

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.2 OF 1990

BETWEEN:

EVERETTE DYERS

APPELLANT

and

THE QUEEN

RESPONDENT

Before: The Honourable Mr. Justice Dennis Byron, J.A.
The Honourable Dr. Nicholas Liverpool, J.A.
The Honourable Mr. Justice Satrohan Singh, J.A.

Appearances: Mr. Ralph Francis for the Appellant
Mr. Lloyd Luckhoo QC, and Mr. Derrick Osborne for
the Respondent

1991: February 22, 23, 24;
June 7.

JUDGMENT

BYRON J.A.

On the 2nd day of April 1990 the appellant was convicted of the murder of Arab Hector and sentenced to death after trial before Mitchell J. and a jury. He has appealed against his conviction and sentence.

The Record of Appeal

On the 24th day of November 1992 when this appeal came on for hearing we made an order for the rectification of the record of appeal. The record as modified is accompanied by the Declaration of Verification required by Rule 4B(5) of the Court of Appeal Rules 1960 and has the approval of counsel for the appellant and for the respondent. We were therefore satisfied that the record on which this appeal was heard was accurate to the extent required by the verification procedure of the Court of Appeal Rules and that both sides to the appeal were equally satisfied that it represented the proceedings at the trial.

The Grounds of Appeal

I trust that I do no injustice to the presentation of counsel for the appellant if I summarise the grounds of appeal which he argued as follows: -

1. that the trial Judge was wrong to reject the submission of no case to answer;

2. that the Trial Judge wrongly admitted evidence which had more prejudicial than probative value;
3. that the Trial Judge failed to direct the jury properly on evidence which identified the accused as the person in the yellow van travelling to Libertá; and
4. that the Trial Judge failed to put the defense properly to the jury;
5. that the Trial Judge gave directions which were prejudicial to the appellant.

There were no eye witnesses to the killing of the deceased. The case against the appellant was based on circumstantial evidence.

The gravamen of the appeal was the contention of counsel for the appellant that the evidence was insufficient to justify the conviction and the thrust of his argument requires that the prosecution's case and the evidence in support of it be subjected to a careful review. The appellant did not give evidence nor make any sworn or other statement during the trial. The jury were therefore left with the uncontroverted testimony of the prosecution witnesses, except in so far as it was shaken in cross-examination.

The Case for the Prosecution

The deceased was married to Tim Hector. He left Antigua on an overseas trip to Europe on 25th May 1989. He had to cut short his trip and returned on 31st May 1989 after receiving reports that the deceased was missing. Virginia Issava a family friend from Trinidad was staying at their home during this period.

The Hectors had a farm house on their farm at Libertá and ran a laundry business in St. John's. They also owned vehicles including a Yellow Diahalso Van which was used mostly in connection with their businesses. There was evidence that this van was driven by the appellant from time to time.

The appellant was employed by the Hectors and worked as a handyman on the farm and at the laundry. He lived with his girlfriend Jean Francis and her family on Alfred Peters Street. He also occupied Austin Brown's home on Bennett Street. His duties on the farm included feeding the animals. There was evidence that Mr. Hector had given him specific instructions to build pig pens on the farm while he was overseas.

The evidence disclosed that on 26th May 1989 Ms. Issava drove the appellant to and from work at the Libertá farm in the yellow

van and that on 27th May 1989 the deceased drove him to and from the farm, and that the deceased was to pick him up on the 28th May 1989 to take him to the farm to build pig pens and feed the animals.

On the night of Saturday 27th May 1989 Ms. Issava and the deceased went to a food fair. Ms. Issava left the deceased there at about 11.00 pm in good spirits, and that was the last time she saw her alive. Ms. Issava returned to the house about midday on 28th May 1989. The deceased was not at home but she noticed that the kitchen wares from the night before had been washed. She left home about 3.00 pm and returned about 7.00 pm to find the house exactly as she left it earlier that day. She found this unusual, but turned the lights on and left home and did not return until the next morning at 7.45 am on the 29th May 1989. There was no sign of the deceased or that she had come into the house. Ms. Issava started to ask around for the deceased. A search was mounted. About midday George Goodwin a family friend and associate went to the farm to look for the deceased. He did not find her there. He made a report to the police. About 2.00 pm Ms. Issava and Gregson Williams went to the appellant's home to inquire whether he had seen the deceased on the day before. In her evidence she said that: -

"He said that he had not seen her. She was supposed to pick him up, he waited all day, till he even fell asleep. And he said that he was still waiting. He said something about her picking him up about a blow torch."

About 3.00 pm George Goodwin made a further report to the police who immediately commenced a search and investigation. Later that Monday the yellow van was seen parked on a street behind the Hectors home in a place where the Hectors never park it. Shortly after 6.00 pm a party of police officers under the command of Superintendent Truchant Smith went to the yellow van and a search revealed what appeared to be blood stains on the floor at the back of the van.

Jean Francis gave evidence of a conversation at her home with the appellant after 6.00 pm on 29th May 1989, in which the enquiries being made for the deceased were discussed and which included this exchange: -

"Byers why don't you go and help them try and find Mrs. Hector?". He turned to me and said "who told you that they don't kidnap her?". I told him "if they kidnap her, Tim has his money. Tim will pay to make his wife talk". The accused said, "well I don't know, cause I did not see Mrs. Hector for the day."

The police continued their enquiries. They went to the home of the appellant some time after 7.00 pm that night. Having been told by Superintendent Truehart Smith in the presence of other police officers that he was making enquiries into a report that the deceased was missing and that it was understood that she was to pick him up on the Sunday to go to the farm to feed the animals, the appellant replied that the last time he saw the deceased was the Saturday before, when she picked him up at home and they went to the farm at Liberta where they fed the animals and that she dropped him back home at Alfred Peters Street and that he had not seen her since. The police then took him into custody. Later that evening at Police Headquarters during an interview the appellant told Superintendent Smith in the presence of other police officers that he never saw the deceased on Sunday 28th May 1989 and that he waited at his home all day for her to pick him up for them to go to the farm to feed the animals. He repeated that the last time he saw her was on Saturday 27th May 1989.

On 30th May 1989 about 6.00 am the police conducted a search at the Hector's farm. One Lowell Jarvis a friend of the Hector's entered the farm house through a window from which the wooden louvers were removed by the police. He looked around and did not see the deceased or anything he considered unusual. During the search of the farm and surrounding area the police found a black panty along with a sanitary pad. The black panty was identified as being similar to one the deceased owned. The police also found one varilux bifocal lens which was identified as being from the glasses the deceased wore.

Later that day Superintendent Smith asked the appellant to show him where Ira Stevens, known as Jabumba lives. The appellant replied in the presence of other police officers: -

"I know that I told you last night I did not see Mrs. Hector on Sunday but the truth is that I did see her because she came and picked me up at home at Alfred Peters Street in the van, and we went by Jabumba and picked up a welding plant. She dropped me at home with it and left me there. She drove away and I never saw her again."

About 6.00 am on 31st May 1989 Allington Thomas who was at the beach with members of his family in the Jabberwork area smell and saw something. He summoned police officers whom he had seen bathing in the area. These officers included the Commissioner and Deputy Commissioner of Police. They immediately radioed a number of people including Dr. Simon, a pathologist.

The decomposing body of the deceased was found in a shallow grave. Dr. Simon the pathologist described various injuries to the palm of the right hand, the fingers and palm of the left hand, a gaping laceration at the right elbow, three incised wounds to the front of the neck (which in his opinion would have caused death within seconds of having been inflicted). He found abnormalities in the hyoid bone which he suspected was a fracture commonly seen in strangulation. There was a wound in the centre of the forehead and a gaping os in the uterine cervix with an adjacent bloody area. He determined that death resulted from the wounds to the neck and occurred about 72 hours before his examination plus or minus 0 to 12 hours. He explained the reasons why he was unable to give an unequivocal and accurate time of death, but formed the opinion that it could have occurred late on 28th May 1989.

The prosecution adduced evidence to show that the deceased was killed at the farm house. Adrian Ennes a forensic scientist employed at Metropolitan Police, New Scotland Yard gave expert testimony. During this testimony he explained the extensive researches which he had undertaken and presented numerous exhibits. He expressed the opinion that blood stains found in the bedroom of the farm house were that of the deceased. He said: -

"The incident involving the spilling of the blood of Arah Hector would have taken place between the bed and wardrobe."

On 1st June 1989 the police executed a search warrant at the home of Jean Francis where the appellant lived with her and found a Hennessy Brandy Bottle, a miniature bottle marked Curacao Bols two miniature bottle caps, and some pieces of miniature bottle in the yard. The appellant told Superintendent Smith in the presence of other police officers that he and Jean Francis drank the contents of the bottles and threw them in the yard. He said that a friend had given him the miniature bottles either the Wednesday or Thursday of the week before. Superintendent Smith told the appellant that he believed these bottles were the ones missing from the Hector's farm house. The appellant said "you will have to prove that."

Subsequently on the same day Superintendent Smith told the appellant in the presence of other police officers that he received information that he and the deceased had gone to the home of Stowie Benjamin on Sunday 28th May 1989 in the Hector's Van and that he the appellant had two pieces of pipe with him which he asked Stowie Benjamin to thread for him. The appellant said that the incident occurred on the Saturday not the Sunday.

Later that day Slowic Benjamin was invited to the police station where in the presence of the appellant he repeated what he had told the police officers earlier that day. He insisted that the incident occurred on Sunday 28th May 1989. The appellant on the other hand insisted that the incident took place on the Saturday not on the Sunday. About 8.30 pm on 1st June 1989 the appellant was arrested and charged with the murder of the deceased.

The Events of Sunday 28th May 1989

The statements made by the appellant between the 29th May and 1st of June 1989 formed an important part of the case for the prosecution. These statements were not contradicted in any way because the appellant said nothing at the trial and no cross-examination was directed to challenge them. It is clear from these statements that he was presenting an alibi. He was saying that on the 28th May 1989 he was not with the deceased, except his subsequent admission that she took him to Jalumba in the morning to pick up a welding plant.

The prosecution adduced detailed evidence of the movements of the deceased and the appellant on Sunday 28th May 1989 to show that the deceased did pick up the appellant for him to work on building a gate for the pig pens and that they went to the farm at Liberta in the van. These are some examples.

Orlene Lytle an employee at the Hectors' laundry gave evidence of a conversation she had with the appellant outside her home at Alfred Peters Street about picking coconuts for her at her home. He promised to come but she said that she waited until 5.00 pm and he never showed up. She put the time of the conversation at 10.00 am. Her neighbour Condace James who also gave evidence of this conversation put the time at 6.30 - 7.00 am. She also testified that on Saturday 27th May 1989 the deceased dropped her home after work between 4.00 - 5.00 pm and on the way home the deceased collected two pieces of pipe from Jardine's home.

Ira Stevens known as "Jalumba" gave evidence that on Sunday 28th May 1989 about 8.00 am the deceased drove the van with the appellant to his home on Wilkinson Street and he lent them his welding plant for one day for the appellant to build a gate for the Hector's farm, at Austin Brown's home, which he also occupied. There were other witnesses to this incident who saw the deceased driving the yellow van to and from Jalumba's place with the appellant and picking up the welding plant which was subsequently seen at Austin Brown's home.

Aubrey Joseph gave evidence that he sold the appellant a

quarter bottle of rum in his lavern on Bennett Street about 150 yards from Austin Brown's home in same street at about 8.45 am on 20th May 1989. There were several witnesses to this incident who also testified that after the appellant left the shop the deceased came there and asked questions.

Stowie Benjamin a welder gave evidence that he was at home cooking breakfast when the appellant came there between 8.30 - 10.00 am and asked him to thread two pieces of 1/2 inch galvanise pipe. Benjamin told him he had no die of that size. When the appellant left, Benjamin heard a car start up and looked out to see the Hector's yellow van drive off. Stowie Benjamin also gave evidence of the incident at the police station when he recounted his story to the police in the presence of the appellant. He said that the appellant insisted that the incident had occurred on the Saturday before and not on the Sunday. He confirmed that he had no doubt that the incident took place on the Sunday.

Stowie Benjamin's daughters Alezia and Aldis gave evidence in support and testified that they were sure that this occurred on Sunday 20th May 1989 and that they both saw the deceased driving the van away with the appellant in it.

Christobel Christian said that about 8.30 - 9.00 am she saw the deceased drive the yellow van across Bryson Street with some one in it. She did not recognise the person.

Jean Francis said in her evidence that the appellant said that he expected the deceased to pick him up at 12 O'clock. Between 10.00- 11.00 am he pulled out the steel to build the gate at Austin Brown's place because there was no current at her home. She said that she did not see him at home between 10.00 - 11.00 am and about 6.00 pm in the evening.

Fitzroy Wilkins the 18 year old son of Jean Francis said that about 11 O'clock the appellant was at home and said "Mrs Hector didn't come as yet."

Ira Stevens Aka Jalumba said in his evidence that at about 12 noon he passed by Austin Brown's home and saw that the steel had not been worked on. He went to Jean Francis home and called out the accused who told him to come back later for his welding plant. He in fact collected the plant the following morning 29th May 1989. At that time he could see that no work had been done on the building of the gate. There was evidence from two witnesses that there was no electricity in the area on the morning of 20th May 1989.

This section of the evidence showed that the deceased collected the appellant as early as 8.00 am for the purpose of building the gates for the pig pens for the farm and assisted him to prepare for the work. Several people saw her driving him about. There was also the evidence of his statements to members of his household that the deceased would pick him up about 12 noon.

Joan Labadie a security guard living at Liberta gave evidence that she saw the Hector's van going to their farm after 12 noon.

Leisa Simon a 20 year old student who lives at Liberta, gave evidence that she saw the Hector's van pass travelling towards the farm between 12.30 pm - 2.30 pm. A man was driving. The deceased was in the passenger seat.

Reuben Rhodes a 72 year old man who lives at Liberta gave evidence that he saw the Hector's van after 12.00 pm going on towards 1.00 pm, travelling towards their farm. The deceased was in it but not driving. He identified the appellant as the driver. But his evidence was discredited in cross-examination because he had previously said he could not identify the driver, both in his statement to the police and in his evidence at the Preliminary Inquiry.

Barthilda Francis the daughter of Reuben Rhodes who lives at Liberta with him gave evidence that she saw the van between 12 noon and 1.00 pm. It was travelling in the direction of the farm. She saw the appellant and the deceased in the van. In her examination in chief she said the deceased was driving. But in cross-examination she admitted that it must have been the appellant who was driving.

Margaretta Stevens was on her farm at Liberta and could see the Hector's farm clearly. Between 3.00 pm and 6.00 pm she saw the Hector's van at their farm parked in the back yard of the farm house. She said that when she left about 6 o'clock the van was still at the farm.

Condace James who lives in an alley-way off Alfred Peters Street gave evidence that she saw the appellant walking up the alley-way about 5.30 - 6.00 pm with a St. Lucia Banana Box on his head. They had a conversation, during which she obtained a plastic bag and the appellant gave her some mangoes from the box. She said that she saw bottles of Napoleon Brandy, Hennessy and some small bottles - souvenir type in the box. The appellant told her he had gone to Liberta with the person who came to pick him up, and that he got some of the mangoes from Boudals and that he took a bus and

came to town. There was evidence that the Hectors imported bananas from St. Lucia in similar boxes and that they had mango trees on the farm.

Gertrude Hanton a Supervisor at the Inland Revenue Department, gave evidence that on Sunday 28th May 1989 about 7.00 pm she saw the Hector's van parked in lower Gambles in front of her house.

Avolin Brown the 14 year old daughter of Jean Francis gave evidence that she saw the appellant come back home after 6.00 pm with a plastic bag with mangoes and sample bottles.

Jean Francis said in her evidence that the appellant did not come back home until after 6.00 pm. He returned with a plastic bag containing mangoes, Hennessy Brandy and sample rum. They drank the contents of the liquor bottles and threw away the empty bottles in the yard. She fell asleep about 9.00 pm and woke up at 6.00 am the next morning. The appellant was there when she fell asleep and when she woke up.

Tangy De Plaza the 15 year old daughter of Jean Francis saw the appellant in the evening about 5.55 pm with a pink plastic bag which had some little bottles of rum and some mangoes. She gave evidence of the appellant's presence about the house until about 11.00 pm when she asked the appellant to help her to cook. The appellant said he couldn't help her because he was going on a mission and he went outside. Tangy did not see him again until the next morning.

Collin Browne a Carpenter living at Liberta gave evidence that he saw the Hector's yellow van pass along towards the Hector's farm between 11.45 and 11.50 pm but he could not see who was driving.

Winfield Harris and Clarence Joseph employees of Antigua Paving Co. Ltd, gave evidence that they went to work at T.M.Kirnon Street about 7.00 am on 29th May 1989 and saw the Hectors van parked in the area they intended to pave. It was open and they pushed it into an alley way.

Circumstantial Evidence of the Appellant's Presence in the Hector's Farm House at Liberta.

Tim Hector gave evidence that a collection of miniatures he had at the farm house and his supply of liquor were missing when he first searched the farm house after the disappearance of the deceased. He identified as his, the empty Hennessy Brandy bottle, empty miniature Curacao Bols bottle, broken pieces of a J&B

miniature bottle, and the cap for a miniature Dewars Scotch Whisky bottle which were found in the yard of Jean Francis' home when the police executed the search warrant there on 1st June 1989 and which, according to the evidence of Jean Francis, the appellant had brought home on the evening of 28th May 1989.

The prosecution also produced a wooden cup found at Austin Brown's home, which the appellant also occupied, on the execution of a search warrant on 1st June 1989 which Tim Hector identified as being one of a set of six Mexican cups he and the deceased had purchased in Mexico in 1987. The other five were still in the farm house.

The prosecution also tendered the expert testimony of a forensic scientist Pamela Hamer from the Metropolitan Police Forensic Laboratory in London, United Kingdom, together with supporting exhibits that some of the footprints on the floor boards taken from the Hector's farm house were made by the left and right sneakers sent to her for examination. These sneakers were identified by witnesses from the appellant's home as those which he was wearing on 28th May 1989.

Tim Hector, and some of his close associates and employees at the farm gave evidence that the appellant was not permitted to enter the farm house and that he had never been seen in it.

The No Case Submission

In support of his submission that the Trial Judge was wrong to reject the submission of no case to answer counsel for the appellant relied on the English Court of Appeal case of *R v GALBRAITH* [1981] 73 Cr. App. R. 124 at p.127 where the Lord Chief Justice said: -

"How then should the Judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The Judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the Judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are

generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the Judge should allow the matter to be tried by the jury."

I adopt this as an accurate statement of the law. In applying these principles we conclude that no reasonable analysis of the evidence adduced in this case could result in the view that there was no evidence that the crime was committed by the appellant. The material evidence in our view was not of a tenuous character, nor was it weak or vague or inconsistent with other evidence.

This was a case in which the prosecution relied on circumstantial evidence. In such cases the Court must be mindful of the warning of Lord Hewart in *TEPER v R* [1952] A.C. 180 at p.189 where he cautioned that: -

"Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another person. 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."

But after close scrutiny circumstantial evidence could have the character described in *R v TAYLOR, HEAVER AND DONOVAN* [1920] 21 Cr. A. R. 20 by the Lord Chief Justice at p.21:-

"It has been said that the evidence against the applicants is circumstantial: so it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

In my view this was such a case where, the surrounding circumstances which were proven in evidence, linked the appellant to the commission of this crime with such mathematical precision, that the trial Judge was right to consider that a jury could find him guilty. In those circumstances it was his duty to reject the no case submission as he did. I have no doubt that there was sufficient evidence to support the conviction in this case.

The Admissibility of the Evidence

Counsel for the appellant submitted that the Trial Judge ought to have excluded, on the ground that it was more prejudicial than

probative: -

- a. The evidence of the empty alcohol bottles found in the yard of Jean Francis because they were incapable of particular identification as being the bottles that were missing from the farm house; and
- b. The evidence of the shoe prints found in the floor boards of the farm house because it was not possible to link those prints with the relevant date of 20th May 1989.

In the 4th edition of Halsbury's Law of England Vol. II para. 364 it is stated that the test of admissibility is relevance, but that the trial Judge has an over-riding discretion to exclude evidence, even if relevant in law, where its admission would operate unfairly against the defendant. There is abundant precedent that a Judge in a criminal trial has a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value.

In *SCOTT v THE QUEEN* [1989] A.C. 1242 Lord Griffiths explained the meaning of "prejudicial effect" thus: -

"The phrase 'prejudicial effect' is a reference to the fact that although evidence has been admitted to prove certain collateral matters there is a danger that the jury may attach undue weight to such evidence and regard it as probative of the crime with which the accused is charged."

In the course of his speech he made it clear that evidence which was "prejudicial" in the sense that it was strong prosecution evidence that might well result in the conviction of the accused did not fall within this exclusionary rule. It seems to me that the evidence was relevant and had a high probative value, and consequently the issue of unfairness to the appellant could not arise in the circumstances of this case. The trial Judge carefully pointed out the issues which the jury had to consider in determining whether to accept this evidence as proof of the propositions advanced by the prosecution, including the quality of Mr. Hector's identification of the bottles and the quality of the researches concerning the foot prints.

Counsel did not complain about the directions given to the jury as to the manner in which they were to consider this evidence, and quite rightly so, because the trial Judge was thorough in his presentation of the evidence and directed the attention of the jury to the need for careful consideration of the evidence on these issues. In my view he pointed out to the jury all the factors which they ought to have considered and in a fair manner.

The evidence of the bottles and the shoe prints when coupled with the evidence that (a) the appellant was seen going towards the farm in the Hector's van on the 28th May 1989 (b) that the van was seen parked at the farm that afternoon (c) that he carried the bottles home on the evening of 28th May 1989 and the circumstance that (d) no explanations were offered by him; was capable of proving the proposition that the appellant was inside the farm house on 28th May 1989.

There was another matter of importance. When the bottles were found, Jean Francis in the presence of the appellant stated to the police that he brought them home on the 28th May 1989. The appellant told the police that they were given to him by a friend at Kennedy's bar on the preceding Wednesday or Thursday. Superintendent Smith asked the appellant to identify the friend and the appellant took the police down to Kennedy's bar where after about half hour the search for and enquiries about the "friend" proved fruitless.

In my view this evidence was directly relevant to at least two important issues (1) did the appellant enter the farm house on 28th May 1989?, (and in accordance with the doctrine of recent possession his possession of those goods is evidence to support the conclusion that he entered the farm house and carried them away.) and (2) was the appellant deliberately misleading the police as to his movements on the 28th May 1989? And if so for what purpose? (If the answers to these questions were that he was deliberately misleading the police to conceal the fact that he was at the farm where the deceased was killed then it would be evidence from which an inference of guilt could be drawn.)

This evidence was not collateral to the issue. It was directed to proof of the appellant's presence in the farm house on 28th May 1989 which in the context of the other evidence in the case was an important link in the chain of circumstances that pointed to the guilt of the appellant. In my view it was highly probative of the offence and it would therefore be wrong to characterise this evidence as having a prejudicial effect. The admission of this evidence was a proper exercise of the Trial Judge's discretion.

Identification Evidence

Leisa Simon

Counsel complained that the Trial Judge should have told jury that Leisa Simon did not identify the accused as being in the van when it was going to the Hector's farm after 12 noon on the 28th May 1989. But that submission was ill founded because the Judge gave

the jury adequate directions on that issue, and went on to explain the difference between the evidence relating to the deceased and the appellant and invited the jury to consider whether Leisa Simon's failure to identify the appellant affected the reliance which they could place on Bertilda Francis' evidence in that regard when he said: -

"So you may think there is a common factor there in the evidence of Bertilda Francis and Leisa Simon - Mrs. Hector. Bertilda Francis says its the Accused, but Leisa Simon is not in a position to say it is the Accused because she couldn't identify the man. You will have to decide again how you accept the evidence in that regard."

Reuben Rhodes purported to identify the appellant in the dock as being the man who was in the van as it was travelling towards the farm on 28th May 1969. It was proven that when he gave the police a statement before trial and also when he gave evidence at the preliminary enquiry he had stated that he could not identify the man. Counsel argued that the trial Judge should have ruled the evidence of Rhodes completely unreliable and relied on the judgment of Lord Parker C.J. in *R. v GOLDBER* [1960] 3 All E.R. 457 at 459: -

"In the judgment of this court, when a witness is shown to have made previous statements inconsistent with the evidence given by the witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence on which they can act."

This submission must be rejected because the trial Judge gave directions which followed the very guidelines of *R v GOLDBER* on which counsel for the appellant relied as he quite unequivocally told the jury that the identification of the appellant by Reuben Rhodes was unreliable. In that regard he said:-

"I have already told you that the dock identification in the circumstances of this case is an unreliable identification, if there is no other evidence to support it, and you will very well decide, as Judges of the facts, how you will treat that. But it is my function to tell you that it is unreliable and perhaps of little weight or no weight at all."

and in another passage when he indicated the irrelevance of the previous statements except as to the effect they may have on the credibility of the witness he said: -

"As I indicated to you earlier, we are concerned with the evidence given here, not the evidence before the

Magistrate or in the statement to the police, and you will reflect on the evidence given in the statement as it has been elicited, and what has been said before the Magistrate to determine whether you will accept the evidence given here and what weight you will attach to it, if any, if you accept it. But we are concerned with the evidence given here. And you will have to determine his credibility on the basis of what you have seen and heard here. Whether you could accept that as being true- what he is saying now, and whether you could act on it. It may be, in the light of his contradictions, that his evidence could not be as credible as you wish but that is entirely a matter for you. That is your particular province and you have to make up your minds on that."

Bertilda Francis

Counsel submitted that Judge failed to follow the "Turnbull" guidelines in directing the jury on how to deal with the identification evidence of Bertilda Francis, and that he failed to point out that from the position in which was stooping to pick up leaves behind the hedge she was not in a position to see.

The effect of *R v TURNBULL* [1976] 3 All E.R. 549 was to ensure that as a matter of law a trial Judge must warn the jury in the clearest terms of the risk of mistaken identification, because experience has shown that no matter how honest a witness and no matter how convinced he may be of the rightness of his opinion his evidence of identity may be wrong. This is of particular importance where the case against an accused person depends wholly or substantially on the correctness of one or more identifications in circumstances where the witness or witnesses only had a fleeting glance.

In this case the evidence of the identification of the appellant as being in the van as it was travelling to Liberia was an important link in the chain of circumstances and it was necessary for the trial Judge to direct the jury carefully on this aspect of the case. Despite the importance of this evidence the prosecution's case did not depend on it in the sense that if it was rejected the case would of necessity have to fail, because even without it, there would have been sufficient evidence to support a conviction.

The judge spent a considerable amount of time on this evidence and he did explain to the jury the special need for care. In his summation he invited a close examination of the circumstances in which the identification was made and dealt with the quality of the

light, the duration of the observation, the greeting which allegedly was given, the distance, the issue of impediments to visibility, the issue of recognition and he dealt with previous encounters which the witness alleged having with the appellant including an incident where he knocked down her dog. He also dealt with a contradiction between her testimony in chief and in cross-examination. The trial Judge invited the jury to consider the quality of the identification before deciding whether to accept it. On my own assessment of the evidence it was of a good quality and it was safe for the jury to consider it.

In my view the trial Judge dealt adequately with the evidence of the witnesses who identified the van and its occupants as it travelled on the road to the Hector's farm at Liberta on 28th May 1969.

Failure to put the Defence

In a case where the appellant had remained silent throughout the trial this ground of appeal may well seem unexpected. Counsel's argument did nothing to lessen our surprise. He argued that (i) by directing the jury on the need for proof of the particular intent required for murder the trial Judge was suggesting to the jury that the act had been committed by the appellant.

(ii) that the evidence did not raise insanity, self-defence, provocation or alibi and it was wrong for the trial Judge to give the jury directions on those issues, as it was likely to prejudice the appellant.

It is not surprising, however, that counsel did not refer us to any judicial or other precedent for his submissions.

With regard to the issue of "intent" the trial Judge directed the jury that by his plea of not guilty the appellant had raised a "general issue".

The trial Judge in very lengthy and thorough directions on this issue also gave this direction: -

"If, on the totality of the evidence, there is room for more than one view as to the intent of the Accused at the particular moment in time - if you find that it was the Accused, and the Crown is asserting that he was the person; he is saying that he was not - it is the duty of the Crown to prove the specific intent of the Accused to the extent that you feel sure. And if, on the whole of the evidence, you members of the jury either think that that intent did not exist, or you are left in doubt as to

whether that intent existed at the time, the Accused is entitled to be acquitted of murder. If you are left in doubt as to whether that was so, the act was perpetrated with this particular intent, well then he is entitled to be acquitted. But the Crown is saying that from the circumstances here, you should be left in no doubt at all."

The trial Judge made several abbreviated references to this principle throughout his summing up by saying: -

"The accused is saying that he did not do it and he did not have the necessary intent."

In my view it was the duty of the trial Judge to give these directions which relate to the fundamental principle that it is the duty of the prosecution to prove every ingredient of the offence charged so that the jury may feel sure before a verdict of guilty can be returned. The intent of the appellant is one such ingredient and it was the duty of the trial Judge to impress on the jury that the appellant would not be guilty if the prosecution did not prove that he had committed the act and also that he had the necessary intent.

The submission with regard to the other defences was also completely untenable for the same reason. I will refer to brief extracts from the summing up to demonstrate this. In each case the Judge examined the issues thoroughly and in accordance with correct legal principles.

On insanity the trial Judge said inter alia: -

"In order to sustain the indictment of murder, too, as it stands, the Crown has to prove to you that the Accused inflicted the injuries voluntarily - that is, his mind went with his act, that he was not insane. That he was of sound mind and memory and discretion. Well there is nothing in this case to suggest that at the material moment of time that the Accused - if you find that he was the person involved - was insane. No proposition has been put forward. So you may very well think on the basis of the evidence - if you are so disposed to - that we are dealing here with a sane person, a sane human being. And the Crown is inviting you to find that on the evidence by virtue of the actions which the Crown says reveal themselves on the evidence that he was sane throughout the period of time under review of this case, and in the circumstances concerning Arsh Hector."

On self-defence the Trial Judge stated: -

"You have to also find on the evidence that they were not justified or necessary in the circumstances. That is, they were not inflicted as a result of self-defence. Well we have no proposition in this case that the alleged assailant was defending himself, and as a result cut Arah Hector on her neck and as a result she died. You may very well think the medical evidence of Dr. Ivan West indicated that they were defensive wounds, that she was putting up her hands, perhaps grabbing the sharp-cutting instrument as distinct from attacking. So the Crown is saying there is evidence on which you could find that the assailant had no reason to defend himself or herself, as the case may be, when the injuries were inflicted on Arah Hector. And as a result, the Crown is saying that this idea of self-defence is also eliminated from the case.

On provocation the Trial Judge reminded the jury: -

"And the crown is saying, too that there is no evidence on the basis of which the injuries were inflicted under the stress of provocation. So the Crown is saying that there is no evidence to find justification or excuse."

I think it is necessary to add that the statements which the appellant had made before he was arrested amounted to an alibi. That was the only defence which was put before the jury and the trial Judge gave the jury adequate directions on that issue

Prejudicial Directions Given by the Judge

Under this heading the counsel for the appellant argued that:-

- (a) The trial Judge imposed his view of certain aspects of the case on the jury.
- (b) The trial Judge's direction on the appellant's failure to testify suggested that it was an indication of guilt.
- (c) The trial Judge's directions were prejudicial and inadequate on the issues of: -
 - i. The time of death.
 - ii. The absence of a weapon.
 - iii. The phrase "going on a mission".
 - iv. The evidence relating to a "mop" in the farmhouse.
 - v. The "false alibi".
 - vi. Lies told by the appellant.
 - vii. His suggestion that the appellant had to prove that he was not with deceased or by a process of elimination he must have been the one who

killed her.

(d) The summing up was too long.

(a) Judge imposed his view

Under this head counsel referred to passages where the Trial Judge was putting the case for the prosecution. He took objection to the Trial Judge's use of the phrase "you may think" as a preface to comments which the Trial Judge made on the evidence.

I have studied the instances to which counsel referred and I do not think there is any basis for the submission. At the very outset of his summing up the Trial Judge dealt quite thoroughly with the respective duties of the Trial Judge as to law and of the jury as to facts. He repeatedly referred to these directions with comments such as:

"I indicated to you earlier that you are the sole judges of the facts and if in the course of this summing up I venture to express an opinion, you are quite free to reject that opinion and come to your own conclusions as judges of the facts, but if anything I should say should appeal to your reason, well then you may adopt it and make it your own."

The phrase "you may think" appeared so frequently throughout the summing up that it seemed to be a mannerism of the trial Judge. The frequency and context of its use was of such a nature that no jury could have felt that the Judge was imposing his view by his use of that phrase. In addition these comments were made throughout the review of the evidence and directly resulted from the evidence itself.

(b) Appellant's failure to testify

Counsel submitted that the Trial Judge's direction on the failure of the appellant to testify were prejudicial and suggested that the appellant was guilty.

There is abundant authority to support the proposition that a Trial Judge should not adversely comment on the defendant's failure to testify so as to suggest that failure to give evidence is inconsistent with innocence or that the only reasonable inference to be drawn is that the defendant is guilty. See *WAUGH v R* [1950] A.C. 203. There is also clear authority to support the proposition that a Judge may comment on the failure of the defendant to testify and where the circumstances warrant may go so far as to make the comment that an inference can be drawn from uncontested or clearly established facts which point so strongly to guilt as to call for an explanation and if no explanation is given when the

circumstances are such that an innocent man would be expected either to give an explanation or deny the basic facts, this is a factor which can be taken into consideration, but even in these cases it must be pointed out to the jury that no inference of guilt can be drawn merely from his failure to give evidence. See *R v HUTCH* [1973] 1 All E.R. 178.

The Trial Judge impressed these principles on the jury in a lengthy and thorough discussion on this aspect of the case interspersed with quotations from decided cases. At one stage in his direction on this issue quoting from the case of *R v BATHURST* [1968] 1 All E.R. 1178 he said: -

"In a case decided in 1968 the Lord Chief Justice of England, Lord Parker, said words to the effect:

".....the Accused is not bound to give evidence or any explanation at all. That he can sit back and see if the prosecution have proved their case against him to the extent that the jury can be sure of his guilt."

And you may think that is what the Accused has done here. He has led no evidence, he has said nothing, he says he is not guilty - which has put the prosecution to prove the case against him. And that:

"..While the jury may be deprived of the opportunity of hearing his explanation, the one thing they must not do is to assume that he is guilty because he has not gone into the witness box or made an unsworn statement from the dock, but said nothing at all."

So you can't assume that he is guilty because he hasn't gone there. He has a right to say nothing at all, and the burden still remains on the prosecution to prove the case against him to the extent that you feel sure of his guilt before you can find him guilty."

The following extract shows the principles on which the Trial Judge directed the jury to act; and in my view he followed the guidelines, in the passage quoted quite faithfully: -

"An English Judge, Lord Ellenborough, in stating the principles of circumstantial evidence, went on to say that:

"No person accused of crime is bound to offer any explanation of his conduct."

and that is what I explained to you,

"or of circumstances of suspicion which are charged to him."

I explained that to you.

"But nevertheless if he refuse to do so, where a strong prima facie case has been made out, and when it is in his own power to offer evidence - if such exist - in explanation of such appearance."

You see, it may appear so,

"which would show them to be fallacious,"

would show that what the Crown has said is a lie,

"and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would adversely affect his interest."

I would reject this submission.

(c) Prejudicial Directions

Counsel argued that inference of the appellant's guilt was weakened by certain circumstances on the evidence on which the Trial Judge failed to give adequate directions to the jury.

(1) Time of death

The medical evidence as to the time of death was not precise as the pathologist gave a time of death as being accurate to within 8 to 12 hours of the estimated time. Counsel for the appellant's submission was that as the evidence was circumstantial the time of the deceased's death could affect the conclusions to be drawn from the evidence, as to whether death could have occurred during the periods the prosecution sought to show the appellant had an opportunity to do the act.

In my opinion there was evidence apart from that of the Doctor to show the period within which death must have occurred. There was evidence that the last time the deceased was seen alive was in the van going to the farm between 12.00 - 2.00 pm on 28th May 1989. The evidence of Adrian Emes supported the conclusion that death occurred at the farm. The evidence of the search for the deceased supported the conclusion that the body was removed from the farm before Monday 29th 1989 when Lowell Jarvis searched the farm house. Against that background the estimated time of death given by the pathologist was consistent with the other evidence in the case. There was nothing ambiguous or unclear about it.

In my view the evidence did not require the Trial Judge to suggest to the jury that the inferences to be drawn from the proven facts could have been rendered subject to doubt because of the uncertainty as to the exact time of death.

(ii) The Absence of the Murder Weapon

Counsel referred to the fact that no weapon was identified as being the "murder weapon". He complained that the Trial Judge's summation suggested that the appellant must have committed the offense when he explained that the medical evidence expressed the opinion that the deceased's injuries were inflicted by a sharp-cutting instrument such as a cutlass and that as an agricultural worker the appellant could have a capacity to use a cutlass. The Trial Judge had said: -

"You may very well think too that if, indeed, the Accused worked at the farm - worked on the shed, the duck pond - he might very well have had knowledge where the cutlasses were; where the shovel was. His ability to procure them would be admissible evidence, a circumstance which the Crown invites you to find could tend towards this conclusion that he was there and he could have used it. You will very well decide on that."

In my view there is no merit in this complaint as the point being made by the Trial Judge was reasonable. The Judge however went much further. He discussed in some detail that the opportunity to commit the crime was only one factor and was not by itself a conclusive factor. He concluded that section of his summation by saying: -

"The accused cannot be convicted on the fact, if you so find, of mere opportunity alone. There must be other factors which make it conclusive that the Accused not only had the opportunity, but that he did it with the necessary intent at the material moment of time. He not only had the opportunity, but he took it. The Crown is saying that is what happened in this case. The Accused on the other hand, is saying he didn't do anything. He didn't do the act, didn't have the intent, and the Crown has to prove the case against him to the extent that you feel sure."

(iii) "Going on a mission"

Counsel for the appellant complained that during his summing up the Trial Judge punned on the phrase "going on a mission" in a manner which was prejudicial to the appellant, and that although counsel for the Crown rose then and there and the Trial Judge explained himself in detail that it was very damaging to the appellant.

An important feature of the prosecution's case was the evidence of Tangy De Peiza who had said that about 11.00 pm on 28th May 1989 the appellant had said he was "going on a mission". When

the trial Judge was dealing with the evidence to show that the appellant had gone to the farm on the Sunday afternoon he said thus: -

"You may very well think that before that there was this 'mission', to use the word expansively. You may think he subsequently used the word 'mission', if you accept the evidence of Tangy Depeza, there was the mission to go to the farm on Sunday. Well did he go to the farm?"

In answer to a question from Mr. Luckhoo, Counsel for the Crown:

"I used the 'mission' expansively to embrace any outing. Tangy did say he went on a mission. I hope you understand my use of the word 'mission' in that context. What I am saying is using the word 'mission' on going out."

In a nutshell I do not agree with counsel for the appellant. The jury cannot be taken to be less than reasonable and in my view what transpired in court was clear and unambiguous and incapable of having misled the jury in any way. Of course, I do not go so far as to approve of this play on the word "mission". The use of the "pun" could be prejudicial by insinuating a double and sinister meaning to the word which would then be transposed to the other context of Tangy's evidence. However in my view the discussion which the Judge had with counsel for the Crown in the presence of the jury and the Judge's subsequent explanation to the jury as to the meaning he intended to import by his use of the word "mission" clarified the issue in such a way that no reasonable jury could have been left unclear as to its use in the particular circumstances.

(iv) The mop

Counsel submitted that the prosecution relied on the production in evidence of a mop which the Hectors kept at the farm house to show that the appellant mopped up the blood of deceased, and that this was prejudicial because the mop did not contain any blood stains.

I must reject this submission. The evidence of Adrian Euer on this issue was quite clear and unequivocal. He said: -

"I did tests on that mop. No blood was found on that mop."

His other evidence on this subject was also clear. He said:-

"From what I had seen there the floor had been cleaned to remove most of the blood from the upper surface....."

Some sort of fabric that could be used for cleaning a large amount of blood could be used."

In my view the evidence was clear and there was no need for the Judge to specifically say that the mop could not have been used. In any event the important aspect of this evidence was the issue of the attempt at concealment of the location where the incident occurred, and not what was used to effect it.

(v) The False Alibi

Counsel for the appellant submitted that the appellant having said nothing at the trial it was wrong and prejudicial for the trial Judge to have given directions to the jury as if the appellant had set up a defence of alibi which was shown to be false.

While it is true that the appellant said nothing at the trial, there was abundant evidence that when enquiries were being made about the deceased's whereabouts after her disappearance the appellant made several statements to suggest that he did not see her, was not with her and did not go to the farm with her but stayed at home and waited for her on Sunday 28th May 1989. The Judge had to give the jury directions on this evidence and the use of the term alibi to describe it was accurate. There is evidence from which the jury could infer that the alibi was fake. In my view his directions on this issue which I quote, were absolutely fair and proper.

On the "false alibi" the trial Judge had this to say: -

"If, indeed, you reject the suggestion that he was home as an alibi, you are then thrown back on a consideration of the case for the Crown that you return a verdict accordingly.

So merely because you find that his alibi, if you accept it, was false that does not necessarily follow because you find that he is where the Crown is saying that he is. You have to be satisfied to the extent that you feel sure that the Crown has proved its case that he was at the particular place at the particular time which the Crown asserts."

(vi) Lies Told By The Appellant

Counsel for the appellant submitted that the effect of the trial Judge's summing up was to give the impression that it was his view that the appellant had lied and that they should determine that he was a liar.

He relied on *BROADHURST v R* [1964] 1 All E.R. 111 where at p.119 Lord Devlin said: -

"There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty and according to convict him without more ado. It is the duty of the Judge to make it clear to them that this is not so. Save in one respect, a case in which an accused gives untruthful evidence is no different from one in which he gives no evidence at all. In either case the burden of remains on the prosecution to prove the guilt of the accused. But if on the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends of course on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness."

In this case the evidence of the prosecution witnesses if believed, must lead to the conclusion that the appellant had lied about his whereabouts on Sunday 20th May 1989. It was the duty of the Trial Judge to give the jury directions as to how they should deal with a conclusion that the appellant had lied.

Counsel for the appellant complained about the following passage from the summing up: -

"You have to decide too how you are going to assess the untruth, if you so find? You will have to decide whether it was a deliberate statement in relation to a material issue and you have to decide whether the motive for the untruth was the realisation that he wanted to conceal, whether, perhaps, there might have been a realisation in his mind of some guilt and a fear of the truth? It is appropriate that I remind you, members of the jury, that people sometimes lie, for example in an attempt to bolster up a just cause, or out of shame or out of wish to conceal distasteful conduct. Well, you will bear those in mind. The Crown is inviting you to find that the statement of the Accused in those circumstances are shown to be a lie by evidence of persons other than himself. And you will have to decide how you accept that."

In my view that direction accords with the accepted principles (set out in *Broadhurst Supra*) that lies told by a defendant about his whereabouts do not indicate guilt unless the jury is satisfied

that the sole reason for the fabrication was to deceive and that there is no other explanation than his guilt that might account for the fabrication. See TURNBULL (SUPRA) and R v PERHAM [1906] 82 Cr. App. R. 44.

The trial Judge had gone further and explained to the jury as follows: -

"And it has been said that false denials of material facts, if you find that the denial was of material fact, can tell against an Accused in a case based on circumstantial evidence. A lie by itself cannot fill in the gaps of proof. It can strengthen a case otherwise significantly proved. You can't convict him merely for telling a lie, but you will consider if he told a lie - if you find that he did - in the totality of the other evidence and make up your minds accordingly how you accept the evidence."

In my view this ground also fails.

(vii) Burden of proof

On this issue the appellant rightly conceded that the trial Judge was mostly correct in his directions on the burden and standard of proof. He complained however of instances where the trial Judge indicated that the appellant must prove his innocence. None of the passages to which counsel referred supported this complaint.

In the example I quote, which I think is sufficiently clear to refute the complaint without further comment, counsel complained that the trial Judge was saying it was for appellant to prove that he was not with the deceased and that by a process of elimination it was only the appellant who could have committed the crime.

"So the Crown is saying if you take all that in terms of the evidence - and again you have to think of the evidence - you are left really that she was seen in the company of only one person on that day going towards the farm. And then at the end of the day you will have to make up your minds as to who you will find going towards the farm, and you will have to make up your minds at the end of the day whether indeed he is the person concerned in the commission of the offence."

(d) Summing up too long

Counsel submitted that the trial Judge's summing up which lasted for 5 3/4 hours with a 35 minute break after 3 3/4 hours was too long and must have confused the jury.

In my view this ground of appeal, also fails. The trial Judge should ensure that the jury are able to follow and understand his summation. It would be wrong to sum up for long periods without adequate breaks for rest and refreshment. He must consider the health and the level of fatigue of the jury, and take steps to ensure that its members are able to absorb the import of his directions to them. In the case of *R v RINHER and BEECH* [1983] Crim. L.R. 250 the Court of Appeal described it as an error of judgment for a trial Judge to commence his summing up at 4.15 pm and then address the jury for 30 minutes, before adjourning on the tenth day of a murder trial after the jury had listened to closing speeches of three counsel, because they could not be expected to absorb important and detailed directions at that time.

In *R v STODDARD* [1989] 2 Cr. App. R. 217 P.246 the Lord Chief Justice commented: -

"Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and the defence respectively."

The facts pertinent to the conduct of this trial and this issue are that in this case about 53 witnesses gave evidence. The trial commenced on 5th March 1990 and the trial Judge commenced his summing up on 2nd April 1990 after continuous hearing with the usual weekend breaks. It is obvious that it was incumbent upon the trial Judge to undertake a detailed review of the evidence to refresh the memory of the jury, bearing in mind that the evidence would have been adduced over a period approximating one month. Failure on the part of a Judge to so act would have been harmful to the interests of justice.

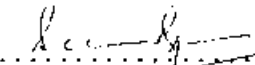
The period of the Judge's address was well within the time which the Court normally sat. He commenced at 9.20 am broke from 12.40 pm to 1.15 pm and concluded at 3.45 pm. In my view since the jury had been able to sustain a full day in Court during the taking of the evidence, and the addresses of counsel, it would seem logical to assume that they would be able to absorb the summation over a similar time period.

Having studied the summing up, it is fair to say that the trial Judge has a style that is longwinded and repetitive, and the directions that were given could have been compressed, but I can think of no principle on which one could justify over-turning a conviction merely because of the duration of the summing up without other circumstances which had an adverse effect^{on} the fairness of the

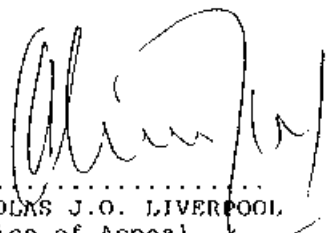
trial.

In this case I do not conclude that there was anything likely to confuse or unduly tire the jury, nor was the presentation dull and likely to bore. I would reject this ground of appeal as well.

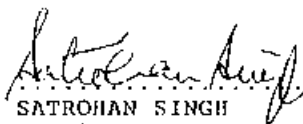
I therefore dismiss this appeal.


.....
C.M. DENNIS BYRON
Justice of Appeal

I concur.


.....
NICHOLAS J.O. LIVERPOOL
Justice of Appeal

I concur.


.....
SATROHAN SINGH
Justice of Appeal