Privy Council Appeal No. 23 of 1993

Dennis Lobban *Appellant*

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 6th April 1995

Present at the hearing:-

Lord Goff of Chieveley
Lord Mustill
Lord Slynn of Hadley
Lord Nicholls of Birkenhead
Lord Steyn

*[Delivered by **Lord Steyn**]*

On 11th September 1987, in the parish of Saint Andrew, in Jamaica, three robbers armed with guns entered a dwelling-house. During the course of the robbery they shot and killed three men. By an indictment containing three counts the appellant (the first defendant) and Steve Russell (the second defendant) were charged with the three murders. Both defendants pleaded not guilty. After the prosecution closed its case, and after the appellant ("Lobban") had testified and called an alibi witness, the trial judge upheld a submission that Russell had no case to answer. The judge discharged Russell. On 17th June 1988, following a five day trial, the jury by unanimous verdicts convicted Lobban of all three murders. The judge passed three death sentences. Lobban applied to the Court of Appeal of Jamaica for leave to appeal against convictions. On 4th June 1990 the Court of Appeal dismissed the application. Special leave to appeal from the judgment of the Court of Appeal was granted on 10th March 1993.

The trial.

The thrust of the prosecution case can be stated quite briefly. At about 7.30 p.m. on 11th September 1987 Peter Tosh and Marlene Brown, who lived together, were entertaining three visitors at their home in Saint Andrew. There was a knock on the front door. Three men entered. One man acted as the leader. They brandished guns and demanded money. Peter Tosh was an internationally known singer who had recently returned from a successful United States tour. Peter Tosh said they had no money. The robbers plainly did not believe him. The robbers ordered everybody to lie face downwards on the floor. The robbers threatened their victims. There was then another knock on the front door. Unaware of what was going on in the house, two other friends of Peter Tosh entered. The robbers also ordered them to lie face downwards on the floor. The robbers took a number of articles of jewellery from their victims. They repeatedly demanded money. They threatened Peter Tosh with a machete. No money was produced. Suddenly, one of the men shot Marlene Brown. Then a barrage of shots followed. All three robbers seemed to fire indiscriminately at their victims, who were lying on the floor. Peter Tosh and two of his male visitors were killed. Marlene Brown sustained a relatively superficial head wound. She recovered and she subsequently testified at the trial. Michael Robinson, another visitor, was badly wounded. He also recovered and he also subsequently testified at the trial.

Only two of the survivors were able to identify Lobban as one of the three robbers. Marlene Brown and Michael Robinson said that the leader of the robbers was Dennis Lobban who was also known to them as "Leppo". Both these witnesses testified that they knew Lobban well. The prosecution case was therefore based on recognition evidence. Counsel for Lobban put to both witnesses that they were on bad terms with Lobban and that they had fabricated their evidence against him. The witnesses denied those suggestions.

The prosecution case against Russell was that he was the driver of the car who took the robbers to Peter Tosh's house and drove them away after the robbery. In a statement made to the police under caution on 27th October 1987, some six weeks after the robbery, Russell admitted that he was the driver of the car in which the robbers travelled to the scene of the robbery and in which they left after the robbery. In his statement Russell said that he drove the three men to the scene of the robbery in ignorance of their intentions. He heard the shooting. The men came out of the house. Then only did he see guns. The men threatened him and he was forced to drive the robbers away from the scene. His statement under caution ended as follows:-

> "Sometime later I saw a photograph of a man in the Star and I recognised the photograph as one of the men who I drove in the van to Peter Tosh house. He sat in the back. He was the man who I saw with the gun when we were coming from the house. The name below the photograph was Dennis Lobban otherwise called Leppo."

The prosecution tendered Russell's statement as part of its case against him. In the absence of the jury counsel for Lobban asked the trial judge, Patterson J., to direct that the final sentences of the caution statement, which implicated Lobban by name, should be excluded from the caution statement before it was admitted in evidence. Counsel for the prosecution and counsel for Russell objected to the editing of the statement. The judge ruled that the statement should be admitted in its entirety.

The case against Russell was that he was involved in a joint criminal enterprise with the three robbers: the prosecution alleged that it was to be inferred that he agreed that he would be the get-away driver. There was, however, very little evidence to controvert his explanation in his caution statement. The high point of the prosecution case against Russell was some evidence from two witnesses that the driver of the car, which was parked outside Peter Tosh's house during the shooting, acted suspiciously in that he appeared to hold his head away from the lights. In the light of detailed questioning this evidence did not seem particularly impressive. The state of the evidence cried out for a submission that Russell had no case to answer as soon as the prosecution case closed.

Counsel for Russell did not at that stage make a submission that Russell had no case to answer. The best explanation seems to be that there was a misunderstanding between the judge and counsel. The case of Lobban started. Lobban testified that he was not involved in the robbery and that on the night of the killing he was drinking at the shop of a friend. He said he had a bad relationship with Marlene Brown and Michael Robinson. He suggested to the jury that previous ill-feeling was the motive for these witnesses implicating him. Counsel for Russell and counsel for the prosecution cross-examined Lobban to the effect that he was one of the robbers. Counsel for the prosecution suggested that the part of Russell's statement in which Russell identified the man in the photograph as "Dennis Lobban o/c Leppo" was true. Counsel for Lobban then called a witness to support Lobban's alibi. Some discrepancies between the accounts of Lobban and the witness emerged.

Immediately after the case for Lobban was closed counsel for Russell made a submission that there was no case against Russell.

Submissions were made in the presence of the jury. The trial judge ruled in the presence of the jury that there was insufficient evidence for the case of Russell to be considered by the jury. On the direction of the judge the jury returned a verdict of not guilty in the case of Russell. The judge discharged Russell.

That resulted in a new situation. The part of Russell's statement under caution, which implicated Lobban, had been adduced as evidence in the case of Russell. It was *prima facie* relevant and admissible evidence in the case against Russell. It was not evidence against Lobban. After the discharge of Russell his statement implicating Lobban was irrelevant to the remaining issues in the case. Yet the members of the jury were aware of it. Counsel for Lobban did not seek a ruling that the jury should be discharged.

In his summing up the judge directed the jury as follows:-

> "After a submission in law was made to me, submission which I upheld, I directed you, as a matter of law to return a verdict of not guilty against the second named accused man on this indictment. There are a number of things that I would like to tell you at this stage about that. Firstly, when I made that ruling it in no way affected the case against the second accused man. In other words, I was not saying that the second man is guilty or not guilty of this charge. That is something for you to consider. I was not considering his case at all.
>
> The second thing I would tell you is this, now that the second accused has been discharged, I must warn you to disabuse your minds entirely of all the evidence that has been adduced in this case against that accused man and consider only the evidence against this accused now remaining in the dock. In particular, I must warn you that the statement of the second accused which was admitted in evidence and read to you, it was tendered and admitted as evidence only against the maker, that is, the second accused, and at no time was it evidence against this accused man, and I am going to tell you to discard that statement entirely.
>
> In no way can it be used to further the case for the prosecution against this first accused man. Forget entirely that you heard that statement. Nothing from it, nothing said in it must colour your judgement against this accused man. There is nothing that was said in that statement that can be used by you against this accused man, now sitting in the dock. I want that to be very clear and for you to bear it in mind."

The rest of the summing up was irrelevant to the grounds of appeal.

The jury retired for nine minutes and then returned to deliver three verdicts of guilty of murder against Lobban. The judge sentenced Lobban to death in respect of each verdict.

The proceedings in the Court of Appeal.

The grounds of appeal argued in the Court of Appeal of Jamaica centred on the last sentence of Russell's statement to the police that "the name below the photograph was Dennis Lobban otherwise called Leppo". Carey J.A., giving the judgment of the Court of Appeal, said:-

> "In the case where one co-accused makes statements implicating his co-accused, we are not aware of any rule requiring a trial judge to edit such a statement. Indeed, in our judgment, it would be wholly unfair to the maker of the statement who would be entitled to have the statement in its entirety placed before the jury. A trial judge has an undoubted duty to ensure a fair trial but that cannot mean fair to one, and unfair to a co-accused. His responsibility is to both. We have already observed that defence counsel for the co-accused in the instant case, intimated that the whole statement was necessary for his defence, and provided reasons therefor. We fail to see how the learned trial judge could have acted otherwise than he did. We think the principle is conveniently set out in the head note in *R. v. Gunewardene* 35 Cr.App.R. 80."

Carey J.A. observed that the judge impressed on the jury that the last paragraph of the statement of Russell was not evidence against Lobban.

The grounds of appeal.

The grounds of appeal placed before the Board were helpfully refined on the hearing of the appeal by Mr. Thornton Q.C. who appeared on behalf of Lobban on the appeal before the Board but not at the trial or in the Court of Appeal in Jamaica. Counsel put in the forefront of his submissions the argument that the trial judge should have ordered (as he was invited to do) the editing of the statement of Russell so as to exclude the final paragraph which implicated Lobban or at least that part of it which referred to Lobban by name. Counsel submitted that this amounted to a material irregularity which was not cured by the directions in the summing-up.

Counsel further submitted that an irregularity occurred in the trial when the judge permitted counsel for the prosecution to cross-examine Lobban on the content of Russell's statement under caution. He argued that this irregularity prejudiced Lobban's defence.

Counsel for Lobban also submitted that the judge allowed counsel for Russell to make his submission that there was no case against Russell at the wrong time, namely after Lobban's case. Furthermore, he submitted that the judge should not have allowed the application to be made in the presence of the jury. He argued that these irregularities also prejudiced the defence of Lobban.

The co-defendant's statement implicating Lobban.

Mr. Thornton submitted that Russell's account, explaining how he came to connect Lobban by name with the robbery, was inadmissible against Lobban and was nevertheless likely to prejudice Lobban in the eyes of the jury. In any event, he submitted, the real danger of the jury being influenced by that portion of Russell's statement was avoidable by the simple expedient of the judge, in the exercise of his discretion, ordering the last paragraph of the statement or at least the reference to Lobban by name to be excluded. He argued that in exercising his discretion the judge was plainly wrong since the interests of justice, which must always be of paramount importance, required such editing.

It seems right to put these submissions in their context. The statement of Russell was relevant and admissible as part of the prosecution's case against Russell. It was a "mixed" statement, containing admissions as well as an exculpatory explanation and as such admissible in its entirety: *R. v. Sharp (Colin)* [1988] 1 W.L.R. 7. In England the position is now governed by section 76 of the Police and Criminal Evidence Act 1984 read with the definition of "confession" in section 82(1) of the Act. It is right that in earlier times in the strict theory of the law of evidence the exculpatory part of a mixed statement was not regarded as evidence in favour of the maker's case. But their Lordships do not agree with counsel for Lobban that today it is merely allowed "as an indulgence ... as part of the narrative". In *Sharp* the House of Lords deprecated any idea of the jury being told that the exculpatory parts of a mixed statement amount to something less than evidence: at 11A-B. Nowadays, it is plainly part of the evidential material which forms part of a case of a defendant who does not testify. No doubt it has less value than oral evidence tested by cross-examination, but the defendant has an absolute right (subject to considerations of relevance) to have his exculpatory explanation fairly placed before the jury as part of his case.

Russell's statement, although initially admissible in the joint trial, was not evidence against Lobban. It was only admitted because Russell was a co-defendant. He was then discharged. Yet the jury remained aware of Russell's identification of Lobban as

one of his passengers. It was highly prejudicial to Lobban and, because Russell was discharged, it could not be countered by cross-examining Russell. That is the *gravamen* of Mr. Thornton's argument.

But here their Lordships must consider counsel's characterisation of the evidential status of Russell's reference to Lobban. The whole statement of Russell is documentary hearsay as against Lobban, and plainly was not admissible against him. But counsel argued that the relevant paragraph is based on what was said in a newspaper. He said it was double hearsay. This is not an argument of substance. It was not in dispute at the trial that Lobban was also called Leppo and that a photograph so describing him appeared in a newspaper which Russell saw. It was not double hearsay in the light of the issues in this case. The last paragraph of Russell's statement simply served to explain his delay in reporting the matter and the basis of his identification of Lobban. Nevertheless, the argument as to the potential impact of Russell's hearsay incrimination of Lobban in his statement remains.

There is another aspect of the broader context which must now be considered. It is established practice that, subject to a judge's discretion to order separate trials in the interests of justice, those who are charged with an offence allegedly committed in a joint criminal enterprise should generally be tried in a joint trial. The case of a trial of alleged robbers and a get-away driver is often regarded as a classic case for a joint trial. These considerations may be the reason why, despite the fact that Lobban's counsel had full knowledge in advance of the trial of the statement of the co-defendant, he made no application for separate trials. And, in the light of the same considerations, he did not apply for a discharge of the jury after Russell was discharged. Their Lordships do not mention these matters by way of criticism of trial counsel. Counsel took what no doubt appeared to be the realistic course.

It is now possible to address directly the issues raised by the ground of appeal under consideration: Did the trial judge err in not directing the last paragraph of Russell's statement or at least that part of it which named Lobban to be edited? Counsel for Lobban argued that the last paragraph of the caution statement was irrelevant to the prosecution case against Russell. If this premise is established, the judge should undoubtedly have excluded the last paragraph. After all, if it was not relevant to the case against Russell, there was no permissible purpose for which it could be used at the trial. It was undoubtedly inadmissible against Lobban. The question is whether the premise of the argument is sound. Counsel for Russell said that

Russell's defence was that he was ignorant of his passengers' intentions when he drove them to Peter Tosh's house and that afterwards he acted under duress in driving them away. Accordingly, counsel for Lobban submitted, the relevant paragraph of the statement, which identified Lobban as one of his passengers on the night of the shooting, added nothing to the case against or for Russell. This is an oversimplification. An argument against Russell, which might have impressed the jury, was that he did not drive away from the scene as soon as he saw the guns and that he only made his statement to the police six weeks after the shooting. In this context Russell explained that he did not know any of the passengers. But he stated that six weeks later, as a result of a newspaper photograph and report, he recognised one of his passengers as a person described as Lobban. While this explanation still left the fact that Russell did not report what he did know earlier, it was at least an account which the jury might have considered as explaining the long gap. And his mention of Lobban was an integral part of that explanation. It was also put forward as a sign of his frankness. It was logically relevant to Russell's defence.

Furthermore, it must be borne in mind that counsel for Lobban was challenging the judge's exercise of his discretion not to edit the statement. The judge made clear that he considered Russell's explanation of how he came to make a statement, and name Lobban, as relevant to Russell's case. Their Lordships agree that it was of significant relevance to Russell's case. But, in any event, it would be difficult to say that the judge erred, on the materials before him, in regarding the explanation as relevant to Russell's case. In the light of the issues in the case, the judge was entitled to take the view, as he did, that it would be unfair as against Russell, to exclude part of his exculpatory explanation. And it is impossible to say that he erred in the view he took.

But counsel challenged the judge's exercise of his discretion not to edit Russell's statement on an alternative legal basis. For this purpose he accepted that the last paragraph of Russell's statement gave some support to Russell's defence, and that it was in Russell's interests that the whole of the statement should be admitted. He submitted, however, that the prejudice to Lobban by allowing the whole statement to go before the jury outweighed the relevance of the disputed paragraph to the defence of Russell. He argued that if the judge, in measuring the prejudice to Lobban and Russell respectively in editing or not editing the statement, concluded that the potential prejudice to Lobban was greater than the potential prejudice to Russell, the judge had a discretion to exclude the last paragraph. He submitted that a judge was always entitled in respect of evidence led by the prosecution as a matter of discretion to choose the course that involved the lesser risk of injustice as

between the two defendants. Counsel referred to four English decisions in support of his submission: *R. v. Rogers and Tarran* [1971] Crim.L.R. 413; *R. v. Silcott* [1987] Crim.L.R. 765; *R. v. Mathias and Others* [1989] Crim.L.R. 64; *R. v. Jefferson and Others* [1994] 1 All E.R. 270. And, if his proposition of law is sound, counsel submitted that the judge erred in failing to edit the statement in asmuch as in comparative terms the injustice to Lobban in failing to edit was greater than any injustice to Russell if he had ordered editing.

On the supposition that counsel's legal submission is correct their Lordships consider that on the facts of the case it does not avail Lobban. Both defendants faced the same grave charge. It is true that the case against Lobban was considerably stronger than against Russell. That does not, however, help on this point. It would simply have been impossible for the judge to say that the exclusion of the last paragraph would have caused less prejudice to the plausibility of Russell's explanation than the admission of it would have caused to the case of Lobban, having regard to his intended directions to the jury that it was irrelevant to the case against Lobban. And, counsel's suggestion of the substitution of a letter of the alphabet for Lobban's name, if adopted by the trial judge, would probably have set the jury on an irresistible trail of speculation. For these reasons the alternative challenge to the exercise of the judge's discretion is rejected.

It would, however, be wrong not to deal with counsel's legal submission, notably since Patterson J. at first instance and the Court of Appeal in Jamaica plainly envisaged that the suggested discretion to edit Russell's statement in the face of Russell's opposition did not exist. On examination the English decisions relied on by counsel do not yield substantial support for his submission. *Rogers* involved charges against two defendants for respectively giving and taking a bribe. The alleged giver of the bribe admitted in a statement to the police that he had given bribes to unnamed persons in the course of his business. It is to be noted that counsel for <u>both</u> defendants asked the judge to exclude the relevant answers. The judge did so. There was no conflict on this point between the defendants. This case does not assist. *Silcott* is of some relevance. Six defendants were jointly charged with public order offences and the murder of a policeman. Each defendant had been interviewed by the police. The interviews implicated co-defendants. The prosecution tendered in evidence transcripts of the interviews. Counsel for one defendant asked the trial judge, Hodgson J., to order the editing of the interviews by substituting letters of the alphabet for the names of co-defendants. Counsel submitted that the names were not relevant to any issue between the prosecution

and the makers of the statement. Counsel for the prosecution and counsel for two defendants objected. The judge's holding as reported in truncated form in [1987] Crim.L.R. at page 766 was as follows:-

> "... all references to names should be excluded from the interviews. The method of achieving this should be agreed by counsel. If the names were not removed, it would require mental gymnastics of Olympic standards for the jury to approach their task without prejudice. The prejudice could not be cured by a strong direction to the jury. Inclusion of names might add verisimilitude to the confessions, but loss of that proof would be fairly minimal if the names were excluded. In two cases *R. v. Pearce* (1979) 69 Cr.App.R. 365 and in *R. v. Gunewardene* (1951) 2 K.B. 600, the Court had held that it was unfair to exclude evidence which is exculpatory of the maker of the statement. In the present case, references to names were in no way exculpatory of the makers of the statements."

Hodgson J. apparently thought that editing would cause "fairly minimal prejudice" to the makers of the statements. This decision does afford some assistance to the submission made by counsel. It is not clear, however, to what extent the judge had the benefit of full argument on the principles and authorities to which their Lordships in due course must turn. In *Mathias* a circuit judge also adopted the compromise solution of Hodgson J. in *Silcott*. In *Jefferson* the Court of Appeal considered a similar point. It was, however, apparently not argued that the discretionary power to edit on the basis of relative prejudice to co-defendants did not exist. It is not clear to what extent there was in truth a dispute as between co-defendants about editing. In any event Auld J., in giving the judgment of the court, assumed without examination that such a discretion existed and ruled that the judge's exercise of his discretion could not be faulted. Counsel for Lobban also referred to a decision of the Court of Appeal in New Zealand in which the court also assumed that the jurisdiction to edit in the interests of a co-defendant exists ("as we are disposed to accept") but stated that it was an exceptional course: *R. v. Hereora* [1986] 2 N.Z.L.R. 164. The judgment contains no discussion of the rival arguments.

It is now necessary to examine counsel's argument from the point of view of legal principle. Two principles are clearly established. First, a trial judge in a criminal trial always has a discretion to refuse to admit evidence, which is tendered by the prosecution, if in his opinion its prejudicial effect outweighs its probative value. This power has probably existed since *R. v. Christie* [1914] A.C. 545 but, in any event, it was expressly affirmed by the House of Lords in *R. v. Sang* [1980] A.C. 402. The

power is based on a judge's duty in a criminal trial to ensure that a defendant receives a fair trial. The width of the discretion is circumscribed by the purpose for which it exists. This common law discretion is the foundation of a judge's power to cause part of a written statement made by a defendant, which is adduced in evidence by the prosecution, to be edited in the interests of justice. It is wide enough to allow a trial judge to exclude evidence, which is tendered by the prosecution in a joint trial and is probative of the case against one co-defendant, on the ground that it is unduly prejudicial against another co-defendant. *Rogers* was such a case. In such cases it is in the interests of both defendants that the disputed part of the document be edited: the distinctive feature of the present case is that there was a conflict between co-defendants as to editing.

The second principle is lucidly summarised by Keane, The Modern Law of Evidence, 3rd edn., 1994. The author states (at page 36):-

> "... the discretion may only be exercised in relation to evidence tendered by the *prosecution*. There is no discretion to exclude, at the request of one co-accused, evidence tendered by another. Thus although, as we have seen, there is a discretion to exclude similar fact evidence tendered by the prosecution, such evidence, when tendered by an accused to show the misconduct on another occasion of a co-accused is, if relevant to the defence of the accused, admissible whether or not it prejudices the co-accused. Similarly, there is no discretion to prevent an accused from cross-examining a co-accused about his previous convictions and bad character when, as a matter of law, he becomes entitled to do so pursuant to s 1(f)(iii), Criminal Evidence Act, 1898, i.e. where the co-accused has 'given evidence against' the accused, because, it is said, the accused, in seeking to defend himself, should not be fettered in any way."

These propositions are amply borne out by the decisions cited by the author, namely *R. v. Miller* [1952] 2 All E.R. 667, at page 669; *R. v. Neale (Paul)* (1977) 65 Cr.App.R. 304; *Murdoch v. Taylor* [1965] A.C. 574; Cross on Evidence, 7th edn, 187-188.

The present case is not precisely covered by either of these principles as formulated. On the one hand, the evidence of Russell's statement was tendered by the prosecution. Counsel submits that the fact that the evidence was tendered by the prosecution is determinative. The discretionary jurisdiction to exclude evidence where prejudice outweighs relevance is automatically engaged. That seems to their Lordships a surrender to mechanical jurisprudence. After all, a prosecutor

is a minister of justice and frequently calls a witness, or tenders a witness for cross-examination at the request of the defence and in their interests. The essential issue to which counsel's submission is directed involves a conflict between the interests of two co-defendants. The argument is that the judge has a discretionary power, as between co-defendants, to exclude relevant evidence or to cause a document to be edited, on the ground that he is choosing the course which involves the lesser injustice as between the defendants. If the submission is accepted, a serious derogation of a defendant's "liberty to defend himself by such legitimate means as he thinks it wise to employ" is established: *Murdoch v. Taylor, supra*, at page 584G, per Lord Morris of Borth-y-Gest. The second principle militates against the submission.

Taking into account the rationale underlying the second principle, their Lordships have concluded the discretion envisaged by counsel's submission, as deployed in a case such as the present, does not exist. The discretionary power to exclude relevant evidence applies only to evidence on which the prosecution proposes to rely. It exists to ensure a fair trial to the defendant, or, in a joint trial, to each defendant without seeking to differentiate between the quality of justice afforded to each defendant. It does not extend to the exculpatory part of a "mixed statement" on which a co-defendant wishes to rely. While section 78 of the Police and Criminal Evidence Act 1984 has no counterpart in Jamaica, it is noteworthy in this context that the discretion under section 78(1) to exclude relevant evidence having an adverse effect on the fairness of the proceedings only applies to "evidence on which the prosecution proposes to rely". And the prosecution was not entitled to rely on any part of Russell's statement against Lobban. Counsel for Russell was entitled to insist that evidence tending to support Russell's own case, or more accurately, the material favourable to him in a mixed statement, should not be made the subject of editing by the judge.

This conclusion is consistent with observations in decisions of high authority. In *R. v. Gunewardene* [1951] 2 K.B. 600 the Lord Chief Justice, Lord Goddard, said (at pages 610-611):-

> "If we were to lay down that the statement of one prisoner could never be read in full because it might implicate, or did implicate, the other, it is obvious that very difficult and inconvenient situations might arise. It not infrequently happens that a prisoner, in making a statement, though admitting his or her guilt up to a certain extent, puts greater blame upon the co-prisoner, or is asserting that certain of his or her actions were really innocent and it was the conduct of the co-prisoner that gave them a sinister appearance or led to the belief that the prisoner making the statement was implicated in the crime. In such a case that prisoner would

> have a right to have the whole statement read and could, with good reason, complain if the prosecution picked out certain passages and left out others. The statement was clearly admissible against Hanson and was read against her, and although in many cases counsel do refrain from reading passages which implicate another prisoner and have no real bearing on the case against the prisoner making the statement, we cannot say that anything has been admitted in this case which was not admissible, and the judge gave adequate and emphatic directions to the jury on the subject." (Emphasis supplied)

Devlin J. and Lynskey J. were the other members of the court. Devlin J.'s observations in *R. v. Miller, supra*, at page 667, also emphasised that an accused's right to deploy relevant evidence as part of his case is absolute and not subject to discretionary control. In *R. v. Neale (Paul), supra*, at page 304, Lord Justice Scarman, in giving the judgment of the court, put it as follows (at page 306):-

> "The discretionary control the judge has in a joint trial or indeed in any trial, that is to say the discretion to refuse to allow the Crown to adduce, or elicit, evidence which though probative is so prejudicial that it should not be accepted, does not exist or arise when application is being made by a co-defendant."

The other members of the court were Geoffrey Lane L.J. and Donaldson J. Moreover, nothing in the speeches in the House of Lords in *Sang* in any way suggested a discretionary power in a joint trial on application of a defendant to exclude relevant evidence tendered by a co-defendant.

The compromise solutions adopted in *Silcott* and *Mathias* do, of course, have a certain appeal. It is, however, a tenuous line of authority. So far as those decisions suggest that a judge in a criminal trial has a discretionary power at the request of one defendant to exclude evidence tending to support the defence of another defendant they are contrary to well established principles and do not correctly reflect the law of England or of Jamaica. The principled objection to the discretion envisaged by counsel is that it conflicts with a defendant's absolute right, subject to considerations of relevance, to deploy his case asserting his innocence as he thinks fit. For these reasons their Lordships reject counsel's alternative legal submission.

Inevitably, the legal principles as their Lordships have stated them result in a real risk of prejudice to co-defendants in joint trials where evidence is admitted which is admissible against one defendant but not against the other defendants. One remedy is

for a co-accused to apply for a separate trial. The judge has a discretion to order a separate trial. The practice is generally to order joint trials. But their Lordships observe that ultimately the governing test is always the interests of justice in the particular circumstances of each case. If a separate trial is not ordered, the interests of the implicated co-defendant must be protected by the most explicit directions by the trial judge to the effect that the statement of one co-defendant is not evidence against the other. And that duty the trial judge fulfilled in the present case by emphatic and repeated directions that the last paragraph of Russell's statement was irrelevant to the case against Lobban. The judge could not have been more explicit. For all these reasons the ground of appeal under consideration is rejected.

Cross-examination of Lobban by prosecuting counsel on Russell's statement.

Prosecuting counsel cross-examined Lobban by putting to him Russell's statement under caution. It is trite law that prosecuting counsel may not cross-examine a defendant on a statement which is inadmissible in the case against him. The statement of Russell was inadmissible in the case against Lobban. It is difficult to understand how prosecuting counsel could have overlooked this most elementary of rules governing criminal procedure. The judge should have stopped the cross-examination of Lobban by the prosecutor on Russell's statement. This departure from established rules constituted a material irregularity. Their Lordships will return to its impact at the end of the judgment.

Submission of no case at wrong time.

Russell's counsel should have made his submission that there was no case against Russell at the end of the prosecution case. He did not do so. It was apparently due to a misunderstanding. Counsel for Russell made his submission after Lobban had testified and after Lobban's alibi witness had given evidence. Counsel for Lobban has not argued that the judge did not at that stage have power to hear and rule on the application. He did argue that Lobban was prejudiced by the unusual sequence because it enabled counsel for Russell to cross-examine Lobban. If the application had been made at the proper time, Russell would have been discharged before Lobban testified and Lobban would not have faced cross-examination by counsel for Russell. Their Lordships are satisfied that there was no material irregularity. The cross-examination of Lobban by counsel for Russell was, if their Lordships may say so, gentle, general and unproductive. No prejudice was caused to Lobban. This ground of appeal is rejected.

The submission of no case in the presence of the jury.

The judge allowed the jury to be present during the course of the argument on the application of counsel for Russell that the latter should be discharged. The judge explained his ruling and the reasons for it to the jury at considerable length: the relevant part of the transcript runs to almost three pages. The jury ought to have been asked to withdraw: see the judgment of the Board in *Crosdale v. The Queen*, delivered immediately before the judgment in Lobban's case. The procedure adopted was irregular. What was its impact on the case against Lobban? Neither counsel nor the judge said anything to the detriment of Lobban's case. The argument, and the judge's reasons, focused on the issue whether an inference of joint enterprise could be drawn against Russell on the basis of his statement and his conduct outside the house when the robbery was taking place. The irregularity caused no prejudice to Lobban. This ground of appeal is rejected.

Conclusion.

That brings their Lordships back to the material irregularity involved in the judge permitting prosecuting counsel to cross-examine Lobban on Russell's statement. Their Lordships wish to say nothing to condone this serious departure from a well established rule which is designed to prevent unfairness to a defendant. On the other hand, their Lordships must look at the matters in the round. The prosecution case, which was based on the recognition evidence of two witnesses, was very strong. Lobban's suggestion that these witnesses fabricated a story that he was one of the robbers, because of previous ill-feeling between them, was transparently weak. The jury thought they were honest witnesses and disbelieved Lobban. It was a plain and obvious case for the proviso. There was no miscarriage of justice.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed.