Privy Council Appeals Nos. 2 of 1987
and 32 of 1986

(1) Winston Barnes
(2) Washington Desquottes and
(3) Clovis Johnson *Appellants*

v.

The Queen *Respondent*

and

(1) Richard Scott and
(2) Dennis Walters *Appellants*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH MARCH 1989

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD GRIFFITHS
LORD ACKNER
LORD GOFF OF CHIEVELEY
LORD LOWRY

*[Delivered by **Lord Griffiths**]*

On 25th September 1980 the appellants, Richard Scott and Dennis Walters, were found guilty of murder and sentenced to death. Their appeals were dismissed by the Court of Appeal of Jamaica on 20th December 1982. On 24th November 1983 the appellants, Winston Barnes, Washington Desquottes and Clovis Johnson, were found guilty of murder and sentenced to death. They were refused leave to appeal by the Court of Appeal of Jamaica on 10th February 1986.

These appeals have been heard together because they raise a common issue of importance, namely whether a trial judge in a criminal case in Jamaica has a discretion to refuse to admit a sworn deposition of a
[10] witness who has died before the trial, and if so in

what circumstances the discretion should be exercised. The appeals also require their Lordships to consider further grounds of appeal in each case with which they will deal after considering the common issue.

The prosecution case against Scott and Walters was that on 11th May 1978 the appellants shot Abraham Roberts, a special constable, with his own revolver in a bar at 9 Harris Street, Kingston. He died from his injuries on 15th May 1978. The only eye witnesses to the shooting were a woman who was in the company of the deceased and who was subsequently seen at the police station but who did not give evidence at the trial and David Ridley, the ten year old son of the owner of the bar, who had a good opportunity to see those who carried out the shooting but who failed to identify either of the appellants on a subsequent identification parade.

The only evidence of identification of the appellants was that contained in the deposition of Cecil Gordon who died before the trial. The deposition as read by the Registrar at the trial reads:-

> "This deponent Cecil Gordon, on his oath says as follows:
>
> > 'I am a sideman on a truck and live in the parish of Kingston. On 11th May, 1978, about 2.45 p.m. I was walking on Harris Street, Kingston 13, in the parish of Kingston, and after passing a bar, saw two men standing at a gate about half chain from the bar. I walked past these men who were about an arm's length from me and went into the yard. I then went to my gate about two chains away at 2 Harris Street. As I opened the gate I heard an explosion like a gunshot coming from the direction of the bar. I turned around and looked in that direction and saw the two men I had passed on the road running from the bar. One of the men who I had known about five months before that day was running in front with a gun in his hand, the other man was running close behind him. They ran across Harris Street, turned down a cross street and disappeared from my sight. I then saw a woman holding up a man and taking him out of the bar. They passed me at my gate. I followed them down a Spanish Town Road and saw the man leaning against a wall. I went up to him and he raised up his shirt. I then saw a wound at his side. The lady had left him at the time. She returned shortly after in a taxi, the man was placed in the taxi which drove away with him and the lady. I went to the Denham Town Police Station and made a report.

On the 19th of May, 1978, about 9.00 p.m., I was walking on Spanish Town Road and saw the two men sitting around a table on the sidewalk playing a game with other men. I went to the Denham Town Police Station and made a report. I went back with the police to Spanish Town Road and saw the two men still playing the game. In the presence and hearing of the two men I told a policeman that they were the two men who had shot the policeman at the bar. The men made no statement. The policeman took them to the Denham Town Police Station. I went with them.

The two accused in the dock are the men I saw running from the bar and who were pointed out by me to the police. The accused Richard Scott is the man I knew before that day. He was the man running in front with the gun in his hand. The accused Walters was running behind the accused Richard Scott. I knew Scott as Owen. Immediately after hearing the explosion I saw the two accused running from the bar and the lady holding the man and coming out after them.'

Cross-examined by Miss Benbow:

'I used to live at 11 Harris Street before going to 2 Harris Street. I do not know the number of the bar premises. I passed the bar before reaching the gate at 11 Harris Street. There are other buildings between the bar and 11 Harris Street. The buildings are houses. There is just one gate between the bar premises and 11 Harris Street. The two men were standing in front of a gate at 11 Harris Street. Other people are now living at 11 Harris Street. The two accused men were standing against the gate column of 11 Harris Street and looking in the direction of the bar. They were looking sideways down the road. I did not call to them.'

Cross-examined by Miss Lyer:

'I have been living on Harris Street for a long time. The gate of premises 11 Harris Street was open and the accused men were standing behind the column of the gate. The column was taller than the men. I had turned into the premises 11 Harris Street, and saw the men by the column at the gate. Premises No.2 Harris Street is on the other side of the road from 11 Harris Street. I was going to somebody at 11 Harris Street. I went into Harris Street with the intention of picking some ackees but they were not yet open. I just looked on the ackee

> tree and turned back through the gate. I did not stop to speak to anyone. The two accused men were still at the gate when I left the premises. I cannot say how long it took me to walk from 11 Harris Street to 2 Harris Street. I saw the faces of the two men when they were running.'

To Court:

> 'I did not know the lady who was holding up the man. I had never seen her before. I saw her at the Denham Town Police Station later that day. I didn't know the man with the wound before that day.'

This is signed by the Resident Magistrate of the Gun Court.

REGISTRAR: Mr. B.L. Myrie, on the 25th of July, 1978 and it is also signed by the witness Cecil Gordon."

The appellants both gave evidence and their defence was that neither of them had been in Harris Street on the day of the shooting and that at the time of their arrest they were not singled out by Gordon but arrested with a number of other persons.

The prosecution case against Barnes, Desquottes and Johnson was that on the morning of 3rd December 1982 Horace Fowler was shot after stopping his Datsun van in Olympic Way whilst on his way to his factory in Spanish Town Road and $1,000 that he had with him to pay his employees were stolen. The prosecution alleged that Barnes had hidden in the back of the van and at a prearranged spot had shouted for the van to stop and that when it stopped Clovis Johnson and Washington Desquottes approached the cab of the van and Johnson shot and killed Fowler. It was then alleged that all three accused ran off with Johnson carrying a bag containing the money.

There were two eye witnesses of the shooting. Percival Brown heard the gunshot and looked in the direction of the van to see Fowler slumped over the wheel of the van. He saw one man walking away from the van down Fourth Street but was unable to recognise anyone.

Larkland Green was the other eye witness. He gave evidence at the preliminary inquiry but was shot and killed before the trial. His deposition including cross-examination reads as follows:-

> "This deponent Larkland Green on his oath saith as follows:

I am a truck sideman residing in the parish of St. Andrew. I knew the deceased Horace Fowler. He was the manager for the Gypsum Factory on the Spanish Town Road. I used to see him driving a motor van. I do not remember the colour.

On 3rd December, 1982, I was standing at the corner of Olympic Way and Sixth Street in Olympic Gardens and saw the van driven by the deceased coming from the direction of the bank on Olympic Way, and reaching near the corner of Sixth Street, near Mr. Austin Shop, I heard the accused Winston Barnes who lying on the floor of the van called out 'Hold on driver' and the driver Mr. Fowler stopped the van. I then saw two men who had come along Sixth Street stopped at the corner. They were Clovis Johnson and Washington Desquottes, otherwise called Budda. They are now in the dock. (witness points to accused man).

I saw Clovis Johnson went to the front of the van where the driver Mr. Fowler was sitting and pushed a gun through the window. I heard an explosion like a gun shot and saw the accused Clovis Johnson with the gun in his hand running down Sixth Street, followed by the other two men. Clovis Johnson had a bag in hand which he did not have when he went up to the van. After the explosion I observed that Mr. Fowler was lying stretched out on the seat of the van. A crowd gathered and a man went in the van and drove it away with Mr. Fowler.

I have known Clovis Johnson for more than twenty years. He used to live near to me at Magesty Gardens.

I have known Washington Desquottes, otherwise called Budda for over one year. I knew him when living at Woodpecker Avenue.

I have known Winston Barnes, o/c Redman for about two years. I used to see him at the Gypsum Factory.

I heard something later that day. I never saw Mr. Fowler again. The incident took place after lunch time. Lunch time was 12.00 midday.

Cross-examination by Mr. Green who also holds for Mr. Soutar.

Clovis Johnson was a boy when I first knew him. He was about ten years of age at the time. I have been seeing him all along. He stopped talking to me from he turned away. I was once a Home Guard. I knew that Johnson was once involved in politics. I do not know what side he supported. I

am a J.L.P. supporter. I was not a P.N.P. at the last election. There was no bad blood between the accused Johnson and myself.

I have known the accused Barnes for about three years. I have never spoken to him. I was standing about eight feet from the van when it stopped. (Witness points out distance). I was standing at a gate. I was standing outside Mr. Austin's gate waiting on a man that I worked with. People were walking on the road. More buses than pedestrians passed that corner. Mr. Austin's premises is a bar. The other two men were standing at the corner when the van stopped. As the van stopped the men went up to it. After the explosion some people ran away, others ran towards the van. I didn't run away.

Cross-examined by Mr. Williams.

The van stopped on Olympic Way. I was standing on Olympic Way. I was at Mr. Austin's gate. The gate is about ten feet from the corner. (Witness points out distance). I was not then working at the Gypsum Factory. I saw the van drove up before seeing the two men. I have no idea of the time. The men went up to the van as it stopped.

The incident with the accused putting his hand in the front of the van took place in a short time. After the incident the three men ran down Sixth Street. I saw their backs while they were running. I was standing on the left hand side of the van. I don't know if the van was a left or right hand drive vehicle.

Larkland Green, His Mark.

B.L. Myrie,
Resident Magistrate
Gun Court
3.3.83."

The defence of each defendant was an alibi. Barnes made an unsworn statement from the dock supported by the sworn evidence of one witness. Desquottes made an unsworn statement from the dock supported by the sworn evidence of his sister. Johnson gave sworn evidence in support of his own alibi.

It will be seen from this brief recital of the facts that in each case the vital evidence of identification was that contained in the sworn depositions of the deceased witnesses. Without the evidence in the depositions there would have been insufficient evidence to put any of the appellants on trial. The trial judges in each case admitted the depositions in evidence pursuant to the provisions of section 34 of the Justices

of the Peace Jurisdiction Act, the relevant part of which provides:-

> "... and if upon the trial of the person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, or is absent from this Island or is not of competent understanding to give evidence by reason of his being insane, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he, or his counsel or solicitor had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the Justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not, in fact, signed by the Justice purporting to sign the same:
>
> > Provided, that no deposition of a person absent from the Island or insane shall be read in evidence under the powers of this section, save with the consent of the court before which the trial takes place."

In its original form the section only provided for a deposition to be read in evidence if the deponent was dead or too ill to attend the trial. The power to read the deposition if the deponent was absent from the Island or insane was added by amendment and it was at the same time provided that this power should be subject to the consent of the court. That this additional power should be made subject to the consent of the court is readily understandable. If absence from the Island is temporary an adjournment may be more just than continuing without the presence of the witness and if the witness becomes insane it may cast grave doubt on the value of his evidence. But no similar statutory discretion is bestowed on the court if the witness is dead or gravely ill. The judgment of Carberry J.A. in the appeal of Scott and Walters contains a masterly analysis of the historical background of section 34 and the corresponding provisions contained in English statute and common law. Their Lordships accept his conclusion that no statutory discretion is bestowed upon a judge by section 34 to exclude a deposition if a witness is dead or too ill to attend court. If such a statutory discretion had existed it would have been unnecessary to provide specifically for such a discretion when the two additional grounds of admissibility, namely absence from the Island and insanity, were subsequently added to the statute.

There remains however the further question whether, even if a deposition is admissible under section 34,

there exists at common law a power in a judge to refuse to allow the prosecution to adduce it in evidence.

Two recent cases in the House of Lords *Selvey v. D.P.P.* [1970] A.C. 304 and *R. v. Sang* [1980] A.C. 402 contain numerous judicial dicta that refer to the discretion of a judge in a criminal trial to exclude admissible evidence if it is necessary in order to secure a fair trial for the accused. In *Selvey* the power was held to extend to exclude the admission of the character of the accused under section 1(f)(ii) of the Criminal Evidence Act 1898. In Sang the Court of Appeal certified the following question of law for the consideration of the House "Does a trial judge have a discretion to refuse to allow evidence - being evidence other than evidence of admission - to be given in any circumstances in which such evidence is relevant and of more than minimal probative value?". The answer to that question contained in the speech of Lord Diplock, with which the rest of their Lordships agreed, was in the following terms (p.437):-

> "(1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value.
>
> (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The Court is not concerned with how it was obtained. It is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of the activities of an agent provocateur."

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 a jury may attach undue weight to such evidence and regard it as probative of the crime with which the accused is charged. An example is the admission of the bad character of the accused if he has attacked the character of a prosecution witness. This evidence of the accused's bad character is admitted to assist the jury to decide how far they can rely on the allegations he makes against the prosecution witness and therefore what weight they should attach to the evidence of that prosecution witness. It is not admitted to prove that because the accused is a man of bad character he is more likely to have committed the crime because English law does not regard a propensity to commit crime as probative of the particular crime with which the accused is charged. Nevertheless there may be a danger that knowledge of the accused's bad character may unduly prejudice the jury against him.

In the case of Barnes, Desquottes and Johnson it was submitted to the Court of Appeal that the prejudicial effect of the deposition outweighed its probative value. This was a misuse of the phrase. The evidence in the deposition was highly probative of the offence, it was the evidence of an eye witness well placed to see the events he described. It was only "prejudicial" in the sense that it was on the face of it strong prosecution evidence that might well result in the conviction of the accused. The Court of Appeal after citing *Sang* rejected the submission saying:-

> "In the instant case, as already pointed out, there was no question of the prejudicial effect of the evidence outweighing its probative value, the evidence had not been obtained from any of the applicants, and since the evidence was relevant and admissible the learned trial judge had no discretion to exclude it from the trial."

Whilst agreeing with the Court of Appeal that the admission in evidence of the deposition did not fall within the rule that evidence may be excluded on the ground that its prejudicial weight excludes its probative value, their Lordships do not accept that because the deposition is relevant and admissible evidence a judge has no discretion to exclude it.

In *R. v. Sang* the House was not concerned to consider the problem of the admissibility of depositions and a number of their Lordships were careful to state that the discretion was not limited to cases where the prejudicial effect of evidence outweighed its probative value. In particular Lord Salmon said:-

> "I recognise that there may have been no categories of cases, other than those to which I have referred, in which technically admissible evidence proffered by the Crown has been rejected by the Court on the ground that it would make the trial unfair. I cannot, however, accept that a judge's undoubted duty to ensure that the accused has a fair trial is confined to such cases. In my opinion the category of such cases is not and never can be closed except by statute. I understand that the answer given by my noble and learned friend, Lord Diplock, to the certified question accepts the proposition which I have just stated. On that basis, I respectfully agree with that answer."

See also the speeches of Lord Fraser and Lord Scarman.

There have been a number of decisions in which a deposition has been excluded. In *R. v. Linley* [1959] Crim.L.R. 123 Ashworth J. refused to allow the evidence of the victim of a robbery to be read. In *R. v. O'Loughlin* [1988] 3 A.E.R. 431 Kenneth Jones J. refused to permit the depositions of two witnesses and the statement of a police officer to be read in an IRA

trial where this evidence constituted the sole evidence against the accused. It should however be noted that in this case the judge was exercising the statutory discretion recently bestowed by section 78(1) of the Police and Criminal Evidence Act 1984. In *R. v. Blithing* [1983] 77 Cr.App.R. 86 the Court of Appeal allowed an appeal on the ground that the trial judge should have exercised his discretion to exclude a statement tendered in committal proceedings which is treated as equivalent to a deposition under the English statute. Again in parenthesis it is to be noted that the court assumed that the discretion existed under section 13(3) of the Criminal Justice Act 1925. The Court of Appeal held that the discretion should be exercised to ensure that the defendant received a fair trial and allowed the appeal because the judge had held that the discretion should only be exercised if it would be "grossly unfair" to the accused to admit the statement. Their Lordships are very doubtful whether they would have exercised the discretion in the same way as the Court of Appeal on the facts of that case but do not dissent from the proposition that the discretion should be exercised to ensure a fair trial for the accused.

In *R. v. White* (1975) 24 W.I.R. 305 the Court of Appeal in Jamaica held that the trial judge had a common law discretion which he ought to have exercised on the particular facts of that case to exclude a deposition which contained the only evidence against the accused in an identification case. The Court of Appeal in Scott and Walters were critical of some of the reasoning of that decision but did not go so far as to say it was wrongly decided insofar as it recognised the existence of the discretion at common law. In *Sutherland v. The State* (1970) 16 W.I.R. 342 the Court of Appeal in Guyana recognised a discretion at common law to exclude a deposition if its admission would be likely to produce injustice of a kind inconsistent with a fair trial: although on the facts of that case the Court of Appeal held the deposition had been properly admitted.

There is one further case to which reference is made in some of the authorities but which has little bearing on the problem raised in the present appeal. In *R. v. Collins* [1938] 26 Cr.App.R. 177 the accused had indicated to the examining magistrates that he intended to plead guilty at his trial. The magistrates therefore bound over the witnesses for the prosecution conditionally under section 13 of the Criminal Justice Act 1925 as it appeared that no witnesses would be required at the trial. When the accused appeared at Quarter Sessions he changed his mind and pleaded not guilty. He asked for an adjournment to call witnesses to prove an alibi. His application for an adjournment was refused and the Deputy Chairman allowed the prosecution to prove their case by reading the depositions of the witnesses who had been conditionally

bound. Humphreys J., in giving the judgment of the Court of Criminal Appeal, stated that the course adopted by the Deputy Chairman "was not intended by the statute and could never have been contemplated by Parliament". This observation was manifestly correct, the power to bind over a witness conditionally was introduced to provide for the situation when the evidence of a witness is uncontroversial and unchallenged so that it can be read without putting the witness to the unnecessary inconvenience of attending the trial. In making this point Humphreys J. naturally stressed the normal form of jury trial and the value of cross-examination: but his remarks in this context are no reliable guide to the considerations that should weigh with a judge when considering whether or not to exercise his discretion to admit a deposition.

In the light of these authorities their Lordships are satisfied that the discretion of a judge to ensure a fair trial includes a power to exclude the admission of a deposition. It is, however, a power that should be exercised with great restraint. The mere fact that the deponent will not be available for cross-examination is obviously an insufficient ground for excluding the deposition for that is a feature common to the admission of all depositions which must have been contemplated and accepted by the legislature when it gave statutory sanction to their admission in evidence. If the courts are too ready to exclude the deposition of a deceased witness it may well place the lives of witnesses at risk particularly in a case where only one witness has been courageous enough to give evidence against the accused or only one witness has had the opportunity to identify the accused. It will of course be necessary in every case to warn the jury that they have not had the benefit of hearing the evidence of the deponent tested in cross-examination and to take that into consideration when considering how far they can safely rely on the evidence in the deposition. No doubt in many cases it will be appropriate for a judge to develop this warning by pointing out particular features of the evidence in the deposition which conflict with other evidence and which could have been explored in cross-examination: but no rules can usefully be laid down to control the detail to which a judge should descend in the individual case. In an identification case it will in addition be necessary to give the appropriate warning of the danger of identification evidence. The deposition must of course be scrutinised by the judge to ensure that it does not contain inadmissible matters such as hearsay or matter that is prejudicial rather than probative and any such material should be excluded from the deposition before it is read to the jury.

Provided these precautions are taken it is only in rare circumstances that it would be right to exercise the discretion to exclude the deposition. Those circumstances will arise when the judge is satisfied that

it will be unsafe for the jury to rely upon the evidence in the deposition. It will be unwise to attempt to define or forecast in more particular terms the nature of such circumstances. This much however can be said that neither the inability to cross-examine, nor the fact that the deposition contains the only evidence against the accused, nor the fact that it is identification evidence will of itself be sufficient to justify the exercise of the discretion.

It is the quality of the evidence in the deposition that is the crucial factor that should determine the exercise of the discretion. By way of example if the deposition contains evidence of identification that is so weak that a judge in the absence of corroborative evidence would withdraw the case from the jury; then if there is no corroborative evidence the judge should exercise his discretion to refuse to admit the deposition for it would be unsafe to allow the jury to convict upon it. But this is an extreme case and it is to be hoped that prosecutions will not generally be pursued upon such weak evidence. In a case in which the deposition contains identification evidence of reasonable quality then even if it is the only evidence it should be possible to protect the interests of the accused by clear directions in the summing up and the deposition should be admitted. It is only when the judge decides that such directions cannot ensure a fair trial that the discretion should be exercised to exclude the deposition.

In neither of the present appeals was the evidence of identification contained in the depositions of such poor quality that it would be unsafe to convict upon it if the jury had received the appropriate guidance in the summing up. There were accordingly no grounds upon which it would have been right to exercise the discretion to exclude the admission of these depositions in evidence.

Their Lordships turn now to consider the additional grounds of appeal. In Scott and Walters it is submitted that the judge failed to give an adequate direction on the issue of identification. Experience has taught judges 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 and that it is at least highly desirable that such evidence should be corroborated. It has however also been recognised that to require identification evidence in all cases to be corroborated as a matter of law will tilt the balance too far against the prosecution. The compromise of this dilemma arrived at in *R. v. Turnbull* [1977] Q.B. 224 is the requirement that a judge must warn the jury in the clearest terms of the risk of a mistaken identification. Lord Widgery C.J. giving the judgment of the five judge Court said:-

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words."

In *R. v. Oliver Whylie* (1978) 25 W.I.R. 430 the Court of Appeal in Jamaica, following *Turnbull*, said:-

> "Where, therefore, in a criminal case the evidence for the prosecution connecting the accused to the crime rests wholly or substantially on the visual identification of one or more witnesses and the defence challenges the correctness of that identification, the trial judge should alert the jury to approach the evidence of identification with the utmost caution as there is always the possibility that a single witness or several witnesses might be mistaken."

Never can the importance of such a warning be greater than in a case such as the present where the sole evidence of identity is contained in the deposition of a deceased witness and where the quality of the identification may have been of the fleeting glance type for in cross-examination the witness said he saw the men's faces as they ran from the bar. It is possible that he may have recognised the men as he passed them earlier in the street but he does not say so in the deposition and there will of course be no opportunity for investigating the matter at trial.

In dealing with the evidence of Gordon the judge never warned the jury that although Gordon may have been an honest witness his identification of the two accused might nevertheless be mistaken. On the contrary the emphasis throughout is upon the question of the adequacy of the opportunity that Gordon had for observing the two accused. These passages in the summing up, so far from conveying any warning of the danger of mistake, carry the clear implication that provided that the identifying witness had a sufficient opportunity to observe the accused the identification evidence may be safely relied upon. The concluding paragraph in the passage dealing with the identification evidence again, so far from hinting at any danger in reliance on the identification evidence, suggests by implication that the confidence with which Gordon picked out the two accused when they were found amongst others at the bingo game in some way

authenticates the identification itself. This of course is erroneous. The fact that an identifying witness has picked out the accused at an identification parade in no way obviates the need for a warning of the danger that his evidence may be mistaken.

The Court of Appeal considered that the judge's direction on identification was adequate and referred to the fact that he had pointed out the circumstances in which the identification was made and the handicap the jury suffered in not seeing the witness cross-examined. The Court of Appeal also said "the judge discussed with the jury ... the danger of identification evidence". With all respect to the Court of Appeal the judge did not discuss with the jury the fundamental danger of identification evidence which is that the honest witness convinced of the correctness of his identification may yet be mistaken. Their Lordships have given anxious consideration to the question of whether this submission is fatal to the convictions. They take into account that the jury had the opportunity to see the accused give evidence and clearly rejected their alibis and that they took only eleven minutes to arrive at their verdict. Their Lordships have nevertheless concluded that if convictions are to be allowed upon uncorroborated identification evidence there must be a strict insistence upon a judge giving a clear warning of the danger of a mistaken identification which the jury must consider before arriving at their verdict and that it would only be in the most exceptional circumstances that a conviction based on uncorroborated identification evidence should be sustained in the absence of such a warning. In this capital offence their Lordships cannot be satisfied that the jury would inevitably have convicted if they had received the appropriate warning in the summing up and they will accordingly advise Her Majesty to allow the appeal of Scott and Walters.

The same point on lack of a proper direction on identification evidence is taken on behalf of the appellants, Barnes, Desquottes and Johnson. The judge in this case gave no direction of any kind on the issue of identification. He did not warn the jury of the danger of a mistaken identification nor did he draw attention to the circumstances in which it was made or to the fact that it differed from the evidence of the other eye witness Brown.

The Court of Appeal in rejecting the application for leave to appeal on this ground said:-

> "A failure to warn the jury of dangers inherent in visual identification cases, it must be borne in mind, is but one of the factors to be taken into consideration in determining the fairness and adequacy of a summing up."

This passage gives too little weight to the recognised dangers of convicting on uncorroborated evidence of

identity. For the reasons already given a failure to give a warning of the danger of identification evidence is generally to be regarded as a fatal flaw in a summing up and almost inevitably so in a case such as the present where the sole evidence of identity is the uncorroborated deposition of a deceased witness. Their Lordships are satisfied that the failure to give any direction on the issue of identity is a sufficient reason to compel them to advise Her Majesty to allow the appeal in this case.

Barnes and Desquottes also appeal upon the ground that no adequate direction was given upon whether or not they might be guilty of manslaughter rather than murder on the ground that they were not party to a common enterprise to use a firearm in the robbery. In their Lordships' view the circumstances of this case did call for a direction on common enterprise which would have left the issue of manslaughter to the jury, albeit there was evidence upon which the jury would be entitled to conclude that all three men were party to a common enterprise to use the gun. However as their Lordships are satisfied that the appeal must be allowed on the issue of identification, they do not propose to go further into this issue which depends solely upon the particular circumstances of this case.

Complaint was also made that the judge gave the impression to the jury that the witness of identification had been deliberately liquidated to prevent him giving evidence. Their Lordships are sure that the judge had no intention to convey any such impression, nevertheless they have misgivings that the judge's choice of language may have unwittingly sown the seed of such a suspicion in the minds of the jury. The judge in the presence of the jury delivered a long ruling giving his reasons for admitting the deposition of the deceased witness in the course of which he said:-

> "That application was based on the evidence that Larkland Green was a witness called at the preliminary enquiry into this charge, and that after giving evidence at the enquiry, and before the start of this trial he was shot and killed."

And at a later stage in the ruling he said discussing section 34:-

> "The other instance is where the witness, having given evidence at the preliminary enquiry and before the Circuit Court trial begins has died. And it doesn't matter whether the witness was deliberately liquidated for the purpose of putting him out of the way so that he cannot give evidence, or he dies of natural causes, of a heart attack, for instance, it doesn't matter, once it is proved that he has died."

And finally he finished his ruling by saying:-

> "It would be a serious thing. That was what I was trying to avoid from away back in 1974, for it to be authorised in Jamaica; for it to be believed in Jamaica; or that it should be the law in Jamaica, that a man can commit a serious offence and those acting on his behalf, or even with his assistance, only have to eliminate the chief witness and to secure his own acquittal. That if that were laid down to be the law in Jamaica, I shudder at what should happen.
>
> The evidence that we have is that the chief witness - I make no further comment, it is the subject of police inquiry, and it would have to be, because the officer who gave evidence saw the man dead on the street with a bullet in the head, to at least enforce the preliminary enquiry into the cause of death the police would have to enquire into it."

In the course of the summing up the judge said:-

> "Now witnesses were called on both sides but the principal witness, Mr. Larkland Green, who would have been if he had been alive, is gone beyond, way beyond, and miracles are not being worked these days where you can raise a man from the dead, so you remember listening to that lengthy legal argument as to whether or not I should have allowed the deposition of this witness to be read."

At a later stage in his summing up he said:-

> "... the only eye witness to the incident, Larkland Green, who, at the preliminary examination, implicated the three accused, was shot to death on 11th May 1983. That was about two months after he had given evidence at the preliminary examination. That is not under any dispute."

Larkland Green was found by the police shot dead in the street with a man named Bennett who had also been shot to death. Bennett had no connection with this case and there is no suggestion that Green's death was in any way connected with the accused or anyone acting in their interest. Their Lordships nevertheless feel considerable unease that the judge's remarks may have at least implanted in the jury's mind the suspicion that Green was killed to prevent him giving evidence that identified the accused. The judge should have heard the arguments of counsel and have given his ruling on the admissibility of the evidence in the absence of the jury and should have avoided language in the summing up that could be interpreted as carrying any implication that the witness had been killed to prevent him giving evidence. This then is another feature of the trial that contributes to the final decision of their Lordships humbly to advise Her Majesty that the interests of justice demand that the convictions of these appellants should be quashed and their appeal allowed.