu Dyal Singh on whose evidence alone a conviction had to rest. He said quite rightly:

> "It is true it is the evidence of one man but our law in its wisdom does not say that the evidence of one man cannot be accepted in a case. According to our criminal law the evidence of one man may be accepted against thousands. The question is the quality of that evidence."

His Honour, obviously referring to the prior consistent statement made in the absence of the appellant, said:

> "If this man had not made a complaint at the first opportunity to a responsible person you could have said well he acted irresponsibly. He saw a policeman there, somebody robbed him, he didn't tell the policeman, that is not consistent in itself.
>
> "The prosecutor pointed out to you that he had given a story and he acted consistently at the first opportunity, he saw a policeman and he told the policeman about it." (Underscoring mine).

In these directions the trial judge pointed out, reasonably, that if a man was robbed, one would expect him to complain of this to the first policeman he met afterwards; if he did not, this would not be consistent with such an experience. Then he drew attention to the fact that Singh told the first policeman he met (Munroe) that he was robbed. This was another straight reference to what was said behind the back of the appellant, and to a prior consistent statement inadmissible for the purpose of confirming Singh's evidence on the basis of his consistency. A common law rule of evidence disallows this, and it was wrong to suggest to the jury that this was a line of reasoning open to them in reaching a verdict. And then this misdirection was continued when he said to the jury:

> "Ask yourselves whether Singh has impressed you as the type of man who can concoct a story within minutes. After he saw Munroe he told Munroe, and then he went to Reliance Police Station and reported the matter. That is a matter for you. It is a question of fact entirely for the jury and you must examine all the facts in the case." (Underscoring mine.)

The only evidence that the story of a "robbery" was mentioned "within minutes" was what Singh said to Munroe-a prior consistent statement. This was one of the "facts" the jury were invited to examine. Finally, there was this concluding passage in which the trial judge charged the jury in these words:

> "It is his story and there is no supporting evidence, but you have his behaviour. It has been submitted to you by the prosecution that his behaviour throughout is consistent with truth. That is a matter entirely for you." (Underscoring mine.)

This was a clear direction that Singh's "behaviour" (in making the two prior consistent statements of a robbery to Munroe and Sukhdeo) showed "consistency", which, in the absence of direct corroborative evidence, could help them to decide whether or not he (Singh) was truthful.

It is plain that there was, in this summing-up, grave misdirection. Assuming without admitting-that the particular evidence of Singh and Munroe in examination-in-chief was, as a matter of practice, admissible as part of a report or as part of the history of the matter, and assuming that their answers and that of Sukhdeo under cross-examination were admissible as answers given to questions directed legitimately to test the credibility of Singh, as all of it involved prior consistent statements, such evidence could not be used by the jury to confirm Singh's evidence in the witness-box, and the jury should have been so warned. Instead, they were invited plainly to use this evidence wrongly. It is true that in the cases cited earlier, what the courts ruled against, was the admission of evidence of prior consistent statements sought to be tendered expressly as evidence of consistency. Here, the move initiated by counsel for the State, was to use evidence already in-rightly or wrongly-for this purpose. But, in my judgment, the prohibition applies with equal force. This question of the consistency of the witness was stressed so persistently, that in this case a fair trial according to law was imperilled.

In R. v. Spring [1958] N.Z.L.R. 468, the Court of Appeal of New Zealand heard an appeal from a conviction for indecent assault of a seven-year-old child named Judith. Shortly after the alleged assault, a policeman took a statement from her in his note-book that the appellant had placed his hand in the front of her pants. This note-book was put in evidence by the constable who wrote in it. The trial judge admitted it as a "complaint". So he directed the jury that while it did not corroborate Judith's evidence, for it was only Judith speaking again, he said it at least gave "a certain confirmation or strength that she said much the same thing while, if the assault occurred, the facts were fresh." The Court ruled that the statement in the note-book was not a "complaint" in law, and then went on to consider whether there was misdirection on it not being a complaint. NORTH, J., reading the judgment of the Court allowing the appeal for misdirection on Judith's

statement, said: "In our view, this was an invitation to the jury to make a wrong use of the statement..." I conclude this decision was right and that it is applicable to this appeal, as a similar invitation was issued here to the jury.

R. v. Jimmy Weeks (1960) 2 W.I.R. 184 was a judgment of the Federal Supreme Court (RENNIE, ARCHER and WYLIE, JJ.) allowing an appeal from a conviction for the murder of the reputed wife of the appellant, who died from laceration of the brain with haemorrhage following injuries from a razor and an axe. The police constables testified about a visit by the appellant to their station shortly after the incident. The constable in charge of the enquiries office swore the appellant told him that he (the appellant) had cut the deceased with a razor, and believing she was dead from this injury, he tried to cut his own neck with it. The appellant then had a wound on the left side of his neck. Counsel in cross-examination suggested to this witness that there was no record of such a report in the station's Occurrence Book. The officer replied he had made in it at the time, a note of what the appellant said. Counsel himself asked that the book be brought to court the next day. As a result, the officer the next day tendered the book in evidence without objection. There was a note in it which supported and was consistent with his evidence from the witness-box. Another constable who was at the station then gave evidence. He said the appellant reported that he had just killed the deceased, and when asked what was wrong with his neck, said he was trying to kill himself because the deceased had ruined his life. There was, therefore, this conflict as regards the reason the appellant gave for wounding himself. According to the officer-in-charge, it was a consciousness that he had deliberately caused her death; according to the other constable, it was domestic unhappiness.

The appellant, in an unsworn statement from the dock, raised the defence that all the injuries of the deceased happened accidentally. The prosecution submitted to the jury that the attempted suicide on the version of the constable in charge of the station, showed a consciousness of wrongdoing consistent only with guilt: while the defence preferred the version of the other constable as consistent with innocence. In his summing-up, the trial judge commended the Occurrence Book to the attention of the jury and invited them to consider whether the version of the officer who made that entry was not more likely to be correct than that of the other constable. On appeal, it was submitted for the appellant that the note was inadmissible as written hearsay: but the Crown contended it was admissible to rebut the suggestion of the defence in cross-examination that no record of what the appellant had said at the station had been made. Their Lordships rejected the Crown's submission. ARCHER, J. delivered their judgment. He said (p. 185): "We are clearly of the view that the Occurrence Book was inadmissible in evidence. The judge should have excluded it and the misapprehension as to its admissibility and the failure of the appellant's counsel to object to its admission cannot be allowed to operate to the prejudice of the appellant." What could have

operated here to the prejudice of the appellant was the possible use by the jury of the prior consistent statement in the entry itself either as proof of what the appellant had said at the station corroborating the constable's evidence, or as confirmatory of the constable's credibility, against which impermissible uses there was no warning. And such a warning would have been called for even if the Court had held the evidence of the entry in the Occurrence Book admissible in the circumstances of the case on the ground urged on behalf of the Crown.

Then in R. v. Springer (1968) 12 W.I.R. 446, the Court of Appeal of Barbados (DOUGLAS, C.J., WILLIAMS and BROWNE, JJ), allowed an appeal from a conviction for housebreaking with intent, for misdirection on words spoken by a person (not called as a witness) in the presence of the appellant, although this evidence was elicited by the appellant himself in cross-examination. The defence of the appellant was that he had entered the house at the invitation of its mistress, a friend of his. He suggested to Corporal Watson, a witness for the Crown, that at the scene a woman nearby had shouted out that he (the appellant) was a regular visitor to the house. Watson denied this. The appellant insisted that Watson should repeat what the woman said. Watson testified that she said that about two days before the appellant had spoken to her: that he said then, he was an inspector from town and asked her who lived at the house, what time they went to work and what time they returned. In summing-up to the jury the trial judge, referring to this as "casing the joint", told them in relation to this evidence: "It is there in evidence and it is alleged to have been said in his presence, so it is not even hearsay. It is evidence that they gave in his presence, he asked for it and it was given in evidence against him. You have to consider it as far as he is concerned, whether you accept it or not." WILLIAMS, J., delivered, the judgment of the Court. His Lordship pointed out that this evidence having been admitted at the instance of the appellant, it was of the utmost importance that it should have been dealt with very carefully by the judge in his summation. He then went on to say (p. 448): "They (the jury) were not put on their guard as to this evidence... He (the trial judge) treated the evidence as if it were just another part of the evidence which had been properly put in..." This ruling also is, in my view, right and relevant. The jury here were not put on their guard as to this evidence.

It is the duty of the judge in a criminal trial to take care that the verdict is not founded upon any evidence or consideration except that which the law allows. (See R. v. Gibson (*supra*), *per* COLERIDGE. C.J., at p. 542.) Regrettably, that duty was not performed in this case, and altogether there was an absence of the affirmative specific guidance which the authorities required. The jury had to decide the guilt or non-guilt of the appellant on the evidence of Parbhu Dyal Singh alone. On the reading of the charge as a whole, it is, I think, impossible to escape the feeling that, in the absence of the most careful warnings, great weight might have been attached by the jury to this circumstance of alleged consistency, stressed and repeated as it was by counsel and judge alike; and also that there

was, in this case, a real risk and likelihood that the relevant answers in examination-in-chief and under cross-examination might have been used by the jury as evidence of the truth of the facts stated. The jury were not warned against those errors as they ought to have been (See R v. Henry Grills (1910) 11 C.L.R. 400).

In Balenzuela v. De Gail & Anor. (1959) 101 C.L.R. 226, DIXON, C.J. said (p. 233):

> "There is a wrong or miscarriage occasioned by a misdirection in law, or as to the application of evidence, if, as a final result of what has been said by the judge, the jury retire to their room under a wrong impression in relation these matters, and the result of the case is such as to show that they may have been influenced in their verdict by the misdirection." (Underscoring mine.)

I would apply here this proposition of that great Australian judge: There was in this summing-up a misdirection as to the application of certain evidence to the crucial issue at the trial; as a result of the drift of it, the jury must have retired to their room under a wrong impression in relation to that evidence, so that the jury may have been influenced by this in their verdict.

In these circumstances, I would hold that the conviction cannot stand unless it is a fit case for the application of the proviso. The proviso is not intended to be a substitute for trial by jury. It could be applied here only if, on the whole, the evidence is so overwhelming that it is plain that no reasonable jury, acting sensibly and anxious to do their duty, would have acquitted the appellant if there was no irregularity or misdirection. (See R. v. Brown (1971), 55 Cr. App. R. 478, per CAIRNS, L.J., at p. 484, approved in R. v. Pilcher *et al* (1975) 60 Cr. App. R. 1. *per* LORD CHIEF JUSTICE WIDERY at p. 6). In view of the course I would propose, I shall refrain from discussing the evidence further than to say I do not think it would justify the use of the proviso.

I would allow this appeal, set aside the conviction and order a new trial of the appellant.

**PERSAUD, J.A.:** For the reasons set in the judgment of Luckhoo, J.A., I agree that this appeal should be allowed, and with the order proposed by the learned Chancellor.

**LUCKHOO, J.A.:** The appellant, who was a policeman at the time of the alleged offence, was charged with the offence of Robbery with Violence, contrary to s. 222 (a) of the *Criminal Law (Offences) Act, Cap. 8:01,* and was convicted before a judge and jury at the Berbice Assizes and sentenced to five years' impris-

onment and to receive a whipping of twelve strokes.

The facts of the case as led by the State were briefly these: The victim of the robbery Parbhu Dyal Singh, a tractor operator employed at Rose Hall Estate, had received his pay-packet of $42.37 on the 7th June, 1974, which he placed in his right side trousers pocket. He then spent some of it for certain necessaries, and on some drinks which he had with friends.

On his way home later at about 7 p.m., he was alone with his bicycle which had no light. He decided to ride home without a light, and as he was riding along the Canje-Rose Hall public road he saw a jeep coming from the opposite direction. He observed, as it passed him, that it was marked 'Police'. He rode on for a few yards and jumped off. The jeep also stopped and turned back. He attempted to go into Thomas Sukhdeo's yard, but the gate was locked. He called out to Sukhdeo. The jeep travelled a little way past Sukhdeo's yard, reversed and stopped outside the yard. The appellant came out of the jeep which had no other occupant, arrested Singh for riding without a light, took his bicycle and threw it into the jeep. He then held Singh at the back of his neck and pulled him towards the jeep. Singh was unwilling to go into the jeep, but after being exhorted by Sukhdeo to do so, he went into the jeep which was driven away by the appellant. Evidence was led as to what was spoken during this incident by the appellant Singh and Sukhdeo reference to parts of which will be made later when dealing with the grounds of appeal argued.

On the way, Singh asked the appellant why he was taking him to New Amsterdam for the alleged offence and not to Reliance Police Station which was much nearer to where he was arrested. The jeep continued and turned west into Canefield Settlement to the last street. On Singh asking where the appellant was then taking him, the appellant replied that he had brought down some policeman on a bush rum raid at the back street. When Singh observed that he saw no policemen the appellant told him not to argue with him. Singh continued to ask where were the policemen, to which the appellant replied "Alright fat man, I am going to give you a break, don't keep noise." The appellant stopped at the last street, switched off the light, but kept on the park lights. The area was dark, Singh went on to relate, in detail, the manner in which he was robbed by the appellant, and the circumstances in which the appellant whilst robbing him, applied pressure against the middle of his back with some object causing him pain on about four occasions during the process. After he was robbed, Singh went on to say that the appellant told him "Alright fat man you pick your bicycle up and run for your life." The jeep went slowly past him just the park lights on and when it reached the public road the bright lights were put on and the jeep increased its speed and went out of sight. Singh said whilst he stood and watched the jeep drive away. Police Constable Munroe, whom he had known before, approached on a motor-cycle and he (Singh) thereupon reported the matter. He was advised by Munroe to report to

Reliance Police Station which he did, and five days later at New Amsterdam Police Station he picked out the appellant at an identification parade as the person who had robbed him. The State also led evidence to the effect that the appellant was not detailed to go that night to Canje-Rose Hall public road: and that his act in driving the jeep there was unauthorised.

The appellant's defence was put forward by him in an unsworn statement from the dock at the trial as follows:

> "I arrested Singh because he was riding without a light. He resisted and was behaving badly. I put him into the jeep and set off for New Amsterdam Station. On my way he begged me for a chance and I told him to get out of the jeep and he did so. He began riding again and I went past him and told him to get off the cycle. He did so and 1 drove on to New Amsterdam Police Station."

No witnesses were called for the defence.

In this appeal against conviction, counsel for the appellant had argued a number of grounds of appeal set out in the amended grounds of appeal. He has pointed out that the learned trial judge had failed to direct the jury adequately as to how they should deal with certain inconsistencies in the evidence of the alleged victim of the robbery, Parbhu Dyal Singh. This ground was not pressed-and I think quite rightly so-as it is well to bear in mind it is no part of a judge's duty to refer to, and give directions on, every inconsistency in the evidence heard by the jury,

I agree with the observation of the English Court of Criminal Appeal in R. v. Zielinski (1950) 34 Cr. App. R. 193, that a judge was not obliged to refer to every particle of evidence or point out the smallest inconsistency which might have emerged in the evidence which had been given by any particular witness. "After all," the Court held, "the jury are there to see the witnesses and hear their evidence ... the jury were quite capable of making up their minds, having heard the evidence and having observed the demeanour of the witnesses."

With respect to the next ground-that the learned trial judge failed to give a positive direction to the jury that the evidence disclosed that the appellant did not tamper with the station diary by making an alteration therein as the evidence of Traffic Officer Basil Williams revealed. I am of the view that the learned trial judge also dealt adequately with this aspect when he told the jury at various stages." ... You must not hold that against the accused because there is no evidence that he tampered with it." And again: "... We don't know who changed it. Anyone could have changed it, but you must not let that prejudice your minds. You must dismiss that from your minds. There is no evidence that the accused did that. So please bear that in mind." As counsel for the State correctly pointed out, the

evidence of Basil Williams was,"... the hand-writing does not appear to be that of the accused," which is not the same thing as saying positively that the handwriting was not that of the accused, and thus the summing-up on this aspect did not mislead but reflected the nature of the evidence given.

In the course of the trial, evidence was given in two instances by two witnesses for the State as to what the alleged victim, Parbhu Dyal Singh, told them in the absence of the appellant. One Thomas Sukhdeo, a witness called by the State, gave evidence as to what transpired between Parbhu Dyal Singh and the appellant on the public road just outside his home when the appellant arrested Singh for riding his cycle without a light, put him and his cycle into a police jeep and drove away prior to the commission by the appellant of the alleged offence. Under cross-examination, Sukhdeo said that Singh did tell him to keep $30.00 for him, and that he (Sukhdeo) did not take it because the accused was after him (Singh) who had no opportunity to give it to him. Sukhdeo also said under cross-examination that Singh told him on his return, that he was robbed of his $30.00. What Singh had told him in the presence of the appellant outside his home on the public road was admissible in evidence. It all formed part of what occurred between Singh and the appellant at that stage-all that was said and done-and was relevant in the particular circumstances of this case. I do not agree with counsel for the appellant that this was hearsay; but I do agree it was admissible not as evidence of the truth that Singh had on him $30.00, but merely of the fact of what he said, that is, that he told Sukhdeo this in the presence of the appellant. Sukhdeo also testified under cross-examination. "He" (Singh) told me on his return that he was robbed of his $30.00." This evidence of a conversation in the absence of the appellant is, on the face of it, definitely inadmissible. How it came to be given we cannot say. It might be it was in answer to a specific question put by counsel for the accused: "Did Singh tell you anything when next he saw you that night?" Perhaps, counsel hopefully expected a reply to the effect that Singh did not say anything to him concerning a robbery, in which case great emphasis would have been laid on that answer in counsel's address to the jury in order to press home the point that Singh was not in fact robbed later that night. If that was the object of asking the question, such evidence would still be inadmissible. Singh's statement to Sukhdeo was not part of the *res gestae.* Singh himself could not have led that evidence when being examined in chief.

Nor does it seem to me the evidence was adduced through a question put under cross-examination to test such things as the accuracy, impartiality, or credibility of the witness, as it is difficult to see how effective that could have proved as there was nothing against which to measure the truthfulness or otherwise of the answer, Singh himself not having been questioned on this aspect. In *Powell's Law of Evidence,* the learned author in his treatment of the subject of cross-examination as to credit said: "Great latitude is permitted in cross-examination, and a cross-examination will not be stopped by the court unless the question is mani-

festly irrelevant and calculated neither to weaken the examination-in-chief nor to impeach the credit of the witness. Questions clearly irrelevant in examination-in-chief may be relevant and of the highest importance when asked any question, however irrelevant the matter in issue, the answer to which may tend to affect his credit; but he will not always be obliged to answer such question, and if he does answer, he cannot as a rule be contradicted." (See also the judgements delivered by this Court in Omar Khan v. The State (Criminal Appeal No. 106 of 1968.)

Counsel for the appellant had contended that the learned trial judge failed to direct the jury adequately or at all, as to how they should approach the two portions of Sukhdeo's evidence referred to above, assuming they were admissible as being answers given under cross-examination as to credit. It is true that the trial judge did not direct, and ought to have directed, them that Sukhdeo's evidence must not be used by them to confirm the fact; or, to put it another way, as proof of the truth of the fact that Singh did have on him $30.00 and that he was robbed of the $30.00; and that such evidence had no probative value. I do not feel, however, that this non-direction in any way prejudiced the appellant and vitally affected the outcome of the case.

Objection was also taken to the admissibility of the evidence given by Police Constable Munroe that Parbhu Dyal Singh told him: "Officer, me just get rob of $32.00." Such evidence was elicited under cross-examination. In order to rule whether it was admissible we must first analyse, examine and consider the nature, line and purport of the cross-examination directed to Singh. He did not give in examination-in-chief details of his report to Police Constable Munroe, as indeed he could not be permitted to do. Quite legitimately, however, he could go so far as to state that he had made a report to Munroe shortly after the alleged incident. This would be evidence of the fact that he had made a report, and of the fact that it was made shortly after the alleged incident. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the report, but the fact that it was made. (See Subramaniam v. Public Prosecutor [1956] 1 W.L.R. 965).

When Singh's answers under cross-examination are carefully analysed, it is evident that two distinct lines were being pursued by the cross-examiner. In the first place, it would appear he was suggesting to the witness that it was not the appellant but someone else who had robbed him. Questions as to whether Singh had checked the number of the jeep and the man's face etc., bear out that line. Singh's answers to these questions were that it was the appellant and no one else who had robbed him. Then followed another line of cross-examination which sought to elicit the details given by Singh in his report to the police. Suggestions were made that the witness had fabricated the story of robbery against the appellant because he was annoyed with the appellant for having arrested him for riding without a light. Singh's replies were "I never reported to anyone that the person

who robbed me had a gun. That is not so, I do know what is a revolver and a pistol. I at no time stated that the man had a pistol or a revolver or a gun. I never said that." the witness was as emphatic as the cross-examiner was persistent.

From the nature of the cross-examination and the line and course the cross-examination had taken, one wonders whether the prosecutor could not, in re-examination of his witness, have justifiably sought to obtain the details of the report to the police in order to rebut what appeared to be suggestions by the defence that the witness's testimony at the trial was an afterthought, or a recent concoction, or a reconstruction of the incident. This, however, was not done. When Munroe took the stand he was not examined in chief or re-examined as to the details of the report made by Singh to him. Counsel for the accused was, however, anxious to find out what it was that Singh had reported to him, and Munroe's answers were: "The witness Parbhu Dyal Singh told me, 'Officer me just get rob of $32.00.' No mention was made to me of any gun, pistol or revolver by the witness, Singh." The picture is therefore clear that what the cross-examiner was seeking to do was to discredit Singh on an issue both relevant and vital. Singh had not, in his narrative of the robbery incident, said that he had been robbed by the accused with a gun, pistol or revolver, and had counsel for the accused succeeded in getting Munroe to accede to the suggestions put concerning the details of the report to the effect of robbery with a gun, pistol or revolver. I have no doubt that would have been an end of the case, as no reasonable jury would have had any hesitation in acquitting, having rejected Singh's evidence.

Viewed against the background of the cross-examination directed to Singh and Munroe, I take the view that the evidence of Munroe under cross-examination, to wit: "Officer me just get rob of $32.00." to which objection has been taken in this appeal, was admissible in evidence. Its reception was not in proof of the truth of Singh's story of the robbery, but on the important question of credibility. In the circumstances set out above, and because of the manner in which the trial was conducted. I cannot share the view taken by counsel for the State that the manner in which the evidence was obtained at the trial was in order to rebut an allegation of recent concoction within the purview of R. v. Arthur Benjamin (1913) 8 Cr. App. R. 146. I have had the advantage of reading the judgment of the learned Chancellor in this appeal and I agree with the legal principles and reasons he has so lucidly extracted from the authorities referred to by him on the subject of leading evidence of previous statements confirmatory of a witness's testimony. This would offend against the general rule, and would be permissible only if a case should fall within one of the exceptions, for example, to rebut a suggestion of afterthought, (See also R. v. Coll (1889) 25 L.R. Ir. 522 and The Nominal Defendant v. Clements (196 D.C.L.R. 476, both of which were followed in R. v. Oyesiku (1972) 56 Cr. App. R. 240.)

As I stated earlier, the line adopted by the cross-examiner made Munroe's evi-

dence of the nature and details of the report by Singh to him given under cross-examination admissible as affecting credit. The question posed then is this: In what way would the challenged evidence affect credit? The answers given by Munroe under cross-examination would tend, if believed, to give credence to Singh as a witness. They are not evidence of the truth of the facts stated by Singh, but of the reliability and trustworthiness of Singh as a witness. The defence, from the trend of the suggestions put under cross-examination, made Singh's conduct in this matter relevant and important. The attack on Singh's is credibility brought into focus for critical examination by the jury his conduct from the time he and the appellant had parted that night.

The appellant was putting forward this story in relation to Singh's conduct and with a view to discrediting him. Singh was lawfully arrested by him for riding without a light. Because of this, Singh was annoyed and thereafter pursued a course of conduct hostile, untruthful and inimical towards him. He (Singh) saw a policeman (Munroe) and made false report to him about robbery. The falsity of the story was to be found not only because it was the creation of a person who had a motive from the cycle arrest incident to be spiteful and revengeful, but also from the inherent nature of the account of the robbery given at the trial as compared and contrasted with what he had said earlier to Munroe. I feel the State could properly repel that attack on Singh's conduct by inviting the jury to take into account, when considering this relevant question of Singh's conduct and his credibility, the following factors, namely, (a) that shortly after the alleged incident, and at the first opportunity. Singh made a report to Munroe, a person authorised by law to receive the report for the purpose of investigation: (b) that the suggestion distinctly made by defence counsel that it was a false story given by Singh because at the trial he had given an account of the robbery fundamentally different from what he had reported to Munroe, was totally ill-founded; and (c) that the answers given by Singh and Munroe under cross-examination relating to the nature and details of the report go to Singh's credit rather than to his discredit.

In elaborating on (a) above, normally, the fact that a person goes to the police and makes a report has no evidential value, but in the particular circumstances of this case having regard to the cycle incident immediately prior to an alleged robbery and paying attention to the nature, line and purport of the cross-examination directed to Singh and Munroe, this fact of a report to the police at the earliest opportunity became an important factor bearing on the victim's conduct. For authorities on the legality of cross-examination along these lines in order to elicit details of a conversation between two witnesses in the absence of the accused, see Lloyd Adonis v. The State (Criminal Appeal No. 96 of 1968), Omar Khan v. The State (Criminal Appeal No. 106 of 1968) and Ashraf Alli v. Moses ([1957] L.R.B.G. 169).

The learned trial judge had, at various stages in his summing-up, commented quite legitimately on the aspect of the credibility of Singh: but where I feel he went too far is when he said: "It has been submitted to you by the prosecution that his" (meaning Singh's) "behaviour throughout is consistent with truth. That is a matter entirely for you." The trial judge ought to have warned the jury that if they should believe Singh and Munroe in their replies under cross-examination on the matter of the report they could properly consider that evidence as going to Singh's credit, but such evidence must not be taken as proof of the truth of the facts of the report. The way in which that passage was put to the jury they might well have understood it to mean that if they accepted the submission made by the prosecution they could find that the contents of the report by Singh to Munroe were evidence of the truth of the complaint.

For these reasons 1 would allow the appeal and set aside the conviction. I agree with the order proposed by the learned Chancellor.

**Appeal allowed. New Trial ordered.**

**Hazari v. Burnett C.A.**

**MONERAM HAZARI**
**Appellant**

**v.**

**PAUL BURNETT**
**Respondent**
**(Complainant)**

[Court of Appeal (Haynes, C., Luckhoo and Massiah, JJ.A.) July 29, 30, 1976]

*Customs-Bringing currency notes to an airport for the purpose of exportation-Whether charge bad in law-Exchange Control Ordinance, No. 28 of 1958, para 3 of Part 111 of the Fifth Schedule (now Exchange Control Act, Cap. 86:01)-Law Revision Order 1973-Exchange Control (Amendment) Ordinance 1962, s. 8-Exchange Control (Amendment) Ordinance 1965, s. 3.*

*Customs-Bringing currency notes to an airport for the purpose of exportation -Whether provision under which appellant charged creates an offence-Effect of failure to refer to correct provision-Exchange Control Ordinance 1958, s. 24, paras. 1 (1) and 3 of Part III of the Fifth Schedule-Summary Jurisdiction (Procedure) Ordinance, Cap. 15, s. 109 (2) (now Summary Jurisdiction (Procedure) Act, Cap. 10:02, s. 110 (2) & (4))-Customs Act. Cap. 82:01, s. 218.*

**Hazari v. Burnett C.A.**

*Practice and Procedure-Amendment-Whether Court of Appeal can amend complaint-Summary Jurisdiction (Procedure) Ordinance, Cap. 15, s. 94 (2) (now Summary Jurisdiction (Procedure) Act. Cap. 10:02, s. 7 (1) & (4), s. 95 (2))-Summary Jurisdiction (Appeals) Ordinance, Cap. 17, ss. 24 & 28 (now Summary Jurisdiction (Appeals) Act, Cap. 3:04, ss. 24 & 28)-Court of Appeal Act, Cap. 3:01, ss. 31& 41-British Caribbean Court of Appeal Order in Council, 1962, art. 5 (2).*

*Exportation of currency notes-Proof that currency is legal tender-Bank of Guyana Act, Cap. 85:02, s. 22 (1), (3)-Exchange Control Act, Cap. 86:01, s. 3 (4).*

*Sentence-Penalty-Whether election of treble the value must be made on oath-Customs Ordinance, Cap. 309, s. 216, (now Customs Act, Cap. 82:01, s. 218)-Customs (Consolidation) Ordinance, 1952, s.* 217-*Customs Act, Cap. 82:01, s. 218.*

On 29th September, 1973 the appellant was at the Timehri Airport for the purpose of travelling to Canada. Having passed through immigration he was on his way to board the aeroplane when Ronald Hunte, an officer of the Customs and Excise Department stationed at the airport, accosted him. On being questioned, the appellant said he had declared $23.00 in Canadian currency and that he had no other money in his possession. On conducting a search in the appellant's bags Hunte found $1,945.00 in United States of America currency notes and $569.00 in Canadian currency notes in three glass containers which were in three jars of achaar. In the appellant's clothing he found currency notes of those countries in the sum of $62.00. The appellant admitted that it was Canadian and American currency. He was charged with bringing currency notes to an airport for the purpose of exportation contrary to para. 3 of Part III of the Fifth Schedule to the *Exchange Control Ordinance, 1958.* He was found guilty and fined three times the sum of money he was allegedly endeavouring to export or in default thereof, he was to serve a term of imprisonment of six months. The money itself was ordered to be forfeited. The appellant's appeal to the Full Court was dismissed.

On appeal to the Court of Appeal, counsel for the appellant contended that (1) the charge was bad in law, (2) there was no proof that the currency notes were legal tender, and (3) although under s. 216 of the *Customs Ordinance, Cap. 309* the Comptroller of Customs could elect a penalty of treble the value of the goods in question, such election could only be made on oath on behalf of the Comptroller and this was not done.

**HELD:** (1) That the charge was not bad in law and was properly laid under the *Exchange Control Ordinance, 1958* and not the *Exchange Control Act, Cap. 86:01* because the latter was not in force at the date of the commission of the

offence, nor was it included in the Laws of Guyana until 31st December, 1973 by virtue of the *Law Revision Order, 1973* which was only made on 29th December, 1973.

(2) That the charge was properly laid under the Fifth Schedule of the *Exchange Control (Amendment) Ordinance, 1965* since the amendment which had redesignated the Fifth Schedule as the Fourth Schedule had been repeated.

(3) That the charge laid was not bad in law for failing to refer to s. 24 of the *Exchange Control Ordinance, 1958,* as that section referred specifically to actual exportation of currency and not to taking currency to a place for exportation as was the case here.

(4) That the charge should have included a reference to para. 1 (1) of the Fifth Schedule as this was the section creating the offence, but the omission had in no way prejudiced or misled the appellant because the charge as instituted clearly indicated to him the case he had to meet.

(5) That the words "This note is legal tender ..." and "Will pay to the bearer on demand" which were found on the currency notes were hearsay and inadmissible, but the appellant's admission and assertion to Hunte that "all is good money" was *prima facie* evidence and proof that the currency notes were legal tender.

(6) That whether or not the Comptroller has elected a penalty as prescribed by s. 216 of the Ordinance is a matter of which the court should be satisfied by evidence on oath, and since there was no such evidence, the magistrate was not empowered to fine the appellant treble the value of the currency notes.

(7) That the Court of Appeal inherited the powers of the British Caribbean Court of Appeal, which had the power of amending complaints by virtue of art. 5 (2) of the *British Caribbean Court of Appeal Oreder in Council, 1962,* and accordingly the Court of Appeal could amend the complaint in this case by inserting therein a reference to para. 1(1) of Part III of the Fifth Schedule to the *Exchange Control Ordinance, 1958.*

**Appeal dismissed.**
**Conviction and forfeiture affirmed.**
**Sentence varied to** a **fine of $1,000.00 or six months imprisonment in default thereof.**

**Editorial Note:** The legislation referred to as Ordinances in the judgments of the Court are now Acts, as follows: *Exchange Control Ordinance, 1958 (No. 28 of 1958)* s. 24, now the *Exchange Control Act, Cap. 309,* s. 24:

*Customs Ordinance, Cap. 309,* s. 216, now the *Customs Act, Cap. 82:01,* s. 218;

*Summary Jurisdiction (Procedure) Ordinance, Cap. 15,* s. 94 (2) now the *Summary Jurisdiction (Procedure) Act, Cap. 10:02,* ss. 95 (2), 110 (2).

*Summary Jurisdiction (Appeals) Ordinance, Cap. 17,* ss. 24, 28 now *Summary Jurisdiction (Appeals) Act, Cap. 3:04,* ss. 24, 28.

**Cases referred to:**

1. R. v. Goswami [1968] 2 All E.R. 24
2. R. v. Bryant [1956] 1 All E.R. 340
3. Dowden v. Liverpool [1960] L.R.B.G. 373
4. Ramnarine Matoo v. Louis Smith [1931-37] L.R.B.G. 320
5. Ramsundar v. Charles Welcome [1944] L.R.B.G. 132
6. Da Silva v. Abrams (1969-70) 14 W.I.R. 315
7. Queen v. Micheal Hoard (1842) 6 J.P. 445
8. Williams v. Daniel and Bobb (1968-69) 13 W.I.R. 490
9. Lomas v. Peek [1947] 2 All E.R. 574
10. Waring v. Wheatley [1951] W.N. 569
11. Roopnarine v. Heyliger [1956] L.R.B.G. 61
12. Gill v. Alert [1946] L.R.B.G. 24
13. Ramsarran v. Heyliger [1956] L.R.B.G. 139
14. Ishmael v. Pile [1969] L.R.B.G 108
15. Bagado v. Welcome [1942] L.R.B.G. 293
16. Persaud v. Sparman [1961] L.R.B.G. 164
17. Peters v. Gordon (1969-70) 14 W.I.R. 345
18. Nabi Baksh *et al* v. Drupattie *et al* (1969) Criminal Appeal, No. 1 of 1969
19. Alladat Khan v. Bhairoo and De Castro (1970) 17 W.I.R. 192
20. Dyer v. Tully [ 1894] 2 Q.B. 794
21. D'Oliveira v. Stoll (Unreported: Magistrates Ct., 1966)
22. D'Oliveira v. John Partin (Unreported: Magistrates Ct., 1970)

C.L. Luckhoo, S.C., for the appellant.
L. Ganpatsingh, Assistant Director of Public Prosecutions, for the respondent.

**MASSIAH, J.A.:** The appellant was convicted in the magistrate's court for "bringing currency notes to an airport for the purpose of exportation", contrary to paragraph 3 of Part III of the Fifth Schedule to the *Exchange Control Ordinance, 1958,* (hereinafter referred to as "the Ordinance") now the *Exchange Control Act, Cap. 86:01.* The allegation was that on 29th September, 1973, the appellant had taken $1,945 in United States of America currency notes and $569 in Canadian currency notes to Timehri Airport for exportation. The equivalent value thereof in Guyanese currency is $5,173.15. Acting under the provisions of paragraph 3

aforesaid, the magistrate fined the appellant $15,519.45, three times the sum of money he was allegedly endeavouring to export, in default whereof he was to serve a term of imprisonment of six months, and ordered that the money itself be forfeited. The appellant appealed to the Full Court. That Court dismissed the appeal and affirmed the conviction and sentence. It is against the Full Court's decision that this appeal has been brought.

The facts in brief are as follows: On 29th September, 1973, at about 10. a.m., the appellant was at Timehri Airport. He had intended to travel to Canada by a British West Indian Airways aircraft, and having been attended to by the immigration officer, he was on his way to the tarmac to board the aeroplane when Ronald Hunte, an officer of the Customs and Excise Department stationed at the Airport, accosted him. Hunte questioned the appellant who told him that he had declared on the relevant form that he was taking with him $23 in Canadian currency and that he had no other money in his possession. But when Hunte searched one of the appellant's bags (acting under the provisions of paragraph 4 of Part III of the Fifth Schedule to the Ordinance), he found therein three plastic jars with achaar and in those jars were three glass containers with currency notes of the United States of America and Canada in the sum of $2,452. In the appellant's clothing he found also currency notes of those countries in the sum of $62. When Hunte found the first glass container he asked the appellant what was in it and the appellant replied that it was Canadian and American currency.

When warned of prosecution and asked if the notes were legal tender in the respective countries the appellant said "all is good money". He was subsequently charged.

Counsel for the appellant rested his submissions on three main grounds. In the first place, he contended that the charge was bad in law, secondly, that there was no proof that the currency notes were legal tender, and thirdly, under s. 216 of the *Customs Ordinance, Cap. 309*, now s. 218 of the *Customs Act, Cap. 82:01,* the Comptroller of Customs can elect whether a penalty of treble the value of the goods in question or a fine of $1,000 shall be imposed. An averment that an election was made should be made on oath on behalf of the Comptroller and should not proceed from State Counsel at the Bar Table, as was done in this matter.

The contention that the charge was bad in law was argued under three subheads. The first was that the charge should not have been laid under the Ordinance but under the *Exchange Control Act, Cap. 86:01,*which appears in the present edition of the Laws of Guyana, *Chapter 86:01,* the argument ran, presents the law as in force on 23rd September, 1972 (See Note on Revision Date on original page 2A of *Cap. 86:01),* and since the appellant was charged one year later, on 1st October, 1973, the charge should have been laid under *Cap. 86:01* and not under

the Ordinance as was done.

This argument overlooks the fact that *Cap. 86:01* was not included in the Laws of Guyana until 31st, December, 1973 by virtue of the *Law Revision Order 1973, (No. 163 of 1973)*, which was made on 29th December, 1973 so that when the appellant was charged in October 1973, *Cap. 86:01* was not in force and indeed was not known at all. It was impossible, therefore, for the appellant to have been charged thereunder.

The second aspect of the contention that the charge was bad in law was that it was laid under the Fifth Schedule to the Ordinance whereas reference should have been made instead to the Fourth Schedule. The argument was that the "Fifth Schedule" had been redesignated the "Fourth Schedule" by virtue of s. 8 of the *Exchange Control (Amendment) Ordinance, 1962, (No. 22 of 1962)* which reads thus:

> "8. The Principal Ordinance is hereby amended by the repeal of the first schedule thereto and by redesignating the second, third, fourth, fifth and sixth schedules thereto as the first, second, third, fourth and fifth schedules, respectively."

But these arguments did not take account of the provisions of the *Exchange Control (Amendment) Ordinance, 1965 (No. 21 of 1965)* s. 3 which repealed most of the provisions of Ordinance No. 22 of 1962 including s. 8 thereof and provided that the Ordinance shall have effect as if those repealed provisions had not been enacted. On the coming into operation of Ordinance No. 21 of 1965, therefore, the proper designation of the relevant schedule was no longer the "Fourth Schedule". The original position had been restored. This was the position in October, 1973, when the appellant was charged: the reference to the Fifth Schedule in the complaint would appear to be correct.

The third argument in relation to the submission that the charge was bad in law was that para. 3 of Part III of the Fifth Schedule does not create an offence but is an enforcement provision which merely prescribes the penalty for the offence created under s. 24 of the Ordinance. Section 24 (1) which appears in Part IV of the Ordinance reads thus:

> "The exportation from Guyana of-
>
> (a) any notes of a class which are or have at any time been legal tender in Guyana or any part of Guyana or in any other territory: and
>
> (b).....
> (c) .....
> (d) .....

(e) .....

is hereby prohibited except with the permission of the Minister."

Paragraph 3 of Part III of the Fifth Schedule under which the appellant was charged reads thus:

"If anything prohibited to be exported by any provision of the said Part IV is exported in contravention thereof, or is brought to a quay or other place, or water borne, for the purpose of being so exported, the exporter or his agent shall be liable to the same penalty as that to which a person is liable for an offence to which section 216 of the Customs Ordinance applies."

Section 24 of the Ordinance prohibits the exportation of currency notes, but para. 3 of Part III of the Fifth Schedule further restricts any person from taking such notes, *inter alia,* to a quay or other place for the purpose of being exported, and it is for an alleged breach thereof that the appellant was charged. But Counsel for the appellant contended that a constituent element of the offence for which the appellant was charged was that he had taken to the airport for exportation something that was prohibited from being exported under s. 24 of the Ordinance, and that there should therefore have been some reference to s. 24 in the complaint. Counsel stressed that an offence is committed only when a person takes to a place for exportation something prohibited from being exported under s. 24 It was that section, he argued, which creates the offence.

It is true that the appellant could only have been properly convicted if it were shown that he took to the airport for exportation something prohibited from being exported under s. 24 of the Ordinance. But the position appears to be that the provisions under discussion prescribe two distinct prohibitions. Section 24 prohibits the exportation of certain things, the penalty for which is prescribed by para. 3, aforesaid. If, however, a person is alleged merely to have taken goods to an airport in order to export them, it cannot be said that he should be charged under s. 24 because that section appears to apply only where the goods have actually been exported. But para. 3, aforesaid; meets this situation, for here there is a prohibition against taking the prohibited goods to any place in order to export them. It must have been clear to the draftsman that without such a specific provision a person could not have been charged merely for taking articles to a place for exportation.

But in any case it is to be doubted whether it can be truly said, as was argued by the respective sides, that s. 24 of the Ordinance and para. 3 of Part III of the Fifth Schedule thereto indeed create any offence at all or merely impose certain restric-

tions and requirements in relation to the exportation of certain things. Inasmuch as para. 3 prohibits any person from doing certain things and prescribes a penalty for breaches thereof, it is at least arguable that that paragraph creates offences-there is a sufficient definition of a crime and there is an ordination of punishment. Nevertheless, that paragraph does not specifically create offences. A careful reading of s. 24 shows, that although it provides that the exportation of certain articles is "prohibited except with the permission of the Minister" it does not specifically create an offence and, unlike para. 3, aforesaid, it does not prescribe any penalty. But para. 1(1) of Part III of the Fifth Schedule reads thus:

> "The enactments relating to customs shall, subject to such modifications, if any, as may be prescribed to adapt them to this Ordinance apply in relation to anything prohibited to be imported or exported by any of the provisions of Part IV of this Ordinance except with the permission of the Financial Secretary as they apply in relation to goods prohibited to be imported or exported by or under any of the said enactments, and any reference in the said enactments to goods shall be construed as including a reference to anything prohibited to be imported or exported by any of the provisions of the said Part IV except with the permission of the Financial Secretary."

The effect of that provision in my judgment is to treat contraventions of the restrictions on importation contained in Part IV as customs offences. As already indicated, a further restriction is imposed by para. 3 of Part III of the Fifth Schedule. The true position appears to be that the offence of bringing currency notes to a place for the purpose of exportation is created by the combination of para. 1 (1) and 3 of Part III aforesaid and s. 216 of the *Customs Ordinance.* It must be borne in mind that in the said para. 3, reference is made to s. 216 of the *Customs Ordinance.* (See R. v. Goswami [1988] 2 All E.R. 24). This case bears a close resemblance to Goswami's where somewhat similar questions fell for consideration. I confess that I was at first persuaded, as counsel for the appellant was in that case, that the provision creating the offence is para. 1(1) of Part III of the Fifth Schedule, but further reflection has caused me to consider that view to be untenable.

An interesting case in relation to this issue is R. v. Bryant [1956] 1 All E.R. 340 where LORD GODDARD, C. J., explained a decision that had been given some time before by the Courts-Marital Appeal Court. In that case the Court had reached the conclusion that s. 2 of the *Larceny Act, 1916,* did not create the offence of simple larceny. Section 2 reads thus:

> "Stealing for which no special punishment is provided under this or any other Act for the time being in force shall be simple larceny and a felony punishable with imprisonment for any term not exceeding five years."

At p. 340, LORD GODDARD said:

> "We pointed out that s. 2 deals with punishment and does not create the offence of larceny which is, and always has been, a crime at common law, though the punishment has varied from time to time. The effect of the section is that for any larceny for which no special punishment is provided, the maximum sentence is five years."

(See also Dowden v. Liverpool [1960] L.B.R.G. 373). A careful reading of the relevant provisions may often disclose that what at first sight appears to be a provision creating an offence is in reality merely a provision prescribing a penalty.

There can be no doubt, however, that in the complaint as well as in the summons there should have appeared a reference to para. 1 (1) of Part III of the Fifth Schedule. Section 109 (2) of the *Summary Jurisdiction (Procedure) Ordinance, Cap. 15* (now s. 110 (2) of the *Summary Jurisdiction (Procedure) Act, Cap. 10:02)* provides as follows:

> "The statement of the offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence."

The importance of this is obvious. A citizen must know exactly why he has been charged and what specific law he is alleged to have infringed. If he does not know this, he would be in no position to defend himself properly. It is important that he should not be misled about these matters. But a mere failure to refer to the section creating the offence alleged to have been committed may not necessarily be fatal, for in some circumstances, the omission may not in any way have prejudiced the defendant and there may be little about which he can with justification complain. See Ramnarine Matoo v. Louis Smith ([1931-37] L.R.B.G. 320) where, although the proper regulation under which the appellant should have been charged was not stated in the complaint, the conviction was not set aside because the Full Court held that the appellant was in no way prejudiced thereby, for it was clear to him that he was charged because he had allegedly contravened that regulation.

In the instant matter, the position must also have been very clear to the appellant. In the first place, the Statement of Offence described the offence as "bringing currency notes to an airport for the purpose of exportation" and alleged that this was "contrary to paragraph 3 of Part III of the Fifth Schedule to the *Exchange Control Ordinance, 1958."* As I have already pointed out, that paragraph prescribes that "If anything prohibited to be exported by any provision of the said

Part IV is exported in contravention thereof, or is brought to a quay or other place, or waterborne, for the purpose of being so exported, the exporter or his agent shall be liable to the same penalty". The reference therein to "the said Part is to Part..." IV of the Ordinance. Part IV contains three sections of which s. 24 is one. As previously mentioned s. 24 specifically prohibits the exportation, *inter alia,* of "any notes of a class which are or have at any time been legal tender in Guyana or any part of Guyana or in any other territory." Neither of the other sections in Part IV, ss. 23 and 25, deals with that subject. Section 23 restricts the importation of currency notes and other articles and s. 25 prohibits the exportation of goods to certain territories unless the goods have been paid for.

There seems little doubt, therefore, that the appellant must have known that the allegation was that he had taken to an airport for exportation currency notes which were prohibited from being exported under s. 24, aforesaid. It cannot be seriously contended that the appellant was in any way misled as to the real nature of the offence and the issues involved or that he was prejudiced in any way what ever. There appears to have been no miscarriage of justice.

The position, is of course, different where an omission from the Particulars of Offence causes the defendant to be misled to his detriment. An instance of this is the case of Ramsundar v. Charles Welcome ([1944] L.R.B.G. 132) where the charge against the appellant alleged that he had carried a shotgun without lawful excuse "in a yard within public view." The section under which he was charged provided that it was an offence to carry a dangerous weapon without lawful excuse "in view of any public way or public place" but the words "in view of any public way or public place" were omitted from the particulars of the charge. The appellant was convicted though at the trial no evidence was adduced, as there should have been, that he carried the gun in view of any public way or public place. On appeal it was held that he was wrongly convicted and the conviction and sentence were set aside. SIR JOHN VERITY, CHIEF JUSTICE, who delivered the judgment of the Court, said at p. 133:

"It is clear not only that the form of complaint was likely to mislead the magistrate but that he was in fact so misled as is shown by the form of his conviction and by his failure to address his mind to the absence of any evidence that the appellant conducted himself in the manner described either on or in view of any public way or public place... We would observe that care should be exercised in the conduct of all such proceedings to ensure that the necessary documents are so drawn that neither the Court nor the person charged may be misled as to the real nature of the offence and the issues involved. Failure to observe this care may very well result in a miscarriage of justice either on one side or the other."

(See also Da Silva v. Abrams (1969-70) 14 W.I.R. 315 where there was a failure to state and prove the intent necessary to constitute the offence charge.) Although in Ramsundar v. Welcome (*supra*) there was an omission from the particulars rather than from the statement of the offence as in the matter under consideration, it seems to me that the position should be the same in either case: the test of the validity of the conviction appears to involve, primarily, consideration of what effect the omission had on the case. If it tends to mislead so that it result injustice miscarrying it would be fatal, but if the omission, though technically wrong, has caused no prejudice to the defence, then the conviction should stand after appropriate amendment.

In The Queen v. Michael Hoard ((1842) 6 J.P. 445) the accused was charged with committing "lewd filthy, nasty, beastly, unnatural and sodomitical practices." It appears that the indictment contained no more than that. It was argued, on a motion in arrest of judgment, that the indictment was bad for uncertainty since it "does not specify any particular charge, nor do the words used carry a definite meaning. The terms used are not capable of legal interpretation, and the defendant knows not what evidence to adduce to meet such a charge." The omission to allege the commission of a specific offence was considered fatal: the use of more general terms being deplored. LORD DENMAN, C.J., expressed the view (p. 445) that "in a legal sense no legal offence appears to be defined" and PATTERSON, J. considered (p. 445) that "this indictment (did) not seem to (him) to describe any definite offence, and therefore cannot be supported." The indictment was accordingly held to be bad for uncertainty and the accused was discharged from it. The circumstances in this matter are, of course, entirely different, and I consider, for the foregoing reasons, that the failure to refer in the charge to the section creating the offence does not make the conviction bad in law. Nor do I consider that the position is in any way affected by the fact that no reference was made in the charge to s. 24 of the Ordinance, although, as stated already, the prohibition to export the notes was an ingredient in the offence charged. Section 109 (2) of the *Summary Jurisdiction (Procedure) Ordinance, Cap. 15* (now s. 110 (2) of the *Summary Jurisdiction (Procedure) Act, Cap. 10:02),* to which attention has already been directed, provides that the statement of offence shall "describe the offence shortly in ordinary language ... without necessarily stating all the essential elements of the offence ..." From what has been said already in this judgment, it is clear that the appellant must have known that the allegation was that he was trying to export currency notes prohibited from exportation under s. 24 of the Ordinance, and in my judgment, it was unnecessary to allege this specifically in the complaint or to refer therein to s. 24 of the Ordinance. In the circumstances of this matter, it would be unreasonable to hold that the appellant was prejudiced in this regard.

I shall conclude consideration of this issue with a reference to the case of Will-

jams v. Daniel and Bobb ((1968-69) 13 W.I.R**.** 490) which was decided by the Court of Appeal of Trinidad and Tobago. In that matter the respondents were prosecuted for an offence under s. 9 of the *Criminal Offences Ordinance,* the relevant portion of which reads as follows:

> "If any clerk or servant ... shall wilfully and with intent to defraud make or concur in making any false entry in ... any book, or document or account, every such offender shall be guilty of a misdemeanour."

The respondents were acquitted after a submission of no-case at the close of the case for the prosecution and the complainants appealed. On appeal counsel for the respondents conceded that a *prima facie* case had been out but submitted that the omission of the word "wilfully" vitiated the complaint and, consequently, the proceedings on it. It should be pointed out that in Trinidad there is a provision (s. 35 of the *Summary Courts Ordinance)* which is similar to our s. 109 (2) of the *Summary Jurisdiction (Procedure) Ordinance, Cap. 15* (now s. 110 (2) of Cap. 10:02).

The Court did not accept Counsel's contention. At p. 493 WOODING, C.J. who delivered the judgment of the court, said:

> "The charge is that one of the two respondents made and the other concurred in the making of a false entry in a government time sheet and that this was done with intent to defraud. The section requires that it should also have been done wilfully. No one could have made or concurred in making any such false entry with intent to defraud unless he also acted wilfully. Consequently, the word "wilfully" is in that context a technical term."

The Court therefore considered that the omission from the charge did not make the complaint ineffective. It is true that the *ratio decidendi* was that the word "wilfully" in the circumstances of that case was a technical term and that technical terms were to be avoided under s. 35 of the *Summary Courts Ordinance,* but that notwithstanding, the case is of some relevance because it shows that omissions, even of apparently important matters, are not necessarily sufficient to invalidate a conviction. Each decision will of course turn on the circumstances of the particular case. In Lomas v. Peek ([1947] 2 All E.R. 574) where the words "knowingly and wilfully" were omitted from the particulars of the offence, although they appeared in the statute creating the offence, the Divisional Court (LORD GODDARD, C.J., HUMPHREYS and SINGLETON JJ.) reached the same view as the Court of Appeal of Trinidad and Tobago in Williams v. Daniel and Bobb (*supra*)*;* the *rationes decidendi* were the same in both cases. It should be mentioned that s. 32 of the *Criminal Justice Act, 1925,* of the United Kingdom

corresponds with s. 35 of the *Summary Courts Ordinance* of Trinidad and Tobago and s. 109 (2) of the *Summary Jurisdiction (Procedure) Ordinance, Cap. 25.*

However, in the case of Waring v. Wheatley ([1951] W.N. 569), decided after Lomas v. Peek, (*supra*) the Divisional Court, headed again by LORD GODDARD, C.J., set aside the appellant's conviction of "unlawfully" causing an obstruction in a street; the appellant should have been charged with "wilfully" causing the obstruction but the word "wilfully" was omitted from the charge although it appeared in the statute creating the offence. The Court considered that omission to be fatal, and the reasoning of the Court can be appreciated, for the facts showed that the obstruction was caused by the appellant's van which had broken down in the street owing to some mechanical trouble. It could hardly be said in those circumstances, that there was a wilful obstruction, and had the word "wilfully" appeared in the complaint the court, at first instance, may have decided the matter differently. The omission of the word "wilfully" in the circumstances of this particular case may well have misled the court and prejudiced the defence.

The second main submission made on the appellant's behalf was that there was no proof that the currency notes in question were legal tender in the United States of America and Canada as alleged in the complaint. It will be remembered that s. 24 of the Ordinance prohibits the exportation of notes which "are or have at any time been legal tender in Guyana or any part of Guyana or in any other territory." To succeed therefore the prosecution had to prove that the notes were legal tender in the countries aforesaid. In order to prove this, the prosecution tendered the notes which were duly admitted in evidence and led the evidence that when asked whether they were legal tender in the countries aforesaid, the appellant said "all is good money."

"Legal tender" appears to mean "money that may be accepted in payment" and where this is intended, there is often a statement to this effect on the notes. In Guyana, the position is regulated by the *Bank of Guyana Act, Cap. 85:02, s. 22 (1) and (3)* whereof read thus:

> "22 (1) The Bank shall have the sole right to issue notes and coins in Guyana and, subject as aforesaid, only such notes and coins issued by the Bank shall be legal tender in Guyana.
>
> (3) Legal tender notes shall be accepted throughout Guyana without limitation as to amount in settlement of any public or private debt or monetary obligation."

It will be observed that on all our currency notes there appear the words "These notes are legal tender for the payment of any amount." During the hearing of this matter, this Court examined the notes in question and found that the words "Will

pay to the bearer on demand" appeared on some of the Canadian currency notes while on the others were written the words "This note is legal tender." On all the currency notes of the United States of America the words "This note is legal tender for all Departments, public and private" appear.

It was argued for the respondent that those words are *prima facie* evidence that the notes are legal tender. I am unable to accept that contention. Such "evidence" is clearly hearsay and inadmissible. The words on the notes possess no evidential value.

But in my view, the same cannot be said of the appellant's assertion that "all is good money." He said so when Hunte asked him whether the notes were legal tender in the respective countries. His answer could only mean that they were legal tender: as far as he was concerned, they were genuine notes that would be accepted in payment. That is how I understand the words "all is good money." That statement, to my mind is *prima facie* evidence that the notes are legal tender; that evidence was never challenged in any way at all and the magistrate acted properly when he used it in the determination of this issue.

In the course of his arguments on this issue, counsel for the appellant submitted that the expression "legal tender" has a special meaning. He referred to dictionaries on banking to support this contention. He argued further that the notes, though genuine, may not necessarily be legal tender because currency notes become legal tender only when issued and there was no evidence in relation to the issue of the notes, and even if issued they may have been withdrawn from circulation and so ceased to be legal tender. His view was that there should be evidence in relation to these matters before there could be a proper finding on the issue.

In my view, that is to place an intolerable burden on the prosecution in these matters. The intention of the relevant provisions of the law is to prevent the exportation, without permission, of genuine currency from Guyana in order to control and safeguard the foreign exchange position of this country. I do not think that the situation demands a highly technical approach. Once there is unchallenged evidence that the currency notes are genuine as there was in this case, it is enough, in my judgment, to secure and sustain a conviction. I do not think that the prosecution must necessarily fail because there has been no technical or expert proof of the matters to which counsel for the appellant drew attention.

His third main submission was that the averment in relation to the election of the penalty under s. 216 of the *Customs Ordinance, Cap. 309* (s. 218 of *Cap. 82:01)* was invalid, inasmuch as it was made by counsel who was conducting the case for the respondent. As far as I can make out, there is no authority in relation to this aspect of the matter, but on principle, it seems wrong that the averment should be made from the Bar Table. It appears that the usual procedure is for an officer of

the Customs and Excise Department to aver on oath, after the defendant is convicted, that the Comptoller of Customs has made an election under the aforesaid provision. In Roopnaraine v. Heyliger ([1956] L.R.B.G. 61) the Full Court did not accept the contention that the election must be made before conviction.

The procedure aforesaid should always be followed. Whether or not the Comptroller has elected, is a matter about which the court should be satisfied by evidence, for the court's penalty depends on the election, and such evidence should, of course, be adduced on oath or affirmation from the witness-box in the usual way. There appears to be no reason why there should be a departure therefrom. On the contrary, there is good reason why the averment should be given on oath, for in such a case, the officer is subject to cross-examination.

I am of the view that in this matter, there was no proper averment and consequently, no evidence that the Comptroller had elected. The magistrate was therefore not empowered to fine the appellant, as he did, treble the value of the currency notes.

One further point remains to be considered. Can this Court amend the complaint and conviction order by inserting therein a reference to paragraph 1(1) of Part III of the Fifth Schedule of the Ordinance? In my view, it can. It seems to me that the magistrate could have amended the complaint accordingly under s. 94 (2) of the *Summary Jurisdiction (Procedure) Ordinance, Cap. 15* (now s. 95 (2) of *Cap. 10:02)* which reads thus:

> "No objection shall be taken or allowed, in any proceedings in the court, to any complaint, summons, warrant, or other process for any alleged defect, in substance or in form, or for any variance between any complaint or summons and the evidence adduced in support therein.
>
> Provided that if any variance or defect mentioned in this section appears to the court at the hearing to be such that the defendant has been thereby deceived or misled, the court may make any necessary amendments, and, if it is expedient to do so, adjourn, upon such terms as it thinks fair, the further hearing of the case."

The Full Court has similar power. Section 24 of the *Summary Jurisdiction (Appeals) Ordinance, Cap. 17* (now s. 24 of *Cap. 3:04)* reads thus:

> "If, on the hearing, any objection is made on account of any defect in a complaint or information, or on account of any omission or mistake in the drawing up of a conviction or order, and if it is shown, to the satisfaction of the Court, that sufficient grounds were in proof before the magistrate who made the conviction or order to have authorised the draw-

> ing up thereof free from that omission or mistake, the Court shall amend the complaint or information, or the conviction or order, and proceed thereafter as if the defect, omission, or mistake had not existed. Nothing in this section shall affect the provisions of s. 22 of this Ordinance."

See Gill v. Alert ([1946] L.R.B.G. 24), Ramsarran v. Heyliger ([1956] L.R.B.G. 139), Ishmael v. Pile ([1959] L.R.B.G. 108); see, on the contrary, Bagado v. Welcome ([1942] L.R.B.G. 293) and Persaud v. Sparman ([1961] L.R.B.G. 164) where the Full Court refused to amend because the appellants were not convicted of offences under the law.

Reference should also be made to the powers of the Full Court under s. 28 (a) and (c) of the *Summary Jurisdiction (Appeals) Ordinance, Cap. 17* (now s. 28 *of Cap. 3:04)* which read thus:

> "28. The Court may-
>
> (a) affirm, modify, amend, or reverse, either in whole or in part, the decision, sentence, or any order made by the magistrate with refer ence to the cause, or may enter any judgment or make any order which the magistrate ought to have made; or
>
> (b) ...: or
>
> (c) make any other order for disposal of the case which justice re quires."

It appears to me to be inconceivable that this Court does not possess similar powers of amendment, but such powers are not explicitly stated in the same way in the *Court of Appeal Act, Cap. 3:01.* However, s. 31 (3) thereof provides as follows:

> "Upon the determination of an appeal under this section, the Court of Appeal may affirm or set aside the order of the Full Court and where any such order is set aside, the Court of Appeal may make any order which ought to have been made at the trial or make such other order as justice requires."

Although that provision appears to empower this Court *inter alia* to amend the complaint or conviction, it appears, on a careful reading of that section, that this Court may only do so where it has set aside the order of the Full Court; if this Court does not wish to set it aside it would appear that it cannot so amend. This provision was applied by the Court of Appeal in Peters v. Gordon ((1969-70) 14 W.I.R. 345) where the Court set aside the order of the Full Court. But additional

powers reside in this Court by virtue of the provisions of s. 41 *of Cap. 3:01* which reads thus:

> "Subject to this Act and rules of court, the Court of Appeal shall, in addition to the jurisdiction, powers and authorities vested in it by virtue of the provisions of this Act apart from this section, have and may exercise any other jurisdiction, power or authority which is analogous to any jurisdiction, power or authority belonging or incident immediately before the 26th May, 1966, to the British Caribbean Court of Appeal as a Court of Appeal for Guyana."

The British Caribbean Court of Appeal was established by the *British Caribbean Court of Appeal Order in Council, 1962 (S.I. 1962 No. 1086)* art. 5 (2) of which provides thus:

> "In connection with any appeal from a court of a Territory, the Court shall, subject to the provisions of this Order and any law in force in the Territory, have all the powers and jurisdiction that are possessed by that court under any law in force in the Territory; and decisions of the Court in respect of any appeal from a Court of a Territory shall, subject as aforesaid, be enforced in the Territory in the same way as decisions of that Court."

It seems therefore, that in determining an appeal from the Full Court, the British Caribbean Court of Appeal could have amended the complaint or conviction since the Full Court was empowered to do so by virtue of the provisions of ss. 24 and 28 of the *Summary Jurisdiction (Appeals) Ordinance, Cap. 17,* (now ss. 24 and 28, *Cap. 3:04)* to which reference has already been made. Since this Court is empowered by virtue of section 41 *of Cap. 3:01* to exercise the powers which the British Caribbean Court of Appeal formerly exercised, it follows that this Court may also amend a complaint or conviction relating to an appeal heard and determined by the Full Court.

Earlier in this judgment 1 expressed the view that the appellant was in no way misled or prejudiced by the omission from the complaint of a reference to the section creating the offence charged. The question of justice miscarrying does not arise, and this might well be one of the cases in which an amendment might properly be made.

On a full consideration of this matter and for the foregoing reasons, I would dismiss the appeal, affirm the conviction and forfeiture and vary the sentence to a fine of one thousand dollars or in default thereof, a term of imprisonment of six months.

**HAYNES, C:** I agree with the order proposed by my brothers LUCKHOO and MASSIAH that the appeal be dismissed, the conviction affirmed and the sentence varied to a fine of one thousand dollars or in default thereof, a term of imprisonment of six months.

**LUCKHOO, J.A.:** On the 15th November, 1974 the appellant was convicted in the Magistrate's Court (in words of the conviction as drawn up) "for that he on Saturday 29th September, 1973 at Timehri Airport within the Georgetown Judicial District, brought currency notes amounting to US $1,945 which are legal tender in the United States of America, $569 Canadian dollars which are legal tender in Canada, to Timehri Airport for the purpose of exporting same, contrary to paragraph 3 of Part 111 of the Fifth Schedule to the *Exchange Control Ordinance, 1958*". He was ordered to pay a fine in the sum of $15,519.45, or to serve a term of imprisonment for six months in default of payment of the fine. An order was also made for the forfeiture of the currency notes.

An appeal to the Full Court was dismissed in April 1975 and the conviction and sentence affirmed. Before this Court three grounds of appeal were argued, and they will be dealt with in the order in which they were presented. Counsel for the appellant has submitted that the complaint as laid was bad in law, as well as the conviction as drawn up. The wording of the complaint is as follows:

Statement of Offence

> Bringing currency notes to an airport for the purpose of exportation, contrary to paragraph 3 of Part 111 of the Fifth Schedule to the *Exchange Control Ordinance 1958.*

Particulars of Offence

> Defendant on Saturday 29th September, 1973 at Timehri Airport within the Georgetown Judicial District brought currency notes amounting to one thousand nine hundred and forty-five United States of America dollars which are legal tender in the United States of America; five hundred and sixty-nine Canadian dollars which are legal tender in Canada, to Timehri Airport for the purpose of exporting same.

Counsel has argued that para. 3 of Part III of the Fifth Schedule to the *Exchange Control Ordinance* (hereinafter called the Act) is the penalty provision, as it reads:

"If anything prohibited to be exported by any provision of the said Part IV is exported in contravention thereof, or is water-borne, for the purpose of being so exported, the reporter or his agent shall be liable to the same penalty as that to which a person is liable for an offence to which

section 216 of the *Customs Ordinance* applies."

The section prohibiting the exportation of foreign currency from Guyana is s. 24 (1) (a) of the Act which states:

> "The exportation from Guyana of (a) any notes of a class which are or have at any time been legal tender in Guyana or any part of Guyana or in any other territory;... is hereby prohibited except with the permission of the Minister."

As can be seen from the complaint laid, there was no mention of s. 24 of the Act, but there is reference in paragraph 3 of Part III of the Fifth Schedule to Part IV of Act. In Part IV of the Act there are three sections dealing with prohibitions: s. 23 deals with the prohibition of the importation into Guyana of certain notes and documents. Section 24 (1) (a) has already been referred to: and s. 25 deals with the prohibition of the exportation from Guyana of goods of any class or description to a destination in any such territory as may be prescribed, etc. Part IV relates to imports and exports, and it is clear that the relevant section under Part IV on which the complaint is founded is s. 24. It is to s. 36 (1) of the Act that we must look for the code for the enforcement of the provisions of Part IV of the Act. Section 36 (1) states: "The provisions of the Fifth Schedule shall have effect for the purpose of the enforcement of the Act".

The code for the enforcement of the three sections of Part IV of the Act is found in Part III of the Fifth Schedule, and thus an offence for contravention of s. 24 of Part IV is made punishable under Part III of the Fifth Schedule, in particular, by virtue of paras. 1 and 3 thereof. This part of the Fifth Schedule makes a contravention of any of the provisions of Part IV an offence of the same kind and punishable in the same way, as offences under the customs enactments in relation to the illegal importation or exportation of goods. Paragraph 3 of Part III of the Fifth Schedule provides for the penalty that can be imposed for a contravention of any of the exportation prohibition provisions of Part IV of the Act.

The Statement of Offence in this appeal as set out earlier was, therefore, inaccurate in the sense that it was treating paragraph 3 of Part III of the Fifth Schedule (the penalty provision) as creating the offence of bringing currency notes to the airport for the purpose of being exported. The question is whether this is a defect of such a nature as to be fatal. No objection was taken either by the appellant, or through his counsel, at the hearing of the case before the magistrate, that the complaint as laid was bad in law. There was no submission made either preliminary to the hearing of the case before the magistrate, or at its close, that the appellant was in any way prejudiced or misled by not being informed, or sufficiently informed, of the section of the Act which was contravened. Nor was there any request by the appellant for further and better particulars of the charge.

Counsel now appearing for the appellant has, however, submitted to this Court that the absence from the charge as laid of the section creating the offence makes the charge bad beyond correction. He says it is a fatal defect: whereas counsel for the respondent submits that if there is a defect in the charge (which is not admitted) through omission to state the offence-creating section, that defect can be cured by amendment which this Court has the power to do in like manner as the magistrate at the trial could have done under s. 95 of the *Summary Jurisdiction (Procedure) Act, Cap. 10:02,* and the Full Court under s. 24 of the *Summary Jurisdiction (Appeals) Act, Cap. 3:04.* For the purpose of this appeal it is necessary to advert to the form and requisites of a complaint as set out in s. 7(1) and s. 7 (4) of the *Summary Jurisdiction (Procedure) Act, Cap. 10:02.* Section 7 (1) reads:

> "No complaint need be in writing, unless it is required to be so by the written law on which it is founded or by some other written law, but if a complaint is not made in writing, the clerk shall reduce it into writing."

Section 7 (4) states:

> "The description of any offence in the words of the written law creating the offence, or in similar words, with a specification so far as practicable of the time and place when and where the offence was committed, shall be sufficient in law."

There is nothing in that section which requires the complaint to contain any reference to the section of the Act under which a defendant is charged. Once the substance of the complaint is expressed in language which describes the offence either as it is worded in the enactment or in similar words, with a specification so far as practicable of the time and place when and where the offence was committed, that will be a sufficient compliance with the statutory requirements of a valid complaint. An amendment was made to the *Summary Jurisdiction (Procedure) Act* in the year 1932. Though this later sub-section *of Cap. 10:02.* namely s. 110 (2) has enacted that if the offence charged is one created by written law it shall contain a reference to the section of the written law creating the offence it would appear sub-s, (4) of the same section preserves the position set out in s. 7 referred to above. Section 110 sub-s, (4) reads as follows:

> "Any information, complaint, summons, warrant or other document to which this section applies which is in such form as would have been sufficient in law, if this Act had not been enacted shall, notwithstanding anything in this section continue to be sufficient in law."

The object is to ensure that a defendant is properly alerted as to what facts are alleged against him, so that he will experience no difficulty in judging for himself

whether they constitute an offence, and that he will not be misled or prejudiced in the preparation of his case to meet that charge. A court has the power to see that this object is not defeated. Section 95 (2) of the *Summary Jurisdiction (Procedure) Act, Cap. 10:02* provides, that no objection shall be taken or allowed, in any proceeding in the Court, to any complaint, etc., for any alleged defect therein in substance or in form, or for any variance between any complaint or summons and the evidence adduced in support thereof: "Provided that if any variance or defect mentioned in this section appears to the court at the hearing to be such that the defendant has been thereby deceived or misled, the court may make any necessary amendments, and, if it is expedient to do so, adjourn, upon such terms as it thinks fit, the further hearing of the cause."

In this appeal, the appellant was being informed in the complaint under "Statement of Offence" that what was alleged against him was that he brought currency notes to an airport for the purpose of exportation. This constitutes a violation of s. 24 (1) of Part IV of the Act, and an offence under Part III of the Fifth Schedule to the Act. In the "Particulars of Offence" the appellant was informed as to when and where and in what manner he had committed the act which constituted the complaint laid against him. In my view, the description of the offence with a specification of the time and place when and where the offence was committed and the reference to Part III of the Fifth Schedule to the Act, had supplied the appellant with sufficient information to make him aware that he was being charged with an offence constituted by virtue of the combined effect of Part III of the Fifth Schedule of the Act and s. 218 *of the Customs Act Cap. 82:01*. [See R. v. Goswami [1968] 2 All E.R. 24]. The appellant was in no way deceived or misled in substance or in form by the complaint laid against him. In the circumstances, this ground of appeal cannot be upheld.

The second ground argued was that the prosecution has failed to prove that the currency found was, legal tender in the United States of America in so far as the American notes were concerned and legal tender in Canada as regards the Canadian notes. In proof of the charge as laid, the case for the prosecution rested chiefly on the evidence of Ronald Hunte, an officer of the Customs and Excise Department, stationed at Timehri Airport. The relevant portions of his evidence in relation to this ground of appeal are these:

> "I asked him (defendant) how much currency he declared on the form. He told me he declared $23.00 Canadian currency. I asked if that was all the money he had in his possession. He said 'Yes'.

I asked if he had other currency. He said he had none. I asked the defendant if the black handbag and the briefcase was (sic) his. He said 'Yes'. I opened the bag-a plastic jar, which appeared to have achaar. I found a glass container which appeared to have a quantity of currency. I

> asked Hazari what was inside the glass container. He said he had some Canadian and American currency. ... I proceeded to search the other two jars and found in the jar a similar glass container which contained what appeared to be currency. In a third container I found a third glass container which also appeared to have currency. I searched Hazari's clothing. I found a quantity of currency".

Hunte's further testimony was to the effect that in the first glass container he found "$698.00 made up of United States and Canadian currency". In the second glass container he found "$1,340.00 Canadian and United States currency ". The currency in the third glass container "was $414.00 Canadian and American currency". The currency found in Hazari's clothing "was $62.00 Canadian and American currency". The list of currency found was made in the presence of the appellant and tendered in evidence. The notes found were also tendered in evidence as exhibits, and the envelopes containing them were opened and the exhibits inspected by this Court. On a number of the notes, both the American and Canadian notes, were printed the words that they were legal tender. Hunte warned the appellant of prosecution and cautioned him. He told Hunte: "Officer, it don't need all of that-this is life man. I take a chance and you have to do your duty." Hunte then asked him if all the currency was good currency. Hazari, in reply, asked what Hunte meant by that, to which the witness said: "Are all the currency legal tender of America and Canada?" The appellant's reply was: "All is good money".

Ronald Hunte's evidence was not challenged. There was no suggestion put to the witness that his testimony was not true, nor did the appellant in his defence in any way dispute or contradict what had been given in evidence by Hunte. Against the background of this evidence, the soundness of the submission of learned counsel is to be examined. The complaint against the appellant was that he took to Timehri Airport currency notes amounting to 1945 United States of America dollars, which were legal tender in the United States of America, and 569 Canadian dollars, which were legal tender in Canada, for the purpose of exporting same from Guyana without having obtained the permission of the Minister. The statutory prohibition is against the taking by a person to an airport, for the purpose of exporting, "of notes of a class which are or have at any time been legal tender in Guyana or any part of Guyana or in any other territory". This is only one of the many aspects with which the *Exchange Control Act* is concerned. As can be gleaned from the various prohibitions, the Act is a far-reaching measure designed for the protection of the national economy.

Hunte speaks of having found in the possession of the appellant so many dollars made up of Canadian and American currency. "Currency" as ordinarily and commonly used means "money current in actual use in a country." The import of Hunte's evidence is that he found money which was Canadian and American

money current in actual use in those countries. The notes were tendered in court as real evidence and their genuineness was not disputed. I hold, that money that is legal tender in a country, is money that is current in actual use in that country. Implicit, therefore, in Hunte's evidence is the fact that the money found was legal tender, at the time of finding, in Canada and the United States of America. It cannot be denied that Canadian and American currency are foreign currency. "Foreign Currency" has been defined by s. 3 (4) of the *Exchange Control Act, Cap. 86:01* which is as follows:

> "(a) the expression 'foreign currency' does not include any currency or notes issued by the Government or under the laws of any part of the schedule territories but, save as aforesaid, includes any currency other than Guyana dollars and any notes of a class which are or have at any time been legal tender in any territory outside Guyana ..."

The expression is wide enough to cover not only foreign notes current in actual use but also foreign notes which were at some time legal tender but ceased to be so. Hunte's evidence that the money found were dollars which were made up of Canadian and American currency, went unchallenged by cross-examination and uncontradicted by evidence. His statement of fact in proof of an ingredient of the complaint was not controverted. His means of knowledge that what he had found was Canadian and American currency was not examined or tested. It would have been interesting to know, if this evidence was challenged by cross-examination, whether his answers might have revealed that he was not speaking from his own knowledge of the notes but from what he had heard in relation to them, in which latter case his admission would have been of no real evidential value. Far from there being any probe by the defence into Hunte's means of knowledge, there was a confirmation of this aspect of his evidence by the appellant's admission to Hunte, at the time of the finding of the concealed notes in one of the glass containers, that they were some Canadian and American currency. It is important to note also that the currency found were not declared on the declaration form tendered and admitted in evidence as Exhibit A' as being on his person or in his baggage, as it was his duty to declare in accordance with the law. He was aware that he was required to declare on Exhibit "A" the names of the currency in his possession and the countries of issue.

Hunte's evidence of the appellant's admission was not challenged, and, further, there was nothing in the evidence to indicate that the appellant's means of knowledge that the notes were Canadian and American currency was based on hearsay. At the close of the case for the prosecution, there was, therefore *prima facie* evidence in proof of the fact that the notes found were legal tender in the United States of America and in Canada. In the circumstances of this case, there was no need for proof from some other source, for example, by expert evidence, that the notes found were legal tender in the two countries. The inference which a court

can reasonably draw from the uncontradicted evidence of Hunte, is that the notes were printed and issued in those countries. On the aspect of the competence of a court to accept the unchallenged evidence of a witness; see the observations of this Court in Nabi Baksh and *anor* v. Drupattie *et al* ((1969) Criminal Appeal [No. 1 of 1969]), and Alladat Khan v. Bhairoo and De Castro ([1970] 17 W.I.R. 192).

The last ground argued by counsel for the appellant concerns the penalty section, s. 218 of the *Customs Act, Cap. 82:01,* which is applicable for the offence charged. The point taken is that the purported election by W.G. Persaud, Barrister-at-Law, on behalf of the Comptroller for a fine of treble the value of the currency found was invalid, as not having been made in accordance with the law. It was submitted that the election should have taken the form of evidence led by the Comptroller, or his duly authorised officer, making the election on oath. It was not contended, nor do I think it could seriously have been contended, that Mr. Persaud could not properly have represented the complainant Burnett, Officer of Customs & Excise, at the hearing, and conducted the prosecution. (See Dyer v. Tully [1894] 2 Q.B. 794). What was urged, however, was that the statement made by Mr. Persaud, after the appellant had been convicted of the offence, and recorded as follows on p. 17 of the record: "Mr. Persaud states that the Comptroller is electing for a penalty treble the value of the currency found" did not constitute a valid election. The cases of D'Oliveira v. Stoll and D'Oliveira v. John Partin, heard in the Magistrate's Court in the years 1966 and 1970 respectively, were referred to as examples of the practice and procedure of the Courts in Guyana when election was made. In both cases, after the defendants were found guilty, D' Oliveira, an Officer of Customs & Excise, took the witness-stand, and testified that he averred that the Comptroller of Customs & Excise had elected that the penalty in the case should be three times the value of the goods. The truthfulness of that averment was tested by cross-examination in the latter case. The same procedure was adopted in Roopnarine v. Heyliger ([1956] L.R.B.G. 61), in which, on the defendant being found guilty, the Comptroller of Customs testified that he was electing, as empowered by s. 217 of the *Customs (Consolidation) Ordinance, 1952,* that the punishment should be treble the value of the gold seized.

Section 218 of the *Customs Act, Cap. 82:01,* under consideration, and before amendment by s. 3 of the *Exchange Control (Amendment) Act, No. 28 of 1975,* reads:

> "Every person who -
>
> (a) .....
>
> (b).....

(c) .....

(d) .....

(e) .....

Shall be liable for each such offence to a fine of treble the value of the goods or one thousand dollars at the election of the Comptroller; and all goods in respect of which any such offence shall be committed shall be forfeited."

In the circumstances of this case, it was necessary for evidence to be adduced by the prosecution of the Comptroller's election. This would then have given the defendant an opportunity of cross-examining the witness, with a view to proving the contrary, to wit, that the purported election was not validly made. An election brings into operation a provision which has the effect of depriving the magistrate of the discretion of fixing punishment, and the imposition by him of a fine of treble the value of the seized articles might well prove to be highly penal. The procedure of evidence of election on oath was not adopted in the matter under review, and for this reason I hold that the submission made on this aspect is sound. There was no proof that the Comptroller had exercised his right of election for a fine of treble the value. The learned magistrate had acted on the basis that the election was validly made and proceeded to impose punishment in accordance with the provisions of the section. He had, therefore, acted on a wrong principle. I would dismiss the appeal and vary the sentence by substituting a fine of $1,000.00 in default of payment of which, a term of imprisonment for six months.

Until I have the benefit of full argument from both sides, I would not like to express an opinion on the question whether or not the evidence of election to be adduced by the prosecution must be given before a defendant is convicted. This point was taken by counsel for the defendant in Roopnarine v. Heyliger (*supra*) but the members of the Full Court held that they did not subscribe to the contention that the election by the Comptroller should have been before conviction.

**Appeal dismissed.**
**Conviction and forfeiture affirmed. Sentence varied to a fine of $1,000.00 or six months imprisonment in default thereof.**

**Re: Trade Marks Act & General Foods Corporation**

**IN THE MATTER OF THE TRADE MARKS ACT**
**AND**
**IN THE MATTER OF AN APPLICATION BY**
**GENERAL FOODS CORPORATION**

[Court of Appeal (Haynes C., Persaud and Crane, JJ.A.) October 17, 1975; April 1, 1976]

*Trade Mark-Application for Registration of word-mark-"JELL-O"-Application rejected because mark has direct reference to the character or quality of certain named food products-Distinctiveness of mark-Whether descriptiveness and distinctiveness of mark are irreconcilable attributes-Trade Marks Ordinance, Cap. 340 (now Trade Marks Act, Cap. 90:01, ss 11 and 12).*

*Preliminary Objection Order of Judge in Chambers on appeal from Registrar of Trade Marks-Not identical for appellate purposes as Order of Judge of the High Court made in Chambers-Appeal from Registrar's ruling is directly to Court of Appeal, not compulsorily via the Full Court of the High Court-Court of Appeal Act. Cap. 3:01. s. 6 (2) (a) (i). s. 6 (2) (d)-Rules of the High Court. Cap. 3:02, 0.41, r. 1-Trade Mark Rules. Cap. 90:01, rr 117-123.*

The applicants applied for registration under class 30, Parts A and B of the Register of Trade Marks, of the word "JELL-O" as a trade mark in respect of the following foodstuffs, *viz.*, coffee, tea, cocoa, sugar, rice, tapioca, sago, coffee substitutes; flour, and preparations made from cereals; bread, biscuits, cakes, pastry and confectionery; ices, honey, treacle, yeast, baking powder, salt, mustard; pepper, vinegar, sauces; spices; ice.

The Registrar of Trade Marks took objection to such registration on three grounds, *viz.*, under s. 11 (1) (c), (d) and (e) of the *Trade Marks Act. Cap. 90:01*. He heard arguments from the parties and rejected the application in respect of both Parts A and B in the case of those products that have a tendency to congeal or set when cold. The objections to registration were: (i) that the word "JELL-O" is not an invented word; (ii) that it has a direct reference to the character or quality of the goods; and (iii) that it is not distinctive.

The appellants appealed from the Registrar's decision to a judge of the High Court in Chambers on grounds (ii) and (iii) above, and, on the appeal being dismissed, they appealed to the Court of Appeal. There, it was contended that the judge on review erred by agreeing with the Registrar to disallow registration of the word "JELL-O", on the ground that it has a direct reference to the character or quality of the goods, because the products to which objection was taken, *viz.*, tapioca, sago, preparations made from cereals, ices and ice, do not really jell, and

even if they do jell, the judge had failed to consider whether the character or quality of the products was direct or indirect.

Counsel for the Registrar raised a point *in limine* that since the appeal was one from a judge in chambers it had to go to the Full Court of the High Court and only then to the Court of Appeal with leave of the Full Court or the Court of Appeal.

**HELD:** (Overruling the preliminary objection): That since an appeal from an order of the Registrar of Trade Marks is regulated by rr. 117-123 of the *Trade Mark Rules, Cap. 90:01.* and is made pursuant to s. 6 (2) (d) of *Cap. 3:01,* it can proceed directly to the Court of Appeal from the judge on review from the Registrar. This is unlike an appeal from an order of a judge of the High Court made in chambers within s. 6 (2) (a) (i) of the *Court of Appeal Act. Cap. 3:01,* which is an order made under 0.41. r. 1 of the *Rules of the High Court, Cap 3:02,* and which must therefore be filtered through the Full Court before it can reach the Court of Appeal.

**HELD:** (*per* HAYNES, C., CRANE, J.A. dismissing the appeal):

(1) The Registrar, having made a specific finding of fact with which the judge on review agreed, *viz.*, that the word-mark "JELL-O" is "descriptive of those products in the application and so offends against s. 11 (1) (d)" of the Act, that was a finding that "JELL-O" had a direct reference to the character or quality of the food products in question.

(2) No applicant ought to be allowed to register a descriptive word because such words are the property of all mankind and it would be wrong to allow am individual a monopoly of them.

(3) The mark "JELL-O" will have a direct reference to one or more food products if it is so descriptive of any one or more of them as to become identified therewith in terms of its own definition. If that is so, and the judge had so found, then registration of the word was rightly refused.

(4) The mark when referred to in terms of "ices" is plainly descriptive in terms of it's ordinary dictionary connotation, i.e., to convert from the liquid to the solid state, by cold.

(5) The judge on review from the Registrar did not err in thinking that the mere fact that the word-mark "JELL-O" is descriptive, disqualifies it for registration under s. 11 (1) (e) on the ground of distinctiveness because he appeared to have recognised that whether "JELL-O" is inherently distinctive of the products *of* General Food Corporation was a question of fact for him to determine.

(6) The criterion for registration of "JELL-O" is not whether any particular product in respect of which it is sought to register the mark is solid or gelatinous in nature. The true test is whether the mark has no direct reference to the character or quality of the food products under consideration.

(7) The learned judge came to the right conclusion that registration of the mark "JELL-O" in relation to the five products in question was properly refused and properly permitted in respect to others by the Registrar.

(8) (*per* PERSAUD, J.A., allowing the appeal in part) That the word "jell" has come to refer to gelatinous substances rather than to solids. Therefore "ices" and "ice" being solids in character rather than of a gelatinous nature, the mark would have no direct reference to the character and quality of "ices" and "ice" and so would be registrable under s. 11 (1) (d) of *Cap. 90:01*.

However, the other products excepted by the Registrar were properly excluded on the ground that the mark has a direct reference to the character and quality of the goods.

**Appeal dismissed. Order of the Registrar of Trade Marks affirmed.**

**Editorial note:** This case is also reported in (1976) 22 W.I.R. 253.

**Cases referred to:**

(1) George Banham & Co. Ltd. v. Reddaway & Co. Ltd. [1927] A.C. 406; 136 L.T. 485; 43 T.L.R. 138; 71 Sol. Jo. 34.

(2) Yorkshire Copper Works v. Regr. of Trade Marks [1954] 1 W.I.R. 554; [1954] 1 All E.R.570;98 Sol. Jo. 211.

(3) H.G. Burford & Co's Appln. [1919] 2 Ch. 28; 88 L.J. Ch. 186; 120 L.T. 591; 35 T.L.R. 319; 63 Sol. Jo. 409; 36 R.P.C. 139. *C.A.*

(4) Eastman Photographic Materials Co. Ltd.'s Appln. [1898] A.C. 571; 67 L.J. Ch. 628; 79 L.T. 195; 47 W.R. 152; 14 T.L.R. 527.

(5) In re Meyerstein's Trade Mark (1890) 43 Ch. D. 604; 59 L.J. Ch. 401; 62 L.T. 526; 38 W.R. 440; 7 R.P.C. 114.

(6) Re Compagnie Industrielle Des Petroles' Appln. [1907] 2 Ch. 435; 76 L.J. Ch. 646; 97 L.T. 235; 23 T.L.R. 672.

(7) Regr. of Trade Marks v. W. & G. Du Cros. Ltd. [1913] A.C. 624; 83 L.J. Ch. 1; 109 L.T. 687; *sub nom* Re Du Cros' Appln. Regr. of Trade Marks v. Du Cros 30 R.P.C. 660; 43 Digest 155. 138.

(8) Eno's Case (1890) 15 A.C. 252.

(9) R.J. Lea's Application [1913] 1 Ch. 446; [1912] 2 Ch. 32; 81 L.J. Ch.

489; 106 L.T. 410; 28 T.L.R. 258; 56 Sol. Jo. 308; 29 R.P.C. 165.

(10) Re Clark. Son & Morland Ltd.'s Trade Mark [1938] 2 All E.R. 377; *sub nom.* Baily & Co. Ltd. v. Clark, Son & Morland [1938] A.C. 557; 107 L.J. Ch. 193; 159 L.T. 361; 55 R.P.C. 253; Digest Supp.

(11) In re Joseph Crosfield & Sons. Ltd. [1910] 1 Ch. 130; 79 L.J. Ch. 211; 101 L.T. 587; 26 R.P.C. 837; 43 Digest 153. 114.

(12) Demerara Electric Co. Ltd v. Commr. of Inland Revenue (1961). No. 1108, Demerara.

(13) In re Farbenfabriken Appln. [1894] 1 Ch. 645; 63 L.J. Ch. 257; 70 L.T. 186; 42 W.R. 488; 10 T.L.R. 260; 38 Sol. Jo. 251; 7 R.P.C. 439. C.A.

(14) Re California Fig Syrup Co. [1910] 1 Ch. 130; 79 L.J. Ch. 211; 101 L.T. 587; 26 T.L.R. 100; 26 R.P.C. 846. C.A.

(15) Pepsi-Cola Co. v. Coca-Cola Co. [1939] L.R.B.G. 252.

(16) In re H.N. Brock & Co. Ltd. [1910] 1 Ch. 130; 79 L.J. Ch. 211; 101 L.T. 587.

(17) Re. J & P. Coats Ltd. Appln. [1936] 2 All E.R. 989.

(18) Smitsvonk N.V.'s Appln. (1954) 72 R.P.C. 117.

Appeal from an order of the Registrar of Trade Marks.

J.A. King S.C., for the applicants.
S.Y. Mohamed, Senior Legal Adviser, for the Registrar.

**PERSAUD J.A.:** This appeal comes to this Court by leave of the judge in the Court below. In 1971, the applicants General Foods Corporation, a corporation organised and existing under the laws of Delaware in the United States of America, made application to the Registrar of Trade Marks for registration in Part A of the register of Trade Marks of the mark "JELL-O" in class 30 in respect of coffee, tea, cocoa, sugar, rice, tapioca, sago, coffee substitutes, flour, and preparations made from cereals; bread, biscuits, cakes, pastry and confectionery; ices, honey, treacle, yeast, baking-powder, salt, mustard, pepper, vinegar, sauces; spices; ice.

The application was made under s. 19 of the *Trade Marks Ordinance, Cap. 340* (now the *Trade Marks Act. Cap. 90:01)* which enables the Registrar to refuse an application, or to accept it absolutely or subject to such amendments, modifications, conditions or limitations, if any, as he may think right (sub-s. (2)).

Subsection (3) authorises the Registrar, provided the applicant is willing, instead of refusing the application, to treat it as an application to register under Part B of the register, and to deal with it accordingly. The Registrar found that the mark was registrable in Part A of the register only in respect of those goods included in the application which do not jell, *viz.*, coffee, tea, cocoa, sugar, rice, coffee substitutes; flour, bread, biscuits, cakes, pastry and confectionery; honey, treacle, yeast,

baking-power; salt, mustard; pepper, vinegar, sauces; and spices; and he refused registration in Part A or Part B in respect of tapioca, sago; preparations made from cereals, and ices and gave as his reasons that there was not sufficient evidence of user; that the word is not an invented one, it has a direct reference to the character or quality of the goods concerned, and it is not distinctive. On appeal to a judge in Chambers, the applicants argued that the Registrar was wrong in finding: (1) that the mark was descriptive of the goods in respect of which he had refused registration; and (2) insufficiency of user. The learned judge affirmed the finding of the Registrar and dismissed the appeal.

It has been said that registration of a proposed trade mark is not an absolute right, but rather a privilege which under certain circumstances so far approximates to an absolute right that it must be granted; that the Registrar has a discretion whether to register or not, but such discretion must be reasonably and not capriciously exercised; and that while the statute gives a right of appeal from the decision of the Registrar, unless he has gone clearly wrong, his decision ought not to be interfered with. "The reason for that is that it seems to me that to settle whether a trade mark is distinctive or not and there is the criterion laid down by the statute is a practical question, and a question that can only be settled by considering the whole of the circumstances of the case." *per* VISCOUNT DUNEDIN in George Banham & Co. Ltd. v. Reddaway & Co. Ltd., [1927] A.C. at p. 413. And in Yorkshire Copper Works v. Regr. of Trade Marks [1954] 1 All E.R. at p. 572 LORD SIMONDS, in speaking of borderline cases said:

> "... I think a court to which an appeal is brought from the Registrar, though, no doubt, it must exercise its own discretion in the matter, should be slow to differ from the experienced official whose constant duty it is to protect the interests of the public not only of today, but of tomorrow and the day after."

On the other side of the line, so to speak, stands the *dictum* of EVE, J. in H. G. Burford & Co.'s Appln. [1919] 2 Ch. at p. 49, to this effect:

> "The Act was framed to stimulate commercial enterprise by giving the trader adequate protection for the results of his enterprise, and every application to obtain that protection must be decided on its own merits whatever the consequences may be. I venture to think that, having regard to the full opportunities afforded to all who may object to the registration being completed to show cause why it should not be completed, the Court ought not to be astute to discover reasons for refusing the application *in limine* but should incline rather to extending to the trader who has honestly and legitimately used a mark a fair opportunity of establishing his right to the statutory protection for the same."

**Re: Trade Marks Act & General Foods Corporation**

Section 11 (1) of the *Trade Mark Act* sets out the essential particulars which a trade mark must contain or consist of in order to make it registrable in Part A of the register. Among them are the following:

> "(c) an invented word or invented words;
>
> (d) a word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname;
>
> (e) any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the foregoing paragraphs (a), (b), (c) and (d), shall not be registrable under the provisions of this paragraph except upon evidence of its distinctiveness."

And sub-ss. (2) and (3) provide as follows:

> "(2) For the purposes of this section 'distinctive' means adapted, in relation to the goods in respect of which a trade mark is registered or proposed to be registered, to distinguish goods with which the proprietor of the trade mark is, or may be connected in the course of trade from goods in the case of which no such connection subsists, either generally or, where the trade mark is registered or proposed to be registered subject to limitations, in relation to use within the extent of the registration.
>
> (3) In determining whether a trade mark is adapted to distinguish as aforesaid the tribunal may have regard to the extent to which-
>
> (a) the trade mark is inherently adapted to distinguish as aforesaid; and
>
> (b) by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact adapted to distinguish as aforesaid."

The divisions (c), (d) and (e) of s. 11 (1) above are separate and distinct, so that the fact that a thing is not an essential particular under one heading will not prevent its being a proper essential particular under another heading. And qualifications under more than one heading is also possible. (See Eastman Photographic Materials Co. Ltd.'s Appln. [1898] A.C. 571 popularly referred to as the 'Solio' case.) In the court below it seems that the applicants in this case were contending that "JELL-O" was an invented word, and therefore did qualify under para, (c) of s. 11 (1) of the Act. The judge agreed with the Registrar and decided against the applicants; the point was not pursued before this court. If, in fact, it

could be said that the word "JELL-O" was an invented word, then even though it might contain 'a covert and skilful allusion' to the character or quality of the goods it would have been registrable. But if it is not an invented word, and it refers to the character and quality of the goods in respect of which registration is sought, it does not quality for registration under the Act. See In Re Meyerstein's Trade Mark (1890) 43 Ch. D. 604, where an application to register the word 'Satinine' was refused on the ground that not only was it not an invented word, but it was descriptive of the article, to wit, laundry starch. While in Re Compagnie Industrielle Pes Petroles' Appln. [1907] 2 Ch. D. 435, it was held that the word 'motorine' had no direct reference to the character or quality of the goods which consisted of lubricating oil. WARRINGTON, J. said (*ibid* at p. 446):

> "The goods in question consist of lubricating oil, I cannot see how the word 'motorine' has any direct reference to the character or quality of these goods. No doubt it suggests that in some way they are oils which are to be used in connection with a motor, but beyond that it has no reference either to the character or to the quality of the goods, and such reference as the use of the two syllables of the word 'motor' in the word 'motorine' has to the character or quality seems to me not to be that direct reference which the Act contemplates."

But in the instant case the Registrar expressed the view that the word 'JELL' referred to the character and quality of ice, ices, tapioca, sago, and preparations made from cereals. Describing the function of the Registrar of Trade Marks, LORD SHAW OF DUNFERMLINE said in Regr. of Trade Marks v. W. & G Du Cros. Ltd. [1913] A.C. at p. 629:

> "My Lords, in my opinion, that official, when an application for registration is made, has not only an administrative but also a quasi-judicial function. I think he has to exercise a discretion, exercising it of course, in a judicial spirit. To use the words of LORD HERSCHELL in Eno's case (15 A.C. at p. 261); 'while he in certain cases is prohibited from registering, a discretion whether to register or not seems in all cases plainly conferred. Of course, this discretion must be reasonably and not capriciously exercised.'"

And it is accepted that in exercising his quasi-judicial function, the Registrar is entitled to have recourse to his specialised knowledge of these matters.

In the *Nutall's Standard Dictionary* the word 'jelly' is defined as anything gelatinous or glutinous; the inspissated juice of fruit boiled with sugar; a transparent sizy substance obtained from animal substances by decoction; and the verb means to turn or be converted into jelly, while the meaning attributed to the adjective 'jellied' is brought to the consistency of jelly; cased in jelly. In the *Webster's*

*International Dictionary* the word is defined as (1) a soft, resilient, partially transparent semi-solid gelatinous food resulting from the cooling of fruit boiled with sugar, or meat juice cooled down. (2) Any substance like this; gelatinous substance. And in the *Chambers' Twentieth Century Dictionary* the word 'jelly' is defined as anything gelatinous; and the intransitive verb is to set as jelly, to congeal, while the transitive verb is to make into a jelly "Jellied" is defined as being in a state of jelly; enclosed in jelly

It would seem that the word jell' has come to refer to gelatinous substances rather than to solids, and I find it difficult to accept that it has a direct reference to ice or ices, so as render it unregistrable on that score. I would have thought myself that ice and ices were solids in character rather than of a gelatinous nature, in which case the mark under discussion would have no direct reference to the character and quality of those two items, and would therefore be registrable under s. 11 (1) (d) of the Act. However, I agree that the other articles excepted by the Registrar were properly excluded on the ground that the mark has a direct reference to the character and quality of the goods.

The other ground argued, is that even if the mark is descriptive of the goods, its distinctiveness would permit of its registration under s. 11 (1) (e) of the Act. I have already made reference to the subsection earlier on. The expression, 'adapted to distinguish' is also to be found in s. 9 of the English *Trade Marks Act of I905*, and was considered in R.J. Lea's Application [1913] 1 Ch. 446, where HAMILTON, L.J. had this to say;

> "... the mere proof or admission that a mark does in fact distinguish does not *ipso facto* compel the judge to deem that mark to be distinctive It must be further adapted to distinguish, which brings within the purview of his discretion, the wider field of the interests of strangers and of the public."

In this case, the applicants relied on s. 11 (3) (b) which speaks of the tribunal having regard to the extent which 'by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact adapted to distinguish ...', but I agree that the evidence as to user, as is contained in the two affidavits sworn to by two housewives falls short of what is required. Indeed, the records disclose that the affidavits were never before the Registrar, with the result that there was really no evidence of user before him. The affidavits were put before the judge on appeal. But in any event, there is not, in my opinion, enough to show that degree of universality which is required. Mere user is not necessarily decisive. Even if it was felt that the mark was registrable by reason of its distinctiveness based on user, it is to be remembered that distinctiveness is not conclusive upon the questions whether a mark is 'distinctive' as defined by the Act, and whether it ought to be registered. See Re Clark Son & Morland Ltd.'s Trade Mark [1938] 2 All E.R.

377). This is how the matter was put in In Re Joseph Crosfield & Sons Ltd., [1910] 1 Ch. 130, by FLETCHER MOULTON, L.J. (at p. 147):

> "... if the tribunal is of the opinion that the nature of the word is such that it is adapted to distinguish those particular goods of the trader from those of persons, it will be its duty- in the absence of special circumstances-to allow the registration to proceed. But the applicant is not confined to arguments drawn from the word itself. He may support his application (in the case of a mark already in use) by showing that by user, the mark has in fact become more or less completely identified with the goods by having been continuously used in connection therewith, and the statute expressly provides that the Court may take this into consideration for the purposes of its decision. To my mind, this provision can bear but one interpretation. It recognises that distinctiveness i.e., being adapted to distinguish the goods from those of other traders, is not necessarily an innate quality of the word. It may be acquired."

Had the evidence been of a more supportive nature, perhaps the applicants might have stood on firmer ground. I would, therefore, affirm the findings of the learned judge, save only for his order as regards ice and ices.

At the commencement of this appeal, counsel for the Registrar had submitted *in limine* that this court has no jurisdiction to hear this appeal in view of the provisions of s. 6 (2) (a) (i) of the *Court of Appeal Act. Cap 3:01,* which precludes an order of a judge of the High Court made in Chambers or in a summary proceeding being made the subject of an appeal to this court. Counsel argues that the proper forum is the Full Court of the High Court as is provided for by s. 6 (4) of the Act, and then to this court only with the leave of the Full Court or of this court. Counsel for the applicants contends that this is an appeal under s. 6 (2) (d) of the Act which enables appeals to be brought from any order of the Full Court or a judge of the High Court where such order is 'an order upon appeal from any other court, tribunal, body or person'. He argues that in dealing with applications for registration in the Trade Marks Register, the Registrar is a tribunal within the meaning of that expression as is used in s. 6 (2) (d). He seems to have some support from LORD SHAW OF DUMFERLINE in Regr. of Trade Marks v. W. & G. Du Cros Ltd. [1913] A.C. at p. 629, to which I have already referred. And in Demerara Electric Co. Ltd. v. Commr. of Inland Revenue (1961) No. 1108 Demerara, a decision of the Full Court which concerned an appeal against an assessment of income tax to that court from a judge in Chambers the effect of s. 6 of the *Court of Appeals Act* [then s. 9 of the *Federal Supreme Court (Appeals) Ordinance 1958 (No. 19)*] was considered. It was there conceded that the Federal Supreme Court had exclusive jurisdiction to hear appeals from a judge in Chambers which are made upon appeal from any court, tribunal, body or person, and it was held that an appeal from a judge in Chambers from an assessment made by the Commis-

sioner of Inland Revenue was an appeal within the meaning of the Ordinance.

I am of the view that this is an appeal within the meaning of s. 6 (2) (d) of the *Court of Appeal Act Cap. 3:01,* and leave of the Full Court having been obtained, the provisions of sub-s. (3) have been complied with, I would hold, therefore, that this is the proper forum in which an appeal of this nature is to be heard.

As I have indicated earlier, I am prepared to allow this appeal in part only in the manner shown. In the circumstances, I would order the Registrar to amend the register to include ice, ices, but I would affirm that the other articles should be excluded for the reasons I have given. Each party should bear his own costs.

**CRANE, J.A.:** Paradoxical as it may seem, the order of dismissal made by GEORGE. J., though in fact made in chambers, was not "an order of a judge of the High Court made in chambers" within the meaning of s. 6(2) (a) (i) of the *Court of Appeal Act. Cap. 3:01.* The word "order" in that section means, it seems to me, an order made consequent on such an application as can be properly made in chambers either *ex-parte* or by summons under 0.41. r. 1 of the *Rules of the High Court, Cap. 3:02.*

An appeal to the High Court from a decision of the Registrar of Trade Marks under *Cap. 90:01* is, however, on a different footing. Such an appeal is not an application made pursuant to 0.41. r. 1 as aforesaid. The point about the order under review is that it does not stem from an application to a judge in chambers for an order under the *Rules of the High Court.* In effect, it is from an appeal from the decision of the Registrar of Trade Marks, and, what makes all the difference, it is regulated by rr. 117-123 of the *Trade Marks Rules, Cap. 90:01*.

So, contrary to the view of learned counsel for the respondent, who took the point *in limine,* the mere fact that the order disposing of the appeal happens to be made by the judge when sitting in chambers does not affect the matter at all. Admittedly, the entire trade mark appeal proceedings were heard in chambers and, as the order of court shows, the order was made there too, but that cannot make the order that which it is not, i.e., an "order of a judge of the High Court made in chambers". A judge always has a discretion whether a matter should be heard in chambers or not, and may adjourn from chambers into court or from court into chambers, as he pleases (0. 41. r. 15.) In fact, r. 120 of the *Trade Mark Rules* gives him the discretion to make directions for the hearing of the appeal which may, at his option, include a hearing in chambers. It provides as follows:

> "The Court may thereupon give such directions (if any) as they may think fit with respect to parties and evidence, or otherwise, for the purpose of the hearing of the appeal by the Court."

To appeal from an order made by a judge in chambers to this Court, one must do so either with leave of the Full Court or the Court of Appeal after a hearing in the Full Court. In other words, appeals from orders made by High Court judges in chambers must generally be filtered through the Full Court and from thence to us on appeal *via* s. 6(4) of the *Court of Appeal Act. Cap. 3:01;* but they cannot be heard by us directly from a judge in chambers thus by-passing the Full Court.

It is otherwise, however, in the case of an appeal like the present. As I have explained, *stricto sensu*, the order made is not "an order made in chambers", but an order made upon appeal pursuant to s. 6 (2) (d) of *Cap. 3:01*. i.e., "Upon appeal from any other court, tribunal, body or person" in this case on appeal from the Registrar of Trade Marks. An appeal in this case can therefore properly be made directly to us from the judge and not compulsorily *via* the Full Court as contended.

The submission *in limine* therefore fails.

On 22nd June, 1974, the applicants Messrs. General Foods Corporation, a foreign company organised and existing under the laws of Delaware in the United States of America, filed application No. 8353A under the *Trade Marks Act. Cap, 90:01*.

The application concerned registration in the name of GENERAL FOODS CORPORATION under class 30, Parts A and B of the Register of Trade Marks, of the word "JELL-O" in ordinary block capitals as a trade mark in respect of certain foods, *viz.*, coffee, tea, cocoa, sugar, rice, tapioca, sago, coffee substitutes; flour, and preparations made from cereals; bread, biscuits, cakes, pastry and confectionery; ices, honey, treacle, yeast, baking-powder, salt, mustard; pepper, vinegar, sauces; spices; ice.

The Registrar of Trade Marks took objection, as the law entitles him to do, to the application to register the mark on three grounds under s. 11(1) (c), (d) and (e) of the *Trade Marks Act,* and having heard argument, upheld all three of his objections, *viz.*, (i) that the word "JELL-O" is not an invented word; (ii) that it has a direct reference to the character or quality of the goods; and (iii) that it is not distinctive.

On the first objection, there is no appeal to this Court, just as there was none to the High Court from the Registrar's decision. An appeal on that ground would have been futile, I think, because the learned Registrar came to the correct conclusion which is supported by an abundance of authority that "JELL-O", being a combination of the ordinary English word 'jell' with the meaningless suffix 'o', could not have been "invented". (See Eastman Photographic Materials Co. Ltd.'s Appln. [1898] A.C. 571. In Re Farbenfabriken Appln. [1894] 1 Ch. D. 645, and

in In Re Meyerstein's Trade Mark (1890) 43 Ch. D. 604).

On the second objection, the Registrar concluded that since the dictionary meaning of the word 'jell' or 'gel' is "to reach the consistency of jelly, to congeal or to set" (see *Concise Oxford Dictionary;* Latin *gelo, gelare* = to freeze), the mark "JELL-O" is descriptive of such food products as above-mentioned, which, by their nature, have a tendency to congeal or to set. Thus, the mark will have a "direct reference to the character or quality of the goods, and therefore offend against s. 11(1) (d)."

On the third objection, it was found that there was insufficient evidence of user of the mark in relation to the products sought to be registered; that user of the mark on all products in the application was not supported, and that while the quantities were not stated, the value of their sales dated back only to 1964. Very important, too, was his finding that there was no proof of user from members of the public. So, on the sum-total of all these, the application for registration of the mark "JELL-O", was rejected in respect of both Parts A and B in the case of those products which have a tendency to congeal, i.e., to freeze, to convert from the liquid to the solid state by cold, or to set, *viz.*, tapioca, sago, preparations made from cereals, ices and ice. Registration was, however, allowed in Part A of all other food products which do not jell on preparation.

Dissatisfied with this decision, the applicants first appealed to the High Court and when the Registrar's decision was there upheld, they now appeal to this Court.

The registrability and validity of registration of a trade mark for admission to Part A and B of the Register are governed by ss. 11 and 12 of the *Trade Marks Act, Cap. 90:01.* and are in the following terms:

> "11. (1) In order for a trade mark (other than a certification trade mark) to be registrable in Part A of the Register, it must contain or consist of at least one of the following particulars:
>
> (a) the name of a company, individual or firm, represented in a special or particular manner;
>
> (b) the signature of the applicant for registration or some predecessor in his business;
>
> (c) an invented word or invented words;
>
> (d) a word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or surname;

(e) any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the foregoing paragraphs (a), (b), (c) and (d), shall not be registrable under the provisions of this paragraph except upon evidence of its distinctiveness.

(2) For the purposes of this section 'distinctive' means adapted, in relation to the goods in respect of which a trade mark is registered or proposed to be registered, to distinguish goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists, either generally or, where the trade mark is registered or proposed to be registered subject to limitations, in relation to use within the extent of the registration.

(3) In determining whether a trade mark is adapted to distinguish as aforesaid, the tribunal may have regard to the extent to which -

(a) the trade mark is inherently adapted to distinguish as aforesaid; and

(b) by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact adapted to distinguish as aforesaid.

12. (1) In order for a trade mark to be registrable in Part B of the register it must be capable, in relation to the goods in respect of which it is registered or proposed to be registered, of distinguishing goods with which the proprietor of the trade mark is or may be connected in the course of trade mark from goods in the case of which no such connection subsists, either generally or, where the trade mark is registered or proposed to be registered subject to limitations, in relation to use within the extent of the registration.

(2) In determining whether a trade mark is capable of distinguishing as aforesaid the tribunal may have regard to the extent to which -

(a) the trade mark is inherently capable of distinguishing as aforesaid; and

(b) by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact capable of distinguishing as aforesaid.

(3) A trade mark may be registered in Part B notwithstanding any reg-

> istration in Part A in the name of the same proprietor of the same trade mark or any part or parts thereof."

It was contended before us that the judge on appeal erred by agreeing with the Registrar to disallow registration of the word "JELL-O" on the ground that it has a direct reference to the character or quality of the goods because the products to which objection is taken do not really jell, and even if they do, he had failed to consider whether the reference to the character or quality of the products was direct or indirect.

For myself, I cannot see the force of this argument in view of the specific finding of fact by the Registrar, with which the judge agreed that the word mark "JELL-O", is descriptive of those products set out in the application "... and offends against s. 11(1) (d)" of the Act a finding which, I think, can have no other meaning than a direct reference to the character or quality of the goods. In my opinion, a specific finding that "JELL-O" is descriptive of the products clearly identifies that word with having a direct reference to those very products. So, if "JELL-O" "offends against" the section, then it follows that it must necessarily have a direct reference to the character or quality of the above-mentioned food products. The whole principle behind trade mark legislation is that no one ought to be granted the exclusive right to use a word that is descriptive of the character or quality of any goods because descriptive words are considered to be the property of all mankind, and it would be wrong to allow any individual to monopolize them by giving him a registered title to them against the world. The history of *Trade Marks Acts* is consistent on this point. (See Joseph Crosfield & Sons, Ltd. [1910] 1 Ch. 135).

Well as I can appreciate the importance of the Registrar neglecting to make a finding on whether there was a direct or indirect reference to the character or quality of goods, no such failure has arisen in this case. Here, I think, there can be no question that there was a failure to consider that aspect because of the express finding that there was a direct reference to the character or quality of goods. *Expressio unius exchusio alterius.* My researches into the origin of the word "direct" with reference to the character or quality of goods, have disclosed that the expression was not present in s, 64 (1) (e) of the *Patent, Designs and Trade Marks Act, 1888.* but was introduced for the first time into s. 9 (4) of the *Trade Marks Act, 1905*, and, according to the opinion of COZENS-HARDY, M.R. in Re California Fig Syrup Co. [1910] 1 Ch., at p. 141, its presence before the word "reference" perhaps allows "some words which have only an indirect reference to the character or quality to be registered". However that may be, whether a mark has such a direct reference as aforesaid is, in each case, largely a question of fact, and in deciding whether that is so, the Registrar has to examine the trade mark not in its strict grammatical significance, but as it would present itself to the public at large who are to look at it and to form a view as to what it connotes.

The appeal on the first ground therefore fails.

The second ground of appeal is that the judge erred in holding that a trade mark cannot qualify for registration on the ground of distinctiveness on the mere fact that it is descriptive.

After concluding that registration could not be allowed under s. 11 (1) (d) of the Act, the learned judge, on appeal from the Registrar, next went on to consider whether there was such evidence of distinctiveness as would permit registration under s. 11 (1) (e), which is quite permissible in law for him to do, notwithstanding his finding that the word "JELL-O" has a direct reference to the character or quality of the products in question and was not registrable for that reason. Accordingly, in considering whether the mark, was registrable in Part A or B, he considered, as the law requires him to do, firstly, whether there was any evidence that it was adapted to distinguish the products from those of the applicants' competitors; secondly, whether in the one case it was inherently adapted to distinguish the products (Part A registration), and in the other, whether it was capable of distinguishing the products (Part B registration). Being already in use, he also considered evidence of user of the mark in the form of two statutory declarations with a view to determining whether there was acquired distinctiveness, i.e., distinctiveness of the mark in fact. But, as it seems to me, it is evident that in so doing, he misdirected himself in relation to those affidavit declarations on user by two housewives on "JELL-O" products that the applicants laid over, with the judge's approval, some ten months after the Registrar gave his decision. Both affidavits are dated 24th July, 1973, i.e., after the Registrar's decision on 19th October, 1972, rejecting the application for registration of the mark "JELL-O".

The manner in which the learned judge misdirected himself was in the respect that he considered these two declarations on user by the housewives were present to the mind of, and before the Registrar when, in fact, they had not yet been sworn to. Mistaken references were consequently made as to what he thought the Registrar said about the declarations when that was clearly not the case. As a matter of fact, the judge expressed agreement with what he thought was said about them in this way:

> "Evidence of use was supplied by the affidavits of two housewives one of whom, according to the Registrar, was in the appellants' employ ... I agree with the Registrar that the affidavits fall far short of the type of evidence of user contemplated by ss. 11 and 12 of the Act."

That was, of course, erroneous. What had been completely overlooked by the judge was the fact that he himself had caused the two declarations to be admitted in the appeal proceedings before him. I do not, however, think a problem of any great magnitude arises from this misdirection, because the judge made his own

assessment of the evidence on those two declarations, apart from his erroneous reference to what he considered the Registrar had said about them. Also considered and agreed on was the Registrar's finding on the affidavit of the applicants' assistant secretary from which there was found to be no sufficient evidence of actual user of the products from members of the public who are the ultimate customers, their quantity or the value of their sales; nor did the evidence support user of the mark on all the products set out in the application for registration.

Generally speaking, a Court of Appeal is always loath to interfere with the decision of the Registrar of Trade Marks. In the case of George Banham & Co. Ltd. v. Reddaway & Co. Ltd. r [927] A.C., at p. 413 VISCOUNT DUNEDIN stated the principle and the reason for this approach as follows:

> "Now, it is true that an appeal lies from the decision of the registrar, but in my opinion, unless he has gone clearly wrong, his decision ought not to be interfered with. The reason for that is that it seems to me that to settle whether a trade mark is distinctive or not and that is the criterion laid down by the statute is a practical question, and a question that can only be settled by considering the whole of the circumstances of the case."

The West Indian Court of Appeal also adopted the same approach in the trade mark appeal case of Pepsi-Cola Co. v. Cola Co., [1939] L.R.B.G. at p. 252, when it said:

> "Assuming, however, that the Registrar may have approached the determination of the question before him in the manner indicated by the respondents, if this court is satisfied that, notwithstanding the misconception of the Registrar on the question of the burden of proof, he came to a reasonable conclusion, this court would uphold his decision.
>
> The principle upon which an Appellate Court acts, in relation to decisions made by the Registrar, is that it will exercise its own mind on the question at issue, attaching, however, considerable weight to his decision on any matter which falls peculiarly within his experience.
>
> The court should, we think, be cautious of reversing the finding of the Registrar, unless it is of the opinion that he applied wrong tests or overlooked considerations which he should have applied to the facts."

In my opinion, we should adopt the identical approach and uphold the Registrar's decision with which the judge agreed, namely, that there was no sufficient evidence of distinctiveness of the mark proved before him.

I will now deal with the complaint that there was error in holding that the mere fact that a mark is descriptive disqualifies it for registration on the ground of distinctiveness. According to FLETCHER MOULTON, L.J. this is a fallacy, because "descriptive names may be distinctive and *vice versa."* (See In Re H. N. Brock & Co. Ltd. [1910] 1 Ch. at p. 145). It is to be admitted that the learned judge, in the light of the language he has used, certainly appears to have created the impression that descriptiveness of a trade mark and its distinctiveness are irreconcilable attributes and it would appear that this view finds support in the following excerpt from the speech of LORD SIMONDS. L.C. in Yorkshire Copper Works, Ltd. v. Registrar of Trade Marks [1954] 1 All E.R. at p. 572, that "the more apt a word is to describe the goods of a manufacturer, the less apt it is to distinguish them."

I do not myself, however, understand the learned judge to have meant there is an "innate antagonism" between distinctiveness and descriptiveness as applied to words, for which registration is sought as trade marks, even though one is forced to concede there is to some extent an overlapping of the two attributes. The offending passage is underlined hereunder:

> "In my opinion, therefore, the appellants have failed to establish the distinctiveness of the mark. As regards its inherent adaptability to distinguish the appellants' products from others, the very fact that the mark is descriptive of the products is in itself a denial of such attribute."

Indeed, I do not think the judge could have so thought, because he appears to have recognised that whether a word for which registration is sought is inherently distinctive or adaptable to distinguish or capable of becoming distinctive of the goods of a particular maker, as the case may be, is essentially a question of fact, and is not to be determined *a priori* by its descriptiveness. (See In Re H.N. Brock & Co. Ltd., at p. 146.) For example, it must be purely a question of evidence whether the word "JELL-O" has lost its primary or dictionary meaning which we have noted above, in connection with the food products enumerated in the above application and taken on a secondary meaning, i.e., a factual or acquired descriptiveness in relation to them, in which case, the mark "JELL-O" will be registrable with regard to all of them. On this aspect, ROMER, L.J. pointed out in Re J. & P. Coats Ltd. Appln [1936] 2 All E.R. at p. 989:

> "But there are words which have a direct relation to the character and quality of goods which nevertheless may lose their primary meaning and acquire in a particular trade, a secondary meaning as indicating to people interested, whether as traders or as the public in the trade, the goods of a particular manufacturer. When that does occur, and the evidence shows that the word has attained a secondary meaning then, in my opinion, the word is registrable as a trade mark."

I am of the clear opinion that the learned judge on appeal from the Registrar could not have entertained, as it is contended he has, any steadfast view that descriptiveness of a trade mark is the denial of its distinctiveness. Rather, he has plainly shown he has not done so, because immediately after the offending words in the passage from LORD SIMONDS' speech in the Yorkshire Copper Works case (above), he went on to quote from Smitsvonk N.V.'s Appln. (1954) 72 R.P.C. 117, a decision of LLOYD JACOB, J. which makes it abundantly clear he must have borne it in mind that "the question of determining whether or not an applicant has shown whether the mark applied for is capable of distinguishing really means the determination of an issue of fact...." If it is indeed a question of fact which the judge obviously realised, then it seems fairly certain he could not have held fast to the view complained of to the extent that it affected his decision.

I think the learned judge came to the right conclusion that registration of the mark "JELL-O" in relation to the five products in question, *viz*., "tapioca, sago, preparations made from cereals, ices and ice" was properly refused and properly permitted in respect to others. In my opinion, the test has been correctly applied and the mark "JELL-O" found to bear a direct reference to the character or quality of the above-mentioned food-products; the disqualification from registration was justified. It seems to me, in even, case, the particular food-product for which application for registration of the mark is made, has to be considered in conjunction with the dictionary meaning of the word, so as to determine whether the latter has a direct reference to the character or quality of it. If it has, then registration ought to be refused.

The criterion for registration of "JELL-O" is not whether any particular product in respect of which it is sought to register the mark is solid or gelatinous in nature. The true test is whether the mark has no direct reference to the character or quality of the food-products under consideration. It is not whether the food-products are gelatinous in nature; a mark in respect of non-gelatinous foodstuffs is equally registrable once it conforms to the test. It is only if a mark is not directly referable to the character or quality of the products that it may qualify for registration. In my opinion, the mark will have a direct reference to one or more food-products if it is so descriptive of any one or more of them as to become identified therewith in terms of its own definition. We have already seen that the underlying principle is that descriptive words are the property of all the world and so are non-registrable. For example, in the case of the first of the three rejected items tapioca, sago, and preparations made from cereals, the obvious characteristic or quality about them is that they all colloidize, to use a chemical word, i.e., they all convert from a liquid form into a jellylike matter on exposure to cold air. The word "JELL-O" plainly describes them. Again, the mark when referred to in terms of "ices" and "ice", is plainly descriptive in terms of its dictionary connotation which, as we have seen, means to freeze, i.e., to convert from

the liquid to the solid state by cold. Therefore, if that word is, on registration, intended to be descriptive of any frozen liquid, then, in my opinion, the Registrar has rightly refused to register it as a trade mark.

For these reasons, I agree that this appeal be dismissed with costs.

**HAYNES, C:** I agree with the judgment of my brother CRANE.

**Appeal dismissed. Order of the Registrar of Trade Marks affirmed.**

**Solicitors:**

H. de Freitas for the applicants.

State Solicitor for the Registrar.

**Noel & Jeune v. Wallace**

**MARGARET NOEL**
**GWENDOLYN JEUNE**
**Appellants**
**(Defendants)**

**v.**

**BURCHELL WALLACE**
**Respondent**
**(Plaintiff)**

[Full Court of the High Court (Bollers, C.J., Vieira, J.) November 15, 1975; June 23, 1976]

*Land Lord and Tenant-Wrongful eviction-Whether agent acted for landlord-Contractual tenancy-Statutory tenancy-Special damages-Exemplary damages-Rent Restriction Act, Cap. 36:23, s. 21*

This was an appeal from a decision of a magistrate in which the respondent' plaintiff was awarded special and general damages against the two appellants defendants for wrongful eviction of the respondent from premises occupied by him. The second named appellant, Jeune, contended that she at all material times dealt with the respondent and the demised premises in her capacity as agent of the first named appellant, Noel, a contention which the latter denied.

**HELD:** (1) That the learned magistrate did correctly find that Jeune was the agent of Noel and that Noel was the landlord of the respondent. All acts done by Jeune were therefore specifically for and on behalf of Noel.

(2) That the respondent was a statutory tenant within the ambit of s. 21 of the *Rent Restriction Act. Cap. 36:23* and therefore was entitled to the benefit of all the terms and conditions of the original contract of tenancy including an implied covenant for quiet enjoyment.

(3) That there was no order for possession made against the respondent but the respondent had been tortuously evicted from the demised premises and therefore was entitled to the special and general damages awarded. Having regard to all the circumstances, the award was reasonable.

(4) Punitive or vindictive damages could not be granted in this case since there had been no interference with any part of the demised premises amounting to the tort of trespass.

**Noel & Jeune v. Wallace**

**Appeals dismissed**
**Order of the learned**
**Magistrate affirmed.**

**Cases Referred to:**

(1) Forman & Co. (Proprietary) Ltd. v. The Ship "Liddlesdale" [1900] A.C. 190; 82 L.T. 331; 42 Digest (Repl.) 737.
(2) Lavender v. Betts [1942] 2 All E.R. 72; (1942) 167 T.L.R. 70.
(3) Cruise v. Terrell [1922] 1 K.B. 664.
(4) Witham v. Kershaw 16 Q.B.D. 613.
(5) Perera v. Vandiyar [1953] 1 All E.R. 1109; [1953] 1 W.L.R. 672; 97 Sol. Jo. 332 C.A.

L. Osborne for appellants.
No answer or appearance for or on behalf of respondent.

**VIEIRA, J. (delivered judgment of the Court):** This was an appeal from a decision of a Magistrate of the Georgetown Magisterial District in which he awarded the respondent (plaintiff) the sum of $1,562.25 (one thousand five hundred and sixty-two dollars and twenty-five cents) as damages against the two appellants (defendants), jointly and severally, in respect of the wrongful eviction of the respondent from premises occupied by him at 337 Murray Street, Georgetown.

It was the allegation of the respondent that he was the tenant of the first-named appellant (hereinafter referred to as Noel) in respect of one room of a six-room house at 337 Murray Street, Georgetown, rented by him from her since October, 1973 at a rental of $35.00 per month, which tenancy was determined by a notice to quit dated 28th December, 1973, effective on 31st January, 1974. Despite this notice, he remained in possession of the premises and he testified that, when he returned home on 4th February, 1974, he found somebody else in occupation and all his personal belongings, including a quantity of cash, missing. He then went and reported the matter to Noel who told him that it was only that very afternoon that she had received information that it was the second-named appellant (hereinafter called Jeune) who had removed them, and she advised him to get a policeman which he did and, later that very afternoon, he and a policeman went to Jeune's home, where he saw some of his possessions, and he inquired of her the reason why she had put his things out and she told him that she had given him a notice to quit on 1st February, 1974, and not seeing him for about three weeks and not knowing his whereabouts, she had decided to enter the premises and rent it to someone else. The respondent categorically stated that at no time did he ever recognise Jeune as his landlord.

Noel denied ever renting any premises at 337 Murray Street or anywhere else to

the respondent and/or ever authorising Jeune to collect any rent from him on her behalf, neither did she ever authorise Jeune or anybody else to issue a notice to quit to the respondent in respect of any premises at 337 Murray Street or anywhere else at any time. She testified that the house at 337 Murray Street was rented by her from Mr. B.C. De Santos, Barrister-at-law, at a rental of $125.00 per month and that she had rented that very house to Jeune at the same monthly rental.

Jeune denied ever being Noel's tenant or the landlord of the respondent and she alleged that she was Noel's agent with whom she had been working for about nine months. She admitted issuing receipts for rent collected by her from the respondent but asserted that all such monies collected had been paid over by her to Noel. She also admitted that she did issue the notice to quit but alleged that she had done so on Noel's specific instructions. She testified that one Mr. Daby was the person who had actually put the respondent's belongings out on Noel's instructions and that when that was done both herself and Noel were present.

The learned Magistrate accepted and believed the evidence of the respondent in preference to that of the two appellants whom he considered not worthy of belief, as they were each trying to place responsibility on the other.

Before us, Mr. Osborne argued that Jeune had committed an unlawful act by throwing out the respondent's personal belongings which was outside the scope of her ostensible authority and he cited Forman & Co. (Proprietary) Ltd. v. The Ship "Liddlesdale" ([1900] A.C. 190) in support thereof. We had no hesitation in dismissing the appeals and affirming the order of the learned Magistrate but, in the exercise of our discretion, made no order as to costs. It is from our decision that this appeal has been brought and we now give our reasons therefor.

The learned Magistrate found as a fact that Noel was the real landlord of the respondent and we consider this a most reasonable and correct finding of fact. The respondent tendered three receipts dated 6.11.73 (Ex. "A"), 7.12.73 (Ex. "B"), both signed "Per G. Jeune" and 7.1.74 (Ex. "C) signed "Margaret Noel". With regard to Ex. "C", Noel sought to explain this by saying that the respondent had given her the money as rent to pay to Jeune and she had merely signed as having received same. In relation to this explanation, the learned magistrate quite pertinently, we think, posed the question: Why did she collect rent for January, 1974 from the plaintiff, since, as she contended she had already handed over the place to the No. 2 defendant? In relation to Ex. "A" & "B", however, we do not agree with the Magistrate that they were issued by Jeune "apparently in her own right and not on behalf of anybody else." These two receipts were signed "Per G. Jeune" and not "Gwendolyn Jeune" or "G. Jeune" and, as we see it, clearly indicated that she was signing on behalf of somebody else, to wit here, Noel. With regard to the notice to quit (Exhibit "D"), the learned Magistrate pointed

out that it was addressed 6, North Road, Bourda, and we consider this rather significant when we have it from Noel herself in examination-in-chief that she resided at 4, North Road. Further, this notice is signed "Gwendolyn Jeune for Margaret Noel (Landlord)", and this fact, together with all the other relevant circumstances, clearly indicated that Jeune acted throughout with the consent and on the instructions of Noel and was, accordingly her agent, which finding the learned Magistrate also rightly made.

We do not consider the authority of Forman v. The Liddlesdale (*ubi supra*) as cited by Mr. Osborne to be apposite here. In that case, the plaintiffs had contracted with the agent of an absent ship-owner to effect certain, specified repairs (all confined to damage done to The Liddlesdale which had run aground off the coast of Western Australia) and, instead of doing the work which the ship-owner in Glasgow, Scotland had expressly communicated to his agent, the captain of the said ship, viz., that the repairs should not go beyond the damage resulting from the stranding, the plaintiffs, on the agent's authority, did extra work which enhanced the value of the ship. Held that, it appearing that the agent's authority to the plaintiffs was limited to repairs for the stranding damage they could not recover for the extra work done since the contract was an entire one and, in its entirety, had never been performed. This was certainly not the position here since whatever Jeune did was lawfully within the scope of her authority and accordingly, the principal, Noel, was bound thereby.

Before the learned Magistrate, Mr. B.E. Gibson had submitted on behalf of the respondent that he was a statutory tenant and that Noel was estopped from denying that she was his landlord. Although the Magistrate made no reference in his memorandum of reasons to these two legal concepts, nevertheless, it is abundantly clear that the respondent was a statutory tenant within the ambit of s. 21 of the *Rent Restriction Act, Cap. 36:23* and as such, was entitled to the benefit of all the terms and conditions of the original contract of tenancy, including an implied covenant for "quiet enjoyment". Like a contractual tenant, a statutory tenant cannot be dispossessed of premises subject to the *Rent Restriction Act* unless an order for possession has been made against him by a Magistrate thereunder.

Where, as here, there was not only no order for possession made against the respondent but also the eviction of his personal belongings were effected by means of a tort, *viz.*, trespass to chattel, then the principle in Lavender v. Betts ((1942) 167 T.L.R. 70), applies. In that case, the defendant gave the plaintiff notice to quit on 1st February, 1940, after the plaintiff had failed to pay his rent regularly. The plaintiff failed to comply with the notice and remained in possession of the demised premises, to wit, a flat. In November, 1941, the defendant entered the flat accompanied by workmen, and forcibly removed the doors and windows. ATKINSON, J. held that the plaintiff was a statutory tenant and as such, was entitled to the benefit of an undertaking for quiet enjoyment, and the defendant

had no conceivable right to interfere with his possession or to trespass upon the premises unless he had obtained an order giving him possession of the premises. His Lordship then referred to the judgment of LORD STERNDALE, M.R., in Cruise v. Terrell ([1922] 1 K.B. 664 at p. 670), quoting with approval what BOWEN, L.J., had said in Witham v. Kershaw (16 Q.B.D. 613 at p. 618) as follows:

> "Nothing we have said must be understood as in any way derogating from the principle that, when a wrongful act is done by a tresspasser, or by a tenant, to the property of his reversioner, under circumstances which call for vindictive damages, the jury may give vindictive damages".

It is clear, therefore, on the authority of Lavender v. Betts (*supra*) that a Magistrate may award general damages in addition to special damages where a tenant is tortuously evicted from the demised premises. But it is equally clear on the authority of Perera v. Vandiyar ([1953] 1 All. E.R., 1109, C.A.), that punitive or vindictive damages cannot be granted where there has been no interference with any part of the demised premises amounting to the tort of trespass. In that case, the landlord cut off the supply of gas and electricity to the flat with the object of inducing the statutory tenant to leave. As a result, the tenant was forced to move out of the flat and live elsewhere until the services were later restored. In an action by the tenant against the landlord for damages for breach of the implied covenant for quiet enjoyment and for eviction, it was held by the Court of Appeal, distinguishing Lavender v. Betts. ( *supra*) that the tenant was not entitled to an additional sum as punitive damages since there has been no actual interference with any part of the demised premises amounting to the tort of trespass. ROMER, L.J. said (at p. 1112):

> "That the landlord's action was deliberate is plain, and that it was malicious is, I think, reasonably plain, but I cannot see that it amounted to a tort. It did not constitute an interference with any part of the demised premises, and, therefore, could not be regarded as a trespass. It was merely a breach of contract, the object of which was to persuade or induce the tenant to go. That is not a tort. The intention of the landlord in the present case was precisely the same as the intention of the landlord in Lavender v. Betts, but in that case the landlord resorted to trespass for the purpose of getting his own way and so was guilty of a tort. It was not because he formed an intention to evict that damages were awarded in Lavender v. Betts. They were awarded because he trespassed on his tenant's property. Eviction might, in certain circumstances, be a tort, and certainly would be if it involved a trespass, but the mere intention to evict cannot, as I see it, be a tort, nor does it become a tort merely because the person who forms the intention hopes to give effect to it by interfering with the tenant's contractual rights".

What the learned Magistrate did here was to grant special damages in the sum of $1,062.25 in relation to the articles set out under the heading "Special Damage" at p. 2 of the respondent's plaint and $500.00 as general damages for the tortious eviction of the respondent's personal belongings, which we consider most reasonable having regard to all the circumstances.

For these reasons, therefore, we dismissed the appeals and affirmed the order of the learned Magistrate.

**Appeals dismissed.**
**Order of the learned magistrate affirmed.**

**DEONARINE SINGH**
**Appellant**
**(Plaintiff)**

**v.**

**TRANSPORT and HARBOURS DEPARTMENT**
**Respondent**
**(Defendant)**

[Court of Appeal (Haynes, C., Crane and Luckhoo, JJ.A.) February 17, 18; June 1, 1976.]

*Personal Injuries-Injury to passenger on railway-liability of Transport & Harbours Department for loss or damage occurring upon the railway-Whether purchaser of railway ticket can sue Department in contract for damages for personal injuries suffered whilst travelling as a passenger-Transport & Harbours Act, Cap. 49:04, s. 22 (I)*

*Common Carrier-Carrying on the business of a carrier in Guyana-Whether this entails in Guyana the business of both a carrier of passengers and goods as in England-Common Carriers Act, Cap. 48:01, s. 2.*

On October 29, 1970, the appellant was a passenger on the respondents' railway journeying from Parika to Vreed-en-Hoop. At Greenwich Park, East Bank, Essequibo, there was a derailment. He sustained personal injuries for which he launched an action in the High Court claiming damages for breach of duty and/or negligence of the respondents' servants.

At the hearing, in submissions in *limine*, counsel for the respondents contended that the action was not maintainable because there was no cause of action dis-

closed in the pleadings and the trial judge dismissed the claim.

This case raises once again the old problem whether an action for damages for personal injuries can be maintained for a breach of contract in an action for loss or damage occurring upon the railway under the provisions of s. 22(1) of the *Transport & Harbours Act, Cap. 49:04.*

Both in the High Court and in the Court of Appeal, Counsel for the appellant contended that the action was properly before the court, that s. 22 (1) contemplates suits against both common carriage of passengers and of merchandise. The word "carrieer" in the section, he argued, includes a common or private carrier. So if the law permits an action against either, an action may be brought against the Transport & Harbours Department. Further, since the business of a common carrier under the common law of England is to carry passengers, and the latter being the same as the common law of Guyana, the phrase "carrying on the business of a carrier in Guyana" must include that of a common carrier of passengers.

Counsel for the respondents, on the other hand, contended that s. 22 (1) relates solely to actions relating to contractual rights and liabilities; that an action for personal injuries to a passenger by the negligence of the respondents' servants is essentially an action in tort and not in contract; that the purchase of a ticket on the railway does not create any contractual obligation on the Department, because the duty to use care and skill does not arise as the result of the purchase of a railway ticket, but arises under the general duty/care relationship of the law.

On appeal.

**HELD:** (1) That it was never the intention of the legislature under s. 22 (1) to render the Transport & Harbours Department liable in contract both as a common-law carrier of passengers and goods.

(2) That actions on contracts for the carriage of merchandise are the only permissible kind under s. 22 (1), and a claim for damages for personal injuries by passengers on the railway or government vessels is not within the section.

(3) That it not being permissible to sue a government department such as the Transport & Harbours Department in tort, there must be a specific cause of action for negligence in the section, i.e., a right to sue for negligence in relation to a contract for the carriage of passengers before an action for personal injuries can be maintained.

That the expression "loss or damage occurring upon the railway" refers to pecuniary prejudice suffered by a passenger's goods or merchandise: but not to his personal injuries;

(5) That the trial judge was right in upholding the submissions in *limine* and in dismissing the action.

Hunt v. Evelyn and Transport & Harbours Department (1970) 17 W.I.R. 428 applied.

**Appeal dismissed with costs.**
**Decision of trial judge affirmed.**

**Editor's note:** Notwithstanding the recent abolition of the railway train in Guyana in 1973 as a public means of transport, this decision will apply to all Government vessels, including any ship or boat or any other description of vessel used in navigation.

**Cases referred to:**

1. Evelyn v. Chichester [1969] G.L.R. 111; (1970) 15 W.I.R. 410.
2. Coggs v. Bernard (1703) 2 Ld. Raym. 909
3. Readhead v. Midland Ry. Co. (1869) L.R. 4 Q.B.379; 9 B.S. 519; 38 L.J.Q.B.169; 20 L.T. 628.
4. Hunte v. Evelyn and Transport and Harbours Department (1970) 17 W.I.R. 428.
5. Taylor v. Manchester, Sheffield and Lincolnshire Railway and Metropolitan Railway Co. [1895] 1 Q.B. 134; 71 L.T. 596; 59 J.P. 100; 11 T.L.R. 27; 39 S.J. 42; (C.A.).
6. Kelley v. Metropolitan Railway Co. [1895] 1 Q.B. 944; 72 L.T. 551; 59 J.P. 437; 11 T.L.R. 366; 39 S.J. 447; (C.A.).
7. Luddith and Others v. Ginger Coote Airways, Ltd. [1947] A.C. 233; [1947] All E.R. 328; [1947] L.J.R. 1067; 177 L.T. 334; 63 T.L.R. 157, P.C.
8. Grand Trunk Railway Co. of Canada v. Robinson [1915] A.C. 740; 84 L.P.C. 194; 113 L.T. 350; 31 T.L.R. 395. (P.C).
9. White v. John Warrick and Co. Ltd. [1953] 1 W.L.R. 1285; 97 Sol. Jo. 740; [1953] 2 All E.R. 1021. (C.A.).
10. M' Alister (Donoghue) v. Stevenson [1932] A.C. 562; [1932] All E.R. 1 (H.L.).
11. Protheroe v. Railway Executive [1951] 1 K.B. 376; [1950] 2 All E.R. 1093; 66 T.L.R. (9 Pt. 2); 94 Sol. Jo. 823.
12. Farrell v. Alexander [1977] A.C. 59; [1976] 3 W.L.R. 145; [1976] 2 All E.R. 721;(H.L.).
13. East India Railway Co. v. Kalidas Mukerjee [1901] A.C. 396; 84 L.T. 210; 17 T.L.R. 284. (P.C).
14. Clarke v. West Ham Corporation [1909] 2 K.B. 858; 101 L.T. 481; 25 T.L.R. 805; 53 S.J. 731 (C.A.).

15. De Ramos v. Transport and Harbours Department [1961] L.R.B.G. 65
16. The Stonedale (No.1) v. Manchester Ship Canal Co. [1954] 2 W.L.R. 1075; [1954] 2 All E.R. 170; 98 Sol. Jo. 351.
17. Workington Harbour v. S.S. Towerfield [1951] A.C. 112; [1950] 2 All E.R. 414. 66T.L.R. (Pt. 2)387.
18. The Cairnbahn [1914] P. 25; 110 L.T. 230; 30 T.L.R. 82. (C.A.).
19. B.G. Timbers Ltd. v. Toolsie Persaud. Ltd. [1963] L.R.B.G. 454.
20. Great Western Railway v. Bunch (1888) 13 A.C. 31; 58 L.T. 128; 4 T.L.R. 356.H.L.

D.C. Jagan with M. Zephyr for the appellant.
D.C. Biscessar with C. Singh for the respondent.

**LUCKHOO, J.A.:** The Transport & Harbours Department is a statutory body whose liabilities and duties, as well as its rights and immunities, are governed by the provisions of the *Transport & Harbours Act, Cap. 49:04*, referred to as 'the Act'. It is a Government Department. (See Evelyn v. Chichester, (1970) 15 W.I.R. 410, and Hunte v. Evelyn & Transport & Harbours Department, (1970) 17 W.I.R. 428.) It is therefore, not suable in tort, unless a right is clearly given by the Act to bring actions in tort against the Department.

The appellant's claim was for damages as a result of injuries received by him on the 29th October, 1970, when he was lawfully on the respondent's train and was being carried as a passenger on a journey from Parika to Vreed-en-Hoop, It was alleged by the appellant that the train ran off the railway line at Greenwick Park, East Bank Essequibo, due to breach of duty and/or negligence of the servants of the respondent. The particulars of breach of duty and/or negligence were set out in the pleadings. The action came up for hearing before the learned Chief Justice, who, on submissions being made *in limine* by counsel for the respondent, dismissed the action with costs.

If the appellant is to succeed in his appeal, he would have to satisfy this Court that his action was maintainable against the respondent either in contract or in tort. This would entail an examination of the provisions of the Act with particular reference to s. 22 (1) which reads:

> "All actions and suits relating to contractual rights and liabilities in respect of loss or damage occurring upon the railway and Government vessels in respect of any matter or thing done or omitted upon the railway and such vessels or otherwise in connection with the business of the railway and such vessels, which, if the railway and such vessels were the property of any company, firm, of person carrying on the business or a carrier in Guyana, might under the law of Guyana be brought by or

> against such company, firm, or person, may be brought by or against the Department."

Could the appellant maintain an action for damages for personal injuries suffered founded on a breach of contract of carriage under the provisions of that section? Mr. Biscessar, counsel for the respondent, has stoutly argued, in the first place, that an action for personal injuries caused to a passenger by the negligence of the respondent's servants, was an action founded upon tort and not upon contract, even though the passenger had purchased a ticket. He has submitted that the ticket does not create a contractual obligation on the Department, and that any duty to use care and skill is not the result of the purchase of the ticket, but arises under the general law of duty-care relationship. He has cited a number of authorities, but I shall refer to two of them, which, he said, served to illustrate his contention: Taylor v. Manchester, Sheffield, and Lincolnshire Railway and Metropolitan Railway Company [1895] 1 Q.B. 134; and Kelley v. Metropolitan Railway Company, [1895] 1 Q.B. 944.

In Taylor's case (*supra*), it was held that an action brought by a railway passenger against the company for personal injuries caused by the negligence of the defendant's porter in shutting the door of the compartment upon, and crushing the plaintiffs thumb, was an action founded upon tort and not upon contract even though the passenger had taken a ticket. In that case, what was under construction was s. 116 of the *County Courts Act, 1888,* as to whether the plaintiff was entitled to his full costs or not. If the action was founded on contract, the plaintiff would only recover Country Court costs: whereas, if founded on tort, he would get his full costs. LINDLEY, L.J. in Taylor's case (*supra*) said:

> "All that the plaintiff would have to prove in such a case would be that he was lawfully on the premises of the railway company, and the contract is merely a part of the history of the case."

He had this to say in the course of the judgment (*ibid.* [1895] 1 Q.B. at p. 138):

> "Very often a cause of action may be treated either as a breach of contract or as a tort. But here we are compelled to draw the line hard and fast and put every one of the actions into one class or the other. I have looked into the authorities, but it is only necessary to refer to these cases which bear upon the true construction of this Act of Parliament."

He concluded his judgment by stating that he preferred to base his decision on what he considered to be the true construction of the Act of Parliament in that case. Along similar lines was the judgment of A.L. SMITH, L.J. in Kelley's case. Kelley's case had to deal with a similar question of costs as regards the *County-Courts Act, 1888,* and followed along the lines of the Taylor case. It concerned an

action brought by a railway passenger against the company for personal injuries caused by the negligence of the company's servants while he was travelling on their line. Both Taylor's case and Kelley's case were considered from the point of view of what the court held to be the true construction of the Act of Parliament in question, namely, s. 116 of the *County Courts Act, 1888.*

If, however, I am wrong in my analysis of the true *ratio* underlying these cases, and that they can be cited as authorities in support of the submission of counsel for the respondent. I would prefer to base my judgment on more recent pronouncements on this aspect of the case. *Halsbury's Laws of England,* 4th Ed., p. 192, para. 394, gives a general statement on the matter:

> "Contract by ticket. The issue of a ticket to a passenger in return for the payment of his fare is evidence of a contract to carry him with reasonable care to the named destination within a reasonable time. However, the contract may include other terms and conditions, either expressed on the ticket itself or incorporated in the contract by reference, on the ticket, to some other document containing these terms and conditions. Thus the words, printed on a ticket. 'This ticket is issued subject to the regulations and conditions stated in the company's timetables and bills' are sufficient to incorporate those conditions in the contract of carriage."

In the Privy Council case of Ludditt & Others v. Ginger Coote Airways Ltd., ([1947] 1 All E.R. 328), which concerned the carriage of passengers on an aeroplane and dealt with the duties of a carrier of passengers, reference was made by LORD WRIGHT to an important passage of VISCOUNT HALDANE, L.C. who delivered the judgment of the Board in Grand Trunk Railway Company of Canada v. Robinson ([1915] A.C, 740, at p. 747):

> "There are some principles of general application which it is necessary to bear in mind in approaching the consideration of this question. If a passenger has entered a train on a mere invitation or permission from a railway company without more, and he receives injury in an accident caused by the negligence of its servants, the company is liable for damages for breach of a general duty to exercise care. Such a breach can be regarded as one either of an implied contract, or of a duty imposed by the general law, and in the latter case as in form, a tort. But in either view this general duty may, subject to such statutory restrictions as exist in Canada and in England in different ways, be superseded by a specific contract, which may either enlarge, diminish, or exclude it ..."

The Privy Council in Ludditt's case (*supra*) accepted that statement of general principle.

SINGLETON, L.J., in the case of White v. John Warrick & Co. Ltd. ([1953] 2 All E.R. 1021, C.A.), which concerned a contract of hire of a carrier tricycle, and in which, among other cases referred to, were Taylor v. Manchester. Sheffield, and Lincolonshire Rly. Company (*supra*) and Kelley's case (*supra*) made reference to a passage of LORD MACMILLAN in M'Alister (or Donoghue) v. Stevenson, ([1932] A.C. 562), and expressed approval of it ([1932] A.C. at p. 610):

> "The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract, does not exclude the co-existence of a right of action founded on negligence as between the same parties, independently of the contract, though arising out of the relationship in fact brought about by the contract. Of this, the best illustration is the right of the injured railway passenger to sue the railway company either for breach of the contract of safe carriage or for negligence in carrying him."

This statement of general principle was put into practical effect in a railway passenger case (Protheroe v. Railway Executive [1950] 2 All E.R. 1093), in which the facts were that a railway season ticket holder, when about to board a train, caught his foot in a crack between a paving stone and one of the coping stones along the edge of the station platform belonging to the defendant, with the result that a bone in his foot was fractured. He claimed that there had been a breach of an implied warranty in the contract contained in the season ticket that the station platform should be reasonably safe: and. alternatively, a breach of general duty owed to him.

It was contended for the defendant that their contract with the plaintiff was one of carriage from Plaistow Station to Mansion House Station and back, and that any implied warranty extended only to the actual period when the carriage was taking place, and not to the premises to which the plaintiff had access for the purpose of commencing the carriage. They further contended that, if there was any breach of duty on their part, which they denied, it was actionable in tort only and not in contract.

Counsel for the defendant took a similar stand to the one taken in this appeal on the nature of the claim. He urged that in all, or nearly all, of the reported cases which dealt with the duty of railway companies in such circumstances as those, the plaintiffs claim was always made in tort and not in contract.

PARKER, J. said on this in Protheroe v. Railway Executive ([1950] 2 All E.R. at p. 1095):

> "I think that is too narrow a view. It seems to me that there must be a contractual duty in relation to the premises which the passenger is bound

> to use for the purpose of access to the train or for dismounting from the train, and, although access to the premises is what one might call ancillary to the actual contract of carriage, it seems to me that in relation to those premises-certainly in relation to those premises which are so near the edge of the platform-over which a passenger is going to step to mount the train there is an implied warranty as to the premises being reasonably safe."

The judge awarded damages on the claim for a breach of an implied warranty in the contract contained in the season ticket and felt it unnecessary to deal with the alternative claim for a breach of general duty.

My view, is that the payment by the passenger of the cost of the ticket, is the consideration for the carrier's undertaking to convey the passenger with due care for his safety to his place of destination. The ticket serves a dual purpose: It is the receipt or acknowledgement that the fare has been paid, and it indicates usually by reference to conditions to be found elsewhere, the terms on which the passenger has contracted with the carrier to be carried. Implied in that contract are obligations on both sides. There is implied an undertaking on the part of the carrier to carry the passenger with due care for his safety. Injury suffered by a passenger, who was being carried by virtue of his contract, due to a breach by the carrier of his duty of care, would entitle that passenger to sue in contract or in tort.

It remains to consider the scope of the enactment s. 22(1), of the Act, to see whether the appellant could justify the institution of proceedings, whether the claim is founded in contract or in tort. This section has already come under the scrutiny of this Court in the case of Hunte v. Evelyn & Transport & Harbours Department (*supra*) and the interpretation put on it is that the actions and suits contemplated by that section relate exclusively to contracts for the carriage of goods. CRANE, J.A. said:

> "Section 22(1) appears to me to relate exclusively to contracts for the carriage of goods on a railway and Government vessels. So that I would readily agree with the judge that the appellant's claim does not fall within s. 22(1) above, because therein is contained the only permissible cause of action in contract against the Department."

The appellant's claim is not one for loss or damage suffered as the result of any breach of duty by the carrier in relation to a contract for the carriage of goods, and is, therefore, not maintainable under the section. My impression as to the meaning of the words in their context is that the Legislature was confining the scope of the section to the institution of proceedings in relation to rights and liabilities arising in breach of a contract for the carriage of goods. The use by the Legisla-

ture of the words "loss or damage" and "occurring upon the railway and Government vessels", is an aid in the construction of the statute. I have not been persuaded that the interpretation given to the section by this Court in Hunte v. Evelyn and Transport & Harbours Department, (*supra*) is erroneous. Had the Legislature intended that claims for personal injuries suffered by a passenger should be included within the scope of the enactment, it would have used the word 'injury' also, in order to distinguish such claims from claims for 'damage' to property. This object was achieved by the language used in s. 17(2) where the Legislature made provision, with respect to the institution of proceedings to cover both types of claims, arising through the conveyance of dangerous goods in certain circumstances, for the payment of compensation for 'injury' to the Department's servants and 'damage' to their property. It would appear the whole of s. 17 was modelled on s. 50 of the *Railway Act, 1921*. If claims for personal injuries were to be included in s. 22(1), it would have been a simple thing for Parliament to reveal its purpose in language similar to that used in s. 503(1) of the *Merchant Shipping Act, 1894*, which, in dealing with the liability of the owners of a ship, referred to claims:

> (a) where any loss of life or personal injury is caused to any person being carried in the ship; and
>
> (b) where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship.

It is with regret that I have to uphold the submissions of counsel for the respondent on this point. I would have liked, if I could, to have given an extended meaning to the words used in the section, so as to permit within its purview the institution of proceedings for personal injuries suffered by passengers due to any negligent act or omission on the part of the respondents. But that would be stretching the law, and as LAWTON, L.J. said in Farrell v. Alexander ([1976] 1 All E.R. 129, at p. 143), adapting Shakespeare's words: "... I might be doing a great right but I would be doing a little wrong and as Portia said: 'Twill be recorded for a precedent, and many an error by the same example will rush into the state. It cannot be."

For the reasons set out above I have to dismiss this appeal with costs. But I would like to add that we are swiftly moving away from the days when litigants approach the judgment-seat in uneven combat, some being in an advantageous and privileged position. With the modern trend in social legislation within a welfare state, there is reason to hope that soon all litigants will stand on equal terms before the law for determination of their rights and obligations, and that everyone who has suffered loss or damage or injury through a breach by a defendant of his duty of care will not be turned away without compensation.

**CRANE, J.A.:** The question to be decided in this appeal, is whether a person who purchases a ticket on the railway can sue the Transport & Harbours Department in contract for damages for personal injuries, while travelling as a passenger thereon.

There is no doubt that at common law, a carrier who conveys passengers for hire or reward, whether it be in a motor-car on the highway, or anywhere else, is under an implied obligation to carry them safely and to use all care in so doing. However, should he fail to do so, he will only be liable on proof of negligence: he does not guarantee the safety of his passengers, so he will not be liable as a common carrier of goods, is, i.e., independently of negligence. Such was the advice of the Privy Council in East Indian Railway Co. v. Kalidas Mukerjee ([1901] A.C. 396), which finds expression in the following passage in Vol. 4 *Halsbury's Laws of England,* 3rd Edn., p. 174, para. 444, under caption 'LIABILITY TO PASSENGERS':

> "Whereas a common carrier of goods, as their bailee, insures the safety of the goods which he carries, a common carrier of passengers, not being a bailee, does not insure the safety of his passengers, but is bound to exercise due care with regard to their carriage. It does not appear that a higher standard of care is demanded of him than of a private carrier of passengers for reward."

Also, see Crane's *'Law of Compulsory Motor Vehicle Insurance'*, 1975, 2nd Edn., pp. 155 & 184.

Section 22 (1) of the *Transport & Harbours Act, Cap. 49:04*, the section under consideration, is a difficult piece of legislation that cannot be interpreted without reference to historical antecedents. It reads as follows:

> "All actions and suits relating to contractual rights and liabilities in respect of loss or damage occurring upon the railway and Government vessels in respect of any matter or thing done or omitted upon the railway and such vessels or otherwise in connection with the business of the railway and such vessels, which, if the railway and such vessels were the property of a carrier in Guyana, might under the law of Guyana be brought by or against such company, firm, or person, may be brought by or against the Department."

Under s. 19 (*ibid.*), the General Manager with the Minister's approval may enter into contracts for either the carriage of passengers or merchandise. Nevertheless, I do not think anyone can say it necessarily follows from this, that every action or suit under s. 22(1) relating to contractual rights and liabilities in respect of passengers or merchandise occurring upon the railway, is cognisable by the courts.

It all depends on whether the legislature intended such contractual rights and liabilities should spring from both the carriage of passengers and merchandise or from solely one or the other of those two types of contract spoken of in s. 19. That intention can only by determined on the true construction of s. 22(1). The problem to be resolved is: Does s. 22(1) embrace contractual rights and liabilities as is contended for on behalf of the appellant in respect of both kinds of contracts under s. 19, which the General Manager is empowered to enter into with the Minister's approval, or only one of them, and, if so, which one of them? Did the legislature intend to make the Transport & Harbours Department liable under s. 22(1) both as a common law carrier of passengers and goods or only as a common carrier of goods? The term 'common carrier' is not confined to a carrier of goods, as is sometimes thought to be the case. The distinction between these two categories of carrier is explained by FARWELL, L.J. in Clarke v. West Ham Corporation ([1909] 2 K.B. at p. 877) in the following passage:

> "It is contended that carriers of passengers only are not common carriers at all, and that none of the liabilities of common carriers attach to them. I am of opinion that this is not correct. A common carrier of goods comes under two distinct duties or liabilities: he is liable to carry according to his profession, and he is also liable, as bailee of chattels under the fifth head in Coggs v. Bernard (*locatio operis faciendi*): it is as bailee that his liability as insurer arises, binding him to answer for the goods delivered to him at all events. A carrier of passenger comes under the first duty or liability and for the same reason, namely, that he is bound to carry according to his profession. But he is not liable under the other head because he is not a bailee; bailment is confined to chattels and does not extend to human beings. The carrier of passengers is free from liability as an insurer, not because he is not a common carrier, but because, although a common carrier, he is not a bailee of his passengers. This is apparent from the judgment of the Exchequer Chamber delivered by SIR M. SMITH in Readhead v. Midland Rly. Co. where he says: 'The law of England has from the earliest times, established a broad distinction between the liabilities of common carriers of goods and of passengers. Indeed the responsibility of the carriers to redeliver the goods in a sound state can attach only in the case of goods' ... 'The liability of the common carrier of goods attached upon a particular bailment of the goods to him in his capacity of common carrier, and the rules that govern the rights of bailors or bailees of things, are of course only applicable to things capable of bailment.' It will be observed, that the learned judge treats common carriers of passengers as well as of goods as having been known to the law from the earliest times: and when I turn to the basis on which their first duty, namely, of carrying according to their public profession, is founded, it is apparent that it applies as much to carriers of

passengers as of goods."

In contending that s. 22(1) embraces both types of carriage, i.e., of passengers and of merchandise, counsel for the appellant reasoned this way: The word 'carrier' in s. 22(1) can mean either a common or a private carrier. Therefore, if, as the law permits him to do, a litigant can bring an action against either a private or a common carrier, then he will be allowed to bring an action against the Transport & Harbours Department. And since, as the decisions show, it is the business of a common carrier to convey passengers, under the common law of England which is the same as the common law of Guyana, the phrase "carrying on the business of a carrier in Guyana" must include that of a common carrier of passengers. Well sounding as this argument may seem to be, it overlooks the important point that the Transport & Harbours Department is not a corporation like the British Transport Commission, and so liable to be sued. It is a department of State, and it is only possible to bring legal proceedings against the Department if such proceedings are sanctioned by law. Accordingly, the Department cannot be sued in tort (see De Ramos v. Transport & Harbours Department *et al* [1961] L.R.B.G. 65), and save with the permission of the Minister under s. 38 of the *High Court Act, Cap. 3:02*, cannot be sued in contract either. [See Hunt v. Evelyn & Transport & Harbours Department, (1970) 17 W.I.R. 428.]

Learned counsel for the appellant in support of his argument has cited several English authorities. But whilst they are to some extent helpful, I have observed that the decisions turn mainly on the construction of particular statutes on the wording of which the relevant arguments were constructed. For example, in Taylor v. Manchester, etc., Rly. Co., ([1895] 1 Q.B., at p. 138) there arose the question whether the cause of action was properly framed in contract or in tort. That was a case like the present where the plaintiff was injured when travelling as a passenger on the company's railway by a servant of the railway who slammed the compartment door and crushed his thumb. The question arose as to whether the cause of action properly lay in contract or tort for the purpose of determining whether costs should be fixed on a High Court or County Court scale. The Court of Appeal held that the action was one in tort and not in contract, and that being so, the passenger was entitled to High Court costs. It was properly brought in the High Court and not in the County Court. For my part, I think it is important that LINDLEY, L.J. made the following observation which, I venture to say, trenchantly supports the point I am seeking to make, *viz.*, that each case must be construed with reference to the particular statute from which the legal rights and duties that are granted flow, and not merely because of the factual similarities it bears to other cases. LINDLEY, L.J. said (p. 139):

> "But, in the first place, that case was not like this, and, in the next place, it has been criticized and commented upon somewhat adversely: I do not say it has been overruled. But it is not a case on the construction of this

> Act of Parliament, and I prefer to base my decision on what I consider to be the true construction of the Act of Parliament in this case."

See, also, Kelley v. Metropolitan Rly. Co. ([1895] 1 Q.B. 944), in which Taylor's case, above, was explained. In Kelley's case, which also concerned an action for personal injuries suffered by a passenger on the defendants' railway, the Master of the Rolls gives what I regard as an important clue to the solution of our problem of interpretation of s. 22(1). He said, (*ibid.*), (p. 946):

> "In old times the question of injury to a passenger through something done by the servants of a railway company, gave rise to a dispute whether such an action was an action of contract or one of tort, and it was ultimately settled that the plaintiff might maintain an action either in contract or in tort. In the former case, he might allege a contract by the railway company to carry him with reasonable care and skill, and a breach of that contract; and on the other hand, he might allege that he was being carried by the railway company to the knowledge of their servants, who were bound not to injure him by any negligence on their part, and if they were negligent, that was a matter on which an action for tort could be brought. At the present time a plaintiff may frame his claim either way, but he is not bound by the pleadings, and if he puts his claim on one ground and proves it on another, he is not now embarrassed by any rules as to departure. The question to be tried is the same in either case. The plaintiff must rely on and prove negligence, and whether that negligence is active or passive seems to me to be immaterial. Omission to do something which the defendants were bound to do, or an act of commission in the doing something which they ought not to have done, may both be acts of negligence. The jury have to determine on the facts of the case, and if they found that there was negligence, which was the cause of the injury, they have in fact tried an action of tort."

Accordingly, since a plaintiff in England has the right in a case of this kind to frame his claim in either contract or tort, may not the Guyana Legislature lay it down in s. 22(1), bearing in mind that nobody has an unqualified right in Guyana to sue a state department in either contract or tort, that in all actions or suits concerning contractual rights and liabilities the cause of action must be brought in contract when the question arises in relation to any 'loss or damage' (which expression will presently be considered) that occurs upon the railway in connection with the business of the railway, in cases of misfeasance or non-feasance by the Department's servants? Because I am decidedly of opinion that is exactly what has been done in s. 22(1).

There does not appear from the wording of s. 22(1) to be any English parallel. That subsection seems to be peculiar to Guyana' and so must be construed in its

local milieu: particularly in view of the fact that the Transport & Harbours Department, being a state department, the citizen is restricted to such rights of suit as the law specifically allows him. In Hunte v. Evelyn & Transport & Harbours Department ((1970) 17 W.I.R. 428), this Court was unanimous in holding that an action for arrears of salary could not be recovered as either "loss or damage occurring upon the railway or a Government vessel". Hunte was a ticket-seller at Vreed-en-Hoop ferry stelling and he sued for arrears of salary allegedly due him to the extent of $342.63. Such arrears were clearly not related to any "loss or damage occurring upon the railway". The only connection Hunte had with the railway was the fact that he sold railway tickets to railway passengers, and in my construction of s. 22(1) at that time. I supported the learned trial judge who held that s. 22(1) of *Cap. 49:04* related solely to contracts for the carriage of merchandise on the railway and Government vessels, and I held that the courts were not the proper place to extend the operation of the section: only the legislature could properly do so. I proposed that consideration should be given to the enactment of legislation after the fashion of the *English Crown Proceedings Act of 1948* which would give the citizen the unqualified right to sue government departments of the State. But, of course, at that time Guyana was not a socialist state, and state policy may well be different now. It was also considered that actions on contracts for the carriage of merchandise were the only permissible kind under s. 22(1), and, speaking for myself, I still think so. Such "loss" of salary as Hunte suffered, if loss it can be called, may have arisen out of his contract of employment, but it certainly did not arise out of any contractual rights occurring upon the railway that was in connection with the business of the railway. While his might have been properly called a claim for liquidated 'damages', it certainly could not have been referred to as a claim for 'damage', which word in s. 22(1) seems to me to be referable to no more than such 'actual physical damage' done to merchandise as distinct from consequential damage, arising out of a contract for their carriage on the railway. See The Stonedale No. 1 ([1954] 2 All E.R. at p. 176), where in considering the distinction between the concepts of 'damages' and 'damage'. LORD RADCLIFFE is reported to have said:

> "I only wish to make it plain that, in my view, the section is confined to damage not damages. I think that it covers no more than the actual physical damage which a vessel may do to the works which constitute the harbour dock or pier." (See also Workington Harbour v. S.S. Towerfield [1950] 2 All E.R. at p. 449.)

I would respectfully adopt LORD RADCLIFFE'S approach to the elucidation of the meaning of the word 'damage' and apply it to s. 22(1) because when I make a comparison of other sections in *Cap. 49:04,* wherein there appears either the selfsame expression, 'loss or damage', with slightly different variations of it, such as, 'compensation for all injury to the department's servants and damage to their property' in s. 17(2): 'damage or injury' in s. 20; or 'damages or costs' in s. 53, it

will be seen that from the sum-total of all those expressions the word 'damage' is employed as meaning harm done to property, whilst 'injury' is harm to persons. So in just the same way as LORD RADCLIFFE has construed the term 'damage', in the context of the section he was considering, to mean actual hurt or harm done by a vessel in relation to a "harbour, dock or pier" (inanimate objects), so in like manner. I would construe that word in s. 22(1) to mean such actual hurt or harm as is done to properly, merchandise and other goods which the department has contracted to convey and taken into charge on its railway or Government vessel. 'Damage', therefore, is the actual hurt or harm to merchandise, goods or property, while 'damages and costs' are the *solatium* which the law awards to him who has suffered such hurt or harm. S. 53 exempt the Advisory Board, the General Manager and every employee of the Department from payment of such damages and costs, thus making a clear distinction between 'damage' and 'damages'.

But the goods or merchandise may not have been merely damaged through any active or passive fault of the Department's servants: they may have been partially or totally destroyed so as to become a 'loss' to their owner who will have suffered pecuniary prejudice thereby. For example, livestock and animals may have been washed overboard in rough weather, or crushed under the wheels of the railway carriages so that they became a total loss to the owner, owing to the failure of the Department's employees to secure or tether them properly on board. In that case, the 'damage' to the merchandise or other property will have been financial 'loss' to the owner of it. It is this kind of 'loss' I think s. 22(1) envisages, and the kind of which LORD SUMNER speaks in The Cairnbahn, ([1914] P. 25) when he said (p. 33):

> "The word 'loss' is wide enough to include that form of pecuniary prejudice which consists in compensating third parties for wrong done to them by the fault of persons for whose misconduct the party prejudiced must answer."

And which he considered *vis-a-vis* with its concomitant concept of 'damage' and said (*ibid.* p. 32):

> "The owners of the Cairnbahn suffered 'damage' because their ship ran into the hopper which was in tow of the tug 'Nunthorpe'. They suffered 'loss' because the owners of the hopper sued them for her injuries and won."

So if a plaintiff were, pursuant to an order of court, to pay to a third party compensation for damage to merchandise in his care, which was damaged when being conveyed on the railway by or through the neglect of the Department's servants, it would appear he could properly claim such compensation from the Department under s. 22 (1) as a 'loss' suffered by him.

Again, the phrase appears in inverted form as 'damage or loss' in s. 1(1) of the *Maritime Convention Act, 1911,* where in a case of a collision between two or more vessels"... the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault". Some years ago, in the case of B.G. Timbers Ltd. v. Toolsie Persaud Ltd. ([1963] L.R.B.G. 454), I had occasion to consider the expression in an Admiralty action for the purpose of assessing damage when two tugs collided in the Demerara River. It was necessary for me to apply s. 503 of the *Merchant Shipping Act, 1894,* in the first subsection of which, the phrase 'loss or damage' occurs. That subsection in limiting the liability of the owners provides that-"The owners of a ship, British or foreign shall not ... where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things *(ejusdem generis)* whatsoever on board any other vessel, by reason of the improper navigation of the ship, be liable to damages beyond the following amounts ..."

The point I seek to make, is that loss or damage being an Admiralty expression was used by that Division in the assessment of damages and was imported into common law actions after the *Judicature Act, 1873,* and is referable solely to inanimate objects.

It appears to me that the clear intention of s. 22(1) is to enable a plaintiff to sue for breaches of contract in respect of negligent carriage on the railway, which the Department has undertaken in fulfilment of such 'services' as are contemplated under ss. 14(2), 15 and 19, in relation to contracts for the carriage of merchandise, which 'services' must necessarily be performed by its servants. Section 22(1) plainly contemplates that the Department's employees may be guilty of committing positive or negative acts of wrongdoing in the course of their duties; they may either do something they ought not, to have done or neglect to do something they ought to have done in the performance of their duties, and as a result cause 'loss or damage' in the sense explained above, to property or merchandise belonging to someone with whom the Department is in contract to convey it. For example, as a common carrier of goods, the Department may owe a duty of care to a ticket-holder like Mrs. Bunch in Great Western Rly. v. Bunch, ((1888) 13 A.C. 31) to see that her goods are not missing when one of its servants absconds with them.

The purport of s. 22(1) is clearly to permit an action or suit to be brought by or against the Department in the same way as one may be brought against any company, firm or business that is "carrying on the business of a carrier in Guyana", i.e., of a common carrier in Guyana, just as if the railway were the property of that company, firm or business. Such power to sue the Department in contract and to make railway property available for execution just like that of any company, firm or business is important in view of the decision of this Court in the case of Hunte v. Evelyn (*supra*), which shows that the Transport & Harbours Department is a

state department. This means that legislative sanction must be forthcoming before it can be sued at law, (See s. 38 of *Cap. 3:02).* It seems fairly obvious to me that the expression 'carrying on the business of a carrier in Guyana' falls for judicial interpretation, and that in so doing, resort must be had, *inter alia,* to the *Common Carriers Act, Cap. 48:01,* since any company, firm or business being a legal entity may profess the calling of a common carrier of goods under that law. I think the definition of the term in s. 2 of that Act is rather helpful as an aid to interpreting s. 22(1). It reads as follows:

> "In this Act-'common carrier' means any person who undertakes provided he has room, either expressly or by a course of conduct, to convey for hire or reward the goods or certain classes of goods of all persons who choose to employ him; and by 'person' in this definition is meant and included the State as well as any company, firm or individual:"

What is important is to observe, firstly, that while the definition of 'common carrier' is stated to be referable to *Cap. 48:01,* which is an Act dealing exclusively with the carriage of goods and not the carriage of passengers, that does mean that the definition is to be concerned solely with that Act, and cannot be applied, if the context requires, to any other prior or subsequent Act. The *Transport & Harbours Department Act* was enacted subsequent to the Common Carriers Act, and 1 think it is reasonable to suppose that since a common carrier may be both a carrier of passengers as well as a carrier of goods, the legislature must have had the previous Act in mind when enacting the subsequent legislation. But, as it seems to me, 'carrying on the business of a carrier in Guyana' in the section must be construed strictly in the local context. I think the words 'in Guyana' must be emphasised in the expression. They are very significant, because while I find no fault with the argument advanced by counsel for the appellant that the business of a common carrier in England is generally to convey both passengers and goods. I think the answer to the question whether our legislature intended to make the Department liable both as a common law carrier of passengers and as a common law carrier of goods is to be determined by construing the local *Common Carriers Act* which, we have already observed, concerns <u>only</u> the conveyance of goods together with the nature of the relief that is granted.

It is obvious that the sole cause of action in s. 22(1) is in <u>contract</u> and that the purpose of that section is to enable actions and suits to be brought against the Department to enforce "contractual rights and liabilities" in relation to "loss or damage" to goods occurring upon the railway. However, the absence of a specific cause of action in negligence, I think, is meaningful, for it indicates that a claim for damages for personal injuries by passengers on the railway or government vessels is not within the purview of the section. Had it been the intention of the legislature to give to an injured passenger the right to bring an action or suit for personal injuries, I think there is every likelihood that a cause of action in negli-

gence would have been built into the section in view of the fact, which we have already noted, that a common carrier of passengers is not liable for injury to his passengers independently of negligence, and the fact that it is not permissible to sue a government department in tort. There must be a specific cause of action for negligence, i.e., a right to sue for negligence must be given not in relation to a contract for the carriage of goods, but solely in relation to a claim for damages for personal injuries for the carriage of passengers. But, as we have seen, no such cause of action is permitted in s. 22(1). In other words, the right to sue for negligence must arise *ex lege* and not at common law. It is for this reason we are unable to agree with counsel and adopt as our guide the following excerpt from LORD MACMILLAN's speech in Donoghue v. Stevenson ([1932] A.C., at p. 609), which counsel for the appellant submitted for our consideration after the case had been adjourned for decision:

> "The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract, does not exclude the co-existence of a right of action founded on negligence as between the same parties, independently of the contract, though arising out of the relationship in fact brought about by the contract. Of this the best illustration is the right of the injured railway passenger to sue the railway company either for breach of the contract of safe carriage or for negligence in carrying him. And there is no reason why the same set of facts should not give one person a right of action in tort."

The right of action or right of an injured railway passenger to sue the railway company of which LORD MACMILLAN speaks above, is his right at common law, not a statutory right to bring an action for negligence, which is really what we are concerned with in s. 22(1) of *Cap. 49:04.* LORD MACMILLAN is, of course, speaking of the common law right of suit in an action for negligence against a railway company in England. But no one has that right against a state department in Guyana unless it is given him by statute. When Donoghue v. Stevenson ([1932] A.C. 562) was decided, it was possible to sue a railway company because, unlike the Transport & Harbours Department in Guyana, a railway company in England was not, and still is not, a state department. Now, of course, since the *Crown Proceedings Act: 1948,* the subject may proceed in England even against a state department, and there lies the difference in the comparison made by learned counsel.

Bitter pill as it might be at the present day to many constitutionalists, the fact remains that government departments are still not under the law generally: they are immune from suit and cannot be sued in our courts of justice unless permission is granted by statute to the citizen to do so. Meanwhile, a lead on this vital matter is awaited, particularly in view of the new social order that has come about since Independence. Until then, it means that a citizen who is seriously injured

by the fault of a government department, can recover as of right no compensation, save by way of an *ex gratia* award.

In the circumstances, the absence of a specific cause of an action in negligence for damages for personal injuries for the carriage of passengers is fatal to the appellant's case.

I would dismiss this appeal and affirm the judgment of the trial court on the preliminary objection to the action, with costs.

**HAYNES, C:** Without stating reasons. I agree that this appeal should be dismissed-with costs.

**Appeal dismissed with costs.**
**Decision of trial judge affirmed.**

**JOHN LALMAN and STEPHEN NQ QUI-SANG**
**Appellants**
**(Defendants)**

**v.**

**BASIL WILLIAMS, Det. Constable No. 7845**
**Respondent**
**(Informant)**

[Full Court (Bollers, C.J. and Churaman, J.) February 16, March 27, May 22, July 9, 1976].

*Price control order-Sale of margarine exceeding price prescribed by competent authority.*

*Price controlled items-Variation of retail selling prices according to locality-Price prescribed by weight and or package and type or brand of article-Whether omission to specify lesser quantity of article to be taken as exclusory from the order-Trade Act, Cap. 91:01, Order No. 37 of 1971-Order No.74 of 1963-Order No. 15 of 1973.*

On July, 1973 a police decoy purchased by retail from a grocery run by appellants (employee and owner respectively) "two quarter-pound packets of golden cream margarine" for 40 cents and two pounds of salt for 24 cents. The margarine and

salt were allegedly sold at 9 cents and 7 cents respectively above the maximum price prescribed by Orders under the *Trade Act, Cap. 91:01*.

The appellants were charged and found guilty of being in breach of the *Trade Orders* and sentenced to 6 months imprisonment.

On appeal to the Full Court, counsel for the appellant contended, *inter alia,* that while 'salt' was indeed sold, there was no evidence whatsoever from which it may be inferred that the salt purchased and sold was intended to be used as 'a foodstuff a quality essential to the proof to ascertain the conviction.

The quarter pound packet of margarine was pre-wrapped and pre-weighted by the manufacturers and not a price controlled item as the order described maximum retail price of one pound packets of margarine and that what is controlled is a, one pound packet and the omission to specifically refer to 'quarter pound packet' is to be taken as exclusionary from the order.

**HELD:** (1) There was no sufficient evidence to sustain the conviction in so far as the 'salt' is concerned; the *Trade Order* dealt with a number of types of foodstuff and, since not every kind of salt may be classified as foodstuff, there was nothing in the evidence to suggest that the salt purchased and sold was intended for human consumption.

(2) The two quarter packets of margarine sold are not price controlled articles unless there was evidence that they formed part of the contents of the one pound packet. The one pound packet is not a minimum unit but a standard, the price of a lesser amount sold from a "one pound packet" may be determined. However, there was no evidence that the two quarter pound packets were sold as a lesser quantity from a one pound packet within the necessary meaning of article 13 of the *Trade Order No. 74 of 1963.*

**Appeals allowed with costs.**

**Cases referred to:**

1. Garnett & Co. Ltd v. Slater [1942] L.R.B.G. 354.
2. H.B. Garaj Ltd *et anor.* v. Slater [1944] L.R.B.G 152.
3. Lewis Robeiro v. David Hughes [1943] L.R.B.G 217.

C. Lloyd Luckhoo with M.C. Crawford for appellant.
M.L.R. Ganpatsingh for respondent.

**CHURAMAN, J. (delivered the judgment of the court):** By orders made under the authority of the *Trade Act, Cap. 91:01,* the prices of a number of items of foodstuff have been controlled. From time to time, a number of such orders have

been made. The maximum selling price varies according to locality. By *Order No. 37 of 1971* the maximum retail price of "Golden Cream Margarine" was variously prescribed according to weight and/or package. A "one pound packet" was prescribed at 62 cents. So too was "salt" which by *Order No. 15 of 1973* was prescribed for Berbice (the area applicable to this appeal) at "2 lbs for 17 cents."

On 7th July, 1973, at a grocery at Albion, Berbice, a police decoy purchased from the appellants, employee and owner respectively, "two quarter pound packets" of Golden Cream Margarine for 40 cents, allegedly nine cents above the maximum price, and "two pounds of salt" for 24 cents, allegedly seven cents above the maximum price. The purchase and sale were admittedly a retail transaction in respect of each item. If the respective items were proved to be "price-controlled items", then the appellants were obviously in breach of the relevant orders and were therefore guilty. Indeed, so thought the learned Magistrate, who, after coming to a conclusion of guilt on each of the two breaches, imposed custodial sentences of six months on each appellant, on both charges, concurrent.

Learned Counsel for the appellants challenged the validity of those convictions on points of law. It would be convenient, first of all, to deal with the "salt". The evidence disclosed that all the decoy asked for was "two pounds of salt". He did not say what kind nor did he in any way indicate the use intended to be made of it. Learned Counsel contends that, while *prima facie* "salt" was undoubtedly sold, there was absolutely no evidence, direct or circumstantial, from which it may fairly be inferred that the salt purchased and sold was intended to be used as a "foodstuff', a quality essential, contends learned Counsel, to sustain a conviction. For, runs the argument, the Order dealt with a number of foodstuffs, and, since not every kind of salt (of which within common knowledge there exists a variety) may be classified as a "foodstuff', its quality for human consumption became an essential ingredient for proof. Counsel alerted attention to "salt" used purely for industrial purposes, as well as "salt" which might decidedly be dangerous for human consumption. There was therefore nothing in the evidence to suggest that the "salt" purchased and/or sold was intended for human consumption; as for example, by the decoy using such qualifying or descriptive words such as "for cooking" or "for eating" or any such like expression. There is in our view much substance in this argument.

Learned Counsel for the respondent, after hearing the breadth of these arguments, conceded, quite properly in our view, that there was no sufficient evidence to sustain the conviction in so far as "salt" is concerned. While the point taken by the appellants may fairly be said to be not decided, we hope we have sufficiently expressed our views in relation to the matters essential to the proof of guilt.

So far as the conviction for Golden Cream Margarine is concerned, the relevant portion of the Order calls for close examination. In the second column of the

schedule, there appears the word "Margarine" suggesting a generic term, and thereunder are listed eight different types or species with varying prices, the first of them being "Golden Cream." The prescribed maximum retail price (for Berbice) is described thus: "62 cents per 1 lb pkt; 64 cents per 1 lb tin, $3.03 per 5 lb tin."

Learned Counsel for the appellants contends that "quarter pound packets", which appear to be pre-weighed and pre-wrapped by the manufacturers, are not price-controlled items; what is controlled is a one pound packet. And as other portions of the Order clearly control articles smaller or less than one pound units, for example, "half pound tin" for both "Glow Spread" and "Mello Kreen" margarine, omission to specifically refer to "quarter pound packets" under "Golden Cream" must be taken as exclusory from the Order. To substantiate that contention, Counsel, in a very thorough analysis of the whole Order, drew our attention to differentials in pricing on a "cost per pound" basis; for example, (a relevant one) the price of a one pound packet of Golden Cream is not the same as one-fifth of a five pound tin, the difference being one cent and a fraction. The effect of this differential, says Counsel, destroys any possible argument that the price of "quarter pound packets" of "Golden Cream" could be ascertained by taking one-quarter the price of a controlled one pound unit.

This contention, however, seems to be in the very teeth of art. 13(1) and (2) of *Order No. 74 of 1963*, the effect of which clearly is to maintain control of smaller quantities of a price-controlled article in the relevant Schedule by determining the proportionate amount of the maximum price thereof. On an assumption therefore, that "one pound packets" contain four pre-weighed and pre-wrapped quarters, there can be no doubt that the cost per quarter must be calculated proportionately to a one pound packet. To hold otherwise would be to frustrate the whole scheme of the legislation. It seems clear that the quantity, that is to say "1 lb packet" is not a minimum unit but a standard by which the price of a lesser amount sold from a "1 lb packet" may be determined. (See Garnett & Co. Ltd. v. Slater [1942] L.R.B.G. 354).

A further question, however, arises for answer: Is there any evidence that the "two quarter pound packets" were sold as a "lesser quantity" from a "1 lb packet" within the meaning of art. 13 (*supra*)? In our view the question must clearly be answered in favour of the appellants. We entertain no doubt that a Court is not entitled to take any notice of any trade custom to conclude that quarter pound packets are found or contained only in "one pound packets containing four quarters", (*vide* H.B. Gajraj Ltd. *et anor* v. Slater [1944] L.R.B.G. 152).

Learned Counsel for the respondent, with commendable propriety, drew our attention to the case of Lewis Robeiro v. David Hughes ([1943] L.R.B.G. 217) decided by VERITY C.J., FRITZ AND DUKE, J.J. In that case, "Milk-con-

densed-(sweetened)-per case of 48 14-oz tins" was controlled. A sale took place of one tin of condensed milk. Held, a tin of condensed milk was not controlled unless it formed part of the contents of a case containing 48 14-oz tins. Learned Counsel for the respondent, however, sought to distinguish Robeiro's case from the instant matter on the ground that, in Robeiro's case the article "Condensed Milk" as well as the unit to be controlled appeared under the Column "Article" whereas, in the instant matter, only the article (Golden Cream) appears thereunder while the unit to be controlled appears under the "prices" column. This transposition of the "unit" from the "article" column on to the "prices" column, argues learned Counsel, is significant and deliberate, the effect of which is, so far as the instant matter is concerned, to make the "two quarter pound packets" price-controlled without any need to establish evidentially that they came out of a "one pound packet" having four quarters. We are quite unable to accept this argument. If, indeed there is any distinction in the transposition of the "unit" from one column to another, it is in our view, a distinction in terms and not substance. It seems to us, looking at the relevant order, that on account of the eight types or brands of "Margarine" sought to be controlled, each of which has varying units of varying prices, it was demonstrably more convenient to specify the "units" with the prices under the "Prices" Column against the brand names under the "Article" Column rather than to list prices only against both brand names as well as "units". In Robeiro's case, the order dealt with a single article and a single unit. Therein lies the true distinction, if distinction it truly is.

We have come to the conclusion that Robeiro's case is authority for saying that the two quarter pound packets of margarine sold are not price-controlled articles unless there was evidence that they formed part of the contents of the one pound packet. We can do no better than to adopt the views of VERITY, C.J. in Robeiro's case (*supra*) when he said at p. 218:-

> "It may appear entirely irrational that the price of a certain article should be controlled if it comes from a case of a certain size (packet) and not controlled if it comes from a case of any other size..." (parenthesis ours).

And at p. 219 after dealing with the effect of a conclusion if the words "per case of 48 14-oz tins" were in the "prices" column, continued:

> "However reasonable this construction may appear to those who are unversed in the science of price control, it is not a mode of construction open to courts of law which are bound to give effect, if it be possible, to the terms used by the competent authority' and to the distinctions which that authority has itself drawn."

With these pregnant observations underscored in mind, we have come to the

conclusion, looking at the Order as a whole, that, in the light of the varying prices determined by the method of packing with a weight qualification, the omission to specifically refer to "quarter pound packets" is a distinction which the order itself has drawn. If however, there was evidence to establish that "the two quarter pound packets" were sold out of any of the specified units, assumed to be "1 lb packet", the result may well have been different.

The appeals are therefore allowed, and the convictions and sentences set aside.

The point on sentence was also fully argued; learned Counsel for the respondent, again with characteristic candour, expressed the concessional view that the custodial sentences were unduly severe. The sale took place on 7th July, 1973 in Berbice; similar offences by other persons committed in that district during that period were dealt with by the imposition of only monetary penalties; the certified extract issued by the Clerk of Court in Berbice (submitted to us by Mr. Luckhoo) for the period July, 1973 to June, 1975 so indicates. The appellants were charged in July, 1973, but, we were told, on account of an appellate history relating to these matters, the instant convictions were made only as late as May, 1975. The appellants both had a clean record. If it was necessary for us to consider sentence, we would have been disposed to consider a monetary penalty in the light of these circumstances.

**Appeals allowed with costs.**

**The State v. Persaud & Ors.**

**GOWKARRAN PERSAUD**
**JOWALLA PERSAUD**
**MICHAEL BOODRAM**
**Appellants**

**v.**

**THE STATE**
**Respondent**

[Court of Appeal (Haynes, C., Bollers, C.J., and K.S. Massiah, J.A.) June 7, 8, 9, 10, 11, 14, 16, 17, 18, 21, 22, July 20, 1976]

*Criminal Law-Evidence-Murder-Accomplice vel non-Need for direction that corroborative evidence must exist both as to a material circumstance of the crime and as to identity of accused-Non-direction on either might vitiate conviction.*

*Crminal Law-Evidence-Co-accused-Matters regarded as corroborative evi-*

*dence against one accused-Not necessarily so regarded against his co-accused-Failure to so warn jury in a fit case might be a fatal misdirection.*

*Criminal Law-Evidence capable of amounting to corroboration-Whether duty of trial judge to point out such evidence when it exists-Whether when no such evidence exists judge must so inform jury-Uncorroborated evidence of accomplice-Duty of judge to warn jury it is unsafe to convict despite their legal duty to do so-Evidence Act, Cap. 5:03. s. 61 (5).*

*Criminal Law-Evidence-Whether lie told police during investigations capable of amounting to corroboration-Whether jury should have received a direction on the point.*

The three appellants were convicted of the murder of one Victor Yassin. The prosecution's case was that the first appellant carried on an illicit affair with Yassin's wife; that sometime previous to the date of the murder he and others threatened Yassin and he boasted to a police sergeant that one day he would become owner of all Yassin's property. In keeping with this desire, he so openly expressed, the first appellant plotted and planned with the other two appellants; he procured and counselled his brother, the second appellant and the third appellant to murder the deceased, whilst he personally was the master-mind and directed the operation of the crime.

On September 9, 1973, about 11:45 p.m. the murder took place, but there was, no direct only circumstantial evidence of it. The three appellants were driven up and down the East Coast car park in Georgetown in questionable circumstances by one Ramnarace Singh, a hire-car driver, to the Carib Hotel owned by Yassin. The first appellant waited outside in Ramnarace Singh's car with a shot-gun on the back seat. Meanwhile, the second and third appellants went into the hotel premises where they imbibed alcohol which they bought with money the first appellant borrowed from Ramnarace Singh for the purpose. At about 10-10.30 p.m. Yassin was seen to leave the hotel and to go to his car followed by some identified men with whom he drove off in the direction of the city. From the evidence, the inference was capable of being drawn that both second and third appellants were among Yassin's passengers since the finger prints of the second appellant were found on the right rear door, and a human blood stained white T-shirt belonging to him was found at his home by a police search party, whilst a pair of human blood stained yachting shoes which the third appellant was proved to have worn at the time were found at the home when searched. In the one case, the second appellant told the police a lie that the stains on his T-shirt were caused by syrup from stout. In the other case, the third appellant lied saying syrup from shave ice had fallen on his yachting shoes. In both cases the stains were proven to be that of human blood. There was, however, no proof that the first appellant had accompanied Yassin in his motor car.

Both second and third appellants gave incriminating caution statements in which, though they endeavoured to exculpate themselves, they sought to implicate others. In those statements, both placed themselves at the scene of the crime by admitting being present in Yassin's car at the time of his death. However, at the trial, in statements from the dock, they both raised alibis as their defence. The first appellant, on the other hand, declared his innocence pleading that he had nothing to do with the death of Yassin. His defence was, however, erroneously presented to the jury, like the other two, as an *alibi.*

On appeal to the Court of Appeal from their convictions and sentences at the Demerara Assizes.

**HELD:** (1) That the evidence was overwhelming on which a reasonable jury could properly have found that at the time Ramnarace Singh was in the motor car in company of the three appellants, and from the evidence he gave, he was an accomplice, and therefore the trial judge was right in leaving the issue of accomplice *vel non* to the jury.

(2) That a *prima facie* case was made out against the first appellant from the cumulative effect of the evidence that was led. A jury could reasonably find that he plotted and planned Yassin's death and had procured and counselled the second and third appellants to do so.

(3) That the jury were misdirected in relation to the meaning of an accomplice and to the warning that must be given if the jury found Ramnarace Singh was an accomplice. There was also a non-direction amounting to a misdirection as to the evidence required to amount to corroboration of the evidence of an accomplice. The evidence of an accomplice must be corroborated both as to a material particular or circumstance of the crime and as to the identity of the accused.

(4) That in cases where persons are jointly charged, it is a misdirection not to warn the jury that what may be treated as corroboration in relation to the case against a particular accused, may not necessarily be corroboration in relation to the case against another.

(5) That in all cases in which corroboration is required as a rule of practice a trial judge in Guyana should regard it as a duty to point out to the jury the evidence capable of amounting to corroboration, and if there is no corroborative circumstantial evidence he must tell the jury so. A trial judge must indicate what independent evidence (if any) in the case is capable of being corroborative, and then direct the jury that they must decide (a) if they believe it, and (b) if so, whether it does corroborate the accomplice. Failure to do this in a fit case, might well invalidate a conviction.

(6) That the trial judge did not deal with the matter of the lies told by the, second and third appellants about the T-shirt and yachting shoes which they respectively wore in Yassin's motor car. The jury may well have treated the lies they told about them as corroboration, but may not have done so if they had been afforded the guidance the situation demanded.

(7) That the defences of the first, second and third appellants were not adequately nor fairly presented to the jury, but as the interests of justice indicate a new trial, the convictions of the three appellants would be set aside and a new trial ordered.

R. v. Zielinski [1950] 2 All E.R. 114 disapproved; R. v. Edward Williams (1966) 23 W.I.R. 179 followed.

**Editorial Note:** This case is also reported at (1976) 24 W.I.R. 97.

The State v. Kowshall Persaud is now reported at [1975] 1 G.L.R. 13.

The State v. Sookraj Evans is now also reported at [1975] 1 G.L.R. 242.

**Appeals allowed. Convictions and sentences set aside. New trial ordered.**

**Cases referred to:**

(1) R. v. Vernon [1962] Crim. L.R. 35.
(2) Gokool and Gokool v. R. (1968) 13 W.I.R. 477.
(3) Vigeant v. R. [1930] S.C.R. 396.
(4) R. v. Durham and Crowder (1788) 168 E.R. 341.
(5) R. v. Atwood and Robbins (1788) 168 E.R. 334.
(6) R. v. Davies (1954)38 Cr. App. R. 11.
(7) R. v. Mullins (1848) 3 Cox C.C. 526; 12 J.P. 776; 14 Digest (Repl.) 300, 2809.
(8) R. v. Baskerville [1916-17] All E.R. Rep. 38; [1916] 2 K.B. 658; 86 L.J.K.B. 28; 115 L.T. 453; 80 J.P. 446; 60 Sol. Jo. 696; 25 Cox C.C. 524; 12 Cr. App. R. 81.
(9) D.P.P. v. Hester [1973] A.C. 296; [1972] 3 W.L.R. 910; [1972] 3 All E.R. 1065; [1973] Crim. L.R. 43; 57 Cr. App. R. 212; 116 Sol. Jo. 966, H.L.
(10) D.P.P. v. Kilbourne [1973] A.C. 729; [1973] 2 W.L.R. 254; [1973] 1 All E.R. 440; [1973] Crim. L.R. 235; 117 Sol. Jo. 144; 57 Cr. App. R. 381, H.L.
(11) Boardman v. D.P.P. [1974] 3 W.L.R. 673; [1974] 3 All E.R. 887; [1975] Crim. L.R. 36; 118 Sol. Jo. 809. H.L.
(12) R. v. Turner *et al* (1975) 61 Cr. App. R. 67.
(13) R. v. Royce-Bentley [1974] Crim. L.R. 308; 59 Cr. App. R. 51. C.A.

(14) R. v. Sam Chin (1961) 3 W.I.R. 156.
(15) R. v. Peach January 14, 1974 (unrep).
(16) Provencher v. R. [1956] S.C.R. 95.
(17) R. v. Clynes (1960) 44 Cr. App. R. 158, C.C.A.; Digest Cont. Vol. A 379, 5276 b.
(18) R. v. Clapperton [1965] Crim. L.R. 607.
(19) R. v. Rainsford *et al* (1967) 11 W.I. R. 242.
(20) R. v. Mussin [1966] Crim. L.R. 331.
(21) R. v. Gamman [1966] Crim. L.R. 105.
(22) R. v. Sutton [1967] Crim. L.R. 43.
(23) R. v. Stannard, Cope and Brown [1965] 2 Q.B. 1; [1964] 2 W.L.R. 461; 128 J.P. 224; [1964] 1 All E.R. 34; 48 Cr. App. R. 81.
(24) R. v. Anslow [1962] Crim. L.R. 101.
(25) R. v. Johnson (1963) 5 W.I.R. 396.
(26) Pooran v. R. (1966) 10 W.I.R. 51.
(27) R. v. Anderson (1966) 10 W.I.R. 24.
(28) R. v. Watson (1913) 8 Cr. App. R. 249.
(29) Thomas v. Jones [1921] 1 K.B. 22
(30) R. v. Goddard and Goddard [1962] 1 W.L.R. 1282; 46 Cr. App. R. 456; [1962] 3 All E. R. 582; 127 J.P. 11; 106 Sol. Jo. 737.
(31) R. v. Thomas [1959] 1 W.L.R. 1086; [1959] 3 All E.R. 522; 123 J.P. 533; 103 Sol. Jo. 813; 43 Cr. App. R. 210.
(32) R. v. Sailsman (No. 2) (1963) 6 W.I.R 46.
(33) R. v. Jenkins and Another (1845) 1 Cox C.C. 117; 14 Digest (Repl.) 542, 5255.
(34) R. v. Henry and Manning [1969] Crim. L.R. 142; 53 Cr. App. R. 160, C.A.
(35) Eade v. R. (1923-24) 34 C.L.R. 154.
(36) Tumahole Bereng *et al* v. R. [1949] A.C. 253; *sub nom.* Bereng v. R., [1949] L.J.R. 1603. PC.
(37) R. v. King. [1967] Crim. L.R. 172.
(38) R. v. Baldwin and Chapman [1973] 2 All E.R. 624; [1973] 1 Q.B. 774; [1973] 2 W.L.R. 876; 57 Cr. App. R. 511; 117 Sol. Jo. 395.
(39) R. v. Sims [1946] 1 All E.R. 697; [1946] K.B. 531; 75 L.Q.R. 333.
(40) R. v. Zielinski [1950] 2 All E.R. 114; [1950] W.N. 494; 66 T.L.R. (Pt. 2) 956; 34 Cr. App. R. 193; 114 J.P. 571, 49 L.G.R. 45, C.C.A.
(41) R. v. Hughes [1955] Crim. L. R. 508.
(42) R. v. Tragen [1956] Crim. L.R. 332.
(43) R. v. Jones (No. 1) [1961] Crim. L.R. 778.
(44) R. v. Terrell [1947] 3 D.L.R. 523.
(45) R. v. Podluzny (1951) 1 W.W.R. (N.S.) 85.
(46) R. v. Kelso (1953) 105 C.C.C. 305 (Canadian Abridgment (1936-55) Vol. 5 pp. 314-315).
(47) R. v. Smith and Gilson (1956) 115 C.C.C. 38 (Canadian Abridgment.

1956 Annual, p. 370).

(48) R. v. Plantus (1957) 118 C.C.C. 260 (Canadian Abridgment 1957 Annual, p. 370).

(49) R. v. Boucher [1963] 2 C.C.C. 241 (Canadian Bridgment 1963 Annual, para. 604).

(50) R. v. Freestone [1913] T.P.D. 758.

(51) Dockery and Brown v. R. (1963) 5 W.I.R. 369.

(52) R. v. Smith [1964] Crim. L.R. 818.

(53) R. v. Daniels (1967) The Times, April 14.

(54) R. v. Edward Williams (1966) 23 W.I.R. 179.

(55) R. v. Davidson Tidd (1817-20) 33 How. State Trials 1338.

(56) R. v. Andrews and Payne (1843- 46) 1 Cox. C.C. 183.

(57) Broadhurst v. R. [1964] AC". 441; [1964] 2 W.L.R. 38; [1964] 1 All E.R. 111; 107 Sol. Jo. 1037.

(58) Davies v. D.P.P. [1954] A.C. 378; [1954] 2 W.L.R. 343; [1954] 1 All E.R. 507; 38 Cr. App. R. 11; 118 J.P. 222; 98 Sol. Jo. 161.

(59) R. v. Prater [1960] 1 All E.R. 298; [1960] 2 Q.B. 464; [1960] 2 W.L.R. 343; 124 J.P 176; 104 Sol. Jo. 109; 44 Cr. App. R. 83. C.C.A.

(60) R. v. Carey and Williams [1968] Crim. L.R. 389; 52 Cr. App. R. 305; 112 Sol. Jo. 332. C.A.

(61) R. v. Braithwaite (No. 1) (1969) 15 W.I.R. 263.

(62) Samaroo and Ezaz v. R. [1953] L.R.B.G. 150.

(63) David and Watkins v. R. (1966) 11 W.I.R. 37.

(64) Ramkishan Sharma v. The State of Bombay [1954] S.C.R. 903.

(65) Ilu v. Emperor (1934) A.I.R. 1934 Cal. 847.

(66) R. v. Dixon (1925) 19 Cr. App. R. 36. CCA.

(67) R. v. Abigail and Macnamara (1893) 14 N.S.W.L.R. 7; 9 N.S.W.W.N. 141.

(68) R. v. Reeve (1917) 17 S.R.N.S.W. 81; 34 N.S.W.W.N. 123.

(69) McDonald (1945) 84 Can. C.C. 177.

(70) R. v. Hookoomchand and Sagur [1918] L.R.B.G. 12.

(71) Jewell v. Parr (1853) 13 C.B. 909; 1 C.L.R. 454; 22 L.J.T.C 253.

(72) Practice Note [1962] 1 All E.R. 448; *sub nom.* Practice Direction, [1962] 1 W.L.R 227; 33 Digest (Repl.) 227, 614.

(73) R. v. Everest (1909) 2 Cr. App. R. 130.

(74) R. v. Parker (1925) 18 Cr. App. R. 103.

(75) Marz v. R. (1955) 93 C. & R. 493.

(76) R. v. Whitehead [1929] 1 K.B. 99; [1928] All E.R. 186; 21 Cr. App. Rep. 23; 98 L.J.K.B. 67; 139 L.T 640; 92 J.P. 197; 21 L.G.R. 1; 28 Cox, C.C. 547.

(77) Noor Mohamed v. R. [1949] A.C. 182; [1949] 1 All E.R. 365; 65 T.L.R. 134; 93 Sol. Jo. 180; 14 Digest (Repl.) 421, 4097.

(78) R. v. Dossi (1918) 13 Cr. App. R. 158; 87 L.J.K.B. 1024; 34 T.L.R. 498

(79) R. v. Iman Din [1910] Can. C.C. 82.
(80) R. v. O'Donnell (1917) 12 Cr. App. R. 219. C.C.A.; 14 Digest (Repl.) 331, 3209.
(81) R. v. Dinnick (1910) 3 Cr. App. R. 77; 74 J.P. 32.
(82) R. v. Attar [1956] C.L.R. 289.
(83) The State v. Samad (1970) 15 W.I.R. 35.
(84) R. v. Croft (1944) 29 Cr. App. R. 169.
(85) R. v. Whitehouse [1941] 1 D.L.R. 683.
(86) The State v. Lloyd Harris (1974) 22 W.I.R. 41.
(87) Copertino v. McDonald [1964] L.R.B.G. 280.
(88) Harries v. Thomas (1917) 25 Cox, C.C. 753.
(89) The State v. Sookraj Evans [1975] 1 G.L.R. 242; (1975) 23 W.I.R. 189.
(90) R. v. George Joseph Smith (1915) Notable British Trial Series pp. 270.
(91) R. v. Hodge (1838) 2 Lew. C.C. 227; 68 E.R. 1136; 14 Digest (Repl.) 402, 3935.
(92) Peacock v. R. (1912) 13 C.L.R. 619.
(93) Plomp v. R. (1963) 110 C.L.R. 234.
(94) McGreevy v. D.P.P. [1973] 1 W.L.R. 276; [1973] 1 All E.R. 503; [1973] Crim. L.R. 232; 117 Sol. Jo. 164; 57 Cr. App. R. 424. H.L.
(95) R. v. Comba [1938] S.C.R. 396.
(96) R. v. Duesharm [1956] 1 D.L.R. (2d) 732; 22 CR. 129, 113, Can. Crim. Cas. 1 C.A.; Digest (Cont. Vol. A) 358. 1933 a.
(97) Teper v. R. [1952] A.C. 480; [1952] 2 All E.R. 447; 116 J.P. 502; 14 Digest (Repl.) 451, 4377.
(98) R. v. Sparrow [1973] 1 W.L.R. 488; [1973] 2 All E.R. 129; 117 Sol. Jo. 283.
(99) The State v. Henry Roberts and Michael Roberts [1975] 1 G.L.R. 38.
(100) R. v. Findlay [1944] 2 D.L.R. 773. C.A.
(101) Credland v. Knowler (1951) 35 Cr. App. R. 48. D.C.
(102) Jones v. Thomas [1934] 1 K.B. 323; [1933] All E.R. 535; 103 L.J K.B. 113; 150 L.T. 216; 98 J.P. 41; 31 L.G.R. 424; 30 Cox. C.C. 47; 3 Digest (Repl.) 453. 425.
(103) Tripodi v. R. (1960-61) 104 C.L.R. 1.
(104) Eric James v. R. (1970) 16 W.I.R. 272; 55 Cr. App. R. 299. P.C.
(105) Braithwaite v. R. [1954] L.R.B.G. 22.
(106) Ramroop v. R. (1963)6 W.I.R. 425.
(107) R. v. Heaps [1961] Crim. L.R. 254.
(108) R. v. Russell (1968) 52 Cr. App. R. 147.
(109) R. v. Hill (1911) 22 Cox C.C. 625; 105 LT. 751; 76 J.P. 49; 28 T.L.R. 15; 7 Cr. App. R. 26. C.C.A.
(110) R. v. Henry Mills and Edith Mills (1936) 25 Cr. App. R. 138.
(111) Julian v. R. (1969) 13 W.I.R. 66.
(112) R. v. John Canny (1945) 30 Cr. App. R. 143.
(113) R. v. Tillman [1962] Crim. L.R. 261.

(114) R. v. Bovell (1969) 15 W.I.R. 258.
(115) Mills and Gomes v. R. (1963)6 W.I.R. 418.
(116) The State v. Kowshall Persaud [1975] 1 G.L.R. 13.
(117) Kelly v. R. (1923) 32 C.L.R. 509.

Sir Lionel Luckhoo, S.C., with Edward Luckhoo, for the first appellant.
Doodnauth Singh, with K. Juman-Yassin and Edward Luckhoo, for the second appellant.
Doodnauth Singh, with K. Juman-Yassin and Edward Luckhoo, for the third appellant.
G. H. R. Jackman, Deputy Director of Public Prosecutions with L. Ganpatsingh, Assistant Director of Public Prosecutions for the State.

**HAYNES**, **C:** At his trial, the proof the prosecution relied on in its case against the appellant Jowalla Persaud, was circumstantial. If accepted entirely, it was sufficient to establish beyond reasonable doubt that this appellant was, at least, a principal in the second degree to the murder of the deceased Victor Yassin.

The basal evidence was a material admission in a written statement he gave to Detective Superintendent Roberts at Cove & John Police Station on 16th September, 1973-one week after Yassin's murder, put in evidence after an unsuccessful objection to its admissibility. In it this appellant placed himself in the death car between 11 p.m. and midnight on that fatal Sunday when, so he said, in his presence, but without his complicity, another passenger in the car (named Lincoln) stabbed Yassin fatally in the neck with a kitchen knife.

The prosecution was not able to prove that this appellant, himself in the car, inflicted the death wound or actively assisted the assassin who did. But, nonetheless, they urged the jury to convict him as an aider and abettor to the killer. The trial judge put the position rightly in this direction:

> "It is important for you to note that in this category mere presence alone is not sufficient to make a person an aider and abettor. He must either (a) do some positive act of participation, such as give active assistance or encouragement, or (b) have agreed that the crime should be committed. In the former, it is immaterial that there was no prior agreement whereas in the latter, once the evidence establishes mere presence without any positive act, a prior agreement that the crime be committed must be proved."

The prosecution relied on (b). And to prove such preconcert, rested mainly on the evidence of the witness Ramnarace Singh, called Ramesh, the owner-driver of taxi-cab PZ4094. Admittedly, it was neither alleged nor proved that this appellant himself had any motive for any participation in the crime. In effect, the

prosecution said, he set out to help his brother-the appellant Gowkarran Persaud-to get rid of Yassin, so that Gowkarran could take over in full Yassin's wife and Yassin's worth.

The learned Chief Justice, in his judgment just read in the appeal of Gowkarran Persaud, has set out in detail the relevant evidence of Ramnarace Singh in relation to the movements of this and the other appellants and a fourth man, between 2 p.m. and 8 p.m. on Sunday 9th. This judgment claims the benefit of his narration and it is not proposed to repeat all those details. Suffice it to say at this point, that this evidence of that witness, if believed, tended to prove that that night this appellant (Jowalla Persaud) was party to a plan to "get" someone (who the State said was Yassin) before that night ended. For, according to the witness, this appellant said to him outside of the Carib Hotel around 8 p.m.: "If ah we nah get the man tonight ah we can't get him no more." Yassin was then in the hotel. And a few hours later this appellant entered Yassin's car with two others who, he said in a written statement, murdered the unsuspecting victim in his own car in this appellant's presence.

The trial judge put to the jury in the summation that "the statement standing by itself does not point the finger of guilt against the number two accused" (Jowalla Persaud); and-"the strong factor that the State is saying in relation to the number two accused (Jowalla Persaud) is the words that he told Ramnarace Singh." And so the credibility of Ramnarace Singh was the crucial issue of fact for the jury. His evidence, as was to be expected, was severely attacked by counsel in cross-examination. And as a result of all his answers the trial judge "out of abundant caution", left to the jury the question whether or not Ramnarace Singh was an accomplice in the murder.

Counsel for the State submitted in this Court he was not, and that this direction was uncalled for, as there was no evidence on which a reasonable jury could find that he was. As intimated earlier, unless it is compulsive to do so, no evidence traversed in the first judgment shall be reiterated. It must suffice, then, to confirm in this judgment that we are all agreed that there was such evidence. And it would have been a serious and potentially fatal omission if this issue had not been left to the jury. [See R. v. Vernon [1962] Crim. L.R. 35 and R. v. Gokool & Gokool (1968) 13 W.I.R. 477.] The duty of a trial judge when there is such evidence is succinctly stated in Vigeant v. His Majesty The King ((1930) S.C.R. 396), a case of conspiracy, in these words of ANGLIN, C.J.C. (pp. 399-400):

> "Under such circumstances, the first duty of the trial judge was, in our opinion, to have instructed the jury as to what, in law, would constitute a man an accomplice. He should then have proceeded to direct their attention particularly to any facts in evidence which would serve to indicate Boulanger's complicity in the conspiracy at any stage thereof; and

> to submit to them the issue as to whether what he was proved to have done made him, having regard to the direction in law, already given, an accomplice. ...
>
> He should then proceed to instruct the jury that, if they concluded that the witness was, at any stage of the proceedings, an accomplice in the crime charged against the defendants, there would be danger in convicting them of that crime upon his evidence standing alone and uncorroborated; that the law does not preclude their doing so-indeed, they are at liberty to do so-but that there is danger in basing a conviction on such uncorroborated evidence. If, after this warning, the jury had faith enough in the evidence given by the accomplice to convict, their verdict will not be set aside."

This obligation is inescapable under the common law as it now is. The 'accomplice warning' has become part of the mystique of the administration of justice under English law. It perhaps does much good; it certainly does some mischief, for it results ever so often in a number of guilty persons escaping justice on appeal as a result of a trial judge having gone wrong in his direction on the relevant law. During the latter part of the eighteenth century, the judges of England were unanimously of opinion that a conviction could rest validly on the uncorroborated evidence of an accomplice, if the jury thought him sufficiently creditworthy. [See The King v. Durham & Crowder (1788) 168 E.R. 341 and The King v. Atwood& Robbins (1788) 168 E.R. 334.] And during the greater part of the nineteenth century, it was regarded as a matter of discretion whether the trial judge administered the accomplice warning to the jury or not. As time went by, it was given as a matter of routine, right up to the middle of the present century. But in Michael John Davies ((1954) 38 Cr. App. R. 11), the House of Lords announced unequivocally that the present strict rule was the common law of the country. As is often said, the rule of practice had "hardened" into a rule of law.

The reason for it has been put variously, in history. An understanding of them could assist jurors in determining the true weight to be placed on an accomplice's uncorroborated evidence. Traditionally, several dangers of an accomplice's testimony have been suggested. But, basically, it must be self-interest, whether he is a self-confessed participant or is considered one judicially, in spite of his denial of complicity. He would or might have "an axe to grind", so to speak. He might be tempted to curry favour with the prosecution in return for having already escaped prosecution or for a promise or expectation of immunity; or he might be tempted to try to exculpate himself or to reduce his own degree of responsibility by inculpating others; or, he might implicate an innocent man through spite or, revenge or a desire to take others with him into imprisonment, if he has been charged and sentenced before giving evidence. By reason of his inside knowledge of the crime, he would be well-equipped to testify falsely (if he wished to do so) with impres-

sive plausibility, about matters for which general corroboration might be found easily in the rest of the evidence. Further, in the early days of the shaping of the rule, the accused could not give sworn evidence on his own behalf and so was peculiarly vulnerable to invented allegations by persons guilty of the same offence.

And in R. v. Mullins ((1848) 3 Cox C.C. 526, 531), MAULE, J., put forward an additional danger. He said: "It often happens that an accomplice is a friend of those who committed the crime with him, and he would much rather get them out of the scrape and fix an innocent man than his real associates." And so, for these and maybe other good reasons, the common law judges looked around for a safeguard against these risks. They found it in the doctrine of corroboration. They worked out that to make it safe to convict on the evidence of an accomplice, the tribunal of fact should look outside of this testimony for some piece or pieces of evidence which singly or cumulatively would tend to show that the accomplice was speaking the truth when he implicated the accused, directly or circumstantially, in the commission of the crime. Thus, corroborative evidence was independent testimony which supported the story the accomplice told about the prisoner implicatingly.

This doctrine of the tainted or suspect nature of accomplice evidence and the prudence of looking for corroboration was wholly a judge-made law. As they did in relation to confessions, in an era when most, if not all, of the common felonies were capital offences, and, as stated before, accused persons could not give evidence on their own behalf, the judges, to protect them, invented this rule or practice. What juries were exhorted or advised, was not to act on such testimony unless they found some additional evidence which they believed, and which tended to fortify his credibility, or to provide some assurance, or to make it probable or reasonable to believe that the story of the accomplice was true in its implication of the accused. And so obediently was this warning acted on and heeded by both judges and juries that in R. v. Baskerville ([1916-17] All E. R. 38). VISCOUNT READING, C.J., speaking for a Bench of five, felt justified to say (p. 41): "It can but rarely happen that the jury would convict in such circumstances."

In very modern times, the approach the jury must be guided to take in cases where the prosecution's case rests on accomplice evidence, has been clarified. First of all, they must examine his evidence to decide if they find it in itself believable; if not, then they must without more acquit. If they find it intrinsically believable, then, before accepting it as true, they should look for corroboration in the rest of the evidence because of the danger of convicting the accused without it. If they find corroboration, then the risk of convicting a possibly innocent person is lessened and it could be safe to reach a verdict of guilty. In deciding whether the evidence of an accomplice is believable, they are entitled to look at the evidence as a whole and not at his testimony alone; so that in some cases that which adds

credence to the evidence of the accomplice might also serve to corroborate it. If the jury find no corroboration, they should convict only if, in spite of the risk or danger, they feel fully convinced the accomplice is speaking the truth. [See D.P.P. v. Hester (1973) 57 Cr. App. R. 212; D.P.P. v. Kilbourne (1973) 57 Cr. App. R. 381; Boardman v. D.P.P. [1974] 3 All. E.R. 887, and Turner *et al* (1975) 61 Cr. App. R. 67.] So much, briefly, for the origin and historical development of the rule and its application.

In the usual type of case, the accomplice is present when the crime is committed and testifies to the participation of the accused. It was not so here. Ramnarace Singh's evidence was circumstantial. It related to what this appellant did and said between 2 p.m and 8 p.m. on Sunday, 9th September, 1973. The prosecution relied on it as a strong link in the chain of circumstantial proof of guilt. So that what was needed as corroboration was some additional piece of evidence, oral or written, from an independent source, to make it safe for a reasonable jury to act on Ramnarace Singh's testimony as implicating this appellant in the murder of Yassin, in the way that its acceptance might tend to make this appellant's long wait at the Carib Hotel, his entry into the death car at a late hour that night in the company of two others, and his presence in that very car when very shortly after those two (so he said in the disputed statement) did "get" (kill) Yassin, criminously.

But counsel for the State submitted that Ramnarace Singh gave no evidence adverse to this appellant, and, that being so, the trial judge was under no duty whatever to direct the jury on corroboration. "If." said he, "an accomplice does not implicate an accused on a material particular in his evidence, a non-direction on corroboration could not be a misdirection at all." He relied on John William Royce-Bentley ((1974) 59 Cr. App. R. 51). In R. v. Sam Chin ((1961) 3 W.I.R. 156), Chin was convicted for setting fire to a shop. On appeal, it was submitted that two of the prosecution witnesses should have been treated as accomplices and the necessary warning given to the jury. The Federal Supreme Court held that even if the trial judge should have left the issue of accomplices *vel non to* the jury with the warning, this omission caused no miscarriage of justice, because the evidence of the two witnesses did not further the case against the appellant. It was not really adverse to him. In Peach, an unreported case of January 14, 1974, (cited in Royce-Bentley (1974) 59 Cr. App. R. 51) an accomplice failed to give any evidence adverse to the accused, who was convicted for burglary. The Lord Chief Justice said (59 Cr. App. R. at p. 53);

"But of course the real point here, and one only has to think about the case for a few minutes, is that if Griffin that is, the accomplice-was not giving evidence adverse to the accused; the ordinary reason for giving a direction on accomplices and corroboration did not arise. The whole purpose of the well-known requirement for directing juries in this sense in a criminal case is that one is normally concerned with an accomplice

who has given adverse evidence. If there was no such evidence, then no such direction was necessary because the law does not require a direction on corroboration unless the evidence is adverse."

And in the later case of John William Royce-Bentley (*supra*) in which Peach was cited], the Lord Chief Justice himself was able to say (p. 53): "... if the so-called accomplice does not in fact give evidence adverse to the defendant, no warning is required ..."

We do not intend, in this judgment, to attempt to lay down any precise definition of what is 'adverse evidence', even if it would be possible to do so. However, we are satisfied beyond any doubt whatever, that the evidence of Ramnarace Singh in this case was adverse to this appellant. The prosecution relied on it, rightly, as tending to prove that this appellant's presence in the death car at the time of the killing was a guilty one, so as to make him criminally responsible, at least as a principal in the second degree. The defence denied the most damaging and potentially incriminatory parts of it; and the trial judge directed the jury that, without it, the case against the appellant "hangs in the air", and that if they disbelieved it, they had to acquit. Counsel for the State's approach was to look at and consider Ramnarace Singh's evidence in isolation without regard to its probative effect upon the rest of the evidence and its materiality to the case for the prosecution. We consider this approach erroneous. Ramnarace Singh's evidence, looked at in the setting-of the whole proof, tended materially to establish the case for the prosecution-and to undermine the defence. In these circumstances it would be unrealistic and not sensible to say that it was not adverse to the appellant. It certainly was not favourable to him. We reject that submission without difficulty.

As was indicated, since the issue of accomplice *vel non* was to be left to the jury, they had to know what could make a man an accomplice in law. And it was the duty of the trial judge to tell them. It is plain that they were misdirected on this very important issue. The learned Chief Justice in his judgment has shown the character of this misdirection. In this, we make a single additional observation. The jury were told that an accomplice was a person who had "an actual share in the commission of the crime whether as a principal or as an accessory". The trial judge had already earlier told them accurately who was a principal and who was an accessory to a crime. Putting these two directions together and applying them, a reasonable jury would have been led to find that Ramnarace Singh could not be and was not an accomplice. The trial judge overlooked the fact that a man could be guilty of aiding and abetting a felony without being a principal or an accessory to it as defined to the jury. He could have been indicted separately at common law for aiding and abetting; and under the *Criminal Law (Procedure) Act Cap. 10:01* for the same offence or as a principal. But, whether this happens or not, he is *particeps criminis*, and so an accomplice. In Proyencher v. The Queen ((1956) S.C.R. 95), a gang of men drove up near to a garage in a car driven by the appel-

lant. He drove off. They broke into the garage and stole a quantity of articles. He was charged for this offence itself, and one of the gang was the main witness for the prosecution. The case against him rested on the accomplice's testimony that the appellant, with guilty knowledge of the plot, drove the principals to the scene of the crime. There was never any question but that this was sufficient to convict him of the felonious entry itself, although the appeal to the Supreme Court of Canada was allowed on a mis-direction as to corroboration. As a result of this oversight, there was serious error in the direction in this regard. In the circumstances, it is not unlikely that, misled by the misdirection, the jury did not find Ramnarace Singh to be an accomplice which they might well have found he was, if they had been correctly directed. If this happened-and we cannot be sure it did not happen-the appellant would have been deprived of the chance of acquittal open to him in a real sense if Ramnarace Singh was treated as an accomplice and the rule of prudence applied. This would be misdirection sufficient to invalidate the conviction, unless the proviso applies.

It is equally plain, as the learned Chief Justice also found and for the reasons he gave, that the jury were misdirected on corroboration in more ways than one. If, in spite of the error just pointed out, the jury did consider Ramnarace Singh an accomplice, they needed adequate instruction on that difficult requirement.

The trial judge had to explain to the jury the meaning of corroboration in law; not to do so could invalidate a conviction [see Patrick Joseph Clynes (1960) 44 Cr. App. R. 158. R. v. Claperton [1965] Crim. L.R. 607 and R. v. Rainsford *et al* (1967) 11 W.I.R. 242]; in doing so, he need not, in fact, ought not to use technical legal language or a succession of verbal formulae culled from decisions of appellate courts, which might make the summing-up immune to appeal upon a point of law but is calculated to confuse a jury of laymen or pass over their heads, but should give a sensible direction couched in ordinary language directed to the facts of the particular case [per LORD DIPLOCK in D.P.P. v. Hester (1973) 57 Cr. App. R. 212. at pp. 247-248]; it was important that the jury understand that corroboration had to "implicate the accused"; not to tell them so could be fatal [R. v. Mussin [1966] Crim. L.R. 331]; further, even if any item of evidence "implicated" or connected or tended to connect the accused as the accomplice testified, to be corroboration in law it must do so, in some "material particular" that is to say, in respect of some matter adduced by the prosecution through the accomplice which tends to prove the guilt of the accused [R. v. Gamman [1966] Crim. L.R. 105]; R. v. Sutton [1967] Crim. L.R. 43:] and, finally, that the law required corroboration only where the accomplice has given evidence adverse to the accused [John William Royce-Bentley (1974) 59 Cr. App. R. 51, and Stannard, Cope & Brown (1964) 48 Cr. App. R. 81].

If the trial judge was satisfied rightly that there was no evidence capable in law of being corroborative, it was his duty to tell the jury so; if not, this omission could

be fatal [see R. v. Anslow [1962] Crim. L.R. 101, R. v. Johnson (1963) 5 W.I.R. 396, Pooranv. R. (1966) 10 W.I.R. 51 and R. v. Anderson (1966) 10 W.I.R. 24]; if a piece of evidence capable of being corroborative was, in the view of the jury, equally consistent with the truth of the evidence of the accomplice implicating this appellant as with its untruth, then the jury could not properly use it as corroboration [David Watson (1913) 8 Cr. App. R. 249; Thomas v. Jones [1921] 1 K.B. 22; Provencher v. The Queen (*supra*); Goddard & Goddard (1962) 46 Cr. App. R. 456; and Pooran v. R. (*supra*)]; if any evidence was not corroborative in law, to tell the jury it was, could also be fatal [Anthony Hoggarth Thomas (1959) 43 Cr. App. R. 210; and R. v. Sailsman (No. 2) (1963) 6 W.I.R. 46]; as Ramnarace Singh's evidence implicated all three appellants, the jury had to be directed they should look for corroboration in relation to each appellant separately and could find it only in the evidence legally admissible against him [R. v. Jenkins & Anor. [1845] 1 Cox C.C. 117; R. v. Baskerville [1916-17] All E.R. Rep. 38; Goddard & Goddard (*supra*); and Henry & Manning (1969) 53 Cr. App. R. 150]; if the jury found that the appellant told lies to the police on any relevant matter in the course of the investigations, they could use this as corroborative only in certain circumstances, which had to be explained to the jury carefully [Eade v. The King, (1923-24) 34 C.L.R. 154; Patrick Joseph Clynes (*supra*); Pooran v. R. (*supra*) and R. v. Sutton (*supra*)]; if the jury believed that the defence of this appellant in his unsworn statement from the dock was a false account and rejected it, this by itself could not be corroborative of the accomplice's evidence-[see Tumahole Bereng *et al* v. R. [1949] A.C. 253; R. v. King [1967] Crim. L.R. 172 and Baldwin & Chapman (1973) 57 Cr. App. R. 511]; and. finally, if there was any item of evidence which the jury might treat wrongly as corroborative, but which is not, they should be warned against so doing [See Goddard & Goddard (*supra*)]. In my opinion, on all the evidence in the case against the appellant, Jowalla Persaud and his co-accused, the need arose for adequate and clear directions on all of these matters just recounted.

There is another aspect of this law, deliberately omitted from this collectanea for separate consideration, and this is, whether a duty rested on the trial judge in this case to indicate to the jury what evidence, if any, was capable of being corroborative. We think there was. To justify this onus, we must relate to the authorities.

First of all, in England the decisions appear inconsistent. In R. v. Sims ([1946] 1 All E.R. 697), LORD GODDARD, L.C.J., in the judgment of a Bench of five, in an appeal from convictions on three counts of buggery with three different men, in which ample warning as to acting on the evidence of an accomplice was given, said *inter alia* (p. 703):

> "... We do not think that the evidence of the men can be considered as corroborating one another, because each may be said to be an accomplice in the act to which he speaks and his evidence is to be viewed with

> caution; but the judge gave the jury ample warning as to acting on the evidence of an accomplice, and no objection can be taken to the summing-up on that account. In some passages of the summing-up, however, the judge did use expressions which seem to convey that it was for the jury to say whether there was corroboration or not. That, of course, is not the case. It is for the judge to say whether a particular piece of evidence, if accepted, is capable of being corroboration and then for the jury to act on it or not as they think right."

It is suggested that it could be only in his charge to the jury that a trial judge could "say, whether a particular piece of evidence, if accepted, is capable of being corroboration", "and then" for the jury to say if it is. Hence, this passage can be construed to be accepting the proposition that the judge is to indicate what evidence can be, and the jury are to say if that evidence is, corroborative. Professor Cross in *Cross on 'Evidence'*, 4th Ed., 1974, at p. 192, footnote (4), supports this construction of R. v. Sims (*supra*).

But four years later in Zielinski ((1950) 34 Cr. App. R. 193), the same Court (LORD GODDARD, L.C.J., and BYRNE and McNAIR, JJ.) speaking through BYRNE, J., said something quite different. It was an appeal from a conviction for indecent assault of an elderly woman. The Court held there was corroboration. But the trial judge did not point it out. BYRNE, J. did say (p. 197):

> "... It is quite true that he did not point out to the jury any piece of evidence which was capable in law of amounting to corroboration, but there was no reason why he should. It is not, in the view of the Court, the duty of the judge to point out to the jury pieces of evidence which are capable in law of amounting to corroboration, though judges frequently do so."

And later:

> "... there is no duty upon the judge to point out every piece of evidence which is capable of amounting to corroboration, providing he has sufficiently told the jury what in law is meant by corroboration."

R. v. Sims (*supra*) was not cited to the Court or referred to in the judgment. If it was, the relevant proposition might well have been adopted in Zielinski as a prestigious authority. Be that as it may, Zielinski was followed in R. v. Hughes ([1955] Crim. L.R. 508), with no reference to R. v. Sims (*supra*).

Then in R. v. Tragen ([1956] Crim. L.R. 332), that Court (LORD GODDARD, C.J., HILBERY and BYRNE, JJ.) allowed an appeal against a conviction for indecent assault of a girl. The appellant's defence was that he patted or shoved

her only. The trial judge told the jury: "I direct you as a matter of law that... there is corroboration." The Court held that "the function of the judge was to point out the evidence capable in law of being regarded as corroboration. It was then for the jury to decide whether or not this evidence amounted to corroboration." Here, although not cited. R. v. Sims (*supra*) was followed. And the law was back where it was in 1946, it might have been thought. But this was not to be. In Clynes (*supra*) STREATFIELD, J., in the judgment of the Court (p. 161) observed: "It is quite true that in this Court it has been laid down that a judge is not obliged to draw the jury's attention to specific items of evidence which may or may not be corroboration", referring obviously to Zielinski (*supra*) but not at all to R v. Sims ( *supra*) or to the more recent R. v. Tragen (*supra*). Next came R. v. Jones (No. 1) [1961] Crim. L.R. 778, where the Court, following Zielinski (*supra*) *and* Clynes (*supra*), held it to be sufficient for the judge to indicate that there was corroborative evidence, without specifying in detail what it was. It would not be an unfair criticism to remark that the judges of that Court had, from 1946 to 1961, demonstrated consistent inconsistency in their reasoning. The time was ripe for reconciliation.

And so in Goddard & Goddard (1962) 46 Cr. App. R. 456, the Court considered what is described as the principle of Zielinski (*supra*). Its conclusion appeared in the now well-known passage in the judgment of the Court (p. 461):

> "It is only right to say that in the experience of this court that principle is seldom followed; indeed, if it is to be treated as a general principle applicable to all cases of corroboration, this court feels that it goes too far. Quite clearly, it is idle to give that direction *simpliciter* in a case where in fact there is no evidence capable of amounting to corroboration because the very fact that the direction is given would leave the jury to infer that there was some evidence capable of amounting to corroboration if they looked for it. Equally if you get a case, as in many sexual cases, where there is a danger that the jury will treat as corroboration something which is incapable of being corroboration, there must be a duty on the judge to explain to the jury what is not corroboration as, for example, a complaint made by the complainant. In the general run of cases, where there is evidence capable of amounting to corroboration, the duty of the judge must depend upon the exact facts of the case, bearing in mind that he certainly would not be expected to refer to every piece of evidence which is capable of amounting to corroboration but, in general, in the judgment of this court he should give a broad indication of the evidence which the jury, if they accept it, may treat as corroboration."

One can gather at least four things from this passage, *viz.*, (i) what was stated in Zielinski (*supra*) is not to be taken as a general principle of law; (2) in practice, it

is customary for trial judges to point out to the jury the evidence capable of being corroboration; (3) whether the judge is bound to do so or not depends on the facts of each case; and (4) he cannot be bound to refer to every piece of evidence capable of being corroboration. In relation, this decision, Professor J. C. Smith of the University of Nottingham said, "the tide seems to have turned again." [See (1964) Crim. L.R., at p. 440.]

We look next at Stannard, Cope & Brown ((1964) 48 Cr. App. R. 8)1. The trial judge there did not indicate to the jury what items of evidence could be corroborative. WINN, L.J. said (p. 92): "... The learned trial judge did in fact give a warning ... but, naturally, since this was before July 31, 1962, on which day the case of Goddard & Goddard ((1962) 46 Cr. App. R. 456)... was decided, he did not go on to tell the jury what matters could, as a matter of law, be regarded by them, if they saw fit, as corroboration of the accomplices' evidence." The language of WINN, L.J. suggests that if the trial was after Goddard & Goddard (*supra*) the learned judge would have made the indication to the jury. This was the state of the authorities in England then. It would be safe to say that the stage had been reached in 1964, of a perhaps not inflexible practice to indicate to the jury what evidence (if any) was capable of amounting to corroboration although there had not been any judicial overrule of the Zielinski (*supra*) principle that they were under no duty so to do.

But in Canada, many judges had spoken differently. In Rex v. Terrell ([1947] 3 D.L.R. 523), in the British Columbia Court of Appeal, O'HALLORAN, J. said (p. 528): "The function of the judge is not to tell the jury what is corroborative but rather to tell them what may be corroborative." It is true his was a dissenting judgment, but this was not the point of dissent. In R. v. Podluzny ([1951] 1 W.W.R. (N.S.) 85), the Court held that the judge should not leave that important subject (what evidence bears a corroborative character) at large for a jury to extract corroboration, unguided, from the whole body of evidence. [See Empire Digest, p. 547, No. 3706.] Then in R. v. Kelso ((1953) 105 C.C.C. 305; Canadian Abridgment (1936-55) Vol. 5. pp. 314-315), the Court of Appeal of Ontario deliberately refused to follow Zielinski (*supra*) and ruled this to be a duty imposed on the trial judge. LAIDLAW, J.A. said:

> "When the learned trial judge decides as a matter of law that there is evidence of corroborative character that can be accepted by a jury, he knows the evidence upon which he has made his decision. Why should he not assist the jury by directing their attention to that evidence and thus enable them to proceed in their deliberations in a properly guided way? ... The danger of their finding what they should not find and the peril arising from such an error of convicting an innocent person is so great that, in my opinion, it cannot be said that the accused has had a satisfactory or fair trial when the case is left to the jury in that way."

In R. v. Smith & Gilson ((1956) 115 C.C.C. 38; Canadian Abridgment, 1956 Annual, p. 370), in the same Court, PICKUP, C.J. said:

> "I consider it settled law in this country that, in a case such as this [a prosecution for rape], it is the duty of a trial judge, where he is of the opinion that there is independent evidence capable of corroborating the testimony of the complainant, to point out to the jury what that evidence is, and to do so in a way whereby the jury will appreciate that the only evidence which they need consider, in determining whether there is corroboration or not, is the evidence pointed out to them by the trial judge as being capable of constituting such corroboration ... I do not consider the Kelso case as deciding that a trial judge must go over every piece of testimony which is independent of the testimony of the complainant and tell the jury which pieces are and which are not capable of being considered by them as corroboration but the Kelso case does... hold that a case should not be left to the jury merely with an explanation as to what in law constitutes corroboration, leaving the jury to wade through the evidence in a search for corroboration unaided by the trial judge relating his direction to the evidence in the case."

Then in R. v. Plantus ((1957) 118 C.C.C. 260; Canadian Abridgment, 1957 Annual, p. 370), the same Court allowed an appeal where the trial judge had made no indication at all to the jury; and in R. v. Boucher ((1963) 2 C.C.C. 241; Canadian Abridgment, 1963 Annual, para, 604), the Court of Appeal of British Columbia upheld the duty to do this. There are other Canadian authorities to the same effect, but these are sufficient to show those judges declined to follow Zielinski. Surprisingly, in the reports available to us, we have found no Australian decision on this point. But in a South African judgment, R. v. Freestone (1913)T.P.D. 758 [see *14 Empire Digest* 464, No. 4944, footnote (ii)] the brief note was that it is for the judge to decide if there is corroboration of an accomplice's evidence and for the jury to decide if such corroboration is sufficient.

In our Caribbean research, we found just a single reported case. We refer to Dockery & Brown v. R. ((1963) 5 W.I.R. 369), a judgment of the Court of Appeal of Jamaica [DUFFUS, P. (Ag.), LEWIS, J.A. and MOODY, J.A. (Ag.)]. Counsel for the appellant had relied on Goddard & Goddard (*supra*) to support a submission of non-direction for failure to indicate what evidence could be corroborative. LEWIS, J. A., in the judgment of the Court, asserted (p. 373): "... Goddard's case is not in our opinion to be understood as laying down an inflexible rule that the trial judge must in every case point out to the jury the portions of evidence which are capable of affording corroboration." In effect, that Court did not adopt the Canadian position. It is not amiss to comment that only Zielinski (*supra*) and Goddard (*supra*) were referred to all around.

Back in England in R. v. Smith ([1964] Crim. L.R. 818), where the trial judge left to the jury the issue of accomplice *vel non*, in accordance with Zielinski (*supra*), he gave no indication as to what evidence there was capable of amounting to corroboration. The appeal was quashed but it is not clear that this was a ground of the Court's decision. But in R. v. Daniels ("The Times", April 14, 1967), in a case in which there was no warning for corroboration, the Court (LORD JUSTICE SALMON, FENTON ATKINSON, J. and BRABIN, J.) held that one should have been given, and that the trial judge "should then have reviewed the evidence to see what corroboration there was." This seems to mean that the trial judge should have discussed with the jury the question as to what evidence was capable of being corroborative. It is open to the construction that the Court was making a ruling here inharmonious with Zielinski (*supra*).

In our judgment, it would hardly be an unfair criticism to say that the English decisions demonstrate a measure of inconsistency. We would like, if needs be if we can, to ensure that our judges should know without judicial hesitancy, what they should tell a jury and what they need not say, in their directions on corroboration. We are assisted in this appellate effort by the precise and unequivocal expression of opinion of this Court in The Queen v. Edward Williams, ((1966) 23 W.I.R. 179). The appellant had appealed from his conviction for rape on the ground that there was no corroboration, and the judge should have told the jury so. The Court (STOBY, C., LUCKHOO and CUMMINGS, JJ.A.) held there was, and dismissed the appeal. Their written judgment concluded with this statement:

> "This court desires to state that in all cases in which corroboration is required as a rule of practice, the judge should regard it as a duty to point out to the jury the evidence capable of amounting to corroboration, and if there is no corroborative evidence, to tell the jury so." (Underscoring mine.)

It is true this was not the basis of the decision. So the observation might be classed as *obiter*. But if it was, in our judgment, trial judges should still have been following it for these reasons: firstly, it was a statement made after the Court's attention was drawn to Zielinski (*supra*) and Goddard (*supra*) cited in its judgment; and, secondly, it was clearly intended to lay down the practice at assizes in our courts in spite of those two decisions.

We would wish to lend full support to this direction. In our judgment, this Court should approve of the practice stated in it and in the Canadian cases in preference to what was laid down in Zielinski (*supra*) and its satellite decisions. We cannot say we follow the bare reasoning in Zielinski (*supra*). All the Lord Chief Justice said against the submission in that case-that the judge ought to have pointed out what evidence was potentially corroborative-was (p. 197), "there was no reason why he should." With respectful humility, we disagree. There is cogent reason

why a trial judge should do so. We conceive that Professor Glanville Williams wrote appositely in his lectures *The Proof of Guilt,* 3rd Ed., p. 168, that:

> "It has been held on a number of occasions that (just as in the case of the accomplice warning) the trial judge is not required to go through the evidence for the purpose of pointing out to the jury what items in the evidence can amount to corroboration and what cannot. Thus the jury, who are wholly unversed in problems of evidence, are expected to solve questions of law and logic without assistance from the trial judge. The unsatisfactory nature of the rule can be illustrated from cases in which even trial judges have gone badly astray in deciding whether evidence amounts to corroboration."

The rule in Zielinski (*supra*) is unsatisfactory. A contrary rule will impose no extra burden on trial judges. If a trial judge must tell the jury there is no corroborative evidence when there is none (as is clearly the law), and if he must warn the jury in cases when there is danger that they might treat a particular item of non-corroborative evidence as corroborative (as also is clearly the law), to perform these functions rightly, he must himself go through all the independent evidence to decide if there is corroborative evidence or not, and if any such danger exists. This exercise would enable him without further strain to tell the jury, according to his view, what items of evidence, if believed, could corroborate the evidence of the accomplice. We think our juries need guidance on this problem, often times a difficult one to solve even for a trained legal mind.

We suspect that some trial judges shy away from such indication for fear of falling into error themselves and misleading the juries. There is this exposure. But this very possibility emphasises the existence of a real risk that lay juries might also fall into error and mislead themselves. And trial judges owe it to the accused and to the jury to do as much as they can to reduce the risk of error on the part of juries. Either the trial judges must run the risk of falling into error and misleading the jury, or juries are to be left, possibly to find corroboration where it does not exist, and mislead themselves, resulting in either case in unlawful convictions. Of these two courses, the former appears to be the lesser evil. For then, the error, if conviction follows, could be detected and corrected in the Court of Appeal; in the latter case, it might remain undetected and so uncorrected.

We feel that in the present state of the authorities, trial judges have been following Zielinski (*supra*) too closely; we feel that the clear direction in The Queen v. Edward Williams (*supra*) has been understandably overlooked; and we feel that for us here, the law should be made sensible and certain. For all these reasons and because we conclude we should stand by what this Court said in that case, we decide and direct that in these cases that direction must be followed by trial judges, that is to say, that they must indicate what independent evidence (if any) in the

case is capable of being corroborative, and then direct the jury that they must decide-(a) if they believe it; and (b) if so, whether it does corroborate the accomplice. Failure to do this in a fit case, might well invalidate a conviction.

But was there corroboration? Counsel for the appellant Jowalla Persaud, submitted that there was none to be found in the independent evidence admissible against that appellant; and that the trial judge should have so directed the jury. He rested on some of the principles and authorities stated and cited earlier in this judgment. We do not agree there was no corroborative evidence. If the jury considered Ramnarace Singh an accomplice, corroboration could have been found in the contents of the statement to the police, Ex. 'DD'; in particular, in the cumulative effect of the admissions he made therein, and in the lies told to the police about his movements on that Sunday in his first statement, Ex. 'CC-and as regards the cause of the bloodstains found on his shirt, if the jury found he did so lie, and if all the circumstances of the case would justify-the jury in drawing corroborative inference from such lies, as to the truth of his story, implicating the appellant.

His counsel submitted that the appellant's admission in the disputed statement that he was present in the death car at the time of the killing, was not capable in law of amounting to corroboration, because such presence was equally consistent with innocence. Even if this be so (without here admitting it is so), the jury would be entitled to consider not only this bare admission, but also all the other admitted facts in the statement. Corroboration can be found in a single admission or in the cumulative effect of a series of admissions if, in either case on the strength thereof, the accused is implicated in a material particular. It is true that the bare fact that an accused person's statement confirms some part or parts of an accomplice's story, is not necessarily enough to amount to corroboration. It depends on whether what is admitted, as a matter of reason and common sense and bearing in mind how ordinary people think and behave, leads or tends to lead to a reasonable belief that the accomplice is truthful as regards the material part of his story, which is not admitted or is denied. We have indicated already the statement contained corroboration. We are satisfied the trial judge could have indicated rightly to the jury that they could find it on the basis of the appellant's own account of his movements in PZ 4094; his admission of a visit in it to the Carib Hotel and of a later conversation with Ramnarace Singh; his staying behind after Ramnarace Singh left and entering the deceased's car with two others; and his remaining in it while these two committed the killing.

Another submission of counsel was that the lies (if any) told to the police could not be corroborative. This, of course, depends on all the circumstances of the case. A trial judge has to direct a jury very carefully about this. The reason for this is manifest. Such a lie may or may not amount to corroboration. It may be due to guilt; it may be due to pure fear or panic; if due to guilt, it can be corroborative; if to fear or panic, it cannot be, I find the clearest exposition of the law in

the judgments in Pooran v. R. ((1966) 10 W.I.R. 51). It was a case of a rape. The Chancellor said (p. 57):

> "It is clear then, that the mere fact that the accused made a false statement is not in itself corroboration; since a false statement could be due to a multiplicity of motivating factors, e.g., through fear of being charged; panic, shame-to disguise the truth for family reasons; and not necessarily out, of sense of guilt. ...
>
> It is only when the untrue statement or statements is or are of such a nature, and made in such circumstances as to lead to an inference in support of the evidence of the prosecutrix-that it (or they) can be regarded as corroborative evidence; the nature of the lie and the nature of the rest of the evidence, which shows the circumstances under which the lie was told, will have to be examined together to determine whether the lie in those circumstances, would render the story of the prosecutrix more probable."

And (*ibid* p. 58):

> "If a false statement is made by the accused, which does no more than impeach his veracity, but does not strengthen the evidence of the prosecutrix, there could be no corroboration.
>
> A jury would require some guidance to determine whether the false statement merely affects veracity or goes further and aids in the belief of the testimony of the prosecutrix by rendering it more probable that the offence was committed by the accused than not.
>
> To look at the false statement alone in isolation will hardly do justice in deciding whether it was made out of a sense of guilt or for some other reason."

PERSAUD, J.A. first cited the direction of the trial judge (*ibid.* p. 63) that:

> "If you feel that this is so (that is, that the accused lied out of panic) then that lie can never amount to corroboration, but if you feel on the evidence that the accused did tell a lie to the police and that he did so out of a sense of guilt, it is for you to say whether that lie in fact corroborates the evidence of the prosecutrix."

Then the learned Justice of Appeal continued (*ibid.* p. 63):

> "No doubt, the learned judge was using language similar to that used by

STREATFIELD, J., in R. v. Clynes (*supra*).

> "... the trial judge is required to do more than the trial judge did in this case. He must not merely tell the jury that if they find the accused lied out of a sense of guilt, then that may be corroboration of the prosecutrix's evidence. He ought to bear the circumstances in mind (and this must include the defence), and must explain to the jury that if they find that an untrue statement is consistent with panic as well as with guilt, then it is not corroboration. In other words, it is not, in my view, sufficient to deal with an untrue statement in isolation, even though the direction in law might be accurate, and strictly in accordance with what is to be found in the books."

And in his conclusion, PERSAUD, J.A. went on to say (*supra* p. 64):

> "... The jury may very well have felt that the mere fact that the appellant had told the police an untruth was in itself corroboration of the prosecutrix's evidence, without having regard to the other circumstances of the case."

We commend all these passages to the attention of trial judges called upon to direct juries on the corroborative value (if any), of a lie. In the case of this appellant it was for the trial judge to decide whether the lies (if any), in all the circumstances of the case, were capable of being corroborative; if so, to tell the jury this, and then to leave them to say whether or not the lies in fact corroborated Ramnarace Singh's story insofar as it affected this appellant. None of these material directions were given.

But in addition to telling the jury what evidence could be corroborative, the trial judge had a correlative duty to warn them about evidence which could not be, but which they might think was corroborative. In the circumstances of this case, three matters called for such caveats.

Firstly, it had to be made clear that confirmation of the truth of Ramnarace Singh's story as regards one accused could not be treated as confirmation of his truthfulness as regards another; or, put another way, that if, by reason of what they accepted as confirmation as regards one accused, they believed Ramnarace Singh to be creditworthy in his implication of the appellant Gowkarran Persaud or of the appellant Michael Boodram, they could not, without looking for confirmation of his implication of this appellant, then proceed to say: "Since he is truthful in implicating them or either of them, he must be truthful in his implication of Jowalla Persaud." There had to be separate confirmation. It cannot be assumed that without guidance the jury would follow this exercise. Indeed, in some of the early cases many judges directed juries that they could properly use confirmation

of an accomplice in his implication of one accused as confirmation of his credibility in relation to others; [*per* BARON GARROW in R. v. Davidson & Tidd ((1817-20) 33 How. State Trials, p. 1338), and *per* COLERIDGE, J. in R. v. Andrews & Payne ([1843-46] 1 Cox C.C. 183). If judges could think so, jurors can. Admittedly, the jury were directed to consider the case against each accused separately. But we cannot be confident that this direction would have made the situation clear to them as laymen. We think a specific direction was necessary.

Secondly, the jury had to be warned that if they rejected this appellant's defence as a false one, this could not be in law corroboration of the evidence of Ramnarace Singh, if they thought him an accomplice. LORD DEVLIN said in Broadhurst v. R ([1964] 1 All E.R. 111. at p. 119): "It is very important that a jury should be carefully directed on the effect of a conclusion, if they reach it that the accused is lying." And ROSKILL, L.J. (for the Court) said in Baldwin & Chapman ((1973) 57 Cr. App. R. 511, at p. 520):

> "There is no doubt that a lie told out of Court is capable in some circumstances of constituting corroboration, though it may not necessarily do so ... But, in the view of this Court, there is a clear distinction in principle between a lie told out of Court and evidence given in the witness-box which the jury rejects as incapable of belief or as otherwise unreliable. Proof of a lie told out of Court is capable of being direct evidence, admissible "at the trial, amounting to affirmative proof of the untruth of the defendant's denial of guilt. This in turn may tend to confirm the evidence against him and to implicate him in the offence charged. But a denial in the witness-box which is untruthful or otherwise incapable of belief is not positive proof of anything. It leads only to the rejection of the evidence given, which then has to be treated as if it had not been given. Mere rejection of evidence is not of itself affirmative or confirmatory proof of the truth of other evidence to the contrary."

Again, we feel a specific direction was necessary on this point.

Thirdly, in his unsworn statement of defence, this appellant admitted to a visit to the Carib Hotel on that Sunday night, and that he went there by car. This was, generally, a relevant bit of circumstantial proof. And it also corroborated Ramnarace Singh's story as to the presence of the appellant there. But it was not corroboration in law within the meaning of "the accomplice warning"; it did not, by itself, implicate this appellant, in that, it did not confirm or tend to confirm the truth of any material incriminatory' part of the evidence Ramnarace Singh gave against him, and, further, it was equally consistent with innocence as well as with guilt. If the jury relied and acted on the disputed statement Ex. 'DD'-it (the admission in the unsworn one) would then be of no practical evidential importance But if they did not, then there would have been a degree of danger in the

circumstances of this case, that they might think this admission corroborative. Certain evidence of the prosecution as to the circumstances leading up to the making of Ex. 'DD' (of which, more later), having regard to the directions of the trial judge, could have caused the jury reasonably not to rely on it. Accordingly, a warning that the admission was not by itself corroborative should have been given. It was not.

If the jury accepted his story of an innocent hire, it was open to them to take a certain view of Ramnarace Singh's position. In R. v. Sam Chin ((1961) 3 W.I.R. 156), HALLINAN, C.J. said (p. 158):

> "... it is useful to distinguish between three categories of witnesses. First, the witness, who on his own confession or because of the facts and circumstances of the case, is obviously an accomplice. Secondly, the witness, who is not an obvious accomplice, but concerning whom there is evidence on which a reasonable jury might find that, in the language of LORD SIMMONDS in Davies v. Public Prosecutions Director [1954] 1 All E.R. at p. 513], he was a participant. Thirdly, there is the witness concerning whom there is no evidence that he might have been associated with the accused in committing the offence but nevertheless he might, as was said by the Court of Criminal Appeal, in R. v. Prater [1960] 1 All E.R. at p. 299], be a witness with some purpose of his own to serve." (Underscoring mine.)

On his own answers under cross-examination, there was overwhelming evidence to prove that Ramnarace Singh gave the police information concerning this appellant and the others, five days after the crime on 14th September, 1973, after he went to Kitty Police Station as "a suspect because he "did not want to get locked up too", and felt compelled to talk on account of Det. Supt. Augustus's warning that if he did not tell the police what he knew, he would get himself "into trouble" Plainly, in these circumstances he had an obvious purpose of his own to serve and might have strong motive to inculpate others. He could have served it by telling the police the truth, or a false story implicating innocent persons; or, by adding false details to those which are true, so as to please the police and save himself from continued detention and possible prosecution. Be that as it may, this was clearly a case, where it could be said, as HALLINAN, C.J. said in R. v. Sam Chin (*ibid.* p. 158), that it was "desirable that a warning similar to that given to juries about accomplices should be given ..." In R. v. Gokool and Gokool (*supra*), it was submitted for the appellant that there was a duty (as distinct from a desirability) so to direct the jury in such cases. The Court said (p. 481):

> "This Court is of the view that in the present state of the law there is no duty cast on a trial judge to deal with the evidence of a prosecution witness on the footing of his being an accomplice merely because it may

> be said that the witness has 'some purpose of his own to serve'. Indeed, having regard to the indefinite and elastic nature of that expression, we are of opinion that the adoption of any such rule might well lead to great uncertainty in the administration of criminal justice. We accordingly reject the second submission of counsel for the appellants. In doing so, however, we are not seeking to derogate from the exercise of a judge's discretion, when dealing with the credibility of a witness's evidence, to give to the jury in proper circumstances, a direction of the kind required to be given in the case of the evidence of an accomplice."

In Carey & Williams ((1968) 52 Cr. App. R. 305), it was said to be "customary" to give the warning indicated in R. v. Sam Chin. And in D.P.P. v. Kilbourne (*supra*), LORD HAILSHAM put it this way, (*obiter* at p. 394): "A judge is almost certainly wise to give a similar warning" (that is, about corroboration) "about the evidence of any principal witness for the Crown where the witness can reasonably be suggested to have some purpose of his own to serve in giving false evidence." In our case no such warning was given. And counsel for the appellant submitted it should have been. It is then necessary to ask whether the omission to give such a warning in such a case as this could be fatal. In R. v. Sam Chin (*supra*) HALLINAN, C.J. adverted (p. 158): "... we are not aware of any case where a conviction was upset because the judge had failed to give such a direction." And in R. v. Gokool & Gokool (*supra*) after observing it would have been proper for the trial judge to give such a direction in the Court below. PHILLIPS, J.A. went on to say (p. 481): "On the other hand, his omission to do so does not, in our opinion, have the effect of vitiating his directions." But in R. v. Braithwaite (No. 1) ((1969) 15 W.I.R. 263), it appears that the failure to give such a warning was one of several reasons why the Court of Appeal of Barbados allowed an appeal from a conviction for murder. On these authorities it certainly could be submitted that to give this warning is still discretionary, even if customary.

But we draw attention to R. v. Daniels (*supra*), decided after R. v. Sam Chin and R. v. Gokool & Gokool (*supra*). The appellant was convicted for receiving a quantity of stolen copper wire found in a lorry with him in the cab. The chief prosecution witness was the owner of it, who said he had allowed the appellant to use his lorry to take the wire he (the appellant) had, to a scrap iron dealer. He was cross-examined to show he was lying, and it was implied that he was the thief or the receiver. The defence was that the lorry owner had hired the appellant, completely innocent, to convey the wire to the scrap dealer. No issue of accomplice *vel non* was left to the jury and there was no submission that he should have done so. The Chairman gave the jury no warning whatever in relation to the lorry owner's evidence. The Court held that this was a misdirection but applied the proviso. LORD JUSTICE SALMON giving the judgment of the Court said:

> "It must have been obvious to the jury that there were three possibilities.

Either the lorry owner's or the appellant's evidence was true, or, which might not have been unlikely, the appellant and the lorry owner were liars and both in the crime.

There was real substance in the appellant's contention that there was a non-direction by the chairman, R. v. Prater [1960] 2 Q.B. 464, laid down that, where a Crown witness might have some purpose of his own to serve in giving evidence, it was desirable in practice, that a warning should be given to the jury of the danger of acting without corroboration, similar to the warning given in the case of an accomplice, whether the witness could properly be classed as an accomplice or not. In R. v. Stannard Cope & Brown [1965] 2 Q.B. 1, it was pointed out that that did not amount to a rule of law, but was merely a rule of practice.

The chairman ought to have told the jury that, when they were considering the lorry owner's evidence, they should bear in mind that, if the appellant's evidence was true, it would seem to follow that the owner must have been guilty of stealing the copper or receiving it and, therefore, had a strong motive in trying to place the guilt on the appellant, because, if he succeeded, he was in the clear.

The chairman ought to have gone on to say to them that they might consider, that there was an obvious danger in convicting on the lorry owner's evidence alone, and that they should see whether there was some independent evidence that tended to show that the appellant had committed the crime. He should then have reviewed the evidence to see what corroboration there was.

He did nothing of the kind, and the Court concluded that the failure amounted to a misdirection or non-direction in that, there was a failure to give a direction that ought to have been given.

There were, perhaps, many cases in which a misdirection of that kind would have been so serious that this Court would not be justified in saying that, even if the direction had been given, nevertheless, there must have been a conviction. Clearly, however, the Court could feel entirely satisfied that there had been no chance of any miscarriage of justice."

Admittedly, this judgment went further than any other reported decision of that Court available to us. For it ruled that, in circumstances of that case it was the duty of the Court to give the direction which R. v. Prater and Stannard Cope & Brown (*supra*) had laid down to be merely "desirable" and so purely discretionary. It may be, that the explanation is the application to the criminal law of a

principle well-established in the civil law as regards the exercise of statutory discretionary' powers vested to be used for the benefit of the public-that, in fit circumstances, it may be the duty of the authority to exercise that discretion in a particular way. Although the appeal was dismissed, the Court indicated clearly that such a non-direction could possibly result in a conviction being quashed.

We doubt considerably whether an isolated decision as this, is sufficient to justify a conclusion today that the rule of practice has 'hardened' into a rule of law; and we will not so hold in this judgment. It suffices to say we consider that, in this case, having regard to the particular circumstances leading to Ramnarace Singh's collaboration with the investigating police, the trial judge ought to have directed the jury that on his own evidence, even if he was not an accomplice. Ramnarace Singh would have had a very strong motive to implicate other persons so as to clear himself of suspicion and escape prosecution; and if they thought so, to look for corroboration of his story. The omission to do so in this case was a misdirection, as it was in R. v. Daniels (*supra*).

Finally, the appellant raised the objection that his defence was inadequately and not fairly put to the jury. There is substantial merit in this complaint. Every one knows it is a principle that for a summing-up to be fair, it must put the defence, whatever it is, adequately. And yet, ever so often, this is not done. It is rare (if it ever happens here) that the defence is not put at all. What does happen too frequently is that it is not sufficiently gone into. True it is, the jury hears all the evidence. But, as BELL, C.J., speaking for the Court, said in Samaroo & Ezaz v. The Queen ([1953] L.R.B.G. 150) [a judgment of the Court of Criminal Appeal of British Guiana], at p. 151: "It cannot be enough, we feel, merely to assume that because the jury have heard both sides of the case, they are cognisant of the defence which is put forward. Something more than that is necessary. Something must be done to emphasise to the jury the defence which an accused person is offering." Too often a trial judge is content only to read out the evidence on oath of the accused and his witness (if any), or of his unsworn statement and then say. "Members of the jury, that is the defence." In a short and simple case, to do this may be sufficient. But in other cases, it would not be. Then, he should explain its true nature and purport; he may do so expansively or he may do succinctly, but do so he must, as it would not suffice merely to recite the evidence [*per* FRASER, J.A. in David & Watkins v. R. ((1966) 11 W.I.R. 37. at p. 39)]. More often than not, at our assizes, the accused presents his defence in an unsworn statement from the dock. Sometimes, after this, he calls witnesses who testify on oath; most times, he does not. This very meagre presentation oft times results in meagre treatment in the summing-up. And there are times when the trial judge is hardly blameworthy for this. Regrettably, in this case there was plain error in putting the defence to the jury. There was non-direction and there was misdirection.

In his unsworn statement, this appellant said:

> "I don't know Yassin. I never had any story with Yassin on Sunday, 9th September, 1973. Some people asked me to meet them at the Carib. When we were drinking there the car man had already left. I never spoke to the car man. I went out to the public road to catch a car. A car with Lincoln and Prekay and another man stopped and picked me up and dropped me at East Coast car park. I took a car and went home. Lincoln and Prekay left in the car with the other man. I gave a statement to the police because Superintendent Bacchus told me that if I tell the stop, against the other people he would loose me and make me a police witness. I don't know how Yassin died. I frighten because I take a lift with the car and they say the same man driving the car got killed. That is why I made a statement. That is all."

Admittedly, it was a weak defence in that, it was untested by cross-examination and unsupported. But it was his defence. He was saying a number of things: (i) he never knew the deceased; (ii) he had no motive for murder; (iii) his visit to the hotel on Sunday 9th was an innocent one to meet friends there-it had nothing to do with the deceased; (iv) he never spoke to any taxi driver at all at the hotel; (v) as regards the actual killing, he was not in the deceased's car at the time-an alibi; (vi) when he left the hotel, he joined a passing car and travelled in it to the East Coast car park in Georgetown, where he came off; and (vii) what was in the statement (Ex. 'DD') was untrue and was said in the hope of obtaining release from detention and because a police officer promised to use him as a witness for the prosecution against those named in it. The trial judge read the unsworn statement to the jury. He should then have explained to them its true nature and import, in relation to the prosecution's case against the appellant. But this was not done as it ought to have been done. He told the jury, the defence was an alibi and what an alibi was; then he added the orthodox directions to acquit if they accepted it or if it left them in reasonable doubt.

Of the seven points of the defence indicated, the trial judge referred to point (v) only-the alibi, his absence from the death car, the scene of the crime. But this was part only of the defence. There was no emphatic reference to the rest of it, that is, to his acquaintance with the deceased; his denial of the crucial conversation with Ramnarace Singh; the innocence of his visit to the hotel; and his explanation of the statement Ex 'DD' and the denial of the truth of it, as part and parcel of the whole defence this appellant had actually put forward, as distinct from any mere suggestions put in cross-examination and commented on briefly in passing while the case for the prosecution was discussed. This was a non-direction. Further, putting a defence to a jury is an exercise not confined only to reading out the relevant defence evidence and explaining it. A defence can draw support from evidence led for the prosecution or from the omission to lead evidence on

some particular point. If so, in either case it would be the duty of the trial judge, in dealing with the case for the defence and as a part of it, to draw the attention of the jury to such evidence or omission as supporting or as tending to support the defence; or as relevant matter, fit to be weighed and considered in assessing it.

In this respect, there was a material omission. A vital part of the defence was that raised in answer to the disputed statement-Ex. 'DD'. If the jury believed it was induced by the promise alleged, they might still accept it as true, or might refuse to give it any weight at all. This was a matter entirely for them. For this purpose they had to consider the evidence of retired Detective Chief Inspector of Police Francis Roberts with great care. For some of it could fairly support an inference in favour of the defence of the truth or, of a reasonable possibility of the truth of this aspect of the defence, or at least of a reasonable doubt about the truth of Roberts's testimony as to the circumstances leading up to the making of that statement at Cove and John Police Station on Sunday, 16th September, 1973. Briefly, the relevant evidence was as follows:

A week had passed since the murder and the detectives had discovered nothing really to hold on to. This appellant on the 15th, in a cautioned statement in his own handwriting, stated that one Lincoln told him, the Monday after, that he (Lincoln) had stabbed "the man at the Carib" in the neck. So, on Sunday 16th Detective Supt. Augustus (in charge of the investigations), Roberts (his second in command), Sgt., Bryant Bacchus and a few of the ranks set out with the appellant to locate Lincoln at Clonbrook, East Coast, Demerara. They did not find him. But, according, to Mr. Roberts, a few minutes after Supt. Augustus and his men left the vehicle for the second time on the search, in his presence and hearing, the appellant said to Mr. Bacchus: "I want to tell you the story about Yassin's death." Bacchus cautioned the appellant and told him he (Bacchus) would take the appellant to Cove & John Police Station. About 30 to 40 minutes later Supt. Augustus and his men returned and reported failure. Neither Roberts nor Bacchus told the Superintendent what the appellant had said. They all went to Cove & John Police Station, where Roberts took down Ex. 'DD' in the presence of only Bacchus, so that Supt. Augustus, the man-in-charge, was told nothing about it all.

There were a few odd features about this evidence of Chief Inspector Roberts. Why did neither he nor Bacchus ask the appellant to tell them what he wished to tell about Yassin's murder during the 30-40 minutes before the rest of the party returned? Why did neither of them tell Supt. Augustus about it after his return? Why was Supt. Augustus, in charge of the investigations, not present to hear what the appellant had to say at the station? Why did not the appellant himself write out this statement as he wrote Ex. 'CC on the 15th? Why was Bacchus not called to support Roberts? Was not the exclusion of Supt. Augustus from all knowledge of the matter more consistent with the appellant's story of a promise by Roberts and Bacchus to release him and use him as a witness for the State (which

they might not wish the head of investigations to know about), than with the appellant's request to tell them of the murder (which they should want to tell him the truth about)? Those questions a reasonable jury would ask themselves, and answer one way or the other, for or against the appellant if the relevant evidence was drawn to their attention by the trial judge in relation to it when dealing with his defence. It was not. Here again, was non-direction and no guidance whatever, on material points of evidence on which guidance should have been given.

I think it apposite, at this point, to advert to the attractive words of BHAGWATI, J. in the Supreme Court of India in Ramkishan Sharma v. The State of Bombay ([1954] S.C.R. 903, 930), where His Lordship said:

> "The judge lays down the law and directs the jury on questions of law. So far as the facts are concerned however, they are within the exclusive province of the jury. But even there the judge has to sum up the evidence for the prosecution and defence. Summing-up does not mean that the judge should give merely a summary of the evidence. He must marshall the evidence so as to bring out the lights and the shades, the probabilities and the improbabilities so as to give proper assistance to the jury who are required to decide which view of the facts is true, *vide* Ilu v. Emperor ((A.I.R. 1934 Cal. 847). The judge should give the jury the help and guidance which they are entitled to expect from the judge and which it is his duty to give. The charge should not consist of a long rambling repetition of the evidence, without any attempt to marshal the facts under appropriate heads, or to assist the jury to sift and weigh the evidence so that they will be in a position to understand which are the really important parts of the evidence and which are of secondary importance. It is necessary in every criminal case for the judge carefully, properly and efficiently to charge the jury."

So much for non-direction. As regards misdirection, a very serious slip on the part of the trial judge might have contributed to the verdict reached in no small measure. It was a crucial part of his defence that this appellant left the hotel in a passing car and not in Yassin's. But the trial judge told the jury differently. His Honour said: "Even accepting that he was a passenger in Mr. Victor Yassin's car-and I think that is a perfectly reasonable inference for you to draw from an assessment of his statement from the dock." The fact that he went on to say such presence could be innocent, is beside the point. What he did tell the jury, erroneously, was that one meaning that could reasonably be put on the unsworn statement itself, was that the appellant left the Carib in Yassin's car, whereas, the only meaning it could bear was to the contrary. The jury under the influence of his direction might well have thought the defence was that the appellant joined Yassin's car at the Carib, was driven in it to the car park in Georgetown, where the appellant left Yassin alive and well, so that he must have been killed afterwards. If so,

the appellant might have been prejudiced gravely.

It is plain, therefore, that the defence of this appellant was unfairly and inadequately put to the jury. And on this ground alone his conviction could be invalidated. Add to this the non-directions and misdirections indicated already in relation to accomplices and corroboration, and we have a situation, in a case described by the judge himself as "rather complex" and "rather difficult", where a conviction was reached under non-guidance and misguidance and cannot be allowed to stand. However, in the particular circumstances of this case, we feel that the interests of justice dictate a new trial of this appellant. Accordingly, his conviction is set aside but a new trial is ordered.

**BOLLERS, C. J.:** On the night of the 9th September, 1973, Victor Yassin, age 48 years, the proprietor of the Carib Hotel on the East Coast of Demerara, was cruelly and brutally murdered in his car at Sandy Babb and Alexander Streets, Kitty, His body was found on its left side on the back seat of his white Austin motor-car GAA 1040 with the head turned facing east; the right knee was resting on the back seat and the left foot extended outside of the car as the left back door was open. All the other doors were closed, and the headlamps were on with the engine running. Below his head was a pool of blood and the entire blade of a brown-handled knife was embedded in the right side of the neck. On the floor of the back seat were found; an odd-side slipper, a pair of spectacles and a knife. Under the steering wheel-on the left-hand side on the dashboard-was a spectacle case. A search of the body revealed; in the right hip pocket $136 in Guyana currency; on the fingers of the left hand, two gold rings; on one of the fingers of the right hand, a gold ring; and cigarettes and a pen in his trousers pocket. This circumstance clearly ruled out the motive of robbery.

The medical evidence revealed that the deceased had sustained:

(1) A lacerated wound over the right maxilla 3/4 inches long;

(2) A lacerated wound over the left maxilla 3/4 inches long.

Both wounds were at the midpoint between the nostrils and the ears.

(3) A stab wound at the right aspect of the neck beginning from the outer margin of the sternomastoid muscles on the right side 1 1/2 inches long by 1/2 inch wide and 2 1/2 inches below the lobe of the right ear.

When the wound was probed in depth it stretched right to the other side of the neck.

(4) A small abrasion or bruise on the left side of the neck under the

angle of the mandible.

Internal Examination:

Chest: Heart normal in appearance.

Lungs: Showed basal congestion.

Abdomen: Stomach had an odour of alcohol and there was evidence of chronic gastritis.

Liver: Congested.

Spleen: Normal in appearance.

Kidneys: Normal in appearance.

Head & Neck: Skull showed no fracture.

Brain: Congested.

Neck in detail:

There were haemorrhages in the right sternomastoid muscles. There was a fracture of the hyoid bone, i.e., the tiny bone above the Adam's apple. There was perforation of the carotid artery. There was a fractured dislocation of the second and third cervical vertebrae. There were also haemorrhages in the deep structure of the left side of the neck.

In the opinion of the doctor who performed the post mortem examination, death was due to shock and haemorrhage following multiple injuries, to wit:

(1) perforation of the carotid artery;

(2) fracture of the hyoid bone; and

(3) fractured dislocation of the second and third cervical vertebrae.

In his opinion, the injuries could have been caused by a sharp-cutting instrument, such as a knife, the force being used not great, and not amounting to one forward thrust but a series of thrusts with the weapon.

As a result of investigations by the police the three appellants were charged and

indicted jointly for the offence of murder, contrary to s. 100 of the *Criminal Law (Offences) Act, Cap. 8:01* and were duly tried and convicted before a judge and jury at the Demerara Assizes, from which conviction they now appeal to this Court.

The case for the prosecution against the three appellants put briefly was: that the No. 1 appellant for sometime before the day of the murder was carrying on an illicit affair with Jeannette Yassin, the wife of the deceased; that he had made threats to the deceased, and had expressed a desire to own all the deceased had, and that he was an accessory before the fact to the crime which he had plotted and planned with the other appellants, and had procured and counselled his brother, the No. 2 appellant, and the No. 3 appellant to kill the deceased on the night in question; and that the No. 1 appellant had directed the operation of the crime and the crime had been committed by them. The motive alleged was therefore the acquisition of the wife and property of the deceased by the No. 1 appellant.

The evidence which was led at the trial by the prosecution against the three appellants was purely circumstantial, and revealed that the story began to unfold itself with a conversation which Mavis Young, a cousin of the deceased, who had borne him a child, had in April, 1972 with the No. 1 appellant at a ceremony at her home. The No. 1 appellant had appeared to take more than a passing interest in the wife of the deceased when he enquired of Mavis Young the age of Mrs. Yassin, and whether her children belonged to her.

On the 1st June of that year, the caretaker of a house at Beehive, East Coast Demerara, owned by one John Quail, was approached by the No. 1 appellant who enquired of him whether he knew of anyone who had a house to rent, upon which the No. 1 appellant was shown the house and informed where he could find Quail. The No. 1 appellant then visited Quail at the latter's office in Georgetown and arrangements were made for the rental of the house at Beehive, Mrs. Yassin, who was well-known to Quail, was present when these arrangements were made. Quail accompanied the No. 1 appellant and Mrs. Yassin to the house at Beehive, where the key to the house was handed over to the No. 1 appellant. On the 3rd June, 1972, the No. 1 appellant returned to Quail's office accompanied by Mrs. Yassin and the three of them drove to Lombard Street, Georgetown, where a new mattress was purchased for the bed in a bedroom of that house at Beehive. The caretaker verified that the mattress was taken to the house by the No. 1 appellant, but at no time did he see Mrs. Yassin on the premises.

In August, 1972 as a result of a conversation which Mavis Young had with the deceased, the deceased drove her, along with two other persons in his car to a house at Beehive, East Coast Demerara, and, having received certain information, they proceeded further on to Mahaica. On their way, they passed a car which was being driven by the No. 1 appellant, travelling in the opposite direc-

tion; Mrs. Yassin was sitting alongside of him in the front seat. There was no one else in the car. Subsequently, the car driven by the deceased turned back and after it had passed Beehive, the other car driven by the No. 1 appellant was seen to be proceeding in the opposite direction. Mrs. Yassin was not then in the car, but it was filled with young men of East Indian descent; this car travelled in a zig-zag manner and the No. 1 appellant and the men-some of whom had sticks-were observed to be shouting threats and were heard to say: "Mr. Yassin we gwine cut your rass." They declared that they would wait in a lonely spot for him. Mavis Young, however, did not recognise the voice of the No. 1 appellant because all the men appeared to be shouting at the same time.

Meanwhile, in July 1972, the deceased had made a report to Masood Nasir, a sergeant of police, at Alberttown Police Station, and, following upon that, the sergeant interviewed the No. 1 appellant at the station; he informed him that the deceased had reported that he was living with his wife in a house on the East Coast, whereupon the No. 1 appellant replied: "I don't care 1 have to spend his money." The sergeant advised the No. 1 appellant to leave the wife of the deceased alone, and he replied: "When I lef she I will have to own all Yassin have." At that time Mrs. Yassin was sitting in the front seat of the No. 1 appellant's car which was parked outside of the police station. During August, 1972 the No. 1 appellant came to the station and extended an invitation to the sergeant to visit 'his home' at 41 Anira Street, Queenstown, Georgetown, which was, in fact, the matrimonial home of the deceased and his wife. Subsequently, the sergeant paid several visits to that home and found the No. 1 appellant and Mrs. Yassin and her daughters there.

On the fateful day-September 9, 1973-the witness Abdool Raheem spoke of seeing the No. 1 appellant about 2.00 p.m. at the East Coast hire car park on Commerce Street, Georgetown, where they engaged each other in conversation. At this stage, the witness, Ramnarace Singh, enters the drama to supply the main evidence for the prosecution against the three appellants. He deposed that he knew the No. 1 and No. 2 appellants for about 4 years and he knew where they lived at Clonbrook, East Coast Demerara, On the 9th September, 1973 about 2.00 p.m. he saw the No. 1 appellant at the East Coast car park where the No. 1 appellant told him that he wanted to hire his car HZ 4094 as he had to do some 'spinning around' town and on the East Coast. About 5 minutes later the No. 2 appellant came up with another man and the three men got into the car and asked him to drive up the East Coast. He drove them to Beterverwagting and stopped; the No. 2 appellant and the third man went into a house nearby but the No. 1 appellant remained in the car. Subsequently, the No. 2 appellant and the other man came back and the third man had a newspaper parcel in his hand. The No. 1 appellant came out of the car and the three men engaged in conversation. The three men then entered the car and the third man took the parcel into the car. They told him to drive on to the public road and on the way back to Georgetown,

the car stopped at a mud dam at La Bonne Intention on the East Coast, Demerara, where the No. 1 appellant and the third man got out of the car and went on the dam. The No. 1 appellant and the third man then returned with the No. 3 appellant and the car was driven to Georgetown. In the car were the three appellants and the third man.

At the car park, the No. 2 and No. 3 appellants and the third man left the car and went away while the No. 1 appellant remained in the car. The No. 1 appellant then ordered the witness to drive up to the Carib Hotel at Lileendaal, East Coast Demerara; this was done with the witness and the No. 1 appellant being the sole occupants of the car. As they were passing the Carib Hotel, the No. 1 appellant instructed the witness to drive slowly. They then drove about 60 rods east of the Carib Hotel and turned back and the No. 1 appellant told the witness to drive back to the East Coast hire car park.

He did so, arriving there about 6.30 p.m. On the instructions of the No. 1 appellant, the witness drove to Humphrey's Pawnbrokery where the Nos. 2 & 3 appellants and the third man were found standing on the pavement outside of the pawnbrokery and were picked up. The No. 1 appellant then said: "The man deh ah Carib." The No. 1 appellant requested the witness to drive up to the Carib Hotel; it was then about 7.00 to 7.30 p.m. On the way, they stopped at Conversation Tree and the No. 1 appellant enquired of the witness if he had any 'loose money' like $5.00 to lend him as he had 'big money' and he did not want the boys to go to the Carib to spend 'big money'. Ramnarace Singh agreed to lend the No. 1 appellant $5.00 and handed him five 1-dollar notes. The No. 1 appellant told him to drive up to the Carib, which he did, arriving there about 8.00 p.m. The Nos. 2 & 3 appellants and the third man left the car and went into the Carib Hotel but the No. 1 appellant remained in the car. On the instructions of the No. 1 appellant, the witness drove on to a distance of about 30 rods east of the hotel and stopped on the public road. He observed that No. 1 appellant had a shot-gun on the back seat. It was at that stage that he asked the No. 1 appellant for his fare which was $15.00 plus the $5.00 he had lent him. All that he had on him at the time was $2.00. The No. 1 appellant told him to 'hold on'. About 15 minutes later the No. 1 appellant asked him to go back to the hotel and blow his horn and call the boys and come back for him. He again asked the No. 1 appellant for his money to which the No. 1 appellant replied that he should not be afraid as he would get his money. The No. 1 appellant came out of the car with the gun and the witness turned around and drove his car to the Carib Hotel, blew his horn, and the No. 2 appellant came out. He asked the No. 2 appellant what was the position as he wanted to go home and the No. 2 appellant replied: "Hold on if ah we nah get the man to-night ah we nah get him no more." The No. 2 appellant returned to the hotel. Ramnarace Singh then pretended to turn around his car but drove away, eventually parking his car by the Kitty Police Station, and returned home, which was about 50 rods east of the station.

The story is taken up from there by the bartender at the Carib Hotel, De Britto, and his brother, Gilarty, who happened to be in the hotel when the Nos. 2 & 3 appellants entered therein. De Britto spoke of the No. 3 appellant coming to the bar of the hotel on the said day about 5.00 p.m., where he purchased a coca-cola and enquired whether he could rent a room there as he had a girl to bring but she was giving him 'a hard time'; he said he would go and return later. About 7:00 p.m. the No. 3 appellant returned with three other East Indian men and he purchased a half-bottle of rum with two one-dollar notes. The four men then sat at a table by the front door. About 11.30 p.m. the deceased, who was present, was about to leave the premises when two of the men spoke to him. At that stage the No. 3 appellant and the fourth man were walking out of the door. The deceased was seen to go to his car and the two men who spoke to him went into the back seat of the car. The No. 3 appellant and the fourth man were observed walking on the public road going east. The car then drove off.

This witness attended three identification parades but failed to identify anyone. Gilarty spoke of seeing three East Indian men sitting at a table drinking on the ground floor of the hotel. His brother, De Britto, was at the bar. According to him, the deceased left the hotel about 10.00 to 10.30 p.m. and got into his motorcar. Two of the three men whom he had seen drinking went into the back seat and one went into the front seat. He did not recognise any of the three men and when he attended three identification parades he failed to identify anyone. The fingerprint of the No. 2 appellant was subsequently proved to be found on the right rear door of the car of the deceased.

Police Constable 8495 Phillip English, who was stationed at Kitty Police Station on the night in question, testified that about 11.45 p.m. he saw the said car proceeding south along Alexander Street at a slow rate of speed; the car slowed down at the junction and he noticed four persons were in the car-two in the front and two in the rear. They were all men of East Indian descent.

The witness, Brian Austin, swore that about 11.20 p.m., on the night in question, he was riding his motor-cycle west along the southern side of Sandy Babb Street when he saw a car parked on the southern side of Sandy Babb Street at its junction with Alexander Street in Kitty. He observed that the headlamps were on. He then saw about two men who appeared to be of East Indian descent sitting in the back seat of the car. They appeared to be working energetically with their hands over something in the front seat. He felt something was amiss, and turned back to see what was going on. He rode past the vehicle and observed that the men were still working away with their hands. He saw the words 'Victor Yassin' were written on the bottom of the right front door of the car which was white.

Rex Bishop, a prison officer, also testified that about 11.25 p.m. on the night in question, when he was off duty, he was cycling south along the eastern side of

Alexander Street approaching Sandy Babb Street. As he reached the junction of the two streets, he saw a white motor-car under the road-light facing west, and it was then that he discovered the body of the deceased lying on the back seat. He made a report to the Kitty Police Station and returned to the scene with the police.

On the 14th September, 1973, as a result of the police speaking with Ramnarace Singh, he went to the Kitty Police Station and subsequently accompanied the police to Beterverwagting, where he pointed out the house the No. 2 appellant and the third man had come out of when the third man had a parcel in his hand. They then went to La Bonne Intention, where the No. 3 appellant was seen by the railway line and pointed out by the witness, and as a result he was arrested and taken to the station. This witness attended two identification parades but did not pick out anyone. He was never paid his fare for his trips up and down the East Coast. He had heard the third man referred to as 'Prekay'.

On Thursday, September 13, 1973, the police executed a search warrant on the home of the No. 2 appellant at Clonbrook, East Coast Demerara. The No. 2 was asked if he had any of the articles mentioned in the warrant, to which question he made no reply. In his presence, a white T-shirt was found which was subsequently proved to have human bloodstains; he was shown the shirt and told that it was suspected that the stains were bloodstains and he was cautioned. The No. 2 appellant replied: "A bank stout throw way deh." He was told that he was being arrested in connection with the murder of Victor Yassin which occurred on Sunday, September 9, 1973 at Sandy Babb and Alexander Streets, and he replied: "Ah just bathe and shave. I ain't eat yet." Later that day, the No. 3 appellant was arrested at La Bonne Intention after having been pointed out by Ramnarace Singh; when he was brought to the police car he was seen to be wearing a chain around his neck, whereupon Ramnarace Singh pointed to the chain and said: "This chain is similar to the one that the person was wearing on Sunday, 9th September when he was in my car."

At the station a pair of yachting shoes which the No. 3 appellant was wearing at the time which appeared to have bloodstains which were subsequently proved to be stains of human blood was shown to him and he was cautioned and he replied: "It's syrup from shave ice."

Subsequently, the No. 2 appellant made two statements to the police and the No. 3 appellant made one statement to the police. At the trial, objection was taken to the second statement of the No. 2 appellant and to the statement of the No. 3 appellant on the ground that they were not freely and voluntarily made. The learned trial judge held a *voir dire* in respect of both statements at the conclusion of which he ruled that the statements were free and voluntary and admitted them in evidence.

In their respective statements, No. 2 appellant and No. 3 appellant each sought to exculpate himself from the crime and implicate others; but each placed himself at the scene of the crime by stating that he was in the car of the deceased at the time he was murdered. Each appellant in respect of his defence made a statement from the dock.

The No. 1 appellant declared his innocence and said that he had nothing to do with the death of Yassin. He denied ever saying, "The man deh ah Carib". He denied saying to Sergeant Nasir what the sergeant alleged that he had said. He also denied that he was ever in any car when boys threatened to beat Yassin. He claimed that he owned two cars and gave as a reason why Ramnarace Singh and himself were not on terms was that he had obtained judgment against him for products purchased by Ramnarace Singh from his filling station. A barrister-at-law gave evidence on behalf of the No. 1 appellant, stating that he had appeared for the No. 1 appellant in a civil action against one Mahase at Mahaica Magistrate's Court and had obtained judgment against him. Ramnarace Singh admitted that he had a brother by the name of Mahase.

The No. 2 appellant in his statement from the dock denied having any story with Yassin. He declared that some people asked him to meet them at the Carib on the date in question and when they were drinking there the car-man had already left. He never spoke to the car-man. He went onto the public road to catch a car and a car with one Lincoln and one Prekay and another man stopped and picked him up and dropped him at the East Coast hire car park. He then went home. He asserted that he did not know how Yassin died. He was afraid because he had taken a lift with a car and was told that the same man who drove the car was killed and that was why he had made the statement to the police.

The No. 3 appellant in his defence stated that, on the night in question, he went to the Carib where he had some drinks; he left there about 9.00 pm., caught a car and went to the East Coast car park and then went home. He knew nothing concerning the death of the deceased. He gave a statement to the police because he was told that, if he gave a statement concerning Yassin's death, he would be used as a police witness, and his mother and sister would be released. Between the 14th September, 1973 (the date of his arrest) and the 17th of September (when he made the statement) he was given no food; he became weak and could not sleep. He was innocent of the offence.

At this stage it should be noted that the learned trial judge, in his charge to the jury, left the issue with the jury as to whether the witness, Ramnarace Singh, was an accomplice *vel non*, and we consider that he was right in so doing. The evidence which pointed to the witness, Ramnarace Singh, being considered to be an accomplice was:

(1) He was in the company of Nos. 1. 2 & 3 appellants from 2.00 p.m. to 6.00 p.m. or even later, and made 3 trips up the East Coast and back and merely charged the meager fare of $15.00, which he never collected, and, in addition to that, lent the No. 1 appellant $5.00. He did not demand his money from the No. 1 appellant even though the No. 1 appellant had told him that he had 'big money' on him.

(2) After the incident, although he knew where the No. 1 & No. 2 appellants lived at Clonbrook, he did not attend on them to demand payment of his fare and repayment of the loan to the No. 1 appellant.

(3) Although he was in the company of these men for such a long period, he never enquired what the running around was all about.

(4) When he saw Prekay with a newspaper parcel, he made no enquiry.

and even when he assumed, subsequently, that the gun in the possession of the No. 1 appellant had been contained in the parcel, he asked no question.

(5) When the No. 1 appellant got out of the car with the gun about 30 yards from the Carib, he did not question the No. 1 appellant as to why he had a gun.

(6) He did not go to the police station of his own volition and make a report of what he had seen, although he considered that what had taken place in his presence might have been connected with the death of the deceased, but on the contrary admitted that he had concealed his knowledge.

(7) He confessed that if the police had not come to him he would not have said anything to anybody.

(8) He was kept at the police station from 2.30 p.m. to 10.00 p.m. on the 14th September, 1973 and on the following day from 8.00 a.m. to 12 noon during which time he made four statements.

(9) It was extremely unlikely that the No. 1 appellant would have engaged the services of a hire car driver if he had contemplated that the crime would be committed that night.

(10) He finally admitted that he had seen Prekay after previous denials of ever having seen him on the day in question.

(11) He heard the No. 1 appellant say that the man was at the Carib and

> when later he enquired of the No. 2 appellant what was the position, he was told by the No. 2 appellant to 'hold on', that if they did not get the man that night they could not get him anymore, from which it could be inferred that he was driving his car with knowledge that a man who was in the Carib was to be killed that night by the three men whom he was driving.

The argument by counsel for the State that there as no evidence upon which the jury could have found that Ramnarace Singh was an accomplice because of his statement that he did not want to say things against his friends, and he was afraid to go to the police as he did not want to become involved and did not want to get locked up, cannot be sustained, for the evidence appears to us to be overwhelming on which a reasonable jury could properly have found that at the time Ramnarace Singh was in the company of the three appellants he was an accomplice.

In the case of Davies v. D.P.P. ((1954) 38 Cr. App. R. 11), LORD SIMONDS, L.C., in the House of Lords, stated the law plainly when he said in his judgment (at p. 35):

> "But there are other cases within this field in which there is evidence on which a reasonable jury could find that a witness was a 'participant'. In such a case the issue of accomplice *vel non'* is for the jury's decision; and a judge should direct them that, if they consider on the evidence that the witness was an accomplice, it is dangerous for them to act on his, evidence unless corroborated, though it is competent for them to do so if, after that warning, they still think fit to do so. The delimitation which I have outlined as proper between the provinces of judge and jury in this particular matter, seems to me to be supported both by English authority and by Dominion decisions [e.g. Dixon (1925) 19 Cr. App. R. 36; Abigail and Macnamara (1893) 14 N.S.W.L.R. 72; Reeve (1917) 17 S.R.N.S.W. 81, Australia; McDonald (1945) 84 Can. C.C. 177, Canada; and of, *Restatement of American Law*, 2nd ed. 9 Vol. 22, pare. 797]."

This *dictum* was referred to by the Court of Appeal in Trinidad in Gokool & Gokool v. R. (1971) 13 W.I.R. 477 at p. 479, where the Court interpreted the dictum to mean that the only question that arose for determination by the Court was whether or not there was evidence fit to be put before the jury by the learned judge on the issue as to whether or not the witness was an accomplice to the crime. The Court went further and held that, in the particular circumstances of the case, they were considering it would have been appropriate for the learned judge to have directed the jury that they should apply a similar warning in the event of their being left in doubt on that issue.

In the present appeal, we are of the view that, whichever test is applied, there was

an abundance of evidence fit to be left to the jury on the issue as to whether Ramnarace Singh was an accomplice or not, and it was open to them, as a reasonable jury, to find that the witness was an accomplice in the commission of the offence.

In respect of the appeal of the No. 1 appellant with which I shall deal, counsel in his numerous grounds of appeal has, in effect, raised three points around which centre his main submissions:

Firstly, that no *prima facie* case was made out against the No. 1 appellant as a result of which at the trial when a no-case submission was made, the judge ought to have withdrawn the case from the jury and directed the jury to return a verdict of not guilty.

Secondly, that the judge misdirected the jury in relation to the method of approach to the evidence of an accomplice, and as to the warning to be given to the jury in relation to the evidence of an accomplice and also as to corroboration of such evidence.

Thirdly, that the summing-up was unfair and the judge did not deal adequately with the defence.

In relation to the first point, counsel's argument is that the evidence of prior incidents and threats some 13 to 17 months before the death of the deceased was innocuous and of little probative value. He submits that the motive was not established as there was no evidence of Mrs. Yassin succeeding to her husband's property, and the words alleged to have been used by the No. 1 appellant ("The man deh ah Carib blow and call the boys back") were all capable of an innocent interpretation, as the name Yassin was not mentioned and "calling the boys back" could only mean it was time to go home. At the most, counsel submitted, the evidence merely amounted to suspicion and suspicion upon suspicion is not proof.

A *prima facie* case is made out against an accused person when the evidence led by the prosecution against the accused, if not rebutted, raises the presumption of guilt. The test, as the distinguished writer, Professor Glanville Williams, puts it in the *Criminal Law Review* issue of June 1965 (at p. 346:),"... is whether there is sufficient evidence at that stage for the conviction to be upheld." The trial judge, in ruling on a submission, must put himself in the position of an appellate court hearing an appeal against conviction. In Regina v. Hookoomchand & Sagur ([1918] L.R.B.G. 12), O'MALLEY C.J. put the matter succinctly when he stated that the test is whether there is reasonable evidence on which reasonable men could reasonably or fairly find a verdict. The learned judge then quoted the *dictum* of MAULE, J. in Jewell v. Parr (13 C.B. at p. 916) that the question for the judge is "... not whether there is literally no evidence, but whether there is none that ought

reasonably to satisfy the jury that the facts sought to be proved are established." Comparatively recently ([1962] 1 All E.R. 4481) LORD PARKER, C.J., in a Practice Note, laid it down how justices should approach the matter when a submission of no case is made before them. He said therein that a submission that there is no case to answer may properly be made and upheld when: (a) there has been no evidence to prove an essential element in the alleged offence; and (b) the evidence adduced by the prosecution has been discredited as a result of cross-examination, or is so manifestly unreliable that no reasonable tribunal could safely convict on it. The note continues (*ibid*, at p. 448):

> "Apart from these two situations, a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer."

We are of the view (the learned Chancellor *dubitante sed non negante*) that there was *A prima facie* case made out against the No. 1 appellant; there was the evidence that he was carrying on an *affaire intime* with the wife of the deceased, and at some time prior to the fateful day in question, he was actually living in a house with this woman at Beehive, East Coast Demerara; that he was in the company of persons when threats of killing were made to the deceased; that he expressed a desire to own all that Yassin had when he left his wife; that on the day in question, he was in association with the other two appellants and another man who brought a parcel to the motor-car from which it could be inferred that it subsequently turned out to contain a gun; that he directed the operations of the motorcar travelling up and down the East Coast passing the Carib Hotel, and picking up the other two appellants, on his instructions, at a spot in Georgetown where they were waiting for him; that it was he who used the words "The man deh ah Carib," from which the inference could be drawn from subsequent events that the man referred to was the deceased, Yassin; that on the final trip to the Carib Hotel the No. 1 appellant borrowed $5.00 from Ramnarace Singh presumably to give the other appellants to buy drinks at the Carib, and stood some 30 rods east of the hotel with the gun in his possession, which suggested the theory that he had sent the other two appellants into the Carib Hotel to lure the deceased out of the hotel to be shot by him either in the vicinity of the hotel, or to be threatened and forced into the car and there shot by him, or one or the other of the appellants, or stabbed to death by the other two appellants. There was the further evidence that, when the deceased subsequently left the Carib that night driving his motor-car, three men who had been in the hotel that night entered his car, from which it could be

inferred that the Nos. 2 and 3 appellants were two of the three men and shortly after when the car reached Sandy Babb and Alexander Streets, the deceased was found murdered.

There was then, in our view, from the cumulative effect of the totality of the evidence that was led which went beyond mere suspicion, sufficient material from which a reasonable jury could reasonably find that the No. 1 appellant plotted and planned the death of the deceased and procured and counselled the Nos. 2 and 3 appellants to kill the deceased, by any means, when the opportunity arose, for indeed it was clearly proved that the deceased was murdered. The rejection of a submission of no case to answer means, then, no more than that such evidence has been given by the prosecution that, if it was submitted to the jury at the stage of the close of the prosecution's case, they could properly find a verdict of guilty upon it.

In relation to the second point, it is clear that the judge misdirected the jury in relation to the meaning of an accomplice and to the warning that must be given if the jury found Ramnarace Singh was an accomplice. There was also a non-direction amounting to a misdirection as to the evidence required to amount to corroboration of the evidence of the accomplice. The learned judge commenced his directions on accomplices by stating:

> " ... the evidence of Ramnarace Singh is of vital importance to the case for the State in this matter so you have to be quite clear in your minds how you have to approach the evidence of this witness, Ramnarace Singh. If Ramnarace Singh is an accomplice, that is to say, a person who has knowledge and has shares in the commission of this crime, then the law places very strict sanctions against the evidence of such persons."

This passage could hardly be open to objection save and except it might have been more correct to speak of the accomplice participating in the commission of the crime rather than sharing.

The learned judge then continued:

> 'But it seems to me, members of the jury, that this is an issue of an accomplice *vel non,* that is to say, it is for you to decide whether Ramnarace Singh from all the surrounding circumstances can be considered as an accomplice, and by an accomplice I mean not an accomplice to driving a car, but an accomplice to the murder of Victor Yassin."

It is obvious that here the judge was telling the jury that Ramnarace Singh could not be considered an accomplice if he merely drove the car *simpliciter* but this circumstance was not elegantly expressed, and its meaning not clearly conveyed

to the jury, for, the jury may have thought that, if he was driving the Car with knowledge that the offence was to be committed and his part of the plot was to drive the car to the Carib Hotel which was to be used as a getaway car after the deed was completed, he was not an accomplice; but, in these circumstances he certainly would be an accomplice.

Then there appear two passages in the record, the second of which followed almost immediately after the first, that must be considered inadequate in view of the authorities on the matter, when the judge proceeded to give directions as to the warning to be given to the jury if they found the witness to be an accomplice. The passages read thus:

> "If Ramnarace Singh can be so considered (an accomplice), then it is very dangerous to convict any of these accused persons on the evidence of Ramnarace Singh unless his evidence is corroborated. By corroboration is meant, members of the jury, confirmation of a witness' testimony by independent evidence that tends to implicate an accused person.
>
> An accomplice, members of the jury, is any person who is *particeps criminis*, that is to say, who has an actual share in the commission of a crime whether as a principal or as an accessory. It is for you to say, members of the jury, whether you consider that Ramnarace Singh is an accomplice or not. If he could be so considered then it is dangerous for you to act on his evidence alone, unless corroborated."

The learned judge in these two passages overlooked a most important aspect of the matter and that was that the evidence of an accomplice must be corroborated both as to a material particular or circumstance of the crime, and as to the identity of the prisoner. "A material particular", the authorities show, is presumably a matter adduced by the prosecution which has a tendency to prove the guilt of the accused, i.e., independent evidence which makes it probable that the story of the accomplice is true. From these directions then the jury may have been misled into thinking that certain portions of the evidence which supported the evidence of Ramnarace Singh, but which did not implicate the accused, were, in fact, corroboration. They may well have thought that from the evidence of Abdool Khaleem that he saw No. 1 appellant about 2.00 p.m. that day at the car park, which clearly did not implicate the No. 1 appellant, was corroborative of the evidence of Ramnarace Singh. It must follow that this was a serious misdirection on the part of the judge. In R. v. Everest ((1909) 2 Cr. App. R. 130 at p. 132), where there was no corroboration such as was necessary of the evidence of the accomplice, it was held that it was not sufficient that there should be corroboration in some particular which did not touch the prisoner, and the conviction was quashed.

Then comes the most offending passage in the summing-up of the learned judge.

which must amount to a serious misdirection, when he directs the jury on the definition of corroboration. The learned judge states:

> "What is required, members of the jury, is some independent testimony which tends to connect Ramnarace Singh with the crime, that is, evidence, direct or circumstantial, which would tend to implicate him, which confirms in some material particular not only the evidence given that a crime has been committed but evidence that he had a hand in its commission."

It seems that the learned judge suffered a lapse in concentration, for here he was telling the jury that the independent testimony in relation to corroboration must connect the accomplice and not the accused, and must implicate the accomplice and must confirm in some material particular that the accomplice had a hand in the commission of the offence. This was clearly wrong, and in view of the foregoing passages, must have caused great confusion in the minds of the jury. The jury may well have thought from this direction that, if they arrived at the conclusion that Ramnarace Singh participated in the killing of the deceased, it followed that the No. 1 appellant was guilty of the offence. In a bold attempt to show that this mistake on the part of the judge was repaired later in the summing-up, counsel for the State has referred to two passages in the summing-up where the learned judge told the jury that the evidence of Ramnarace Singh was clearly the important link in the chain of circumstances against the No. 1 appellant. He then posed the rhetorical question: If Ramnarace Singh were removed from the scene "where is the nexus, where is the connecting circumstance from which you can draw the inference that he was the planner, the procurer, the counsellor, the accessory before the fact? There would be none." The learned judge then told the jury in plain terms that, if they did not believe and accept the evidence of Ramnarace Singh, there would be no case against No. 1 appellant. He adverted the minds of the jury to what he suggested was the connecting link, that is, the words alleged to have been uttered by the No. 1 appellant: "The man deh ah Carib", and "Go blow your horn and get the boys"; and concluded: "If you take that away, the case, it seems to me, hangs in mid-air." Counsel submits that the effect of these two passages would have removed any doubt that might have existed in the minds of the jury-that they were to look for evidence tending to connect Ramnarace Singh with the crime, instead of tending to connect the accused with the crime, in finding whether there was corroboration,or not, for, he argues, the jury were specifically told that, if they did not accept the evidence of Ramnarace Singh that the No. 1 appellant had uttered the aforementioned words, there would be no case against him. The danger, however, in this approach may be that the jury may have thought that as Ramnarace Singh was implicated in the commission of the offence it followed that the No. 1 appellant was guilty. From this direction one can only be left to speculate what might have been the line of reasoning of the jury. They may well have considered the other evidence in the case which related to the case against

the No. 2 appellant and/or the No. 3 appellant and arrived at the conclusion that, as Ramnarace Singh had a hand in the commission of the offence, it followed that the No. 1 appellant was also guilty of the offence. The learned judge then incorrectly told the jury that if, despite the warning, they were to consider Ramnarace Singh an accomplice to the murder, they might still accept his evidence if they believed him to be a witness of truth. This is not the correct approach for a jury to take in their consideration of the evidence of an accomplice, for here, the judge was adverting the mind of the jury to the warning first before the jury were to consider whether the witness was to be believed or not, and then directing them that they could still accept his evidence if they believed him to be a witness of truth. The jury may well have thought that the manner in which they were to approach the evidence of the accomplice was, first of all, to look for evidence which corroborated and strengthened his evidence, and, if so, they were then to make up their minds as to whether he was speaking the truth or not; whereas, the true position must be that the jury must, first of all consider whether the accomplice is a credible witness; if he is not a credible witness no question of corroboration can arise. If the witness is believed, then the warning must be given and heeded by the jury, and they must then look to see if there is independent evidence which confirms his testimony. If there is such evidence, or, indeed, no such evidence, they must then consider whether they will act on his evidence or not. If, at that stage, after paying attention to the warning, his evidence brings a clear conviction to their minds that he is a witness of truth, then it is open to them to convict whether there is corroboration of his testimony or not.

In the most recent decision in the House of Lords, Reg. v. Kilbourne ([1973] 2 W.L.R. 254), LORD HAILSHAM showed the manner in which the evidence of an accomplice which requires corroboration should be approached, when he said (at p. 267):

> "Corroboration is only required or afforded if the witness requiring corroboration in giving it is otherwise credible. If his evidence is not credible, a witness' testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness' testimony fails of its own inanition, the question of his needing, or being capable of giving, corroboration does not arise."

LORD MORRIS of BORTH-Y-GEST in D.P.P. v. Hester ([1972] 3 All E.R. at p. 1065) pointed out that "the essence of corroborative evidence is that one creditworthy witness confirms what another credit-worthy witness has said." The purpose of corroboration, he said, is not to give validity or credence to evidence which is deficient or suspect or incredible, but only to confirm and support that which as evidence is sufficient and satisfactory and credible; corroborative evi-

dence will only fill the role if it is itself completely credible evidence.

The concept of the evidence of the accomplice being considered on its own separately and apart from any other evidence in the case (and that where the evidence is corroborated) has been well explained by HENRIQUES, J.A. in the Court of Appeal of Jamaica in R. v. Sailsman ((1963) 6 W.I.R. 46 at p. 49):

> "A clear distinction ought always to be drawn between matters which affect the intrinsic credibility of the accomplice's story, when that story is considered by itself, and on the other hand, corroborative evidence in the sense of independent testimony proceeding from a source other than the accomplice, and implicating the accused. It is essential that the distinction between these two things should always be kept clearly in mind."

In a case of complexity, as this one was, where three accused were indicted jointly, it must be expected that the learned judge would have given the jury the classic direction from R. v. Baskerville ((1917) 12 Cr App. R. 81), in relation to the evidence of an accomplice, and then would have gone on to explain to the jury the type of evidence that was required to corroborate the evidence given by the accomplice. He should have told the jury that, in the particular circumstances of the case having regard to s. 61 (5) of the *Evidence Act, Cap. 5:03.* he was required, as a rule" of law, to warn them that it was dangerous and unsafe to convict on the uncorroborated testimony of the accomplice; but, if, after paying attention to that warning, they were satisfied that the accomplice was a witness of truth, then it was open to them to convict on his evidence. He should then have told them in relation to corroborative evidence that what is required is some independent or additional evidence rendering it probable that the story of the accomplice was true and that it was reasonably safe to act upon it. He should have also made it clear to the jury that the evidence of the accomplice must be corroborated both as to a material circumstance of the crime and as to the identity of the prisoner, i.e., it must be evidence which implicates the prisoner, and which confirms in some material particular not only the evidence that the crime had been committed, but also that the prisoner committed it. Having given them that direction, it was his further duty to point out what evidence, if any, there was in the rest of the case which was capable of amounting to corroboration and to give the jury a broad indication of the evidence which, if they accepted it, they could treat as corroboration, [R. v. Goddard (1962) 46 Cr. App. R. 456].

In this case, as far as the case against the No. 1 appellant was concerned, there was no corroboration, in which case it was the bounden duty of the learned judge to direct the jury that there was no such evidence, and that the whole case would depend upon whether they accepted the evidence of Ramnarace Singh as being a witness of truth or not, after paying attention to the warning. The danger in

failing to so direct the jury would mean that the jury might well have looked for corroboration in the rest of the evidence which was not capable of amounting to corroboration. In sexual cases, where the same rule applies to the evidence of the prosecutrix, the Court of Appeal in England stated in its judgment in the case of R. v. Goddard (*supra* at p. 461), that it was idle to give the direction in relation to the evidence of an accomplice *simpliciter* where in fact there is no evidence capable of amounting to corroboration, when that court said:

> "Equally, if you get a case, as in many sexual cases, where there is a danger that the jury will treat as corroboration something which is incapable of being corroboration, there must be a duty on the judge to explain to the jury what is not corroboration..."

In R. v. Parker ((1925) 18 Cr. App. R. 103), where there was no corroboration of the evidence of the prosecutrix, the Court of Appeal, in its judgment, stated (at p. 104):

> "In truth, there was no corroboration of the girl's story in the sense of evidence corroborating that story in a material particular and implicating the accused, but the jury were left to decide whether or not there was any corroboration. If the jury had been told that there was no corroboration, and that, in the absence of it, it would be unsafe to convict, and if they had nevertheless convicted the appellant, it might well have been that the conviction would stand. But their minds were left with the belief that they could find certain matters to be corroboration, whereas they could not. This appeal must therefore be allowed."

The learned judge should also have made it crystal clear to the jury that, in considering whether there was independent testimony which corroborated the evidence of the accomplice in relation to the No. 1 appellant, this evidence would not corroborate the accomplice in relation to the case against the other accused persons. As was held in R. v. Jenkins ((1845) 1 Cox C.C. 177), where an accomplice gives evidence against two prisoners, the fact that there is corroboration so far as one of them is concerned does not corroborate his testimony against the other. It is true that the learned judge did tell the jury that whatever is said or mentioned in a statement by one accused person which mentions the name or names of another accused person or other persons is not evidence against the other accused or those other persons, but is only evidence against the person making the statement itself. This direction, however, did not go far enough.

In our view, as a result of these misdirections and non-directions amounting to misdirections, there must have existed in the minds of the jury a state of obfuscation as to how they should approach the evidence of Ramnarace Singh in relation to the case against the No. 1 appellant. As was said by FULLAGER, J., in Marz

v. The Queen ((1955) 93 C & R. 493 at p. 514):

> "... every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice."

It was submitted by counsel for the State that there was evidence capable of amounting to corroboration of the evidence of Ramnarace Singh in relation to the case against the No. 1 appellant. His submission is, as I understand it, that the No. 1 appellant, in his defence statement from the dock, merely said that he had nothing to do with the death of Yassin and denied using the words, "The man deh ah Carib." It followed, he said, that though the No. 1 appellant was under no obligation to say anything in his defence, as he had to be specifically warned by the judge that he was not required to say anything, but, having decided to make a statement from the dock, he did not deny the evidence of Ramnarace Singh that he had hired his car to make the various trips to the East Coast and driving finally to the Carib where the car dropped off the No. 2 and No. 3 appellants; and he did not deny standing outside of the Carib Hotel with a gun in his possession. As he had the opportunity to make such denials, he must be taken to have admitted these allegations by the State, which counsel submits would be capable of amounting to corroboration of the evidence of the accomplice Ramnarace Singh. In our view, counsel's submission really amounts to an assertion that silence in relation to these matters on the part of the No. 1 appellant amounted to corroboration. We reject this submission as the authorities are clear that silence on the part of an accused person in these circumstances can never amount to corroboration. The learned author of *Cross on Evidence* 4th edition, p. 190, after a review of the authorities dealing with cases where an accused person remains silent when charged by a police officer, is of the view that it can be assumed with a good deal of confidence that silence can never amount to corroboration of evidence against someone charged with a crime. [See also R. v. Whitehead (1930) 21 Cr. App. R. 23]. The case of Tumahole Bereng v. The King [1949] A.C. 253 RC, bears directly on the point where the Privy Council, in its advice, plainly stated (at p. 270):

> "The circumstances that the appellants (other than the No. 2) elected not to give evidence is equally incapable of constituting corroboration, though on more general grounds. Silence on the part of an accused person which is tantamount to an admission by conduct may, on occasion, amount to corroboration. But an accused admits nothing by exercising at his, trial the right which the law gives him of electing not to deny the charge on oath. Silence of that kind-and it is the only kind relevant to this appeal-affords no corroboration to satisfy the rule of practice under

> consideration. Nor does an accused corroborate an accomplice merely by giving evidence which is not accepted and must therefore be regarded as false. Corroboration may well be found in the evidence of an accused person; but that is a different matter, for there confirmation comes, if at all, from what is said, and not from the falsity of what is said. It is, of course, correct to say that these circumstances-the failure to give evidence or the giving of false evidence-may bear against an accused and assist in his conviction if there is other material sufficient to sustain a verdict against him. But if the other material is insufficient either in its quality or extent, they cannot be used as a make-weight. To hold otherwise would be to undermine the presumption of innocence in a manner as repugnant to the Proclamation of 1938 as to the common law of England."

It is clear, therefore, that in exercising his right of not making a statement from the dock, and making no denial as to the aforementioned matters, the No. 1 appellant could not be regarded by his silence as corroborating the evidence of Ramnarace Singh. If the position were otherwise, the result would be that the criminal law would be brought in line with the rule of pleading in civil law that what is not denied must be taken to be admitted. It must always be remembered that an accused person is entitled to plead not guilty and say. "Let the prosecution prove its case if it can", and having so said, he may take refuge in silence, [Noor Mohamed v. R. [1949] A.C. 182 at p. 191].

The case of R. v. Dossi ((1919) 14 Cr. App. R. 158) cited by counsel for the State in support of his proposition offers no assistance to him. In that case, where an accused was charged for an indecent assault on a child, it was held that the accused's admission in evidence that he had platonically fondled the child, who gave sworn testimony to the effect that he had indecently assaulted her, could be treated as corroboration of her statement. ATKIN, J., in the course of his judgment, said (*ibid*, at p. 162):

> "... the question of corroboration often assumes an entirely different aspect after the accused person has gone into the witness-box and has been cross-examined."

Here, undoubtedly, the learned judge was referring to clear admissions made in court by the accused person which would corroborate the case against him, but was certainly not projecting any concept of the silence of the accused, in relation to matters deposed to by the witness whose evidence required corroboration.

In The King v. Iman Din [1910] Can. C.C. 82 a case which required corroboration of the unsworn testimony of a child, a distinguished Canadian judge pointed

out that the accused had the right at the close of the case for the prosecution, to rest upon its insufficiency. If he chose, however, to put in evidence, then it may be looked at for any purpose, including that of corroborating the story of the principal witness. But there the learned judge was speaking of positive evidence of admissions and not of negative omissions from the evidence given by the accused.

Under the third point raised for the No. 1 appellant, counsel referred to the circumstance that, in dealing with the case for the prosecution, the learned judge did so in scores of pages, but, when dealing with the defence of the No. 1 appellant, he merely read out his statement from the dock. He also referred to statements made by the judge in the record which he criticised as statements prejudicial to the No. 1 appellant's case, and not justified by the evidence, but adopted by the judge. The judge said that the State was alleging that the No. 1 appellant was the mastermind behind the whole brutal crime and that his motives for so doing were sins of lust and greed; lust, that he set out to seduce the young and attractive Mrs. Yassin; and greed, in that he wanted everything Yassin had-and what better way was there to see that Yassin was no longer around, than to have him killed? The judge continued that the State was alleging that the No. 1 appellant was too smart to get personally involved so he was nowhere around when Yassin was killed. The judge referred to the death of the deceased as not being sudden, but carefully planned for over a year by the No. 1 appellant (of which there was no such evidence), and to the aiding and abetting of the execution of his plan by the No. 2 and No. 3 appellants. The judge repeated the allegation of the State that the No. 1 appellant was the mastermind who had plotted the diabolical crime out of a motive of lust and greed. Finally, the judge reminded the jury that the State was alleging that the circumstances pointed inexorably the finger of guilt against the No. 1 appellant, who was the mastermind, and who was careful to keep out of the way when the plot was sealed and prepared and executed on the night in question.

There is no objection to a judge, when directing a jury clearly expressing his opinion, even strongly in words adverse to the prisoner, as long as he leaves the issues of fact to the jury to determine. As was said in O'Donnell (1917) 12 Cr. App. R. 219 at p. 221:

> "A judge obviously is not justified in directing a jury, or using in the course of his summing-up such language as leads them to think that he is directing them, that they must find the facts in the way which he indicates. But he may express a view that the facts ought to be dealt with in a particular way, or ought not to be accepted by the jury at all."

From this point of view, the judge's summing-up cannot be said to be unfair, even though he expressed his opinion in strong language, for he left the issues of fact in the case to be decided by the jury. Early in his summing-up, he had told the

jury that if he expressed any opinion on the facts of the case they were not bound by his opinion. The question remains, however, whether he had put the defence of the No. 1 appellant adequately to the jury. In the case of the No. 1 appellant, the learned judge read out the statement made from the dock by the No. 1 appellant, and referred to the evidence given by the barrister-at-law who had appeared for the appellant in the Magistrate's Court in a case brought against one Mahase, which he described as being the motive on the part of Ramnarace Singh to give "some sort of evidence detrimental to the No. 1 accused." Then he lumped the respective defences of the three appellants together, telling the jury that they were setting up the defence of alibi and gave a direction thereon to which objection has not been taken. Then, immediately after this direction, he returned to the case for the prosecution against the No. 1 appellant. Nowhere, however, in dealing with the defence of the No. 1 appellant, did the learned judge suggest any favourable inference that might be drawn from the evidence led by the prosecution in favour of the No. 1 appellant. Nowhere, as counsel pointed out, does he suggest that an innocent interpretation might be put on the enquiries by the No. 1 appellant of Mrs. Yassin's age and whether her children belonged to her, and that an interval of fifteen months had elapsed between the time when the No. 1 appellant rented Quail's house and bought a mattress and took Mrs. Yassin to the house at Beehive, and the date of the death of the deceased, and that it could have been an innocent expedition by the No. 1 appellant, as the caretaker had not seen Mrs. Yassin there. Nor does he suggest to the jury that there might be no wisdom in the No. 1 appellant wanting to get rid of the deceased in order to obtain his money and property as there was no evidence that Mrs. Yassin was due to inherit her husband's possessions under his last will and testament. In relation to the evidence that the No. 1 appellant was present in a motor car with others when threats were made to the deceased, the learned judge did not point out that the voice of the No. 1 appellant was not recognised.

The authorities are clear that no matter how weak the defence of an accused person may be, it is of paramount importance that the judge, in his summing-up, must put fairly the defence of the accused to the jury and make it clear to the jury what the defence of the accused person is, [R. v. Dinnick(1910) 3 Cr. App. R. 77 at p. 79]. In Samaroo & Ezaz v. The Queen ([1953] L.R.B.G. 150), the former Court of Criminal Appeal of Guyana pointed out in its judgment that it was the function of the Appellate Court to make sure that a judge sitting with a jury never loses sight of the fact that at some stage of his summing-up and in some language and method he must alert the jury to the defence which has been offered to them by the accused. This function is not carried out by the judge merely by reading out the statement of the accused from the dock. The judge should paraphrase the statement and translate it in simple terms for the benefit of the jury and explain to them what the defence of the accused person is.

The Court of Appeal of Trinidad in David & Watkins v. R. ((1968) 11 W.I.R. 37

at p. 38), made a pertinent observation on this matter when, in its judgment, the Court stated:

> "In our judgment, then, no case can be said to have been put to a jury without telling, however briefly, of its true nature and purport. A judge may do so expansively or he may do so succinctly, but do so he must. Further, he will not have put it adequately if he omits to call the jury's attention to any of its essential features, and he will have failed to put it fairly if by word of implication he withdraws or may reasonably have been understood to withdraw any such feature from the consideration of the jury. Nor can it suffice merely to recite the evidence. No judge would be content to put the prosecution's case merely by reading to the jury what its witnesses have said. So, by the same token, no judge should be content to put the case for the defence merely by reading what the witnesses have stated. Nor does it help to interrupt the recital occasionally solely for the purpose of making a comment, especially when, as in this case, the comment was always adverse."

In our judgment, the defence of the No. 1 appellant was not adequately presented to the jury when the learned judge did not make it clear to the jury that the defence of the No. 1 appellant was that he knew nothing about the death of the deceased and he did not use the words alleged by Ramnarace Singh to have been used by him, i.e., that he had said that the man was at the Carib, and that he had never told Sergeant Nasir that he did not care, and that he would have to spend Yassin's money; and, further, he had not said that when he left Yassin's wife he would have to own all Yassin had, and that he had not invited the sergeant to visit his home in Anira Street. It should also have been explained to the jury that the No. 1 appellant was saying he was never at any time in a car with boys who had threatened to beat Yassin, and that inferentially he was asserting that he had two cars of his own and there was no need to hire one. When this failure on the part of the learned judge to explain to the jury exactly what the defence of the No. 1 appellant was, and to point out to them the inference which could be favourably drawn from the evidence led by the prosecution in relation to this appellant, and, above all, to inform the jury that the case against this appellant was purely circumstantial and they should see whether the cumulative effect of this evidence gave rise to no more than a case of suspicion against the appellant as "You cannot put a multiplicity of suspicions together and call it proof [*per* DEVLIN, J. in R. v. Attar [1956] C.L.R. 289] it cannot be said that the defence of this appellant was adequately put.

As was said by LUCKHOO, C. in The State v. Samad ((1970) 15 W.I.R. 35 at p. 37):

> "One of the functions of an Appellate Court is to ensure not only that

> what is stated by the learned judge has been fairly stated, but also that what it was necessary and fair to state was not omitted, lest the result of the jury's verdict might be affected thereby."

One other point raised by counsel for the No. 1 appellant which can be dealt with conveniently under this head is his submission that the words alleged to be uttered by the No. 1 appellant to Ramnarace Singh outside of the Carib Hotel: "Go and call the boys and come back for me," if believed by the jury, were capable of amounting to a countermand by the No. 1 appellant of his original order to the other appellants to kill the deceased Yassin; and that the learned judge did not deal with this aspect of the case against No. 1 appellant.

In R. v. Croft ((1944) 29 Cr. App. R. 169), there was a mutual agreement by the appellant and a woman to commit suicide and it was alleged that the appellant had acted as an accessory before the fact to a felony. The Criminal Court of Appeal held that, in order for the appellant to escape liability as an accessory, there must be evidence that he gave an express and actual countermand or a revocation to his order previously given. In dealing with the conduct of the appellant just prior to the death of the woman who, in pursuance of the mutual agreement, had spent the evening with him and had shot herself, the Court (*ibid.* at p. 173) said:

> "He had been in the summer-house all night long with the woman who was killed; he had brought to her his revolver; he had loaded it and he had cocked it; he had loaded it in every chamber and they were in the dark. All he (appellant) did, according to his evidence, when she shot herself through the breast and cried out in pain and told him to get some help, was to put his hand to her breast and then get out of the window. He never said anything to her which could have removed from her mind the effect of the counsel which he had given her before. He does not say that he said anything to her, and he left her wounded, possibly fatally wounded, with the revolver loaded in all chambers except the one which had been fired. In our opinion, that conduct cannot be held to be such a countermanding or determination of an agreement to commit suicide as would entitle him to an acquittal." (Underscoring mine).

In the Canadian case of Rex v. Whitehouse ([1941] 1 D.L.R. 683), SLOAN, J.A., in the Court of Appeal of British Colombia in his judgment (at p. 685), after expressing his opinion that a mere change of mental intention when quitting the scene of the crime just before the crime is committed would not absolve those who participated in the commission of the crime by overt acts just up to that moment, went on to set out the law on the matter when he stated:

> "After a crime has been committed and before a prior abandonment of

> the common enterprise may be found by a jury, there must be, in my view, in the absence of exceptional circumstances, something more than a mere mental change of intention and physical change of place by those associates who wish to dissociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of that crime. I will not attempt to define too closely what must be done in criminal matters involving participation in a common unlawful purpose to break the chain of causation and responsibility. That must depend upon the circumstances of each case. But it seems to me that one essential element ought to be established in a case of this kind; where practicable and reasonable, there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. What is 'timely communication' must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw. The unlawful purpose of him who continues alone is then his own and not one in common with those who are no longer parties to it nor liable to its full and final consequences."

When these principles are applied to the circumstances of the present case it cannot be said that the words alleged to have been uttered by the No. 1 appellant were capable of amounting to a countermand or revocation of his order previously given, as according to the evidence there was no communication of any intention to abandon the common purpose made to the other appellants, for, when Ramnarace Singh purported to carry out the order of the No. 1 appellant, he spoke to the No. 2 appellant and merely asked him what was the position. This submission must, therefore, fail. It must follow, then, that counsel for the No. 1 appellant has succeeded in his arguments on the second and third points raised by him and, in view of the misdirections in relation to the evidence of the accomplice and the corroboration of that evidence and the inadequacy of the summing-up in relation to the defence of the No. 1 appellant, we are of the view that the conviction of the No. 1 appellant must be quashed and the sentence set aside and a new trial ordered.

**MASSIAH, J.A.:** This judgment relates to the appeal of Michael Boodram the third appellant (hereinafter referred to as "the appellant"), who was convicted of and sentenced to death for the murder of Victor Yassin. The evidence generally adduced in this matter has been set out in detail by the learned Chief Justice and there is therefore no need to recite it again. In this judgment, attention shall be paid, as far as possible, to the evidence in relation only to the appellant's case.

The first submission on the appellant's behalf was that the evidence for the State did not disclose *a prima facie* case against him and that it was therefore wrong for the trial judge to have sent the case to the jury. It may be useful to begin, therefore, by considering what principles of law apply to this aspect of the matter and to see whether, in the light thereof, the trial judge was right in acting as he did.

In The Queen v. Hookoomchand and Sagur ([1897] L.R.B.G. 12) the Court of Crown Cases Reserved laid down the test to be employed in determining whether a case should properly be left to the jury. SIR EDWARD O'MALLEY, C.J., reading the judgment of the Court, stated as follows, at p. 16:

> "The point we have to consider is whether, apart from the evidence of Ramkellowan, Jaglall and Juggernath there was evidence that might properly be left to the jury as sufficient upon which to convict. The test in such cases is whether there is reasonable evidence on which reasonable men could reasonably or fairly find a verdict." (Underscoring mine)

This Court approved of that test in The State v. Lloyd Harris ((1974) 22 W.I.R. 41)-see the judgment of the present Chancellor at p. 11. In Copertino v. Mc Donald ([1964] L.R.B.G. 280) the Full Court (LUCKHOO, C.J., and BOLLERS, J.) approved at p. 285 of the test laid down by LORD PARKER, C.J., in the Practice Note appearing in ([1962] 1 All E.R. 448), to be applied in determining whether a submission of "no case" should be upheld. LORD PARKER said as follows:

> "If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer."

In Harries v. Thomas ((1917) 25 Cox C.C. 753), the appellant was convicted of keeping his premises open for the sale of intoxicating liquor at a time when they should have been closed. On appeal it was held that upon the evidence adduced in the court below, *a prima facie* case had not been established against the appellant because, in the words of LORD READING, C.J. at p. 756:

> "... it seems clear that the evidence was equally consistent with innocence as with guilt."

The appeal was therefore allowed and the conviction quashed.

Although the test applied in Harries v. Thomas (*supra*) might at first glance appear to be different from that enunciated in The Queen v. Hookoomchand and Sagur (*supra*) in that it appears to place a heavier onus on the prosecution, it expresses the same conception. If the evidence is equally consistent with innocence as with guilt, then it follows that it is not, in the words of SIR EDWARD O'MALLEY, "reasonable evidence on which reasonable men could reasonably or fairly find a verdict," nor, in LORD PARKER'S words, is it evidence on which " a reasonable tribunal might convict," for the evidence being equally consistent with innocence as with guilt a reasonable jury would inevitably acquit.

With those principles in mind, consideration will now be given to the main portions of the evidence led against the appellant to determine whether a *prima facie* case has been established against him. .

In chronological sequence, the first portion is Ramnarace Singh's testimony that at La Bonne Intention the first appellant who had hired his car left it along with an unknown man, and that later they returned to it along with the appellant, and that all of them then travelled to Georgetown in the witness' car. Subsequently, he took the appellant along with the second appellant and the unknown man to the Carib Hotel and left them there.

There is also the evidence that while the appellant was in the car on its way to the Carib Hotel, the first appellant said "The man deh ah Carib;" the State contended that that was a reference to Victor Yassin and that the first appellant was announcing that Yassin was to be found at the Carib Hotel which he owned.

There is to be considered also the evidence of the Carib's barman Lawrence De Britto, that the appellant had visited the hotel about 5.00 p.m., on 9th September, 1973, the day on which Yassin was murdered, and enquired if there were rooms to rent; he spoke of a girl and appears to have suggested that he wished to take her there. The State's view is that his enquiry was not genuine and that he went to the hotel at that hour merely to reconnoiter the place preparatory to his returning there later that evening with murder on his mind.

The State placed emphasis also on the evidence that the appellant indeed returned to the hotel about 7 o'clock that evening along with the second appellant and an unknown man and that he was drinking there until about 11.30 p.m. when he left the hotel in the company of either two or three other men, and on his assertion in the statement he made to the Police on 17th September, 1973 that the first appellant had told him and other persons that they should go into the Carib Hotel and look out for Yassin and that they had done so. There is evidence that Yassin also left the hotel sometime about 11.30 p.m. At least two of the men were seen to have entered Yassin's car after him, but the appellant was not identified as one of the men who did so.

However, in his statement to the Police which he said he made under the influence of a promise by them that he would be made a witness for the State if he told them what he knew of Yassin's death, the appellant said that after he left the hotel he was standing on the road, presumably waiting for transportation to his home, when the men with whom he had been drinking in the hotel came up in a car driven by Yassin. The car stopped and he entered it when one of the men to whom he referred as "Gowkarran's brother" invited him to do so. He said further in that statement, that when the car reached a comer near the Kitty Police Station it stopped, whereupon the men attacked Yassin, one man actually cutting his neck with a knife. Aghast at this turn of events the appellant decided to run away. So runs his statement. The position is, therefore, that in that statement he puts himself in the car when Yassin was killed.

One Brian Austin who was then on his way to work professed to have seen two men sitting in the back seat of Yassin's stationary car at about 11.20 o'clock that night at the junction of Sandy Babb and Alexander Streets, Kitty, a stone's throw from Kitty Police Station. In Austin's own words, the two men were "working energetically with their hands over something between the front and back seats." But some time before that while he was on duty in the compound of Kitty Police Station, P. C. English had seen the car passing south in Alexander Street with four persons in it, two in the front seat and two in the back. In his statement to the Police, the appellant said that he was sitting in the back seat of the car near the unknown man, but he did not say where "Gowkarran's brother" was sitting. But having regard to the evidence of P.C. English that two persons were in front and two in the back seat it may be inferred that "Gowkarran's brother" was sitting in front with Yassin and that the appellant and the unknown man were in the back seat. Bearing in mind Austin's evidence that there were two men in the back seat "working energetically with their hands," it may be inferred that those men were the appellant and the unknown man.

There was also the evidence that when he was arrested on 14th September, 1973, and his attention was drawn to certain stains on the yachting shoes he was wearing the appellant said that they were "syrup stains from, shave ice" but subsequent analysis showed them to be bloodstains. In his statement to the Police he retracted his earlier assertion and admitted that blood had got on to his shoes when he was in Yassin's car.

In that statement the appellant had also said that after the car took them to Georgetown on the afternoon of 9th September, 1973, the first appellant alone went away in the car telling him and his companions to wait for him and they did so, which may suggest that he, the appellant was under the control of the first appellant, particularly when it is remembered that he also admitted that the car later returned for them and took them to the Carib where the first appellant told them to go into the hotel and look out for Yassin, which they did.

It was through that concatenation of events and circumstances that the State hoped to prove the guilt of the appellant. It is clear that the case against him was based wholly on circumstantial evidence. The State's contention was that there was a plot to kill Yassin, that the whole idea was conceived by the first appellant who, concupiscent for Yassin's wife and anxious to possess his money, desired to get rid of him, and that he had procured the appellant, the second appellant and an unknown man to assist him. Since the appellant was a party to the plot to kill Yassin, the State's argument ran, it could be inferred therefrom that he was in Yassin's car in order to carry out that intention, and further, his movements before that time were all concerned with setting the stage for the subsequent murder.

To determine whether *a prima facie* case had been established against the appellant, one cannot look merely at the individual evidential links for it is the case taken as a whole, *tout ensemble*, that must be considered. Having done so and having regard to the principles laid down in Hookoomchand's case (*supra*) and the other authorities to which reference has been made, we are satisfied that a *prima facie* case had been established against the appellant and that the trial judge was right to send the case to the jury.

Since the case was one wholly of circumstantial evidence, attention must now be paid to the principles of law applicable thereto and to the approach the judge and jury should have followed in the execution of their respective functions.

If we wish to find out about the principles in relation to circumstantial evidence we need to look no further than The State v. Sookraj Evans ([1975] 1 G.L.R. 242) where all the leading authorities in this field were reviewed by the present Chancellor. In his judgment, he cast his net wide dealing with cases in Guyana as well as with others in England, India, Canada, the Caribbean and Australia. He referred to, *inter alia*, the cases of George Joseph Smith ((1915) Notable British Trial Series 270 at 276-278) the infamous "Brides in the bath" murderer; R. v. Hodge ((1838) 2 Lew. C.C. 228); Peacock v. The King ((1912) 13 C.L.R. 619); Plomp v. The Queen ((1963) 110 C.L.R. 234); R. v. Samad and others ((1970) 15 W.I.R**.** 35); Mc Greevy v. Director of Public Prosecutions ([1973] 1 All E.R. 503).

But we would wish especially to borrow and adopt the statement he made at pp. 259-260 of his judgment in relation to the approach the jury should take in cases where, as in the instant matter, the proof that is offered by the State is entirely circumstantial. He said as follows:

> "First of all, the jury have to decide what facts they accept as proved. This involves the credibility of the witnesses testifying to those facts, usually an exercise in belief or disbelief by the jury. Then comes the next step-drawing conclusions from them. This is a different exercise.

> It is a deductive process, involving the weighing of the probative value of the facts and the probabilities in the light of human experience. Sometimes a little commonsense is all that is needed to reach the right conclusion, which stands out obviously. At other times it calls for more insight and selectiveness. The question for the juror to ask himself is: 'Is guilt the only reasonable explanation of these facts?' If it is not, then guilt is not proved beyond reasonable doubt. 'Reasonable doubt' exists if in the evidence there is a reasonable explanation of the facts, other than guilt. If there is not, then, there is no reasonable doubt."

After that explication, the learned Chancellor proceeded to examine the question whether a judge in Guyana, as a matter of law, is obliged to give the jury, in cases where the State is relying on circumstantial evidence only, the special direction that they must not convict unless they are satisfied that the facts proved were not only consistent with the guilt of the accused, but also such as to be inconsistent with any other reasonable conclusion, which is the direction that ALDERSON, B. gave the jury in R. v. Hodge (*supra*). In R. v. McGreevy (*supra*) the House of Lords held that there was no rule of law that made it imperative for a judge so to direct the jury, and Hodge's case was thought not to have laid down any such rule. In his speech LORD MORRIS of BORTH-Y-GEST observed as follows (p. 508):

> "The singular fact remains that here in the home of the common law, Hodge's case has not been given very special prominence; references to it are scant and do not suggest that it enshrines guidance of such compulsive power as to amount to a rule of law which if not faithfully followed will stamp a summing-up as defective."

The position is different in Canada-see The King v. Comba ([1938] S.C.R. 396) and R. v Duesharm ([1956] 1 D.L.R. (2d) 732 C.A.). The position in Australia appears to be uncertain.

In The State v. Sookraj Evans (*supra*) the view was expressed that the legal position in Guyana is the same as in England. The learned Chancellor's analysis of the position involved consideration of the difficult and rather complex question as to whether this Court is bound, whatever its own views might be, to accept as declaratory of the common law of Guyana, whatever the House of Lords declares to be the common law of England. At p. 271 he expressed his conclusions thus:

> "In my opinion, these are compelling reasons to justify the proposition in McGreevy that Hodge's case did not lay down or apply any rule of law, and that no such rule existed in 1973 when Mc Greevy was put on trial.
>
> Strictly speaking, subject to what is said below, that would be declaratory of the state of our common law when the appellant was put on trial.

> Accordingly, the failure to give this special direction to the jury then would be no misdirection."

But he went on to explain that the position may well have been different if "a common law rule or practice had developed differently in Guyana and it could be said that there was then a well-settled compulsory practice or rule here to give the special direction in terms or effect.

But the matter does not end there. Although it has now been made clear that the trial judge is under no legal duty to give the special direction, it appears, nevertheless, that in certain cases he should do so. At p. 272 of his judgment when he was considering the amplitude of the direction necessary in relation to the burden of proof in cases of circumstantial evidence, the Chancellor observed as follows:-

> "Without setting out now to lay down the law, I would advise that in cases of circumstantial evidence, it would be at least desirable, and certainly helpful, to tell juries that to be satisfied of the guilt of an accused beyond reasonable doubt they must be sure that his guilt is the only reasonable explanation of the true facts; that (even where the defence is an alibi or a mere denial of such facts) they should address their minds to the question whether, on the evidence, there is, or may be, a reasonable innocent explanation of the apparently damaging testimony; and that if that is so, then the case is not proved beyond reasonable doubt and an acquittal must follow. For even if a special direction is not compulsory, there may well be cases where the evidence is such that this Court might feel that, in that case, failure to give such a direction was a misdirection." (Underscoring mine)

In our view, that direction should always be given where a careful examination of the evidence reveals that it is not very strong and the accused offers a reasonable defence. To do otherwise would be less than fair.

In this matter the appellant's presence in Georgetown, in the Carib Hotel on both occasions and in Yassin's car may well be considered to be consistent with innocence and with the appellant's explanation that he was merely out with friends on some innocent revelling, for there is no evidence that he was aware or could have been aware of the presence of the gun or the significance; if any, attaching to the sentence "The man deh ah Carib," that is, assuming that he heard when it was uttered and knew to whom it referred.

There is absolutely no direct evidence to show that on the day in question, at anytime at all, the appellant did anything or said anything that suggests his guilt, and there is nothing in his statement to the Police or from the dock that shows that he was in any way directly implicating himself. In our judgment, the "evi-

dentiary circumstances" on which the State relied were such as to compel the trial judge not only to give the direction formulated by the learned Chancellor at p. 272 of his judgment in The State v. Sookraj Evans (*supra*) but also to relate that direction to the evidence led. To do one without the other is to provide the jury with no help at all. This has been emphasised in many cases.

It is true that the trial judge in his summing-up quoted the well known statement of LORD NORMAND in Teper v. R. ([1952] A. C. 480, at p. 489) that:

> "It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

It is also true that those words express the conception that to find an accused person guilty the jury must be satisfied not only that the circumstances are consistent with the guilt of the accused but also that the facts proved are such as to be inconsistent with any other rational conclusion. About LORD NORMAND'S statement it should be said, with respect, that it is very unlikely that a lay jury, not well educated in a formal way, will comprehend that statement at all; the meaning of the sentence "co-existing circumstances which would weaken or destroy the inference" may not be easily apprehended by all. It is true that this statement was uttered in the Privy Council and has been approved of in several cases, but although the correctness of the expression of the idea is not challenged we seriously doubt that the statement can easily be understood by a lay jury who may well be hearing for the first time about circumstantial evidence. What is required, is not a mere incantation of certain words that may go beyond the jury's ken, but a clear and simple exposition of the principle so that its meaning could easily be grasped.

But immediately after referring to LORD NORMAND'S statement, the trial judge directed the jury as follows:

> "On this question of circumstantial evidence I will give you this direction. You must not convict any or all of these three accused persons merely because the circumstances are consistent with their guilt. You can only convict them if you are satisfied that the circumstances are inconsistent with any other rational conclusion but that they are the persons who in fact did the act in question."

And the trial judge further directed the jury thus:

> "Having regard to all of them (the circumstances) put together, can you say with inexorable certainty, beyond reasonable doubt, that the inference you are asked to draw by the State is not only reasonable but the

> only and conclusive one that you can possibly draw?"

The trial judge did not direct the jury as to what they should do if they were able to draw other inferences, but that apart, it appears to me that he should not have contented himself merely with the formulation of those general propositions but rather should have attempted also to relate them to the evidence adduced. What he ought to have done was to have examined closely the circumstantial evidence adduced against the appellant and the explanations offered by him and then specifically have directed the jury that in reference thereto they "should address their minds to the question whether, on the evidence there is, or may be, a reasonable innocent explanation of the apparently damaging testimony; and that if that is so, then the case is not proved beyond reasonable doubt and an acquittal must follow." This would have taken the jury to the very heart of the matter and secured for them a proper appreciation of the true position and of the way they should approach the problem.

It is not suggested that those identical words should have been used. The trial judge was free to employ his own phraseology provided he ensured the jury's due appreciation that it was necessary for them to consider whether the appellant had not offered a reasonable explanation which would have cast the testimony in a light other than guilt. To do this, it was necessary to discuss with the jury the appellant's statement from the dock as well as his statement to the Police, attracting attention to the explanation he was offering and leaving it with them to decide whether they considered in all the circumstances of the case that the explanation was reasonable and innocent. This was of vital importance; the enunciation of a principle is one thing, understanding it is another; its application to stated facts is a third. In McGreevy v. D.P.P. (*supra*) LORD MORRIS of BORTH-Y-GEST said, at p. 510:

> "In a case in which inferences may have to be drawn by a jury from such facts as are found by them a judge will wish to give the jury guidance as to their approach."

Such guidance must be rather more than the mere statement of a principle.

In dealing with the appellant's statement to the Police, it was not enough merely to tell the jury that it was "exculpatory in that it does not implicate himself but tends to throw blame on others." True enough the appellant did that, but the trial judge missed the statement's true significance, from the appellant's point of view, which was, that in exculpating himself the appellant offered an explanation of his presence in the Carib Hotel and in Yassin's car and that that factor had a direct and important relevance to the whole question of circumstantial proof. It was this aspect of the matter that was required to be emphasised.

It is particularly unfortunate that the judge fell into this error because he seemed to think that the case against the appellant was weak. He asked the rhetorical question "What is the case against the number three accused?" and, answered thus: "The case against the number three accused mainly consists in his statement." He said as follows:

> "Number three accused; take away the evidence of Ramnarace Singh and this might well be considered the weakest of the lot, because, apart from the evidence of Ramnarace Singh of association, what is actually the evidence against the number three?"

We would not ourselves describe the State's case as weak but the trial judge seemed to think it was. But merely to assert that the case is weak is not really helpful, nor indeed does a series of rhetorical questions assist. It would have been more helpful instead to have drawn attention to the weak aspects of the circumstantial evidence which perhaps the trial judge had in mind, so that the jury could have been alerted to their true significance and gained a proper appreciation of the strength, if any, of the State's case. As LAWTON, L.J., said in R. v. Sparrow ([1973] 2 All E.R. 129 (at p. 135):

> "The object of a summing-up is to help the jury and in our experience a jury is not helped by a colourless reading out of the evidence as recorded by the judge in his notebook. The judge is more than a mere referee who takes no part in the trial save to intervene when a rule of procedure or evidence is broken. He and the jury try the case together and it is his duty to give them the benefit of his knowledge of the law and to advise them in the light of his experience as to the significance of the evidence." (Underscoring mine)

And in The State v. Henry Roberts and Michael Roberts ([1975] 1 G.L.R. 38) the present Chancellor at p. 18 of his judgment referred to the Canadian case of R. v. Findlay ([1944] 2 D.L.R. 773 C. A.), in which O'HALLORAN, J., in the Court of Appeal of British Columbia said as follows, at p. 775:

> "No doubt each judge should be left to sum up a case to the jury in his own way, so long as he does not misdirect the jury in law or in fact. But that does not absolve him from presenting to the jury the material evidence related to the case for the prosecution and the defence, respectively, and from doing so in a manner which will enable the jury to appreciate its full significance as related to the essential questions of fact upon which guilt depends". (Underscoring mine.)

In our judgment, it is essential that a trial judge should do this if his summation is to be purposeful. Perhaps consideration of this aspect of the matter should be

concluded with a reference to the Australian case of Peacock v. The King (*supra*) in which the appellant was convicted of murder almost entirely on circumstantial evidence, which, however, was very strong. The appeal was heard by the High Court of Australia where GRIFFITH, C.J. took the view that there was a reasonable hypothesis consistent with the appellant's innocence. In dealing generally with circumstantial evidence he referred to *Starkie on Evidence* (3rd edition) and at p. 629 of his judgment quoted from that work, the following passage which appears to be apposite to this matter:

> "The force of circumstantial evidence being exclusive in its nature, and the mere coincidence of the hypothesis with the circumstance being in the abstract insufficient, unless they exclude every other supposition, it is essential to inquire with the most scrupulous attention what other hypotheses there may be which may agree wholly or partially with the facts in evidence. Those which agree even partially with the circumstances are not unworthy of examination, because they lead to a more minute examination of those facts with which at first they might appear to be inconsistent ... In criminal cases the statement made by the accused is in this point of view of the most essential importance. Such is the complexity of human affairs, so infinite the combination of circumstances, that a true hypothesis which is capable of explaining and reconciling all the apparently conflicting circumstances may escape the acutest penetration; but the prisoner so far as he alone is concerned can always afford a clue to them; and although he be unable to support his statement by evidence, his account of the transaction is for this purpose always most material and important." (Underscoring mine.)

That elegant and perceptive quotation couched in rather quaint language should be remembered by all.

Consideration will now be given to the question of corroboration which was also raised by the appellant. The position contended for was that the evidence of Ramnarace Singh on which the State relied so heavily, did not implicate the appellant at all so that the question of the need for evidence corroborating Singh's evidence could not arise in relation to the case against the appellant. It is a sensible proposition that if the evidence of an accomplice does not implicate an accused person, the question of corroboration cannot arise since there is nothing to be corroborated.

But one of the problems in this matter is that Ramnarace Singh's evidence does not directly implicate the appellant in the way that an accomplice usually does, that is to say, he did not testify that the appellants, or any of them, actually committed the crime, but he gave evidence of certain matters which when enlinked and taken in conjunction with other evidence may be considered to lend signifi-

cance and meaning to the appellant's presence in Yassin's car when he was killed. To that extent, therefore, such evidence as Ramnarace Singh gave, suggesting acts of preparation, not only had an important material bearing on the issues to be decided but also tended to implicate the appellant; it follows, therefore, that since Ramnarace Singh was capable of being regarded as an accomplice for the reasons given by the learned Chief Justice, the question of corroboration was of direct relevance in this matter. It should be stated, in passage, that it was for the jury to decide whether or not the witness was an accomplice.

On the issue of corroboration, the question arises whether the appellant's lie that the stains on his yachting shoes were not of blood was capable of amounting to corroboration. It is clear law that a lie may not always amount to corroboration; regard must be paid to the circumstances in which the lie was told, for a lie may be prompted by a circumstance that does not suggest guilt; for example, fear, or agitation, or the like. It all depends on the circumstances of the particular case. In one case, therefore, a lie may afford corroboration and in another, it may not. As LUCKHOO, J. A. (as he then was) put it in Pooran v. The Queen ((1966) 10 W.I.R. 51, at p. 57):

> "One has to look at the whole circumstance of the case. What may afford corroboration in one case may not in another. It depends on the nature of the rest of the evidence and the nature of the lie that was told."

In the well known case of Credland v. Knowler ((1951)35 Cr. App. R. 48), the appellant was charged with indecent assault on a girl aged ten. Both she and another girl aged nine gave unsworn evidence that the appellant had committed the offence. He was convicted of the offence. The appellant appealed against his conviction and one of the matters that fell to be considered was whether a lie that he had told the Police during their investigations was capable of amounting to corroboration of the girls' testimony. The Court held that in the circumstances of the case it was capable of so amounting but pointed out that not every lie has this quality.

LORD GODDARD, L.C.J., explained the position thus, (*ibid.* p. 54):

> "Most of the argument and, no doubt much of the case, has dealt with the lie which the appellant told and the question whether the fact that the appellant told a lie is in itself corroboration. I should be very sorry to lay down, and I have no intention of laying down and I do not think any case has gone the length of laying down, that the mere fact that an accused person has told a lie can in itself amount to corroboration. It may but it does not follow that it must. If a man tells a lie when he is spoken to about an alleged offence, the fact that he tells a lie at once throws great doubt upon his evidence, if he afterwards gives evidence, and it

> may be very good ground for rejecting his evidence, but the fact that his evidence ought to be rejected does not of itself amount to there being corroboration."

And at p. 57, OLIVER, J., said:

> "I think the right conclusion is this, that whether a false statement is or is not corroboration must depend on all the circumstances of the case. A lie in itself in some circumstances might be corroboration; in other circumstances it obviously would not."

See also Jones v. Thomas ([1934] 1 K.B. 323) and the Australian case of Tripodi v. The Queen ((1960-611 104 C.L.R. 1).

Here then the trial judge's duty was twofold. He should first have explained to the jury that the lie the appellant told may or may not amount to corroboration and then gone on to deal with the approach they themselves should take in the determination thereof, bearing in mind the principles stated in Pooran's case (*supra*), and making it clear that the issue was a matter for their determination. In Patrick Joseph Clynes ((1960) 44 Cr. App. R. 158), STREATFIELD, J., said as follows, (at p. 163):

> "A lie, for instance, may come from a man acting in pure panic, in which case it is not corroboration. It may, on the other hand, be indicative of a man's sense of guilt, in which case it may be, but that is a matter which ought to be carefully explained to the jury and left to them. (Underscoring mine.)

PERSAUD, J.A., explained it thus in Pooran's case (*supra*) at p. 64:

> "(The judge) must not merely tell the jury that if they find the accused lied out of a sense of guilt, then that may be corroboration of the prosecutrix' evidence. He ought to bear the circumstances in mind (and this must include the defence), and must explain to the jury that if they find that an untrue statement is consistent with panic as well as with guilt then it is not corroboration." (Underscoring mine.)

But the trial judge did not deal with this aspect of the case at all. The jury may well have treated the appellant's lie as corroboration but may not have done so if they had been afforded the guidance which this situation demanded.

Another portion of the evidence that is capable of amounting to corroboration, is the appellant's admission in his statement to the Police that the first appellant had told him in Georgetown to wait for him and had later returned for him at Humphrey

and Company and that they had then driven to the Carib where the first appellant told them that they must go into the hotel and look out for Yassin, and that they did so. In our judgment that evidence, if accepted, together with the appellant's further admission that he was in Yassin's car when he was killed may tend to make Ramnarace Singh's evidence more credible. Corroboration that shows generally that a witness' story is true is sufficient-see David Watson ((1913) 8 Cr. App. R. 249, at p. 253).

This aspect also was never dealt with by the trial judge. Indeed, he never at any stage of the trial, in any way at all, indicated to the jury, as he should have done what evidence he considered to be capable of being treated as corroboration. (See Leon Goddard, Rodney Keith Goddard ((1962) 46 Cr. App. R. 456). Opinion appears to be divided as to whether such a duty is cast on the judge at all-see, for example the view of the Court of Criminal Appeal in Edmund Zielinski ((1950) 34 Cr. App. R. 193 at p. 197), that there is no such duty. That view was criticised in Goddard's case (*supra*). There it was said, (p. 461), that the judge must give a broad indication of the evidence capable of amounting to corroboration but that "the duty must depend upon the exact facts of the case." In the instant matter where Ramnarace Singh was not identifying the appellants as the persons who committed the crime it was necessary when dealing with corroboration to explain to the jury the nature and effect of the witness' evidence, and having regard thereto, to indicate the portions of other evidence that were capable of amounting to corroboration. It is our view that it is always the duty of the trial judge to do so. A lay jury is entitled to be guided in this area which often proves perilous even to the trained lawyer, for it is not uncommon that even he is prone to treat as corroboration matters that certainly are not. If this is so, it is difficult to understand why better should be expected of the layman.

Although in England opinion appears to be divided on the question whether it is the duty of the trial judge to indicate to the jury portions of the evidence that are capable of amounting to corroboration this Court should not for that reason feel deterred from stating that it is, for we will have, in many instances, to chart our own jurisprudential course. This is not an attempt to enfeeble the common law but to contribute to its growth and strength, for law is not a static concept but intrinsically is subject to intellectual investigation and change.

However that may be, if, on the other hand, the trial judge felt that there was no evidence capable of amounting to corroboration then equally his duty was to make this clear to the jury in simple terms so that they could be in no doubt about the matter, and failure to do so, is a serious misdirection. (See Eric James v. The Queen (1970) 16 W.I.R. 272, at p 275; R. v. Johnson (1963) 5 W.I.R 396; R. v. Anderson (1966) 10 W.I.R. 24; R. v Anslow [1962] Crim. L.R. 101; Braithwaite v. The Queen [1954] L.R.B.G. 22 (a decision of the Court of Criminal Appeal)). However, the directions of the trial judge in relation to corroboration were inad-

equate and quite confusing, for having offered a definition of "corroboration" that was incomplete the trial judge proceeded, in the paragraph but one thereafter, to illustrate what he meant by reference to the facts of the case and in doing so told the jury the very antithesis of what he had earlier predicated-*obscurum per obscurius.* It may be that the mistake arose from mere inadvertence, but from whatever cause it proceeded, its effect must have been confusing rather than elucidative in relation to a difficult matter that was of vital importance to the case. It must be borne in mind that the subject of corroboration, even when properly explained, presents many problems; when not properly explained, the results may well be disastrous.

It was contended for the State that the jury must have realised that the trial judge had fallen into error, and that in any case the error was corrected by implication in later paragraphs, some forty-five pages further on, and that the jury must have appreciated this.

The answer to that is that a trial judge must correct his mistakes expressly, specifically directing the jury's attention to what he is doing so as to leave them in no doubt that his former statement no longer stands and that they are to be guided only by his later statement. Failure to do so will leave the jury in a quandary as to which of the statements should guide them, and in that dilemma they may well choose to follow the wrong course. Also, it is unreasonable to credit a lay jury with the possession of the intellectual qualities and legal scholarship required for the observation of mistakes perpetrated by a judge in reference to principles of law; and in any case they would feel themselves unable to dare to take that approach, the trial judge having already told them explicitly that matters of law were not within their compass but were for him alone. It would require a certain rashness to disobey this cardinal, judicial injunction.

The trial judge's misdirections in relation to corroboration make it unsafe to allow the conviction to stand. We hold with LORD MORRIS of BORTH-Y-GEST in Mc Greevy v. Director of Public Prosecutions (*supra* p. 510), that:

> "If having regard to the facts and circumstances of a particular case, a summing up is held to have been inadequate and to have failed to set the jury on their proper line of approach or to give them proper guidance a conviction might be held to be unsafe and unsatisfactory." (Underscoring mine.)

We do not think that we should pass from the subject of corroboration without stating that it is wrong to deal with it generally, as the trial judge did, in cases where persons are jointly charged, without making it clear that what may be treated as corroboration in relation to the case against a particular accused person may not necessarily be corroboration in relation to the case against another. In

dealing with corroboration, the trial judge should deal separately with the case against each accused person and with the portions of evidence which are capable of being regarded as corroboration.

There are several cases that illustrate this principle. In Goddard's case (*supra*) two brothers were convicted of being accessories after the fact, to store-breaking and also of receiving. Two men who had pleaded guilty to the store-breaking testified for the prosecution and theirs was the main evidence against the appellants who offered alibis. It is clear that a careful direction was required in regard to corroboration and especially as to what evidence was capable of amounting to corroboration in the respective cases against the appellants, LORD PARKER, L.C.J., in dealing with this aspect of the case, said as follows (p. 461):

> "If one looks at the facts of this case, one is faced at once with this, that here are two defendants. So far, as one of them is concerned, Rodney, there was clearly evidence capable of amounting to corroboration from the fact that materials found in the turn-ups of his trousers corresponded with the ballast and metal of the safe, pointing to his presence and discrediting his alibi; whereas, in the case of Leon there was no such evidence at all-a clear distinction which had to be drawn between these two defendants."

The same situation arose more than a century ago in The Queen v. Jenkins and Another ((1845) 1 Cox C.C.177) where the principal witness for the prosecution was an accomplice. In summing-up, BARON ALDERSON said:

> "Where there is one witness of bad character giving evidence against both prisoners, a confirmation of his testimony with regard to one, is no confirmation of his testimony as to the other. If, therefore, you find there is a corroboration applicable to one prisoner, take it as against him; but unless it exists with regard to both, it seems to me it would be unjust to give it a general effect."

This question was also considered in the case of Neville Benson Henry and Jeffrey Patrick Manning ((1969) 53 Cr. App. R. 150) where the appellants were convicted of rape. In respect of the case against Henry, there was ample evidence capable of amounting to corroboration but there was none in respect of that against Manning. It was therefore a matter of particular importance to point this out to the jury for fear that they may have used that corroborative evidence when considering the case against Manning. SALMON, L.J., who delivered the judgment of the Court of Appeal dealt with this aspect as follows, (*ibid.* p. 156):

> "As far as he (Manning) is concerned, there was not, for the reasons already indicated, a shred of corroboration of the charge against him.

> That being so, it was highly important for the judge to tell the jury that there was no corroboration against Manning. It was particularly important for him to do so in this case, because there was corroboration against Manning's co-defendant, the three pieces of evidence to which reference has already been made, and the learned judge ought to have told the jury that none of these should be taken into account against Manning, because the evidence against him rested solely on the evidence of the girl herself."

It appears to us, therefore, that this line of approach should have been followed by the trial judge in the instant matter.

In connection with this issue there is one further point to which attention must be directed. In our view, the witness Ramnarace Singh is capable of being regarded as a person who had an interest to serve in this matter. It was his car that conveyed the appellants up and down during the period when, according to the State, they were setting the stage for the murder. Although he knew so much, he avoided all contact with the Police even when he learnt about the murder, perhaps because he could not care less, or that he felt he too would have been under suspicion, for he admitted that he said nothing to the Police because he was afraid that he would have got himself into trouble. Later, he came to learn, however, that the Police were treating him as a suspect, and he testified that Superintendent Augustus had warned him that if he did not tell them what he knew he would get himself into trouble.

In the light of all these circumstances, he may well have felt, perhaps quite wrongly, that if he did not tell the Police something that he considered to be of interest to them, he may have been charged with Yassin's murder.

The evidence of a person in such a position who obviously has an interest to serve should be regarded with caution, for in his anxiety to ward off the peril by which he considers himself to be encompassed it is not unlikely that he may cast blame on others who may be quite innocent.

It is not surprising, therefore, that the courts, though not laying it down as a duty of the trial judge, have stated that it is desirable that in relation to the evidence of a witness who has some purpose to serve a warning should be given as if the witness were an accomplice. In Kenneth Frank Prater ((1960) 44 Cr. App. R. 83) EDMUND DAVIES, J., in delivering the judgment of the Court of Criminal Appeal said as follows, (pp. 85-86):

> "For the purposes of this present appeal, this court is content to accept that, whether the label to be attached to Welham in this case was strictly that of an accomplice or not, in practice it is desirable that a warning

> should be given that the witness, whether he comes from the dock, as, in this case, or whether he be a Crown witness, may be a witness with some purpose of his own to serve ...This Court, in the circumstances of the present appeal, is content to express the view that it is desirable that, in cases where a person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given."

The Court of Appeal of Trinidad and Tobago adopted this approach in Ramroop v. The Queen ((1963) 6 W.I.R. 425), where it was made clear, (at p. 428), that the Court accepted the pronouncements in Prater's case as well as those in R. v. Heaps ([1961] Crim. L.R. 254) to the same effect. But in Gookool and Gookool v. The Queen ((1968) 13 W.I.R. 477) that Court differently constituted, (though WOODING, C.J., and PHILLIPS, J.A., sat on both occasions) although not expressly disapproving of Ramroop's case, which was not referred to, pointed out, at (p. 481), that there is "no duty cast on a trial judge to deal with the evidence of a prosecution witness on the footing of his being an accomplice merely because it may be said that the witness has 'some purpose of his own to serve." If that means that it is not a rule of law but at most one of practice, it would appear to be correct. As far as we can make out, nowhere has it been said that it is a rule of law and the need to give the direction has invariably been described as "desirable."

In R. v. Brathwaite (No. 1) ((1969) 15 W.I.R. 263), a witness for the prosecution had originally been charged jointly with the appellant for murder, but a *nolle prosequi* was entered in his favour. At the trial, the witness gave extremely damaging evidence against the appellant but he also admitted that he had made two statements to the Police in which he had told lies. The trial judge left to the jury the issue of whether or not the witness was an accomplice and properly directed them in relation thereto, but he left the matter at that, telling the jury, that if they found he was not an accomplice they should treat his evidence as they would the evidence of any other witness. The Court of Appeal of Barbados held that he was wrong to have limited his direction in that way. WILLIAMS, J., who delivered the judgment of the court said as follows, (p. 268):

> "They were further told that should they find that he was not an accomplice they should treat his evidence as they would the evidence of any other witness. In other words, if they found that Mc Glorie was not a party to the violence which resulted in Mrs. Gale's death, the caution on corroboration did not apply. We are of the view that it was desirable for a warning as to corroboration to have been given irrespective of whether he was in strict law an accomplice or not; we think, that in the circumstances he could reasonably be regarded as having some purpose of his own to serve."

Here, once again, the epithet used is "desirable" as it was in Prater's case and Ramroop's case, as well as in Frederick Valentine Russell ((1968) 52 Cr. App. R. 147). We would say, with respect, that the use of the word "desirable" makes the position somewhat vague. A rule, whether of practice or strict law, should state the position much more positively; the trial judge should know where he stands and should be told clearly that it is, or is not, necessary to give the warning, not that it is desirable for him to do so.

In the Director of Public Prosecutions v. Kilbourne ([1973] 1 All E.R. 440), LORD HA1LSHAM, L.C., numbered the instance of a witness who has a purpose to serve, among the classes of case that require corroboration. In his speech he observed as follows (p. 447):

> "A judge is almost certainly wise to give a similar warning about the evidence of any principal witness for the Crown where the witness can reasonably be suggested to have some purpose of his own to serve in giving false evidence."

The criticism offered in respect of the word "desirable" applies equally to the phrase "almost certainly wise." The employment of that phrase in this context, implies that it would be unwise and perhaps unfair not to give the warning lest it might result in the conviction of an innocent person. If this is so, and the danger is to be avoided, or at least guarded against, the situation would appear to require a more positive approach. But those authorities all show, nevertheless, the necessity for the exercise of care and caution in accepting the evidence of a person who has some interest to serve by giving false evidence, and although the seeming rule of practice has not yet hardened into one of law, it is still considered "desirable" to give the warning.

In this matter, the compulsive and preponderant evidence to which attention has already been directed, proceeding from the witness himself, prompts the view that a reasonable jury may well consider that he had an interest to serve, and in our opinion, it was therefore the duty of the trial judge to have dealt with this aspect and to have warned the jury that it would be unsafe to convict without corroborative evidence if they considered that the witness had an interest to serve.

Another reason why the conviction cannot be sustained is that the trial judge did not put the defence fairly and adequately to the jury; this was another matter about which the appellant complained. It is a settled and abiding principle for which there is a profusion of authority that this should be done in every summation and it is so fundamental that it hardly requires to be stated. In Samaroo and Ezaz v. The Queen ([1953] L.R.B.G. 150), SIR PETER BELL, C.J., reading the judgment of the Court of Criminal Appeal said as follows, (p. 150):

> "Now, it is clearly settled law that it is of paramount importance that the summing-up must fairly put the case for the defence, whatever it may be. No matter how trivial or stupid, or unlikely the defence may be, it is of paramount importance that the judge in his summing-up must fairly put that defence to the jury."

The judge's obligation in this regard was described by the Lord Chief Justice in Benjamin Henry Dinnick ((1910) 3 Cr. App. R. 77, p. 79), as "a paramount principle" of the criminal law. Not to put the defence to the jury, however weak, was said by DARLING J., in R. v. Hill (22 Cox C.C. 625, at p. 626), to be "a miscarriage of justice." [See also James Henry Mills and Edith Mills (1936) 25 Cr. App. R. 138, Julian v. The Queen (1969) 13 W.I.R. 66 and John Canny (1945) 30 Cr. App. R. 143].

In the instant matter, the appellant made a statement from the dock and closed his case without calling any witnesses. His defence is contained in that statement. The first four lines of the statement read thus:

> "On the night of 9th September, 1973, I went to town and had some drinks. I later went to the Carib where I had some more drinks. About 9 p.m. I leave Carib to go home. I catch a car and go to the East Coast car park and I went home."

It is obvious, that in the first three sentences the appellant was giving an explanation of his movements on the night in question and of his presence at the Carib Hotel. He was endeavouring to make it clear that he had gone to Georgetown and the Carib without criminal intentions and was thereby denying that his presence there was motivated by any criminal design as the State was vigorously contending. Bearing in mind the State's allegation that his trip to Georgetown and his visit to the Carib were steps preparatory to the eventual murder of Yassin, his explanation of his presence in those places was a matter of considerable moment.

The trial judge, however, in dealing with the defence specifically, completely overlooked this point, as he had earlier done when dealing with the burden of proof in cases of circumstantial evidence, and never at all attracted the jury's attention to this significant aspect of the matter. This constituted a grave omission on the part of the trial judge whose parochial approach to the defence must have been profoundly damaging to it. It may be, that it all arose from the vertiginous length of the summation but in any case the mistake is too grievous to be overlooked.

The trial judge dealt with the defence as if it consisted only of an alibi and as if it began at the fourth sentence of the appellant's statement which reads "I catch a car and go to the East Coast car park and I went home;" this suggests that he

conflated that sentence with those that preceded it without apprehending that the ideas they contain are quite disparate. True enough it was in the fourth sentence that the appellant was asserting that he was elsewhere when the offence was said to have been committed, but as has already been stated, his defence began much earlier than that, and it was that early part that was not dealt with at all. It may be that that part may have escaped the jury's attention, or if it did not, the trial judge not having mentioned it and explained it, they may have thought it to possess uncertain value.

Justice and fairness would appear to dictate that not only should that aspect have been put to the jury but that it should also have been stressed. It was argued for the State that the appellant's statement was short and bare, the implication being, as was said expressly of the first appellant's statement, that it provided the trial judge with little or no material for directions; bread, it was said, cannot be made from stones. But to state that truism in this context is not to apprehend the essential point, which is not that a trial judge is expected to convert a weak and unconvincing defence into a strong, persuasive one, but that he is required to put the defence to the jury, weak and unconvincing as it may appear to be. He is certainly not permitted to eviscerate it. In R. v. Tillman ([1962] Crim. L.R. 261), the view was expressed that the duty is not whittled down even where the defence consists almost entirely of denials.

An interesting case that exemplifies this principle is David and Watkins v. R. ((1966) 11 W.I.R. 37) which engaged the attention of the Court of Appeal of Trinidad and Tobago. It clearly indicates what is expected of the trial judge. The appellants were charged with and convicted of murder. The victim, one Ollie Bartholomew, died from extensive bums caused by sulphuric acid allegedly thrown on her by the appellants acting in concert. The Prosecution did not allege that Watkins actually threw the acid. The essence of the defence of the appellant David was that it was the deceased's husband who, motivated by jealousy, threw the acid on her. Watkins' defence was that he was not actually there when the acid was thrown but was elsewhere in the house and never saw who threw it.

The trial judge, however, appeared to have misconceived David's defence and treated it as a mere denial; the element of the husband's alleged motive for killing his wife completely escaped him. Also, he treated Watkins' defence as if it were a mere concurrence with the prosecution's case that he had thrown no acid on Bartholomew, whereas the defence was really that he was not on the scene when the offence was alleged to have been committed. The position was, therefore, that the trial judge never dealt with the question of motive as an aspect of David's defence, and indeed appears to have withdrawn it, nor did he deal with Watkins' alibi.

FRASER, J. A., delivered the judgment of the Court. He sat with WOODING,

C.J., and MC SHINE, J.A. At pp. 38-39 he observed as follows:

> "In our judgment, then, no case can be said to have been put to a jury without telling, however briefly, of its true nature and purport. A judge may do so expansively or he may do so succinctly, but do so he must. Further, he will not have put it adequately if he omits to call the jury's attention to any of its essential features." (Underscoring mine.)

At p. 39 he said as follows when dealing specifically with the defence:

> "The essence of David's defence was no simple denial. Nor did it merely extend to a counter-charge that it was the husband who threw the corrosive fluid. It went much further. It put forward a motive-a motive such as might provoke an intemperately jealous husband to maim or murder his wife. This was an essential feature of his defence since, ordinarily, no jury would expect a husband, let alone a husband of long standing and ripe years, suddenly to do his wife serious injury and, more especially, to do this in the presence of others. Likewise, the essence of Watkins' defence... was that he was not actually on the scene when the corrosive fluid was thrown ... In effect, therefore, he was not merely at one with the Crown that he threw no acid on Ollie Bartholomew; he went far further putting himself off the scene, claiming to be surprised by the events, dissociating himself from any community of purpose, and knowing nothing of how or why anyone acted in any way whatever."

These aspects of the defence were never dealt with at all by the trial judge. The Court considered that the defence was not put to the jury fairly or adequately and gave this as one of their reasons for allowing the appeals.

This case serves to illustrate that the trial judge should not content himself with a superficial interpretation of the defence, considering the words thereof at their face value, but rather should examine them more deeply in order to apprehend the true significance and import of what the defence really is, and explain this to the jury in clear and simple terms. When, for example, in the matter under instant consideration, the appellant said that "on the night of 9th September, 1973, I went to town and had some drinks." it is manifest that he did not merely wish to declare that he was drinking in Georgetown; implicit in that declaration was his desire to convey as well that his presence there was wholly innocent, thereby coming firmly to grips with the State's allegation that it was all part of a sinister and aggressive design. At the very least, that would not be an unfair interpretation of his statement.

There is a lesser point of rather general application raised by the appellant which requires to be discussed. It was said that the trial judge used such strong language

when dealing with the State's case that it must have prejudiced the defence. He had said, for example, that there was conceived a "diabolical plot" to kill Yassin and that the motive therefor was "lust and greed." Ramnarace Singh, the State's main witness was described as "the north star that shines brightly in the night." The events of 9th September, 1973, were thought to be "the final nail in the coffin" and "the conclusive link of soldering of the chain, "a rather odd mixture of metaphors if we may say so with respect. Again, the trial judge said that the State considered that certain circumstances "point inexorably the finger of guilt" at the first appellant who was depicted as "the mastermind." Those are some of the phrases about which complaint was made.

It should be stated, in the first place, that a judge is entitled to express his own views on the evidence, and strong, and confident expressions of opinion, even in extravagant terms, are not necessarily prejudicial. [See R. v. Bovell (1969) 15 W.I.R. 258, and Leo George O'Donnell (1917) 12 Cr. App. R. 219]. Each judge will have his own style and will express his opinions in his own way. Some will choose to use simple and direct prose; others may prefer to adorn their language in meretricious robes. It does not really matter. To each his own. But it would appear prudent to avoid "words of learned length and thundering sound." But whatever he may choose to say, and in whatever fashion, the judge's duty, above all, is to be fair; what he is forbidden to do, for example, is to express himself in such a way as to appear to be assuming the functions of counsel for the prosecution. This is what happened in Mills and Gomes v. The Queen ((1963) 6 W.I.R. 418) where the appellants were convicted of murder. There were several passages in the summing-up which clearly suggested bias, and about these the appellants complained. WOODING, C.J., who delivered the judgment of the court, said as follows when considering the evidence of a witness of doubtful credibility who the trial judge appeared to think was reliable, (pp. 422-423):

> "A judge should be relied upon to be coldly neutral even when the opinions he expresses are strongly in favour of one of the parties. He must be strictly impartial, and no less so when the issue is between the subject and the Crown. We agree that neutrality notwithstanding, a judge may so marshal the facts in his direction to the jury as inevitably to persuade. But, in our opinion, there is a distinction to be drawn between persuasion by facts and persuasion by a judge."

Later, on (p. 423), when still discussing the witness' evidence, he said:

> "To the extent to which he was accepted to be credible, we are satisfied that it was in large measure, if not wholly, due to the advocacy of the learned judge."

The court considered that in speaking as he did, the trial judge went far beyond

his proper function and did not therefore afford the appellants a fair trial. The appeal was allowed and the convictions and sentences quashed.

The position seems to be that the trial judge is free to express strongly worded opinions provided that he remains neutral and fair and does not give the jury the impression that they must find the facts as he indicates.

In this matter, the conclusion clearly emerges that although the trial judge often employed strong and vividly expressive language, it cannot be said that he went beyond the pale of fairness, and about this particular aspect the appellant cannot with justification complain.

When the question of corroboration was canvassed it was contended for the State, indirectly, that this Court should apply the proviso to s. 13 (1) of the *Court of Appeal Act, Cap. 3:01,* and sustain the conviction even if the Court considers that the trial judge's directions in relation to corroboration were defective, for, the State contended, there has been no substantial miscarriage of justice inasmuch as the testimony against the appellant was sufficient to have made a conviction inevitable even if the jury had been properly directed. The burden is on the State to show that justice has not been miscarried.

The principles applicable to this issue and the leading authorities in connection therewith were fully examined by the present Chancellor, if we may say so with respect, in The State v. Kowshall Persaud ([1975] 1 G.L.R. 13). We consider that we need to look no further for guidance. At p. 37 of his judgment the learned Chancellor said as follows:

> "In my judgment, the independent evidence before the jury here was not so strong or so cogent or so convincing or so overwhelming as to satisfy me that, if an impeccable direction had been given, a reasonable jury would inevitably have reached the same conclusion."

That, therefore, is the test to be applied. See also the judgment of PERSAUD, J. A. (*ibid.*), p. 17. The position in this matter is exactly the same as in Kowshall Persaud (*supra*) in that the independent evidence against the appellant is not overwhelming. We cannot be satisfied that a reasonable jury properly directed would inevitably have reached the same conclusion. In the result, we do not consider this to be a fit case for the application of the proviso. But in any case, the failure of the trial judge to put the defence fairly and fully makes it impossible to sustain the conviction.

The next question that arises is whether or not the interests of justice require that a new trial be ordered under the provisions of s. 13 (2) of the *Court of Appeal*

*Act, Cap. 3:01*. Once again guidance is given in the local cases as to how this issue is to be approached and dealt with. The principles to be considered emanate from the judgment of the present Chancellor in The State v. Lloyd Harris (*supra*), where he examined several cases in which this question was considered. Here again a rather wide landscape was surveyed and cases from Guyana, New Zealand, the Caribbean, the United Kingdom, Canada and Australia were reviewed-see pp. 32-40 of his judgment. From these authorities, the learned Chancellor extracted certain principles which he set out at pp. 38-39 of his judgment. He said as follows, (p. 38):

> "If the court feels that on the evidence led at the trial, on proper directions a reasonable jury might properly convict, then a new trial may rightly be ordered. But if the court feels that on the evidence led at the trial, upon proper directions a reasonable jury would or ought to acquit, then it may justly enter a verdict of acquittal."

We agree also with the view expressed by GRIFFITH, C.J., in Peacock v. The King (*supra* at p. 641), that the power to order a new trial "should be used with great caution." In the same case, O'CONNOR, J. said (at p. 674):

> "Where the facts proved at a first trial would have been sufficient to support the conviction if the jury had been properly directed, it seems to me that in general, a new trial may be granted to enable the faulty direction to be remedied. In exercising the discretion given by the Statute, the interests not only of the prisoner, but of the efficient administration of justice ought to be considered, always providing that no injustice is done to the accused." (Underscoring mine.)

In the later case of Kelly v. The King ((1923) 32 C.L.R. 509), KNOX, C. J., said (at p. 517):

> "The question whether the appellant in this case shall be again put upon his trial is one in which the interest of the community is involved as well as that of the individual." (Underscoring mine.)

On a full consideration of these principles and for the reasons which have already been offered, we would allow this appeal, quash the conviction and order a new trial.

**Appeals allowed. Convictions and sentences set aside. New trial ordered.**

**Budhoo v. Singh**

**SASE BUDHOO**
**Appellant**
**(Defendant)**

**v.**

**BUDHAI SINGH**
**Respondent**
**(Plaintiff)**

[Full Court (Bollers, C.J., and Bishop, J.) May 14, June 11, 1976]

*Magistrates' Court-Jurisdiction-Boundary line and inter-lot drain between adjoining properties-Dispute about existence of drain and location of paals aligning fence-Bona fide dispute as to title to land-Summary Jurisdiction (Petty Debt) Act, Cap.7:0l, s. 3 (3)-Land Surveyor's Ordinance, 1891, s. 15 (now Land Surveyor's Act, Cap. 97:01 s. 16)-Summary Jurisdiction (Offences) Act, Cap. 8:02, s. 11.*

The plaintiff and defendant were adjoining land owners in possession. In the magistrate's court, the plaintiff sued the defendant for trespass to land which the plaintiff allegedly bought from one Verwayne, but title to which had not yet been perfected in him. The allegation was that the defendant trespassed by digging a drain on his land causing the plaintiff's fence to fall and become damaged. In the course of the hearing, the dispute between the parties centered on the existence or non-existence of an inter-lot drain between their respective properties at Lots 35 Section B and 36 Danielstown, Essequibo. The Plaintiff said there was no drain between the properties when he bought from Verwayne and went into possession. The defendant and Verwayne, on the other hand, spoke positively about the drain on the defendant's side of the fence in question, and the existence of two paals in line with which the fence in dispute was positioned. These paals were later found to be missing.

At the conclusion of the hearing, it was submitted by counsel for the defendant that the court's jurisdiction was ousted by reason of the existence of a *bona fide* dispute as to title to land. Nevertheless, the learned magistrate gave judgment for the plaintiff on his claim. Section 3 (3) of the *Summary Jurisdiction (Petty Debt) Act, Cap. 7:01* provides, *inter alia,* as follows:

> "The court shall not have cognizance of any action in which any incorporeal right, or the title to any immovable property, is or may be in question ..."

On appeal to the Full Court of the High Court.

**HELD: (1)** That there was a genuine dispute about (a) the existence or nonexistence of the drain on the defendant's side of the fence: (b) the true position of the paals delineating the boundary between Lots 35 B and 36, (c) the actual position of the fence.

(2) That it should have been apparent to the magistrate that though there was no reliable evidence before him as to the boundary line and the existence of the drain, there were nevertheless, competing claims as to ownership of the strip of land, undefined though it was, in the vicinity of the existing fence.

(3) That some evidence ought to be taken by a magistrate, to ascertain whether he is possessed of jurisdiction to entertain the claim within s. 3 (3) of *Cap. 7:01*. He must ascertain whether an incorporeal right or title to any immovable property is in question or may be in question, and if he has a doubt whether such right may be in question, he should decline jurisdiction.

(4) That the appeal would be allowed because, on evidence, the magistrate ought to have ruled that the defendant/appellant had successfully raised a *bona fide* dispute as to title to immovable property.

*Per Curiam:* In the Magistrate's Court, there are no pleadings in the sense that the term is understood in an action in the High Court of the Supreme Court of Judicature. It is sufficient that the plaintiff and the defendant should state their respective positions in writing and in such a manner as to enable a person of ordinary understanding to know what is intended: Ramraj v. Williamson [1944] L.R.B.G. 2.

**Appeal allowed with costs.**
**Order of Magistrate set aside.**

**Editorial Note:** See report of this case in (1976) 24 W.I.R. 54.

**Cases referred to:**

(1) Pereira v. Bourne [1895] L.R.B.G. 137.
(2) Baillie v. Smart [1896] L.R.B.G. 24.
(3) Timothy v. Farmer (1849) 137 E.R. 323; 7 C.B.814.
(4) Cannon v. Smallwood and others (1684) 83 E.R. 651; 3 Lev. 203.
(5) Lilley v. Harvey (1848) 17 L.J.Q.B. 357; 5 Dow and L. 648, 654, n: 11 L.T.O.S. 273; 12 Juv. 1026; 12 J.P. Jo. 455.
(6) Re Emery v. Barnett (1858) 140 E.R. 1149; 4 C.B.N.S. 423.
(7) Mountnoy v. Collier (1853) 22 L.J. Q.B. 124; 118 E.R. 573; 1 E&B. 630.
(8) Jones v. Mc Rae [1931-37] L.R.B.G. 128.

(9) Gangadiav. Barracot [1919] L.R.B.G. 216.
(10) Mangru v. Kalla [1931-37] L.R.B.G. 414.
(11) Brijlall v. Jay [1948] L.R.B.G. 12.
(12) C.O. Andrews, *ex parte* The Administrator General O.G. 28th September, 1901 p. 737.
(13) Lord Advocate v. Young (1887) 12 App. Cas. 544, H.L.
(14) Wuta Ofei v. Danquah [1961] 1 W.L.R. 1238; [1961] 3 All E.R. 596; 105 Sol. Jo. 806. P.C.
(15) Backhouse v. Bonomi (1861) 11 E.R. 825; 9 H.L.C. 503; 34 L.J.Q.B. 181; 4L.T. 754.
(16) Dalton v. Angus (1881) 6 App. Cas. 740; [1881-85] All E.R. 1.
(17) Singh v. Singh [1963] L.R.B.G. 251.
(18) Lyttle v. Williams and Another [1961] L.R.B.G. 100.
(19) Ramraj v. Williamson [1944] L.R.B.G. 2.

K.D. Doobay for the appellant.
Respondent in person.

**BISHOP, J. (delivered the judgment of the Court):** In this appeal the main ground argued by counsel for the appellant (defendant) was that:

> "The Magistrate's Court, had no jurisdiction in this matter, objection to which was formally taken before decision, in that the jurisdiction of the Court was ousted by operation of s. 3 (3) of the *Summary Jurisdiction (Petty Debt) Act, Cap. 7:01,* as there was a *bona fide* dispute as to the land and the fixtures thereon, the subject matter of this action."

It should be noted, that the appellant (defendant) did not in his defence 'plead' this objection to the magistrate's jurisdiction being ousted but, through his counsel, did so at the close of his case. The learned magistrate, unaware therefore that such an objection would be raised, proceeded to hear evidence and in due course, gave judgment for the respondent (plaintiff) on his claim.

In paragraph 5 of his plaint, the respondent (plaintiff) averred that between the 26th January and 2nd February, 1975, inclusive of both dates, the appellant (defendant) unlawfully and maliciously trespassed upon his land; dug a drain thereon and as a result caused 233 feet of the respondent's (plaintiffs) said fence to fall down and become damaged. He specifically claimed, as damages. $350.00 for the fence and $150.00 for the land but the learned magistrate did not indicate any apportionment, under the two sub-heads.

During the trial it emerged, however, that the respondent (plaintiff) had bought Lot 35, Section B. Danielstown, Essequibo from one Francis Verwayne, on the

2nd February, 1973 with the building thereon and the surrounding fence. In support of the said sale, the respondent (plaintiff) tendered the agreement, Ex. "A". He also testified that he had been living on the land prior to the sale, and had paid Verwayne no rent since purchase. The respondent (plaintiff) complained that though these were the facts. Verwayne had refused to formally convert the property to him.

When Verwayne gave evidence, on the 20th May, 1975, he said that Lot 35 B and the surrounding fence were his property and denied, *inter alia*, signing the agreement or receiving the purchase price of $3,000.00 acknowledged therein. In short, he denied selling Lot 35 B, Danielstown to the respondent (plaintiff) but conceded that the respondent (plaintiff) had discontinued paying him rent in 1973, and had held up his son for picking coconuts on the land. Above all, Verwayne admitted that he had taken no action against the respondent (plaintiff) to recover any rent. The learned magistrate assessed Verwayne to be an inveterate liar and found that he had sold the property to the respondent (plaintiff).

Nonetheless, it appeared to be common ground that Verwayne had erected a fence separating the respondent's (plaintiff's) land from the appellant's (defendant's). Verwayne said:

> "I know the boundary between my lot and Sase Boodhoo's. I built a fence in line with the two paals. The fence remained there all the time. I did not go into my land in building the fence. There was a drain on Sase Boodhoo's side of the fence."

But, precisely where the fence was and its position in relation to the paals were intensely disputed by the respondent (plaintiff) and the appellant (defendant) who held a transport for his land, Lot 36 Danielstown, Essequibo. The respondent (plaintiff) after testifying that the appellant (defendant) had encroached on his land said:

> "At some points the defendant dug into my land about 4 inches and in other places about 6 inches and 18 inches. At some points on the drain the defendant dug about 3 1/2 feet deep."

Here were positive statements underlining the extent of the trespass but, under cross-examination, the respondent (plaintiff) appeared less assured. He said:

> "I do not know where the paal is between my land and Sase Budhoo's land. There is no paal there now. There was a paal there. Francis Verwayne pointed out the paal to me. At the time of sale and before I went into possession, there were two paals between the land I occupy and Sase Budhoo's land. There was no drain between the defendant's

land and mine."

The appellant (defendant) on the other hand, spoke positively about the drain. He said:

> "When I bought the place there was a drain side of the fence on my land ... The land on which I dug the drain is my land. The drain I dug did not in anyway interfere with the fence Verwayne had built separating my lot from the plaintiff's lot. I did not go on Verwayne's land which is occupied by the plaintiff, while I was digging the drain."

Under cross-examination he, too, seemed uncertain about certain facts. He said:

> "I went to live on my land in 1958. The land had two paals. Verwayne built a fence in 1962. I do not know if the paals are still there. Verwayne stuck a wallaba post touching the paal when he built his fence. It is not true I pulled out the paal. After the fence was built the paals were left on Verwayne's land ... After Francis Verwayne enclosed the paals I did not look for them again. I did not dig into the plaintiff's land."

The focal point for discussion therefore, is whether it can be said that, on the evidence, there was a *bona fide* dispute, within the meaning of s. 3(3) of the *Summary Jurisdiction (Petty Debt) Act, Cap. 7:01* which enacts-

> "The Court shall not have cognizance of any action in which any incorporeal right, or the title to any immovable property, is or may be in question, or in which the validity of any devise, bequest or limitation under any will or settlement is or may be disputed, or of any action for malicious prosecution, libel, slander, seduction, or breach of promise of marriage."

If it could be so found, then the jurisdiction of the learned magistrate would have been ousted.

This limitation on the jurisdiction of the Magistrate's Court, involving disputed title to land, had its origin in *Ordinance No. 2 of 1846* and one the earliest reported cases on the question is Pereira v. Bourne [1895] L.R.B.G. 137. (See Dr. M. Shahabuddeen's: *"The Legal System of Guyana" p. 91*).

In that case, the allegation against the defendant was that he unlawfully removed a paal, lawfully planted by a land surveyor in pursuance of the provisions of the *Land Surveyors' Ordinance, 1891*. The learned magistrate found that the land, in which the paal was planted and from which it was removed was *bona fide* in dispute. Nonetheless, he went on to find that the planting of the paal was not

done lawfully as contemplated by the Ordinance and dismissed the case. On appeal ATKINSON, J. said:

> "No doubt, where a question of title is in dispute the jurisdiction of the magistrate is ousted, but here the magistrate was not asked to decide any question as to the title in question but merely to decide whether a paal had been 'wilfully' removed by the defendants, which had been "lawfully placed." If he had carefully read s. 15 of the Ordinance he would have seen that it is by reason of the very fact that the land is in dispute that the law authorises a land surveyor to enter upon the land and make a survey, having first, however, given the notice required by the section to the owner of the adjacent land."

For other reasons including non-compliance with s. 15 of the said Ordinance, the appeal was dismissed.

Under the *Summary Jurisdiction (Offences) Act, Cap. 8:02,* s. 11 is enacted:

> "Nothing in this Act shall authorise the Court to hear and determine any complaint for a summary conviction offence under this Act in which any question in good faith arises as to the title to any immovable property or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or as to any execution under the process of the High Court."

And while it may be said this section is similar in intendment to s. 3(3) of the *Summary Jurisdiction (Petty Debt) Act, Cap. 7:01,* the latter differs from it in that it deals, *inter alia,* with a situation where any incorporeal right to any immovable property "is or maybe disputed." This qualification may become important in our decision.

In the *Dictionary of English Law* by Earl Jowitt, it is stated that the two kinds of hereditaments were corporeal, that is to say, tangible (meaning the same thing as land), and incorporeal, that is to say, not tangible (meaning the rights and profits annexed to, or issuing out of land). The definition of incorporeal hereditaments included easements *and profits a prendre, (2 Blackstone's Commentanies 21).* In *Cheshire's Modern Law of Real Property,* the 11th Edn. p. 112, it is stated that the most important incorporeal hereditaments now are easements, profits and rents.

We now turn to what actually happened at the trial. On the "pleadings' before the magistrate the respondent (plaintiff) claimed that there was trespass, whereas, the appellant (defendant) denied this and further said that "he was served with a notice by the local Sanitary Authority to re-open his drains- this he did, in no way interfering with anything belonging to the plaintiff." On the "pleadings'

therefore, there was no dispute as to title and, had there been strict adherence to the rules of procedure, as in Baillie v. Smart [1896] L.R.B.G. 24, bearing in mind that the appellant (defendant) applied for no amendment to his defence, we doubt that ordinarily, he would have been permitted to raise an issue not disclosed on his 'pleadings'.

In Baillie v. Smart (*ibid*.), the head-note reads:

> "In an action for trespass, where the question of the title of the plaintiff is not raised on the pleadings, the defendant is not entitled thereafter to raise any question putting such title in dispute;"

and in his judgment ATKINSON, J. said this:

> "At the close of the plaintiff's case, counsel for the defendant said he would show that the plaintiff was not the owner of the land upon which the alleged trespass had been committed. Plaintiff's counsel submitted that, upon the pleadings as framed, the defendant could not go into any question of the plaintiff's ownership."

The judge, who was sitting in his limited jurisdiction, held that as the answer stood:

> "... the only issue was trespass or no trespass, and that ownership of the land had not been in dispute."

In England, under the *1846 Act (c. 95)*, s. 58 (repealed) a somewhat similar provision to s. 3(3) of the *Summary Jurisdiction (Petty Debt) Act, Cap. 7:01,* of Guyana, ousted the jurisdiction of the County Courts, when title was in question. In Timothy v. Farmer (1849), 7 C.B. 814, WILDE, C.J. held that if the existence of such a question appeared upon the face of the proceedings, the jurisdiction of the County Court was ousted. See also the earlier case of Cannon v. Smallwood and Others (1684) 83 E.R., 651 in which CRESWELL, J. held that the jurisdiction of the Country Court was at an end the moment the title to the freehold was pleaded.

And in Lilley v. Harvey (1848) 17 L.J.Q.B. 357, WIGHTMAN, J. had this to say at p. 359:

> "it can hardly be intended by the statute that the mere assertion of the defendant that he claims title, or that it is in question, will suffice to take away the jurisdiction: the judge must be satisfied that it is in question, and for that purpose, must have authority to inquire into so much of the case as is necessary to satisfy him upon that point."

WIGHTMAN, J. was also of the opinion, that where the pleadings *ex facie* disclosed that title was in issue, the County Court's jurisdiction was ousted. He said at p. 359:

> "Where there are special pleadings, and the question is raised upon them, the judge can go no further; but where the question is not raised upon the pleadings, but is merely suggested by the defendant, the judge must inquire into the circumstances before he can be satisfied that title does come in question."

This case shows the preparedness of the Court to relax the strictures of the rules affecting pleadings to allow the defendant to challenge the plaintiffs title, even though the issue is not deducible therefrom. See also: Re. Emery & Barnett (1858) 4 C.B.N.S. 423. In Mountnoy v. Collier (1853) 1 E & B. 630, it is said that if it appears that title is *bona fide* in dispute, the judge cannot enter in the smallest degree into the merits of the case.

No general rule can be laid down as to when title to a hereditament is in question: *The County Court Practice, 1960,* p. 65: but it seems clear that the mere belief that the land is the property of a disputant is not sufficient to oust the magistrate's jurisdiction: Jones v. Mc Rae [1931-37] L.R.B.G. 128. In that case, the plaintiff had no conveyance for a piece of land on which she was erecting a house and the defendant broke it down. However, the plaintiff was in possession for a number of years. She was the mother of James Taite who died intestate in 1921, leaving as his widow Amelia Taite who died on the 4th January, 1931, leaving the defendant as her executor. The defendant gave evidence that the name of James Taite appeared in the Village Assessment Book, as the owner of the piece of land in question and that he therefore claimed the land as executor of Amelia Taite who was the lawful wife of James Taite, deceased-and who died intestate.

In a claim by the plaintiff against the defendant for damages for trespass, the magistrate held that his jurisdiction was not ousted. On appeal the Full Court upheld the magistrate's decision inasmuch as there was no evidence of title to support the defendant's belief that his testatrix was the owner of the land: but that the plaintiff's possession was proved and admitted, although she did not hold any conveyance of the premises.

In the appeal before us, there could be little doubt, on the evidence before the magistrate that, as against Verwayne, the respondent (plaintiff) was in possession of Lot 36 B, Danielstown having regard to his being in undisturbed occupation of the land, his non-payment of rent to Verwayne and his preventing Verwayne's son from picking coconuts on the land. Against the background that he held Ex. "A", the agreement of sale by Verwayne to him, it was evident that the respondent (plaintiff) was asserting his rights of ownership over Lot 36 B, in respect of which

Verwayne, on his own admission, had taken no positive step to assert his title to it, or his entitlement to the rents or the reversion.

It was clear that the respondent (plaintiff) had bought the property but his title, as owner, had not yet been perfected by a formal conveyance from Verwayne to him. Gangadai v. Barracot [1919] L.R.B.G. 216; Mangru v. Kalla [1931-37] L.R.B.G 414; Brijlall v. Jay [1948] L.R.B.G. 12 are among the many decisions on the question of imperfect title, in this sense. See also Dr. Ramsahoye's *Land Law in British Guiana,* p. 234.

On the strength of Ex. "A", and assuming that there were no other between himself and Verwayne, the respondent (plaintiff) appeared entitled to exercise his right to compel Verwayne to convey the property to him. See the judgment of BOVELL, C.J. in C.O. Andrews *ex parte* The Administrator General (O.G. 28th September, 1901, p. 737).

Possession means the occupation or physical control of land. The degree of physical control necessary to constitute possession may vary from one case to another. In Lord Advocate v. Young ((1887) 12 App. Cas. 544 at p. 556), LORD FITZGERALD said:

> "By possession is meant possession of that character of which the thing is capable."

And in Wuta-Ofei v. Danquah ([1961] 3 All E.R. 596 (Privy Council)), LORD GUEST delivering the opinion of the Board said at p. 600 that:

> "the type of conduct which indicates possession must vary with the type of land."

On the evidence in the present appeal, the respondent (plaintiff) was entitled to recover damages if his fence fell as a result of the withdrawal of support, given previously by the land owned by the defendant. In *Megarry's Manual of The Law of Real Property;* 4th Edn. p. 422, it is stated:

> "In addition to the rights over his land, every landowner has a natural right to support i.e., a right that the support for his land provided by his neighbour's land should not be removed."

And in *Clerk & Lindsell on Torts,* the 12th Edn. p. 661-para. 1253 it is stated:

> "The landowner is entitled to recover in addition to damages for the subsidence of his land, damages for the injury to his buildings or other erections thereon although he has no acquired right in support of them."

An 'acquired right', in the context above, is an easement; but a natural right to support is not, and is a natural incident of ownership; Backhouse v. Bonomi ((1861) 9 H.L.C. 503); POLLOCK, B. in Dalton v. Angus ((1881) 6 App. Cas. 740 at p. 742) said:

> "The right to lateral support of soil by the adjoining soil is a natural right which exists wherever the lands of adjoining owners are in contact."

As between the appellant (defendant) and the respondent (plaintiff) no question affecting any incorporeal hereditament appeared to arise.

In order to maintain his claim for trespass, the respondent (plaintiff) had to show that he was in possession at the material time, and this was largely a question of fact for the magistrate.

As the case unfolded, counsel for the appellant (defendant) proceeded to ask certain questions of the respondent (plaintiff), to which opposing counsel did not object and he, in turn, seemed to adopt a similar approach when he cross-examined the appellant (defendant). All these questions were with reference to the boundary line between Lots 35 and 36 B. As said earlier, there was no forewarning of this on the 'pleadings'.

Could it be said that, as between the respondent (plaintiff) and the appellant (defendant) the following matters were being genuinely disputed?

1. (a) the existence or non-existence of a drain on the appellant's

   (defendant) side of the fence when Verwayne erected a fence in or about 1962.

   (b) the true position of the paals delineating the boundary between Lots 35 and 36 B.

   (c) the actual position of the fence *vis-a-vis* those paals.

2. Had a genuinely mistaken view of any or all of the foregoing matters engendered bitterness and the consequent assertions and challenges to title before the magistrate?

3. Having regard to all the evidence there was a *bona fide* dispute which resulted, so as to invoke the provisions of s. 3 (3) of the Act.

In Mountnoy v. Collier (*ibid*), the facts, relevant to the present discussion, were that the plaintiff in an action for use and occupation of a house named the "Shoul-

der of Mutton", proved a demise by him and an occupation by the defendant. The proposed defence was that the plaintiff's title had expired since the demise and before the period for which rent was claimed. The main question therefore, was whether the defendant could show that as a defence, he not having given up possession. It was proposed to prove the declarations of a certain deceased tenant.

WIGHTMAN, J. who was not sure what the declarations when admitted would prove, said:

> "It will be for the judge to say whether they show that there is a *bona fide* raising of a question of title on the part of the defendant. As the case stands, it seems to me, that there is such a *bona fide* raising of the question of title."

In Singh v. Singh ([1963] L.R.B.G. 251), the respondent claimed that the appellant gave him an acre of land to plant rice, and that after he had cultivated it, the appellant entered on the land and proceeded to reap the crop. The appellant denied having given the land to the respondent to cultivate and alleged that the respondent was never in possession of it; that the rice had been planted by the appellant. The magistrate accepted the respondent's story and awarded him damages for trespass, holding that he was a licensee of the land.

On appeal, it was argued that it was not competent for a mere gratuitous licensee to maintain an action in trespass, and secondly, that if the respondent had a licence it was coupled with a grant of an interest in the land and was therefore an incorporeal right, with the consequence that the jurisdiction of the magistrate was ousted.

The Full Court (BOLLERS and CHUNG, JJ), in Singh v. Singh (*ibid*) at p. 258 said:

> "The respondent was asserting that the incorporeal right of planting crops on the land and removing them therefrom had been given to him, whereas, the appellant was saying that such a right had not been given to the respondent and he was the owner of the land, by transport, which had actually been planted by him. There was nothing to suggest that the defence was not *bone fide*. In the circumstances, the magistrate ought to have declined jurisdiction."

See also: Lyttle v. Williams & Another [1961] L.R.B.G. 100.

At p. 164 of *Salmond on Torts*, 12th Edn., it is said:

> "Where it is uncertain which of several claimants has possession, it will

be adjudged to be in him who can prove title i.e., the right to possess."

WILDE, C.J., in considering whether there was a *bone fide* dispute raised by the defendant in Timothy v. Farmer (*ibid*.), asked this question:

"By pleading not possessed, you put the plaintiff to proof of his title. How does he prove a trespass without proving his title?"

It is difficult to prescribe how extensive should be the inquiry, before a magistrate, to determine whether there is a *bona fide* dispute as to right or title but, in the instant case, it should have been apparent to the magistrate that though there was no reliable evidence before him as to the boundary line and the existence of the drain in 1962 or thereabout, there were nonetheless competing claims as to ownership of the strip of land, undefined though it was, in the vicinity of the then existing fence.

Further, that there was no evidence as to whether Lots 35 and 36 B were defined by description or by reference to a plan incorporated in the respective transports and therefore, all the more there was probably a genuine dispute as to title of the said narrow strip of land which was immovable property.

We are of the view, that in cases where the disputant is seeking to invoke the provisions of s. 3(3) of the *Summary Jurisdiction (Petty Debt) Act, Cap. 7:01),* or s. 11 of the *Summary Jurisdiction (Offences) Act, Cap. 8:02),* some evidence should be taken by the magistrate to ascertain whether the requirements of the relevant section have been satisfied, so as to oust his jurisdiction. He is not required to make any finding as to right or title but he should bear constantly in mind that under the said *Petty Debt Act,* his inquiry is in the alternative. He is required to ascertain whether any incorporeal right, or title to any immovable property

(a) is in question, or
(b) may be in question.

If the answer to pan (a) of the question is in the negative, he must not stop there but is obliged to answer part (b). We are of the view that if he is in doubt about this second answer, he should decline jurisdiction, since that seems to be the import of framing the question in the alternative. Of course, if the answer to part (b) is also in the negative his jurisdiction is not ousted.

On the evidence, the learned magistrate ought to have ruled that the appellant (defendant) had successfully raised a *bona fide* dispute as to immovable property under part (b) of the question, and we accordingly allow this appeal.

*Per Curiam:* It should be borne in mind that in the Magistrate's Court, there are no pleadings in the sense that the term is understood in an action in the High Court of the Supreme Court of Judicature. It is sufficient that the plaintiff and the defendant should state their respective positions in writing and in such a manner, as to enable a person of ordinary understanding to know what is intended: Ramraj v. Williamson [1944] L.R.B.G. 2. However, when legal practitioners are involved in the drafting of such written statements, a higher standard of care and skill reflecting their professional training is to be expected than in those cases where lay litigants are unassisted and/or unrepresented and themselves do the drafting.

For the sake of convenience, we have used the term 'pleadings' in this decision, in reference to the written statements which were before the learned Magistrate defining the issues between the appellant (defendant) and the respondent (plaintiff).

**Appealed allowed with costs.**
**Order of magistrate set aside.**

**The State v. Armstrong & Johnson**

**COLIN ARMSTRONG**
**and**
**LESLIE JOHNSON**
**Appellants**

**v.**

**THE STATE**
**Respondent**

[Court of Appeal (Haynes, C., Crane and R.H. Luckhoo, JJ. A.) January 28, April 1, 21, May, 25, 1976]

*Criminal Law-Robbery with aggravation-Elements-Co-accused-Appeal allowed against one accused-Whether appropriate to substitute conviction for larceny from person for conviction for robbery with aggravation-Criminal Law (Offences) Act, Cap. 8:01 s. 222 (b)-Court of Appeal Act, Cap. 3:01 s. 14(2)*

*Evidence-Summing-up-Inadequate directions given by trial judge in relation to robbery-Misdirection.*

The two appellants were indicted at the Criminal Assizes for robbery with aggravation, and were both found guilty of that offence. The particulars of the offence were that they, being together, robbed one Charles Sykes of $37 in money.

**The State v. Armstrong & Johnson**

According to the evidence, while Johnson was holding on to Sykes' hand asking him for a "raise" (which Sykes understood to mean he was being asked for a tip), Armstrong approached Sykes from behind, snatched at, and ripped off the left breast pocket of his shirt, in which was contained $37, running off with both shirt pocket and the money it contained.

The trial judge, in his charge to the jury, explained that if they came to the conclusion that robbery was done by Armstrong alone, then the case would be "just plain robbery," that is, simple robbery, and that they would, in that event, have to acquit Johnson.

Johnson's appeal was allowed in an earlier decision of the Court of Appeal, on the ground that no proper foundation had been laid for the reception in evidence of a confession statement he was alleged to have given to a policeman concerning the crime.

Thereafter, the court reserved for further argument the question whether, on the facts and on the law, a verdict of robbery with violence, robbery *simpliciter*, or larceny from the person was the appropriate one to record against the appellant. Armstrong, in the circumstances.

**HELD:** (1) The jury ought to have been directed that before they could properly convict the accused of robbery, they had to be sure he had the intention to inflict force and violence on the victim.

(2) The judge ought to have directed the jury to consider whether or not the evidence relating to the manner in which the event occurred, constituted the force and violence necessary to make the offence one of robbery. The omission to do so amounted to a misdirection substantially affecting the outcome of the case.

(3) It was incumbent on the trial judge to have left for the jury's consideration the verdict for the lesser offence of larceny from the person. The failure to do so deprived the accused of the chance of the jury's returning a verdict for the lesser offence.

(4) It is an established practice of the Court of Appeal in recording where it is possible, a verdict for a lesser offence when intention, which is an ingredient in a criminal offence, has not been proved.

**Appeal allowed.**
**Conviction for larceny**
**from the person substituted.**

**The State v. Armstrong & Johnson**

**Cases referred to:**

1. R. v. Thos Gnosil (1824) 171 E.R. 1206; (1824) 1 C. & P. 304.
2. R. v. Edwards (1843) 1 Cox C.C. 32; 7 J.P 532.
3. R. v. Lapier (1784) 1 Leach 320.
4. R. v. Walls & Hughes (1845) 2 Car. & Kir 214.
5. R. v. Geo, Mason (1820) 168 E.R. 876; Russ. & Ry 419.
6. Boaler v. R. (1888) 16 Cox C.C. 488.
7. Smith v. Desmond & Anor. [1965] A.C. 960; [1965] 2 W.L.R. 894; [1965] 1 All E.R. 976; 49 Cr. App. R.249; 129 J.P. 331. 109 S.J. 269. H.L.

P.S. Britton, for appellants.
N. Kissoon, Senior State Counsel for the State.

**CRANE,** J.A.: At the Demerara Assizes, the appellant, Colin Armstrong, and his co-accused Leslie Johnson were indicted for robbery with aggravation, and they were both found guilty of that offence, the particulars of which were that they, being together, robbed one Charles Sykes of $37 in money.

On 1st April last, we were compelled to allow Johnson's appeal, on the ground that no proper foundation had been laid for the reception in evidence of a confession statement he is alleged to have given to a policeman concerning the crime. Thereafter, we reserved for further argument the question whether, on the facts and on the law, a verdict of robbery with violence, simple robbery, or larceny from the person was the appropriate one to record against Armstrong in the circumstances.

Briefly, the role played by Armstrong, as narrated by the victim Sykes and a witness to the crime, is that while Johnson was holding on to Sykes' hand asking him for a 'raise', which Sykes understood to mean he was being asked for a tip. Armstrong approached from behind and with hand extended over Sykes' left shoulder, snatched at and ripped off the left breast pocket of his shirt in which was contained the sum of $37, running off with both shirt pocket and the money it contained. The violence and asportation were obviously part of one transaction. However, in view of Johnson's acquittal as aforesaid and the consequent impossibility of our arriving at a positive conclusion that there was a joint enterprise between the two men, i.e., that they acted in concert, the problem is: Is a conviction for robbery *simpliciter* (as the trial judge thought), or one of larceny from the person, the proper offence to be substituted in place of the jury's verdict of Guilty of robbery with aggravation? Insofar as robbery with violence is concerned, I think we can rule that out from our consideration since a conviction for that offence could only be sustained if "personal violence" was used against Sykes (see s. 222 (a) of the *Criminal Law (Offences) Act, Cap. 8:01):* and the facts are not capable of supporting such an offence.

The learned trial judge in his charge to the jury had been at pains to explain that, if they came to the conclusion that robbery was done by Armstrong alone, then the case would be "just plain robbery", i.e., simple robbery, and they would, in that event, have to acquit Johnson. I shall have cause to examine the judge's explanation in some detail at a later stage, but was that direction really adequate in view of the fact that in addition to requiring an intention to steal, robbery involves a *mens rea* in the form of an intention on the robber's part to use force, so as to overpower his victim or to instil some kind of fear into him in order to get possession of his property?

In an old authority, *viz., Daltons 'Country Justice'* (1967 Edn.) at p. 363, robbery is defined as follows:

> "Robbery ... is properly the felonious taking of any thing from the person of another, or in his presence, against his will, by assault in the highway, or elsewhere, and putting him in fear thereby."

And in *Blackstone's Commentaries*, Bk. IV, p. 242 (1769) thus:

> "This previous putting in fear is the criterion that distinguishes robbery from other larcenies ... it is sufficient that so much force, or threatening by word or gesture, be used, as might create an apprehension of danger, or oblige a "man to part with his property without or against his consent."

Therefore, where property is stolen by violence or by putting the victim in fear of violence, that is robbery in its simplest form. In R. v. Thos. Gnosil (1824) 171 E.R. 1206, the trial judge explained the requisite *mens rea* in this way:

> "The mere act of taking, being forcible, will not make this offence a highway robbery; to constitute the crime of highway robbery, the force used must be either before, or at the time of the taking, and must be of such a nature, as to show that it was intended to overpower the party robbed, and prevent his resisting, and not merely to get possession of the property stolen. Thus, if a man walking after a woman in the street, were by violence to pull her shawl from her shoulders, though he might use considerable violence, it would not, in my opinion, be highway robbery: because the violence was not for the purpose of overpowering the party robbed, but only to get possession of the property."

Another case which illustrates the necessity for a specific intention to overcome the victim's resistance, in that accidental hurt to him is of no avail in establishing robbery, is R. v. Edwards (1843) 1 Cox C.C. 32, where BARON ALDERSON said:

> "It does not appear there is any evidence here to show that the force relied on by the prosecution was used to take away the basket from the person of the prosecutrix. In order to constitute the crime of robbery there must be intentional force and violence. Here, the wound (on the prosecutrix's arm) seems to have been inflicted undesignedly, and by mere accident. If the prosecutrix had not put forth her hand just at the moment the prisoner was attempting to cut the string, there would not have been any violence or force applied to her person. I am therefore of opinion that the case resolves itself into one of simple larceny."

Therefore, in order to consider what effect the ripping away, of the pocket and carrying away Sykes' money had in determining the nature of the offence committed by the accused, it was necessary for the judge to explain the charge of robbery with particular reference to the mode of taking, of which the case afforded an illustration, *viz.*, snatching and any attendant degree of force that accompanied that mode of taking. As has been explained above, force or putting in fear being of the essence of the crime of robbery, the mode of taking possession of the money or property from the victim's person or in his presence, is always of importance in determining the intent to accomplish the robbery. Violence invariably involves force of some kind, but not all force involves violence to the person.

The question is always one of degree. When, however, force does involve violence to the person, the offence committed is robbery with violence. Take, for example, the case where a thief snatched a lady's earring in order to get possession of it, but only succeeded in tearing it away from the lobe of her ear to which it was attached, so that it lodged in the curls of the hair, it was held by twelve judges that he was rightly convicted of robbery with violence. (See R. v. Lapier (1784) 1 Leach 320). Lapier's was clearly a case of snatching, but personal violence was done to the victim and so it presents no difficulty. But mere snatching of money or property from the person is generally not sufficient force to constitute robbery. A sudden snatch is not robbery unless accompanied by resistance from the victim to keep his property. Snatching a lady's handbag in the street or a man's hat from his head and running away with them will not be robbery, for the force used to get possession, though used on the person, is not considered sufficient. It is otherwise, however, if the victim resists and there is a struggle. So, where a thief asked an unsuspecting victim the time of day and the victim took out his watch to tell him holding it loosely, and the thief snatched it away from him and made off with it, that was held to be no robbery, but larceny from the person instead. (See R. v. Walls & Hughes (1845) 2 Car. & Kir. 214).

Nevertheless, sometimes it does happen that the snatching of an article may constitute robbery if it is so attached to the person of the victim or his clothing, as to afford resistance. Where a prosecutor had his gold watch fastened by a steel chain around his neck and the thief violently took hold of its seals and chain and

had to administer two or three jerks which broke the steel chain before he made off with the watch, it was held that the force administered was sufficiently violent to constitute robbery, and not merely larceny from the person. (See R. v. Geo. Mason (1820) 168 E.R. 876). The purport of Mason's case is twofold. It shows, firstly, that the snapping of a watch-chain attached to the person, may be considered an adequate degree of force to constitute the crime of robbery, albeit, there was no injury done to the person as in Lapier's case (*supra*). In Mason's case (*supra*), there was no intentional physical resistance, i.e., no struggle from the victim, only from the fact that the property had been sufficiently attached to his person as to afford resistance to the taking. The gold watch was fastened by a steel chain around the neck. Secondly, insofar as the offences of simple robbery and larceny from the person are concerned, the dividing line is very thin, and it appears that little is required to turn a case of larceny from the person into one of robbery. The crime of robbery with violence is, however, unequivocal since, the act of removing of a man's watch from his person after striking him a blow on the head, can admit of no other explanation than that there was the intention on the striker's part to overcome his victim's resistance by the use of "personal violence".

In his charge to the jury, the trial judge gave the following direction on the face of which, and on the principles as set out above, there is clearly a non-direction in the nature of a misdirection:

> "If you find that the number two accused was not acting together in concert with the number one accused, that is, he was not there with him, with one idea, a common design, and he was not aiding and abetting the number one accused, well then, members of the jury, you will have to acquit him, that is, if you find that the number one accused robbed Charles Sykes alone, you will have to acquit the number two accused and in that case you can't convict the number one accused of robbery with aggravation, just plain robbery."

The jury, having been invited in the passage above to consider the possibility that Johnson might not indeed have been acting in concert with Armstrong, and their minds having been alerted to the possibility of having to convict Armstrong alone. I think it was incumbent on the trial judge to have left for their consideration the verdict for the lesser offence of larceny from the person since, on the authorities above, the question which sometimes arises on the evidence in cases of apparent robbery like this, is, *quo animo*, did Armstrong rip away Sykes' shirt pocket, notwithstanding the undoubted force he employed in so doing on the person? Admittedly, the force was enormous, but the jury ought to have been asked to find whether the force was used to overpower Sykes so as to facilitate getting possession of the contents of his breast-pocket, or merely to get at the money in it, and to have had it pointed out to them that they may wish to consider whether the fact

that Sykes was attacked from behind was indicative of what was his real intention. It was purely and simply a question of what was Armstrong's intention, and the jury ought to have been directed that before they could properly convict the accused of robbery, they had to be sure he had the intention to inflict force and violence on Sykes. While it is true the judge did counsel that "intent is a question of fact for you the jury" and that "intent is not capable of positive proof, yet he omitted to leave to them the matter of the intention of the accused.

In the result, the accused was deprived of the chance of the jury's returning a verdict for the lesser offence of larceny from the person. For these reasons, the appeal must be allowed and the conviction amended by the substitution of a verdict of Guilty of Larceny from the person for the conviction of Robbery with aggravation, because we are certain that the jury must have been satisfied of facts which proved him guilty of the offence we are substituting. (See s. 14(2) *of Cap. 3:01).* In so doing, we are merely following the established practice of the Court of Appeal in recording, where it is possible, a verdict for a lesser offence when intention, which is an ingredient in a criminal offence, has not been proved. See Boaler v. R. (1888) 16 Cox. C.C. 488, where, on failure of the prosecution to establish the requisite intent, a verdict for a lesser offence was recorded. I am in agreement with the variation of sentence to two years' imprisonment.

**HAYNES,** C: Delivered an oral concurring judgment.

**R.H. LUCKHOO, J.A.:** The substantial point in this appeal, concerns the adequacy of directions given to the jury by the learned trial judge on whether or not the evidence adduced by the State was sufficient to constitute the offence of robbery as distinct from the offence of larceny from the person.

The appellant was tried along with one Leslie Johnson for the offence of Robbery with aggravation, contrary to s. 222 (b) of the *Criminal Law (Offences) Act, Cap. 8:01,* and convicted of that offence, as was Johnson, and sentenced to imprisonment for a period of three years and to receive a whipping of six strokes. Johnson, who was sentenced to imprisonment for a period of four years and to receive a whipping of six strokes, also appealed against his conviction and sentence, and his appeal was allowed and his conviction and sentence set aside on 1st April, 1976, by this Court on grounds which need not be set out in this judgment.

The State based its case of robbery on the evidence of two persons-the victim Charles Sykes and Hector Carmichael, Sykes said in effect, that on 8th August, 1973, while he was walking in Hincks Street, Georgetown, Johnson stopped him and was speaking with him when the appellant put his hand over his left shoulder into his shirt pocket "and snatched the entire pocket away-that is, the pocket was torn off and the money disappeared with the hand. And the person walked past me." That person was the appellant. He said he tried to go after the appellant but

Johnson locked him off with both hands around his waist. He and Johnson had a tussle and after a while he was able to free himself and go up to the appellant. Carmichael's evidence was to the effect, that Johnson placed his hand around Sykes' neck and as he talked with him the appellant came from behind and pulled out a wad of money from Sykes' pocket, and as Sykes attempted to go after the appellant. Johnson held Sykes and told him, "Don't worry with that"; they had a scuffle and Sykes was able to push off Johnson and go up to the appellant.

It was in that setting, that the question fell to be determined on appeal, whether the evidence of the two witnesses in substance constituted the offence of robbery, or merely larceny from the person, and whether adequate directions were given by the learned trial judge on the facts in relation to the elements of robbery. Counsel for the appellant and Senior State Counsel both agreed on what was the definition of robbery. But the former has maintained that the facts of the case proved only the offence of larceny from the person, and that the learned trial judge ought to have left with the jury the question whether the facts established only the offence of larceny from the person. Senior State Counsel in reply urged that the evidence of Sykes of the snatching away of the entire pocket with the money was sufficient evidence of force in order to constitute the offence of robbery.

It might be useful to set out the definition of robbery as given in *Roscoe's 'Criminal Evidence'*. It is given as follows:

> "Common Law: Robbery, 'properly so called,' is thus defined:
>
> 'A felonious taking of money or goods to any value from the person of another, or in his presence against his will, by violence or putting him in fear."

In confining this judgment solely to the question of force necessary to constitute the offence, it would be well to set out the views of the learned authors in two well-known works.

*Russell on 'Crime'* (12th Edn.), Vol. 2 at p. 859, put it this way when dealing with the degree of violence to constitute robbery:

> "Where the taking is effected forcibly by a sudden taking or snatching away from a person unaware it is not 'robbery', but only stealing from the person. But if any injury is done to the person, or there be any previous struggle by the party to keep possession of the property before it be taken from him, there will be a sufficient actual 'violence'."

*Smith and Hogan* expressed it as follows in their *'Criminal Law'* (1965 Ed.) p. 395:

> "With robbery there is an intentional (or reckless) use of violence to the person or an intention by force to overpower resistance in order to take the property which is absent in larceny from the person. Of course, some instances of larceny from the person may involve violence to the person, as where D breaks P's grasp on her handbag by snatching it, but this would not make it a case of robbery. There is absent, the threat to the physical security of the victim which is the hallmark of robbery."

It is the application of these principles which made Gnosil's case (*supra*) one not of robbery, where the defendant, with considerable force, jerked a watch from the victim's pocket and made off with it; and Lapier's case (*supra*) one of robbery, where the defendant, in snatching the victim's earring caused the lobe of her ear to be torn. Lapier's conduct was explicable only on the basis that he had intended to use personal violence to take the earring, for that was the only way in which he could have got it. Gnosil's conduct was explicable on the basis that he did not intend to use violence to the person in order to get the watch.

As LORD PEARCE has correctly stated in Smith v. Desmond & Anor. [1965] 1 All E.R. 976, at p. 989:

> "Robbery is an aggravated form of theft. It adds an offence against the person to the offence of stealing since the theft is carried out by using violence to the person from whose possession the goods are stolen or by putting him in fear of violence."

It was held in the very old case of Harman, tried in 1620 that sleight of hand theft where the defendant deftly picked the pocket of the victim who did not realise his purse had gone until he saw it in the defendant's hand, did not constitute robbery. Nor would a sudden snatching unawares be enough unless some injury was done to the victim by the defendant with the intention of achieving his object. It should be noted that in Mason's case (*supra*), it was held to be robbery where the defendant snatched the victim's watch only to find that it was secured by a chain about his neck and the defendant had to give two or three hard pulls to break it loose. The defendant had there met with resistance and had determined to use personal violence to achieve the theft.

In this appeal, the learned trial judge dealt with the matter in this way: he gave a correct definition of the crime and quite rightly said that the State would have to prove that there was an actual taking of the money from the person of Sykes. With respect to the use of force, he directed that the State had to prove that force or violence was used in the taking. In his reference to the evidence on this point, he said:

> "Here you have the evidence of Sykes, who told you that the number two

> accused (Johnson) spoke to him, and after the money was taken from his pocket, he attempted to get at number one accused (the appellant) when force was used by the number two accused, holding him, preventing him from going to number one accused, so that if you accept that evidence of Sykes, well, members of the jury, that could be evidence that there was force either at the taking, immediately before, or immediately after the taking."

The learned trial judge again adverted to the reason for the use of force in this way:

> "The case against the number two accused is not that he pushed his hand in Sykes' pocket and took Sykes' money, but that he held on to Sykes and was trying to prevent Sykes from going after the number one accused."

It does appear from the passages referred to that the learned trial judge was confusing this particular offence of robbery contrary to s. 222 (b) of the *Criminal Law (Offences) Act, Cap. 8:01* with the offence contrary to s. 222 (a) which is worded thus:

> "Everyone who robs any person and at the time of, or immediately before or immediately after, the robbery, beats, strikes, wounds, or uses any other personal violence to any person..."

It is my view, that the direction relating to the aspect of violence used by Johnson in trying to prevent Sykes from going after the appellant who had already stolen the money was a misdirection which must seriously have affected the result of the case. The force used by Johnson was after the theft had taken place and the appellant had gone off with the stolen property. The force used by Johnson was not with the object of obtaining the money but, instead, with the object of preventing Sykes from going after the thief. The force necessary to constitute robbery must be either immediately before or at the time of the larceny, and not after it. The learned trial judge ought to have directed the jury to consider whether or not the evidence relating to the manner in which the entire pocket with the money was snatched away, constituted the force or violence necessary to make the offence one of robbery. There was an omission to do so. The failure to give the right directions in applying to the facts of the case the legal principles constituting the offence with which the appellant was charged amounted to a misdirection substantially affecting the outcome of the case. The conviction could not, therefore, be sustained.

In the circumstances of this case, the charge of robbery contained within itself the essential ingredient of larceny from the person. Larceny from the person was a

constituent element of robbery. The facts essential to establish the offence of larceny from the person were proved. The jury could, on the indictment of robbery, have found the appellant guilty of the offence of larceny from the person, and on their finding they must have been satisfied of facts which proved him guilty of larceny from the person. In the exercise of the powers given this Court under s. 14(2) of the *Court of Appeal Act, Cap. 3:01,* I would allow the appeal against conviction for the offence of robbery with aggravation and set aside the conviction and sentence for that offence, and substitute a conviction for larceny from the person, contrary to s. 182 of the *Criminal Law (Offences) Act, Cap. 8:01,* and a sentence of two years' imprisonment, the sentence to commence from date of conviction, that is, 4th June, 1975.

**Appeal allowed.**
**Conviction for larceny from the person substituted.**

**Goel v. Erskine**

**JAIPRAKASH GOEL**
**Appellant**
**(Defendant)**

**v.**

**STANLEY ERSKINE**
**Respondent**
**(Complainant)**

[Full Court of the High Court (Vieira, Collins and Churaman, JJ.) May 13, 14, 1976]

*Attempt-Attempt to purchase foreign currency-Statutory offence-Whether actus reus established-Whether non-existence of foreign currency negatives intent-Impossibility of committing completed offence-Whether there was an attempt.*

*Foreign Currency-Whether draft constitutes foreign currency.*

*Statutory offence-Whether appellant charged under proper section.*

*Jurisdiction-Magistrate's order for forfeiture-Exchange Control Act, Cap. 86:01, para 1 (3) of Part 11 of Sched. 5-"Any currency"-Meaning of.*

## Goel v. Erskine

*Sentence-Magistrates' exercise of discretion-Exchange Control Act, Cap. 86:01, ss. 2 (1), 3 (1) and (a); para. 1 (1) and (3) of Part 11 of Sched 5.*

The appellant was accosted by one Richard Lowe who offered him an opportunity of acquiring United States currency to be converted at the rate of $2.20 (G) per $1.00 (U.S.)

The appellant agreed to pay Lowe $10,780 (G) for a draft worth $4,900 (U.S.)

The appellant accompanied Lowe to the National Insurance Building Brickdam where it was understood a "friend" awaited with the draft. The appellant as requested by Lowe, paid over the $10,780 (G) to Lowe on the understanding that he (Lowe) would return with the draft. Lowe entered the building and vanished.

The appellant reported the matter to the police and submitted a written statement. The Police subsequently recovered the money intact.

The appellant was charged and convicted in the Magistrate's Court with attempting to buy foreign currency, not being an authorised dealer, from a person other than an authorised dealer, contrary to law.

The appellant was fined $32,340 (G) representing three times the amount or value of the United States currency and ordered to forfeit the $10,780 (G).

On appeal to the Full Court.

**HELD:** (1) That the appellant's conduct had all the prerequisites of an attempt. There was the *actus reus* as well as the intent. The appellant by taking payment to Lowe had done all that he could to complete the purchase of foreign currency though final commission had been prevented by the conduct of Lowe; R. v. Hensler (1870) 22 L.T. 69, *dictum* of LORD REID applied.

(2) The moment the appellant had agreed to purchase United States currency and paid over the purchase price with the expectation of receiving a draft for United States currency, the offence of attempting to buy foreign currency was completed.

(3) The term 'draft' for $4,900 (U.S.) must be given a reasonable evidential meaning as used by the appellant. This is sufficient to amount to foreign currency as defined in the Act.

(4) The appellant was charged under the offence-creating section and that is the proper statutory basis for charging the offence.

(5) The order for forfeiture of Guyana currency was contrary to law and therefore

null and void. The term "any" as used in the Act must be referable only to the particular currency, the dealing in which is prohibited by the Act and is the subject of an offence thereunder.

(6) There is no indication of any improper exercise of discretion in the imposition of sentence. There could be no justifiable reason to interfere with the fine imposed.

**Appeal dismissed subject**
**to invalidity of order for forfeiture.**
**Conviction and sentence affirmed.**
**Costs to Respondent fixed at $35.00.**
**Leave to appeal granted.**

**Editorial note: -** The appeal is reported in (1977) 25 W.I.R. 78 and [1977] G.L.R.

**Cases referred to:**

(1) Haughton v. Smith [1973] 3 All E.R. 1109.
(2) R. v. Green [1976] 2 W.L.R. 57; [1976] Q.B. 985; [1975] 3 All E.R. 1011; 62 Cr. App. R. 74; [1976] Crim. L.R. 47; 119 Sol. Jo. 825.
(3) Partington v. Williams (1976) 62 Crim. L.R. 220; The Times 19th December, 1975.
(4) R. v. Collins and Others 9 Cox C.C. 497; 10 L.T 581; 28 J.P. 436; 12 W.R. 886; 169 E.R. 1447.
(5) R. v. McPerson (1857) 169 E.R. 975; (1857) Dear & B. 197; 21 J.P. 325; 5 W.R. 525; 7 Cox C.C. 281.
(6) R. v. Brown (1889) 24 Q.B.D. 337; 59 L.J.M.C. 47; 61 L.T. 594; 54 J.P. 408; 36 W.R. 95; 16 Cox C.C. 715.
(7) R. v. Ring (1892) 17 Cox C.C. 491; 61 L.J.M.C. 116; 66 L.T. 300; 56 J.P. 552;8T.L.R. 326.
(8) R. v. Easom [1971] 3 W.L.R. 82; [1971] 2 All E.R. 945; [1971] 2 Q.B. 315 sub nom R. v. Easom (John Arthur) 55 Cr. App. R. 410.
(9) R. v. Goodchild (1846) 2 Car & Cir. 293.
(10) R. v. Hensler (1870)22 L.T. 691.
(11) R. v. Eagleton [1843-60] All E.R. Rep. 363; [1855] Dears C.C. 515.
(12) Davey v. Lee [1967] 2 All E.R. 423.
(13) Bell v. Wardell 125 E.R. 1131; (1740) Willes 202.
(14) Haggard v. Mason [1976] 1 W.L.R. 187; [1976] 1 All E.R. 337.
(15) River Wear Commissioners v. Adamson [1877] 2 A.C. 742.
(16) Escoigne Properties Ltd. v. I.R. Commissioners [1958] A.C. 549 [1958] 2 W.L.R. 336; [1958] 1 All E.R. 406; 102 Sol. Jo. 159.

Sir Lionel Luckhoo for the appellant.

G.H.R. Jackman, Deputy Director of Public Prosecutions, for the respondent.

**M. A. CHURAMAN, J. (delivered the judgment of the Court):** With the decision of the House of Lords in Haughton v. Smith [1973] 3 All E.R. 1109, particularly in regard to the breadth of the discussion therein, it might have reasonably been supposed that the law relating to attempts would have, for some considerable time at least, been set at rest; but the infinite variety of circumstances under which crimes are attempted, and the increasing number of statutory offences being created, together of course with the industry and resources of Counsel, all combine to impose upon us the duty once again to examine this branch of the law, and to determine the proper limits of Haughton v. Smith (*supra*)*;* not so much in relation to common law offences involving acts or conduct arising *ex delicto,* for they are fairly well recognisable, as much as statutory offences involving acts or conduct arising *ex contractu.*

The facts so far as relevant and material to the present appeal can be briefly stated; the appellant, a medical practitioner, was accosted near Prashad Hospital in the city on 10th August, 1974, by one Richard Lowe; Lowe offered the appellant an opportunity of acquiring United States currency to be converted at the rate of $2.20 (G) per $1.00 (U.S.). The appellant at first hesitated, but later agreed. By the agreement, the appellant obliged himself to pay Lowe $10,780 (G) for a draft worth $4,900 (U.S.). The appellant obtained cash from his bankers, and accompanied Lowe to the National Insurance Building in Brickdam where it was understood a "friend" awaited with the draft. At Brickdam, it would appear Lowe requested the appellant to pay over the $10,780 (G) to him on the understanding no doubt, to return with the draft. The appellant did so. The inevitable then happened. Lowe entered the building and vanished. The appellant reported the matter to the police and submitted a written statement from which the above facts are substantially taken.

The police eventually recovered the $10,780 (G) and charged the appellant with attempting to buy foreign currency. The appellant was convicted and fined $32,340, and was ordered to forfeit the $10,780. Lowe was not called to testify; we were told during the arguments that a charge against Lowe is pending, but he has, so far, evaded apprehension; nor was any draft for $4,900 (U.S.) tendered-indeed, it is doubtful if any ever existed. We may state at the outset that either Lowe was an accomplished confidence trickster, or he was a police decoy or informer in the light of his visit to Senior Superintendent of Police Cecil Roberts, according to the latter's testimony, two days after this incident when Lowe spoke to him; the details of that conversation were of course inadmissible and therefore not forthcoming, but the conversation undoubtedly inspired the Superintendent to speak with Chief Inspector Francis Roberts of Alberttown Police Station who eventually recovered the money. But neither the accomplishment of a confidence trickster nor the lure of a decoy nor indeed, the intelligence of an informer can have.

in our view, any proper relevance in the determination of whether or not the appellant's conduct was criminal.

It is convenient at this stage to set out the relevant statutory provisions:-

The *Exchange Control Act, Cap. 86:01, s. 3(1)* provides as follows:

> "Except with the permission of the Minister, no person, other than an authorised dealer, shall, in Guyana, buy or borrow any gold or foreign currency from, or sell or lend any gold or foreign currency to, any person other than an authorised dealer."

And *para. 1 (1)* of *part II* of the *Fifth Schedule* of the said Act provides as follows:-

> "Any person in or resident in Guyana who contravenes any restriction or requirement imposed by or under this Act, and any such person who conspires or attempts, or aids, abets, counsels or procures any other person, to contravene any such restriction or requirement as aforesaid, shall be guilty of an offence punishable under this Part of this Schedule." *(Underscoring ours.)*

The appellant was charged with having "on Saturday 10th August, 1974, at Georgetown, in the Georgetown Magisterial District, not being an authorised dealer attempted to buy foreign currency, that is to say, four thousand, eight hundred dollars, (U.S. currency) from a person other than an authorised dealer."

In attacking the conviction, learned Counsel posed three questions which may be conveniently summarised as follows:-

(A) Was there an attempt in law?

(B) Was a draft "foreign currency" within the meaning of the Act?

(C) Was the complaint good in law?

(A) Attempt:

It is essential to recognise that the true principle laid down by the House of Lords in Haughton v. Smith (*supra*) was not the impossibility of achieving the intended objective which prevents an act from being charged as an attempt, but rather the impossibility of proving the *actus reus* of the substantive offence. (*Per* ORMROD L.J. in R. v. Green [1975] 3 All E.R. 1011, at p. 1016 letter (b)). In Haughton v. Smith the charge was "attempted handling of stolen goods", emphasis being on

the word 'stolen'. The House of Lords held the belief that the goods were stolen when they were not, in fact, could not convert the status of the goods into stolen goods, and as the goods had ceased to be stolen goods when handled, there could not be any handling of stolen goods. It was in that sense that the use of the word "impossible" appears to have crept in, and in our humble view rightly so, as it was intended to clearly demonstrate that if the goods were not stolen goods, any handling would only be "handling of goods" and never "handling of stolen goods" which was the pith of the offence. In that sense, it was "impossible" for the handling to be "handling of stolen goods" and therefore the *actus reus* was described as "impossible" in the sense, as we understand it, that it was no longer possible for the "handling of goods" to become "handling of stolen goods" and therefore "impossible".

We entertain no doubt that the "impossibility" envisaged in Haughton v. Smith (*supra*) was not only confined, but intended to be confined, to the impossibility of proving the *actus reus* of the substantive offence, for example, shooting at a dead person; it would be impossible to prove the substantive offence of murder in such a case as there could never be any *actus reus;* therefore, the shooting cannot amount to an attempt; nor for example, injecting poison into a dead person; the substantive offence of murder cannot be established on account of the impossibility of proving the *actus reus and* there cannot consequently be any attempt. But of course if someone injects poison into a "living" person with the necessary intent, not knowing that the poisonous substance lacked the potency to kill, he would clearly be guilty of an attempt to commit murder. This we think demonstrates the true distinction; in one sense the lack of potency makes the objective, that is, death "impossible" of achievement, so that the crime of murder becomes an "impossibility." But the crime of attempt is clearly established in those circumstances for both the *actus reus* and intent are present to constitute an attempt; in another and real sense however, murder was "impossible" for the victim was of "life", and, but for the lack of potency, the full or substantive offence would have been established, the *actus reus* in both senses being the same, that is to say "injecting poison." So that the true distinction lies not in the impossibility of achieving the intended objective, but rather the impossibility of proving the *actus reus* of the substantive offence.

Much reliance was placed by the appellant on the authority of Partington v. Williams (1976) 62 Crim. L.R. 220; the full judgment of which learned Counsel with customary courtesy, was able to make available to us. In that case the appellant, an employee, took a wallet belonging to the manageress, from a drawer; she (the employee) looked into it to see if it contained money. If it had, she intended to steal it. But the wallet had none. The Court of Appeal held that as the complete offence was impossible of commission there could be no attempt, following Collins 169 E.R. 1447 and Mc Pherson (1857) 169 E.R. 975, both of which were considered with approval in Haughton v. Smith, thereby overruling Brown (1889) 24

Q.B.D. 337 and Ring (1892) 17 Cox C.C. 491. We have considered Partington v. Williams (*supra*) carefully, but we do not think it has any application to the circumstances of this appeal. The reasoning proceeds, in our humble view, along the same lines as that in Haughton v. Smith, that is to say, the impossibility of proving the *actus reus* in larceny because one can take nothing out of an empty wallet. How then, it may be asked, can taking nothing be converted into an attempt? If it can be, then it must be "an attempt to take nothing". And that of course would be both ridiculous and absurd. It is to be noted, that it is not "holding" the wallet which would constitute the *actus reus* but "taking" money out of the wallet. If there was no money to take there could be no *actus reus* of the substantive offence, hence the impossibility of proving the commission of the full offence.

Of similar vein was the reasoning in R. v. Easom [1971] 3 W.L.R. 82 also cited, where EDMUND DAVIES L.J. speaking for the Court of Appeal, obviously taking the view that if the accused did not intend to commit theft, he could not be guilty of an attempt to do so, said, at p. 86:

> "...it is implicit in the concept of an attempt that the person acting intends to do the act attempted, so that the *mens rea* of an attempt is essentially that of the complete crime... That being so, there could be no valid conviction of the appellant of attempted theft... unless ... he was animated by the same intention permanently to deprive ..." (*Underscoring ours.)*

Easom turned essentially on the question of "intention" in theft in relation to the subject matter in the indictment, and the evidential inference on such intention by what was obviously only a 'conditional appropriation'. That is not the point in issue in this appeal, and the case may thus be distinguished.

Cases such as Haughton v. Smith, Partington, Easom and the other authorities cited, are all, however, cases of a different hue and nature from the instant appeal. They are all concerned with acts or conduct arising, so to speak, *ex delicto,* and in our view, stand on a different footing from the instant matter. They all deal with offences the complete commission of which lies within the competence and power of a single offender. The complete offence in such cases involves a single *actus reus;* usually, if not invariably, an act of trespass which the law, with certain qualifications, declares to be criminal. In the present appeal, however, the situation is entirely different. The full or complete offence rests not on the *actus* of a single offender, but the *acta* derived from consensual conduct, *ex contractu* so to speak, by or between at least two persons; the buyer and the seller. The *actus reus* of the full offence therefore, is outside the competence and power of a single offender. Reason and commonsense demand the distinction.

It is well to bear in mind what LORD RE1D had to say in Haughton v. Smith at p. 1120 in citing with approval R. v. Goodchild (1846) 2 Car and Cir 293:-

> "If doing something with intent to procure a certain result is an offence, you can certainly be guilty of that offence if you do that thing with that intent although in the circumstances it was not possible to procure that result."

And later in citing R. v. Hensler (1870) 22 L.T. 691 also with approval, the learned LORD REID, when dealing with the theory that an erroneous belief that one is committing crime when he is really not, can convert such non-criminal conduct into an attempt, continued:-

> "Another case of different nature sometimes cited in support of (that) theory is R. v. Hensler. The accused attempted to obtain money by false pretences by sending a letter. The recipient was not deceived. But the accused was convicted (for attempt). The crime of obtaining money by false pretences is unusual in that, the last act constituting the crime is done not by the criminal but by the victim. Here it was perfectly possible that when the letter was sent, the recipient might have been deceived and have paid. The accused had done all that he could do toward the commission of the crime but final commission of the crime had been prevented by the conduct of the victim." *(Underscoring ours.) (Parenthesis ours).*

Those observations of LORD REID so elegantly and lucidly expressed would be sufficient in our view, to dispose of the submission of learned Counsel for the appellant, that the failure of Lowe to deliver the draft would exculpate the appellant of the crime of attempt; for it was perfectly possible that when the money was paid over by the appellant. Lowe might have returned and delivered the draft.

One must bear in mind that para. 1 (1) of *Part II* of the *Fifth Schedule* of the *Exchange Control Act, Cap. 86:01* stipulates that "... any ... person who ... attempts ... to contravene any ... restriction ... shall be guilty of an offence." The enactment itself makes it an offence to attempt to contravene any restriction. And by *s. 3(1)* of the Act, there is a clear restriction against any one buying foreign currency. It follows therefore, that any attempt to buy foreign currency is itself a statutory offence.

The operative word in s. *3(1)* is "buy", and there seems no question but that the true basis of the offence must inevitably rest upon contract or agreement involving at least two parties, for the very use of the word "buy" presupposes the existence of a seller. It is noted in passing, that both the buyer and seller would be guilty of an offence under the Act.

There is no question in this appeal as to whether or not the appellant's conduct had all the prerequisites of an attempt as contemplated in R. v. Eagleton [ 1843-60] All E.R. Rep. 363 and Davey v. Lee [1967] 2 All E.R. 423. There was the *actus reus* as well as the intent. Indeed, by making payment to Lowe he did everything that he could do to complete a purchase of foreign currency; and purchase indeed it was, irrespective of the euphemistic pretence that "he was trying to oblige." In the words of LORD REID "he had done all that he could do toward commission of the crime, but final commission of the crime had been prevented by the conduct (of Lowe)." (R. v. Hensler) (*supra*). By a parity of reasoning if final commission of the crime was prevented by the conduct of the seller or agent, the appellant, having done all that he could do toward the commission of the full crime, was in our view, guilty of an attempt to commit the crime of buying foreign currency. Non-performance of the agreement, whether innocent or fraudulent is quite a separate thing from the "impossibility" envisaged in Haughton v. Smith (*supra*).

To demonstrate the fallacy of the appellant's contention, let us suppose that Lowe had delivered a draft for U.S. dollars purchased. It could not be doubted that the appellant would be guilty of "buying foreign currency." But the argument runs this way; because Lowe has resiled from the bargain (it was suggested, and we think reasonably so, that he was a confidence trickster) the crime is impossible of achievement and therefore the appellant is innocent of an attempt to buy. Expressed in true terms the argument means this; what would clearly have been guilty conduct of the appellant if the sale was completed can be converted into innocent conduct, not because of any truly innocent conduct in him as buyer, but rather because of the sheer dishonesty of the seller. We must resolutely dissent from any such view. Two centuries ago, the Court said: "... what is contrary to reason cannot be consonant to law." (*vide* Bell v. Wardell (1740) 125 E.R. 1131 at p. 1133.

It would serve well to recall LORD REID'S counsel in Haughton v. Smith (*ibid*) (at p. 1121):

> "The life blood of the law is not logic but common sense."
>
> And later (*ibid*.) at p. 1122:-
>
> "There may well be border line cases... We are not applying a rule but a principle and it must be applied sensibly. I would not seek to lay down the law in detail beyond what is necessary for the present case."

Similar views were echoed by ORMROD L.J. in R. v. Green (*supra*) at p. 1017 when he said:

> "It would be sterile logic indeed if counsel for the appellant's contentions in this case, were to prevail and the Court were obliged to fetter the hands of those whose duty it is to enforce the law by a ruling which would undoubtedly outrage commonsense. In this case however, logic and commonsense fortunately coincide."

We would in all humility wish to apply these felicitous *dicta* to the present appeal.

Learned Counsel for the appellant canvassed many permutations arising from the non-production of a draft, as distinct from its non-existence, to aid the proof as to whether or not it was a draft for U.S. currency. In our view, the moment the appellant agreed to purchase U.S. currency and "attempted" to do so in the circumstances herein, and had the expectation of receiving a draft for U.S. currency, the offence of attempting to buy foreign currency was completed. The operative word is "buy". If the draft was delivered and it was not foreign currency, all it meant was that the appellant would not be guilty of "buying". But once he intended to buy foreign currency and paid over the purchase price therefor, the Act was infringed and the offence of "attempt" committed. It matters not therefore, in our view, whether the draft ever existed, nor, if produced, it turned out to be a worthless piece of paper.

Similar views were held in Haggard v. Mason [1976] 1 All E.R. 337; in that case it was an offence "to supply or offer to supply a controlled drug." The appellant offered to sell LSD, a controlled drug, which he believed to be so when he did. A sale took place. The drug turned out to be not LSD but something quite different which was not a controlled drug. Both he and the purchaser believed it was LSD. Held, (LORD WIDGERY C.J., LAWSON and O'CONNOR, JJ.) he was rightly convicted for "offering to supply" for it mattered not what was in fact supplied, the offer having been accepted. He could not, however, be guilty of "supplying."

We are satisfied that when the appellant accepted the offer to buy the foreign currency, believing he was purchasing foreign currency and expecting foreign currency, the offence of attempting to buy was crystallised by the handing over of the $10,780 (G); put another way, attempting to buy foreign currency is not dependent upon a successful buying of foreign currency.

(B) Foreign Currency:

Foreign currency is defined so far as is material by *s. 3(4) (a)* of the *Exchange Control Act, Cap. 86:01,* as follows:-

> "the expression 'foreign currency' ... includes any currency other than Guyana dollars ... and ... except so far as the context otherwise requires.

> includes a reference to any right to receive foreign currency in respect of any credit or balance at a bank..."

It is enough, in our judgment, to refer to the appellant's written statement and the evidence relating to his oral admission that he was proposing to pay for a "draft for $4,900 (U.S.)" This evidence coupled with reference to the conversion rate and the appreciative distinction between "U.S. currency" and "local currency." demonstrably establishes that he was attempting to purchase a draft for U.S. dollars. The term "draft for $4,900 (U.S.)" must be given a reasonable evidential meaning as used by the appellant. From all the circumstances, it is reasonable to infer that he meant, and intended to be understood to mean, an order for the payment of United States currency. That is sufficient in our view, to amount to foreign currency as defined in the Act.

(C) Complaint:

Learned Counsel contends that the appellant is charged under the enforcement section which is improper, and the conviction is therefore invalid. With all respect we disagree. The appellant has been charged under the section which creates the offence *viz., Para. 1 of Part II* of the *Fifth Schedule* of the *Exchange Control Act, Cap. 86:01,* and that in our view is the proper statutory basis for charging the offence.

The conviction was accordingly in all respects quite proper in law and ought to be sustained.

(D) Sentence:

Two aspects fall to be considered hereunder:-

(a) Whether or not the magistrate had jurisdiction to make an order for forfeiture of the appellant's $10,780 (G)(recovered by the Police) and

(b) Whether or not the penalty of $32,340 representing three times the amount or value of the currency was harsh and unduly severe.

So far as is material to the question of (*para. (3)* of *Part II* of the *Fifth Schedule* of the *Exchange Control Act, Cap. 86:01)* enacts:-

> "Any person who commits an offence .... shall be liable....
>
> (a) .....

(b) .....

and where the offence is concerned with any currency, any security, any gold, any goods or any other property, the Court may, if they think fit so to do, order the currency security, gold, goods or property to be forfeited." *(Underscoring ours.)*

From the wording of this Regulation, the question to be answered is: Is the term "any currency" referable to "foreign currency" only, as contends learned Counsel for the appellant, or both foreign as well as local or Guyana currency, as contends learned Counsel for the respondent?

Learned Counsel for the appellant invites this Court to take the view that the term "any currency" must mean foreign currency only and is not referable to local or Guyana currency. We must confess that the resolution of this matter was not without difficulty, and we have reached our conclusions only after anxious thought, for we were first inclined to think that the word "any" in "any currency" ought to be given the meaning sought by the respondent, if only for the reason that "any" ought to mean "any one of a number", as it does at first glance displace any suggestion of a limitation upon the type of currency involved.

But we are, on more sober and matured consideration, convinced and satisfied that the word "any" must be referable only to the particular currency the dealing in which is prohibited by the Act and is the subject of an offence thereunder; the vital words in our view are "concerned with" for they qualify or denote the currency which is to be the subject of forfeiture; for what the offence is "concerned with" is not Guyana currency, but "foreign currency." It might have been/an altogether different thing if "using Guyana currency" was an offence, but it is not; it is "buying foreign currency" that is an offence. The "currency" which the offence was concerned with was foreign currency, to wit, U.S. dollars and not Guyana dollars; so that the currency to be forfeited is U.S. dollars and not Guyana dollars.

In the quest of statutory interpretation a Court must endeavour, within well defined and settled principles, to determine the true intention of Parliament by interpreting the words by which Parliament has chosen to express itself. The interpretation of words, however, and general words in particular, cannot be truly determined by reading them in isolation, for their colour and content are derived from their context. The Act must therefore be read as a whole. "In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without enquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words

varies according to the circumstances with respect to which they were, used." (*dictum* of LORD BLACKBURN in River Wear Commissioners v. Adamson (1877) 2 A.C. 743 at p. 763).

It is essential to first appreciate that the Act read as a whole, and as its short title indicates, is intended, *inter alia*, to "impose restrictions in relation to gold, currency, etc." The Act itself does not define "currency" but specifically refers to at least two types of currency: "foreign currency" (s. 3) and "specified currency" (ss. 4 and 6) both of which are defined by the Act. In respect of both types, a number of restrictions are imposed upon dealings with such currencies. Breach of any of those restrictions gives rise to an offence. What therefore the offences are "concerned with," are the breaches or contraventions, of the restrictions relating to those currencies sought to be restricted. "Guyana dollars" is not a restricted currency for it is neither "foreign currency" nor "specified currency." Without in the least way attempting to be critical of the draftsmanship, and inspired only by a desire to eclipse the true meaning to be ascertained from the Regulation, it seems to us, that if the material part is read "where the offence is concerned with any of the currencies restricted ... the court may ... order the restricted currency, security etc... to be forfeited."

We are of the view that "any" in "any currency" is referable to any of the currencies sought to be restricted under the Act. And in reaching this conclusion, we are mindful of the caution and guidelines afforded in the *dictum* of LORD DENNING in Escoigne Properties Ltd v. I.R. Commissioners [1958] 1 All E.R. at p. 414 where the learned Master of the Rolls said:-

> "When searching for the meaning of a statute it is natural to try to put it in your own words-so as to express its meaning as it appears to you. But you must be careful not to write your own words into the statute as if they were part of it. It may well be that no words of yours convey the meaning of Parliament quite so well as the words which Parliament itself has chosen. You can often appreciate the meaning of a section-get the feel of it, so to speak-without being able to translate it into other words with exactly the same meaning."

Finally on this aspect of forfeiture, if only to demonstrate the unsoundness of the argument in support of the order, we must draw attention that "security" (as in Part III of the Act) "gold" (as in Part I) "goods" (as in Part IV), to mention only three, are all subject to restrictions under the Act. It is clear that the forfeiture section will apply to the "security", "gold", "or goods" if recovered. Assuming local currency, Guyana dollars, was used to obtain the "security", or "gold" or "goods", would the Guyana dollars, if found or recovered, be liable to forfeiture? We answer in the clear negative as the foreiture section does not say so. We fail to see why it should be otherwise if Guyana dollars be used to purchase foreign

currency.

It would of course be altogether different if the offence was concerned with the importation or exportation of Guyana currency notes in contravention of the Act (ss. 23,24), in which case, no doubt, forfeiture may properly be ordered in respect of such notes as being an offence concerned with "goods" or "other property" appearing in the forfeiture section. But this is not the case in the instant appeal.

When the forfeiture section is compared with the penalty section, one sees in the latter, in otherwise identical terms, the additional term "any payment" which is omitted from the forfeiture section. That to our mind is very significant. It demonstrates that in offences concerned with "any payment", such as under (ss. 7, 8 and 9 of the Act a higher penalty may be imposed than the general prescribed maximum of $4,000; on summary conviction. But no provision is made for forfeiture of any payment made in contravention of ss. 7, 8 and 9. It follows in our view therefore, that Parliament clearly intended to exempt from forfeiture such payments under ss. 7, 8 and 9, which involve and are concerned with Guyana currency. These of course attract higher penalty, but not, as we have said, forfeiture. This omission from the forfeiture section in our view, beacons the distinction Parliament has itself drawn, and makes it clear that Guyana currency used in an attempt to purchase foreign currency is not liable to forfeiture.

Haggard v. Mason (*supra*) cited by learned Counsel for the appellant, while of no avail on the question of conviction, is very much on point in favour against an order for forfeiture. LAWSON, J. held, LORD WIDGERY C.J. and O'CONNOR J. concurring, that the money obtained as a result of an offer to supply a controlled drug was not liable to forfeiture, though the drug was; the learned judge did not give any detailed reasoning as to his conclusion, but we apprehend that the conclusion was based, in our respectful view, quite rightly upon the wording of the section to the effect that" the Court by or before which a person is convicted of an offence under the Act may order anything shown to the satisfaction of the Court related to that offence to be forfeited." The learned judge held that the money was not liable to forfeiture. And in the instant appeal, we also have no reservation in holding that the order for forfeiture of Guyana currency was contrary to law and therefore null and void.

In so far as penalty is concerned, we have given the matter careful thought.

Parliament has obviously taken a most serious view of breaches under the Act by the insertion of highly penal provisions. The appellant on conviction for an offence concerned with any currency was liable to both a fine and imprisonment. The learned magistrate in exercising his discretion, and we intend no criticism in saying this, imposed only the maximum monetary penalty of three times the value of that currency as shown in the records. Those who choose to act in contraven-

tion of the Act must be prepared to abide by the consequences. There is in our view, no indication of any improper exercise of discretion in the imposition of sentence, and there could be no justifiable reason to interfere with the fine imposed.

Subject to what we have already said about the invalidity of the order as to forfeiture, the appeal is accordingly dismissed and the conviction and sentence affirmed. Costs to respondent fixed at $35.00.

**Appeal dismissed subject to**
**invalidity of order for forfeiture.**
**Conviction and sentence affirmed.**
**Costs to respondent fixed at $35.00.**
**Leave to appeal granted.**

**The State v. Scantlebury**

**LYNETTE SCANTLEBURY**
**Petitioner**

**v.**

**THE STATE**
**Respondent**

[Court of Appeal (in Chambers) (Haynes, C.) November 5, 6, 1976]

*Bail by Court of Appeal-Petition for bail to the Court of Appeal pending hearing of appeal against conviction and sentence-Allegations of ill-health and family hardship-Special circumstances-What affidavit evidence should establish-Whether real likelihood of sentence being served before appeal comes on for hearing-Guiding principles of Court of Appeal in granting bail*

*Bail by Court of Appeal-Petition for bail to Court of Appeal pending hearing of appeal against conviction and sentence-Short sentence of imprisonment-Administratively impossible to hear appeal before sentence terminates-Real possibility of danger of injustice being done.*

Lynette Scantlebury petitioned the Guyana Court of Appeal for admission to bail pending the hearing of her appeal against conviction and sentence in the High Court on 25th October 1976. She was sentenced to six months' imprisonment for the offence of causing death by dangerous driving, collapsed in the dock after sentence was pronounced and was rushed to hospital in a delirious condition where she has since remained a patient. The affidavit in support of her petition stated she was and still is in great pain and in receipt of medical treatment; al-

though there was no affidavit evidence in support forthcoming from any medical practitoner. From the narrative of facts alleged in her affidavit in support, the petitioner sought bail on the following grounds: (a) her own ill-health, (b) her husband's ill-health; (c) great hardship on her family; and (d) the real likelihood that her appeal will come on for hearing after she will have served her sentence.

**HELD**: (1) In matters of this kind applicants should consider the advisability of, assisting the judge by corroborative proof of allegations of ill-health, or at least, a medical certificate if that condition is to be relied on as a material consideration in deciding whether or not an applicant should be admitted to bail.

(2) If appellants are admitted to bail freely on appeals from the verdict of juries, a dangerous situation could arise inimical to the public interest.

(3) In certain particular circumstances, grounds of family health and hardship taken cumulatively, might justify a grant of bail; but they do not do so in this case.

(4) The Assistant Registrar of the Court of Appeal has been consulted and it has been accepted from him that in the ordinary course of affairs, this appeal is not likely to come on for hearing until about four to six months hence.

(5) Since normally bail should not be granted to an appellant or a prospective one after his conviction by a jury, an applicant would have to show that in his case, there were special circumstances which made it the just thing to do to put him on bail pending the hearing of his appeal ... An appellant on a short sentence of six months should have his appeal heard promptly, but if this is impracticable, then this court might properly admit him or her to bail.

(6) This court being satisfied that if bail is refused to the petitioner, there is at least a real possibility of a danger of injustice being done to her, will admit her to bail in her own recognisance in the sum of $2,000 with a surety in the like sum acceptable to the Registrar of the Court of Appeal.

**Petitioner admitted to bail pending hearing and determination of her appeal.**

**Editorial Note:** This case is also reported in (1976) 27 W.I.R. 103.

**Cases referred to:**

(1) R. v. Gordon (1912) 7 Cr. App. R. 182.
(2) R. v. Gott (1921) 16 Cr. App. R. 86.
(3) R. v. Wise (1922) 17 Cr. App. R. 17.
(4) The Duke of Leinster (1923) 17 Cr. App. R. 147.

(5) R. v. Davidson (1927) 20 Cr. App. R. 66.
(6) R. v. Howeson (1936) 25 Cr. App. R. 167.
(7) R. v. Joseph Greenberg (1929) 21 Cr. App. R. 106.
(8) R. v. Rudolph Henry (1975) 13 J.L.R. 55.
(9) R. v. Joseph Selkirk (1925) 18 Cr. App. R. 172.
(10) R. v. Michael McDonald (1928) 21 Cr. App. R. 26.
(11) R. v. Isaac Waxman (1930) 22 Cr. App. R. 81.
(12) R. v. Alexander Stewart (1931) 23 Cr. App. R. 68.
(13) R. v. Harding (1931) 25 Cr. App. R. 143.
(14) R. v. Tarran, The Times, Dec 16. 1947.
(15) R. v. Gregory Page [1971] 2 Q.B. 330; [1971] 2 W.L.R. 1308; [1971] 2 All E.R. 870; 55 Cr. App. R. 184; 115 Sol. Jo. 385.
(16) R. v. Kallia *et al* (1975) 60 Cr. App. R. 200.
(17) R. v. Frank Ridley (1909) 2 Cr. App. R. 113.
(18) R. v. Cullis and R. v. Nash [1969] 1 All E.R. 593; 113 Sol. Jo. 51; *sub nom* R. v. Cullis (Norman Anthony Paul). R. v. Nash (David John) 53 Cr. App. R. 162. C.A.

D.A.A. Robinson S.C. for the petitioner.
E.A. Romao, S.C. Director of Public Prosecutions, for the State.

HAYNES, C. There is before this Court now an application in the form of a petition by and on behalf of Lynette Scantlebury, described as "of the Georgetown Prisons, 12 Camp Street, Georgetown, in the County of Demerara, Guyana, now a patient in the Georgetown Hospital." It is a petition for admission to bail pending the hearing of her appeal against both the sentence and her conviction by a jury at the present Demerara October Sessions of the High Court on the 25th day of October 1976, for the offence of 'causing death by dangerous driving'. The petitioner was sentenced to 6 (six) months' imprisonment taking effect from the 5th day of October, 1976.

It is alleged in the petition and not disputed by the Director of Public Prosecutions who appeared for the State at the hearing in Chambers yesterday, that immediately before the trial judge passed sentence on the petitioner, she collapsed in the dock, and after the sentence was pronounced, she was admitted a patient in the Georgetown Hospital where, presumably, she still is. Her petition states that she was taken to hospital "in a delirious condition and admitted a patient where she is still experiencing extreme pain, is under observation and receiving urgent medical care and treatment." But this condition is not at all supported by any affidavit evidence of any medical practitioner under whose care the petitioner must be. This evidence should have been easy to obtain. I would have thought that such corroborative proof or maybe at least a medical certificate would have been made available to this Court. Applicants in matters of this kind, should consider the advisability of assisting the judge who has to determine this matter with evidence

of this nature, if the condition of ill-health is to be relied on as a material consideration in deciding whether or not to admit the applicant to bail.

The petitioner filed her appeal on the 2nd day of November 1976. In it she alleges that she was advised that this appeal is not likely to be heard by this Court before a date "some time early in 1977". I have consulted the Assistant Registrar of this Court and have accepted his statement that in the ordinary course of affairs this appeal is not likely to come on for hearing until about four to six months hence. And so in paras, 9 and 10 of her petition the petitioner stated as follows:

> "9.That your petitioner is further advised by her said Legal Adviser that her sentence of six months' imprisonment began to take effect from the 5th day of October 1976, being the first day of the Assizes during which the said sentence was passed, since the Trial Judge did not otherwise order; in the circumstances your petitioner would have in effect served three months of her sentence of imprisonment by 5th January 1977.
>
> 10. That your petitioner is advised by the Georgetown prison authorities that, providing she is of good conduct she would receive a remission of sentence and that then her six months, of imprisonment would expire on the 18th day of February 1977."

But this is not all she relied on, for the petition went on to state:

> "12. That your petitioner's being in prison pending the hearing of her appeal has caused great hardship to her family and she feels a great sense of anxiety about the care and welfare of her two daughters Althea (13) and Gerilyn (11).
>
> 13. That your petitioner's sense of anxiety is accentuated by her knowledge that her husband suffers from a chronic heart condition and she has been, in the past solely responsible for his domestic care and comfort, and also for the care and upbringing of the abovementioned children."

Here again, no supporting medical evidence is annexed and tendered. And I would record here the identical comment written earlier in this ruling in relation to the present state of health of the petitioner herself.

From the narrative of the facts alleged, the petitioner is asking the Court to admit her to bail on the grounds of: (a) her own ill-health; (b) her husband's ill-health; (c) the great hardship imposed on her family, including her daughters Althea (13) and Gerilyn (11); and (d) the real likelihood that her appeal will come on for hearing after she shall have served her sentence. I would say without any hesi-

tancy whatever that, at least in the circumstances of this case, grounds (a), (b) and (c), separately or cumulatively, will not warrant her admission to bail. It is one of the unavoidable, harsh and painful consequences of conviction and imprisonment that the immediate and close family of the convicted person will suffer hardships. It is impermissible generally to treat this factor as a ground for the grant of bail. As regards hers or her husband's state of health, this Court makes two observations: One is that it is conceivable without difficulty that an appellant's state of health might be, in certain circumstances, a ground on which to admit her to bail. But, as at present advised, I am of the opinion that the circumstances must be very special indeed to make the state of health of the appellant's husband by itself, if at all, such a ground or an auxiliary one. In this case, it certainly is not. The other observation is, that the allegations as regards their state of health is unsupported by any medical evidence whatever. I will concede that it is not at all wholly inconceivable that in certain particular circumstances grounds (a), (b) and (c) cumulatively might justify a grant of bail. But they certainly do not do so in this case. Accordingly, in any event, I would not act on these grounds. I think, however, that the fourth ground deserves careful consideration.

Undoubtedly, this court has the jurisdiction to admit an appellant to bail pending the determination of an appeal. It is accepted law that it is a matter of discretion. An appellant has no common law or statutory or constitutional right to bail. But like all other discretionary powers it must be exercised judicially. If appellants are admitted to bail freely on appeals from the verdict of juries, a dangerous situation could arise inimical to the public interest. In England, under the *Court of Criminal Appeal Act 1907,* a similar statutory discretion to admit an appellant to bail existed until its repeal. A study of the many judgments of the Court of Criminal Appeal there, would indicate the considerations by which that Court did so and its successor is guiding itself in the exercise of this discretion.

These authorities are clear that the circumstances must be "exceptional" to justify the grant of bail to persons convicted by juries: Gordon, (1912) 7 Cr. App. R. 182; Gott (1921) 16 Cr. App. R. 86; Wise (1922) 17 Cr. App. R. 17; The Duke of Leinster (1923) 17 Cr. App. R. 147; Davidson (1927) 20 Cr. App. R. 66; and Howeson(1936)25 Cr. App. R. 167. Indeed in Joseph Greenberg (1929) 21 Cr. App. R. 106, the Lord Chief Justice said (at page 106): "It is only in very exceptional cases that bail is granted in this Court." This way of putting it did not find favour with GRAHAM-PERKINS, J. in R. v. Rudolph Henry (1975) 13 J.L.R. 55. That very learned judge, on this point, said (p. 56):

> "By virtue of the provisions of ss. 28 and 29 of the *Judicature (Appellate Jurisdiction) Law 1962* the Court of Appeal, or a judge thereof, 'may, if it seems fit on the application of an appellant to bail pending the determination of his appeal.' The words 'if it seems fit' are unmistakably clear. Their internment is to vest in the court, and the judges thereof, a

> discretion to admit an appellant to bail in circumstances in which, in the opinion of the court, or a judge, such a course is desirable or just. This court has never, as far as I am aware, sought to formulate a catalogue or principles by reference to which an application by an appellant to be admitted to bail is to be determined. It is to be hoped that no such attempt will ever be made. Parliament has, by the terms of ss. 28 and 29 (*supra*), and without equivocation, entrusted this court, and its judges, with a discretion in the widest possible terms in the knowledge, it must be supposed, that that discretion will be responsibly exercised. For these and other reasons I am constrained to the conclusion, that in the exercise of the discretion with which I am here concerned, it is eminently desirable to avoid reference to such vague and indeterminate phrases as 'in the exceptional circumstances of the case' from which, by their very nature, no common statement of principle can be extracted."

But I would venture to suggest with respect, that the English judges meant nothing really different in their use of the word "exceptional" or the phrase "very exceptional." What was being emphasized was that normally bail would not be granted to an appellant or a prospective one after his conviction by a jury; that it was not to be lightly allowed; and so an applicant had to show that, in his case, there were special circumstances which made it the just thing to do to put him on bail pending the hearing of his appeal. For example, if on the face of the papers before the Court, the conviction appears plainly wrong so that his appeal has every prospect of success (as in R. v. Rudolph Henry (supra)) this would be a factor which could make the case exceptional. But an instance of more frequent occurrence is where the sentence is a short one and it is administratively impossible to hear the appeal or, there is not much hope of doing so before his sentence terminates. For, if the appeal succeeds after this, justice might not appear to have been done. And this might even be so where, although the appeal may or will be heard before the sentence ends, he will by then have served most or a very substantial part of it.

In Joseph Selkirk (1925) 18 Cr. App. R. 172, the applicant was convicted for conspiracy to defraud and sentenced to four months' imprisonment. He appealed and was put on bail in the sum of £500 with two sureties in the sum of £250 each; in Michael McDonald (1928) 21 Cr. App. R. 26, on an application for leave to appeal against conviction and a sentence of 18 months' imprisonment for receiving stolen property, in view of the long interval expected to run before the hearing, he was put on his own bail in the sum of £50 and that of a surety in the same sum; and in Isaac Waxman, (1930) 22 Cr. App. R. 81, the applicant was convicted of obtaining goods by false pretence and sentenced to 15 months' imprisonment. It was calculated that his appeal could not be heard for a number of months. The Court granted him bail for £1,000 with two sureties, each to the approval of the police, for £1000 each. Again, in Alexander Stewart (1931) 23

Cr. App. R. 68 for the same reason, the applicant, sentenced to 12 months' imprisonment, was put on his own bail in the sum of £100 with two sureties in the sum of £100 each; in Harding (1931) 25 Cr. App. R. 143, on an appeal from a sentence of 12 months, the applicant was put on bail with two sureties of £100 each and on his own recognisance of £100, the sureties to be accepted to the satisfaction of the police; and R. v. Tarran "The Times December 16, 1947 (cited in *Archibald's Criminal Pleadings* 37th Ed., 1969, p. 308, para 882), bail was granted in view of the fact that owing to the length of the transcript of shorthand notes, the appeal would probably not be heard until the end or after the expiration of the sentence. More recently, in Gregory Page (1971) 55 Cr. App. R. 184, the appellant sentenced to 9 months for fraud, was put on bail as "the only proper course"; and in R. v. Kallia *et al* (1975) 60 Cr. App. R. 200, where the trial lasted 69 days and the proceedings took up 2000 pages of transcript, the appellant was sentenced to 18 months' imprisonment. FORBES, J. put them on bail, and the appeal was heard nearly a year after. So, an appellant on a short sentence of 6 months should have his appeal heard promptly. If this is impracticable, then this Court might properly admit him or her to bail.

At the hearing of this petition the Director of Public Prosecutions himself appeared. And it is only fair to record that he did not oppose it on this last ground. As regards his appearance I would like, without comment, to draw attention to the observations of the Court in Frank Ridley (1909) 2 Cr. App. R. 113, at p. 114:

> "... there is no rule under the Act that notice should be given to the prosecution on applications for bail being made. It may be necessary to provide for it, but there being no rule, we cannot bind the Court by saying that the prosecution ought to be present. But we think it desirable that a judge, or the Court, in the exercise of his or their discretion, should direct that such notice should be given, especially in cases in which the Director of Public Prosecutions is concerned and that where such notice has not been given, applications for bail should be refused."

I have not seen the record of evidence and this Court is not in a position to reach any sensible view as to whether or not this appeal has any prospect of success. Further, this Court is not in a position to say whether or not a sentence imposed was warranted by the facts presumably found by the jury. But this Court is aware that the offence for which the appellant has been convicted, not infrequently is punished by fines of varying severity. While nothing that this Court says in this ruling should be interpreted as accepting or suggesting that the appeal has a fair chance of success either as to the conviction or as to the sentence, having regard to the nature of the offence and the very short sentence imposed, it is felt that this is a fit case to admit her to bail. It must be wrong that she should be exposed to the almost certain consequence of, in effect, serving her sentence before having her appeal determined. And it is certainly very likely, if not certain, that this will

occur if bail is refused. If it is, and subsequently the appeal is dismissed, both as to conviction and sentence, then retrospectively, no harm will have been done. On the other hand, if bail is refused and subsequently the appeal succeeds to the extent that either her conviction is set aside or, if not, the sentence is varied to a monetary one, then she will have suffered imprisonment or detention pending her appeal, unjustifiably. Everyone will agree that justice would not appear to have been done in such event. This Court is satisfied that if bail is refused to the petitioner, there is at least a real possibility of a danger of injustice being done to her.

This Court wishes to make it clear that the sex of the appellant has nothing whatever to do with the decision to admit her to bail. This decision rests wholly on the factors just enumerated. If the facts, presumably found by the jury to be true, warrant a sentence of imprisonment on a person convicted for a grave offence such as this, then I, speaking for myself, would say that a trial judge would be justified in imposing such a sentence, whether the guilty person is a man or a woman. Further, it should be made clear that if the appeal fails, the appellant will still be liable to serve the sentence of six months. In the case of R. v. Cullis and R. v. Nash [1969] 1 All E. R. 593, it was argued in the Court of Criminal Appeal that it would be very unfortunate if a convicted person who is given leave to appeal against conviction, obtains bail, is let out of prison and so encouraged to think that that is probably the end of the matter, should later find himself back in prison in respect of the same conviction. LORD JUSTICE SALMON in the judgment of the Court said (p. 593):

> "This Court does not intend to lay down any general principle to the effect that once a convicted person has been let out on bail, there can never be a question of sending him back to prison. Obviously, there can be no such general principle, because otherwise it would follow that once a convicted person is granted bail, in effect the judge who grants him bail thereby necessarily ensures that he never returns to prison. Everything must depend on the circumstances of the particular case."

The appellant must understand that, depending on the result of the appeal, she might still have to serve her sentence according to law. If there was any doubt about the position, it was removed in R. v. Kallia *et al* (*supra*) where ROSKILL, L.J. said (at p. 209):

> "This Court desires to say as plainly as possible that where (exceptionally) intending appellants or applicants are released on bail and delay follows in the hearing of the appeal, that delay cannot and must not be relied upon, whenever the appeal or application fails, as a reason for their not being sent back to prison to serve their sentence. That is usually made plain when bail is granted, and it must be clearly understood that that is so."

In *Halsbury,* 3rd., Ed. Vol. 10 at p. 526, para. 967, this passage appears:

> "If the Court of Criminal Appeal admits an appellant to bail pending the determination of his appeal, the Court must specify the amount of the recognisances and may direct before whom they are taken; but if the Court does not give such a direction, the recognisances of the appellant may be taken before a Justice of the Peace who is a member of the visiting committee of and at the prison in which he appellant is then confined, or before the Governor thereof, and the recognisances of any surety for the appellant may be taken before any petty sessional court. The appellant must be ordered, by the order admitting him to bail, to be present personally at each and every hearing of his appeal, and at the final determination thereof.
>
> The order for bail may be varied or revoked at any time when the appellant is before the court. If a surety suspects that the appellant when he has been released on bail is about to depart out of England, or in any manner to fail to observe the conditions of his recognisances, the surety may take steps for the arrest of the appellant. On breach of the appellant's recognisances the Court may order them and those of his sureties to be estreated."

This Court should adopt the practice set out in it *mutatis mutandis.*

It is, therefore, the order of this Court that the appellant be admitted to bail pending the hearing and determination of her appeal. The conditions of this admission are: she shall sign her own recognisance in the sum of $2,000 with a surety in a like sum, said surety to be acceptable to the Registrar of the Court of Appeal before whom the recognisances shall be executed; the appellant, unless excused by this Court beforehand, shall be present personally at each and every hearing of her appeal and at the final determination thereof. This is the Order of the Court.

**Petitioner admitted to bail pending hearing and determination of the appeal.**

**The State v. Clarke**

**Cleveland Clarke**
**Appellant**
**v.**
**The State**
**Respondent**

[Court of Appeal (Crane, R.H. Luckhoo and Jhappan, JJ.A.) February 10, 19, 1976]

*Criminal Law-Accused unrepresented by counsel-Failure of trial judge to inform him of his rights to call witnesses in defence-Fairness of trial-Criminal Law Procedure Act, Cap. 10:01, s. 133 (1)-Whether proviso may properly be applied-Court of Appeal Act, Cap. 3:01, s. 13.*

*Constitutional Law-Fundamental right-Constitution of Guyana 1966, art. 10 (1) and (2) (e).*

The appellant, who was unrepresented by counsel at the trial, was charged and convicted for the crime of robbery with violence. He appealed his conviction on the ground that, *inter alia*, the trial judge did not inform him of his right to call witnesses to testify on his behalf when, as a matter of fact, he had witnesses who could have done so. There was no record to be found anywhere that the trial judge had told him of that right.

**HELD:** (1) It is the constitutional right of every person who is charged with a criminal offence to be afforded such facilities as would enable him to obtain the attendance of witnesses for examination on his behalf before the court.

(2) An accused person must be at no disadvantage in obtaining the attendance of his witnesses because, according to the Constitution, he is to have the self-same conditions as those applying to prosecution witnesses for the procuring of witnesses for his trial.

(3) Where there is a failure to inform an accused of his right to call witnesses to testify on his behalf, no matter how overwhelming the case against an accused might be, a court of appeal is disinclined to apply the proviso.

(4) The Court of Appeal regards the matter of informing the accused of his right to call witnesses as one *ex debito justitiae* and any officer of the court present in court should remind the judge, if needs be, of his duty to do so.

(5) The trial judge should make a note in writing of the fact that he has so in-

formed the accused; but even if there is no such note on record or in the State Book or on the original copy of the Indictment, the Court of Appeal would receive affidavit evidence, if it thinks fit, to show that the judge did in fact so inform the accused of his right.

**Appeal allowed. Conviction and sentence set aside.**

**[Editorial Note]:** See The State v. Dennis Pryce (1976) 22 W.I.R. 298, which seeks to explain certain aspects of the present appeal, and 22 W.I.R. 249 for a report of The State v. Cleveland Clarke.

**Cases referred to:**

(1) R. v. Carter (1960) 44 Cr. App. R. 225.

(2) Horace George Andrews (1940) 27 Cr. App. R. 12.

K.A. Juman-Yassin for the appellant.
N. Kissoon, State Counsel, for the State.

**CRANE, J.A.: (delivered the judgment of the court):** The appellant was convicted by a jury at the Demerara Assizes where he was arraigned on a charge of robbery with violence. The case for the prosecution was that he robbed one Sheriff Deen of the sum of $331.00, and at the time of or immediately before or immediately after the robbery he used personal violence to Sheriff Deen.

It was about 8:30 a.m. on April 30th 1973, when P.C. Bernard was on mobile patrol in the city. On hearing shouts of "Thief! Thief!" from the north-western corner of the inter-section of Regent and King Streets, he looked in that direction and saw "an African lad grappling with an East Indian man." After releasing the man, the lad ran west along Regent Street, turned into an alleyway out of which he emerged into Robb Street. He then ran up the steps leading to premises above the Oasis Restaurant at Robb and King Streets. Keeping the fleeing lad continuously within vision, Bernard pursued him up the stairway, but temporarily lost sight of him when he disappeared behind a wall in the building. Checking on the entire building, Bernard and other police officers came to a bedroom door, entry to which had to be gained by wrenching off a hasp and staple. Entering the room the police officers saw the accused lying in bed with his shoes, socks and trousers on; and Bernard observed that he was attired in a 'T' shirt at the time, though not the shirt in which he was dressed when first seen. That shirt was later found in the same bedroom by a search party of policemen.

Immediately upon the accused being brought out of the building, he was identified both by Sheriff Deen, who was then standing on the road outside, as the man

who had just attacked and robbed him of $331.00, and by his wife Azeema with whom he was in company at the time of the attack. What is significant is that in addition to identifying the accused by his facial appearance, both husband and wife also observed that the accused was not dressed in the same shirt as he was at the time of the robbery and they made that fact known to the police.

With such strong evidence of identification of the accused as Sheriff Deen's attacker, coupled with the fact that he was captured in hot pursuit, it seemed very astonishing to us to see that pleas of *alibi* and mistaken identity were ever raised on his behalf at his trial, and moreover, that there was complaint that those pleas were not properly left to the jury for consideration.

Of the six grounds argued before us, we did not consider there was substance in any save the last in which complaint was made that "the learned trial judge failed to inform the appellant, who was unrepresented, that he had a right to call witnesses for his defence." On any view of the matter, it seemed to us that inherent in this ground is the implication that the trial was unfair to the accused.

The record of proceedings has enabled us to verify that throughout the hearing the accused was unrepresented by counsel, and that after the prosecution had rested its case and the accused put to his election, he made a statement from the dock. There is, however, no record that the trial judge gave him to understand that it was his right to call witnesses in his own behalf. At least, the judge did not indicate on the record, as he ought to have done, that any such right was explained or in any way intimated to the accused, and we were given to understand by counsel for the appellant that the latter would have wished to call witnesses had he been aware of his right to do so at the time.

State Counsel, in reply, drew our attention to *Archbold's Criminal Pleading. Evidence and Practice* (38th edn.), p. 311, para. 579, under caption "Where Defendant is Unrepresented," which reads as follows:

> "When a defendant is not defended by counsel, the judge should inform him of his right to cross-examine the witnesses for the prosecution, and, at the close of the prosecution, of his right to give evidence on his own behalf or to make an unsworn statement and to call witnesses and to address the jury. The following form is suggested for giving the defendant the information: 'You have heard the evidence against you. Now is the time for you to make your defence. You may go into the witness-box, and give evidence on oath, and be cross-examined like any other witness and afterwards you may also, if you so choose, address the jury as well or you may make a statement to the jury from where you stand. You are also entitled to call any witness whom you desire to call in support of your defence.' It is essential that a defendant not defended by counsel

> should be asked by the judge whether he wishes to call any witnesses, in his defence, and omission to do so may lead to the quashing of a conviction: R. v. Carter (1960) 44 Cr. App. R. 225."

In seeking to support the maintenance of the conviction and sentence, state counsel urged upon us that it was very unlikely that the above passage would have eluded the trial judge, because from his own experience, trial judges at the appropriate time, invariably read it out to all unrepresented accused persons, although he himself could not vouch whether that had been done in this particular case because he did not prosecute in the case. State Counsel who did so is out of the country, and, as a matter of fact, has ceased to be in the legal service.

The case of Joseph Carter (*supra*), mentioned in the above cited passage, is a case in point. The *ratio* of it is to the effect that whenever a prisoner is unrepresented by counsel at his trial, it is essential he should be asked by the judge whether he wishes to call any witnesses in his defence and a conviction may be quashed where an unrepresented prisoner is not so asked. In Carter's case the accused had intimated there was a witness in court, i.e., his brother-in-law, who might assist his case in testifying that he (the accused) had a receipt for an alleged stolen motor-car which he had bought from a certain man, but neglected to bring it to court. The accused was not asked whether he wanted to call his brother-in-law or whether he had any witness to call at all. The case was (what the Court called) an "almost overwhelming" case against the accused; but what is perhaps particularly informative about the judgment of the Court of Criminal Appeal, is the stricture of the Lord Chief Justice who felt "that the appellant, unrepresented as he was, did not in the result have a fair trial", and the disinclination of the Court to apply the proviso. To the same effect is the earlier case of Horace George Andrews ((1940) 27 Cr. App. R. 12), in which, like Carter's case (*supra*), the conviction and sentence were quashed, although in Andrews (*supra*), the Court did not go the length of saying that the trial was unfair. Perhaps we may regard the stricture of unfairness in Carter's case as applicable only to the particular facts of that case. Yet, it may well be that CHIEF JUSTICE PARKER meant to attach the stigma of an unfair trial to all cases in which an unrepresented accused is not told of his right to have witnesses called on his behalf, even though there are no fundamental rights enacted in England. However that may be, with us, it is perfectly clear that such a stigma must indeed attach to any criminal trial in which an accused is not apprised by the presiding judge of his right to call witnesses on his behalf, because of art. 10 (1) & (2) (e) of our Constitution which enacts:

> "(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence-...

(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as these applying to witnesses called by the prosecution."

Accordingly, it is the constitutional right of every person who is charged with a criminal offence to be afforded such facilities as would enable him to obtain the attendance of witnesses for examination on his behalf before the Court, and he must be at no disadvantage because he is to have the self-same conditions as these applying to prosecution witnesses.

We understand the word "afforded" in art. 10 (2) (e) to be employed in its ordinary dictionary connotation, *viz.*, "to yield the means, able to bear the expense of, furnish, or supply." (See *The New Elizabethan Dictionary)* So, clearly, if the accused is to be "afforded facilities", it is evident the Court is in duty bound to furnish or supply those facilities. And if it is to do so, the Court must first of all inform him of his constitutional entitlement to them as a prelude to obtaining from him all necessary particulars to enable him to partake of the right, on the one hand, and to enable itself to make the facilities available to the accused, on the other hand. This, we feel, is the clear duty which art. 10 (2) (e) imposes on a presiding judge and "no attempt to whittle it down will be entertained".

It is the habit of careful and prudent judges to make enquiries of every unrepresented accused person with respect to the names and addresses of his witnesses immediately after arraignment and before the evidence is recorded, so that *subpoenas* could be issued by the registrar to those witnesses in good time. There is no rule laid down for determining at what stage of the trial such enquiries should be made. Experience has shown, however, that to make them just after arraignment, i.e., before the first state witness testifies, saves time and expense at the trial, because if delayed until the time comes for the accused to make his defence, there is the danger (which is not unknown) that an unco-operative and troublesome prisoner may give a fictitious list of witnesses, send the police on a "wild goose chase", and so cause his trial to be unduly protracted.

Now, it is important to observe from the above authorities that no matter how overwhelming the case against an accused might be, a court of appeal is disinclined to save the situation by the application of the proviso. In its wisdom the Court takes the view that the principle involved is so fundamental that it is greater than the case and invariably allows the appeal. The important point then is what precautions ought to be taken to avoid, as far as possible, a repetition of the judicial error of non-direction on so important a matter. We think the matter is

one *ex debito justitiae.*

So, in a case where a trial judge has obviously forgotten to apprise the accused of the fundamental right, then it becomes the duty of every law officer present in court, be he prosecuting or defence counsel, legal practitioner at the Bar table, whether or not concerned in the proceedings, or court registrar whose duty it is to keep the "State Book" in which he has the duty to enter "a memorandum of the substance of all proceedings at every trial," to remind the presiding judge of this vital function. (See s. 133 (1) of the *Criminal Law (Procedure) Act, Cap. 10:01).* Not only the judge, but everybody as *amicus curiae* should assist the cause of justice, and if the judge is so reminded, we would expect to see a note of that fact recorded in the proceedings. But even in the event of there being no such note on the record or in the registrar's "State Book." or on the original copy of the indictment where a note is also made, there ought to be no dearth of affidavit evidence, if the need for such arises in the future, to show us that the judge did in fact inform the accused of his right to call witnesses on his behalf. It is only by such means that one can ensure that there has been a fair trial and that the cause of justice has been served.

In this case, neither the "State Book" nor the Original copy of the indictment had been of any help to us, and as the trial had taken place exactly one year ago, we did not think a letter from the trial judge could be of any assistance to us in the matter. We had no option, therefore, but to quash the conviction and sentence and discharge the accused.

**Appeal allowed. Conviction and sentence set aside.**

**Small v. Melville**

**ELVIRA SMALL**
**Appellant**

**v.**

**WINIFRED MELVILLE**
**Respondent**

[Court of Appeal (Haynes, C., Persaud and Crane, JJ. A.), October 24, 28, 1975; May 27, 1976.

*Probate-Testator without next-of-kin-Identity of testator-Onus of proof of Testator leaves earlier and later wills-Dispute between beneficiaries of each*

**Small v. Melville**

*will-Compromise agreement that probate of earlier will be applied for instead of later-Validity of such probate-Whether such probate should be set aside in the particular circumstances in favour of probate of later will.*

*Compromise agreement-Power of executor to compromise claims-Trustee Act [U.K.], s. 21-Civil Law Act, Cap. 6:01, s. 11.*

During his lifetime Somwaru, a testator, made two wills-the first in May, 1963 and the second in February, 1966. In the first, he left the entirety of his estate consisting of transported property at lot 85, Vreed-en-Hoop, W.C.D., in equal shares to the appellant, Elvira Small, and one Marie Moulder (since deceased), mother of the substituted respondent. Under that will, Small was appointed sole executrix but under the second she was excluded altogether, when Marie Moulder was made universal beneficiary and appointed sole executrix in her stead.

On Somwaru's death in 1967, apparently without next-of-kin, Small informed Moulder she was in possession of the first will and suggested they should both share the expenses of probating it. Small however received a shock when Moulder told her she was in possession of a later will under which Somwaru left her the whole property and appointed her sole executrix instead. As one may expect there was argument between Small and Moulder. Later on, it was agreed by way of compromise, and only when Small had threatened to take legal proceedings, that both would abide by the terms of the first will, probate of which Small would extract as the testator had originally intended, and that the property and expenses would be shared equally between them. When, however, Small obtained probate as agreed. Moulder reneged on the compromise by refusing to execute the necessary documents, although in pursuance thereof, she had previously by way of part performance, sworn to an affidavit of severance of the joint tenancy preparatory to obtaining transport of the property in their joint names.

Later in the High Court, Moulder sought to propound the second will in solemn form as Somwaru's last will and testament and to have probate of the first where under Small was appointed executrix, revoked. In the same action, Small counter-claimed for a declaration that probate of the first will was valid and effectual for all purposes.

Two questions arose for the consideration of the trial judge in deciding whether he should grant probate in solemn form to Moulder and revoke the common form grant to Small.

(i) Whether there was sufficient proof before him that the testator who made the first will also made the second.

(ii) Whether there was proof that there was compromise of differences between

the parties.

On point (i), the judge found there was no onus on the respondent to prove Somwaru was one and the same individual who executed both wills; and (ii) it was not proved on a balance of probabilities that the parties had compromised their differences.

On appeal.

**HELD** (*per* HAYNES, C., dissenting): (1) That the onus was cast on the respondent/plaintiff to identify the deceased as the person who made the second will and the trial judge was wrong to hold the contrary.

(2) That the arrangement proved can rightly be called a compromise and the trial judge was wrong in holding it was not, but as no person's consent can make a will no will, he was right to find for probate of the second will in the respondent's favour and in revoking the common form grant to the appellant.

(3) That at least one of the following three courses ought to have been advised and acted on, *viz.*, (a) the appellant as executrix of the first will could have proved her will in solemn form citing the respondent as executrix under the second will, "to see the first will probate"; (b) the appellant could have cited the respondent calling upon her to propound the later will with a caveat that should she fail to do so, the court would be asked to grant probate of the earlier will; (c) the respondent could have applied for probate of the second will with the appellant opposing the grant. During the hearing, by agreement, the parties could have informed the trial judge that a compromise was reached and asked that the terms of it be recorded as an order of court, which would include sharing Lot 85 equally. None of these courses was taken, so the appeal must fail.

(4) *(per* CRANE and PERSAUD, JJ.A.): There was no onus on the respondent to prove Somwaru was one and the same individual who executed both wills.

(5) The trial judge was wrong in finding there was no proof that there was a compromise of differences between the parties.

(6) Both parties having agreed to compromise their dispute, and having actually gone to the length of part performing it when they jointly swore to an affidavit "to accept title severally and in common and not jointly", they had thereby concluded an oral compromise that was valid and irrevocable.

(7) That both parties having been *bona fide* in their efforts to put an end to their differences, even though they may have been mistaken in law as to the effect of a later will over an earlier, yet, their agreement ought to stand.

(8) That once a court is satisfied there is a *bona fide* compromise which affects parties *sui juris* and nobody else in the respect that there are no minority interests involved, and no fraud on any person, then the court ought to respect and give effect to their wishes.

(9) In the interests of justice the wishes of parties to a valid compromise should not be thwarted by insistence on procedural requirements to protect third parties against fraud when there are no such third parties in the instant case.

In the Good of Watts, (1837) 163 E.R. 208, distinguished.

**Appeal allowed. Declaration granted. Decision of the trial Court set aside.**

**Editorial Note:** This case is also reported at (1976) 24 W.I.R. 25.

**Cases referred to:**

(1) Murphy v. Mason and Fennell (1753) 161 E.R. 129; 1 Lee. 349
(2) Whitelocke v. Francis Musgrove (1833) 149 E.R. 502; 1 Cr. & M. 511; 3 Tyr. 541; 2 L.J. Ex. 210.
(3) Comptroller of Customs v. Western Electric Co., Ltd. [1966] A.C. 367; [1965]3 W.L.R. 1229; [1965] 3 All E.R. 599.
(4) Bulley v. Bulley (1874) 9 Ch. App. 739; 44 L.J. Ch. 79; 30 L.T. 848; 22 W.R. 779; L.JJ.
(5) Trotman v. McLean [1948] L.R.B.G. 202.
(6) Yuill v. Yuill [1945] 1 All E.R. 183; [1945] P. 15; 114 L.J. (P) 1; 172 L.T. 114; 61 T.L.R. 176; 89 Sol. Jo. 106; 2nd Digest Supp.
(7) Powell v. Stratham Manor Nursing Home [1935] A.C. 243; [1935] All E.R. Rep. 58; 104 L.J.K.B. 304; 152 L.T. 563; 51 T.L.R. 289; 79 Sol. Jo. 179.
(8) Watt v. Thomas [1947] A.C. 484; [1947] 1 All E.R. 582; [1948] L.J.R. 515; [1947] S.C. (H.L.) 45; [1948] S.L.T.; 176 L.T. 498; 63 T.L.R. 314.
(9) Onassis v. Vergottis [1968] 2 Lloyd's Rep. 403; 118 N.L.J. 1052. H.L.
(10) Breen v. Amalgamated Engineering Union [1971] 2 Q.B. 175; [1971] 2 W.L.R. 742; 115 Sol. Jo. 203; 10 K.I.R. 120.
(11) In re F. (Wardship: Appeal) [1976] 2 W.L.R. 189; [1976] 1 All E.R. 417; 120 Sol. Jo. 46.
(12) In re Houghton, Hawley v. Blake [1904] 1 Ch. 622; 73 L.J. Ch. 317; 90 L.T. 252; 52 W.R. 505; 20 T.L.R. 276; 48 Sol. 20. 312.
(13) ReGillis [1936]2 D.L.R. 658.
(14) Trigge v. Lavallee (1862) 15 Moore P.C. 270; 1 New Rep. 454; 8 L.T. 154; 9 Jur. N.S. 261; 11 W.R. 404; 15 E.R. 497, P.C.
(15) Cood v. Cood (1863) 33 Beav. 314; 3 New Rep. 275; 33 L.J. Ch. 273; 9

Jur. N.S. 1335; 55 E.R. 388.

(16) Callisher v. Bischoffsheim (1870) L.R. 5 Q.B. 449; 39 L.J.Q.B. 181; 18 W.R. 1137.

(17) Re. Muirhead (deceased) [1971] 2 W.L.R. 369; [1971] 1 All E.R. 609; [1971] P. 263; 115 Sol. Jo. 128.

(18) Tiger v. Barclays Bank, Ltd. [1975] 2 All E.R. 262; [1951] 2 K.B. 556; [1951] 2 T.L.R. 102; 95 Sol. Jo. 400.

(19) In the Goods of George Watts (1837) 163 E.R. 208; 1 Curt. 594.

(20) Morton v. Thorpe and Others (1863) 164 E.R. 1242; 3 Sw. & Tr. 179; 32 L.J.P.M. & A. 174; 9 L.T. 300; 27 J.P. 679; 23 Digest (Repl.) 183, *2117.*

(21) In the Goods of William Benbow (1862) 164 E.R. 1086; 2 Sw. & Tr. 488;31 L.J.P.M. & A. 171; 6 L.T. 659; 26 J.P. 663; 23 Digest (Repl.) 114, *1151.*

(22) In Palmer and Brown v. Dent (and others cited to see proceedings) (1850) 2 Rob Eccl. 284; 163 E.R. 1319; 23 Digest (Repl.) 113, *1136.*

(23) Quick, Quick v. Quick and Another [1899] P. 187; 68 L.J.P. 64; 80 L.T. 808; 23 Digest (Repl.) 183, *2119.*

(24) In the Goods of George Dennis [1899] P. 191; 68 L.J.P. 67; 23 Digest (Repl.) 184, *2121.*

(25) In the Goods of Bootle-Heaton v. Whalley and Others (1901) 17T.L.R. 476; 84 L.T. 570; 23 Digest (Repl.) 183, *2120.*

(26) Re Robinson (1918) 40 D.L.R. 664.

(27) Gascoyne v. Chandler (1755) 161 E.R. 327; 2 Lee. 241.

(28) Hoffman v. Norris and White (1805) 161 E.R. 1129.

(29) Newell and King v. Weeks (1814) 161 E.R. 1126; 2 Phillim 224.

(30) Bell v. Armstrong (1822) 162 E.R. 129; 1 Add. 365.

(31) Merryweather v. Turner (1844) 163 E.R. 907; 3 Curt. 802; 8 Jur. 295.

(32) Williams v. Evans [1911] P. 175.

(33) Goddard v. Smith (1872) L.R. 3 P.D. 7; 42 L.J.P. & M. 14; 28 L.T. 141; 37 J.P. 199; 21 W.R. 247.

(34) Pickard v. Sears (1837) 2 New. & P.K.B. 488; 6 A. & E. 469; 112 E.R. 179.

(35) In the Goods of Boyle (1864) 164 E.R. 1340; 3 Sw. & Tr. 426; 4 New Rep. 120; 33 L.J.P.M. & A. 109; 10 L.T. 541; 28 J.P. 424.

(36) In the Goods of Robert Morant (1874) 3 L.R.P.D. 151; 43 L.J.P. & M. 16; 30 L.T. 74; 35 J.P. 168; 22 W.R. 267.

(37) Melville v. Ancketill (1909) 25 T.L.R. 655. C.A.

(38) Greenshields v. Crawford (1841) 9 Exch. 314; 1 Dowl. N.S. 439; 11 L.J. Ex. 372; 6 Jur. 303; 152 E.R. 133.

(39) Jones v. Jones (1841) 9 M. & W. 75; 11 L.J. Ex. 265; 152 E.R. 33.

(40) In the Goods of Bryce (1839) 2 Curt. 325; 163 E.R. 427.

(41) Re Finn (1935) 52 T.L.R. 153; 105 L.J.P. 36; 154 L.T. 242; 80 Sol. Jo. 56; Digest Supp.

(42) Mercantile Investment and General Trust Co. v. International Co. of Mexico (1891) 68 L.T. 603 n.; 7 T.L.R. 616, C.A.; [1893] 1 Ch. 484 n.
(43) Singh v. Mortimer (1966) 10 W.I.R. 65
(44) Cook v. Wright (1861) 1 B. & S. 559; 30 L.J.Q.B. 321; 4 L.T. 704; 7 Jur. N.S. 1121; 121 E.R. 822.
(45) Crosby v. Norton (1867) 36 L.J. (P. &.M.) 55; 16 L.T. 153; 31 J.P. 407; 15 W.R. 775.
(46) In the Goods of Morgan (1847) 5 Notes of Cases, 115.
(47) Anon. (1772) Lofft. 81; 98 E.R. 543.
(48) Smith v. Milles (1786) 99 E.R. 1205; 1 Term Rep. 475.
(49) Saunders v. Vautier [1835-42] All E.R. Rep. 58; [1841] Cr. & Ph. 240; 4 Beav. 115; 10 L.J.Ch. 354; 41 E.R. 482. L.C.
(50) Attwood v.- (1826) 1 Russ. 353; 38 E.R. 137.
(51) Lucy's Case (1853) 4 De.G.M.&G. 356; 22 L.J. Ch. 732; 17 Jur. 1143; 1 W.R. 440; 43 E.R. 545, L.JJ.
(52) Cann v. Cann (1721) 1 P. Wms. 723; 24 E.R. 586, L.C.
(53) Dixon v. Evans (1872) L.R. 5 H.L. 606; 42 L.J.Ch. 139, H.L.

Appeal from the High Court from a grant of probate in solemn form.

Doodnauth Singh for the appellant.
Ashton Chase for the respondent.

**HAYNES, C:** Somwaru, an elderly male East Indian, died on December 17, 1967, apparently without kith or kin. He left behind him-as we all must do-all his worldly goods; a lot of land (lot 85, Vreed-en-Hoop, West Coast, Demerara) with a building on it. This estate was valued at $12,500 for estate duty purposes. But he left behind him also, the trial judge found, two testamentary documents -one dated May 29, the other dated February 16, 1966-and two women, Elvira Small and Marie Moulder, who had cared for him apparently faithfully in his lonely years. The earlier will left lot 85 to them equally; appointing Small as executrix; the later one devised it all to Moulder and nominated her the executrix. Each was signed by a mark.

Small took probate in common form of the 1963 will on January 15, 1968. In September, 1969, Moulder cited her to bring in this grant and filed an action for its revocation and to propound the 1966 will. Small opposed these proceedings. She said, *firstly*, that the 1963 will was the last one; *secondly*, that the 1966 will was not a good one because it was made through undue influence or fraud on the part of Moulder; *thirdly*, that Moulder's action was barred by her delay and her acquiescence in Small obtaining probate in common form; and *fourthly*, that even if the 1966 will was a good one, Moulder could not lawfully prove it, because she (Moulder) had agreed with Small that Small would probate the 1963 will at their joint expense; that they would share lot 85 equally; and in fact at her own expense

(of $974.30) she had obtained such probate. She asked the court (1) to declare her grant in common form valid; (2) to declare the oral agreement a legal and binding compromise; (3) to declare that on account of it Moulder could not competently probate the 1966 will; (4) to restrain Moulder from dealing with lot 85; and (5) to order Moulder to pay her one-half of these expenses. Moulder denied every allegation and said that even if there was this compromise, the court could not enforce it. Marie Moulder died on March 16, 1971. Her daughter, Winifred Melville, was substituted as defendant, and the action came up for hearing before Mr. Justice Mitchell in September, 1973. The learned judge granted probate of the 1966 will in solemn form. Small appealed to this court. Her counsel made two points. The first submission was that there was no proof at all that it was the deceased who made the 1966 will; the second was that, if there was, the evidence proved a binding legal compromise which estopped Moulder from probating it. I proceed to consider these submissions separately.

First, as to the question of identity, I refer at once to Murphy v. Mason and Fennell ((1753) 161 E.R. 192). This was a motion in the Prerogative Court for the revocation of a probate in common form, and for administration in intestacy. The deceased, William Murphy, died leaving a will dated in 1744. Mason, the executor named in it, took out common form probate of this will. Then in 1751, a sister of the deceased, Catherine Murphy, cited him to bring it in and prove the will in solemn form. At the hearing of the cause all the witnesses to the execution of the will were proved to be strangers to the deceased and could not identify him as the person who made it. Sir George Lee revoked the probate and decreed administration. He said; "I pronounce against the will for the want of proof of the identity of the testator."

And in Whitelocke v. Francis Musgrove ((1833) 149 E.R. 502) an authority the respondent relied on, the plaintiff sued on a promissory note. It appeared on its face to be signed with "the mark of Francis Musgrove", and this mark was attested by a witness who, since then, had emigrated to the United States of America. One Hardie was the sole witness. He proved the attestor's handwriting, but did not identify the defendant as the person who signed the note as a marksman. BAYLEY, B., directed the jury to find for the defendant for lack of proof of identity. The Court of Exchequer Pleas (BAYLEY B., VAUGHAN, B., BOLLAND, B., and GURNEY, B.) discharged a rule nisi to show cause against a verdict for the plaintiff. In the leading judgment, BAYLEY B., said (1833), 149 E.R. at p.506):

> "There was a perfect blank in the evidence as to any proof to identify the defendant with the party signing the note; and the question therefore is, whether the naked evidence of the handwriting of the subscribing witness is sufficient to fix a defendant in such case? There are many cases in which the instrument gives some description, as by stating the resi-

> dence of the party, so as to give some ground for presuming that a party proved to reside in the same place is the party who has signed the note; and in many instances you have the handwriting of the party, by which he may be identified as the party having signed; but here the case for the plaintiff rests on the mere proof of the handwriting of the subscribing witness." (Underlining mine.)

And (still at p. 506) he gave this illustration, and went on to say:

> "Suppose an attestation of an instrument, which describes the person executing it as A.B. of C., in the county of York. Then the utmost effect you can give to the attestation is, to consider it as establishing that A.B. of C., in the county of York, executed the instrument. But you must go a step further, and shew that the defendant is A. B. of C., in the county of York, or in some manner establish that he is the person by whom the note appears to be executed. Now what does the subscribing witness in this particular case attest? Why, that this instrument was duly executed by a person of the name of Francis Musgrove. There may be many persons of that name and, if you do not show that the defendant is the Francis Musgrove who has executed the instrument, you fail in making out an essential part of what you are bound to prove. It is not sufficient for the subscribing witness merely to prove that he saw the instrument executed. Suppose that a subscribing witness, when called into the box, were to say merely, I saw the note executed, will that suffice? He would be asked, by whom did you see it executed? If he were to say, I saw it executed by a person who was called into the room, but I do not know whether that person was the defendant, the plaintiff would be nonsuited. (See Parkins v. Hawkshaw, 2 Stark, Rep. 239.) Why? because it is an essential part of the issue, which you are bound to prove, that the instrument was executed by the defendant in the suit. It seems to me, therefore, on principle, that you must give some evidence of the identity of the defendant with the party who has signed the instrument... I quite agree that it is not necessary to prove the handwriting of the defendant; but, if you do not prove that you must prove something else to connect the party sued with the instrument." (Underlining mine)

On authority, on principle, and on common sense, then, the respondent at the trial had to establish that the deceased made the will sought to be propounded. He could not write his name or a signature. He had signed the 1963 will, whose validity as a will of the deceased was never disputed, as a marksman. The 1966 will was prepared by David Roopram, a departmental clerk in the immigration section of the General Registration Office in Georgetown, and he and another clerk, Sugrim Singh, witnessed it, Roopram did not know the man who made it so could not identify him with the deceased, and Singh gave no evidence of iden-

tity. This will also was signed by a marksman, Melville (hereinafter referred to as "the respondent") was not present at its execution and could not identify the marksman, Moulder was dead. In these circumstances, identity had to be proved either by effective admission on the pleadings or circumstantially. Counsel for Small (hereinafter referred to as "the appellant") contended it was so admitted on the pleadings and was never in issue; counsel for the respondent said it was in issue, and was never admitted on the pleadings. This makes it necessary to scan them. Paragraphs 1 to 6, 12 and 13 of the Statement of Claim read:

> "1. The aforesaid SOMWARU, late of 345 North East La Penitence, East Demerara, who died on the 17th day of December, 1967, made and duly executed his true last will on the 16th day of February, 1966, whereof he appointed the plaintiff sole executrix.
>
> 2. On the 15th day of January, 1968, probate of an alleged will of the said deceased bearing date the 29th day of May, 1963, was granted to the defendant, as sole executrix therein named, out of the Registry of the High Court of the Supreme Court of Judicature at Georgetown, Demerara and numbered 8 of 1968.
>
> 3. The said will dated the 29th day of May, 1963, was not the last will and testament of the said deceased and was revoked by the said will dated the 16th February, 1966."

The relevant averments of the defence in answer are found in the following paragraphs:

> "1. Save as in hereinafter expressly admitted the defendant denies each and every allegation in each and every paragraph of the Statement of Claim as fully as if the same were herein set out at length verbatim and traversed seriatim.
>
> 2. The defendant admits that SOMWARU died on the 17th day of December, 1967, as is alleged in paragraph 1 of the Statement of Claim.
>
> 3. The defendant admits the facts in paragraph 2 of the Statement of Claim but says that the will whereof probate was granted to the defendant was the true last will and testament of the deceased.
>
> 4. Save as aforesaid the defendant denies each and every allegation of fact in paragraphs 1, 3, 4 of the Statement of Claim.The defendant will contend that the alleged last will and testament of the deceased referred to in paragraph 2 of the Statement of Claim was

> invalid by reason that the execution thereof was procured by the undue influence of the plaintiff over the deceased and/or by fraud.
>
> 6. Assuming, but not admitting, that the said alleged last will and testament referred to in paragraph 1 of the Statement of Claim was duly executed (which, however, is denied), the defendant will contend that, having regard to the terms of a compromise arrived at between the plaintiff and the defendant, it was not competent for the plaintiff to seek to obtain probate thereof and/or to seek to administer the estate of the deceased otherwise than in accordance with the provisions of the will of the deceased whereof the defendant has obtained probate, so far as possible.
>
> 12. The deceased died on the 17th day of December, 1967. The defendant applied for probate of his last will and testament on the 9th day of January, 1968, and probate thereof was granted to her on the 15th day of January, 1968.
>
> 13. Prior to her making her said application for probate the defendant informed the plaintiff of her intention to make the said application. The plaintiff informed the defendant that the deceased had made a subsequent will in which the plaintiff was named sole executrix and sole beneficiary. The defendant then told the plaintiff that she would take legal proceedings against the plaintiff or any other person claiming to represent the estate of the deceased or to be entitled thereto, to have the said purported will set aside on the ground that it was obtained by undue influence exercised by the plaintiff, over the deceased and/or by fraud."

On this issue, the learned trial judge made these findings:

> "I am satisfied, too, that it (the will) was made by a man who called himself Somwaru.
>
> Having regard to the pleadings it is not in issue as to whether it was the one and the said Somwaru who executed both wills. Rather the defence is based on an alleged compromise or agreement between the plaintiff and the defendant with regard to their respective shares in the estate of the said Somwaru as reflected in the two wills which he executed. I am thus of the view that as reflected in the pleadings the plaintiff did not have to specifically prove that it was the one and the said Somwaru who executed both wills."

And so, on this aspect he upheld the submission of the appellant. With all due respect to the learned trial judge and to those who think otherwise, I disagree with this conclusion. I would say it is the result of a misinterpretation of the

relevant paragraphs of the defence. Reading the defence as a whole, I, would interpret it to be making no admission at all that the deceased put his mark to the 1966 testamentary paper, but, to the pleading-(i) a denial that he duly executed that will; and (ii) that if he did, undue influence or fraud induced him to devise all of lot 85 to Moulder. I would hold, therefore, that when the evidence opened, the onus was cast on the respondent (then plaintiff) to identify the deceased as the person who went to the General Registration Office on February 16, 1966, and made that will. But I would not rest my judgment on this part of the case on this viewpoint only. Admittedly, para. 5 or para. 13 in isolation impliedly admits that the deceased made the disputed will. But what would be the probative value of such an admission? If an admission of a fact is to have the effect that the party, on whom the onus of proof of it rests, need not lead evidence of it, but can rely on the admission as proving the fact in the case, the admission must have that probative value of legally establishing that fact. If, in the circumstances of a case, it lacks that value, then the onus of proof is not discharged, and the fact is not proved in the case. Let me illustrate this principle by reference to the Privy Council case of Comptroller of Customs v. Western Electric Co. Ltd. ([1965] 3 W.L.R. 1229).

In that case, the company had imported into Fiji from New Zealand, a quantity of miscellaneous articles for their business. If their country of origin was either Australia or the United Kingdom, they were liable to a preferential tariff; if it was not, there would be no preferential tariff. At the port of entry, their managing director completed a customs import entry form. He wrote in it that the articles came from the United Kingdom or Australia. He had this information from the shipping invoices. On examination, a customs officer discovered on the articles certain inscriptions indicating Danish or U.S.A. origins. On seeing them, the director "admitted" his entry was false. The company was charged with making a false declaration. The prosecution relied on this "admission" to prove that the entry was false, and called no other evidence on the point. The magistrate convicted. The Supreme Court reversed him. The prosecutor appealed to restore the conviction on the ground of the "admission". The Privy Council dismissed the appeal. LORD HODSON, for the Council said: "Their Lordships are of opinion that the conviction ought not to be allowed to rest on the admission alone. If a man admits something of which he knows nothing it is of no real evidential value. The admission made by the respondents agent was an admission made upon reading the marks and labels on those goods and was of no more evidential value than those marks and labels themselves." ([1965] 3 W.L.R. at p. 1232). His Lordship cited Bulley v. Bulley ((1874) 9 Ch. App. 739), where MELLISH, L.J., treated an admission in a deed as of no evidential value because "it is not an admission of what a man himself knows" ((1874) 9 Ch. App. at p. 751). The Lord Justice (in Bulley v. Bulley (*supra*) did go on to say (*ibid,* at p. 751): "If a man admits that he said something, or that he did something, or admits something which is within his own knowledge, that is, of course, very strong evidence against him, unless he shows why he said so, if it was not true;

but if a person merely admits what happened 120 years ago, he cannot possibly know it of his own knowledge;... and... it is for..." (the court) "to judge, having... all the materials upon which" (he) "made that admission, what the worth of that admission is ..." We have in evidence here all the material on which the implied admission (if any) would have been made.

The respondent was not present when the will of 1966 was made. She knew nothing of it before Somwaru's death. It was from Moulder that she got the first news of it. She was in no position to admit it or deny it. The will had no signature she could identify. She could only believe or disbelieve Moulder. She believed her. But she felt that Moulder used her influence over the deceased improperly to get him to "disinherit" her and she said so. An admission (if any) implied in paras. 5 or 13 had to be conditional on, and rest upon, the truth of Moulder's statement that the deceased made that will. It would be an admission of the sort MELLISH, L.J., spoke about, that is to say, an admission of something she knew nothing about. It would therefore be for the judge to find what evidential value the admission had. MITCHELL, J., did not approach the question in this way. If he had, the right view had to be that it had no evidential value whatever. In the circumstances of this case, to treat this admission as proving the fact, would be, in practical effect to make Moulder's extrajudicial assertion to the appellant evidence in the case, as the appellant had merely accepted Moulder's word that Somwaru made the will.

What was involved here had a twofold aspect: one of onus, the other, of weight. But they overlay each other. A party propounding a will must satisfy the Court of Probate that the deceased made the will. He cannot discharge this onus if he leads no affirmative evidence of identity by saying, "I don't have to do so, the defendant admits the fact and is not raising the issue", where, to his knowledge, such admission is really an acceptance of the propounder's assertion of the fact. In such a case as this, a judge cannot say, "I find identity proved because the opposer believes the deceased made the will and is not disputing it." Here, the admission had no more probative value than the assertion of Moulder herself, and Moulder was not there to testify. Admittedly, there was no direct evidence of identity. So, the critical question is: Was the circumstantial evidence sufficient to prove it? The trial judge held that it was, for despite his erroneous ruling as to onus, he did find that having regard to all the circumstances of the case it was "more probable than not that it was the one and the same Somwaru who executed both wills." The appellant challenged this finding of fact.

Now, if the deceased did not make the disputed will, then there was a criminal conspiracy involving an unknown East Indian man and Marie Moulder herself; for it was Moulder who deposited it in the Deeds Registry before Somwaru's death, and she alone stood to benefit under it. The answer to the pertinent query, *"Cui bono?"* would condemn her. In the defence, however, it was not alleged that

the will was a forgery; and no such suggestion of impersonation was even adumbrated at the hearing or in any submission on appeal. All that counsel submitted was that identity was not proved. In these circumstances the presumption of innocence operates legitimately. It will be an error to think that this presumption exercises its probative influence in the criminal courts only. Where an allegation of crime is made in a civil case, it applies in favour of the party accused; *a fortiori* will it apply where no such allegation is made, but probabilities are under consideration. In the absence of such a case being set up, it would take strong circumstances to justify a finding of criminal conspiracy against Marie Moulder, after her death and behind her back, so to speak, especially with the presumption of innocence in her favour. And if so, then it would be, at least more probable than not, that she received the will for deposit on October 9, 1967, from the deceased Somwaru himself. And, further, we would have to presume that things were rightly done and that the person who went to the General Registration Office and made that will on February 16, 1966, was named Somwaru. (See Whitelocke v. Musgrove, (*supra*) *per* BAYLEY, J., at p. 503). So the question would be: Was it the deceased? In my judgment, having regard to the factors indicated above, and to the additional circumstances that: (i) the deceased was of the same race and bore the same name; (ii) he lived then at the same address given in the will; (iii) he had a cousin of the same name, Marie Moulder; and (iv) she was a person who he might reasonably have felt was entitled to his testamentary bounty, the circumstantial evidence here was sufficient to identity' the deceased as the maker of the 1966 will, I think it, on the evidence, extremely improbable that there was any impersonation of the deceased and that Moulder was a party to any conspiracy to prepare and lodge a false will as that of the deceased.

Counsel for the appellant's next submission related to the alleged "compromise" arrangement between Marie Moulder and the appellant. As I read his judgment, the trial judge held that a compromise was not proved either in fact on the evidence or as binding in law. Counsel submitted that it was in both respects. To succeed, he had to invite this court, first of all, to reverse the finding of fact of the trial judge. This is more often than not an awkward stance for an appellant to take up at a judicial wicket. I do not, in this judgment, propose to discuss in any detail, authorities on this point, for they are well-known. In his judgment, CRANE, J.A., has narrated the facts fully, and I claim the benefit of his account of them. Suffice it to say that the material evidence of the appellant, corroborated as it was by that of Solicitor Valz, was uncontradicted, and, if accepted, was adequate to prove the arrangement alleged. The learned trial judge, however, was not bound for these reasons to accept it as true. He had to watch the demeanour of these two witnesses, calculate the probabilities of their story, one way or the other, and bear in mind the important fact that the only person (Moulder) who could have contradicted them on oath was dead. I believe he rejected the evidence for the defence on this score. The critical question is: In this case, could this court properly hold he was wrong to do so? I think we could, and I think we

should.

First of all, the learned trial judge gave no reasons for his finding. This, by itself, is not, in all cases, a sound judicial reason for disturbing a finding of fact. If for example, this happens where there is conflicting evidence, and it is a pure question of the respective credibility of the witnesses, an appellate court might assume, and rightly so, that from observation of their demeanour he must have believed one side and disbelieved the other. But where, as here, the evidence is not inherently improbable, is uncontradicted, is "all one way", and includes the independent testimony of a reputable solicitor who was acting for both parties to the alleged arrangement, with no proved motive for favouring one side or the other, then the trial judge should give his reasons for the finding of fact he made. The appellate court is entitled to know them if it is to judge whether or not the decision is unreasonable or against the weight of the evidence; the loser is entitled to know why he lost; and such a discredited witness (and maybe the profession also) will be entitled to know why he was disbelieved. In such a case as this, omission to give reason is a factor which, together with others, this court can act on in treating the matter as at large and consequently in making its own finding of fact.

Secondly, it was not at all improbable that Moulder would agree to share lot 85 with the appellant as it was she (the appellant) who had persuaded the deceased to devise a half share of it to Moulder under the 1963 will.

Thirdly, while it was right, as already conceded, to bear in mind the reason why the evidence was uncontradicted, as this was not a case where the assertion of a compromise was made for the first time after Moulder's death, that consideration was entitled to less weight than it would have been entitled to if the question was first raised *post mortem.*

Fourthly, the trial judge must have given insufficient weight to Exhibit "M"-the joint affidavit of the appellant and Moulder, swearing to accept title to lot 85 "severally and in common and not jointly". In para. 7 of her reply to the appellant's defence in relation to this affidavit. Moulder pleaded as follows:

> "7. The plaintiff who is aged 74 years was under the belief that the purpose of the said Affidavit was to enable title of the said property to be passed to Ganess Gibbons of Vreed-en-Hoop, West Bank Demerara, who had purchased same from the deceased under an agreement of sale dated the 9th October, 1967. When the plaintiff appeared in Transport Court shortly thereafter and ascertained that the purpose of the said Affidavit was to enable title of the said property to be vested in the defendant and herself in equal shares she refused to accept transport."

If this explanation was true, then solicitor Valz on the evidence was in a criminal conspiracy with the appellant to defraud Moulder of half of her interest in the property, and to testify falsely on oath in support of a fraudulent claim. Such a conclusion could only rightly be reached judicially, on strict proof, which was lacking here.

In Trotman v. McLean ([1948] L.R.B.G. 202) the trial judge in an action for money had and received, and damages for deceit, rejected as false the evidence of a reputable solicitor who had acted for both plaintiff and defendant in certain discussions intended to lead to the preparation and execution of a written agreement of partnership. Both a draft agreement and the deed contained certain terms not included in the written instructions to the solicitor. The plaintiff had signed both instructions and draft, but refused to sign the final deed, on ground that he had not agreed to those terms. He said he was misled as to the contents of the draft which he had not read. The solicitor, who testified for the defendant, was asked to explain why the disputed terms were not in the instructions. He said they were discussed and decided on after those instructions were signed; it was then late on a Saturday afternoon, and he felt it was unnecessary to amend the instructions. The judge found for the plaintiff. The West Indian Court of Appeal (FURNESS-SMITH, P., COLLYMORE, C.J. [Barbados], and WORLEY, C.J. [B.G.]) allowed the appeal of the defendant on a question of fact. In their joint judgment, the two Chief Justices said ([1948] L.R.B.G. at p. 212):

"It is clear from the judgment that the finding is not based on the demeanour of the witnesses but on inferences drawn mainly from Annisette's evidence. The learned trial judge rejects as unreasonable Annisette's explanation as to why he made no note of the decision regarding the book debts, firstly because it was his duty to do so and secondly because it was important from the financial point of view 'invoking 25 per cent of the firm's assets'... No doubt it was Annisette's duty to make a note of the further decision and he ought to have done so but, before his explanation for not doing so is rejected and his evidence as to the discussion therefore disbelieved, it seems necessary to consider the implications of such a view of the evidence. It must follow, not that Annisette has been mistaken in his evidence, as counsel for the respondent attempted to suggest, but that he did in 1944 deliberately conspire with the appellant to defraud the respondent and has perjured himself in the witness-box. Annisette was acting as solicitor for all the parties and I ask myself what interest had he in assisting the appellant to defraud the plaintiff of the paltry sum of one-third of $52 or $36.99? In my opinion the learned trial judge's finding that there was no discussion and no agreement about book-debts in Annisette's office was against the weight of the evidence and the probabilities of the case and cannot be sustained." (Underlining mine.)

Here, in the present case, it was stressed why was the alleged compromise not reduced into writing by the solicitor, if it had happened? He said. "I did not think of reducing that agreement into writing." Before rejecting this explanation a trial judge should consider the serious implications of the alternative hypothesis.

Fifthly, as LORD GREEN, M.R., said in Yuill v. Yuill, ([1945] 1 All E.R. 183 at p. 190) it is important that "the judge's impression on the subject of demeanour should be carefully checked by a critical examination of the whole of the evidence." If, in this case, the trial judge's distrust of the evidence of the appellant and Solicitor Valz was due to some dissatisfaction with their demeanour, he should have done such checking. If he had done this, he ought to have found that Exhibit "M", together with her delay in propounding this will was more consistent with their evidence than with her allegation in para. 7, even if it could be said to be supported by Moulder's letter (Exhibit "G") treating it as-without accepting that it is-evidence of the truth of the contents thereof, under s. 90 of the *Evidence Act.*

Counsel for the respondent submitted that as this finding that a compromise was not proved on a balance of probabilities was a finding of fact, this court should not disturb it. This submission is always made when a finding of fact is challenged on appeal. But this court has statutory jurisdiction to reverse a Finding of fact and this judicial *vires* is not to be rendered nugatory. Of course, an appellate court must be Very conscious that it has not had the advantage of seeing and hearing the witnesses and it is obviously more difficult to satisfy us in such cases that the court below is wrong. (See, for example, Powell v. Streatham Manor Nursing Home [1935] A.C. 243; Wan v. Thomas [1935] A.C. 243; Onassis v. Vergottis [1968] 2 Lloyd's Rep. 403; Breen v. Amalgated Engineering Union [1971] 2 Q.B. 175. Always the view of the trial judge is entitled to great weight. But as BROWNE, L.J., said in In re F. (Wardship: Appeal) ([1976] 2 W.L.R. 189 at pp. 206, 207) "... even in such cases the trial judge is not to 'be treated as infallible', and his decision can be disturbed if the appellate court is 'satisfied that it is unsound'. (See VISCOUNT SIMON, L.C., in Watt v. Thomas, [1947] A.C. at p. 486.)" In my judgment on the evidence led, the finding that in fact a compromise was not made was unsound, and I would reverse it.

At this stage of this judgment, the position reached is that the deceased executed the wills of 1963 and 1966; that the 1966 will was otherwise duly executed, not under undue influence or through fraud (findings of the court below not attacked on appeal); that Moulder agreed that she would not probate it but would stand by and allow the respondent to take probate in common form of the 1963 will at their joint expense and then divide lot 85 equally between them; that probate of the 1963 will in common form was taken at the appellant's sole expense; then, with title to the property not yet vested in the two parties. Moulder changed her mind and moved to prove the 1966 will in solemn form and for revocation of the com-

mon form grant. At the hearing of this appeal, both counsel concentrated their arguments on two questions: identity, and whether or not the compromise (if in fact there was one) had the elements of a binding arrangement. I agree that the arrangement proved can rightly be called a "compromise". The appellant was alleging that Moulder had unduly influenced the deceased to devise all his property to her and threatened to oppose any proceedings to prove the will of 1966; Moulder was then prepared to accept a half-share under the 1963 will, perhaps partly because she remembered how she came to be a beneficiary under that will and also to avoid at 70 the bother and cost of litigation. Hence, this agreement.

Undoubtedly, an executor under a will has powers to compromise on claims against the estate of his testator. In re Houghton, Hawley v. Blake ([1904] 1 Ch. 622) is a good example of its exercise. There, the deceased had appointed his wife Esther and her nephew Blake, co-executors of his will. On his death, she took possession of a number of securities from the testator's iron safe, claiming that the money they represented (£1,180) was hers. The gross estate amounted to only £2,208; she had documentary proof for £820, but her claim to the balance rested on her mere word. After consulting the solicitors for the estate, Blake paid her claim in full. The residuary legatees challenged the validity of this payment. It was upheld in Chancery. KEKEWICH, J., ruled this situation a "compromise", although there was no "give and take". He said: "Esther Houghton had all she claimed, and in that sense there was no compromise. On the other hand, she had possession of the securities; they could only be got from her by discussion, and perhaps litigation. It was entirely for those representing the estate to say whether there should be litigation, with delay and costs, or whether the claim should be acceded to. That is a compromise. Very little was given up, but there was a reason for the transaction, when the possibility of litigation and its consequences are considered. I think, therefore, that, if honest, it was a compromise. About the honesty there is no doubt. No imputation has been made on the honesty of J. S. Blake or Esther Houghton... Very large powers of compromising are given to an executor by the common law; he has also statutory authority, but the statutory-authority really adds nothing to the common law powers..." ([1904] 1 Ch. at p.625). Once he honestly believes the claim is valid, he can settle or compromise it. (See Re Gillis. [1936] 2 D.L.R. 658.)

This is a line of authority relating to claims against the estate of a testator, which would have been enforceable against him in his lifetime, including money claims and claims to property in his name or possession. He could have compromised on them in his lifetime with or without the intervention of the courts. Accordingly, his executor standing in his shoes, could do the same without liability, provided he acts prudently and honestly. The claim here is different in nature, and I hope counsel on both sides will forgive me for saying that in my judgment, regrettably, neither of them addressed their minds sufficiently-if at all-to or cited any authority on the crucial issue for determination at this point, which was not whether

there was legal consideration for the compromise so as to complete the elements of and make it in law a binding contract, but whether be it a legal contract or not a Court of Probate would allow such an extrajudicial arrangement to stand in the way of the grant of probate of a testamentary document proved before it to be the true valid last will and testament of a testator? Admittedly, a contractual arrangement or maybe even a non-contractual one following and on reliance upon which a party suffers legal detriment might well, in fit cases, estop the other party from acting in a manner contrary thereto. But in a case such as this, there are considerations indigenous to the subject-matter concerned, that is to say, certain principles of probate law to be adhered to and regarded. In my judgment, the answer to the legal problems of this compromise is to be found in the application of one or more of these principles.

It cannot be answered rightly by reliance on authorities relating to matters to which the rules and practice of the Ecclesiastical Courts and, later, of the Court of Probate, did and do not respectively apply. Cases such as Triage v. Lavallee ((1862) 15 Moore PC. 270), Cood v. Cood ((1863) 33 Beav. 314), Callisher v. Bischoffsheim ((1870) L.R. 5, Q.B. 449) and In Re Houghton (*supra*) are not determinative of this question here. A research of judgments in probate causes shows that in that jurisdiction in this class of issue these cardinal rules prevail: (i) it is the primary duty of the court to give effect to the final testamentary wishes of a deceased person, although compromise approved by the court might in effect modify or alter them; (ii) no person can, by his consent make a will no will; (iii) the Court of Probate may grant probate of an earlier will in solemn form where all parties legally interested in the later will, that is, the executor and legatees, are cited to prove it and fail to do so; and (iv) in the case of a grant in common form persons interested under the will or a later one are not barred from challenging the validity of the former or setting up the later will only because they did not oppose the grant or consented to it. A careful consideration of the authorities establishing and applying these rules will point the way clearly to the right answer in this case. I proceed to do this relating to these rules *seriatim.*

(i) The primary duty of the Court of Probate. In the recent case of Re Muir (deceased) ([1971] 1 All E.R. 609) a testator made a will (admittedly valid) in 1951 leaving his entire estate to his wife and appointed her sole executrix. Later, in 1967, he made a codicil to it, disinheriting her of a half, which he gave to a Mrs. Archer. Naturally, the wife was incensed. So she filed a motion for a grant of probate of the will without the codicil. CAIRNS, J. (as he then was) rightly rejected it. His Lordship in his judgment discussed the duty of the court, and touched on the question of a compromise. He said (*ibid. at* p. 611):

> "I approach the matter with the conviction that it is the duty of a court of probate to give effect if it can to the wishes of the testator as expressed in testamentary documents. Sometimes it is impossible to discover the true

> intention of the testator because there may be doubts about his testamentary capacity or about whether he knew and understood the contents of some document propounded, or there may be doubts about the formalities of execution. In such cases a compromise is often reached and given effect to by the Court. Where certainty cannot be achieved, it is often better that a will which is *prima facie* valid should be admitted to probate than there should be a prolonged investigation into allegations of incapacity or undue influence; and it is sometimes better that a will or codicil should be pronounced against where there are good reasons for suspecting its validity, although by a full enquiry it might be possible to remove those suspicions. It is proper that in either of these cases, terms should be agreed (and, if all parties are in *sui juris*, approved by the court) to take account of the doubts which remain.
>
> It is a different matter when the court is invited to pass over a document which is apparently a valid testamentary document, as to which there is no evidence of invalidity.... I should be reluctant to pass over the codicil in such circumstances, unless I am compelled by authority to do so."

In the present case, once identity was established, the validity of the 1966 will was clear. There was no evidence of undue influence or of fraud and none whatever to raise any sort of doubts as to the testator's testamentary capacity or knowledge or approval of its contents. All there was, was the respondent's oral indignant exclamation of "undue influence", to Moulder, when, she first heard of the later will, based wholly on her belief, undoubtedly honestly held, that the testator would never have denied her a share of his testamentary bounty. And so in this case the court was invited, as CAIRNS, J., was, to pass over the valid 1966 testamentary document because of the compromise arrangement proved on the evidence, as I have found. In Re Muirhead (*supra*), although counsel told the court there was an arrangement between the wife and Mrs. Archer, it was not proved in evidence. But, as will appear when I deal with the case again under another head, this was not the ground on which the motion was dismissed, Re Muirhead (*supra*) recognised the cardinal duty to be performed unless the court is prepared to give effect to a compromise modifying or altering those wishes. (See also Tiger v. Barclays Bank, Ltd. ([1951)] 2 All E.R. at p. 263.) I move to the next rule.

(ii) No person's consent can make a will, no will. In Re Muirhead (deceased) (*supra*) although as indicated there was no proof of the alleged consensual arrangement. CAIRNS, J., considered the point. He cited with obvious approval the judgment in the Prerogative Court of SIR HERBERT JENNER in the old case of In the Goods of George Watts ((1837) 163 E.R. 208); Watts (like Somwaru), died leaving two testamentary documents: a will and a later codicil. Both were executed at a time after he had been found of unsound mind by a jury under an inquisition of lunacy. His widow and all the parties interested under the two docu-

ments (again like those under the two papers here) put heads together and agreed not to probate the will or codicil (just as here, not to probate the 1966 will), but that the widow would apply for letters of administration in intestacy (similar to the arrangement here to apply for probate in common form of the 1963 will). Her counsel relied on the affidavit evidence of consent of all the parties to pass over the will and codicil as of doubtful validity. SIR HERBERT JENNER said he would not entertain the application "in the present shape". His Lordship said (at p. 208):

> "The will in this case is regularly drawn and executed, and is apparently as sane a will as can possibly be; it is a perfect instrument, and there is nothing on the face of it sounding to folly. How can the Court then, on mere *ex parte* affidavits, pronounce against such a paper? The consent of parties interested proves nothing; no person's consent can make a will no will. If such a proceeding were countenanced by the Court it might open a door to fraud. This Court is not precluded from an investigation of the circumstances of the case by the mere verdict of a jury. The deceased might have had lucid intervals, and the will and codicil, as in Cartwright v. Cartwright (1 Phill. 90), may have been executed in one of such intervals, for they both, on the face of them, bear marks of sanity." (Underlining mine.)

This observation that "the consent of parties proves nothing; no person's consent can make a will no will", was cited also with approval by SIR C. CRESSWELL, in Morton v. Thorpe and Others ((1863) 164 E.R. 1242 at p. 1243). I think that In the Goods of Watts (*supra*) is an authority bearing directly on the issue in the present case. It has never been challenged or overruled and is referred to in all leading textbooks as authoritative of the rule that the court will not pass over a testamentary document just because all interested parties agree that this should be done. If consent cannot make a will no will, it cannot make no will a will.

(iii) This brings me to the third rule which related to the question: When will the Court of Probate pass over a later will not proved invalid and grant probate of an earlier one? The rule on this point of probate practice was adumbrated in the case of In the Goods of William Benbow ((1862) 164 E.R. 1086). Benbow died leaving a will and a codicil to it. The executors believed it not to be a true codicil. Accordingly, they moved the court to call upon the legatees under it to propound and prove it, if they thought fit. The court refused. But SIR C. CRESSWELL said ((1862), 164 E.R. at p. 1086): "... the executors may proceed to prove the will in solemn form, and cite the next of kin and the asserted legatees to see that will proved ..." This would have given them an opportunity in court to oppose the grant on the strength of the codicil and if they did not, then they might be bound by the result if probate in solemn form was granted, of the earlier will. This is a course the appellant here could have been advised to take immediately after the compromise was arranged with Moulder, instead of obtaining only probate in

common form of a will duly revoked. In Re Muirhead (*supra*) CAIRNS, J., said (*ibid*, at p. 615): "I am not persuaded that the decision in Benbow is wrong or has ceased to be good law." He held that that course should have been followed in the case before him.

In Palmer and Brown v. Dent (and others cited to see proceedings) ((1850) 2 Rob. Eccl. 284), a case of two wills, the later one on its face betraying insanity, the executors of the earlier will cited the executor and those interested under the later will to propound it, with a notice that if the did not appear, the court would be asked to decree probate of the earlier will. They filed proxies declining to propound their will and consenting to probate in common form of the earlier one. SIR HERBERT JENNER FUST granted probate in common form of the earlier will. It might be contended that here there was *prima facie* evidence of invalidity. But (as is in the present case) there was none in Morton v. Thorpe and Others ((1863) 164 E.R. 1242), where a will was passed over and administration granted. The report reads thus ((1863) 164 E.R. at pp. 1242-1243):

> "Mr. Pritchard moved the Court accordingly.
>
> SIR C. CRESSWELL: Did not SIR HERBERT JENNER, in The Goods of Watts (dec'd), 1 Curt. 594, refuse to set aside a will on the consent of parties interested, observing that no person's consent can make a will no will? You had better consider this point.
>
> Mr. Pritchard renewed the motion. In the case referred to it does not appear that the parties interested under the will had been cited to propound it. In a later case, where that was done, SIR HERBERT JENNER approved the course adopted, and granted probate of a will of earlier date, passing over one of later date; Palmer & Brown v. Dent & Others 2 Rob. 284.
>
> June 30-SIR C. CRESSWELL: I have considered this matter, and think that there is a substantial distinction between citing parties interested to appear and propound a will, and merely bringing in their consents to the will being passed over. As the parties cited in this case have not appeared, I think administration may go to the brother as prayed."

The same practice or rule was followed in Quick, Quick v. Quick and Another ([1899] P. 187), In the Goods of George Dennis ([1899] P. 191); and In the Goods of Bootle-Heaton v. Whalley and Others ((1901) 17 T.L.R. 476) where, in every case in proceedings by a next of kin, on proof of citation to propound a will and of non-appearance of the citees and failure to do so, the court passed over the will and made grants of administration, although there was no evidence of its invalidity before the court. The facts in Dennis are pointed: There, the deceased, aged

84, died a widower and without issue or parent. For years before he had been in infirm health and under care of a nurse. In 1898 he made a will leaving all to her and made her sole executrix. After he died, an agreement of compromise was made between her and members of his family interested in intestacy. Forthwith, they caused a citation to be issued calling upon her to propound it or to show cause why administration should not be issued to one of them. She did not appear. There was no evidence of the invalidity of the will. But as she did not appear to the citation to prove it, the court passed over the will and granted administration. All of these judgments are at first instance. However, in Re Robinson ((1918) 40 D.L.R. 664) the Court of Appeal of Saskatchewan (HAULTAIN, C.J.S., NEWLANDS and ELWOOD, JJ.A.) considered and applied these authorities and concluded and this is the third rule, that where persons interested in a later will have been cited to appear to prove it and failed to appear, the court is at liberty to grant probate or administration with will annexed to any previous will which can be proven, and which has not been revoked, or, in case of their being no such will, to grant administration to the next of kin. Moulder was never cited to prove the 1966 will.

Summarising the position, these authorities lay down that a Court of Probate will set itself up to carry out the wishes of a testator as expressed in his last will and testament, if it is valid; but on certain conditions his last will can be passed over even though not proved invalid. But interested parties cannot by extrajudicial consent decide effectively which of two wills should be probated, or that a revoked will be proved, or that a will was not to be probated at all but instead a grant of administration in intestacy obtained. It is not that parties cannot compromise a dispute as to the validity of a later will or of a sole will resulting in the former instance, in the propounding of the earlier one and in the latter instance in administration *ab intestato.* But it must all be done, so to speak, in the presence, and with the approval, of the court in a cause before it. Otherwise the door is opened to fraud. The interested parties may not, for good or bad reason, put aside a later will, conceal it from the Court of Probate and by this means obtain a grant on an earlier will, or by concealing the existence of one, thereby obtain of administration *ab intestato.* (Underlining mine.)

But the appellants also put their case this way: They say that even if the 1966 will is valid and can be propounded, Moulder herself (and consequently the respondent) was estopped from seeking to do this by reason not only of the compromise but also of her acquiescence and laches. In other words, she forfeited her right to a grant. I adopt the meaning of "acquiescence" set out in Jowitt's *Dictionary of English Law,* (1959 edn.) p. 365, that is:

> "ACQUIESCENCE: assent to an infringement of rights, either express or implied from conduct, by which the right to equitable relief is normally lost. It takes place when a person, with full knowledge of his own

> rights and of any acts which infringe them, has, either at the time of infringement or after infringement, by his conduct led the persons responsible for the infringement to believe that he has waived or abandoned his rights. It is frequently associated with the word laches (meaning slackness in the phrase 'laches and acquiescence')."

And I also adopt his brief description of 'laches' (*op. cit.,* p. 1050), that is:

> "LACHES (Fr. lacher, to loosen): slackness, negligence or unreasonable delay in pursuing a legal remedy whereby the party forfeits the benefit upon the principle, *vigilantibus non dormientibus jura subveniunt."*

Jurisprudentially, "acquiescence" is nothing more than an instance of the law of estoppel by word or conduct and "laches" a delay or neglect in pursuing a remedy of such a nature that it would be inequitable to allow belated relief. We have to ask: How did the Ecclesiastical Courts apply these doctrines in probate causes? This brings us to the last of the four cardinal rules:

(iv) In the case of a grant in common form persons interested under that will or a later one are not barred from challenging the former or setting up the latter just because they did not oppose or even agree to the former. These doctrines of acquiescence and laches were not applied in the Ecclesiastical Court's with the rigour as at common law or in equity. For instance, in Gascoyne v. Chandler ((1755) 161 E.R. 327) a will named no executor; the widow and daughter (the only legatees) renounced their right to administration *cum testamento annexo,* which was granted to the son. After instituting proceedings in Chancery for payment of her legacy, the daughter cited the administrator to bring in the letters of administration and prove the will or show cause why the deceased should not be pronounced intestate. SIR GEORGE LEE (in the Prerogative Court) held she was not estopped from so doing; in Hoffman v. Norris and White (1805) 161 E.R. 1129 (footnote), a beneficiary claimed and received his legacy under a will. In the same court, SIR WILLIAM WYNNE held he could still later challenge the validity of it and put the executor on proof in solemn form; but his suit was dismissed for unreasonable and inexcusable delay; in Newell and King v. Weeks SIR JOHN NICHOLL pointed out that ((1814), 161 E.R. 1126 at p. 1129): "There are many cases in which parties have received legacies, and afterwards contested the validity of the wills under which they received them." In Bell v. Armstrong ((1822) 162 E.R. 129) the deceased left behind him in 1818 a will of 1815 and one of 1817, the validity of later one was contested by the defendant, Armstrong, in a suit which he abandoned. During its pendency Bell, the sole next of kin, expressed his full acquiescence in this will and declined to bring forward the one of 1815 in which he was named an executor and a substituted residuary legatee. Furthermore, after Armstrong obtained probate of the 1817 will in common form in 1820. Bell accepted a legacy of £500 bequeathed to him in it. Then in 1822 he

moved to have the probate removed and his will of 1815 propounded. Armstrong appeared under protest alleging that in these circumstances Bell had forfeited his right to put him on proof of the will. SIR JOHN NICHOLL overruled the protest. His Lordship said, *'inter alia* ((1822), 162 E.R. at p. 132): "The will" (of 1817) "itself has never been propounded-its validity has ever been put in issue by any party... Much is insisted in the protest on the brother's acquiescence in the executor's taking probate of the will. Now... a mere acquiescence (that is, an acquiescence accounted for by no special circumstances) on the part of the next of kin, to an executor's taking probate, is no bar whatever to his calling it in and putting the executor on proof of the will.... Nor, again, is acquiescence a bar, even though accompanied, as in this case, by receipt of a legacy, under the very will sought to be controverted. This has been determined in a great variety of cases." The court ordered the proceedings to continue subject to Bell bringing in his legacy; and in Merryweather v. Turner ((1844 162 E.R. 907) SIR HERBERT JENNER FUST emphasised that in such cases a party was not barred by lapse of time if he could show good cause for his delay.

In Williams v. Evans ([1911] P. 175) a testator died in November, 1908, leaving a will dated September 26, 1906. The plaintiff (an only child by a first marriage) had cause to believe that it was invalid for undue execution, lack of testamentary capacity, undue influence on the part of the widow, Elizabeth Williams, and absence of knowledge and approval of its contents. Nonetheless, he stood by and did not oppose the grant of probate in common form to the widow on January 10, 1909. She died on January 19, 1909, without issue, and the defendants took probate of her will in February. In March, 1909, the plaintiff took out double probate of his father's will. Then he took proceedings for revocation of the probate of the will. The defendant raised a preliminary point that plaintiff was estopped from so doing. HORR1DGE, J., ruled against the objection. His Lordship said ([1911] p. 175 at pp. 178-179):

> "Three things are necessary to constitute estoppel: (1) a representation made; (2) that it is untrue; and (3) that the party to whom it is made has acted on it to his detriment. In any view I do not think this is a case of estoppel. The question really is, is there any rule of the Probate Court which prevents the plaintiff who has taken out probate from taking proceedings to impeach the will?
>
> ... There is no evidence on this case that the parties have distributed the assets among themselves.
>
> The only alteration in the position of the parties that can here be alleged is that during the wife's survivorship of her husband, a period of about seven weeks, no proceedings were taken, and that owing to her death her

> evidence is not now available, but this was not relied upon as being a delay of such a character as amounted to laches.
>
> .....
>
> On the whole I cannot say the facts in this case are such that I am able to hold that there has been such laches that it would be inequitable for the plaintiff to be allowed to contest the validity of this will." (Underlining mine.)

In Goddard v. Smith ((1872) L.R.P.D. 7) the deceased left two wills made in February, 1870, and October 1871, respectively. The defendant applied for administration *cum testamento annexo* of the 1870 will, and the plaintiff, named as executor of the 1871 will, entered a caveat. Before the caveat had been warned, he withdrew it, and told the defendant he did not intend to seek to establish his will. So a grant was made to the defendant in common form. Then, subsequently, he took out a citation calling upon A. to bring in the administration and show cause why it should not be revoked. SIR J. HANNEN said (at p. 10):

"The defendant, by petition, prays that the suit may be dismissed and the plaintiff condemned in costs on the ground that the plaintiff, with full knowledge of the existence of the alleged will of the 2nd of October, 1871, withdrew a caveat which he had entered, and permitted the defendant to obtain a grant of administration with a will, dated the 20th February, 1870, annexed. The caveat was subducted before an appearance or warning. I am of opinion that, on these facts, the prayer of the petition cannot be granted. It was argued that the plaintiff was estopped from maintaining the suit, on the well-known principle, for which Pickard v. Sears (6 A. & E. 469), is the leading authority, that where one by his words or conduct wilfully causes another to believe in the existence of a certain state things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. This principle, however, appears to me inapplicable to the present case. The plaintiff did not by withdrawing the caveat cause the defendant to believe in any state of facts, or to alter his position; he merely left him free to pursue his own course unopposed, namely, to take a grant in common form if he so pleased.... The caveat is a mere caution to the Court;... and by the previous subduction the caveator only leaves the Court free to act without notice to him. Several cases were referred to as showing that under certain circumstances the Court will restrain proceedings after acquiescence in the previously existing state of things. The case of Hoffman v. Norris (2 Phillim. 230, n.) offers the nearest analogy, but there was an acquiescence of seven years, and the party held to be concluded by his conduct had acted and accepted advantages on the as-

> sumption that that state of things did not exist which he afterwards sought to establish."

In the light of such judicial reasoning, I do not think this is a case of estoppel at all. That principle appears inapplicable to the facts. Admittedly, there was acquiescence in the course of obtaining probate of the 1963 will in common form. Nonetheless, the principle of Pickard v. Sears (*supra*) could not operate, firstly, because in such a case as this the crucial question must be: Is there any rule of the Probate Court which prevents the executor of the last will of the deceased from taking proceedings to propound it? To which the answer on the authorities is that there is not. If, following the compromise, Moulder had effectively renounced probate, then a rule of the Probate Court would have barred her right to prove the will. (See In the Goods of Boyle (1864) 164 E.R. 1340; In the Goods of Robert Morant ((1874) 3 L.R.P.D. 151) and Melville v. Ancketill, ((1909) 25 T.L.R. 655.) But in *Williams on Wills* (3rd edn.) (1967), p. 129 the learned author said, correctly:

> "RENUNCIATION. An executor is quite free to choose whether or not he will accept the office, but, if he decides not to do so, he should renounce the office in writing... A renunciation need not be under seal but it is not effective unless it is filed in the proper court. Until it is filed, it may be withdrawn only by leave of the court." (Underlining mine.)

So Moulder's mere unilateral act of deliberately refraining from acting as executor on to the date of these proceedings, even if in pursuance of the compromise is not in law an effective renunciation; and, secondly, the conditions for estoppel did not exist for these reasons: (i) there was no representation of any existing fact, as Moulder only made a promise not to do an act (take probate of the last will) *in futuro;* (ii) whether or not the representation made was one of the existing fact, the evidence did not prove it to be untrue when made, as it was equally, if not more consistent, with a subsequent change of mind; (iii) in any event, the appellant did not alter her position detrimentally as a result of it. It was her fixed intention in any event following the death of Somwaru, to probate her will even at her own expense and oppose Moulder's so that Moulder's consent to that course merely left her free, as was said by SIR J. HANNEN in Goddard v Smith, (*supra*) to pursue her own course unopposed, and do what she would have done if there had been a refusal to consent and no representation. An "alteration" of position imports acting in a way in which the party pleading the estoppel would not have acted but for the representation. Finally, Moulder received, or accepted no benefit whatsoever as flowing from her acquiescence. And I do not think the circumstances fall within the High Trees principle.

For all these reasons, I have reached the conclusion that MITCHELL, J., was right to find for probate of the will of 1966 in favour of the respondent, with the

consequential revocation of the common form grant to the appellant. This, though it might appear a hardship, is simply the result of taking the wrong course after the compromise was effected. If, for reasons which appeared to them sound, the parties here believed the 1966 will was of doubtful validity or that the result of litigation to establish it was problematical, hence the compromise, then, at least one of two courses ought to have been advised and acted on. The appellant, as executrix of the earlier will, could have taken proceedings to prove her will in solemn form and to cause a citation to issue to Moulder, as executrix and sole devisee under the later one. "to see the earlier will proved"; or she (the appellant) could have caused a citation to issue to Moulder calling upon her (Moulder) to propound the later will, with a formal notice that if Moulder failed to appear and do so, the court would be asked to grant probate of the earlier one. If either course was followed, then, if in pursuance of the compromise, either Moulder took no action to oppose the grant of the earlier will or to propound the later one, the court would have the jurisdiction to pass over the later will and grant probate of the earlier one if satisfied that it was not revoked. Neither course was taken by the appellant. Instead, she was advised and moved to prevent the executrix from doing what it was her duty to do, that is to say, taking probate of the last will and testament of the deceased, and herself wrongly obtained probate in common form of the earlier revoked will.

The parties may have taken a third course after the compromise. Moulder could have applied for probate of the 1966 will which application Small would have opposed. At the hearing of the action, at some convenient point, the parties would have informed the judge at first instance that they had arrived at a compromise; the terms of the compromise could have been made an Order of Court; the end result would have been that Moulder would have been granted probate in solemn form of the 1966 will but would have been bound by the terms of the compromise to share lot 85 with Small. This course also was not pursued.

As a result, in my judgment, Small had to fail in her opposition in the court below and ought to fail on appeal in this Court. I would dismiss this appeal with no order as to costs in the particular circumstances of the case.

**CRANE, J.A.:** The contest in this appeal is between the two competing wills of deceased testator, Somwaru, whereby he disposed of one and the same property to two different persons. The first is dated May 29, 1963; the second, February 16, 1966.

Before his death on December 17, 1967, Somwaru used to live, evidently as man and wife, with an aunt of the appellant, Elvira Small, at the bottom flat of a building at Plantain Walk, West Bank, Demerara, the appellant occupying the top flat of the same building. Small was kind to Somwaru; she looked after him whenever there were quarrels between him and her aunt concerning his drunken

behaviour, and she used to take him upstairs to her flat and look after him there. But sometime in 1950 her aunt left Somwaru and went away to Leguan, Small then took him to stay with Moulder family where Marie Moulder (since deceased), who was the plaintiff in the court below, lived and worked.

Marie Moulder took a personal interest in caring for Somwaru, while Small supplied all his needs-even the meals that he ate, and for this kindness he rewarded them both when he made his first will on May 29, 1963. He did so by appointing Small his sole executrix and devising and bequeathing everything he owned to her and Moulder, "share and share alike".

However, as it would appear, Somwaru underwent a change of heart, for under his second will Small was not mentioned at all. On this occasion, Moulder was left the entirety of the property and appointed sole executrix. The upshop of this changed state of affairs was the sparkling off of an action in the High Court in which Moulder sought to propound the second will in solemn form as her testator's last will and testament and to have revoked probate of the first under which Small was appointed executrix. In that action judgment was given for Moulder, she having in the eyes of the court discharged the onus of proving the second will to be Somwaru's last will and testament. Small has refused to accept that decision and she now invokes the jurisdiction of this court to set it aside, and counterclaims for a declaration that probate of the will which was granted her is valid and effectual for all purposes.

Two points are taken on her behalf in this appeal: Firstly, it is contended there was no sufficient proof of the due execution of the later will and testament of Somwaru; that the person who made his mark was not personally known to either of the two subscribing witnesses to the 1966 will so as to enable him to be identified and linked up with one and the same person made his mark on the first will in 1963. The complaint is that there is no evidence to show it was one and the same Somwaru who signed both wills since it is clear from the attesting witnesses to the 1966 will that neither of them had previously known the testator. Counsel for that appellant contends it is necessary there should be proof of identity of the testator and, by way of analogy, cited three authorities in support dealing with the subject of bills of exchange. These, he contends, demonstrate the need for proof of the identity of a party executing a pro-note and proof of the handwriting of attesting witnesses when these matters are called in question, viz., Whitelocke v. Musgrove ((1833) 149 E.R. 502); Greenshields v. Crawford(( 1841) 152 E.R. 133) and Jones v. Jones (1841) 9 M. &. W. 75.

Whitelocke v. Musgrove (above) was an action on a promissory note. There, it was emphasised that where the subscribing witness is dead or resides abroad, it is necessary, besides proving the handwriting of the witness, to give some evidence of the identity of the party sued with the party who appears to have executed the

promissory note. Thus counsel, arguing by analogy, says it is necessary in the present case for the respondent to adduce evidence that the testator Somwaru who signed the 1963 will was one and the same person as he who signed the will of 1966.I do not myself see the force of this point of analogy between the making or the proving of a promissory note, and the formalities required for proving due execution of a will. In proving the 1966 will, it was not obligatory that the subscribing witnesses should have known the deceased testator as a condition precedent to their witnessing his will. There is no such requirement. All that is needed from a subscribing witness is to be found in the affidavit which he is required to swear when it is sought to prove due execution of the will for probate purposes. (See Tristram and Coote's *Probate Practice* (20th edn.), (Form No.7, at p. 1135.) First and foremost, the witness is required to identify his own signature as one of the witnesses to the will; secondly, to prove that the testator made his mark at the foot or end of it. both in his presence and that of the other subscribing witness; that they both subscribed their names in the testator's, presence after having seen the testator make his mark or acknowledge it; and, thirdly, that previous to the execution the will was read over to the testator who seemed thoroughly to understand it. They must see the testator make his mark on the will before they themselves sign so that if called upon at a later date, they will be in a position to identify their own signatures, the testator's mark and so the whole will of the deceased. But there is no requirements that the testator must have been previously known to one or both of them so that he could be identified later as Somwaru or as the identical Somwaru who made a previous will in 1963. It seems to me had there been any such requirement, the *Wills Act* would have been frustrated on many an occasion and fewer wills would be admitted to probate. There is also no requirement that the name of a testator be placed against his mark. (See In the Goods of Bryce (1839) 2 Curt. 325)

Sometimes it happens that a thumb-print is affixed by an illiterate testator as his mark, as when Somwaru executed a special power of attorney in Marie Moulder's favour. (Ex. "F".) This practice is not unknown in Guyana; it was probably imported here with indentured East Indian immigrants from India, in which country it is the custom among the illiterate population. See Re Finn ((1935) 52 T.L.R. 153), where it was held that the practice came within the statute-the *Wills Act.* But in the instant case, thumb-prints would undoubtedly have ensured positive identification of Somwaru, and the fact that he had placed his mark on both previous and later wills. Thumb-printing, however, in Re Finn (*supra*) did not commend itself to LANGTON, J., who considered that if a mark was the only way a testator had of making his signature, then it came within the *Wills Act.* It appears that no particular type of mark is needed for compliance with *Wills Act* and that any kind would do so long as it is properly attested.

It is true to say, I think, that the purpose of a subscribing witness is to testify' to nothing more than the fact that a testator, whoever he is or whatever name he

bears, has acknowledged the contents of the writing to be his true last will and testament by either signing his name or putting his mark to it in their presence. He witnesses nothing more; he certainly does not subscribe either to the fact that he knew the testator personally, or that he had read the contents of his will. It is in this way that a witness helps to prove the contents of the writing to which he has subscribed and against which the testator made his mark. That is really the important factor and a matter altogether distinct from the subscribing witness' identification of the personality of the testator, *Aliter*, in the case of negotiable instruments where a witness's testimony must be directed to the identity of the maker of the instrument. I therefore find myself in agreement with the trial judge's ruling on the first point of appeal when he held there was no onus on the respondent to prove Somwaru was one and the same individual who executed both wills, and I must agree with him it was not a matter in issue.

Secondly, the judge found there was no proof 'on a balance of probability' that there was a compromise of differences between the parties. He did not in any way impugn the testimony of any of the two witnesses, viz, Elvira Small or Oliver Valz, who testified on the matter of the compromise; he gave no indication that he rejected or disbelieved the whole or any part of their testimony in relation to that matter. It is, however, evident he must have taken what they had to say into account in order to decide on a balance of probabilities the issue which plainly arose on the pleadings in this way. In para., 14 of her statement of defence. Small alleged that Moulder entreated her not to resort to litigation, and following on that request, it was orally agreed by way of compromise as follows:

"(1) That Small would refrain from taking legal proceedings against Moulder or any other person as aforesaid as Small had proposed to do.
(2) In consideration of such forbearance by Small to sue Moulder -

(a) Moulder would refrain from applying for or obtaining probate of the later will of the deceased.
(b) Moulder would acknowledge the right, title and interest of Small in and to one-half of the assets of the estate and more particularly the immovable property thereof.
(c) Moulder and Small would share all the expenses of administering the estate of the deceased but that Small would advance all necessary sums in the first instance and Moulder would repay her half-share thereof by obtaining a loan on the security of her half-share of the estate.
(d) Small would apply for probate of the true last will and testament of the deceased bearing date May 29, 1963.
(e) whether or not Small obtained probate thereof, the estate of the deceased would be administered in accordance with the provisions thereof so far as possible, and in any case. Small

would obtain one-half of the estate of the deceased (more particularly of the immovable properly thereof)."

In pursuance of the said compromise, Small duly applied for and obtained probate of the estate. She then made an application to the Registrar of Deeds for title to the immovable property of the deceased to be vested in herself and Moulder. For this purpose on July 1, 1968, both Moulder and Small swore to an affidavit of severance of the joint tenancy. The said affidavit was in the words and figures following, that is to say:

"GUYANA.

COUNTY OF DEMERARA.

In the matter of the Estate
of SAMAROO, deceased.

AFFIDAVIT
WE, ELVIRA SMALL, of 85, New Road, Vreed-en-Hoop, West Coast Demerara and MARIE MOULDER, of 345, North East La Penitence, East Bank Demerara, make oath and say:
1. That we are accepting title severally and in common and not jointly.

(Sgd.) Elvira Small.
(Sgd.) Marie Moulder.

Sworn to at Georgetown, Demerara,
this 1st day of July, 1968.

50c stamps
cancelled.

Before me,
(Sgd.) Ulric Fingall

A COMMISSIONER OF OATHS TO AFFIDAVITS.

This affidavit is filed on behalf of the applicant by OLIVER MORTIMER VALZ, Solicitor, of and whose address for service and place of business is at his office at lot 1, Croal Street, Georgetown, Demerara."

In her reply and defence to counterclaim Moulder pleaded a denial that she ever entered into any compromise with Small and, in the alternative, that if she did so enter (which is denied), the alleged compromise was invalid and unenforceable in law.

It a will therefore be necessary to examine the evidence to see, firstly, whether there was indeed a compromise and, if so, secondly, whether it was legally binding on the parties.

The first question to have determined is what is meant by a compromise and here the following excerpt from FRY, J., in Mercantile Investment and General Trust Co. v. International Co. of Mexico ([1893] 1 Ch. 484 at p. 497) is enlightening:

> "In our present language it" (i.e.,'compromise') "undoubtedly, embraces an agreement between two or more persons for the ascertainment of their rights, when there is some controversy between them or some difficulty in the enforcement to the uttermost farthing of the rights of the claimant; but in my opinion, the word is applicable only where there is some such controversy or some such difficulty."

At the trial, Small narrated the circumstances under which she first made Somwaru's acquaintance; how she took him to Marie Moulder in 1950 so that he might be cared for; how she expended her own time and money on him and how he rewarded both herself and Moulder by making them joint universal devisees of his property at Lot 85, south of the public road, Vreeden-Hoop, West Coast, Demerara (hereafter called "Lot 85") "share and share alike". She also related how, shortly after the deceased died, she went to Moulder with the object of finding out what was to be done about probating the first will and paying testamentary expenses, but to her surprise Moulder implored her not to worry herself because, she, Moulder, was in possession of a later will in which Somwaru had left her all his property. Small was shocked at this, and having expressed her disbelief that the deceased would have made a will behind her back, pointedly told Moulder that it seemed as if someone was responsible for making Somwaru do as he is alleged to have done, and warned she would be taking the matter to court. Moulder thereupon entreated her not to take that course, particularly as they two had always got on well with each other. Accordingly, at Small's suggestion, Moulder agreed to abide by the terms of the first will, if Small, on her part, would refrain from taking the matter to court, to which Moulder signified her acceptance by saying, "O.K.". Both parties then undertook that a lawyer should be engaged to proceed with an application for probate of the first will. Such was Small's version of the matter and the circumstances relating to how it came to engage the attention of Mr. Oliver Valz, a solicitor who was now to be consulted for a second time in relation to the first will.

Solicitor Valtz was no stronger to either party for as long ago as May 29, 1963; he had taken instructions for, and prepared the draft of the first will for the testator's signature. Now, for the second time, on July 1, 1968, Mr. Valz was meeting them-on this occasion, with a view to vesting title in severity in them both following on the grant of probate to Elvira Small. At his office, where both were present, Valz told Moulder that Small had informed him she was in possession of a later will which was obtained by exerting undue influence on Somwaru, though he was given no details about this aspect. He also told Moulder Small was complaining that much of her time and money had been spent on the deceased and for that

reason she could not believe he had "disinherited" her.

Pausing here for a moment in this narrative of facts, I think it is important to record what Mr. Valz had to say in confirmation of an agreement between Moulder and Small relative to the compromise, i.e., the agreement between Small and Moulder that probate be obtained in respect of the first instead of the later will. The importance of this piece of evidence by solicitor Valz must not be underestimated, for if he were not discredited by the judge, as indeed it appears was not the case, his evidence that Moulder admitted the conversation with Small in which they both agreed not to probate the 1966 but the 1963 will instead, ought to have been accepted by the trial judge as evidence that they had come to a compromise of their differences over the two wills. Mr. Valz also recounted how he advised both parties that it would be necessary for them, in keeping with the devise contained in the first will that they should share equally, to accept title severally instead of jointly. This, he said, was the result of the decision of Singh v. Mortimer ((1966) 10 W.I.R. 65).

Counsel for the respondent submitted that a writ must have been issued before there could be any valid compromise; but this is not so. It is not essential to a compromise that litigation on its subject-matter should have been commenced between the parties to it before there is a compromise: (see Cook v. Wright (1861) 1 B & S 559 and the excerpt from Callisher v. Bischoffsheim, (1870) L.R. 5 Q.B. 449 below). What is essential, however, is, there should be an actual controverted claim or demand which the claimant *bona fide* intends to pursue, such as in Cook v. Wright, (*supra*) where the defendant compromised a claim in good faith for the payment of public rates for which he was not personally liable. However, such compromise was held to be a sufficient consideration for promissory notes given by him for sums he had agreed to pay in satisfaction of the claim.

But, as I said, the trial judge has given no indication whether he accepted, or rejected, or whether he believed or disbelieved Valz's evidence on this crucial point of compromise; although from the reasons he gave, he appeared to have acted on the assumption that though a compromise was agreed on, what the parties had attempted to bring about was, in point of law, invalid as a compromise. The following are the trial judge's observations in this respect, which, I think, support the view that though there was an agreement for a compromise, there could not have been any compromise because what was contemplated was not legally valid:

> "The argument has been advanced in this case by the defendant that there was a compromise between the plaintiff and the defendant and as such it is not competent for the plaintiff to seek to administer the estate of Sonwaru other than in accordance with the prior will dated 29th May, 1963-Ex. 'A'.

> It is not difficult to appreciate that such an argument is untenable in so far as a will has no effect whatever until the testator dies and it is his wishes that are carried out in terms of the will, not the wishes of beneficiary. Since any gift in terms of the will also has no effect whatever until the donor dies, the prospective donee cannot legally transfer his interest to defeat the efficacy of the will or the validity of the bequests in the will. A beneficiary may contract that when the legacy is received in terms of the will, he or she may transfer it to, or share it in whatever proportion one likes with another person but that does not affect the validity of the will on the granting of probate of the will otherwise valid.
>
> The distribution of the bequests, if not in terms of the will, is in any case *ex post facto* the granting of probate to the true will as the testator made it and devised it and not otherwise. If the beneficiary or beneficiaries wish to make certain arrangements for the disposal of property coming to them under a particular will after the grant of probate there is no fetter or impediment to such arrangements *inter* parties unless the will itself legally imposes it.
>
> So in this case, the purported compromise as advanced by the defendant could not in my opinion affect the validity of the will of Somwaru dated 16th February, 1966, or the bequests made under that will or the granting of probate to that will with the consequent revocation of that will of 29th May, 1963, and the revocation of the grant of the probate to that said will of 29th May, 1963.
>
> I am not satisfied on a balance of probability that there was any compromise as to the claims in the estate between the plaintiff and the defendant."

The statement in the concluding paragraph of the above excerpt, namely, that the judge was "not satisfied on a balance of probability" that the claims of the parties had been compromised, must, as it seems to me, be read in the light of his reasons which preceded it; particularly as it was considered impossible for them to have effected a valid compromise because, in a situation like the present, "it is his wishes" (i.e., the testator's) "that are carried out in terms of the will, not the wishes of any beneficiary." It is evident that much reliance was placed on this latter aspect, insomuch that is was considered fitting to emphasise by underscoring the particular lines in the judgment. Evidently, as the judge saw it, the parties could have no say in the matter; the intention of the testator as declared in the later will had to be obeyed; the wishes of the parties could in no way override those of the testator which must prevail and be carried out according to the terms of the later and not the earlier will. Clearly, then, no question arose, insofar as the judge was concerned, of belief or disbelief in the testimony of any witness; it

was simply a question of the later will which he found to be valid, being obeyed. No thought was, however, given as to whether it is proper for two persons, both of whom are *sui juris* and the sole beneficiaries, to have any right at all to elect for the terms of the earlier will, notwithstanding there are no minority or other third-party interests involved. It is evident that both parties had several conversations on the subject of the deceased's estate after his death. Moulder's daughter, Winifred Melville, the substituted respondent in this appeal, supports Small on this fact, and it seems that it was with respect to one of these conversations that Moulder spoke when she admitted to Mr. Valz that there had been a compromise between her and Small on the subject of the will. I have already observed the trial judge did not disbelieve Valz on this matter, and indicated the approach he took in relation to it.

Counsel for Small cited In re Houghton. Hawley v. Blake ([1904] 1 Ch. 622) in order to show that Small, as executrix, had the power to make a compromise; but nobody really disputes that such a power resides within an executor's discretion. In that case, an executor compromised a claim by his co-executor against the estate and the court held the transaction was valid and binding on the residuary legatees. The power of an executor to compromise claims is undoubted, and resides in s. 21 of the *Trustee Act, 1893 [U.K.]* which applies in this country by virtue of s. 11 of the *Civil Law Act, Cap. 6:01*. In Cood v. Cood ((1863) 33 Beav. 314) an administrator made a contract with the next-of-kin of the intestate to value his share of the estate at £1,000. The administrator was held to have made a binding contract from which the next-of-kin could not afterwards resile when he sought to do so. Cood's case shows if there was indeed a binding contract to compromise Somwaru's will, Moulder could not resile from the terms of it. Other cases will be referred to later on in illustration of this principle.

But quite apart from the power which every executor or administrator has to compound or compromise claims under the *Trustee Act.* I think that a valid compromise came into existence when Elvira Small and Marie Moulder agreed to abide by the terms of the 1963 will and to forego those under the, 1966 will. It seems to me there was ample consideration for what each promised the other, *viz.*, that Moulder, on her part, would relinquish her sole beneficial right and interest in Lot 85 and refrain from probating the 1966 will on condition that Small, on her part, would forego her intended threat to take legal action to seek a declaration on the validity of the terms of the 1963 will.

Admittedly, the earlier will was, in law, revoked by the later will, but in my view it is not unlawful for the parties to revive the terms of the earlier will, the disposition under which concerned themselves and nobody else. It would have been quite possible for them to agree that Moulder should first probate the later will (as the trial judge thought was obligatory) and then convey Lot 85 into the joint names of herself and Small in preparation for enjoying it "share and share alike".

But from Small's standpoint that would have been a risky thing for her to allow. This the parties no doubt fully appreciated, because there was no guarantee Moulder would not have reneged when she got probate, in which case, Small's only recourse would have been an action against her for specific performance of the agreement, and only if it had been under seal. The situation was eminently one of convenience in which the parties considered that it would be far safer and simpler to let the terms of the earlier will speak after Moulder had compromised her right to probate the later will in the way she did. As I see it, there can be no impediment in the way of anyone agreeing to compromise his right to a grant of probate, for it is provided that "the terms of settlement of a probate action should not contain any provisions for the making of a grant to a particular person or persons, though they may provide that a person shall renounce his right to a grant, or that he shall apply for a grant if entitled thereto." (See Tristram and Coote's *Probate Practice* (20th edn.), p. 548). (Underlining mine.)

It seems to me, when Marie Moulder relinquished her sole beneficial right to the entirety of Lot 85 under the 1966 will and agreed to refrain from probating it so that the terms and conditions of the 1963 will could be revived, there was nothing illegal about that. But even if that alone were the case, I think that would provide valuable consideration for Small's promise not to sue her. Moulder, however, being solely and beneficially entitled to the whole of Lot 85, her relinquishment of her entire right so as to share half of it with Small provided additional consideration, i.e., the detriment she suffered for Small's promise not to take legal proceedings against her. This, as it seems to me, was quite legal and something she was perfectly entitled to do. Though Moulder's right to obtain probate of Somwaru's will was, *stricto jure*, a right with which she could bargain to effect a legal compromise with Small. I myself have no doubt she could effectively bargain with, and compromise her right in her beneficial interest in Lot 85, and offer it, as valuable consideration in her agreement with Elvira Small, without probating the 1996 will.

This brings me face to face with the composite and crucial question in this case: Is an agreement between a sole executrix and universal beneficiary and another, that probate of the last will and testament of her testator shall not be applied for, one that is against public policy; and can it oust the jursidiction of the court from making a grant of administration to anyone else who can properly apply for it? This point was argued in the court below, though not before us. On the principle in In The Goods of George Dennis, ([1899] P. 187) the answer would appear to be in the negative.

In Dennis's case (*supra*) just as in the present, a testator left by will the entirety of his property to his sole executrix and universal beneficiary. There was a compromise agreement, the terms of which are not stated, which was entered into between the executrix, on the one hand, members of the deceased's family, on the

other. But this notwithstanding, on February 24, 1899, a citation was issued at the instance of the next-of-kin, calling upon the executrix and sole beneficiary under the will to bring into the registry and prove the same, or to show cause why a grant of letters of administration, as upon an intestacy, should not be made to the applicant, who thereby also gave formal notice his intention to move for a grant. Upon proof of personal service upon the executrix of the citation, the court, upon the authority of Crosby v. Norton. ((1867) 36 L.J. (P&M.) 55 and although there was no evidence before it as to the invalidity of the will, made a grant to the applicant, as upon an intestacy, conditionally upon his swearing, when taking the grant, that he was the next-of-kin of the deceased.

The whole point about Dennis, (*supra*) like the instant case, is, I think, that there could never have been any ouster of the court's jurisdiction on the strength of the terms of the agreement of compromise whatever those terms were. Unlike in the present case, there was no indication in In the Goods of Dennis (*supra*) of the terms of the compromise agreement, but whatever they were, they clearly imposed no impediment to the exercise of the court's jurisdiction. So on the clear compromise of her right to obtain probate, the court, to all intents and purposes, maintained its jurisdiction to grant administration to the next-of-kin who was quite competent to ask for it. It seems to me that an agreement of compromise containing, *inter alia*, a condition that an executrix shall renounce her right to probate can never, in the light of the above, operate to oust the court's jurisdiction and hence cannot offend against public policy. Moreover, it is not proper for a judge to invent a new head of public policy. That is the function of the legislature. As LORD WRIGHT said in his *Legal Essays and Addresses* (1939), at p. 71:

> "It is *prima facie* anomalous that a judge should attempt in setting private disputes to introduce into law principles of state policy, or to depart from the rules of the common law in order to invent doctrines of what is good for the common weal. Modern judges, I think, neither desire nor are qualified to fill such a role."

And Professor Friedman in his *Legal Theory* (1967) (5th edn.), p. 480, holds a similar view:

> "Since then" (i.e., Egerton v. Brownlow) there have been relatively few cases where public policy has been directly and openly used as an overriding principle which may invalidate a contract, will, or trust or any legal instrument."

As I see it, a sole executrix and universal beneficiary may, if she wishes, compromise her right to obtain probate of her testator's will, but she cannot oust the court's jurisdiction either to call in the will and insist that she proves it or to grant administration to some other as on an intestacy in a proper case. For myself, I do

not understand the parties in the instant case to have contracted on the basis that their agreement of compromise was intended to have the effect of an ouster of the court's jurisdiction.

In the Goods of Dennis (*supra*) was considered in the recent case of Re Muirhead (deceased) (*supra*). The facts are not entirely relevant here, but, briefly, they are as follows: Mr. Sydney Muirhead died leaving a will under which he devised and bequeath all his real and personal estate to his wife. Mrs. Muirhead, and appointed her sole executrix. By a later document purporting to be a codicil, he varied the provisions of the will. In the codicil, he left certain benefits to his secretary, a Mrs. Archer, and these somewhat reduced those left to Mrs. Muirhead under the will. But Mrs. Muirhead was evidently not interested in the codicil, for she issued a citation on Mrs. Archer out of the Principal Probate Registry to propound it should she think, fit to do so, or to show cause why probate of the will alone should not be granted to her, Mrs. Muirhead. The court held that as there was no evidence casting doubt on the validity of the codicil, the applicant was not entitled to probate of the will alone, without further enquiry, merely because Mrs. Archer had been given an opportunity to propound the codicil and had not done so. The correct procedure was for Mrs. Muirhead to apply for a grant of probate in solemn form and, if she had reason to believe that the codicil was not a valid testamentary document, then she should adduce evidence accordingly.

I myself do not understand Re Muirhead (deceased) ([1971] 1 All E.R. 609) as a case concerning a compromise. I do not think that Mrs. Muirhead and Mrs. Archer were compromising on the question whether the will should be proved apart from the codicil. Though that course was obviously desirable to Mrs. Muirhead seeing she had made application with that intent, I am unable to construe Mrs. Archer's failure to respond to the citation calling upon her to prove the codicil as an indication that she was compromising with Mrs. Muirhead on the matter of proof of the will without the codicil. This is why I think there is no parallel between Muirhead's case (*supra*) and the present. Mrs. Archer's absence from court might have been explained otherwise than that she was agreeing with Mrs. Muirhead that the will alone should be proved. If this is so, it cannot therefore be said that both women were by consent "agreeing to make a will no will", i.e., a codicil no codicil. Re Muirhead (deceased), (*supra*) therefore, has no bearing on a compromise, and since there were no consents in that case, the statement that "no person's consent can make a will no will" was not relevant.

What appears to me to be of some relevance here, insofar as the decision in Re Muirhead (deceased) (*supra*) affects the present case, is the statement of the trial judge. SIR HERBERT JENNER in In the Goods of Watts ((1837) 163 E.R. 208) (cited with approval in In the Goods of Benbow, ((1862) 164 E.R. 1086) and considered in Re Muirhead (deceased) (*supra*)), that "no person's consent can make a will no will." But in my view this statement must be read in the light of

its own particular facts, *viz.*, that where there is a will which, on the face of it is a valid testamentary paper, those interested under it cannot by mere consent claim to have a grant of administration as on an intestacy issued them, in preference to a grant of probate without evidence convincing the court of the necessity for it to make the former grant. SIR HERBERT'S statement simply posits that consents cannot properly be given so as to render invalid what purports to be valid will in order to suppress investigation into its validity by the court. So, too, In the Goods of Morgan, ((1847) 5 Notes of Cases 115) which was a case where a party was named executrix according to the tenor of the will and universal legatee therein. She refused to propound the will and consented to administration being decreed as in a case of intestacy, but the court rejected a motion for such administration. That is all, as I understand the position; the statement of SIR HERBERT JENNER is intended to convey, and nothing else. It certainly does not, in my view, convey the impression that there cannot, out of court, be valid compromise of a disputed claim, as here, where two parties who are *sui juris* consent to the revivor of a previous will the disposition under which concerns them and them alone. In such a case, I am unable to see they would be making a later will no will. I cannot see where one party for valuable consideration by relinquishing her right to probate a later will, is making that later will no will. It is certainly not essential, as counsel for Moulder contends, that a writ should issue for there to be a valid compromise. BLACKBURN, J., when delivering the judgment of the Court of Exchequer Chamber in Cook v. Wright, made this clear when he said ((1861) 1 B. & S. 559 at p. 569):

> "We agree that unless there was a reasonable claim on the one side, which it was *bona fide* intended to pursue, there would be no ground for a compromise; but we cannot agree that (except as a test of the reality of the claim in fact) the issuing of a writ is essential to the validity of the compromise. The position of the parties must necessarily be altered in every case of a compromise, so that, if the question is afterwards opened up, they cannot be replaced as they were before the compromise."

For myself, I cannot doubt that if the parties in the instant case had" effected their compromise after the writ was issued and when they were before the court, the trial judge would most likely have been unwilling to record its terms unless, at least, the later will of 1966 were produced to him in evidence. But here, the parties, having previously to the issue of the writ compromised their differences, a court ought to respect them unless they are plainly *ultra vires.* But even if I am wrong in restrictively distinguishing SIR HERBERT JENNER'S statement and Moulder and Small were ignorant of the law which applied to their situation, *viz.*, that "no person's consent can make a will no will" and had compromised their differences without paying regard to the consequences of that statement. I will show later from the cases that their error of law in this respect is immaterial and that their compromise ought not to be disturbed on both principle and authority.

I believe there is support for the view I have taken in the words of CAIRNS. J., in Re Muirhead (deceased). When outlining his approach to his decision, the learned judge stated as follows ([1971]) 2 All E.R. 609 at p. 611):

> "I approach the matter with conviction that it is the duty of a court of probate to give effect if it can to the wishes of the testator as expressed in testamentary documents. Sometimes it is impossible to discover the true intention of the testator because there may be doubts about his testamentary capacity or about whether he knew and understood the contents of some document propounded, or there may be doubts about the formalities of execution. In such cases a compromise is often reached and given effect to by the court. Where certainty cannot be achieved, it is often better that a will which is *prima facie* valid should be admitted to probate than that there should be a prolonged investigation into allegations of incapacity or undue influence; and it is sometimes better that a will or codicil should be pronounced against where there are good reasons for suspecting its validity, although by a full enquiry it might be possible to remove those suspicions. It is proper that in either of these cases, terms should be agreed (and, if all parties are not *sui juris,* approved by the court) to take account of the doubts which remain."

I find myself in agreement with the above statement of legal principle by CAIRNS, J., which, in my opinion, does not rule out an out of court compromise. The words in parenthesis — "and, if all parties are not *sui juris"* — seem to suggest this. I do not, however, think it is accurate when considering Dennis's case (*supra*) for him to conclude that PRESIDENT JEUNE received evidence on the invalidity of the will. The report of that case is silent on that fact, whereas the headnote of the case is clear that no such evidence was received.

Probate is by no means necessary to confer title on an executrix or the right to enter in and upon the business of winding-up her testator's estate. If authority were needed for this statement, it is to be found in Anon. (1772 Lofft. 81), where it is stated:

> "The will itself, before probate is sufficient title for the executor to the goods of the deceased, as to his property as executor; the probate being only necessary to enable him to sue for debts due to the testator."

But the principle that a will confers title of the testator's goods in his executor and the right to dispose of them before probate is to be found some 300 years earlier in the *Year Books* where LYTTLETON, J., is reported to have said:

> "If a man be made executor it is right if he wish that he shall have the disposition of the estate; a man may make me his executor and tell me

> nothing of it, and yet when I get knowledge of this I may well take upon me the power of administration and disposition and the ordinary may in the meantime grant administration, as was done in this case, but now by proof of the will the administration is determined, unless the executor have renounced before the ordinary in which case the law is otherwise." (See Anon., (1467) Y.B. 7 Edw. 4 fo. 12, pl. 3.)
>
> Again, in Smith v. Milles, (1786) 99 E.R. 1205, an old but extant authority, it is said:
>
> "The executor has the right immediately on the death of a testator and the right draws after it constructive possession. The probate is mere ceremony, but when passed, the executor does not derive his title under the probate, but under the will; the probate is only evidence of his right, and is necessary to enable him to sue but he may release etc., before probate."

So, on principle it seems to me, if Moulder could have legitimately released, compounded or compromised a debt due to her testator's estates and given receipts, etc., without obtaining probate, then, *a fortiori.* I entirely fail to see what legal impediment there could ever be in her way of effecting a valid compromise of something to which she is solely and beneficially entitled; she, being *sui juris,* will only be compromising something which belongs to her and nobody else. Personally speaking, I think the trial judge was wrong in holding she could not do so.

It is well settled that the compromise of a law suit may amount to good consideration in law, for if an intending litigant *bona fide* forbears a right to litigate a question of law or fact which is not vexatious or frivolous, he does give up something of some value in contemplation of law. In the case of Callisher v. Bischoffsheim, ((1870) L.R. 5 Q.B. 449) the plaintiff alleged that money was due to him from the Government of Honduras and was about to take proceedings to enforce his claim. The defendant then promised to deliver certain securities to the plaintiff in consideration of the latter taking no proceedings for an agreed time; the defendant failed to implement his promise. The court gave judgment for the plaintiff and COCKBURN, C.J., said ((1870), L.R. 5 Q.B. at p. 45l):

> "Our judgment must be for the plaintiff. No doubt it must be taken that there was, in fact, no claim by the plaintiff against the Honduras Government which could be prosecuted by legal proceedings to a successful issue; but this does not vitiate the contract and destroy the validity of what is alleged as the consideration. The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been insti-

> tuted makes no difference. If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he *bona fide* believes he had a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexatious incident to it. The defendant's contention is unsupported by authority.
>
> It would be another matter if a person made a claim which he knew to be unfounded, and, by a compromise, derived an advantage under it; in that case his conduct would be fraudulent. If the plea had alleged that the plaintiff knew he had no real claim against the Honduras Government, that would have been an answer to the action."

It appears to me that the trial judge has wrongly approached the matter of the compromise, for it is evident from what has been shown above he considered the parties incompetent to compromise something which, admittedly, concerned themselves and no one else. As he saw it, it was obligatory for them to obey the wishes of the testator and not to follow their own, regardless of the fact that both were of full age and there was no other interest involved save theirs. Clearly in such circumstances it was a mistake so to think, for if under the rule in Saunders v. Vautier. [1835-42] All E.R. Rep. 58 a beneficiary solely entitled and of full age is lawfully entitled to put an end to a trust, then, *a fortiori*, cannot two beneficiaries do so in respect of the contents of a will that concerns them and only them? From the excerpt I have highlighted above, it seems certain it was the view that they were incompetent to do so which influenced the learned trial judge, so much so that I believe I can truly say it was the above passage he underscored in his judgment and not any disbelief in the testimony of either Valz or Elvira Small which influenced the decision against a compromise that was so clear, convincing and compelling on the evidence. Particularly is this so, it seems, because Marie Moulder had actually implemented the agreement to compromise by swearing jointly with Small to an affidavit accepting title severally and in common, in terms of the 1963 will. This however, she later repudiated saying she thought she had signed a document empowering her to transfer title to One Gannes Gibbons to whom she had, pursuant to a special power of attorney on the testator's behalf, sold a one-half part or share of the property that the testator had left her. But this is in direct contradiction to what Mr. Valz said in evidence, viz., that he had advised both parties to swear the affidavit in severalty in view of the decision of Singh v. Mortimer (*supra*) so as to enable them to enjoy Lot 85 according to the tenor of the first will. The learned trial judge, however did not deal with this aspect of the evidence in reaching his conclusion of no compromise, but I think it

was very necessary for him to have done so in the circumstances, if there was to be any basis for his finding that there was no compromise between the parties. As I have shown above, Small raised the issue in para. 15 of her defence that she and Moulder swore to an affidavit of severance of their joint tenancy in support of an application she made to the Register of Deeds for title to the immovable property of the deceased to be vested in herself and Moulder. This affidavit, as para. 15 shows, was filed on Small's behalf by solicitor Valz, who testified in support of it, but the trial judge did not refer to it in any way whatever.

In the excerpt from the judgment indicating that the effect of the 1966 will was to revoke the 1963 will, it was not, I think, a proper objection to the validity of a compromise to say that the claim is, in law, "untenable". The compromise was good so long as it was made in good faith. In Attwood v. -, (1826) 1 Russ. 353 a case concerning a compromise, a claim against an attorney for professional negligence was disputed by him on the ground, *inter alia*, that as a matter of fact there had been no such negligence. LORD GIFFORD, M.R., said that the compromise of a claim entered into after due deliberation, even if it were doubtful whether the claim was such as could have been made effectual, was a sufficient consideration both in law and in equity for an agreement. "For that reason," said he, "I do not enquire, whether, before the agreement was entered into, the plaintiff had or had not a valid demand against the defendant. It is enough for me to say that here was a claim, made on grounds sufficiently disclosed at the time; that after due deliberation, the defendant yielded to the claim; and that he finally compromised it."

Decisions are legion which indicate that it is no ground for setting aside a compromise that the claim, or one of the claims, made by one of the parties was not well-founded in law, if it was *bona fide.* The only distinction to this general principle of an agreement of compromise is that if parties compromise on the basis that the subject-matter is in existence, whereas in truth it does not exist, then that is a matter which goes to the root of the compromise and vitiates it *ab initio.* Such is the theory of initial error of fact; it is a general principle in the law of contract and needs no further illustration. It is otherwise, however, if the error is one of law, as in the instant case, where the matter concerns the effect of a later will revoking an earlier will. The compromise is, nevertheless, valid, *Aliter,* "if the compromise be founded upon a will which turns out to have been revoked by another will of which the parties are ignorant." (See Trigge v. Lavallee (below), at p. 299). Lucy's case ((1853) 4 De. G.M. 356) is a good illustration of this principle. Lucy was on a list of contributories of a company in liquidation. He compromised the claim against him on the ground that the company was in liquidation. He was under the misapprehension of the legal effect of the decision of the House of Lords given during the negotiation of the compromise that an earlier case, on the strength of which Lucy and others had been treated as contributories, was in law incorrectly; decided. This misapprehension was common to both par-

ties. It was held that Lucy could not resile from the compromise he made and TURNER, L.J., considered that it was enough that both parties had thought there was a question between them, and that no compromise would be good if it ultimately turned out that there was no doubt upon the point which was made the subject of the compromise. Again, in Cann v. Cann, ((1721) 1 P. Wms. 723) the plaintiff sought to have a compromise set aside on the ground that he had thereby released to the defendant, who took in good faith, certain property to which, unknown to the plaintiff, he was entitled. It was held he could not recover.

Yet another case which is amply illustrative of the same principle is Triage v. Lavallee. Very pointedly, it was said in this case, though *obiter*, that ((1892). 15 Moore P.C. at p. 293):

> "It is no objection to the validity of such a compromise that the right is really in one of the parties only. If two persons claim adversely to each other the inheritance of a deceased person, and in order to avoid litigation agree to divide the inheritance between them it is no ground for setting aside the agreement that one only was the heir, and that the other therefore gave up no right which he really possessed."(Underlining mine.)

I have found no statement more suitable than the above to apply to the situation in the instant case. Though *obiter*, it is a pointed example of the inability of a party in whom there exists a legal right to a grant of probate to resile from an agreement in relation to that right, once she had compromised it.

Applying the above *dictum* of the Privy Council to the instant case, it will be seen that both Moulder and Small having agreed to compromise their dispute and having actually gone to the length of part-performing it when they jointly swore on July 1, 1968, to an affidavit (Ex. "M") on solicitor Valz's advice, to the effect that "we are accepting, title severally and in common and not jointly", concluded an oral compromise that was valid and irrevocable. Without any doubt that affidavit was referable to their oral agreement of compromise of their differences. But, as I said, the judge did not address his mind to this aspect of the matter even though it is so patent on the evidence of solicitor Valz whom he did not say he disbelieved.

But if I am wrong in the view I have taken of SIR HERBERT JENNER'S statement in Watt's (*supra*) case, cited in the recent decision of Re Muirhead (deceased) (above), there can be no doubt, I think, that Moulder and Small were *bona fide* in their efforts to put an end to their differences. If that is so, then, as I have shown, the authorities are in unison that even though they were mistaken in law as to the effect of what the later will did to the earlier, yet, their agreement ought to stand. In my view, no court would be justified in setting it aside unless that compromise related to something that was unlawful in the sense that it savoured

of a possible fraud on others, or it offended against public policy. In Dixon v. Evans, LORD WESTBURY said that, supposing a compromise has been *bona fide* made, "then, unless manifestly *ultra vires* the parties, a court of justice ought to respect it, and not allow it to be questioned." ((1872), L.R. 5 H.L. at 606 p. 618). A compromise is not unlike a family arrangement which the courts respect and preserve. Once a court is satisfied there is a *bona fide* compromise which concerns the parties only in the respect that there are no minority or other party interests involved, and, consequently, that there can be no fraud on any other person, then that court ought to respect and give effect to the wishes of the parties. Because if, as has been shown, the law will not allow the validity of a true compromise to be prejudiced even by a mistake of law made by the parties, then, *a fortiori*, no court, in my view, can be justified in insisting on procedural obstacles in the way of its enforcement. Why should the wishes of parties to a valid compromise be stultified by the insistence on procedural requirements to protect third parties against fraud when there are no such parties here in the instant case?

For these reasons, I would allow this appeal with costs here and below, and grant the declaration sought by the appellant in the court below that the 1963 will is valid and effectual for all purposes.

**PERSAUD, J.A.:** I agree that this appeal should be allowed and with the order proposed by CRANE, J.A.

**Appeal allowed. Declaration granted.**
**Decision of the trial Court set aside.**

**The State v. Lewis**

**ROBERT LEWIS**
**Appellant**
**v.**

**THE STATE**
**Respondent**

[Court of Appeal (Haynes, C., Persaud and Crane, JJ. A.), December 1, 1975; January 30, 1976]

*Criminal Law-Murder-Self-defence and provocation apparent on evidence though not relied on at trial-Misdirections on self-defence and on burden of proof of provocation-Material on which a reasonable jury could find a verdict of manslaughter instead of murder-Whether loss of fair chance of acquittal.*

The appellant and the deceased had an altercation in a restaurant in the presence of three persons who were engaged in a game of skittles. At the close of the game the appellant and the deceased resumed their quarrel. They began to fight on the public road in the presence of the same three persons one of whom, Randolph Camacho, saw the appellant with an 8 inch blood-stained knife in his hand at the time. Camacho had previously seen an unknown man pass the knife to the appellant over the skittles table but said nothing about it to the police or the magistrate, because he said he was not asked about it.

Blows were exchanged with fists and during the struggle the deceased was seen

to hold the appellant's neck in a "half-nelson" wrestler's lock while the appellant cuffed away at the region of the deceased's abdomen. Suddenly one of the blows lifted the deceased off the ground causing him to fall almost in a standing position in a nearby trench where he fell backwards into the water.

An autopsy disclosed a stab wound on the left side of the deceased's chest. The doctor said it could have been caused by a sharp-pointed knife or a sharp piece of tin or broken bottle and must have entered the body with a great deal of force since it travelled inwards and upwards penetrating the left ventricle of the heart. The injury caused massive visceral haemorrhage and brought about the deceased's death.

The accused was charged with murder. At his trial, he admitted fighting with the deceased on the evening in question, but he did not admit to having been in possession of a knife; he did complain about the "half-nelson" wrestler's lock on his neck.

On the appellant's behalf, counsel advanced the theory that the fatal injury was received by accident when the deceased fell into the trench on a piece of broken bottle, it being the doctor's view that that was quite "possible though not probable". But the jury rejected this theory in the same way as they rejected the defences of self-defence and provocation which the trial judge left to them and they found the appellant guilty of murder. Self-defence and provocation were not however specifically raised by the defence; but arose on the evidence.

On appeal, it was contended the wound might have been caused by accident when the deceased slipped and fell on a heap of stones on receiving a blow from the appellant; also, that there was a vital omission on the part of the witness Camacho not to reveal to the police in his statement nor to the examining magistrate that he had seen an unknown man pass the accused a knife for the first time in the restaurant and that it was highly unsatisfactory for him to explain away this omission by saying that no one had asked him about it. On self-defence it was argued that the real and substantial case of self-defence raised on the evidence was never really put to the jury and might well be said to have been withdrawn from them.

**HELD:** (1) That if the wound was received from the fall on the ground that would not in law support a defence of accident since the fall was from an unlawful act of fighting on the part of the appellant; likewise if it was received in the trench as a result of the fall into it, if that fall also was caused by the unlawful act of the appellant.

(2) That the trial judge should have given the jury a more helpful direction on the possible import of the omissions on Camacho's credibility. Had the judge given adequate direction on the matter of the knife in the possession of the accused in

the restaurant and at the scene of the struggle, a reasonable jury must have found, the appellant left home with a knife to find the deceased, or obtained one sometime that after then and before the fatal incident.

(3) That even if all Camacho's evidence about a knife was discredited the remaining circumstantial proof that the appellant started the quarrel on the public road with a knife in his possession and stabbed the deceased with it was cogent enough.

(4) That there was some material on which a reasonable jury could find a verdict of manslaughter instead of murder, and after dealing with the issue of self-defence the trial judge had to direct the jury that, if they rejected it, they may find manslaughter on the ground of provocation notwithstanding it was not relied on at the trial.

(5) That the directions on the law of manslaughter were inadequate in that the jury were not told, as they ought to have been, that the onus was on the State to prove that the provocation was not sufficient; neither were they told that if they were left in any reasonable doubt as to whether the facts show sufficient provocation, the issue must be determined in favour of the accused.

(6) By reason of these misdirections the appellant lost a fair chance of acquittal of murder; so the verdict of murder must be set aside and a verdict of manslaughter substituted.

**Appeal allowed.**
**Verdict of murder set aside**
**and manslaughter substituted.**

**Editorial note:** See report of this case in (1975) 23 W.I.R. 226.

**Cases referred to:**

(1) Laxman and Others v. State of Maharashtra [1974] 2 S.C.R. 505.
(2) D.P.P. v. Walker [1974] 1 W.L.R. 1090; [1974] Crim. L.R. 368; 118 Sol. Jo. 532. P.C.
(3) Chan Kau v. R. [1955] A.C. 206; [1955] 2 W.L.R. 192; [1955] 1 All E.R. 266; 99 Sol. Jo. 72; P.C.
(4) Dihal v. R. [1960] L.R.B.G. 195.
(5) R. v. Belnavis (1964) 8 W.I.R. 128.
(6) R. v. Grant (1969) 8 W.I.R. 135.
(7) Michaud v. R. (1969) 13 W.I.R. 66.
(8) Julien v. R. (1969) 13 W.I.R. 66.
(9) R. v. Bartley (1969) 14 W.I.R. 407.
(10) Jobe v. R. (1969) 14 W.I.R. 491.
(11) Francis v. R. (1967) 12 W.I.R. 375.

(12) Palmer v. R. (1971) 16 W.I.R. 499.
(13) R. v. Howe (1958) 100 C.L.R. 448.
(14) Lee Chun-Chuen v. R. [1963] A.C. 220; [1962] 3 W.L.R. 1461; [1963] 1 All E.R. 73; 106 Sol. Jo. 1008. P.C.
(15) R. v. Badjan [1966] Crim. L.R. 288; 50 Cr. App. R. 141; 110 Sol. Jo. 146. CCA.
(16) Johnson v. R. (1966) 10 W.I.R. 402.
(17) R. v. Moore (1967) 10 W.I.R. 527.
(18) R. v. McPherson (1957) 41 Cr. App. R. 213. CCA.
(19) R. v. Bullard [1961] 3 All E.R. 470 n; (1958) 42 Cr. App. R. 1.
(20) R. v. Cascoe [1970] 2 All E.R. 883; 54 Cr. App. R. 401.
(21) Lett v. R. (1963)6 W.I.R. 92.
(22) R. v. Prince [1941] 3 All E.R. 37; 28 Cr. App. R. 60.
(23) R. v. Richards (1967) 11 W.I.R. 102.

Appeal from conviction and sentence at the Demerara Assizes.

Jai Kissoon for the appellant.
G.A.G. Pompey, Deputy Director of Public Prosecutions, for the State.

**HAYNES, C. (delivered the judgment of the Court):** Between 5.30 p.m. and 6 p.m. on Sunday, 27th October, 1974, a game of skittles was in progress in the Blue Velvet Restaurant off Victoria Road, in the village of Plaisance on the East Coast of Demerara. Randolph Camacho, a government technical surveyor, was one of the players. Inspector of Police (then Sergeant) Joseph, Arnold Scott, an executive officer of the Hogstye-Lancaster Local Authority and Roy Henry the deceased, were looking on. Camacho saw the appellant enter the restaurant. The appellant was shirtless. He approached the deceased, held on to the latter's left hand and said, "Man Roy come. I want to talk to you, come here." The deceased did not comply. Camacho remonstrated with the appellant for discourtesy and asked him to leave. The appellant replied, "Don't worry with that," or other words to that effect. However, the deceased left the company and had a conversation with the appellant some distance off. No witness heard what was said, Sgt. Joseph also spoke of this incident. He did not see the appellant enter the building, but he said that the appellant "grabbed" the deceased and" pulled him away" from the company.

Not long after, following the close of the game, Camacho, Joseph, Scott and the deceased left the restaurant. This must have been between 6 and 6.30 p.m. They proceeded south along Victoria Road on its eastern side. At some point, the deceased lagged behind and, somehow, an argument ensued between him and the appellant. What happened afterwards was narrated by Scott, Camacho and Joseph with some difference in detail. Arnold Scott said:

> " ... I then saw the accused and Henry hold on to each other. Henry held the accused around his neck in a "half-nelson". The accused was punching Henry with his fists on his abdomen. The accused then pushed Henry a punch and Henry fell in the western drain. The accused then walked away going north."

And in cross-examination:

> "... Whilst Henry held the accused with his left hand he was punching the accused with his right hand. The accused pushed Henry into the western drain and then rolled away. Henry fell on his feet in the drain and then went backwards and fell on his back. The drain had water. The drain was about 4 feet wide and about 1-1/2 feet deep."

Also in cross-examination, he said:

> "... They were facing each other, Henry to the west and the accused to the east. They were both exchanging blows with each other. Henry held the accused's neck in a "half-nelson". He held him around his neck with his left hand. At that stage the accused was in a bending position."

Randolph Camacho gave this version:

> "... I heard the accused said, 'Man Roy because the man drunk you rob he.' Henry then said, 'Man Robert we and you is friends. We go to school together, what wrong with you.' The accused repeated what he had said previously and Henry again asked him what wrong with him and what you granning me for. By 'granning' I understand it to mean to provoke. The accused then dealt Henry a cuff on his face and Henry fell on a heap of stone which was on the eastern side of the road. Henry got up and they held on to each other. They exchanged blows with each other. I then saw Henry become still and the accused dealt him another cuff on his face and Henry fell in the western trench in an almost standing position and almost suddenly fell backwards. The accused stood on the western parapet watching on. I then started to approach the accused when I saw a bloodstained knife in his hand with a blade about 8 inches long and the handle about 3-4 inches long. The accused had the knife in his right hand and he transferred it to his left palm."

And in cross-examination he said:

> "... Henry had his hand around the accused's neck in a "half-nelson." Henry was lifted off the ground with a cuff and he fell almost in a standing position and he then fell on his back."

**The State v. Lewis**

Inspector Joseph told the jury:

> "... I saw the accused and the deceased exchanging blows with their fists. The deceased fell down on the roadway, but got up slowly afterwards. At this stage he pushed the accused by the neck in a "half-nelson" and I saw the accused cuffing away in the region of the deceased's abdomen. After giving the deceased several cuffs I saw the deceased stood up erect facing north. The accused then spun the deceased around and pushed him west by his back and as the deceased reached a shallow trench he pushed the deceased into the trench. The deceased fell on his feet in the trench and gradually fell backwards. I called the accused and he run away."

Under cross-examination, he gave a demonstration of the way the deceased had held the appellant. The trial judge made this note: "I saw the deceased holding the accused with both arms (witness demonstrates full-nelson). The accused was pushing at the deceased's stomach."

The deceased was taken out of the trench. He had a stab wound on the left side of the chest. According to the medical expert evidence, this wound could have been caused by a sharp-pointed knife or a sharp piece of tin or a broken bottle or glass, which must have made contact with the body of the deceased with a great degree of force. The instrument passed through the sixth intercostal space, travelling inwards and upwards, and penetrated the left ventricle of the heart. This injury caused massive visceral haemorrhage and this haemorrhage caused the death of the deceased, when he reached the Georgetown Hospital at 7.45 p.m. the said night.

The appellant was subsequently detained at the Sparendaam Police Station and charged with murder. At his trial he did not testify, and he called no witnesses. In his defence, he made this unsworn statement from the dock:

"On the 27th October, 1974, I went to the Blue Velvet Restaurant, Victoria Road, Plaisance. I went to see a friend of many years, Roy Henry, the deceased. I went to him and we had a little argument-one of his friends the witness Camacho called him away. I then had two beers and left the restaurant. Whilst proceeding south on Victoria Road I was walking with my head down. Henry walked up to me and asked me why I was following him. I told him I was not following him but that I was going home. He then said if I thought he was stupid and I turned to him and we had another argument. I told him if he think he had sense that he and his friends buy a watch from my friend and that we were no more friends after tonight. Whilst speaking to him we began to fight. I hit him and he fell to the ground. When he got up he then resisted at me

> and he held me around my neck in a "half-nelson." I then started to cuff him in his belly and he suddenly loosed me and with my head down I pushed him off. When I raised up he was in a trench. I then walked away. That is all."

He thus denied inflicting the fatal stab wound. And his counsel, after eliciting in cross-examination from the witnesses Scott and P.C. Eastman, evidence that one would find broken bottles in our trenches, put forward to the jury the theory that the deceased received the fatal injury when he fell into the trench on a piece of broken bottle. Dr. John Yoo testified that theoretically it was "possible but not very probable" that the wound could have been received in this way. The jury after a summing-up on the actual defence raised, on self-defence and provocation, rejected this theory, and found the appellant guilty as charged.

At the hearing of this appeal from this conviction, several grounds of complaint against the summing-up were raised. Two of these can be disposed of with comparative brevity. The first related to the defence of "accident". If the appellant's account of the incident is assumed to be true, then the wound would have been received either when the deceased fell on the heap of stones on the ground, admittedly as a result of a blow from the appellant in the course of the fight or from his fall in the trench, from some undiscovered broken bottle or piece of glass among the stones or under water. If it was received from the fall on the ground, then this would not in law support a defence of "accident", since that fall was from an unlawful act in fighting, on the part of the appellant; likewise, if it was received in the trench as a result of the fall into it, if that fall also was caused by any unlawful act of the appellant. But on the evidence led at the trial, any reasonable jury acting sensibly and dutifully would be satisfied beyond reasonable doubt that the deceased must have been wounded during the course of his struggle with the appellant, and that, in the particular circumstances, no serious question of "accident" arose. Accordingly, in this state of the evidence, assuming (without ruling to that effect) that the appellant's defence raised a sufficient issue of "accident" to be put to the jury and that a failure to direct them on this, in terms and with adequacy, was actually a defect in the summing-up, such could not be fatal. There was no miscarriage of justice on this account.

The second easily disposed of complaint related to alleged discrepancies and contradictions in the evidence of certain witnesses for the prosecution. It was submitted that these were not pointed out to the jury as such, and that there were no or inadequate directions about their possible effect on the credibility of those witnesses. This contention was meritless. Such inconsistencies or contradictions as were relied on were not vital; and the inadequacy (if any) of the direction given that-"If however, you consider that any witness... has previously said something different from what he is saying here, then in such circumstances you are entitled to place very little, if any weight, upon the evidence of such a witness or wit-

nesses"-would not be serious or fatal in the circumstances of this case. In what I have just said I did intend to relate to a particular aspect of the evidence, which counsel for the appellant referred to, in my view inaccurately under this head, I shall deal with this aspect now.

The witness Camacho told the jury that about half an hour before the incident on Victoria Road, he saw a man pass a knife to the appellant over the skittles table in the restaurant, and that the appellant stuck it in the waist of his pants. This was while the witness was playing skittles over that table. But this information was omitted from his statement to the police and from his deposition. Under cross-examination, he explained these omissions in this way:

> "... I gave a statement to the police on the very night of the 27th October, 197.4. I was asked questions by the police constable. I gave answers. I did not tell the police about seeing the man hand over the knife to the accused in the restaurant because the police did not ask me any such question. I gave evidence in the preliminary inquiry before the magistrate. I did not give evidence about the handing over of the knife as nobody asked me about that. Today is the first time I am being asked about any handing over of a knife."

Here there was no real inconsistency or contradiction, but a pure omission. By itself, such an omission is not an inconsistency or a contradiction. The witness, in such a case, is not at the trial saying something different from what he said on an earlier occasion. He is saying something he did not say then. Of course, in certain circumstances, the failure to mention a fact in an earlier account might make that account in some material respects conflicting with a later one. But this has not been shown to be such an instance. In that regard, the question would be whether the jury should disbelieve or hesitate to act on what is said at the trial because of what was said differently on the earlier instance; in this regard it would be whether the jury should disbelieve or hesitate to act on what is said at the trial because it was not said in earlier accounts. But in both respects the credibility of the witness at the trial is involved. What did the trial judge tell the jury specifically about this? He said:

> "Camacho said that whilst he was playing this game of skittles, he saw an unknown man hand a knife over the skittles table to the accused and that the accused put that knife into the waist of his pants. The defence made a lot about this, as to why, if that evidence was true, he did not tell the police that in his statement, or the magistrate at the preliminary inquiry. Camacho's answer was simply that he was not asked that.
>
> Members of the jury, this is a matter entirely for you"

Then, after explaining the manner in which depositions are taken at a preliminary inquiry, he continued:

> "It is important for you to note that the preliminary inquiry before the magistrate is not-I repeat not-the trial. This is the trial. So it is for you to say whether Camacho is lying, as suggested by counsel for the defence

And he went on to say:

> "Camacho said he was not asked anything about what took place in the restaurant about this knife. He did not mention it, but he did mention to the magistrate that he saw the blood-stained knife. This is not the first time he is mentioning that. He said so at the preliminary inquiry. So Camacho observed this. He didn't say anything at the time, probably thinking nothing about it."

He did not tell the jury, as he did in relation to previous inconsistent statements, that this omission was something which, in a proper case, might entitle them "to place very little, if any, weight upon the evidence." This by itself in this case, might be of slight moment. But, put with the emphasis placed on the fact that the magisterial inquiry was not the trial, without more, it might well have led the jury to think that the omission could have little or no probative significance because the magisterial inquiry' was not the trial. The appellant complained of this.

In Laxman and Others v. State of Maharashtra [1974] 2 S.C.R. 505, a decision of the Criminal Appellate Jurisdiction of the Supreme Court of India, the Court had cause to rule on the impact of such omissions on the probative value of the evidence of a witness. BEG, J., reading the judgment of the Court, said:

> "It is not possible to lay down a general rule as to what effect a particular omission from a previous statement should have on the probative value of what was so omitted by a witness. The effect will depend upon the totality of proved facts and circumstances in which the omission might have taken place. It will often be determined by the importance of what was omitted."

I would add to this, that it will also often depend on whether or not the witness offered any acceptable explanation of the omission and, of course, on his demeanour.

As the defence of the appellant was a denial of the act itself, and of the possession of a knife, whether or not he received one in, and had this weapon when he left the restaurant that evening, was material. This evidence of Camacho for the

State was a link in the chain of circumstantial proof, as there was no eye-witness testimony of the actual stabbing. Further, the trial judge himself told the jury that this incident was "a very important factor" because (wrongly or rightly) it meant that the appellant was aggressive and had armed himself "possibly" to injure the deceased, whom he had "roughly accosted". If the jury took this view of the evidence, this could have influenced their verdict. They might well have concluded that the "half-nelson" or "full nelson" hold was itself, purely defensive action on the part of the deceased and an unsuccessful attempt by him to resist a felonious attack by the appellant, so that neither the defence actually raised nor self-defence, could succeed. The trial judge should have given the jury a more helpful direction on the possible impact of these omissions on Camacho's credibility on this point. A more critical discussion of the problem was called for.

The crux of the matter, however, was the explanation Camacho gave, as I think a reasonable jury would interpret it that neither the policeman who took his written statement nor the officer who conducted the prosecution, nor the magistrate, nor the appellant, in the Magistrate's Court asked him any question to evoke the disclosure that he (Camacho) saw a knife passed to the appellant in the restaurant. Speaking for myself, bearing in mind my own knowledge and experience of how these things are done, this explanation was, *prima facie,* not unreasonable. If the trial judge had given adequate directions on these matters, a reasonable jury must have found, on the evidence, that the appellant left home to find the deceased with a knife, or obtained one sometime after then and before the fatal incident that evening. It appears to be plain, that even if all Camacho's evidence about a knife was discredited, the remaining circumstantial proof that the appellant started the quarrel on the public road with a knife in his custody and stabbed the deceased with it, was cogent enough. In the particular circumstances of this case, a defect (if any), in the summing-up in relation to this complaint, by itself, could not have caused a miscarriage of justice, for on the residue of evidence, a conviction on the capital charge was inevitable unless, at the end of the day, some of it raised a reasonable doubt as to whether the appellant acted in self-defence or under provocation, sufficient to reduce the killing to manslaughter.

In respect of both these defences, the appellant complained that there was substantial misdirection. As regards self-defence, the trial judge did leave this issue to the jury. The appellant did not complain about what was said in the judge's directions. His sole criticism was of what was not said. The real and substantial case of self-defence raised on the evidence, it was contended, was never put to the jury and might well be said to have been withdrawn from them. If the evidence was sufficient to raise a reasonable doubt about it, then there would be great force in this submission.

The State did not submit that the evidence was not adequate to raise the issue of self-defence. On the contrary, it was conceded that it was, despite the appellant's

denial that he wounded the deceased. But this concession cannot relieve this Court of the right and duty to consider for itself whether the evidence was, in law, sufficient to support the plea or raise a reasonable doubt. If it was not, then it could be no misdirection at all to omit to relate any of the evidence to that defence or fail to leave the issue to the jury (see D.P.P. v. Walker [1974] 1 W.L.R. 1090); and then even if there was a wrong direction of law no miscarriage of justice could result. (See Chan Kau v. R. [1955] 2 W.L.R. 192 P.C.) If it was sufficient, then any such defect in the charge might have deprived an appellant of a fair chance of an acquittal on the whole indictment, and then this Court must allow an appeal and either discharge the appellant or order a new trial. Dihal v. R. [1960] L.R.B.G. 195; R. v. Belnavis (1964) 8 W.I.R 128; R v. Grant (1964) 8 W.I.R. 135;Michaud v. R. (1969) 13 W.I.R. 72; Julian v. R. (1969) 13 W.I.R 66; R v. Bartlev(1969) 14 W.I.R. 407, and Jobe v. R. ( 1969) 14 W.I.R. 491, are all judgments of the Caribbean Courts of Appeal illustrating the application of this principle. If an appellant might reasonably have been acquitted completely if self-defence had been properly left to the jury, then either he must leave the Court a free man or face another trial, as the trial ending in his conviction would not have been a fair one. In such a case, no question of the substitution of manslaughter arises.

For the evidence to be "sufficient", it need not (if believed) prove self-defence conclusively or even as a reasonable probability; it is sufficient if a finding on the issue is reasonably possible. (See Francis v. R (1967) 12 W.I.R. 375 *per* WOODING, C.J., at p. 376, and Palmer v. R (1971) 16 W.I.R. *499 per* LORD MORRIS.) And once this is so, then the issue must be left to the jury and the prisoner would be entitled to an acquittal, unless, in the words of DIXON, C.J. in R. v. Howe (1958) 100 C.L.R. 448, at p. 459, the prosecution satisfies the jury beyond reasonable doubt "that the factual constituents by which such a plea is made out, or some of them did not exist."

In weighing the probative value of the evidence to decide if there was, at least, this reasonable possibility that the prisoner acted or may have acted in self-defence, the trial judge must regard the degree of force used. For if, plainly, it exceeded that which might conceivably have been thought reasonably necessary for defensive action in the particular circumstances, then he would be justified in withdrawing this issue from the jury (see D.P.P. v. Walker (*supra*)). But while a judge will be naturally very reluctant to withdraw from a jury any issue that should properly be left to them and is therefore likely to tilt the balance in favour of the defence, an appellate court must apply the test (of reasonable possibility) with as much exactitude as the circumstances permit. In other words, while a judge might, on a certain quantity of material in evidence, wisely or cautiously leave an issue of self-defence (or of provocation) to the jury, an appellate court might hold rightly that there was not in law sufficient evidence on the issue to go to the jury, and so conclude that any misdirection upon the evidence or the rel-

evant law could have caused no miscarriage of justice. (See Lee Chun-Chuen v. R. [1962] 3 W.L.R. 1461 P.C.)

But the appellate court should do this only in plain cases, as appellants have been held to be entitled to the verdicts of juries on this issue of self-defence, even where the evidence in support of it, in the view of the courts of appeal was considered "of tenuous worth" (R. v. Badjan (1966) 50 Cr. App. R. 141, *per* EDMUND DAVIES, J., at p. 143); or as "' woefully thin "(Johnson v. R. (1966) 10 W.I.R. 402, *per* WOODING C.J., at p. 404); or "weak" (D.P.P. v. Walker (*supra*), *per* LORD SALMON, at 1096.) It is with these principles in mind, that we must consider the evidence relied on as raising the issue of self-defence.

The real and substantial case of self-defence relied on was the use of the degree of force involved here, as defensive action to meet the alleged actual or apprehended danger of the "half-nelson" or "full-nelson" wrestling hold. It was clearly open to the jury to find on the medical evidence that the fatal stab wound might have been inflicted by the appellant while he was "locked off" in this hold. Counsel for the appellant submitted, and the State did not dispute, that such a hold was a potentially dangerous one, and that if sufficient pressure was exerted in a certain manner on the neck or in the area of the windpipe, serious bodily injury could follow. Admittedly, the trial judge never related any of these considerations to the issue of self-defence. In fact, he related the issue only to the cuffs the appellant received in the course of the conflict. He told the jury rightly, "... members of the jury, if you cuff me I am not justified in boring you with a knife...", and his final charge to them at the end of his summation included this passage, again related only to the cuffs:

> "It is a simple case. I have put the other alternatives to you because it is my duty to do so. Self-defence; remember that in self-defence, if you accept that the accused did use a knife, the law says, if you cuff me I cannot bore you with a knife. That is not self-defence. The force used is too excessive and would negative any such defence."

Although the jury are not fools, neither are the lawyers. A reasonable jury might conceivably have thought that (whatever their own views were on the matter), the trial judge was (impliedly) telling them as a legal direction that the evidence of the wrestling hold, for some reason, was not admissible or fit to be considered on this issue. And a later direction-that if the appellant was firmly locked off around his neck in this hold, and lost his self-control, and in a passion used the knife, that would be sufficient in law to reduce the offence to manslaughter -might well have contributed to such a conclusion. If the "half-nelson" or "full nelson" hold, as the evidence went, raised the issue fairly, then the failure to relate it to that defence might be fatal.

The crucial question is: Was this evidence sufficient in law to raise the issue of self-defence? Mr. Jai Kissoon, for the appellant, said it was, and relied on Dihal v. R. (*supra*). Dihal was charged with murder. The medical evidence disclosed at least twenty-three incised wounds on the body of the deceased, eleven of which were in the back. The accused had only two small abrasions on his neck. His case was that he wounded the deceased when he (Dihal) was held by the neck, choked, and falling into a swamp, was being stifled. The trial judge told the jury that when considering self-defence, it would be relevant for them to compare the wounds on the body of the deceased with the injuries on the appellant. He made no mention whatever of the choking and the stifling. The Federal Supreme Court (RENNIE, ARCHER and WYLIE, JJ.) held this omission was a serious misdirection, and that certain directions on provocation, were excessive and confusing. The conviction for murder was set aside, and a new trial was ordered. There, the judge's direction put the issue as related only to the minor injuries on the accused, and disregarded the real case of the choking and the stifling under water. Here, counsel submitted, the judge erred in the same manner, in that he put the issue as related only to the minor assaults of cuffs and disregarded the real case of a "choking hold".

The evidence was barely that the deceased held the appellant in the wrestling hold described earlier. How firm and close the hold was, how long it was maintained and how much pressure was actually or apparently being exerted or threatened to be exerted on the appellant's neck, were matters the evidence relied on to raise the issue did not disclose. Admittedly, it was for the prosecution to convince the jury beyond reasonable doubt that the fatal injury was not inflicted in self-defence once there was evidence in the case pointing to a reasonable possibility that he did. But this does not mean that in determining whether such evidence existed it was irrelevant for the jury to consider and weigh not only what the appellant said in his statement from the dock, but also what he did not say He did not raise an alibi or deny he was fighting. He admitted he was there and spoke of the fact that he was held in this "half-nelson" hold, and that he extricated himself by pushing the deceased off. His failure to tell the jury that "choking" pressure was being exerted on or in the area of his neck or windpipe (which he only would know), or that he feared this would happen, assertions which would have been quite consistent with his denial of the use of a knife, would have probative significance. It could legitimately be put in the scale in weighing the evidence to determine the question now under consideration.

I propose at this point to mention briefly three high authorities, namely Chan Kau v. The Queen, [1955] 2 W.L.R. 192 P.C., Lee Chun-Chuen v. R. [1962] 3 W.L.R. 1461 P.C., and R. v. Moore (1967) 10 W.L.R. 527. These judgments demonstrate that even where an issue of self-defence or provocation is left to the jury with serious misdirection, the Court of Appeal might properly dismiss an appeal on the ground that, on a view of the facts most favourable to the defence, no

miscarriage of justice ensued because there was really no case on the issue to go to the jury. In Chan Kau, the appellant was convicted for murder by a jury, and his appeal to the Supreme Court of Hong Kong in its appellate jurisdiction, was dismissed. It was his defence that he was attacked mistakenly by the deceased "with a wooden instrument", and in self-defence he picked up a knife which was nearby and struck the deceased; alternatively, he raised the plea of provocation. There was a serious misdirection of law on self-defence. The trial judge told the jury that an accused had to satisfy the jury that it was necessary for him to defend himself in the way he did. Despite such misdirection, the Board did not allow the appeal on the ground. They substituted manslaughter. LORD TUCKER, giving their Lordships' reasons, said (p. 197): "Viewing the case as a whole, their Lordships do not consider that the jury's rejection of the defence of self-defence amounted to a miscarriage of justice. It is difficult, if not impossible, to infer from the evidence, taking the most favourable view of the defence, that the appellant's life was ever seriously endangered so as to justify-as distinct from excuse-the use of such a weapon."

In R. v. Moore, the Court of Appeal of Barbados dismissed an appeal from a conviction for wounding with felonious intent, although they reached the view that the jury were not given the assistance on self-defence to which they were entitled. In fact, the appellant in his defence did not admit inflicting any wounds on the injured man at all. But the trial judge left self-defence to the jury. On appeal, the complaint was, that a certain possible view of the facts in support of a plea of self-defence was not put to the jury. The Court of Appeal accepted that there was merit in this submission. Nevertheless, viewing the evidence as a whole, they concluded that the conviction should stand on the ground that on the uncontradicted evidence, certain of the serious injuries could never have been justified on a plea of self-defence.

And in Lee Chun-Chuen, the Privy Council indicated the practical difference between the approach of the trial judge and that of the Appellate Court. The appellant was convicted for murder. He had raised self-defence and provocation. His case was that the deceased threw stones at him and in self-defence he picked up a hammer nearby and threw it at the former, who fell, whereupon he (the appellant), ran away. But the uncontradicted medical evidence disclosed fractures of the skull, the breast-bone and three ribs, together with ruptures of the spleen and kidney; at least three blows of considerable force were inflicted. His appeal to the Court of Criminal Appeal of Hong Kong was dismissed. Before the Board, as there was no misdirection on self-defence, the case for the appellant rested on a serious misdirection on provocation. The trial judge told the jury that if provocation produced in the mind of the accused an intention to kill or to inflict grievous bodily harm, then it could not reduce the killing to manslaughter, if they rejected self-defence. The Board concluded that this grave misdirection upon the law of provocation could not have caused any miscarriage of justice because there

was no sufficient material on that issue to go to the jury. Their Lordships' reasons were delivered by LORD DEVLIN. His Lordship said (p. 1467):

> "... Their Lordships must observe that there is a practical difference between the approach of a trial judge and that of an appellate court. A judge is naturally very reluctant to withdraw from a jury an issue that should properly be left to them and he is therefore likely to tilt the balance in favour of the defence. An appellate court must apply the test (as to whether there was a case on the issue to go to the jury) with as much exactitude as the circumstances permit."

In my judgment, the reasoning and principles applied in these cases are applicable here, I would hold that, on any view of the facts most favourable to the appellant, no reasonable jury considering the evidence sensibly and anxious to do their duty would acquit the appellant on the basis of self-defence by the use of such a weapon in such a manner. I have discussed earlier the facts on which the issue rested. I think, in this case, if the appellant, in the witness-box or in his statement in the dock, had said he was being choked or even that increasing pressure was being exerted, the position might have been different, and Dihal v. R. (*supra*) might have applied. This observation is not inconsistent with the principle that the prosecution must disprove self-defence, for two reasons: Firstly, the rule arises only where there is evidence on which a reasonable jury might find self-defence, or which might raise a reasonable doubt in the matter; secondly, in some cases the failure of the accused to give a more plausible account of the events, in relation to an element of such a defence, might lead an appellate court to hold as I hold in this case (see the judgment of LORD DEVLIN in Lee Chun-Chuen v. R. (*supra*).

After dealing with the issue of self-defence, the trial judge directed the jury on that of manslaughter. Again, the State, at the hearing of this appeal, did not question that there was a case to go to the jury, that is, that there was material on which a reasonable jury could find a verdict of manslaughter instead of murder. In my judgment there was some such material fit for the consideration of the jury. In such a case as this, after dealing with the issue of self-defence the trial judge had to direct the jury that, if they rejected it, they may find manslaughter on the ground of provocation, not withstanding that it was not relied on at the trial; that they must do so, unless satisfied beyond reasonable doubt that the defence should be rejected (see D.P.P. v. Walker [1974] 1 W.L.R.. at p. 1091); and that if there was any reasonable doubt whether the facts show sufficient provocation to reduce the offence to manslaughter, that issue must be determined in favour of the accused in a verdict of manslaughter. The appellant complained of the inadequacy of the directions of law on manslaughter. There is substantial merit in this complaint. It is sufficient to mention two serious defects. The jury were not told, as they ought to have been, that once the issue was left to them properly, the onus

was on the State to prove to their satisfaction beyond reasonable doubt, that the provocation relied on was not sufficient (see R. v. McPherson (1957) 41 Cr. App. R. 213; Bullard (1958) 42 Cr. App. R. 1. and R. v. Cascoe (1970) 54 Cr. App. R. 401); neither were they told that if they were in any reasonable doubt as to whether the facts show sufficient provocation, that issue must be determined in favour of the accused, (see Lett v. R. (1963) 6 W.I.R. 92; R. v. Prince (1943) 28 Cr. App. R. and R. v. Richards (1967) 11 W.I.R. 102.) Plainly, these were grave misdirections and the appellant might well have been acquitted of the charge of murder and found guilty of the lesser offence, if the proper directions were submitted to the jury on the issue of provocation. It is plain that the appellant by reason of these misdirections lost a fair chance of acquittal of the charge of murder on the indictment.

In these circumstances, one of two courses is open to this Court. We may order a retrial of the whole indictment, so that a fresh jury, properly directed, might determine whether the evidence before them established his criminal responsibility at all, or, if it does, whether the appellant is guilty of murder or manslaughter; or we may substitute a conviction for the lesser offence of manslaughter. In my judgment the latter, in this case, is the better course. Consequently, the verdict of murder is set aside, a conviction for manslaughter is substituted, and the appellant is sentenced to seven years' imprisonment.

**PERSAUD, J.A.:** I concur.

**CRANE, J.A.** I concur.

**Appeal allowed.**
**Verdict of murder set aside**
**and manslaughter substituted.**

**PANCHU (KNOWN AS NANKOO)**
**Appellant**
**(Petitioner)**

**v.**

**RAMPERSAUD (KNOWN AS POONOO)**
**Respondent**
**(Opposer)**

[Court of Appeal (CRANE, LUCKHOO and JHAPPAN JJ.A.) February 15, 16, April 9, July 9, 1976]

*Declaration of Title to land-Rival claims for ownership-Undisturbed posses-*

*sion of land-Whether possession of land as licensee or in own right-Action for trespass.*

*Appeal-Question of fact-Function of Court of Appeal.*

The appellant, Panchu, filed a petition seeking a declaration of title to 26.3 acres of land in the Mahaicony Creek known as Grant No. 3263 on the ground that he was in sole, absolute and undisturbed possession of the said land, *nec vi, nec clam, nec precario.* He claimed that he had occupied the land from 1922 until 1940 when he removed the house that he had on it but continued to occupy the said Grant 3263 by cultivating it with rice and rearing cattle on it.

The respondent, Rampersaud, opposed the petition claiming that he, and not the petitioner at was in sole and undisturbed possession and occupation of the land from the year 1940, when that possession was disturbed in 1961 with the appellant forcibly erecting a house on the land. This resulted in an action against the appellant for trespass and judgment was obtained against the appellant. The Commissioner of Title found that the respondent was not a licensee of the appellant but an occupier of the land in his own right and dismissed the petition.

On appeal to the Court of Appeal against the finding of the Commissioner of Title.

**HELD:** (1) The Court will not interfere with the finding of the Commissioner of Title that the opposer was in possession of the land in his own right and not as a licensee.

(2) The Court of Appeal will only interfere with the findings on questions of fact if it finds the evidence so slender and incredible that no tribunal of fact ought reasonably to have acted upon it. If there is enough for a jury reasonably to act upon it, it is quite immaterial that the Court of Appeal may have taken a different view (Forde v. Wilson [1931-37] L.R.B.G. 631 followed).

(3) Although an appeal is in the nature of a rehearing, the Court of Appeal is not there to usurp the province of the jury. The Court is to presume that the Commissioner of Title's finding on the question of facts are right and to bear in mind that the Commissioner of Title is in a better position to appreciate those matters affecting credibility. He has seen the witnesses and could have estimated their intelligence, position and character in a way not open to the Court of Appeal. The Court will not interfere with the findings of facts of the Commissioner of Title.

**Cases referred to:**

(1) O. W. Forde v. H. Wilson [1931-37] L.R.B.G. 631, W.I.C.A.
(2) Khoo Sit Hoh and others v. Sin Thean Tong [1912] A.C. 323.

C. Lloyd Luckhoo, S.C., with F. Allen for appellant.
B.E. Gibson for respondent.

**Appeal dismissed with costs.**

**JHAPPAN, J.A.:** Grant No. 3263, which comprises an area of 26.3 acres, and is situate in the Mahaicony Creek, has been the subject-matter of a bitter struggle for ownership between the appellant, Panchu, and his nephew, Rampersaud, the respondent. It was never owned by any member of their family but was surveyed originally for one Behari, whom Panchu claimed to be his reputed grandfather, by H.H. Bougle, a government surveyor, in 1902.

It is now shown on a plan by Frank R. Lee, Sworn Land Surveyor, and deposited in the Department of Lands & Mines on the 31st May, 1969.

Panchu, the appellant in this appeal, filed a petition seeking a declaration of title to Grant No. 3263 on the ground that he was in sole, absolute and undisturbed possession of the said land, *nec vi, nec clam, nec precario,* from 1922. The respondent opposed the petition claiming that he, the opposer, and not the petitioner, was in sole and undisturbed possession and occupation of the land from the year 1940 when in 1961 the petitioner forcibly erected a house on the land for his son-in-law, Jaggernauth, which resulted in an action against the petitioner for trespass. Between 1940 and 1961 no one had challenged his right to the occupation of the land. The petition was dismissed and as a result the petitioner has appealed to this Court.

The case for the petitioner is that having been born on the 28th March, 1910, at La Bonne Intention, he moved to the Mahaicony Creek with his parents where they occupied Grant No. 3979, which was then owned by his father, Dhakoo, and which was located about 55 rods from Grant No. 3263. In 1919, his father sold Grant No. 3979 and with his family, including, the petitioner, migrated to India where he died sometime after. In 1922, the petitioner returned to this country and went back to the Mahaicony Creek where he discovered that Behari, his reputed grandfather had died, and that no one was living on the land. He occupied the land from 1922 and in 1925 he sought legal advice to see if he could have obtained title for the land. However, in 1940, he purchased his father's former holding. Grant No. 3979, and removed a house he had on Grant No. 3263 to Grant 3979, where he has been living ever since, it should be noted here that it was in this year the opposer said he began to occupy the land. The petitioner, however, continued to occupy Grant No. 3263 by cultivating it with rice and rearing cattle on it. In 1942 he obtained a lease to the second depth and in 1946 a lease to the third depth of Grant No. 3263. In 1949 he sold out his interests in the second and third depths of Grant No. 3263 but continued to occupy Grant No. 3263.

During these years the opposer, Rampersaud, had been living with another uncle of his, Lalchand, on another piece of land 50 rods away. Differences arose between the opposer and Lalchand with the result that Lalchand asked the opposer to leave his house. The opposer had nowhere to go, and so he was invited by the petitioner to live with him. He lived with the petitioner until 1950 when he decided to get married. When the opposer had decided to get married he had no house and no land on which to build a house, and so with permission and a cash gift of $18 from the petitioner, he built a house on Grant No. 3263 in 1950. He was later allowed to enclose an area around his house and to use the enclosed area for a kitchen garden, thus occupying an area of 6 rods by 6 rods.

The case for the opposer, on the other hand, is that he never entered the land with the permission of the petitioner. In 1940 he started to occupy Grant No. 3263 when it was totally overgrown with bushes and when no one else was occupying it. He cleared the land of the bushes and cultivated it with permanent crops as well as rice and vegetables and reared cattle on it. From 1940, that is, the year the petitioner said he re-purchased his father's old land-Grant No. 3979-and removed his house from Grant No. 3263 to Grant No. 3979, he, the opposer, was in sole and undisturbed possession of the land until that possession was disturbed in 1961 when the petitioner trespassed by erecting a house on the land for his son-in-law, Jaggernauth. He sued the petitioner for trespass and obtained judgment against him in action No. 1751 of 1967, Demerara. From 1961 when his peaceful occupation was" disturbed, there had been continuous litigation between them over the land.

In 1961 Panchu, his son Mahadeo, and his son-in-law Jaggernauth, were charged and were later convicted for wounding the opposer, Rampersaud, over an incident which occurred on the land when they were removing the opposer's cows from near his house. In 1964 Umar Karamat, Kamar Karamat, Poonoo, the opposer, and Keerandai were charged with wounding the petitioner's son-in-law, Jaggernauth, during an incident which occurred on the land. In 1967, the opposer filed an action-No. 1751 of 1967, Demerara-against the petitioner alleging that the petitioner and others had trespassed on his land, Grant No. 3263, and obtained judgment against him for $450. In 1971, Rupnarine called Starter, the son of the opposer, was charged with assaulting Jagroop, a son of the petitioner, during an incident over the land. In 1972, the petitioner made two attempts to obtain an order for possession against the opposer for the portion of Grant No. 3263 which he occupies. One was withdrawn and the other is still pending.

The appeal was argued on two grounds which are as follows:

(1) The decision was totally against the weight of the evidence.
(2) The learned trial judge of the Land Court misdirected himself legally on the following:

(a) that the respondent (opposer), Rampersaud, was not a licensee of the appellant (petitioner); and

(b) the appellant (petitioner) was a trespasser in respect of the whole or any part of the plot held by Licence No. 3263.

In support of the second ground, which I will deal with first, it was urged that "the Commissioner of Title went off the beam in his approach to the decision of VAN SERTIMA, J. in action No. 1751/1967, Demerara", when using it to arrive at his decision in this case. In that action, the opposer as plaintiff sued the petitioner herein for trespass committed by him on Grant No.3263, the subject-matter of this appeal. He claimed damages in excess of S500 and also sought an injunction against the petitioner to restrain him from entering the land or in any way interfering with his use, occupation and possession of the land. In his statement of claim, the opposer alleged trespass to his property, Grant No. G 3263 (of the 4th January, 1903) which was described as follows:

"A piece or parcel of land comprising 26 (twenty-six) acres and situate at Water Dog Creek, Mahaicony Creek, East Coast in the County of Demerara, Guyana, bounded on the West by lands owned by Lily Karamat, on the East by the Mahaicony River, on the North by Gajat Narine and on the South by Kumkarran."

The trespass complained of was that having been "in possession since 1940, without force or fraud and without the consent or agreement of anyone"; the defendant in 1961 wrongfully entered the said land, assaulted and beat the opposer, and forcibly occupied the land around the opposer's house, cattle-pen, provision farm and kitchen garden.

The petitioner in his defence denied the trespass and claimed to be in sole and undisturbed occupation of the land, but went on to say that in the year 1950 he granted the opposer permission to erect a house on a portion of Grant No. 3263 which covered an area of 6 rods by 6 rods. He further stated that the opposer never occupied the whole of the land. He counter-claimed and asked for a declaration of title to the land which he described as follows:

"A tract of land formerly Crown Land situate lying and being on the left bank of the Mahaicony Creek commencing at a paal about 45 roods above Water Dog Creek and next to a grant of 25 acres surveyed for E. Gaskin and extending thence upwards facade S 33' W (magnetic) 25 roods by a mean depth N 890 27' W of 300 roods in the county of Demerara and containing 25 Guyana acres as shown on a diagram by Henry H. Bougle, Surveyor, dated the 11th day of June 1902 and annexed to Crown Grant No. 3263 issued in favour of BEHARI, M. 49690 Ex Allan Shaw

> 1891 ..." (underscoring mine.)

The description given in the counterclaim does not seem to refer to Grant No. 3263 but since, in his reply the opposer admitted the description given in the counterclaim, and since the parties were *ad idem* as to the subject-matter of both the action for trespass and this petition as being Grant No. 3263, then there is no real problem. The action was fully heard before VAN SERT1MA, J. who, in his oral judgment, found in favour of the opposer and awarded damages in the sum of $450. He dismissed the counterclaim, made no findings of facts, refused to grant the injunction sought by the opposer and made no order as to costs. There was an appeal by the opposer against the award of damages but it was never prosecuted. The Order of Court and the notes of evidence tendered mean very little or nothing at all. The only evidence of what the trial judge said was given by the petitioner when he said: "Mr. Justice VAN SERT1MA told me to pay for the garden spot and then put in for Declaration of Title and Rampersaud cannot oppose."

At the hearing of this petition each party urged the Commissioner of Title to construe the judgment of the trial judge in a manner that will be advantageous to his case. For the petitioner it was argued that the judgment should be construed to mean that the trial judge ruled that the opposer was in exclusive possession, not of the whole land but of the area comprising the house-spot with the garden, that is, 6 rods by 6 rods, hence the small amount of damages; and, further, that the opposer was a licensee having gone on the land with the permission of the petitioner. On the other hand, it was submitted on behalf of the opposer, that the findings of the trial judge were in accordance with the claim, that is to say, that the opposer was in exclusive possession of the whole of the land in his own right and not with permission from the petitioner. The Commissioner of Title came to the conclusion that the trial judge by his judgment found that the opposer was in possession in his own right and not as a licensee. In his decision he says:

> "From these proceedings it is clear that the learned trial judge found that Rampersaud (opposer) was in possession of the land not as licensee ... but in his own right"

And then later on he went on to say:

> "The learned trial judge having found that Rampersaud was in possession of the land at the time of the trespass it is for the petitioner to establish firmly to this Court that since 1969, when the Court found that Rampersaud was in possession he has ousted Rampersaud and re-possessed the land for a period of 12 years from the year 1969. Having failed to do this, this petition must also fail."

Then again he continued:

> "There is a clear finding that the Court found that the plaintiff (opposer) was in exclusive possession of the land and therefore entitled to maintain an action for trespass."

In the absence of any written decision and also in the absence of any evidence as to what the trial judge may have said as to his actual findings of facts in any oral judgment he may have given. I am of the opinion that since the trial judge found in favour of the plaintiff the only conclusion that can be drawn is that he found in accordance with the plaintiffs claim, and that he rejected the defence. I am, therefore, in total agreement with the conclusions of the Commissioner of Title, that the trial judge found that the plaintiff (opposer) was in possession in his own right and not as a licensee.

The Commissioner of Title also considered the merits of the case based on the evidence that was led before him.

Seven witnesses, including the petitioner himself, testified in support of the petitioner's case. On the other hand, the opposer is the only witness who testified on his own behalf. The Commissioner of Title in his decision considered the evidence of each witness who testified on behalf of the petitioner and rejected their testimony giving reasons for so doing. The reasons given by him for rejecting their testimony were never challenged. He, on the other hand, accepted the lone evidence of the opposer as against the volume for the petitioner and he said:

> "It is clear that the petitioner and his family tried unsuccessfully to bully the opposer into vacating the land which he has occupied all through the years from 1940, so that his son-in-law could have the benefit of the disputed area of land."

Then he gave a series of facts which he found in favour of the opposer, and I reproduce them without apology:

> "In conclusion, after considering and analysing all the evidence in this case I have found the following facts:
>
> (a) That the opposer was and still is in exclusive occupation of the disputed area of land *nec vi, nec clam nec precario,* from 1940 to the present time.
>
> (b) That during such time the opposer built a house and did planting of rice and other crops on the disputed area of land.
>
> (c) That the opposer's occupation was never with the consent or permission of the petitioner as the petitioner alleges.

(d) That whatever occupation the petitioner now has through his son-in-law is a forced occupation based on violence.

(e) That the learned trial judge having found in action No. 1751/67 *vide* Exhibit 'O' that the petitioner did commit trespass on the land must have found then too that the opposer was in exclusive possession thereof and therefore entitled to maintain successfully an action for trespass.

(f) That the occupation and possession by the opposer of the disputed area of land is in his own right and not as a licensee of the petitioner.

(g) That the opposition filed by the opposer herein is just, legal and well founded.

(h) That the reason for the petitioner's claim to the land is the knowledge that the land belonged to Behari whom he claims to be his grandfather as a result of which he feels that he is entitled to the land."

It is from these findings of facts that this Court is asked to set aside the judgment on the ground that those findings were totally against the weight of the evidence. The Commissioner of Title accepted the evidence of the opposer, which was his only witness, as against the testimony of no less than six witnesses who testified on behalf of the petitioner. It is now our business to say whether the evidence before him justified his decision.

The principles upon which this Court must approach the matter have been laid down so often that it is not necessary to refer to them at length, or to all of the relevant cases; but it will suffice to say that I will only interfere with the findings on questions of facts of the Commissioner of Title if I find the evidence so slender and incredible, viewed from within and without, that no tribunal of fact ought reasonable to have acted upon it. If there is enough evidence for a jury reasonably to act upon, it is quite immaterial that I may have taken a different view. Of course, if inferences were drawn, as in the case of the judgement of VAN SERT1MA, J., then I would have to consider whether such inferences were the proper ones. These principles were mentioned in the case of O. W. Forde v. H. Wilson reported in [1931-1937] L.R.B.G. 631, W.I.C.A. where it was referred to in express terms at p. 633.

Forde v. Wilson followed the Privy Council decision of Khoo Sit Hoh and Others v. Lim Thean Tong, ([1912] A.C. 323). This was an appeal from a judgment of the Supreme Court of the Straits Settlements (Settlement of Penang) which reversed the judgment of the trial judge and which had turned entirely on questions

of facts. In that case the judge, sitting alone at first instance in a decree suit, had found that the respondent's mother, Khoo Toon Neah, was only the adopted daughter of the testator and so not one of the next of kin. The Court of Appeal reversed the decision and found that the respondent's mother was the testator's natural daughter born in wedlock, so that the respondent was entitled, as one of the testator's next-of-kin, to maintain an action for administration of the deceased's estate in an intestacy. On appeal to the Privy Council, the Privy Council restored the judgment of the trial judge, LORD ROBSON, who delivered the judgment states (*ibid* p. 325):

> "Their Lordship's Board are therefore called upon, as were also the Court of Appeal, to express an opinion on the credibility of conflicting witnesses whom they have not seen, heard, or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned trial judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position, and character in a way not open to the Courts who deal with later stages of the case. Moreover, in cases like the present, where those Courts have only his note of the evidence to work upon, there are many points which, owing to the brevity of the note, may appear to have been imperfectly or ambiguously dealt with in the evidence, and yet were elucidated to the judge's satisfaction at the trial, either by his own questions or by the explanations of counsel given in presence of the parties. Of course, it may be that in deciding between witness he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial judge based on verbal testimony."

Although an appeal is in the nature of a rehearing, this Court is not here to usurp the province of the jury. We are to presume that the Commissioner of Title's findings on the question of facts are right and to bear in mind that he is in a better position to appreciate those matters affecting credibility. He has seen the witnesses and could have estimated their intelligence, position and character in a way not open to us. As I have indicated before, he considered in some detail the evidence led in the case. I have myself considered the evidence and I do not think that I will interfere with the findings of facts of the Commissioner of Title. For those reasons, I will dismiss the appeal with costs, by consent, in the sum of $750.00 (seven hundred and fifty dollars).

**CRANE, J.A.:** I concur.

**R.H. LUCKHOO, J.A.:** I concur

**Appeal dismissed with costs.**

**Re: Sookram Singh (An Insolvent)**

**Re: SOOKRAM SINGH, (An Insolvent)**
***Ex parte* The Official Receiver, as Trustee of the Property of the above Insolvent.**
**Applicant**

**and**

**LATCHMIN SOOKRAM and JUDISTHIR**
**Respondents**

[High Court (BOLLERS, C.J.) June 24, November 27, December, 1974; January 14, February 10, 17, March 18, 26, April 5, June 19, September 25, 28 November 10, 1976].

*Insolvency-Conveyance-Validity of conveyance-Burden of proof in relation to the bona fides of a settlement-Interpretation of Insolvency Act, Cap. 12:21, ss. 45. 46.*

This matter concerned a motion presented by the Official Receiver in his capacity as trustee of the property of the insolvent Sookram Singh against the respondent Latchmin Sookram, reputed wife of the insolvent, for a declaration that the conveyance by Enmore Estates Ltd. on the instructions of the insolvent to the respondent of property at 51 Logwood. East Coast Demerara, is void as against the applicant Trustee. It was contended by the applicant Trustee that the transaction was done with the intent to defraud the creditors of the insolvent under ss. 45 and/or 46 of the *Insolvency Act, Cap. 12:21.* A similar declaration was also sought in relation to the building on the said land together with an order that the respondent do convey and deliver vacant possession of the said property to him as Trustee.

**HELD:** (1) That the onus of proving that the settlement made in favour of the respondent was *bona fides* and for valuable consideration rested on the respondent, that is the person who seeks to establish it: the respondent had to so satisfy the court on a balance of probabilities.

(2) that having regard to all the evidence the respondent had failed to discharge the burden or onus of showing that the settlement was made in good faith and for valuable consideration.

**Conveyance set aside. Declaration that property is a part of the estate of deceased insolvent. Order that Official Receiver sell property and proceeds be payable to creditors of the estate of the insolvent. Costs against respondent to be taxed.**

**Cases referred to:**

1. Re *ex parte* Tate (1876) 35 L.T. 531.
2. Koop v. Smith (1915) 25 D.L.R. 355.
3. Re Mac Keen [1929] 1 D.L.R. 528.
4. Re Trenwith [1934] 3 D.L.R. 195.

M. Fitzpatrick for applicant.
F. John for respondent.

**BOLLERS, C. J.:** This is a motion presented by the Official Receiver in his capacity as Trustee of the property of the insolvent Sookram Singh against the respondent Latchmin Sookram, the reputed wife of the insolvent, in which is sought a declaration that the conveyance by Enmore Estates Ltd. on the instructions of the insolvent to the respondent of the property described and known as lot 51 Logwood, East Coast Demerara on the 17th day of April, 1974 is void as against the applicant Trustee, as being made with intent to defraud the creditors of the insolvent under the provisions of ss. 45 and/or 46 of the *Insolvency Act, Cap. 12:21*. A similar declaration is also sought in respect of the building on the said land. The applicant also seeks an order that the respondent do convey and deliver vacant possession of the said property to him as Trustee.

The matter to be resolved arose in this way. On the 12th May, 1973, one Salima Khan on her own behalf and as mother and next friend of her children filed an action for damages against the insolvent and his son Gowkarran Singh, claiming damages for loss and injury resulting from an accident on the 4th April, 1973, caused by the negligent driving of Gowkarran Singh of a motor car owned by the insolvent. The writ was served on the insolvent on the 19th May, 1975 and on the 28th May, 1973 he entered appearance thereto. On the 28th February, 1974, judgment in the action was entered by consent against the insolvent (who was made vicariously liable) and his son Gowkarran Singh jointly and severally in the sum of $12,750.00. On the 17th April, 1974 on the instructions of the insolvent, Enmore Estates Ltd. transported the aforesaid immovable property situate at lot 51, Logwood, East Coast Demerara to his reputed wife the respondent, the said immovable property having been purchased by the insolvent from Enmore Estates Ltd.

in 1968; and the building which stood on the land the insolvent alleged that he had sold that building to the respondent on 21st August, 1972. On the 28th May, 1974, the amount due on the judgment not having been paid, an insolvency notice was served on the insolvent and on the 12th June, 1974 a petition was filed against the insolvent. On the 14th August, 1974 a receiving order was made against the insolvent.

On the 17th February, 1975 Sookram Singh was deemed insolvent by the Court under the provisions of s. 41 of the *Insolvency Act. Cap. 12:21*. the insolvency under the Act relating back to the date of the act of insolvency which date was the 5th February, 1974. The applicant, the Official Receiver, now contends that under s. 45 of the *Insolvency- Act, Cap. 12:21* the conveyance by the insolvent to the respondent on the 17th April, 1974 was not a genuine and *bona fide* transaction but was a settlement in defraud of creditors and the purported sale of the building which stood on the land to the respondent on the 21st August, 1972 as alleged by the insolvent and the respondent was a fraudulent transaction, and the receipt which purported to evidence the transaction was false, and manufactured for the purpose of the case.

The section of the *Insolvency Act, Cap. 12:21* which comes under review in a matter of this kind is s. 45 (1) and enacts as follows:-

> " (1) Any settlement of property, not being a settlement made-
>
> (a) before and in consideration of marriage, or
>
> (b) in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or
>
> (c) on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife,
>
> shall, if the settlor becomes insolvent within two years after the date of the settlement, be void against the assignee, and shall, if the settlor becomes insolvent at any subsequent time within ten years after the date of the settlement, be void against the assignee, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in that property passed under the settlement on the execution thereof."

The first question therefore to be considered is, upon whom does the onus lie in the application of the section. Is the onus cast upon the applicant to show that the settlement which was made in favour of the respondent was not made in good

faith and for valuable consideration, or is the onus cast upon the respondent the person in whose favour the settlement was made, to show that it was made in good faith and for valuable consideration. It is clear that the conveyance to the respondent of the immovable property at Logwood, Enmore and the purported sale of the building thereon would be a settlement within the meaning of s. 45 (5) of the Act which includes "any conveyance or transfer of property or money." On an analysis of the section it appears to me that if the settlement is made *bona fide* and for valuable consideration the matter is at an end, if however it is not made in good faith and for valuable consideration then the second step would be to determine whether the settlor became insolvent within two years after the date of the settlement. If so, then the settlement is void as against the assignee. If however the insolvency takes place after the expiration of two years but within ten years after the date of settlement the settlement would be void against the assignee, unless the parties claiming under the settlement could prove that the settlor at the time of making the settlement was able to pay all his debts without the aid of the property comprised in the settlement and that the interest of the settlor in that property passed under the settlement on the execution thereof. This latter condition however merely attaches to the ten year period and not to the two year period. In his argument Counsel for the applicant submitted that the section threw the onus on the person claiming the benefit under the settlement i.e., the respondent, the burden of proving that the settlement was made *bona fide* and for valuable consideration, on the ground that the facts relating to the settlement would be peculiarly within her knowledge. For he argued it would be impossible for anyone other than the parties to have any knowledge of the transaction.

On the other hand Counsel for the respondent disagreed with this submission and opined that the section merely sets out in what circumstances a settlement would become void, and it is upon the party who is claiming that the settlement is void to adduce such facts and circumstances in support of his contention because it is he who is asserting that the settlement is void as he is the mover of the motion.

Section 45 of the *Insolvency Act* of Guyana is s. 42 of the English *Bankruptcy Act 1914*, and s. 46 of the *Insolvency Act* of Guyana corresponds with s. 44 of the English Act and deals with the avoidance of preferences and it is noteworthy that the authorities indicate that the onus of proving good faith under this section is upon the person who seeks to establish it. Re Ex parte Tate ((1876) 35 L.T 531). That section enacts as follows:

> "46. (1) Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered, by anyone unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor with a view of giving that creditor a preference over the other creditors, shall, if he who makes, takes, pays, or suffers.

> the act adjudged insolvent on an insolvency petition presented within three months after the date of that act, be deemed fraudulent and void as against the assignee."

Three Canadian authorities are helpful in deciding this problem as to the burden of proof under s. 45 (1) of the *Insolvency Act viz.,* Koop v. Smith ((1915) 25 D.L.R. 355), Re Mac Keen ((1929) 1 D.L.R. 528), Re Trenwith ((1934) 3 D.L.R. 195). In Koop v. Smith the head-note reads as follows:-

> "The principle of *res ipsa loquitor* applies to assignments made between near relatives under suspicious circumstances and, when impeached by creditors the burden of proof is upon the defendant to establish by corroborative evidence, other than the testimony of interested parties the *bona fides* of the transaction."

In that case an action was brought to set aside a bill of sale executed in favour of the defendant at the time when the latter was financially embarrassed and to have the bill of sale declared void as preferential assignment in fraud of the rights of other creditors of the assignor. The trial judge found that the circumstances surrounding the execution of the bill were so suspicious, as to throw the burden of proof of its *bona fides* upon the grantee the plaintiff's sister who was the defendant. The Supreme Court of Canada agreed with that point of view and reversed the decision of the Court of Appeal which had held that the burden of proof lay upon the plaintiff and that he had not discharged it. DUFF, J. in his judgment agreed with the trial judge who treated the relationship between the assignor and assignee as decisive in the sense that it determined the point of view from which the evidence was to be considered and the all important question of the onus of proof. DUFF, J. then continued in his judgment:

> "The trial judge indeed appears to have laid it down as a proposition of law that a transaction of this kind between two near relatives, carried out in circumstances in themselves sufficient to excite suspicion, can only be supported (in an action brought to impeach it by creditors) if the reality or the *bona fides* of it are established by evidence other than the testimony of these interested parties and there is a series of authorities in the Ontario Courts which has been supposed to decide that, and it may be that it is the settled law of Ontario to-day.

I do not think the proposition put thus absolutely is part of the English law or of the law of British Columbia: but I think it is a maxim of prudence based upon experience that in such cases a tribunal of fact may properly act upon that when suspicion touching the reality or the *bona fides* of a transaction between near relatives arises from the circumstances in which the transaction took place then the fact of relationship itself is

> sufficient to put the burden of explanation upon the parties interested and that, in such a case, the testimony of the parties must be scrutinized with care and suspicion; and it is very seldom that such evidence can safely be acted upon as in itself sufficient.
>
> I may add that I think it doubtful whether the Ontario decisions when properly read really do lay it down as a rule of law that the fact of relationship is sufficient in itself to shift the burden of establishing the burden of proof in the strict sense. It may be that the proper construction of these cases is that the burden of giving evidence and not the burden of the issue is shifted. (As to this distinction see the admirable chapter IX. in Professor Thayer's *"Law of Evidence")* In my own view as indicated above, even this would be putting the matter just a little too high; I think the true rule is that suspicious circumstances coupled with relationship make a case of *res ipsa loquitor* which the tribunal of fact may and will generally treat as a sufficient *prima facie* case, but that it is not strictly in law bound to do so."

In Re Mac Keen (*supra*) where a debtor transferred to his wife all his real property for a past and inadequate consideration i.e., where she had advanced a small sum of money during the course of litigation which he had contested, it was held that under s. 60 (2) of the *Bankruptcy Act* (Canada) which is in similar terms to s. 45 of the *Insolvency Act,* Guyana, there was an onus placed on the debtor and his wife to prove good faith and this they had failed to do. The learned Judge cited Tate's case (*supra*) and Koop v. Smith (*supra*) for the proposition that the onus of proving good faith is upon the person desiring to avail himself of the protection of the saving clause.

In Re Trenwith (*supra*) where a mortgage was made by a husband in favour of his wife within a year before the wife's bankruptcy it was held that the crucial question whether the giving of the mortgage was *bona fide* was pre-eminently one of fact; and as the trial judge did not indicate whether or not he considered the transaction was carried out in good faith a new trial must be ordered. In the course of his judgment in the Ontario Court of Appeal, MACDONNELL, J. A. set out what I believe to be a correct statement of the law on this subject, when he said: "In dealings of this kind between close relatives there is an onus upon those interested to establish their good faith. In this case not only did no defendant pledge his oath to the good faith of the transactions and submit to cross examination before the learned trial judge, but no explanation was given of the various peculiar circumstances."

It appears to me that these authorities illustrate the proposition that although the initial burden may be on the mover of the motion to show that under s. 45 of the Act, the settlement was in defraud of creditors in that it was not made in good

faith and for valuable consideration, the moment it is shown that the grantee or assignee is closely related to the settlor the onus shifts to the former to show that the settlement was in fact made in good faith and for valuable consideration. I do not go so far as the decision in Koop v. Smith (*supra*) seems to suggest to say that this must be done by corroborative evidence, for as one of the judges in that very case stated the onus can be discharged by the unsupported statement of the assignor if the judge is impressed with his veracity. Where that relationship is shown I would agree with the submission of Counsel for the applicant that it would be impossible or almost impossible for a third party to show that the settlement was in defraud of creditors as the circumstances of the transaction would be peculiarly with the knowledge of the parties. As the learned author of *Cross on Evidence* 4th Ed. at p. 86 puts it:

> "All that can be said by way of generalization with regard to the effect of peculiar knowledge is that it may mean that very little evidence is required to satisfy an evidential burden when borne by the party lacking such knowledge and that, subject to what is said in the Addendum, *ante*, where the affirmative of a negative averment is peculiarly within the knowledge of the opponent of that averment, he bears the evidential burden on the issue in the first instance."

As *Stephen's Digest of the Law of Evidence* 12th Ed. Article 104 puts its:

> "In considering the amount of evidence necessary to shift the burden of proof, the Court had regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively."

At the hearing of this matter I therefore ruled that the relationship of husband and wife (even though of an illicit nature) having been established by the applicant the onus then lay upon the respondent to satisfy the Court on a balance of probabilities that the purported sale to her of the building and the conveyance of the land upon which the building stood at lot 51, Logwood, was made in good faith and for valuable consideration.

In her evidence the respondent Sookram stated that after breaking her marriage in 1950, she lived with her grandfather at Mahaica Creek and he gave her three heads of cows. From this humble start, she reared cows and sold them and gave the money to her grandfather to keep. In 1972 she took the sum of $4,500.00 from her grandfather with which she purchased the house at Logwood, Enmore, from her reputed husband, the insolvent. She had also purchased a car in 1968. In 1960 she went to live with Sookram and left $1,800.00 with her grandfather. In 1967 she sold ten heads of cows for $2,000.00 and left the money with her grandfather. In 1971 she had 45 heads of cattle, 35 of which she sold for $6,650.00. In

all her grandfather had $10,450.00 and in September, 1972, the grandfather handed over to her $5,150.00 and from then she kept her own accounts. At this time she was having trouble with the legitimate children of Sookram and after selling her the house he left with his children and went away. She then proceeded to paint and repair the house. Later that year, the insolvent took her to the office of Enmore Estates Ltd. where she paid off the balance of the purchase price of the land which was $596.00. In 1973 she became reconciled with the respondent who returned to live with her and on his instructions transport was passed to her on the 17th April, 1974. It was not until December, 1973 she paid off the purchase price for the land and the reason for this was that the Village Council said that the estate was charging too much for the land and the Council was negotiating to give the purchasers certain amenities like roads and water. She also maintained that the insolvent had become sick after December, 1973 and that was why the land was not transported until April, 1974. She relied on her book Ex. 'J' showing entries made by her of the transactions leading to an accumulation of money which enabled her to make the purchase. It was not until the 4th April, 1973 that she heard about the accident in which the insolvent's son had been involved and she disclaimed all knowledge of the action for damages brought against the insolvent and his son.

Having considered all the evidence in the case, I am convinced that the respondent has not discharged the onus placed on her of showing that the transaction was made in good faith and for valuable consideration. Guided as I am by the evidence of the handwriting expert I find that the entries in the book Ex. 'J' were all made at the same time and do not represent entries in relation to genuine transactions, and I am not satisfied that from 3 heads of cattle she was able to accumulate the amount of money to make the purchase. I agree with the argument that it as unlikely that if the insolvent was quarrelling with the respondent and about to leave her that he would have sold to her his only substantial asset. In her effort to bolster her case the respondent produced a fraudulent document as Counsel put it "to support the validity of the receipt which must have the effect of invalidating the receipt and leading to the conclusion that the receipt was concocted for the purpose of the case." There is also the evidence of the valuator, Moseley, that that house in 1972 would have beer valued at a sum much greater than $4,500.00. I therefore reject the evidence of the respondent and arrive at the conclusion that she has failed to discharge the evidential burden placed on her in view of the circumstances of the case.

I am fortified in my findings by the circumstances that Claude Housty, the Conveyancing Officer of Bookers Sugar Estates Ltd., who was called to give evidence by the Court stated categorically that his evidence given before Mr. Justice Fung-A-Fatt at a creditor's examination to the effect that Sookram Singh gave him instructions on the 24th March, 1973 to pass the transport to Latchmin Sookram by way of a sub-sale was a mistake. The matter was placed beyond doubt when the

witness swore that he became Conveyancing Officer on the 1st October, 1973, so he could not have seen the insolvent Sookram Singh and the respondent Latchmin Sookram in March, 1973 as he was then working in the Supreme Court Registry. In all probability the relevant date was the 24th day of December, 1974. It is passing strange that though the respondent alleges she purchased the building in August 1972 it was not until April 1974, that is, approximately 6 weeks after the judgment was entered against the insolvent, that transport of the land was passed to her. Her excuses for failing to obtain transport before that date appear to be weak and unacceptable.

I would therefore set aside the conveyance made on the 17th April, 1974, by Enmore Estates Ltd. to the respondent Latchmin Sookram in respect of the property situated at 51, Logwood, Enmore, East Coast Demerara and I would grant the declaration that the aforementioned land and the building thereon were at all material times part of the estate of the insolvent Sookram and available for distribution to his lawful creditors. And it is further ordered that the Official Receiver be empowered to sell the aforementioned property of building and land and make the proceeds therefrom available to the creditors of the estate for the insolvent. The Official Receiver will have his costs against the respondent to be taxed.

**Conveyance set aside.**
**Declaration that property is part of the estate of the deceased insolvent. Order that Official Receiver sell the property and the proceeds be payable to creditors of the estate of the insolvent.**
**Costs against respondent to be taxed.**

**SOLICITORS**

D. De Caires for applicant.
H.B. Fraser for respondent.

**The State v. Darrell**

**FITZPATRICK DARRELL**
**Appellant**
**v.**
**THE STATE**
**Respondent**

[Court of Appeal (Haynes, C., Crane, J.A. and George, J.A. (ag.) October 21; November 17, 1976]

*Criminal Law-Evidence-Legal representation-Refusal by judge of request by defence counsel to have State witnesses recalled for further cross-examination-*

## The State v. Darrell

*No reasons given by judge for refusing request-Miscarriage of justice.*

*Constitutional Law-Trial unfair-Breach of fundamental rights provisions of the Constitution of Guyana, Art. 10(2), 10(2) (e).*

On his arraignment at the Demerara Assizes the accused was unrepresented by counsel. The trial was proceeded with. After three State witnesses, the complainant and the medical doctor had testified, and were ineffectively cross-examined by the accused who was unskilled in that art, the accused then sought an adjournment in order to procure counsel to defend him. An adjournment was accordingly taken to later in the day when counsel appeared on his behalf and sought permission of the court to have recalled for further cross-examination those three prosecution witnesses whom the accused had ineffectively cross examined previously. The application was, however, refused by the trial judge without assigning reasons and me accused afterwards convicted.

On appeal.

**HELD:** (1) That permitting counsel to appear at the trial on the one hand, and refusing his request to recall for further cross-examination vital prosecution witnesses, can only be considered, in the circumstances, a denial of proper representation to the accused. By so doing, the trial judge merely complied with the formal desirability of allowing counsel to appear while he in fact denied the accused partially the substantive effect of such representation.

(2) That a trial must be fair in every respect: the refusal to allow the recall of the witnesses was, in the circumstances a miscarriage of justice and a breach of the fundamental rights provisions under art. 10(2), 10(2) (e) of the Constitution of Guyana.

**Appeal allowed.**
**Case remitted to High Court for trial *de novo.***

**Editorial note:** See report of this case at (1976) 24 W.I.R. 211

**Cases referred to:**

1. Pen v. Greyhound Racing Association. Ltd., [1969] 1 Q.B. 125; [1968] 2 W.L.R. 1471; [1968] 2 All E.R. 545; 112 Sol. Jo. 463.
2. R. v. Din [1971] C.L.R. 601.
3. Galos Hired v. R. [1944] A.C. 149.
4. De Freitas v. R. [1960] 2 W.I.R. 523.
5. R. v. Malvisi [1909] 2 Cr. App. R. 251.

**The State v. Darrell**

Rex McKay, S.C., for the Appellant.
M.L.R. Ganpatsingh, Assistant Director of Public Prosecutions, for the State.

**HAYNES, C**: On 21st October, 1976, I delivered an oral judgment of the Court allowing this appeal. As the decision involved certain aspects of law and procedure of some importance, GEORGE, J.A., was invited to write a judgment for circulation.

**GEORGE, J.A. (ag.) (delivered the judgment of the court):** The appellant who, at the time of his conviction was 28 years old, was found guilty by a Demerara Assize jury of causing grievous bodily harm to Archibald Batson with intent to maim, disable or disfigure him. He appealed against this conviction on several grounds, but we propose to consider only one of them, *viz.*, the refusal by the trial judge to allow the recall of three of the prosecution's witnesses for cross-examination by counsel who represented him. It is necessary, therefore, to set out the relevant sequence of events.

The matter came up for trial on Tuesday, 9th December, 1975, when then the accused intimated to the trial judge that he was represented by counsel who was absent. He was nonetheless arraigned and he pleaded not guilty. Two counsel entered appearance on behalf of the State and a panel was struck. The trial judge then adjourned the case to the following day at 9 a.m. to enable the accused to consult with counsel who, it was stated, was at Linden. On the resumption at 9.45 a.m. on 10th December, counsel did not appear nor was any reason given for his non-appearance. The accused was put in charge of the jury, and it was then that another barrister appeared and informed the trial judge that counsel whose services the accused said he had engaged, had asked him to state that proper arrangements had not been made for his appearance. The trial judge then proceeded with the trial. Three witnesses, including the victim, Archibald Batson, all of whom can properly be described as eye witnesses, were called during the morning session, which ended at 11:30 a.m. They were cross-examined by the accused, but the brevity of the cross-examination as well as the nature of the questions asked of them, in our opinion, indicate how inadequate he was to the task. On the resumption at 1:40 p.m. the medical doctor, who had examined the victim on the night of the incident, gave evidence, and he too was cross-examined by the accused. After the doctor had completed his evidence, the accused requested an adjournment to 2:30 p.m. to enable another legal practitioner, whom he named, to be present and appear on his behalf. This request was granted and the adjournment was taken at 1:48 p.m. On the resumption at 2:45 p.m., still another barrister, Mr. R. Hanoman, entered appearance on behalf of the accused and he requested and was granted leave to further cross-examine the doctor. Then the prosecution called its final witness, a detective sergeant, who gave evidence of having gone to the scene on the night of the incident, of an oral statement made to him by the accused, and also of a subsequent written statement, both of which

were under caution. After this witness had been cross-examined, Mr. Hanoman made a request to have the three eye-witnesses recalled for further cross-examination, but the trial judge refused the request. The note he made reads as follows:

> "Mr. Hanoman requests that three witnesses be recalled-Archibald Batson, Pearl Cooper and Theodore Williams, on the grounds that in the interest of justice *(sic)* that because of the fact that the accused was unrepresented until now that an opportunity be given to counsel to cross-examine. Application refused."

Counsel for the State then closed his case and the accused made a statement from the dock which could be construed either as a plea of self-defence or accident. He called no witnesses and was eventually found guilty and sentenced to a term of five years' imprisonment and ordered to receive a whipping of ten strokes.

It is on the basis of the above facts, that counsel for the appellant has argued that the trial judge erred when he rejected the application of counsel at the trial for the recall of the injured man and the two other eye-witnesses for further cross-examination. Section 74 (4) of the *Evidence Act. Cap. 5:03*, empowers a judge 'if he thinks fit, (to) permit a witness to be recalled, either for further examination-in-chief or for further cross-examination, and the question to be determined is whether the trial judge in the circumstances of the present case, exercised the discretion given him by the sub-section, judicially. No reasons are given by him for his refusal to allow the witnesses to be recalled, although it is clear to us from a reading of the notes of evidence that if either the plea of self-defence or accident was to succeed a much more careful and searching cross-examination of these witnesses was required than that done by the accused or, possibly, of which he was capable. This is not a case of an attempt being made to obtain the services of counsel at the last moment. The accused had intimated from the very inception that he not only desired to be represented but that he had actually retained the services of a barrister. The learned trial judge, no doubt conscious of the desirability of an accused being so represented, granted him an adjournment to the following day. And-of this we cannot be certain-it is possible that he was also moved to grant the adjournment in the full knowledge that, because of the procedure used in calling up cases for trial at the criminal sessions, an accused person may well receive less than twenty-four hours' notice as to the time when his case will come on for trial. Such a short period of notification can be a source of acute embarrassment, not only to the accused, but possibly even more so to his legal adviser who may well find himself faced with a clash of fixtures. Indeed, in such circumstances it quite frequently happens that the accused person's case is adjourned in an attempt to accommodate the practitioner. Be that as it may, the pretrial efforts of the accused to retain the services of a practitioner having proved abortive, he must have found himself faced with what, to him, must have been the daunting prospect of conducting his case on his own-a prospect which he did not

seem to have anticipated-and with two lawyers arrayed against him on behalf of the State. LORD DENNING, M.R. has very aptly portrayed the dilemma of the man undefended by counsel in Pett v. Greyhound Racing Association, Ltd. [1968] 2 W.L.R. 1471, at pp. 1475-1476. He said:

> "It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it even day. A magistrate may say to a man. 'You can ask any question you like', whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him."

These rather graphic observations of the Master of the Rolls, portray an all too familiar occurrence in all courts of trial in Guyana.

Another example of the anxiety of the courts that there should be adequate legal representation of a person charged with a criminal offence, is to be found in the case of R. v. Din [1971] C.L.R. 601. The facts so far as they are relevant were as follows:

> "Din was convicted of being in charge of a motor-vehicle when unfit to drive through drink, and with a blood alcohol concentration above the prescribed limit.... His defence was that he was not in charge of the car. ... When he arrived at the trial court his solicitor was not present. He telephoned his solicitor who said that his case had been overlooked but he would try to instruct counsel at once. Counsel was instructed and he took the view that the defence would be handicapped by the absence of witnesses (one was out of the country) but there was no application for an adjournment. The summing-up contained a number of misdirections."

It was held, allowing the appeal, that even if there had been no defect in the summing-up, the court would probably have quashed the conviction, as it was considered one of the essential features of justice was that those entitled to be defended should be defended adequately and that Din was entitled to feel strongly that justice did not appear to have been done. In Galos Hired v. R. [1944] A.C. 149, an advocate was assigned to the appellant for the preparation and conduct of his appeal against his conviction of murder, and the advocate, through no default on his part, was unable to reach the court in time to conduct the appeal which was conducted by the appellants in person and dismissed,' the court having before it the record of the case, the judgment of the trial judge and the petition for appeal which had been submitted by counsel. It was held that the appeal had not been effectively heard and must be restored for hearing in circumstances which

would enable an advocate to conduct it. Although the judgment of the Judicial Committee was concerned primarily with the construction of a provision in the 'Poor Persons Defence Ordinance of the Somaliland Protectorate', the observations of VISCOUNT MAUGHAM (*ibid.*), at p. 155 are of much wider significance and import. He said:

> "The importance of persons accused of a serious crime having the advantage of counsel to assist them before the courts, cannot be doubted by anybody who remembers the long struggle which took place in this country and which ultimately resulted in such persons having the right to be represented by counsel."

And representation includes cross-examination which is of primary importance.

In the present case, the trial judge recognised the desirability of the accused being represented by counsel and rightly allowed such representation. Counsel appeared at a time when all the main witnesses who could testily as to the alleged attack, as well as the doctor who examined the victim, had all completed their evidence. He allowed the doctor to be recalled but not the vital witnesses, concerning the cross-examination on whom so much depended if any credence was to be given to the accused's defence or any reasonable doubt cast on the case for the prosecution. The case was a short one and there is no evidence that any inconvenience would have resulted if the application of counsel had been granted.

The permitting of counsel to appear at the trial, on the one hand, and the refusal of his request to recall for further cross-examination the vital witnesses on whom the prosecution relied for a conviction, on the other, cannot but be considered in the circumstances a denial of proper representation to the accused. The trial judge was merely complying with the formal desirability of allowing counsel to appear but was in fact denying to the accused partially, the substantive effect of such representation; and to adopt what was said in R. v. Din (*supra*), the accused "was entitled to feel strongly that justice did not appear to have been done". What then is the effect of all this?

In de Freitas v. R. [1960] 2 W.I.R. 523. MARNAN, J. in considering whether the refusal of the trial judge to grant an adjournment requested by counsel in a murder trial led to a miscarriage of justice, referred to the case of R. v. Malvisi (1909) 2 Cr. App. R. 251. There, the appellant was arrested, committed for trial and convicted on three successive days. His conviction was quashed after the hearing of the evidence of witnesses whom the appellant had been unable to call at the trial for lack of time to get in touch with them. The learned judge made the following observations on that case (*ibid* p. 525):

> "It does not appear that the appellant was represented by counsel at trial

> or that any application for an adjournment was made, but had such an application been made and refused, the refusal would, in our view have amounted to a miscarriage of justice in the circumstances of that case."

On a similar principle, *viz.,* that a trial must be fair to an accused in every respect, the refusal of the judge to allow the recall of the witnesses was, in the circumstances of the present case, a miscarriage of justice.

The importance of the fair trial of persons charged with criminal offences is recognised as one of the fundamental rights of the individual by the Constitution of Guyana. *Inter alia,* art. 10(2) guarantees to anyone who is charged with a criminal offence the right to adequate time and facilities in order to prepare his defence and the right to be defended either in person or by a legal representative of his own choice. It also guarantees that the person charged "shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court." This guarantee which is provided in Art. 10(2) (e) of the Constitution is but a restatement of the common law right referred to by LORD MAUGHAM in Galos Hired v. R. (*supra*).

In arriving at the conclusion that there was a miscarriage of justice in the present case, we must not be thought to be saying that a court must always exercise its discretion in favour of a recall of a witness when so requested by the accused person or his counsel. The court's function must at all times be, to examine the justice of the request in the particular case as it affects all the parties concerned and exercise its discretion only after taking into account all the circumstances thereof.

We therefore allow this appeal and remit the case to the High Court for trial *de novo.*

**CRANE, J.A.: I concur.**

**Appeal allowed.**
**Trial *de novo***
***ordered.***

**King v. Kum**

**OSCAR ARNOLD KING**
**Plaintiff**

**v.**

**ISAAC KUM**
**Defendant**

[High Court (Vieira J.) January 26; February 9 and May 27, 1976]

*Tort-Personal Injuries-Damage to Property-Damages-Special Damages-General Damages.*

King, the plaintiff in the first action, alleged that he was driving north along the western side of the No. 76 Public Road, Corentyne, Berbice at a speed of about 35 m.p.h. when he saw a pedestrian standing on the road side. It was raining at the time. He recognised the person to be someone he knew and after signalling appropriately pulled over to pick up the person when he felt an impact to the rear of his vehicle. Kum, on the other hand, claimed that King had in fact overtaken him while he was driving along the said road in the same direction and swerved suddenly in front of him towards the pedestrian. He (Kum) applied his brakes but hit the back of King's car. Both drivers and the occupants of Kum's car sustained injuries. Both drivers sued each other in separate actions claiming damages for personal injuries and for damage to property. These two "running down" actions were consolidated at the request of the parties.

**HELD:** (1) That having regard to the evidence as a whole, on a balance of probabilities Kum's version was to be preferred; and that therefore, King's claim against Kum was dismissed with costs to Kum fixed in the sum of $500.00.

(2) That Kum would be awarded special damages for medical expenses, travelling expenses, loss of property and loss of use of his car.

(3) That Kum would be awarded general damages for pain and suffering, loss of amenities and loss of prospective earnings.

**Judgment for Kum in the sum of $23,131.00 in damages with costs in the sum of $500.00.**

**Editorial Note:** Although it was not eventually tendered because it was not produced to the court, the learned judge ruled that the Accident Report Booklet (in which the police had recorded the measurements relating to the accident) was admissible in evidence by virtue of s. 90 (a) (ii) of the *Evidence Act, Cap. 5:03.*

## King v. Kum

**Cases referred to:**

1. Behrens v. Bertram Mills Circus Ltd. [1957] 2 Q.B. 1
2. Manley v. Rugby Portland Cement Co. Ltd. (1951) C.A. Vol. 1 Kemp & Kemp 2nd edn.
3. Basil Jaikarran v. Sheik Zahoor Bacchus No. 2391 of 1971 Demerara (Unrep. Dec. No. 24 of 1973)
4. Fletcher v. Autocar Transporters Ltd. [1968] 1 All E.R. 726: [1968] 1 Q.B. 322
5. Harold Kanhai v. Rooplall *et al* No. 1418 of 1971 Demerara (Unrep. Dec. No. 33 of 1973)

N.O. Poonai for King
M.C. Crawford for Kum

**VIEIRA, J.:** These are two "running down" actions which were consolidated at the request of the parties and, like so many of these actions, a Court has to take the evidence of the opposing sides with a 'pinch of salt' and attempt, as best it can, to sift the wheat from the chaff.

The case for King, as I understand it, is that on June 17th, 1973, around 6.30 p.m., he was alone driving his motor car PT 404 north along the western side of the No. 76 Public Road, Corentyne, Berbice at a speed of about 35 m.p.h. It was raining at the time and he had all his car windows up. Through the rain he saw a woman standing on the western grass parapet about 50 rods north of him signalling cars to stop. When he was about 100 feet south of her he recognised her to be the witness Kathleen Adina Tyndall, a friend of his, and he then decided that he would stop and give her a lift to wherever she was going. To achieve this object, he reduced his speed, signalled with his left side blinker and began to move over to the western parapet. He looked into his rear view mirror and saw the lights of a car coming from behind at a distance of about 300 feet. When he had got to about 50 feet north of where Mrs. Tyndall was standing and before his vehicle had come to a standstill, he felt a heavy impact at the back of his vehicle, as a result of which his car was pushed across the western grass parapet and ended up in the western trench. He came out of his vehicle about 15 minutes afterwards and observed that the rear windshield of PT 404 was broken. He then went up to the other car and recognised that it was PZ 7898 which he knew belonged to Kum, a friend of his for a number of years. He did not see who was actually driving PZ 7898 at the time of the accident but he saw Kum and the witnesses, Cyrus Ross and Lionel Alexander Alert who were all bleeding, being taken away in another car. Later, measurements were taken in his presence by P.C. Rose, after which he went to Dr. Persaud, G.M.O., at Springlands who examined him, treated him and issued a medical certificate. He spent about $50.00 on medicines and he did not have the use of his car (valued then at about $2.500.00 and which had subsequently to be written off) and, as a result, he was obliged to

incur travelling expenses of about $40.00 per month for 6 months.

Kum's case, on the other hand, was that he was driving his motor car PZ 7898 north along the western side of the No. 76 Public Road at a speed of about 35 m.p.h., with two passengers inside, Ross in the front seat next to him and Alert in the back seat behind him. It was raining at the time and he had all his car windows up except one and his air conditioner was working at the time. He observed a motor car about 100 yards away approaching him going south. He then noticed the lights of a vehicle coming up fast behind him through his rear view mirror, at which stage he saw a female person standing on the western parapet about 1 rod north of the approaching vehicle, signalling cars to stop. The car from behind then overtook him and when it was about 1 1/2 rods in front of him it suddenly, without any signal, swung over towards the western parapet where the woman was standing. He immediately applied his brakes but the car skidded on the wet surface of the road and rammed into the back of the car in front and, as a result, his front windshield was smashed and he became unconscious and did not remember anything afterwards until the next morning about 10.00 a.m., when he found himself a patient at the New Amsterdam Hospital, where he spent three months and during which time he underwent three operations by Dr. Tiwari, Eye Specialist. Also admitted a patient at the same institution, was Cyrus Ross who remained there for one month and whose eye was also, severely damaged. Kum, who was a Government Surveyor, had to retire on medical grounds because of the paucity of vision from his right eye (he being only able to see shadows) and he is now a Drainage and Irrigation Board Inspector at Black Bush Polder, Corentyne, at a reduced salary and without any of the allowances that he was previously receiving.

Having regard to the evidence as a whole, including the demeanour of all the witnesses who testified. I am satisfied, on the balance of probabilities, that Kum's version is the more true and reasonable one and I have come to this conclusion for the following reasons: -

(1) Mrs. Tyndall was clearly wrong when she said that it was not raining at the time of the accident. Both King and Kum said that it was raining at that time and it seems to me that Mrs. Tyndall, not having an umbrella with her as King observed, was getting well and truly soaked and was more concerned about her physical comfort than paving attention to what was actually taking place on the highway at that particular place and point of time. Her immediate object was undoubtedly, to join the first car that might heed her signal to stop. Further, she was quite adamant when she said in cross-examination-"the accident did not occur in the western carriageway"-which is in direct conflict with the following passage of King's evidence in cross-examination-"I agree that at the time of the impact Kum's vehicle was on the western carriageway travelling north."

(2) I have no real doubt that King was not seeing clearly when he was driving since, on his own admission, he had all his car windows fully wound up and, what is even more significant, he had no air vent at all. These two factors, together with the undoubted fact that it was raining at the time, prevented him from properly recognising Mrs. Tyndall at the distance (100 feet) that he said he did and I consider Mr. Crawford's suggestion to King in cross-examination that he did not actually recognise Mrs. Tyndall until he was about to pass her, was correct and consistent with King's testimony in cross-examination that-"the impact took place about 50 feet north of where Mrs. Tyndall was standing."

(3) Although P.C. Rose who took measurements in King's presence was not available to give evidence (he now being resident in Canada), nevertheless, by virtue of s. 90(a) (ii) of the *Evidence Act, Cap. 5:03.* his Accident Report Booklet, in which the measurements were recorded, as well as the damage to the two vehicles, was and is admissible in evidence and would have been of great assistance to this Court but, unfortunately, was never in fact produced despite several adjournments in order to procure same. On this material aspect, all that King says is that the impact took place about 50 feet north of where Mrs. Tyndall was standing and that PT 404 ended up about 32 feet north-west of PZ 7898 which he claims was on the road past the centre line on the eastern half. Kum's evidence on this aspect is much more positive and definitive and I accept it in preference to that of King. Kum says that the width of the public road is about 50 feet of which 7 feet forms the western grass parapet and that the point of impact was about 17 feet east of the said parapet, i.e., about 10 feet east of the edge of the said parapet. He further states that the skid marks were not more than 2 rods (i.e., 24 feet or 8 yards) whereas King, in re-examination, said that the skid marks from the point of impact went south in a straight line for about 120 feet.

(4) Unwittingly, perhaps, para. 1 of the statement of defence of King in Action No. 45 of 1974 admits paras. 1-6 of Kum's statement of claim and para. 6 thereof avers that PT 404 was travelling behind PZ 7898. It seems quite clear to me, therefore, having regard to this admission, that an irresistible inference arises that PT 404 did in fact overtake PZ 7898 prior to the impact and, to my mind, clearly gives the lie to the vehement assertions of both King and Mrs. Tyndall that PT 404 never overtook PZ 7898 at any stage prior to the impact.

For these reasons, therefore, King's claim against Kum (No. 33 of 1974) is hereby dismissed with costs to Kum fixed in the sum of $500.00.

There will, accordingly, be judgment for Kum in his claim against King (No.45 of 1974), as follows -

(1)-<u>Special Damages:-</u>

(a) - Medical Certificate-Although, unfortunately, no medical certificate was tendered on Kum's behalf (indeed, none was tendered on behalf of King either!), nevertheless, I accept and believe that there was such a certificate and that it cost $15.00 which is quite cheap when one considers that such a certificate today costs at least $25.00. Accordingly, this sub-head is granted.

(b) - Travelling expenses-15 trips from Williamsburg, Corentyne, to New Amsterdam at $1.20 per trip to attend the normal follow-up clinic is more than reasonable and this amount of $18.00 is granted without further comment.

(c) - Loss of a pair of spectacles valued $85.00 and a shirt at $5.00 = $90.00 is equally granted without further comment.

(d) - The sum of $1,008.00 claimed from July, 1973, to January, 1974, a period of 7 months at $144.00 per month is not unreasonable, to my mind, for loss of the use of PZ 7898 in view of the amount of travelling normally done by a Government Surveyor and 1 have no hesitation in granting this amount.

Under this head, therefore, the sum of $1,131.00, as claimed, is hereby granted in full.

(2)-General Damages:-

Most judges do not indicate their awards of general damages under different subheads but, instead, tend to lump them all together in one global sum. My practice, however, has always been, as far as is humanly and reasonably possible, to make awards of general damages under three (3) main subheads, viz:- (a) pain and suffering: (b) loss of amenities and (c) loss of prospective earnings or profits. I shall now deal with those sub-heads separately as follows -

(a)-Pain and suffering-Although these two words do not necessarily mean the same thing, nevertheless, it is the practice of the Courts to use these words in conjunction and not separately. In general, it can be said that 'suffering' is less acute than pain and covers a much wider range of aches and maladies. 'Pain' is itself a relative term with great variations in degree of severity and is not, per se, capable of medical diagnosis. So much may depend upon the nature of the blow or injury received and the object or instrument which caused same, as well as the part of the body where it occurs. It is only really the patient's reaction to touch or to sensitive media such as light or heat that gives a doctor some idea of the existence of pain and us degree and it is well-known that pain can be easily feigned.

There is no real evidence in this matter that Kum actually suffered any pain as such but I think it most reasonable to assume that he must have undergone some

"discomfort" at least, which the authorities show can be taken into account in assessing general damages although the amounts usually granted are quite small (*vide* Behrens v. Bertram Mills Circus Ltd. [1957] 2 Q.B. 1 at p. 27). Under this sub-head I am prepared to award the sum of $200.00.

(b) - Loss of amenities-In Manley v. Ruby Portland Cement Co. Ltd. (1951) C.A. (reported in Vol. 1 of the Second Edition of *Kemp & Kemp's Quantum of Damages for Personal Injuries* (1961) at p. 55 BIRKETT, L.J., had this to say-

> "There is a head of damage which is sometimes called loss of amenities: the man made blind by the accident will no longer be able to see the familiar things he has seen all his life: the man who has had both legs removed and will never again go upon his walking excursions-things of that kind-loss of amenities."

Undoubtedly, this is a most difficult sub-head to assess and evaluate. Here, Kum has more or less lost the use of his right eye because, merely to see shadows is just as bad as seeing nothing at all. There is absolutely no evidence that there is anything physically wrong with his left eye. I pause here to merely observe that the statement of claim speaks of the loss of vision in the 'left' eye whereas the oral testimony shows that it was really the 'right' eye that was damaged. I make nothing of this discrepancy but merely to mention it *'en passant'*. Putting the best consideration that I can upon this difficult calculation, I would award Kum $ 1,000.00 under this sub-head.

(c) - Loss of prospective earnings-All the authorities show that in serious cases of personal injuries such as undoubtedly is the case here, this is usually not only the most important but the most substantial sub-head of general damages and one not always easy to assess and evaluate . In Basil Jaikarran v. Sheik Zahoor Bacchus (No. 2391 of 1971 (Demerara) unreported Decision No. 24 of 1973), I pointed out that the judges usually calculate this important sub-head in either one of two ways, *viz:*- (i) Method "A"-Multiply the annual wages or salary of the plaintiff by a number of years purchase (not exceeding twenty) which the Court considers reasonable having regard to (a) the age of the plaintiff: (b) contingencies of life and (c) prompt payment of at once and for all lump sum. This method is based upon earning capacity which is valued as a capital asset destroyed or diminished by the accident: (ii) Method "B"-Multiply the annual wage or salary of the plaintiff by the number of years for which he might have gone on working. From the total obtained, deduct 10% representing Income Tax and then divide the result by one-third representing (a) contingencies of life and (b) prompt payment of a once and for all lumpsum. This method is based upon an estimate of the actual amount of future earnings which is discounted to its present value and then reduced on account of contingencies.

As an interesting experiment, I propose to utilise both methods and see what are the respective amounts obtained.

Method "A":-

The plaintiff was a Government Surveyor earning a salary of $480.00 per month plus $240.00 per month in allowances, a total monthly earning of $720.00. He is now a Drainage and Irrigation Board Inspector earning a flat salary of $312.00 per month without any allowances. This means that his earnings have been reduced by the quite considerable sum of $408.00 per month which I shall round off at $400.00. The normal age for retirement for public servants is 55 years. This Court was very much handicapped in that not only were there no medical certificates tendered but absolutely no evidence was led as to the respective ages of the two drivers. Nevertheless, as far as my recollection goes, Kum appears to be a man in his late forties or early fifties. I will consider that at the time of the accident he was about 50 years old. As a public servant, therefore, whether as a Surveyor or a Drainage and Irrigation Board Inspector, he would have had 5 more years of service prior to retirement. In view of this definite period plus the fact that he would probably have at least 5 more years up to age 60 years in which he could work for a wage or salary (probably at a lesser amount), I am prepared to utilise 5 years of purchase here. Accordingly, on that basis, the calculation here would be as follows-$400.00 per month x 12 months would give a yearly loss of earnings of $4,800.00. Multiply this amount by 5 representing years of purchase and we will get a total of $24.000.00.

Method"B":-

Averaging that the plaintiff would have had at least 10 years more of working life if he was 50 at the time of the accident and that his loss was $4,800.00 per annum, then the calculation here would be-$4,800.00 x 5 years up to his retirement at age 55 years = $24,000.00. Between 55 and 60 years the monthly loss would, in all probability, be less than $400.00 per month, since it must be very rare indeed that a man would get the same or more in wages or salary after retirement and for this 5 year period I consider a loss of $200.00 per month reasonable.

For this second 5 year period, therefore, the projection would be $200.00 x 12 months = $2,400.00 per annum x 5 years = $12,000.00. Therefore, the total loss of earnings for the 10 year period would be $24,000.00 + $ 12.000.00 = $36,000.00. From this sum must be deducted 10% representing Income Tax = $36,000.00 -$3,600.00 = $32,400.00 and we must then finally divide this amount by one-third for contingencies and we would then arrive at a total of $32,400.00-3 = $32,400.00-$10,800.00 = $21,600.00.

It will thus be seen, therefore, that Method "A" gives $2,400.00 more than Method

"B". Speaking for myself, I have always considered the former, even though it tends to give a the larger total generally, a simpler and more realistic guide than the latter especially having regard to the high cost of living and the ever spiralling inflation that seems to be a perennial problem worldwide today. I am fortified in my opinion by awards given by the Courts in England and in the Commonwealth Caribbean which clearly show that judges in those countries adopt Method "A" in preference to Method "B".

But the matter does not end there, regardless of which method is used, since it is noticeable in recent years that judges are taking a "second look", so to speak, at the total figure arrived at under this important sub-head. As LORD DENNING, M.R. so succinctly put it in Fletcher v. Autocar and Transporters Ltd. [1968] 1 All E.R. 726 at p. 735-

> "Having reached that figure (i.e., the total amount for general damages), I think it proper to look at it again as an overall figure and see whether it is a fair compensation, and reduce or increase it accordingly."

This opportunity of having a 'second look' gives a judge a breathing space in which to reflect on the warning given by the learned Master of the Rolls at p. 733.

> "If awards reach figures which are "daunting" in their immensity, premiums must be increased all the way round. The impact spreads through the body politic."

On this aspect of "moderation", it is well to remember the words of BOLLERS, C.J., in the same vein, in Harold Kanhai v. Rooplall *et al* (No. 1418 of 1971-Demerara) (unreported Decision No. 33 of 1973) at pp. 8-9 -

"I make no apology for repeating in substance what I said in Alladat Khan v. Kanhai Bhairo and John De Castro, Civil Appeal No. 60 of 1969, that I consider that the compensation arrived at is fair and reasonable in the context of Guyana today, having regard to the purchasing power of its dollar, and the assessment of damages must bear some relationship to the socio-economic condition of the country. The principle of moderation must be predominant in the awards by the Courts in the case of damages for personal injury, for if it is not so, insurances premiums will become so heavy that few of us would be able to keep our vehicles on the road. The Courts must therefore take a reasonable view of the case, and give what it considers under all the circumstances a fair compensation and seek to achieve some degree of uniformity in awards in the various cases that arise."

Adopting method "A", therefore, and utilising the 'principle of moderation', I award total general damages in the sum of $24,000.00 + $200.00 + $1,000.00 = $25,200.00. Taking a 'second look' at this total, I would reduce it by $3,200.00, which leaves a balance of $22,000.00, which as can be seen, is just $400.00 more than the calculation under Method "B".

In the final analysis, therefore, there will be judgment for Kum in Action 45 of 1974 in the total global sum of $23,131.00, being $1,131.00 as special damages and $22,000.00 as general damages. There will be costs to Kum fixed in the sum of $500.00.

**Judgment for Kum in the sum of $23,131.00. Costs fixed in the sum of $500.00.**

**Solicitors:**

S.S. Chandra for King.

Zaman Sankar for Kum in Action 33 of 1974.

Horace Persaud for Kum in Action 45 of 1974.

**The State v. Sattaur & Mohamed**

**ABDOOL AZIM SATTAUR**
**RAFEEK MOHAMED**
**Appellants**

**v.**

**THE STATE**

**Respondent**

[Court of Appeal (Haynes, C., Bollers, C.J., and Jhappan, J.A.) July 1, 2, 31, 1976]

*Criminal Evidence-Voir dire-Confession statement sole evidence of guilt-Admitted as free and voluntary-Cross-examination in presence of jury revealed judge ought not to have admitted confession-Whether duty on trial judge to reconsider his ruling, to withdraw confession from jury and to discharge jury.*

*Criminal Evidence-Illiterate child or young person of poor intelligence-Suspected of crime-Neither parent or guardian nor person of the same sex present at interrogation by police-Validity of confession made without such representation-Necessity for stronger proof of voluntariness of confession in the circumstances and for police officer of highest rank involved in investigation to testify-Practice Note, Judges' Rules, [1964] 1 All E.R. 237.*

## The State v. Sattaur & Mohamed

*Criminal Law-Retrial-Principles of-Interests of justice must require that Court of Appeal should make an order for retrial-Court of Appeal Act, Cap. 3:01, s. 13 (2).*

The appellants, Abdool Azim Sattaur and Rafeek Mohamed, and another man called Abdool Shaheed were jointly tried before judge and jury for murder by shooting of one Pitamber Dookram, called Khedo. Both were convicted, but Shaheed acquitted. The motive assigned was a concerted plot to steal a shot-gun owned by Khedo, to use whatever force they thought necessary and to prevent discovery.

Khedo was last seen alive with his shot-gun on May 4, 1974; but was found dead on his farm two days later; his gun was never found. Enquiries later led to the arrests, first of the accused Abdool Shaheed and Rafeek Mohamed and later of the accused Sattaur who was bitten by a police dog as he tried to escape.

The case for the prosecution rested merely on confession statements and/or dam-aging admissions taken from the three accused who, all being young persons, ought to have been, but were not, represented by their parents or guardians, as required by the Judges' Rules, at the time they gave their confession statements or made their admissions. They were all arrested in the early hours of the morning of May 7, 1974, and within one and a quarter hours after, all committed themselves by making oral and written statements to their detriment.

The admissibility of Sattaur's confession statement was objected to at the trial on two grounds: (a) that it resulted from "pressure" and was not free and voluntary, and (b) that as he was (then 15 going on the 16 years) a young person or a juvenile, the taking of the statement in the absence of his parent or guardian was a breach of the letter and spirit of the Judges' Rules. The judge nevertheless admitted it at a *voir dire* as voluntarily taken; refusing to exercise his discretionary power of exclusion for the alleged breach of the Judges' Rules, and the question raised in this appeal is whether his decision to do so was right.

It turned out however that subsequent to the admission of the confession statement, evidence relevant to the question whether the trial judge ought properly to have admitted the confession was given by three prosecution witnesses and a doctor. These witnesses either testified at, or should have been called upon at the *voir dire,* and in the case of those who testified in the presence of the jury, there was conflict on vital matters touching the propriety of the admissibility of Sattaur's confession so much so that, had those matters been raised at the *voir dire,* they would certainly have been relevant to the question of admissibility, seeing that they raised substantial suspicion of a lack of fairness and of non-disclosure of the real reason why Sattaur's confession statement was taken with no adult civilian present whose presence the investigating officer thought essential, and also the

reason why he was not taken to the doctor for treatment for the dog bite and other injuries of which he complained.

The trial judge, fully realising the impact such evidence would be likely to have had on the jury, directed them to consider the question of voluntariness in relation to the weight they would attach to the confession, but appeared to think he was powerless to do anything insofar as a withdrawal of the statement was concerned, because it had already been admitted by him.

On appeal.

**HELD:** (1) That in the particular situation introduced by the new and additional evidence from material prosecution witnesses; the trial judge should have reconsidered his ruling that the statement was voluntary. Had he done so, it would have been a proper exercise of his jurisdiction to reach a view that it was no longer clear to him that the statement was free and voluntary and to withdraw it from the jury arid direct an acquittal in the circumstances.

(2) That even if the trial judge on reconsideration had concluded he made no mistake in admitting the statement, it would have been his duty to refer to and direct the jury sufficiently on all the evidence bearing on voluntariness so that they would be guided helpfully in determining what weight they would give to it; but he did not do so.

(3) That stronger proof of voluntariness was required since the accused, Sattaur, was a young person of obviously poor intelligence and illiterate. In such a case, the highest ranking officer involved in the investigation should have given evidence in order to provide more weighty assurance that no advantage was taken of the suspect's youth and limitations.

(4) That if, in the course of the arrest of a suspect, he suffers physical injury of some actual or potential gravity at the hands of the police, they should be anxious to arrange for proper treatment of it at the earliest practicable instance.

(5) That conviction of the appellant Sattaur is dependent on his confession statement. Therefore as there appears serious doubt about its admissibility from the evidence led both at the *voir dire* and at the trial, the case against him is not weighty enough to warrant a retrial.

(6) Since the appellant Rafeek Mohamed has been in custody for over two years, and a retrial will entail his remaining there for another indefinite period, and as the court entertains uncomfortable feelings about the admissions, it does not think either appellant should face a retrial.

**The State v. Sattaur & Mohamed**

**Conviction of Sattaur set aside.**
**Judgment of acquittal entered**
**in respect of both accused.**

**Editorial Note:** This case is reported in (1976) 24 W.I.R. 157

**Cases referred to:**

(1) Conway v. Hotten [1976] 2 All E.R. 213; 140 J.P. 355; 63 Cr. App. R. 11.
(2) McDermott v. R. (1948) 76 Crim. L. R. 501.
(3) R. v. Harz [1966] 3 W.L.R. 1241; [1966] 3 All E.R. 433; 110 Sol. Jo. 565, C.C.A.
(4) R. v. W. Middleton [1974] 3 W.L.R. 335; [1974] 2 All E.R. 1190; [1974] Crim. L.R. 667; 118 Sol. Jo. 680; 59 Cr. App. R. 18. C.A.
(5) D.P.P. v. Pin Lin [1975] 3 W.L.R. 419; [1975] 3 All E.R. 175; 62 Cr. App. R. 14.
(6) Smith v. R. (1956) 97 C. L. R. 100.
(7) Sparks v. R. [1964] A.C. 964; [1964] 2 W.L.R. 566; [1964] 1 All E.R. 797; 108 Sol. Jo. 154.
(8) R. v. Wilson and Marshall-Graham [1967] 2 W.L.R. 1094; [1967] 1 All E.R. 797; [1967] 2 Q.B. 406; 131 J.P. 267; 51 Cr. App. R. 194; 111 Sol. Jo. 92.
(9) Chapdelaine v. R. [1935] 1 D.L.R. 805. C.A.
(10) Dhannie Ramsingh v. The State [1973] G.L.R., 257; (1972) 20 W.I.R. 128.
(11) R. v. Rampersaud *et al* [1945] L.R.B.G. 75.
(12) R. v. W. Henry (1960) Indictment No. 16150, dd. October 21, 1960 (unreported).
(13) R. v. Godwin [1924] 2 D.L.R. 362.
(14) R. v. Warringham (1851) 169 E.R. 575; 2 Den. 448 n. 15 Jur. 318; 14 Digest (Repl.) 468. 4520.
(15) Viau v. R. (1898) 29 S.C.R. 90.
(16) R. v. Elizabeth Garner (1848) 169 E.R. 267; 1 Den. 329; 2 Car. & Kir. 920; T. & M. 7; 3 New Cas. 329. 18L.J.M.C. 1; 12 L.T.O.S. 155; 12 J.P. 758; 12 Jur. 944; 3 Cox, C.C. 175; 14 Digest (Repl.) 482, 4612.
(17) R. v. Whitehead (1866) 10 Cox. C.C. 234; L.R. 1 C.C.R. 33; 35 L.J.M.C. 186; 14 L.T.489; 30 J.P. 391; 14 W.R. 677.
(18) R. v. Finkle (1865) Canadian Abridgment. Vol. 18, pp. 888,889.
(19) R. v. Sonyer (1898) Canadian Abridgement. Vol. 18, at p. 888.
(20) Cornelius v. R. [1936] V.L.R. 222; 55 C.L.R. 235; 42 Argus L.R. 278; 10 A.L.J. 118; 14 Digest (Repl.) 471. 3032.
(21) Sinclair v. R. (1946) 73 C.L.R. 316.
(22) R. v. May (1952) 36 Cr. App. R. 96 CCA.
(23) Jacobs v. Layborn (1843) 11 M. & W. 685; 152 E.R. 980.

(24) The State v. Treanor [1924] 2 I.R. 193.

(25) R. v. Thompson [1891-94] All E.R. 376; [1893] 2 Q.B. 12; 62 L.J.M.C. 93; 69 L.T 22; 57 J.R 312; 41 W.R. 525; 9 T.L.R. 435; 37 S.J. 457; 17 Cox C.C. 641; 5 R. 392 C.C.R; 14 Digest (Repl.) 468, 4521.

M.L.R. Ganpatsingh, Assistant Director of Public Prosecutions for the State.

M. Zephyr for the first appellant.

G.M. Farnum, S.C. for the second appellant.

**HAYNES, C. (delivered the judgment of the Court):** The two appellants, Abdool Azim Sattaur and Rafeek Mohamed, were on 29th July, 1975, convicted for the murder of Pitamber Dookram, called Khedo or Daro Baap, on 5th May, 1974, whereupon the Court ordered them to be detained during the pleasure of the President, as each was then under the age of eighteen. Both appealed on a number of grounds. At the hearing on July 1, 1976, this Court unanimously decided to allow the appeal of the appellant Mohamed. But decision was reserved on the appeal of the appellant Sattaur, and on the question as to whether or not a new trial should be ordered for Mohamed or for Sattaur, if his appeal succeeded also. And so this judgment deals with these matters.

The deceased, to whom I shall refer hereafter as Khedo, was a member of the Boerasirie Co-operative Society Project. He had two farm houses on a 22-acre farm on which the appellants used to work. He had a son, Ajit Pitamber and he owned a 16-bore single-barrelled shotgun. He was last seen alive, armed with his gun, at a meeting on May 4, 1974. But he was found by his son, shot to death and lying on his farm, around 2 p.m. on May 6, 1974. His gun, which was missing, was never found. Ajit Pitamber reported this to the Parika Police Station. As a result, a party of policemen including Assistant Superintendent (then Detective Inspector) Sharma, Inspector Wilson, Corporal Simon and two constables left for the scene. From there, they went to the home of the appellant Sattaur. He was not in, but his brother, Abdool Shaheed, told them: "Is me buddy and a strange boy shoot the man." Shaheed was arrested. So the police set out to find Sattaur (the "buddy") and the "strange man". They then went to the home of the appellant, Mohamed, who was suspected to be the "strange man" and he told them: "Is Azim" (the appellant Sattaur) "and his brother" (Abdool Shaheed) "kill the man." He also was arrested, and the police then moved to find Azim (the appellant Sattaur) with a police dog. They reached his home around 6 a.m. on May 7, 1974.

According to the prosecution, Sattaur was seen running out of the house, escaping; so the police dog chased him, apparently bit him on the heel and held him up; he was arrested and taken to his home; thereafter, being cautioned, he said: "Mr. Simon, nah me. Is Shaheed" (his brother) "lash the man with the spear." His mother, Zaimool Sattaur, was asked to accompany the police and Sattaur to the

police station, "in case he made a statement." It was said that she refused to do so and as a result, he was taken there alone. The party arrived at the station around 8.30 a.m. on May 7, 1974. Up to that time his wound was untreated, except that on the way to Parika, a man named Sankar had tied it with a piece of cloth. Within five minutes of his arrival there, Sattaur is said to have told Inspector Simon. "Mr. Simon, I want to tell you what happened". Simon cautioned him and by 9.15 a.m. Simon had completed taking a statement in these words:

> "One Sunday in April, this year me bring home Rafeek at me brother ah road at Greenwich Park, me big buddy Salim direct me and me carry Rafeek in ah me mother at Barnwell, me tell Rafeek that Daro Baap get one gun and me to get am way fuh kill Ramsingh, because he ah make me get catch steady, me buddy Shaheed and Rafeek left foh go thief the man gun, me call Betalall then awe go at the man farm. Betalall called out the man from he farm foh light one cigarette, and the rest awe hide. Rafeek had the spear he lash the man with the spear, me buddy and Rafeek tek down the gun from the mango tree, me tek way the gun and fire one load, then Rafeek tek the gun and shoot the man. Rafeek is the last man had the gun, the spear that the police find ah awe home ah that the spear Rafeek had when he shoot the man after the man fall down me no see Betalall again."

Later this appellant, Sattaur, was charged jointly with Mohamed and Shaheed for the offence, but Shaheed was acquitted by the jury.

At the trial, the case against the appellant was put on this basis: that he (and the co-accused) had plotted to steal Khedo's gun, and to use whatever force was thought necessary to do this and to prevent discovery, hence the stealing with violence and then the killing. It rested on the statement. If it was not admitted in evidence, the trial judge would have to direct an acquittal; if it was, a conviction was not unlikely. As was to be expected, objection was taken as to its admissibility. This was on two grounds: (a) that it resulted from 'pressure' and was not free and voluntary; and (b) that, as the appellant (then 15 going on 16) was a young person or a juvenile, the taking of the statement in the absence of his parents was a breach of the letter and spirit of the Judge's Rules.

It is trite law as WATKINS, J. said recently in the judgment of the Divisional Court in Conway v. Hotten ([1976] 2 All E.R. 213, 216), that:

> "... no statement by an accused person is admissible against him in evidence unless it is shown by the prosecution to have been a voluntary statement. A statement which has been obtained from an accused person by a police officer only as the result of threats, violence or other oppressive conduct, fear or prejudice, or hope of advantage, cannot be

> found to have been made voluntarily and will not therefore be admitted in evidence. Furthermore, such a statement obtained in breach of the Judges' Rules may be rejected as evidence by the courts."

*Phipson on Evidence*, 11th Ed. (1970), p. 350, para. 792, has published the grounds of exclusion more fully in this passage:

> "Where a confession is held to be voluntary within the principle enunciated by LORD SUMNER, and therefore admissible in law, the judge in the exercise of his discretion may still exclude it if it was obtained in circumstances amounting to a breach of the Judges' Rules. Moreover, notwithstanding that the statement was both voluntary and obtained in accordance with the Judges' Rules; the judge may exclude it in the exercise of his residual discretion to exclude any evidence if the strict rules of admissibility would operate unfairly against an accused person."

And so, it would be right to say that, in the circumstances of this case, it was the duty of the trial judge to hold the customary "trial within a trial" to determine first whether or not the prosecution had shown the statement to be free and voluntary, and, secondly, if it was, whether or not it should be excluded on some discretionary ground. See McDermott v. R. (1948) 76 C.L.R. 501; R. v. Harz [1966] 3 All E.R. 433; and R. v. William Middleton (1974) 59 Cr. App. R. 18. He held such a trial; he admitted the statement as voluntary thereafter; and the question has been raised in this appeal whether he so decided wrongly. If he did, the conviction cannot stand. His task was to weigh and consider the evidence, to assess its implications and to decide the issue in the light of the basic established principles. And as LORD SALMON observed in D.P.P v Pin Lin ((1976) 62 Cr. App. R. 14, at p. 26), this Court would disturb his findings "only if it is completely satisfied that the judge made a wrong assessment of the evidence before him or failed to apply the correct principle." For instances of this, one can read Smith v. R. (1956) 97 C.L.R. 100; Sparks v. R. [1964] 1 All E.R. 727, R. v. Wilson and Marshall-Graham [1967] 1 All E.R. 797 (wrong assessment of evidence); and Chapdelaine v. R. [1935] 1 D.L.R. 805, (failure to apply a correct principle).

It was essential, then, for the trial judge to bear in mind the case law built up around the onus laid on the prosecution in this regard. These authorities determined: (i) that he (the judge) had to be satisfied beyond reasonable doubt, and not on a balance of probability: R. v. Wilson and Marshall-Graham and D.P.P. v. Pin Lin (both *supra), per* LORD HAILSHAM at p. 20; (ii) it was not necessary to find that the police did any of the things (threats, assaults, promises of release) alleged in order to exclude the statement, as it was sufficient if he found he was not satisfied they did not; Smith v. R. (*supra*), *per* WILLIAMS, J. at p. 130; (iii) the accused was not bound to give affirmative evidence of the improper means

alleged as the prosecution's proof might be destroyed or a reasonable doubt raised by effective cross-examination only: *per* LUCKHOO, C., in Dhannie Ramsingh v. The State [1973] L.R.G. 257; (iv) he (the judge) would not be justified in finding the statement voluntary and so admissible just because he doubted the veracity of the accused: R. v. Rampersaud *et al* [1945] L.R.B.G. 69, or "could not regard him as a witness of truth": R. v. William Henry (unreported), dated 21st October, 1960, Indictment 16150; or positively disbelieved him: Chapdelaine v. R. and Smith v. R. (both *supra*); for, if so, it becomes then a question only of the cogency and credibilty or otherwise of the evidence for the prosecution, which he would not *ex necessitate* be bound then to accept; (v) among the matters to be considered in determining whether the statement was voluntary or not was the age, the mental development and characteristics of the accused: R. v. Godwin [1924] 2 D.L.R. 362 and Smith v. R. (*supra*)*;* (vi) the authorities insist that there should be full disclosure of all the material circumstances in which the statement was taken, so that if he (the judge) concluded on the evidence that the witnesses for the prosecution had concealed something material of these circumstances, leaving the Court insufficiently informed of them, he ought to reject the evidence, even where he has found the accused an unreliable witness: R. v. Rampersaud *et al* [1945] L.R.B.G. 75; R. v. William Henry and Smith v. R. (both *supra*)*;* (vii) if, at the close of the prosecution's case on the *voir dire* or at the end of the defence, he was in doubt as to whether or not the statement was voluntary, he had to refuse to admit it: R. v. Warringham (1851) 169 E.R. 575; Viau v. R. (1898) 29 S.C.R. 90; and (viii) (a principle not widely comprehended) if, upon the evidence at the *voir dire*, the statement was admitted as proved voluntary, then later the Court, on reconsideration or because of additional evidence in open court, is no longer so satisfied or is satisfied of positive involuntariness, he can recall his earlier ruling and withdraw the evidence from the jury: R. v. Elizabeth Garner (1848) 169 E.R. 267; R. v. Whitehead (1866) 10 Cox 234; R. v. Finkle, [1865] Canadian Abridgment, Vol. 18, pp. 888-889; and R. v. Sonyer [1898] Canadian Abridgment, Vol. 18 at p. 888. Put another way, if, during the course of the trial, evidence is adduced from which the judge concludes he was mistaken in holding the confession admissible and should not have admitted it, he could properly withdraw it then from the consideration of the jury: *per* DIXON EVATT and Mc TIERANAN, JJ., jointly in Cornelius v. R. (1936) 55 C.L.R. 235, 249; and LATHAM, C.J. in Sinclair v. R. (1946) 73 C.L.R. 316, 324.

To establish the admissibility of the confession, the State itself at first relied on Corporal Simon only, and he was cross-examined at some length. At the end of it all, the State's case appeared a simple and straightforward one. The statement was taken, the Corporal said, in the presence and hearing of Constable 8450 Waldron, after a proper caution; no assault or threat or promise or other inducement happened. He believed that, as the accused was a young person who could neither read nor write his parent or some other adult civilian should be present. Although his mother had refused to attend, he felt she would still do so, and in

fact he was instructed to wait for her. But he did not, after he was instructed to take a statement. He did not feel it necessary then to invite a civilian to stand in. As regards the wound, he said he knew the accused was sent to Dr. Sahai for medical attention, but he did not say when, and no medical report was produced or ever seen by him. Of course, the statement was read over to the accused, who said it was true and correct and affixed his right thumb print.

The appellant, on oath, told a different story of his arrest and of the circumstances leading to the making of the statement. His evidence is set out verbatim. It reads:

> "I am 17 years old. I do not know when I was born. My mother told me that I am 17 years. I remember the morning of May 8, 1974 at 6 o'clock in the morning, I was home. I saw Corporal Simon. I saw other policemen-plenty-about seven policemen. They had a dog. I was home. My little brother told me that police came. Our house is a 'bush camp'. The police came and pulled me down off the bed.
>
> Corporal Simon came and lift me off the ground. Another policeman came with a brief-case and torchlight and started to beat me.
>
> When the policeman finished, Corporal Simon asked me where the gun deh. I told him that I do not know where the gun was. When he done beat me Corporal Simon carried me in the bush with the dog. When he carried me in the bush he started to kick me up. The other policeman had the dog and he tied the dog to a tree. When he done Mr. Sharma came up to me and said that he would give me $50.00 if I tell him where the gun was. I said that I do not know where the gun was. The policeman with the dog told me that if I did not tell he would loose the dog on me. He pushed me down flat and loose the dog and it jumped on me and started to bite me. All over my body had bites. I still have the marks. The police pushed me out of the bush and the dog bite me. My clothes tore. I had on a bare beach pants and the dog bite if off and it was left on the ground.
>
> I was bleeding on my belly, hand and feet. They carried me at my mother. My mother started to cry and she said before they beat me it's best they kill me. My mother said she wanted to go to the station. Inspector Sharma was there. Mr. Sharma and Corporal Simon replied to my mother. Corporal Simon started to curse my mother about her mother. They did not take her to the police station. When they left my house going Corporal Simon took out a revolver from his brief-case. He asked me three times for the gun. I told him that I do not know. He took the revolver rope and lift me off the ground and when he put me down I did not know where I was. After that I saw myself in a jeep. The jeep drove about a mile and

collected two policemen. I do not know if they put me in the jeep straight away.

A negro boy came in the jeep and started to beat me and ask me for gun. I said that I do not know about gun. They drove to Parika Police Station. About 10:30 a.m. they reached at Parika Police Station because they stopped about four places. They carry me upstairs. Corporal Simon held me behind my neck and pushed me upstairs with another police-man with the dog. They put me to sit down. The Corporal said to give a statement. I said that I am not giving a statement. He took a staff and beat me all over my body. Inspector Sharma came up and told him don't beat me across my body, beat me at my foot bottom and he beat me at my foot bottom. He started to write and when he finished he said to sign, that he would put me on station bail. I said that I do not know to sign. He put my thumb print on the paper. Then he put me in the lock-up. I was not sent to Dr. Sahai at any time.

[Accused strips and points to part of his body. Court sees no sign of in-jury.]

Cross-examined by Mr. Ganpatsingh: The dog was put on me because I could not tell the police where the gun was. I never did tell the police where the gun was. I was taken into the bush by Corporal Simon. The po-liceman with the dog and Inspector Simon went with us. They ask me for the gun. I said that I know nothing. Dr. Sahai did not see me. A nurse did not see me. I did not go to the hospital at any time. I am sure about that. I got no treatment for the dog bite. When I came to George-town they carried me at Eve Leary. When I was at Eve Leary, I was taken to the hospital for treatment. That was about May 9th, 1974. I was taken to the hospital because I complained that I was not feeling well. That was not the first time that I was complaining that I was not feeling well. I had complained before that. I had complained at Parika Police Station about May 8 or 9, 1974. I was not taken to Leonora Cottage Hospital. The police force me to tell them where the gun was. I did not tell them because I do not know about any gun. It is not true to suggest that I was not beaten on my feet. It is not true to suggest that I was not told that I would be released and put on station bail."

He called no witnesses to support his defence.

Both counsel addressed the Court briefly. Then counsel for the appellant asked that Dr. Sahai be called to produce his records. Dr. Sahai had testi-fied in open court. He was the Government Medical Officer attached to the Leonora Cottage Hospital. He could not remember treating the appellant for anything at all, and

apparently, then, had no records with him in court. At that stage, State Counsel disclosed that a constable, Motie Singh, had taken the appellant to the hospital, and a nurse had treated the wound. The Court adjourned. Next day the prosecution's case was re-opened and two policemen gave evidence. Constable 8531 David Clarke testified that, at about 5.30 a.m. on Wednesday 8th, the appellant reported to him that he was "feeling pain about his body as a result of being bitten by the police dog" and he made an entry of this report. Constable Motie Singh testified that, about 1:30 p.m. on the said day, he and another escorted the appellant to the doctor's surgery to be attended to for "an injury to his foot." They reached the surgery between 2.15 p.m. and 2.30p.m., but the doctor was absent; as a result the appellant was taken to the hospital surgery and treated there by two nurses whose names he did not know. He could not remember if any medical report was issued to him. The appellant gave no additional evidence.

After counsel had addressed a second time, the trial judge made his ruling. It was not a reasoned one, but he must have believed the evidence of the three officers and disbelieved or doubted the appellant's. He saw and heard the witnesses, and the question is: Can this court properly adjudicate there was either a wrong assessment of evidence or a failure to apply correct principles to what material the trial judge had before him? In my judgment, no. Admittedly, as he believed right police practice dictated the presence of a parent or other adult civilian, and as he was instructed to wait for the appellant's mother, one would have expected him to delay the taking of the statement for awhile at least, or to have sought out a civilian among the many available just nearby. And also, admittedly, earlier medical attention for the bite should have been obtained on the very May 7, and no explanation was given why this was not done. But we feel this couplet of circumstances is not probatively strong enough to justify a conclusion by this Court that the decision of the trial judge, that the prosecution had discharged its onus of proof of voluntariness, was wrong. So much up to now for this question.

But the trial judge also refused to exercise his discretionary power of exclusion for the alleged breach of the Judges' Rules. In fact, he held there was no breach at all. We agree with this conclusion but for a different reason. He ruled wrongly, in our view, that, on the evidence, it was not practicable or possible to have the appellant's parent or some other adult present during the taking of the statement. If so, then *lex non cogit impossiblia.* But what rule could have been breached?

On the May 9, 1964, the Chief Justice and the Judges of the Supreme Court of British Guiana published our Judges' Rules effective from June 1, 1964. (See Subsidiary Legislation, 1964, p. 82.) They followed word for word the English Judges' Rules, 1964. (See [1964] 1 All E.R. 237). If any rule was applicable, it had to be rule 4, headed 'Interrogation of Children and Young Persons.' which reads:

> "As far as practicable children (whether suspected of crime or not) should only be interviewed in the presence of a parent or guardian, or, in their absence, some person who is not a police officer and is of the same sex as the child. A child or young person should not be arrested, nor even interviewed, at school, if such action can possibly be avoided. Where it is found essential to conduct an interview at school, this should be done only with the consent, and in the presence, of the head teacher, or his nominee."

Plainly, this rule so worded puts no obligation on the police to have the appellant's mother or some other adult present, even though Corporal Simon believed so. For this reason, rightly, there was no breach, and so no basis on this ground for the application of the provision in the rules that: "Non-conformity with these rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings." But even if it did, the operative word 'may' would have left the Court free to hold that, despite a breach, the statement (already held to be voluntary) would be admitted, as was held in Conway v. Hotten (*supra*). The effect of the Rules was long ago stated by LORD GODDARD, C.J. in R. v. May ((1952) 36 Cr. App. R. 91, at p. 93), in this passage:

> "The test of the admissibility of a statement is whether it is a voluntary statement. There are certain rules known as the Judges' Rules which are not rules of law but rules of practice drawn up for the guidance of police officers; and if a statement has been made in circumstances not in accordance with the Rules, in law, that statement is not made inadmissible if it is a voluntary statement, although in its discretion the court can always refuse to admit it if the court thinks there has been a breach of the Rules."

It is plain then that the trial judge's ruling in this respect cannot be faulted.

But the matter does not rest there as, subsequently, evidence relevant to the question of the continued admission of the statement was given by three prosecution witnesses before the jury.

Corporal Simon said:

> "There was not a parent or an adult other than the policemen because I was given certain instructions by Assistant Superintendent Sharma. I was given those instructions after the accused had told me that he would tell me what happened. I was given two sets of instructions by Sharma. If Sharma did not give me these instructions 1 would have had somebody there." (Underscoring mine.)

But Mr. Sharma himself said:

> "Corporal Simon was instructed by me at Parika Police Station. I told Corporal Simon not to take the mother of No. 1 accused to the police station after Corporal Simon had told me something. I told Corporal Simon so, after the arrest of No. 1 accused. I assumed that No. 1 accused was arrested when I saw him coming out of the bush with Corporal Simon, Corporal Mattar and the police dog. Simon told me something first."

And later:

> "Corporal Simon did not tell me that he wanted somebody there. My conversation with Simon lasted a minute. I do not know what Simon did immediately after the conversation. I cannot say where No. 1 accused gave his statement. From the time of my arrival at the police station with No. 1 accused I can't tell when I left the police station. I was there for some time...
>
> I did not see any wound on No. 1 accused. I am not aware as to whether No. 1 accused was taken to a doctor on May 8, 1974.
>
> I would not be able to say at what time No. 1 accused started to give his statement. I spoke to Corporal Simon when we entered Parika Police Station. I did not know whether No. 1 accused could read or write. I knew that No.1 accused was a young person. I gave Corporal Simon certain instructions on arrival at Parika Police Station enquiries office. The instructions were not that the mother of the No.1 accused should not be there.
>
> I did not tell Corporal Simon that no adult male should be present when the statement was taken." (Underscoring mine.)

Judicial consideration of (a) what Corporal Simon said on the *voir dire* on the question of fact, with (b) his evidence above before the jury, and (c) what Assistant Superintendent Sharma said just above, if all this had been given upon the *voir dire,* without further explanation, it should have raised a substantial suspicion of a lack of frankness and of non-disclosure of the real reason why Corporal Simon took the statement with no adult civilian present whose presence he thought essential. By itself, this circumstance might not be a compelling one. But it is not to be regarded in isolation. It has to be looked at in the light of the allegations of physical ill-treatment, threats and promises, and also of the additional evidence of Dr. Sahai.

It appears there is conflict in the evidence of Corporal Simon and Assistant Superintendent Sharma as regards responsibility for the absence of any adult civilian during the taking of the statement. If, as Corporal Simon wrongly believed, it was his duty to have, if practicable, either the appellant's mother or another adult civilian there, then why was this not done? It was suggested to Simon under cross-examination upon the *voir dire* that the reason was that the appellant was beaten up and bleeding. He denied this and attributed it to "instructions from Assistant Superintendent Sharma." But the Superintendent, before the jury denied he told Simon not to have anybody there. And so, at the end of the day, the reason the police advanced for the absence remained questionable. If Sharma was not responsible, then Simon was. If so, a conclusion of lack of frankness and concealment of the true reason on the part of Simon would seem unavoidable. If Sharma was responsible, why, as the officer in charge of the investigations, did he not say so frankly and explain his reason?

Then there was the additional evidence of Dr. Sahai before the jury. I set it out verbatim:

> "SANKAR SAHAI duly sworn states further re-called by Mr. Zephyr for No.2 accused (Cross-examined by Mr. Zephyr):
>
> I have my record for May 8, 1974. I make one set of records-the police record. There is a record of every patient seen at the hospital-record of general out-patient. There is another record kept by the nurse on duty as to all the patients treated as to any sort of injury. I see the police in respect of injured persons brought by them between 8 a.m. and 10 a.m. and 3 p.m. anytime afterwards, I am on call.
>
> At 1.35 p.m. I was not at my surgery. The Cottage Hospital was open on that day. I am in charge of all the records I have mentioned. I look at the records mentioned. I look at the record made by the nurse on duty as to persons who attended the clinic on the out-patient with any type of injury on May 8, 1974.
>
> I do not see the name Azim Sattaur recorded as for 5.8.74. This is the record tendered, admitted and marked Exhibit 'G'.
>
> [No entry for 8.5.74.]
>
> I look at this record of all the police cases seen by me. There is no entry for the day of 8.5.74.

This is the record tendered, admitted and marked Exhibit 'H'. There is no entry for Mr. Abdool Azim Sattaur on 8.5.74. I can't remember hav-

ing seen him as a patient. I do have an entry on an Abdool Sattaur on 13.5.74. I can't say whether it is his (No. 1 accused).

[No entry for Abdool Sattaur on 5.8.74.]

This is the record kept by the clerk of the hospital of all the patients I see at all the various Health Centres at the hospital. There is no entry for an Abdool Azim Sattaur on 8.5.74.

This is the record tendered, admitted and marked Exhibit 'J'.

Cross-examined by Mr. David Peters for No.2 accused: Declined.

Cross-examined by Mr. Farnum for No.3 accused: Declined.

Re-examined by Mr. Ganpatsingh: Declined.

By the jury: Declined.

Through the Court by Mr. Ganpatsingh:

An entry will be made in one of these records if the patient visits the hospital even if it is not a serious injury. It is the practice that, once a patient has been treated at the hospital, a record is made. I know of no case where this has not been done.

Cross-examined by Mr. Zephyr for No. 2 accused: Declined.

By the jury: Declined."

This evidence of the doctor added to the facts proved upon the *voir dire* those new circumstances: (i) his practice was to see injured persons escorted by the police from 8 a.m. to 10 p.m. and from 3 p.m. to any time after on any day, (ii) he kept a daily personal record of all these 'police cases' (iii) the hospital clerk kept a daily record of all patients the doctor saw at all the various Health Centres at the hospital, (iv) there was a third daily record kept by the nurse on duty at the hospital of every person who attended there as an outpatient and was treated for any type of injury whatever, and (v ) there was no entry in any of these records for May 8, 1974 that any person named Azim Sattaur or Abdool Sattaur attended and was treated by the doctor himself or by any nurse at his surgery, or at the hospital.

If this evidence had been given upon the *voir dire,* it would have been very relevant to the question of admissibility. In his charge to the jury relating to their consideration of the surrounding circumstances in determining what weight, if any, to give to the statement of the accused, the trial judge himself said:

> "Involved in that of course, is the credibility of all the witnesses. The credibility of Sharma, and the credibility of Wilson, in particular, because those are the witnesses that are involved in the taking of the statements.
>
> You will give due perspective to the evidence of Dr. Sahai as it perhaps tends to cast doubt on the credibility of these witnesses, in so far as the medical examination of the accused and the particular accused is concerned. You will give due regard to the other evidence. But, as I said, the case revolves principally and fundamentally on your decision to accept, or otherwise, the statements made by the three accused. Consider them separately and distinctly and come to your conclusion, because if, for example, you reject the statement of the number one accused, that is the end of the case."

It is plain the reference to Dr. Sahai's evidence casting doubt on the credibility of witnesses "insofar as the medical examination of... the particular accused is concerned", refers to this evidence the doctor gave after the statement was admitted; to its impact on that of Corporal Simon that the appellant was sent to Dr. Sahai for treatment; on that of Constable Motie Singh, that he escorted the appellant to the Cottage Hospital where he was treated; and on that of the appellant, that he was never escorted to, or treated at, either place. If it was reliable, then at least Constable Motie Singh gave false evidence upon the *voir dire.* If so, why? In my judgment, this evidence of Dr. Sahai would have raised serious doubts about the admissibility of the statements. The prosecution could have removed those doubts by calling the nurses, or one of them, but they did not. Put together with the conflict already referred to between the evidence of Simon and Sharma, Dr. Sahai's evidence should have caused the trial judge to reconsider his ruling as to admissibility.

This is no new principle being introduced into the common law. In R. v. Elizabeth Garner (1848) 169 E.R. 267, the prisoner, a girl of 13, was tried before PATTESON, J. for administering poison to her mistress with intent to murder. The prosecution offered in evidence an oral confession to a Mr. Gilby, a medical man, who attended the mistress. He swore he did not tell her that it would be better or worse to tell; he used no threats or promises, nor did anyone else. The trial judge admitted the evidence. But afterwards, during the trial before the jury, a woman named Brampton was called. She was also present at the conversation with Mr. Gilby, and swore that he told the prisoner, in the presence of her mistress and before she confessed, that it would be better for her to speak the truth. Mr. Gilby was recalled. He then admitted he might have told the prisoner so, but he could not swear positively whether he did so or not. Then counsel for the prisoner submitted that the confession ought to be struck out from the judge's notes and not submitted to the jury. After consulting with LORD DENMAN, His

Lordship declined to do so, and put the whole matter to the jury. They found the prisoner guilty. The trial judge requested the opinion of the judges as to whether he was right in the course he adopted. The case was argued at the first sitting of the Court for Crown Cases Reserved before POLLOCK, C.B., PATTESON, J., MAULE, J., CRESSWELL, J., and ERLE, J. The court was unanimously of the opinion that it was not right, and set aside the conviction. PATTERSON, J. said (*ibid*, at p. 268): "The only question is whether, when that evidence had been properly admitted, which was the case here, I ought to have struck it out of my notes, after proof that the confession was not voluntary ... I think that I should have treated the evidence of a confession as though it had been inadmissible in the first instance." And this was the view of the entire Court. Garner (*supra*) was followed in Canada in R. v. Finkle (1865) Canadian Abridgment, Vol. 18. pp. 888-890; and R. v. Sonver(1898) (*ibid*.), at p. 888-both confession cases.

Then, in R. v. Whitehead (1966) 10 Cox C.C. 234, on prosecution for rape it appeared that the prosecutrix was deaf and dumb. Counsel proposed to examine her through the medium of her father, who was sworn to interpret her evidence. In addition, the trial judge called in an expert on the education of, and communication with, deaf and dumb persons. With this assistance, the judge became satisfied with her fitness and competence to testify. She was sworn through the expert and admitted as competent. But as her examination proceeded it became apparent she did not understand questions and her answers could not be followed. The trial judge struck her evidence off the record. The Court of Crown Cases Reserved (POLLOCK, C.B., BRAMWELL, B., BYLES, J., PIGOTT, J., and LUSH, J.) upheld his ruling. POLLOCK, C.B. *ibid at* p. 239 said:

> "We think that it was competent for the Chairman to do what he did on the trial, viz., to strike out the evidence of the prosecutrix. Having, in the first instance, admitted her evidence, and, in the course of her examination it being discovered that she was incompetent, we think he was right in striking out the whole of her evidence...."

R. v. Whitehead (*supra*) was relied on as an authority for the proposition enunciated in Cornelius v. R. (*supra*) in the joint judgment of DIXON, J., EVATT, J., and McTIERNAN, J., at p. 249:

> "When a confession is admitted in evidence, the weight to be attached to it is then, of course, a question for the jury, and, upon that question, the circumstances in which it was made are relevant and may be proved before the jury. If, during the course of the trial, evidence is adduced from which the judge concludes that he was mistaken in holding the confession to be admissible, he may withdraw it from the consideration of the jury: Jacobs v. Layborn( 1843) 11 M. & W. 685; 152 E.R. 980; R, v. Whitehead (1866) L.R. 1 C.C.R. 33. But, in such as case, it may be

> impossible sufficiently to remove the prejudice to the prisoner already caused by laying the confession before the jury and, in that case, the jury may be discharged: The State v. Treanor [1924] 2 I.R. 193, at pp. 209, 210."

And Cornelius v. R. (*supra*) was quoted in Sinclair v. R. (*supra*) in the judgment of LATHAM, C.J., at p. 324 in this passage:

> "If, after evidence had been given on the *voir dire* and the confessions had been admitted, the evidence as given before the jury had shown that they ought not to have been admitted, the judge would have acted properly in withdrawing them from the consideration of the jury; or, if such a course might not be sufficient to secure a fair trial, he could have discharged the jury: Cornelius v. R. (1936) 55 Crim. L.R. at p. 249 and other cases cited. (Underscoring mine.)

The same thing was said, in effect, in the recent case of Conway v. Hotten [1976] 2 All E.R. 213 in relation to an oral confession, admitted without objection, in a summary prosecution. At the close of the case for the prosecution, it was submitted for the defendant that his oral admissions were inadmissible in evidence as involuntary, or, alternatively, as made in breach of the Judges' Rules. WATKINS, J., in the judgment of the Divisional Court (LORD WIDGERY, C.J., KILNER, BROWN and WATKINS, JJ.) said at p. 217:

> "Justices, if there has been no trial within a trial (as is customary in the Crown Court when points like this are taken), are left in the position of answering the kind of submissions which were made in this case on the prosecution's evidence alone. Of course, should they admit the confession and afterwards hear the evidence of the defendant himself, they may come to the conclusion at the end of the case, having regard to that evidence, to reject the confession and allow it to play no part in their consideration of the guilt or otherwise of an accused."

The learned trial judge never addressed his mind to this principle at all. If he had, he might have found assistance and guidance in the judgment of TAYLOR, J., in the High Court of Australia in Smith v. R. (*supra*) and in the first instance rulings in R. v. Rampersaud *et al* (*supra*) and R. v. William Henry (*supra*)

Smith v. R. (*supra*) was an appeal against a conviction for murder on the ground that oral and written confessional statements tendered by the prosecution should not have been admitted in evidence. It was allowed by majority (4:1) judgments in which TAYLOR, J., after pointing out that the trial judge had conducted a lengthy *voir dire* to determine the admissibility of the statements, went on to say (at p. 138):

> "In the result he admitted them, and I do not wish to say that, upon the evidence as it stood at that stage of the case, he erred in taking this course. But a consideration of the whole of the evidence at the close of the trial might have induced him to take the view that he had not been sufficiently informed by the police of the circumstances in which the admissions were made and he might well have then entertained grave doubts concerning the propriety of the circumstances in which they were obtained. Moreover, the same considerations were, in the circumstances of the case, of vital importance in considering ultimately what weight should be given to the appellant's statements." (Underscoring mine.)

In R. v. Rampersaud *et al* (*supra*) the accused was detained on a Thursday on suspicion of involvement in a series of shop-breakings and made a written statement establishing an alibi. Nonetheless, his detention continued onto the Sunday following, when he made three written confessions implicating others as well. Objection to them was based on alleged promises by a sergeant and a corporal of police to release him from custody if he gave such a statement, and to use him as a witness for the Crown against those others testified to on oath by the accused. VERITY, C.J., did not admit any of the statements in evidence. The learned Chief Justice, in a written ruling, said *inter alia*, (*ibid.* p. 69):

> "In the present case the accused alleges that each statement not only was made in such circumstances, but was the result of direct inducement by way of promise of release. The contradictions apparent in his testimony... the absence of any complaint or protest to a police officer as to his continued detention after compliance with the condition offered, all tend to cast doubt upon his veracity and I hesitate to accept his story as true. On the other hand, however, I hesitate to accept the evidence of the corporal and the sergeant when they say that each of these statements was made on the initiative of the accused without request, suggestion, or provocation of any kind or, indeed, any apparent reason. I am satisfied upon observation of these two witnesses and consideration of the nature of their evidence that they have concealed something of the circumstances in which these statements came to be made by the accused. If these policemen for any reason, which may or may not have been a good reason, sought to elicit further information from the accused by any means which may or may not have been proper means, then it is their duty to reveal the facts frankly and freely in order that the Court may be assured of the precise circumstances in which the statements were made and thus be enabled to determine whether they were in fact free and voluntary and so admissible in evidence." (Underscoring mine.)

And later (*ibid,* at p. 70), the CHIEF JUSTICE concluded with these classic words:

> "... it would be well that the police should be aware of the necessity for disclosing to the Court every material fact. If they have acted with propriety, there can be no need for concealment. Failure to disclose the full truth may result in the rejection of evidence which, had the facts been revealed, might have been found to be admissible."

R. v. William Henry (*supra*) was a ruling by GORDON, J., on an indictment for murder. The day after the deceased was found on a public roadway seriously wounded, the accused was detained on suspicion at a police station. He made two written exculpatory statements after which he was left sitting on a bench in the public side of the enquiries office. Later the same day, a corporal returned from the hospital with the news that the injured man had died. Immediately, he took the accused into a small back room of the station, used as a storeroom, and ten minutes later, the accused made a written admission of guilt. At the trial, objection was raised to its admissibility on the ground that it was induced by a promise held out by the corporal that, if it were made, the accused would be charged with the lesser offence of manslaughter and put on bail. GORDON, J., ruled out the statement: (a) because of a serious conflict in the evidence of the corporal and the sergeant of the station as to who authorised the removal of the accused to this back room; the corporal saying it was the sergeant and the sergeant denying this; and (b) because he (the trial judge) found the reason given as to why, unacceptable; the corporal said it was because of fear of an attack on the accused by a hostile crowd in the yard outside of the enquiries office, but he admitted under cross-examination that on completion of the statement, he took the accused back to the same seat in the enquiries office, while the same crowd was still in the compound. For these reasons, although he felt he could not regard the accused (who testified on oath as to the inducement) as a witness of truth. GORDON, J., following R. v. Rampersuad (*supra*), held that the police had not been frank with the Court in these two respects and he was not satisfied the statement was free and voluntary.

At the close of the case for the prosecution, the answers to a series of crucial questions touching upon whether the statement was voluntary or not remained undisclosed. Why did Corporal Simon hasten to take it down without an adult civilian present, if he thought this necessary, as he said he did? Why did neither Assistant Superintendent Sharma nor Inspector Wilson nor the Corporal himself see to it that the appellant was escorted for treatment for the dog bite, of which they must have been aware either before the statement was taken or after, during the said day? What caused the appellant in the early hours of the next day to complain of pain "about the body" and not only of pain about the region where the bite was suffered, that is, the heel? Why did Constable Motie Singh not take him to Dr. Sahai's surgery between 8 a.m. and 10 a.m. or 3 p.m. onwards, the hours the police must have known to be the periods the doctor set aside for "police cases"? If the constable did arrive with the appellant at the surgery between 2.15

p.m. and 2.30 p.m. on the May 8, why did he not wait there for the doctor's expected presence from 3 p.m.? Why, instead, did he leave immediately for the Cottage Hospital half a mile away? If the constable did proceed to this hospital and treatment was given by any nurses, why was there no entry in the relevant records? If the failure to make the entry was due to an oversight, why was it that no nurse was called to say so?

As the evidence stood at the end of the *voir dire*, the position was quite different. The questions just asked could not then be raised as they could be, after Corporal Simon and Dr. Sahai had given additional evidence and Assistant Superintendent Sharma (who did not testify at the *voir dire*) had given evidence before the jury.

In our considered judgment, in the particular situation introduced by the new evidence from material prosecution witnesses, who either testified at or should have been called upon the *voir dire* so as to have full disclosure of relevant circumstances, the learned trial judge should have reconsidered his ruling that the statement was voluntary. If he had done so in light of the principles set out earlier in this judgment and the authorities cited, it would have been a proper exercise of his jurisdiction to reach a view that it was no longer clear to him that the statement was free and voluntary, and to withdraw it from the jury. He would then have had to direct the jury to acquit the appellant, as there was no other evidence to support a conviction. But the learned trial judge never considered the matter in this way at all. Apparently he took the view that, as he had admitted the statement on the evidence led at the *voir dire*, that was the end of the matter, and all that he could do was to direct the jury to consider the question of voluntariness on the evidence before them in relation to the weight, if any, they would attach to it. But as the authorities dictate, his jurisdiction is not confined in this way. Of course, it is a jurisdiction to be exercised with caution, and in plain cases only, so as to avoid encroachment on the territory of fact reserved for the jury. And its application ought not to be extended to factual situations totally different from those which existed in the authorities cited. But in fit cases, a trial judge should not hesitate to act, and we consider this was a fit instance for him to withdraw the statement from the jury.

Further, even if the trial judge on reconsideration had concluded he had made no mistake in admitting the statement, it would have been his duty to refer to, and direct the jury sufficiently on, all the evidence bearing on voluntariness, so that they would be guided helpfully in determining what weight they would give to it. This the trial judge did not do. He did not discuss the relevant evidence with the jury in this connection at all; in particular, he did not discuss Dr. Sahai's additional evidence at all, nor the implications of it, nor the conflict between the evidence of Simon and Sharma, nor the implications of it. So that, in any event, there was inadequacy of direction on crucial matters. In these circumstances, the

conviction cannot stand.

Additionally, there are two general observations upon which we would wish to pronounce. The first is this: this was a case of a young person, obviously of poor intelligence, illiterate, being unable to read or write. In such a case, common sense dictates stronger proof of voluntariness is required; that, if practicable, as it was here, the highest ranking available officer involved in the investigation should be present to provide more weighty assurance that no advantage whatever was taken of the suspect's youth and limitations, this being in the interests of the suspect, as well as protective of the police against too frequent allegations that officers of lower functional standing obtained incriminating admissions improperly; and if another officer was present throughout-as Constable Waldron was-and saw and heard all that happened, he ought to be called to corroborate the evidence of the taker or his absence reasonably explained. The second observation is: if in the course of the arrest of a suspect, he suffers physical injury of some actual or potential gravity at the hands of the police, they should be anxious to arrange for proper treatment of it at the earliest practicable instance. If this is not done, an opportunity is afforded the suspect, at his trial later, to attack the conduct of the police in the way it has been done in this case. Even if the police version here were correct, we find it difficult to avoid an inference of callous, or at least indifferent, behaviour on their part. It behoves the police to bear in mind that it is often times not unprofitable to perform an unpleasant duty with consideration and humanity.

The final matter for consideration is whether or not the appellants, or either of them, shall face a retrial. This question must be determined separately in relation to each, even though they were indicted jointly. A retrial is not to be ordered as of course because a conviction is set aside for misdirection. Such an order should be made only if the interests of justice so dictate, and the interests of justice compromise the interests of the accused, the interests of those responsible for instituting criminal proceedings, and the interests of the public welfare.

As regards the interests of the accused, the age of the appellant, the length of time which has elapsed since he was first charged by the police, the length of time-if any-he was in custody and not on bail pending hearings, the length of time he might have to remain in such custody until, or awaiting (on bail), the retrial, the burden of fresh expenses for legal representation he might have to incur, through no fault of his, any particular serious difficulty or disadvantage the appellant might have to face on a retrial (for example, the unavailability then of a material witness), and the weight of the case against him are singly, or cumulatively, pertinent matters. As regards the interests of those responsible for criminal proceedings, the evidential strength of the case, and the need to avoid discouragement of their efforts to bring offenders to justice, are considerations to be regarded and weighed. And as regards the public welfare, the prevalence of the offence, the

public expense involved in a new trial, and the need to preserve, in the minds of the law-abiding, the image that justice must not only be done but must also appear to be done, are relevant factors. The weight to be given to one or more of these considerations, in any particular case, depends upon the circumstances thereof.

As regards the appellant Sattaur, a conviction must rest on the statement. Looking at all the evidence led at the *voir dire* and at the trial, at least there appears serious doubt about its admissibility. That being so, the case against him is not weighty enough to warrant a retrial. As regards the appellant Mohamed, his age at the date of the alleged offence was just a couple of weeks over 15. He has been in custody continuously now for over two years. A retrial would entail his remaining in custody perhaps for another indefinite period, and he is now just a few months over the age of 17. Just as in the case of the appellant Sattaur, a damaging written statement was obtained from this appellant. He was awakened from his sleep and arrested between 1 a.m. and 1.30 a.m., on the May 7. He was escorted to the police station, arriving there at 3.40 a.m., and by 4.10 a.m. had implicated himself in writing. Again, just as in the case of the appellant Sattaur, he had immediately volunteered to tell the police "what happen". It is appropriate to mention that the third accused in the Court below also made damaging admissions by 4.45 a.m. They were all young persons taken from their homes to the police station at 3.40 a.m. and within one hour and five minutes, and before daylight, with no parent or relative there, everyone had implicated himself. Such coincidence causes this Court to lift its judicial eyebrow, and reminds it of the oft-cited comment of CAVE, J. in R. v. Thompson ([1891-94] All E.R. Rep. 376. 380):

> "It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory' the prisoner is not infrequently alleged to have been seized with the desire, born of penitence and remorse, to supplement it with a confession, and this desire itself again vanishes as soon as he appears in a court of justice."

Regrettably, we have an uncomfortable feeling about these written admissions. For all of these reasons, we do not think either appellant should face a retrial. Accordingly, we set aside the conviction of the appellant Sattaur and enter a judgment of acquittal of both.

**Conviction of Sattaur set aside.**
**Judgment of acquittal entered**
**in respect of both accused.**

**The State v. Ken Barrow**

**KEN BARROW**
**Appellant**
**v.**
**THE STATE**
**Respondent**

[Court of Appeal (Haynes, C., Crane and R.H. Luckhoo, JJ.A.) December 17, 18, 1975; January 28, February 13, March 1, April 22, 1976]

*Criminal Law-Evidence-Identification parade-Suspect described to police as man with scar on left side of face-Parade mounted with accused as only person with a scar on left side of face-Whether parade fairly conducted.*

*Criminal Law-Conduct of identity parade-Instructions to identifying witnesses by officer-in-charge of parade-Necessity to add a savings clause-That suspect should be identified only if he is on parade.*

The accused in company with other men entered the yard of the complainant. Richard Beharry, and robbed his wife Edna of several pieces of gold jewellery. While three of the men were engaged in robbing Edna inside the house, the accused was aiding and abetting them by holding on to Richard, violently assaulting him outside, and at the same time keeping a look out to facilitate the crime.

After the robbers had departed with their booty, Beharry reported to the police giving a statement in which he described his attacker as a short, dark, negro man with a scar on the left side of the face. This information led to the arrest of the accused and when the police came to stage an identity parade they did so with the accused as the only person with a scar on the left side of his face.

The accused was convicted of felonious wounding and robbery under arms, and was sentenced to 5 years' imprisonment on each count, concurrently.

On appeal, counsel for the accused complained that at the close of the case for the prosecution at Assizes, he sought leave of the judge to make submissions in the presence of the jury, but the judge overruled the submission and said they had to be made in the jury's absence. This was a grave irregularity counsel contended, since there was no jurisdiction in the trial judge to conduct any part of criminal proceedings in the absence of the jury.

Complaint was also made that the identification parade was unfairly conducted for two reasons-that it was highly prejudicial to the accused to place him on parade with other persons who did not have scars on their faces: that it was not

made clear to Beharry that the suspect was not necessarily on the identification parade. Yet another complaint was that inadmissible prejudicial evidence was let in during the course of the trial without any warning to the jury to disregard it.

**HELD:** (1) (*per* HAYNES, C): That in the light of very recent authority on what is the correct rule of practice, it cannot be said in the instant case that the trial judge erred in ruling that the submissions should be made in the jury's absence. In any event, no injustice resulted from the judge's decision to hear the submissions in their absence.

(2) That the identification parade with the accused as the only man with a scar on the left side of his face was a farce. It was no test at all, since Beharry could have picked out no other person than the accused.

(3) That the trial judge has a discretion as to whether he should or should not draw to the jury's attention the presence of inadmissible prejudicial evidence that has been inadvertently let in the course of the trial.

(4) (*per* CRANE, J.A.): That the summing-up was of little or no help to the jury in that, it did not highlight the vacillating nature of Beharry's testimony on the matter of the scar as his means of identification.

(5) That it was unfair to mount a parade with the accused as the only suspect with a scar on the left side of his face. Moreover, for the officer-in-charge of it to fail to add a savings clause to the effect that the suspect should be identified only if he is on parade vitiated the conviction and sentence.

(6) (*per* R.H. LUCKHOO, J.A.): That the identification was unreliable. It was incumbent on the trial judge to draw the jury's attention to all relevant factors as tended to diminish the cogency of the identification.

**Appeal allowed.**
**Conviction and**
**sentence set aside.**

**Editorial Note:** This case is also reported in (1976) 22 W.I.R. 267

**Cases referred to:**

(1) R. v. Anderson (1930) 21 Cr. App. R. 178.
(2) R. v. Falconer-Atlee (1974) 58 Cr. App. R. 348
(3) Allan Rex Kellert (1975) 61 Cr. App. R. 240
(4) R. v. Parks [1961] 1 W.L.R. 1484; [1961] 3 All E.R. 633; 105 Sol. Jo. 868; 46 Cr. App. R. 29; 78 L.Q.R 19; 21 C.C.A.

(5) R. v. Williams (1912) 8 Cr. App. R. 84.
(6) R. v. Gerard Frederick Jones (1969) Times, July 22
(7) R. v. John [1975] Crim. L.R. 456
(8) R. v. Norton (1910) 5 Cr. App. R. 197.
(9) D.P.P. v. Christie [1914] A.C. 545; 10 Cr. App. R. 141; 83 L.J.K.B. 1097.
(10) R. v. Watson [1814-23] All E.R. Rep. 334; (1817) 2 Stark 116; 32 State Tr. l. N.P.
(11) R. v. Osborne and Virtue [1973] 2 W.L.R. 209; [1973] 1 All E.R. 649.
(12) United States v. Wade (1967) 388 U.S. 218.
(13) Kirpaul Sookdeo and Others v. The State (1972) 19 W.I.R. 407.
(14) Craig v. R. (1933) 49 C.L.R. 429.
(15) Budhsen v. The State of U.P. [1970] 1 S.C.R. 564.
(16) R. v. Roads [1967] 2 W.L.R. 1014; [1967] 2 All E.R. 84; [1967] 2 Q.B. 108; 51 Cr. App. R. 297; 131 J.P. 324; 111 Sol. Jo. 212.
(17) R. v. Hunter [1966] Crim. L.R. 262.
(18) R. v. Howick [1970] Crim. L.R. 403.
(19) Slinger v. R. (1965)9 W.I.R. 271.
(20) Herrera and Dookeran v. R. (1967) 11 W.I.R. 1.
(21) R. v. Weaver [1967] 2 W.L.R. 1244; [1967] 1 All E.R. 277; [1968] 1 Q.B. 353; 131 J.P. 173; 111 Sol. Jo. 174; 51 Cr. App. R. 77.
(22) R. v. Michael Morrissey (1932) 23 Cr. App. R. 188
(23) Maxwell v. D.P.P. [1935] A.C. 309; 24 Cr. App. R. 152; 103 L.J.K.B. 501.
(24) Eric James v. R. (1970) 16 W.I.R. 272.
(25) R. v. Dwyer [1925]2K.B. 799.
(26) R. v. Jones (1961) Times, March 16.
(27) The State v. Lloyd Harris (1974) 22 W.I.R 41.
(28) The State v. Mohamed Khalil (1975) 23 W.I.R. 50.
(29) Arthurs v. A.G. for Northern Ireland (1970) 55 Cr. App. R. 161; 114 Sol. Jo. 824, H.L.
(30) Dallison v. Caffery [1964] 2 All E.R. 610

J.A. Patterson for the appellant.
L. Ganpatsingh, Senior State Counsel, for the State.

**HAYNES, C:** Around 9 o'clock on the night of 28th January, 1974. Richard Beharry was in the yard of his home in the lower flat of a two-storeyed building at lot 339, Cummings Street, Georgetown. His wife, Edna Beharry, was in a bedroom inside. He was a goldsmith and kept a quantity of finished and unfinished gold jewellery resting on a dressing case. A gang of four or five men raided the house. Beharry was wounded on the head with a weapon, and the jewellery was stolen. Mrs. Beharry could not identify anyone. Richard Beharry, in a statement to the police shortly after, said: "I can only identify one of the men. This man has

a scar on the left side face." He described the man otherwise orally then, as:"a 'short dark negro man". On February 14 following-17 days later-Beharry attended an identification parade at Alberttown Police Station. Seven men were in the line-up, including the appellant (the suspect). All were said to be of similar age, height, general appearance and class of life: but the suspect alone had a scar on the left side of the face. Beharry without difficulty identified him as the man who held on to him during a brief struggle just in front of the door to the flat, under a lit 60-watt bulb, while another wounded him and two or three others made their felonious entry into the flat. The appellant was convicted for feloniously wounding Richard Beharry and for robbery under arms. He was sentenced to serve five years' imprisonment on each count, concurrently. He appealed to this Court.

Counsel on his behalf, made a number of submissions to upset the verdict of the jury. I propose, in this judgment, to adjudicate on three of them only. Each raised a question of general importance in the trial of criminal cases. The first was founded on what happened at the trial after the close of the case for the prosecution. Counsel said he wished to make, in the presence of the jury, the submissions that: (a) the ingredients of the offence of robbery under arms had not been established: and (b) there was no case to go to the jury on the indictment. The trial judge ruled that these submissions had to be made in their absence. This was done and they were overruled. Counsel submitted to us that a grave irregularity had thus taken place in that the trial judge had no jurisdiction to conduct any part of the proceedings at a criminal trial in the absence of the jury, without the consent of the defence, save, of course, under some statutory authority. Counsel cited in support of his point, a passage from the judgment of the Court in R. v. Anderson (1930) 21 Cr. App. R. at p. 183, where LORD CHIEF JUSTICE HEWART said:

> "It is difficult to imagine any circumstances in which, except at the request or with the consent of the defence, a jury can possibly be asked to leave the box in order that statements may be made during their absence."

This was the stated authority for a passage in Archbold's *Criminal Pleading'*, 38th Edn., (1969) p. 270 at para. 519 that: "... the jury should not be asked to leave the court except at the request of, or with the consent of the defence."

In Anderson (*supra*) the appellant was convicted for the larceny of stamps. The sole question for the jury was whether at the time the appellant took possession of the stamps he intended to deal with them honestly. At the trial, the appellant's character was put in issue and he was cross-examined as to whether he had not signed a statement, upon dissolving partnership with another doctor, in which he admitted dishonesty. The appellant denied this. There was no such document in

court. But counsel for the prosecution held in his hand, and looked at when cross-examining, a document which the jury must have seen and might have thought was the document referred to. He did not attempt to put it in evidence. Counsel for the accused protested, and a controversy arose over it. It was suggested then, that the jury should leave the box so that matters relating to this document should be discussed in their absence. This was strongly objected to by the defence. Nevertheless, the jury were requested to leave, and did leave, the box, and various statements were made in their absence. The Court of Appeal held this was irregular in that the matter "was enveloped with an air of mystery and suspicion, from which it was at any rate possible that the jury might draw the inference that they had been asked to leave the court because circumstances of a character damaging to the accused were to be discussed." On this and other grounds the appeal was allowed. And it was in this context, that the Lord Chief Justice made the statement cited above and relied on, by counsel for the appellant.

In contrast to what was said in R. v. Anderson (*supra*), we have the practice indicated in R. v. Falconer-Atlee (1974) 58 Cr. App. R. 348, and approved in Allan Rex Kellet (1975) 61 Cr. App. R. 240. Both cases involved no-case submissions heard in the presence of the jury. In Falconer-Atlee (*supra*), counsel said it was on a pure question of law. The learned trial judge said (p. 353):" ... I think it is better that the jury should know what is going on and that they should hear it." Mr. Wheatley for the defence replied: " ... I do not want them to be excluded from anything in this case." So it was that the jury remained in their box. The judge ruled that the case would go to the jury. ROSKILL, L.J., speaking for the Court said (p. 354):

> "This Court has said again and again that it is very undesirable that this should happen where there is a submission of no case to go to the jury either because the evidence for the Crown is suggested to be insufficient to justify leaving the case to the jury, or because, though there may be some evidence, it is so tenuous that it would be unsafe to leave the case to the jury. It is most undesirable that that discussion should take place in the presence of the jury. Inevitably, the judge may express a view on a matter of fact, which is within the province of the jury. The presence of the jury may hamper freedom of discussion between counsel and judge."

The Court was clearly of the view that the course followed at the trial should not have been adopted. It is not reported that Anderson (*supra*), was cited to the Court.

Then in Kellett, (*supra*) at the trial of a charge of attempt to pervert the course of justice, again, counsel for the defence said that the jury might remain, during his no-case submission, and the Lord Chief Justice, who presided, agreed and later ruled against it, holding there was *prima facie* evidence of an intention to pervert

the course of justice. Counsel having submitted there was not, rested on his submission and called no evidence for the defence. It was submitted, relying on Falconer-Atlee, (*supra*) that this was a fatal irregularity. STEPHENSON, L.J., for the Court, said (p. 245):

> "We agree that it is generally undesirable that discussion on a submission of no case should take place in the presence of the jury, even with the agreement of counsel making the submission, one reason being that the judge may express a view on a matter of fact which is within the province of the jury, as was pointed out in Falconer-Atlee (1974) 58 Cr. App. R. 354. But it is important that the jury should be left out of no more of a trial than is necessary for justice, and we do not consider any injustice resulted from the jury's hearing the discussion on defence counsel's submissions in this case."

In the light of these two very recent pronouncements on what is the correct rule of practice, it cannot be said that in such a case as this, the trial judge fell into any error in his ruling that the jury should be out: in any event, I do not think that any injustice whatever resulted from it. However, I would say that judges presiding over criminal trials at the Assizes would hardly go wrong if they adhere to the general rule laid down in these recent English judgments. And so this ground of appeal fails.

The next objection considered is the submission, in effect, that the identification parade was unfair; that this unfairness rendered its evidential value nugatory: and that the trial judge should have so directed the jury. It raises three questions: (i) Was the parade unfair? (ii) If it was, what effect, if any, would this have on the probative value of the identification on oath at the trial? And (iii) What directions were necessary? Questions (i) and (ii) can conveniently be considered jointly. It must be recognised on all sides that no procedure can eliminate entirely the possibility of a misidentification. The fallibility of identification parades has been explored by Professor Glanville Williams in his *'Proof of Guilt'* and in two articles published in [1963] Crim. L.R. at pp. 479-490 and 546-555. And so, it is the duty of the police to be scrupulously fair in the conduct of such a parade; fair to themselves and their own reputation; to the prisoner, lest he be innocent: to the victim of the crime; and to the general public, lest a guilty man escapes through rejection by the Court of the evidence of identification at the trial.

As the then Lord Chief Justice himself warned in R. v. Parks ([1961] 1 W.L.R. 1484), cases of identification can be difficult and could lead to miscarriages of justice. The identification parade is a safeguard valued and relied on by the courts in cases based wholly on visual identification of strangers to the witnesses, to reduce the likelihood of a misidentification. And that is why in R v. Williams ((1912) 8 Cr. App. R. 84, 88), Lord Chief Justice ALVERSTONE said: "... this

identification was not properly carried out; Fulcher (the witness) saw the appellant alone in the police station, and did not pick him out from among other men. In the opinion of the Court the mode adopted was not a proper one...." It is most essential, therefore, that the parade must provide a fair and just test. And, to my mind, it is impossible to hold a fair test if only the suspect in a line-up can possibly completely fit the description of the criminal given to the police and etched in the memory of the witness. In this case, the assailant was "a short dark negro man with a scar on his left side face"; the appellant alone in the line-up could have fitted this description: the others could not. This was no test at all. As a test, it was a farce. Richard Beharry could have picked out no one else. I would not criticise the police over it. It was probably impraticable to find seven men with similar scars. But it was a farce nonetheless.

During the hearing of the appeal, the Court referred counsel to a report of a case in 'The Times Newspaper' of 22nd July 1969, at p. 2, in the appeal of R. v. Gerard Frederick Jones from conviction for an offence against a youth of eighteen. I cite the full report:

> "LORD PARKER OF WADDINGTON, Lord Chief Justice, said in the Court of Appeal yesterday that an identity parade 'really was a complete farce'. But no one could be blamed.
>
> At the start, he said the accused man Gerard Frederick Jones, a motor mechanic, was dressed in his working clothes, which were covered in oil. The other eight men on the parade were well groomed in lounge suits.
>
> It was so obvious that the police suggested to Mr. Jones that he changed into a suit. But he replied: 'I have nothing to fear. Let's go ahead.'
>
> LORD PARKER went on: 'Again the police were not satisfied because they then borrowed a coat for him to wear. Unfortunately, this added to the farce because it was about two sizes too big and the sleeves hung below his hands.
>
> The police then erected a barricade of benches in front of the nine men and draped blankets over them, the idea being that their legs should not be seen and Mr. Jones' trousers would not stand out.

The moment the youth who was to do the identifying came into the room, he spotted a man standing there whose dirty trousers showed under the benches and whose big coat stuck out like a sore thumb. He had his eyes on this man from the word go.'

> The Court held that the identification parade had been such a complete farce that it would be unsafe to allow Mr. Jones' conviction to stand.
>
> The Court accordingly quashed his conviction at Chester Assizes on December 17 of an offence against a youth aged 18, Mr. Jones, aged 43, of Heol Islwyn, Adwy, Coed Poeth, near Wrexham, Denbighshire, had been sentenced to three years' imprisonment."

To offset this decision, counsel for the State referred to R. v. John ([1975] Crim. L.R. 456). John was convicted of wounding with intent and assault, on the evidence of three witnesses who said the assailant wore a leather jacket. At the identification parade three days later, he alone wore a leather jacket. The appeal was dismissed, the Court pointing out that the witnesses had in fact based their identification on what they recalled of the features of the assailant, and dress played no part in it; and, further, they all had excellent opportunity of seeing him and the conditions were good. If, in the present case, the evidence established that the identification was not based on the scar but on the features, R. v. John (*supra*) would support the State's position, but there is no such evidence. At no time, either in his written statement to the police or in his evidence at the trial, did Beharry say he had a good look at the appellant face to face: in fact, at all times he spoke only of seeing the scar on the left side of the face. I do not think R. v. John (*supra*) helps the prosecution in this case.

What then was the effect, if any, of the identification of the appellant at such, a parade on the proof of identification on oath at his trial? This depends on the true evidential relevance and value of an identification at a parade. If the two things are separate and unrelated, then the jury and this Court on appeal, might legitimately limit its consideration to the identification at the trial. If they bear upon each other, then the probative strength and reliability of the identification at the trial might depend on what happened at the parade. I think that as a matter of logic and common sense this latter is the correct position: they inter-relate. I proceed to demonstrate this proposition.

First of all, I take the view that the identification at the parade is not, at the trial, substantive proof or evidence, on which guilt can be solely rested. An accused cannot be, at his trial, linked with a crime only by the evidence that at a parade he was picked out as the offender. He must be identified by a witness on oath at his trial. And the evidence that, shortly, or at sometime after the crime, the witness picked him out in a line-up fairly held is admissible as relevant to the reliability of his identification at the trial in that it tests, or strengthens, the trustworthiness of that evidence. Time was, when there was never any identification parade, as the modem practice of identity parades did not then exist. The accused, after his arrest was not put among other persons to see if any witness to the crime would identify him No doubt before a trial there might be an arranged or accidental

confrontation of witness with suspect and an act of identification might follow. In such cases, the evidence was admitted or rejected as substantive evidence on principles laid down in cases such as: R. v. Norton ((1910) 5 Cr. App. R. 197) and D.P.P. v. Christie ((1914) 10 Cr. App. R. 141). If the prisoner by word, or conduct admitted the identification, it was direct or circumstantial proof of that fact: if, in like manner he denied it was not. Further, in Christie, where, on a charge for an offence against a boy, he testified only of the incident itself and identified the prisoner as his assailant, but his mother told the Court of a pre-trial identification by him a few minutes later. Although there was a difference of opinion among their Lordships as to whether the mother was the proper witness to testify about it, all of them appeared to accept the admissibility of the fact as evidence of identification independently of any admission. But the House had no cause to and did not discuss its own probative value as such.

But cases of mistaken identity occurred with increasing frequency, and so it was thought to be undesirable that the police should do nothing about the question of identification until the accused was brought before the magistrates, and then asked a witness for the prosecution some such question as: "Is that the man?", a form of trial identification held to be quite permissible in R. v. Watson ([1814-23] All E.R. Rep.334), a Trial at Bar, before a Court of King's Bench (LORD ELLEN BOROUGH, C.J., BAYLEY, ABBOTT and HOLROYD, JJ.). Hence, the identification parade became an established pre-trial procedure. Indeed, apparently it became the practice thereafter, that at the trial, the identification from the witness-box would be related to the identification at the parade. For in R. v. Osborne and Virtue ([1973] 2 W.L.R. 209), we find LAWTON, L.J. (p. 214) referring to the fact that at trials "identifying witnesses are always asked" to "pick out the man in the dock whom" (they) "had identified at the identification parade ...". Clearly then, it developed that what happened at the parade directly affected the proof in court. And so often, if a witness did not attend a parade, or did not pick out the accused at one, he was not, at the trial, examined on identity.

In my opinion, it is the identification at the parade which gives probative value, weight and reliability-if any-to the subsequent identification from the witness-box, in the estimate of the jury. I think that the position is well expressed in one of the leading judgments of the Supreme Court of the United States of America: United States v. Wade (1967) 388 U.S. 218, 235-236. cited in Crim. L.R. (1974) (December) at p. 682 thus:

> "The trial which might determine the accused's fate may well not be that in the courtroom but that the pre-trial confrontation, with the State aligned against the accused, the witness the sole jury and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness-'that's the man'."

And as STOBY, J. (ag.) did in Kirpaul Sookdeo and Others v. The State, (1972) 19 W.I.R. 407, I agree with the following passage from Professor Glanville Williams' article on *'Identification Parades'*. [1963] Crim. L.R. pp. 479-480:

> "Evidence of identity is opinion evidence *par excellence*, a form of proof against which English law has always guarded with particular care. As EVATT and MCTIERNAN, JJ., remarked in the Australian case of Craig v. R. (1933) 49 C.L.R. 429. An honest witness who says "The prisoner is the man who drove the car," whilst appearing to affirm a simple, clear and impressive proposition, is really asserting: (1) that he observed the driver, (2) that the observation became impressed upon his mind, (3) that he still retains the original impression (4) that such impression has not been affected, altered or replaced, by published portraits of the prisoner, and (5) that the resemblance between the original impression and the prisoner is sufficient to base a judgment not of resemblance but of identity.' The complexity of this issue is obscured when a witness is asked, as he commonly is, either by prosecuting counsel or by the judge: And do you see the man you speak of in the court today?' The answer to this question, by a gesture in the direction of the dock, is a foregone conclusion: it looks disarmingly plausible and impresses the jury, and yet, the question whether the witness now recognises the defendant as the criminal is of such trifling probative force that it ought not to be asked, except in the context of three other questions: when and in what circumstances did the witness first recognise the defendant as the man; did he have any difficulty in recognising him: and by what marks did he recognise him? Even these further questions might not save this kind of evidence from the danger of misleading juries, but at least they would furnish some opportunity of revealing flaws in the identification." (Underlining mine.)

I agree also with that writer's later comment (p. 482) that:

> "It is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial. When the result of an identification parade may quite conceivably decide the fate of the man picked out, it becomes of the utmost importance to ascertain exactly how it has been obtained." (Underlining mine.)

The identification at the parade is to my mind the crucial test and not the identification in court. What the witness does in court is just to identify under oath, the person he identified not under oath, at the parade. He does not then scan the

features of the accused in the dock to decide then if he is the guilty man. He did this at the parade. At the preliminary injury he just picks out the man he identified at the parade, and who, he knows by then, has been charged with the offence: and at the trial he points out the person he identified in the Magistrate's Court. So that the reliability of the identification in courts truly rests on the reliability of the identification at the parade: and this, in turn, depends in substantial measure, on the fairness of the parade itself. Where a parade is held and there has been a positive identification, the evidence is likely to be given considerable weight. And that is why every effort must be made to make the exercise a completely fair test. If the test is not completely fair, then as a result the identification at the trial might not be as completely reliable, as it should be, for a conviction. As LAWTON, L.J., said in Osborne & Virtue (p. 218 (*supra*)*:* "The whole object of identification parades is for the protection of the suspect, and what happens at those parades is highly relevant to the establishment of the truth."

In Budhsen v. The State of U.P. ([1970] 1 S.C.R. 564), a Criminal Appellate Division of the Supreme Court of India (A.N. RAY and I.D. DUA, JJ.) allowed an appeal from a conviction in the High Court for murder, on two grounds: (i) because the evidence disclosed that at the identification parade some necessary precautions had not been taken to eliminate unfairness; and (ii) because the High Court had treated the identification there, as by itself a substantive piece of evidence sufficient to establish the case for the prosecution. I am concerned in this judgment only with the first ground. In this relation, DUA, J. said (pp. 570-571):

> "As a general rule, the substantive evidence of a witness is a statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances he came to pick out the particular accused person. ... The purpose of a prior test identification, therefore, seems to be to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings." (Underlining mine.)

And (also at p. 571):

> "The identification parades belong to the investigation stage. They are generally held during the course of investigation with the primary object of enabling the witnesses to identify persons concerned in the offence, who were not previously known to them. This serves to satisfy the investigating officers of the *bona fides* of the prosecution witness and also to furnish evidence to corroborate their testimony in court."

I would read the Court as using 'to corroborate' in these two passages as meaning 'to strengthen' what the Court felt would otherwise be weak identification. DUA, J. concluded (p. 572) that: "The identification to be of value should also be held without much delay. The number of persons mixed up with the accused should be reasonably large and their bearing and general appearance not glaringly dissimilar. The evidence as to identification deserves, therefore, to be subjected to a close and careful scrutiny; by the Court." Here, there was this glaring dissimilarity: he (the appellant) had a scar on the left side of the face; no one else had any.

But counsel for the State submitted that there was good opportunity and excellent lighting for a reliable identification, and that, because of this, even if the parade was not a fair test it would be wrong and a miscarriage of justice to interfere with a conviction based on a positive identification from the witness-box. One way to test the force of this submission is to ask: Would the identification have been regarded as reliable if no parade had been held? In such a case, this would have been what is called a "dock identification". Both academic writers and judges view this with disfavour. Admittedly, it could be correct identification by an honest and fair witness with alert powers of observation and a good memory for faces. But it has recognised dangers.

Professor Cross in his publication on *'Evidence'*, 4th Edn., (1974) at p. 49 wrote:

> "It might be thought that in criminal cases there could not be better identification of the accused than that of a witness who goes into the box and swears that a man in the dock is the one he saw coming out of a house at a particular time, or the man who assaulted him. Nevertheless, such evidence is suspect where there has been no previous identification of the accused by the witness, and this is because its weight is reduced by the reflection that, if there is any degree of resemblance between the man in the dock and the person previously seen by the witness, the witness may very well think to himself that the police must have got hold of the right person, particularly if he has already described the latter to them, with the result that he will be inclined to swear positively to a fact of which he is by no means certain."

And Professor Glanville Williams in the article on *'Identification Parades'* cited earlier in this judgment (p. 480) said: "... identification in the dock is patently unsatisfactory ..." Some judges have expressed this same position. [See EVATT and MCTIERNAN, JJ. in Craig v. R. (*supra*) at p. 214 and STOBY, J. (a.g.) in Kirpaul Sookdeo & Others v. The State (*supra*) ("most unsatisfactory")]. Others have taken a less condemnatory approach: In R. v. Roads ((1967) 51 Cr. App. R. 297) LORD CHIEF JUSTICE PARKER said (at p. 299) "The jury were rightly told that they might not think that (Kirby's) identification in those circumstances amounted to very much,"; in R. v. Hunter ([1966] Crim. L.R. 262), *per* DAVIES,

L.J.: "... such a method of identification should be avoided if possible.": in R. v. Howick ([1970] Crim. L.R. 403), *per* SALMON, L.J.: "... it is usually unfair to ask a witness to make an identification for the first time in court because it is so easy for the witness to point to the defendant in the dock.": and most recently in R. v. John, (*supra*) *per* BROWNE, L.J.: "... it was an unsatisfactory method of identification which (*supra*) ought to be avoided if possible." But such identification would not be nugatory. (See Slinger v. R. (1957) 9 W.I.R. 271 and Herrera and Dookeran v. R. (1967) 11 W.I.R. 1). Looking as a whole at what has been said about dock identifications, if this case was to be notionally treated as one such, in my opinion it would have been at least desirable to have drawn the attention of the jury to the possible danger in and weakness of, that method of identification and to warn them to, give careful attention to those considerations in assessing the reliability of the proof. But I doubt that it is permissible or practicable for a Court of Appeal to adjudicate here as if this was a case where no identification parade was in fact held, having regard to what has been said in another part of this judgment about the probative link between the parade and the trial identification, and to the additional circumstance that the case was not put to the jury and considered by them on this basis, it is not possible to say what their verdict would have been if it had been so put. Furthermore, it is to be noted, that in spite of the conditions for safe identification as suggested by counsel for the State. Beharry could identify only the man with the scar.

As in Gerard Frederick Jones, (*supra*) the identification parade was not fair, and the trial judge, in his summing-up, should have discussed this aspect. In the circumstances of this case, he should have directed the jury specifically on the need for a parade to be a fair test and on the relevance of any proved unfairness to the reliability of the trial identification. He should have pointed out to them that there was an element of unfairness disclosed in the evidence, and that it was for them to consider and decide how far-if at all-it affected the weight of the trial identification. But nowhere in his summation did the trial judge deal even briefly with this matter. All he did was to read out from his notes the relevant evidence about the parade and the scar. He did not direct on the relation of these matters to the crucial issue of identity. After referring to the evidence, he gave this direction:

> "The important issue in this case is the identity of the person who held on to Beharry. Beharry says that it was the accused. The accused says that he was at home with his nephew. I must tell you that identity, members of the jury, is often a matter of considerable doubt. An honest witness can make mistakes about identity. This is particularly so when the defence, as it is in this case, is one of alibi. It might well be a case of mistaken identity. But, members of the jury, you have seen the witnesses and you have heard the evidence. If you are disposed to convict on the evidence, well you are perfectly free to do so.

> Beharry is the only witness who has given evidence of the identity of the accused as the man who held on to him while that other man was hitting him on the head. If you have any reasonable doubt of the identity by Beharry, then you must acquit the accused."

That was all the help and guidance given to the jury. In this case, it was inadequate. A jury is entitled to more assistance than this, where the proof of identification rests wholly on a brief visual observation at night by the victim of a crime of violence during a brief encounter, and an identification parade held 17 days later was manifestly unfair.

Sir James Fitz-James Stephen in his *'History of The Criminal Law of England'* Vol. 1, published in 1883, wrote (p. 455): "... a judge who merely states to the jury certain propositions of law and then reads over his notes does not discharge his dun." This is as true today as it was then. In the eyes of the jury, counsel on each side might appear biased so they would look and are entitled to look to the judge for a full and clear analysis of the material evidence and an impartial and helpful summation on the crucial issues of fact on which the verdict depends. If the trial judge had given adequate directions a court might not have interfered even though the identification parade was not a fair and reliable test. But the jury were left free to approach the issue of identity as it was. In my judgment, the summing-up was defective in the respects indicated, and this would be sufficient ground to quash this conviction, subject as always, to the application of the proviso.

There is, however, a third ground to be considered briefly. It arose in this way: Detective Corporal 7918 Eric Hubbard was a witness for the prosecution. In his examination-in-chief he said:

> "On Wednesday, 13th February, 1974, I was on duty at Middle Road, La Penitence, where I saw the accused. I told him it was alleged that he in company with others beat and robbed Richard Beharry of a quantity of gold jewellery at his home, Lot 339 Cummings Street, Georgetown. I arrested and cautioned the accused. He said. 'I don't know anything about that.' On 14th February, 1974, the accused was placed on an identification parade. On the 15th February, 1974, I again cautioned him. He said. 'I do not know what that man is talking about. I do not want to make any statement.' I conducted investigations into the matter and later charged the accused. The first time I knew of the beating of Richard Beharry was about the 31st January, 1974. I know of another against the accused from information received."

Counsel complained that the last statement was evidence of another and similar criminal offence: that it was wrongly received and highly prejudicial, and that the trial judge did not warn the jury to disregard it. I have found some difficulty in

accepting that prosecuting counsel of some experience would put any question in chief in this case to lead to an answer of another charge. And I wondered at one time whether it might not be a case of a typographical error. But counsel for the State did not raise this question, so the Court has to take the record as accurate. If so, then it has to considered whether the jury might reasonably have understood the witness to be saying so.

In my judgment, it is impossible to be sure that a reasonable body of jurymen might not have understood Detective Corporal Hubbard to be saying that the appellant then had a similar or some other criminal charge pending against him. What he said could mean that. The evidence was clearly inadmissible and could have been prejudicial. The trial judge did not refer to it at all in his summing-up. This, submitted counsel for the appellant, was an error, while counsel for the State contended it was the wise exercise of a judicial discretion. In R. v. Weaver ([1967] 2 W.L.R. 1244), where evidence was let in inadvertently that the address of the accused "was known to the police and has been circulated", the trial judge in his charge did not mention it at all. The Court of Appeal held he was "quite right to omit mentioning it". In his judgment, SACHS, L.J. described the position of the judge in these words (p. 1248): "... this is completely a question of discretion and one knows from experience the difficulties which persist for judges who deal with such situations. Whatever he does is submitted to be wrong. If he mentions the matter again he is accused of error in referring to it again: if he had not mentioned it again, he is accused of not having directed the jury properly." On the other side of the line are cases like R. v. Michael Morrissev ((1932) 23 Cr. App. R. 188) and Maxwell v. D.P.P. ((1935) 24 Cr. App. R. 152). In each, the jury were expressly warned to disregard inadmissible prejudicial evidence. In Morrissev (*supra*) it was evidence of another offence: in Maxwell (*supra*) it was evidence of an acquittal on a charge for a similar offence. In the former, the Court of Criminal Appeal, and in the latter the House of Lords, held the conviction bad, in spite of those warnings.

In Maxwell (*supra*) the appellant was charged with manslaughter and with using an instrument with intent to procure a miscarriage on the deceased woman. He testified that she had consulted him for relief and treatment following an abortion already suffered elsewhere. He admitted under cross examination that six years earlier a similar incident had occurred involving him and that he was charged and acquitted. The House of Lords held, that although the case was strong against him, it might well have been that the fact that he was charged some years earlier with a similar offence although he was acquitted, may have been "the last ounce which turned the scale against him" (*per* the Lord Chancellor at p. 176 speaking for the entire House). In the light of all this, it could be that the evidence in the present case of a similar pending charge might have influenced the verdict. But, having regard to the conclusion reached that the second ground of objection discussed above is sufficient to upset this conviction, it is not necessary to reach a

concluded opinion on this point.

I would allow the appeal and discharge the appellant.

**CRANE, J.A.**: Of the several grounds of appeal argued, I think that dealing with the complaint that the identification parade was irregularly conducted is a sound one, and is sufficient to dispose of this appeal in favour of the appellant.

Richard Beharry, the virtual complainant, told the jury that he made no mistake of the fact that it was the accused who held on to him while another man attacked him by repeatedly hitting him on the head with a revolver when he shouted "Thief!" to attract the attention of his wife.

The case for the prosecution was that the accused in company with some other men entered Beharry's premises and robbed his wife Edna of certain pieces of gold jewellery, and that while three of the men were thus engaged, the accused aided and abetted them by holding on to Beharry and keeping a look-out in the yard outside so as to facilitate the crime.

When the robbers had departed with their booty, Beharry reported what had occurred to the police. He gave a statement in writing in which he described the man who was holding him as a short, dark, negro man having a scar on the left side of the face. This information led to the arrest of the accused as the man who answered the description Beharry gave. The accused indeed has a scar on the left side of his face, but when the police came to stage an identification parade, they did so with the accused as the only person with a scar on the left side of his face. The question which arises is: Was that a fair way to hold a parade? It was this aspect that gave rise to the following ground of complaint:

> "The identification parade was irregular in that-
>
> (a) it was not made pellucidly clear that the suspect need not be on parade;
>
> (b) having regard to the fact that the one identifying feature of the assailant was a scar on the left side of the face, it was unfair, improper and highly prejudicial to place only one person so described, i.e., the accused."

It is not difficult to see there is merit in the above complaint once it is established as a fact that, (i) Beharry had indeed described the accused to the police as scarred on the left side of his face, and (ii) the accused was the only person on parade with that facial characteristic.

As to (i) above, there can be no doubt the accused was so described in Beharry's statement to the police, although it was necessary to refer to it so as to remind him of this fact. It seems to me, judging from the vascillating testimony he gave in the witness-box. Beharry must have been a very evasive witness as he sought to deny that he had seen the scar on the face at the parade. He appeared to be intent on concealing the fact that it played an important part in his identification of the appellant. This is revealed from the following extract of his evidence on record:

> "I gave the police one statement. I can't remember if I told the police about the scar. I now say I did not mention the scar in the statement." [Prosecutor shows statement to defence counsel.] "I told police the man was a short, dark, negro man, I gave a statement to the police. The man who hit me with a revolver is a negro man. At the identification parade, seven men were on parade. I did not check on the others to see if they had scars. I don't know if the accused was the only man on parade with a scar. I can't remember telling the magistrate; 'Of the seven on parade only one had scar. That was the accused.' I now say I did tell the magistrate so. I had no problem picking out the accused."

Yet in spite of the above, the trial judge made absolutely no effort, as he is required to do, to put together in one part in his summing-up for the information of the jury, all relevant points and "to summarise for the benefit of the jury all facts which had emerged during the trial such as would cast or tend to cast doubts on whether identification of an accused had been established to their satisfaction." (See Kirpaul Sukhdeo *et al* v. The State (*supra*)*:* also Eric James v. R. ((1970) 16 W.I.R. at p. 272). All he did was to draw the jury's attention to what Beharry told them in relation to the scar, compared it with what he said in the Magistrate's Court about the scar, and told them that any inconsistency was a matter for their attention. In other respects he gave them no assistance, for he positively made no mention that there was anything wrong or could be wrong with a parade comprising of only one person with a scar; nor did he indicate what effect he thought that fact would have on its value or reliability in proving the identity of the accused.

The mounting of an identity parade is a necessary exercise in proof of the very next question that arises after proof of the *corpus deleti viz.,* proving the identity of the accused. It is the initial step in the procedure by which the prosecution brings offenders to justice, and it is for the reason that courts cannot supervise the staging of it, that it is of importance that its conduct should be scrupulously fair. Once a suspect has been identified by the complainant or a witness with the commission of the crime, then, for all practical purposes, the prosecution has gone a long way in establishing its case against the accused. In R. v. Dwyer, ([1925] 2 K.B. 799), LORD HEWART, C.J. said that identity parades should be conducted "with exemplary fairness, remembering always that the Crown has no interest in securing a conviction, but has an interest only in securing the conviction of the

right person."

In conducting identity parades, the police should always see to it that the composition of the parade should be such as not to point in some way or other, however slight, to any particular person. Care must always be taken to select participants who possess the same combination of characteristics and to select a parade comprising of those persons who are, as far as possible, similar to the suspect in age, race, height, general appearance and position in life. If it turns out that a complainant had personally known the suspect before the incident, and satisfactorily establishes that fact to the police, he cannot really be called a suspect at all, since he is known. In that case there will be no need to hold an identity parade. The problem, however, arises when the virtual complainant or witness has never seen the suspect before, and can only give the police a description of him. If, however, a general description is given of the suspect, there is generally no difficulty in staging a parade comprising of persons who bear resemblance to him. But sometimes a difficulty will appear to arise when the suspect is described as having a special characteristic like a mole on the cheek, a cleft chin or, as in the instant case, a scar on the side of the face. In such circumstance, are the police compelled to convene a parade of at least seven persons each of whom is possessed of that special characteristic? The answer would appear to be 'yes' if they are to conduct a parade which is fair to the accused. But what if no person with the special characteristic can be found? Must the parade be held regardless? If the person identifying has previously told the police that his attacker had a cleft chin and only one person is paraded with that peculiarity, all other things being equal I think it stands to reason that an adverse result to the suspect will be a foregone conclusion. Such a parade can hardly be said to be fair in the ordinary acceptance of the word. But are the difficulties of the police really insurmountable in cases such as those mentioned above? It seems to me, their difficulties, if so they may be called, are sometimes more apparent than real.

In R. v. Jones (1961) 'The Times', March 16), the trial judge, in apparent apology for the failure of the police to hold an identity parade, told the jury that it had not been possible for one to be held because they could not be expected to find ten or twelve men who looked like the accused, who were about his height and build with black hair and thin lips and each with a scar on his face. But one wonders whether such a comment was really justified, and was a plausible excuse for failure on the part of the police to mount an identity parade. Admittedly, the scar on Jones' face was an unnatural feature and, in fact, the most striking of all his characteristics, and I think it is true to say that were it not for the scar there could have been no excuse for not holding a parade. But I would enquire: Was the difficulty in holding one really insurmountable in the circumstances? When one considers that the police could have resorted to the simple expedient of putting pieces of plaster on the faces of all those on parade, including Jones', so as to eliminate the one and the only unnatural characteristic, namely, the scar. I am a

little doubtful whether I can agree with the learned trial judge's reasons that it had not been possible for the police to conduct a parade because of the impossibility of finding people resembling Jones. It is all a question of the experience, common sense and fair-mindedness of the particular officer conducting the identity parade. For example, in one case, the suspect had a club-foot. It would not have been possible to gather together seven or eight men with club-foot; at least not within a short space of time. So the officer conducting the parade had the presence of mind to order that all the participants' feet and ankles should be covered with rugs, and the difficulty was overcome in that way. At another parade, a one-eyed girl was the suspect. There, the officer bandaged her damaged eye, and similarly, bandaged one eye of all the other women on parade. The difficulty was again only apparent and easily overcome. But supposing an identifier can recognise the suspect on parade only by the mole on his cheek, his cleft chin, or by the scar on his face, would it be proper to conceal that special feature in the manner suggested if it be obligator, that a parade be held? It seems to me the answer must be 'yes', because as we have already noted, the identification of a suspect who is paraded with a peculiarity not common to all participants, but known beforehand to an identifier, is unfair. If a parade must be held at all it seems to me it is better that one should be held in circumstances where the identification though a remote possibility, is fair, than in circumstances where it is both a certainty and unfair. Speaking for myself, I can well understand what Beharry meant by saying he "had no problem picking out the accused", for it was made all too easy for him to do so.

In the present case the police could, in like manner, with a bit of thought and imagination, have solved the problem if they were imbued with a spirit of fairness. But, as it turned out, they could not bring themselves to feel there was anything amiss in staging the parade with only one man with a scar on his face. The learned trial judge evidently thought so too, for he did not perceive this glaring impropriety, nor, as I have observed, did he even put together the evidence in his summing-up, with a view to showing that the evasive nature of Beharry's evidence on the matter of the scar, was deserving of and invited some critical comment by him. Here, I would respectfully concur with the observation of VISCOUNT DILHORNE in Eric James, (*supra* at p. 276), in a case concerning the identification of an accused to the effect that "if the summing-up had focused attention on the evidence, it is most improbable that the jury would have been satisfied that the appellant was the man and would have found him guilty."

Another matter of some importance is the failure of the officer conducting the parade to give Beharry in the circumstances, an adequate caution in the nature of a "savings clause" so as to ensure he understood that it was not absolutely necessary for him to identify anyone, only if he was positive the person was on parade. This objection was part (a) of the ground of complaint with which we are dealing. In *Crane's Law of Unlawful Possession,* 2nd Edn., it is stated at note (10), p. 156.

as follows:

> "The police officer in charge should add a 'savings clause' prior to what he tells the identifying witness, i.e., he should indicate to him that he should identify only 'if the suspect is on parade' or words to that effect. This, it is thought, would allay the fears of the witness that the suspect is on the parade and that the witness has got to pick him out because he is on the parade."

In the record, it will be seen that Beharry was told by Detective Assistant Superintendent of Police, Peters, just before identifying the accused by touching him, "that he should look at the parade and should he recognise any of the persons who visited his house on Monday he must touch the person ... immediately went up to the accused and touched him." In my opinion that was not a sufficient intimation to Beharry in the particular circumstances of this case, that he was expected to identify' the suspect only if he considered he was on parade. A direction that "should he recognise any of the persons" must, it seems to me, mean any one of the persons on parade resembling his attacker.

With the parade composed as it was of seven short, dark negro men, only one of whom had a scar on the left side of his face, the balance of identification was heavily weighted against the accused. It is difficult to see who else could have been identified other than him of whom the police had received a description as aforesaid. There were not even two such persons on parade, a fact which I think, made it all the more compelling that Beharry should understand that the suspected person was not necessarily on parade so that it was not obligatory on him to pick out someone from among those paraded before him. In my view, the intimation that should Beharry recognise any of the persons who visited his home was only a precautionary measure. I think the situation needed a savings clause in the nature of a caution of a much stronger kind, viz., that Beharry should identify the suspect only if he is on the parade. In my opinion, the fact that the accused was paraded as the only man with a scar on the left said of his face, coupled with the fact that there was no adequate savings clause, rendered his conviction void.

I agree that this appeal must be allowed and that the conviction and sentence be set aside.

**R.H. LUCKHOO, J.A.:** Despite the safeguards taken over the years with a view to reducing to a minimum the tragedy of a miscarriage of justice due to mistaken identification, the situation is as grave today as it has ever been. In June 1972, the Criminal Law Revision Committee in England in its report on the subject of identification had this to say:

> "We have been much concerned by the danger of wrong convictions on

> account of mistaken identification of the accused and as to whether to make any recommendations with a view to lessening this danger. We regard mistaken identification as by far the greatest cause of actual or possible wrong convictions."

Various bodies and organisations have also expressed concern and have advocated a need for corroboration before a conviction can be sustained, or a requirement for a general warning of the dangers involved in identification evidence. These can certainly help but there will always remain that risk of error because no matter how honest a witness may be mistakes will continue to be made due to human limitations and imperfections.

This Court has in two fairly recent cases (The State v. Lloyd Harris (1974) 22 W.I.R. 41. and The State v. Mohamed Khalil (1975) 23 W.I.R. 50), adverted to the dangers inherent in identification evidence by strangers to the accused, and the need for the trial judge to deal in his summing-up not only with such important factors as the credibility of a witness, but also with such relevant and vital factors relating to the setting in which the identification took place, as, for example, the length of time the witness had for seeing the accused, the positions in which the respective parties were, the distance separating them, the nature, size, etc., of any obstructive elements that might tend to impair a proper vision, the quality of the light. It is also necessary to take into account the period of time that elapsed between the incident and the identification parade, or between the incident and when the accused was pointed out to the police, as the witness would have to carry in his mind's eye during that time a visual recollection of the person. (See Arthurs v. A.G. for Northern Ireland (1970) 55 Cr. App. R. 161). Identification is an act of the mind, as LORD MOULTON has truly said in D.P.P v. Christie (*supra* at p.558). Nothing appears more difficult than to carry in one's mind for any length of time the image of someone, seen for the first time and for only a few seconds. No matter how truthful or dependable a witness might be, if conditions were not favourable for a real and true identification, there would always be present that element of risk of a mistake.

In his *"The Proof of Guilt"* Professor Glanville Williams, when dealing with the fragility of memory and the law of evidence, referred to Professor Bartlett's words on the subject of remembering faces thus:

> "Faces seem peculiarly liable to set up attitudes and consequent reactions which are largely coloured by feeling. They are very rarely, by the ordinary person, discriminated or analysed in much detail. We rely rather upon a general impression, obtained at the first glance, and issuing in immediate attitudes of like or dislike, of confidence or suspicion, of amusement or gravity."

With a consciousness of these dangers and with an awareness of the number of convictions of innocent persons based on errors made at identification parades, albeit honestly, I approach a consideration of the substantial ground of this appeal, that is, that having regard to the circumstances in which the identification parade was held when the appellant was picked out, the learned trial judge ought to have cautioned the jury of the element of risk of error involved. Guilt or innocence in this case, depended entirely on the acceptance or rejection of the evidence of the witness Richard Beharry.

The appellant was convicted in July, 1975, at the Demerara Assizes of the offence of robbery under arms, contrary to s. 222 (c) of the *Criminal Law* (*Offences*) *Act, Cap. 8:01*, in that he, on the 28th January, 1974, being armed with an offensive weapon, robbed Edna Beharry of one gold chain, twelve gold earrings and three pieces of gold wire. He was also convicted of having on the said day wounded Richard Beharry with intent to cause him grievous bodily harm. He was sentenced to five years' imprisonment on each count, the sentences to run concurrently.

Richard Beharry outlined, in his evidence, the circumstances of the attack on him by the appellant and another man, and the substance of his evidence was that the incident took place just outside his front door at Lot 339 Cummings Street, Georgetown, at about 9 p.m. on the 28th January, 1974. There was a 60-watt bulb burning at his front door about one or two yards from where he was held by the appellant. He described how the appellant held him while the other man hit him on his head with what appeared to be a revolver. He tried to free himself. He looked at the face of the appellant. He first saw a scar on the left side of the appellant's face during the scuffle to free himself. He kept shouting during the attack, and he was struck several times on his head by the other man for about one minute, during which time the appellant was holding him. He suffered injuries to his head. The appellant then loosed him and both ran away.

Beharry made a report to Alberttown Police Station the next day, and on the 14th February 1974, that is, seventeen days after the incident, he attended an identification parade at Alberttown Police Station, where, according to him, he had no difficulty in identifying the appellant, from seven persons on the parade, as one of his assailants. His evidence also disclosed that when he had made his report to the police he had given a description of the appellant: a short, dark negro man.

Mr. Ganpatsingh has, with his customary candour, disclosed to this Court that although Beharry's evidence at the trial was that he did not mention in his statement to the police about the scar on the face, he did in fact make mention of this in his statement.

Detective Assistant Superintendent of Police James Peters, who had the conduct

of the identification parade, testified to the effect that all seven persons on the parade were of similar age, height, general appearance and station in life. He said also that Beharry went immediately up to the appellant and touched him. Counsel for the State has emphasised this fact in order to show that it was not the scar on the appellant's face which led to his identification by Beharry at the parade, as it was a small and hardly noticeable scar. Counsel for the appellant, however, has stressed that Beharry's evidence revealed that the only person on the parade with a scar on his face was the appellant, and in those circumstances it was not a fair and proper identification at the parade.

One cannot criticise the police in their conduct of the parade. They had done their best in the circumstances, and one fully appreciates their difficulty in being able to obtain persons to sit in on a parade, who are similar in even respect to the appellant. I do not think that Peters' evidence that "Beharry went immediately up to the accused and touched him" should be given the interpretation that there was no pause, no reflection, on the part of Beharry, but that he entered the room and immediately walked up to the appellant and touched him, I say so, because if it had happened in the manner contended for it would have been most unlikely for Beharry to testify: "Of the seven men on parade only one had a scar. That was the accused." The fact that he was able to discern that only the appellant on the parade of seven had a scar, bearing in mind how insignificant was the scar, shows he must have looked carefully at the faces of the six others also before picking out the appellant. It might well be that he would have been able to pick him out from others with a similar scar. But it might equally well be that there might have been some doubt in his mind, which was only resolved when he noticed the scar on the appellant's face.

As LAWTON, L.J. said in R. v. Osborne (*supra* at p. 657) "The whole object of identity parades is for the protection of the suspect, and what happens at those parades is highly relevant to the establishment of the truth". And LORD DENNING, M.R. observed in Dallison v. Caffery ([1964] 2 All E.R. 610 at p. 617): "So long as such measures are taken reasonably, they are an important adjunct to the administration of justice: by which I mean, of course, justice not only to the man himself but also to the community at large". We should also bear in mind that a witness may assume from the fact that a parade is being held that the guilty person is present, and if the person who attacked him has a scar, he may be influenced by the fact that the only man on the parade with the scar is in all probability the guilty man, and so feel compelled to pick him out.

This is a case which depended entirely on identification. That was the sole, vital issue. From the circumstances set out above relating to the identification parade, it became necessary for the trial judge in his summing-up to the jury to try to offset the disadvantage at which the appellant had been placed by being the only person on the parade with a scar on his face, a factor which was likely to militate

against him as the victim had mentioned in his statement to the police before the parade the fact of his attacker having a scar. It was incumbent on the learned trial judge to draw to the attention of the jury these factors, and to instruct them that such factors must affect the reliability of the parade that was held and diminish the cogency of an identification made in those circumstances. No such warning was given. The dangers inherent in an identification which had taken place in those circumstances were not pointed out to the jury. For these reasons I am unable to say that the identification of the appellant was certain and reliable, and I hold that the summing-up failed to give adequate instruction to the jury and to alert them to the attendant risks.

I would, accordingly, allow the appeal and set aside the conviction and sentence.

**Appeal Allowed.**
**Conviction and**
**sentence set aside.**

## SUBJECT INDEX

**WILL-***Probate-Testator without next-of-kin-Identity of testator-Onus of proof of-Testator leaves earlier and later wills-Dispute between beneficiaries of each will-Compromise agreement that probate of earlier will be applied for instead of later-Validity of such probate-Whether such probate should be set aside in the particular circumstances in favour of probate of later will.*

**WORDS AND PHRASES.**