12-04-02

IN THE CAYMAN ISLANDS COURT OF APPEAL

Criminal Appeals No. 5 and 6 of 2001
(Indictments No. 39A and 39B of 2000)

BETWEEN:

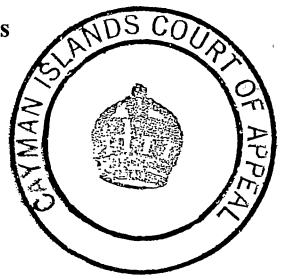
HER MAJESTY THE QUEEN

Respondent

- and -

KURT FABIAN EBANKS
BRYAN ROLAND POWELL

Appellants



BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Honourable Mr. Justice I. Rowe, J.A.
The Honourable Mr. Justice M. Taylor, J.A.

Christopher Kinch Q.C. instructed by Marcus Thompson of Walkers for the appellant Powell.
Douglas Schofield of Hunter and Hunter for the appellant Ebanks.
Samuel Bulgin, Solicitor General, and Marlene Smith Andalcio for the respondent Crown.

Heard: November 23rd 2001

Reasons released: April 12th 2002

REASONS FOR JUDGMENT

ROWE, J.A.

When this matter came on for trial before Henderson J. on January 8th 2001, Mr. Kinch who represented the appellant Powell (Powell) and Mr. Philip St. John Stevens who then represented the appellant Ebanks (Ebanks), announced to the court that their clients had elected to be tried on the charge of murder by a judge sitting without a jury pursuant to section 127 of the Criminal Procedure Code. The trial judge inquired of each

of the accused if they wished to be tried by judge alone and each replied in the affirmative. The trial therefore proceeded by judge alone. On January 26th 2001 both appellants were convicted of murder and were sentenced to life imprisonment.

Curtis Seymour (Curtis), taxi driver, was stabbed to death in his taxi during the early morning of January 18th 2000 and his body was discarded beside a dumpster and was discovered about 7:00 a.m. on January 18th. His taxi was found some distance away in an unpopulated area. Both appellants were arrested, charged and convicted of the murder of Mr. Seymour. It was the Crown's theory of the murder that both appellants had participated in a jointly planned robbery of Mr. Seymour and both participated in stabbing him to death. Dr. Holver Ashley performed a postmortem examination on the body of Mr. Seymour on January 19th 2000. He testified at trial that the body was in blood soaked clothing. It had four stab wounds, two in the neck area and two on the front of the chest through a blood soaked white and blue striped shirt. The lethal stab wound was above the heart on the left side of the chest. It was a horizontal wound which entered at a slight angle and cut both the front and back sides of the aorta. There was a very serious and potentially lethal stab wound on the right chest. This wound entered the front of the right lung, went through the lung and entered the dome of the diaphragm. Two shallow stab wounds were present on the neck just to the left of the epiglottis. They were each at a depth of about one centimeter and had a slight downward slant.

Dr. Ashley said he could not definitely determine the sequence of the stab wounds, however, the neck wounds suggested a threatening maneuver and was probably

associated with defecation found on the deceased. He explained that the defecation mechanism requires several seconds, indicating that the stab wound above the heart on the left was not the first stab wound. Defecation, he said, was a sign of surprise and fear. In most violent deaths, in his experience, there was simply not enough time for defecation to take place, whereas in this case, it had taken place. Dr. Ashley opined that since no defence wounds were found on the arms or hands of the deceased and since the wounds were at a horizontal level, this suggested stabbing from behind.

In cross-examination by Mr. Kinch, Dr. Ashley's attention was drawn to certain photographs from the crime scene. He testified that he saw blood on the surface of the third parking lot from where the body was found in an enclosure and he formed the impression from blood spots on the ground that the body was moved from the parking lot by two people, one carrying the head and the other the end. The body appeared to have been dragged for a short distance within the enclosure.

The sequence of events that followed the discovery of Mr. Seymour's body can be summarized in the following paragraphs.

The police found two sets of blood-stained fingerprints on the gate post to the dumpster area in which the body of the deceased was found. One set of these fingerprints belonged to Powell; the other has not been positively identified. Powell was taken into custody on February 5th 2000. In his recorded interview with the police that day he denied any knowledge whatever of the murder of Curtis Seymour other than what he had

heard on television and denied that he had ever had any personal contact with Curtis. But on February 9th 2000 he gave a cautioned statement to the police. In this statement Powell detailed a plan developed by Ebanks to rob a taxi driver; that he had gone along with Ebanks for this purpose; that during the journey to the Flowers Apartments he recognized the taxi-driver to be Curtis, that when the taxi stopped, Ebanks held the driver from behind and demanded money; that he searched for the money and that Ebanks removed a knife from his back pocket and stabbed Curtis twice in the chest. Powell said the stabbing was no part of the plan to rob and he did not know that Ebanks intended to stab Curtis. He said further that Ebanks dragged the body of Curtis to the dumpster and he assisted in opening the gate. Both Powell and Ebanks re-entered the taxi; Ebanks threw away the knife in some bushes at the Flowers Apartments and then drove the taxi to a swamp area. Ebanks tried to dispose of the taxi in the swamp by attaching a stone to the gas pedal. The taxi bogged down. Powell and Ebanks removed their blood stained clothes and hid them in some bushes.

On February 11th 2000, Powell offered to take the police to where the clothes had been hidden and where Ebanks had thrown the knife. In this search, directed by Powell, the police found several items of bloodstained clothing and the knife believed to be the murder weapon. Then on February 16th 2000 Powell gave a voluntary interview with the police in which he confirmed the facts provided by him in his statement of February 11th 2000 and added some details. These included the fact that Ebanks used his right hand to stab Curtis; that Powell touched Curtis when he was searching him for money while Curtis was being held by Ebanks; that he touched Curtis in the taxi after he had been

stabbed and identified the knife found in the bushes at Flowers Apartment as the murder weapon.

On February 21st 2000, Powell gave a further witness statement to the police implicating Ebanks. In this witness statement Powell said, *inter alia*, the following: he and Ebanks were at his home on the afternoon of Monday January 17th 2000 smoking ganja; they dressed and went to the Zodiac bar in George Town where they had alcohol; about midnight they went to the Breadfruit Restaurant where Powell had a meal; Ebanks went to a nearby warehouse and smoked cocaine; Ebanks made a telephone call for a taxi at the Texaco Service Station; Ebanks told him of his plan to rob a taxi driver; Powell and Ebanks sat in the back of the taxi; Powell recognized the taxi driver to be Curtis whom he knew before; Ebanks gave instructions to the taxi driver to take them to Flowers Apartment; Curtis said the fare was $12.00; Ebanks held Curtis around his neck and demanded money; Powell then searched and found the money in the taxi; Powell opened the door to leave and the lights came on; Ebanks turned off the lights; Powell said to Ebanks: "Let's leave, let's leave"; Ebanks repeated the words, then drew a chrome knife from his back pocket and stabbed Curtis two times in his chest. The statement contained details of the disposal of the body, the taxi, the knife and the clothing. At a subsequent preliminary inquiry into the charge against Ebanks this statement from Powell was included in the committal documents.

Powell gave sworn evidence at trial in which he departed substantially from the various statements that he had given to the police. We will refer to his defence at trial and the evidence which he then gave later.

Ebanks was arrested on February 4th 2000. He was interviewed by the police on February 9th 2000. Powell had given his second statement to the police on that date and immediately afterwards, the police took his statement to Ebanks. They cautioned him in a full and proper way and read that statement to him. Ebanks termed the contents of that statement "bullshit". He declined to respond to any of the questions posed to him by the police.

The prosecution alleged that on February 16th 2000, police officers Angela Campbell and Wayne Powell interviewed Ebanks in his cell. The trial judge found that these officers did not expressly caution Ebanks before the interview began or during the interview but that the caution of February 9th 2000 still operated on the mind of Ebanks. He also found that statements made by Ebanks to the officers were voluntary and were not in breach of any of the restrictive rules relating to statements taken from accused persons in custody. There was no appeal from the judge's decision to admit into evidence the police accounts of what Ebanks told them in that interview.

Ebanks refused to speak to the police officers at the commencement of the interview. His concern was then he should not be recorded and that he was not providing anything in writing that would cause his eventual imprisonment. When officer Campbell

assured Ebanks that he was not being recorded he demanded that she remove her jacket so that he could discern for himself that she was not wearing a concealed recording device. The interview is alleged to have lasted for one hour during which time Ebanks spoke generally of his early years' experience. Immediately after the conclusion of the interview the two police officers went to their offices and recorded their recollections of what Ebanks had told them. Henderson J. considered the statement of Angela Campbell important and as he said at page 1038 of the record: "I will refer to that statement in detail now". Ebanks did not give evidence at trial nor did he call any witnesses. We will therefore reproduce below the statement as recorded by the trial judge:

> "Detective Constable Campbell, who was interviewing Mr. Ebanks together with Detective Constable Powell, said that near the beginning of the conversation, Mr. Ebanks asked if he was being tape recorded. Both the constables told him "no". That was the truth. Mr. Ebanks asked Detective Constable Campbell to open her jacket to be sure he was not being tape-recorded and she did so. Detective Constable Powell was only wearing a shirt and pants so the same request was not made of him.
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> Detective Constable Campbell said that the conversation took about one hour. In deference to the request of Mr. Ebanks she did not record it or write it down while the conversation was occurring. Immediately after it ended she went into an office and wrote down as much as she could remember of it from memory. She acknowledged readily that Mr. Ebanks said a lot more than she had been able to record in writing, because she had simply forgotten those parts. She did not bring back to Mr. Ebanks what she had written down, so there is no evidence that Mr. Ebanks had ever in any way confirmed or authenticated the record of the conversation which she had made.
>
> Detective Constable Campbell said that she and Mr. Ebanks spoke of religious and spiritual matters for some time. I have already ruled during the *voir dire* that this induced in Mr. Ebanks some feelings of remorse and a desire to speak. He did say, at some point towards the end of the discussion about religion, that he wanted to give a statement but he was not ready then.

He was shown Mr. Powell's statement again. He hung his head, sighed and pointed to it. He then said, "three quarters of it are lies". Detective Constable Campbell asked what part. He said, "Most of it". He said he wanted "to walk out of here a free man as he did not kill Curtis Seymour and it was that mental LaHee patient (meaning Mr. Powell) who did it". Mr. Ebanks said that night he was really looking for a woman. Mr. Powell dragged him away to go with him. They went down to a Texaco Station on Eastern Avenue. He gave Mr. Powell three ten cent pieces to call a taxi. Mr. Powell used the pay phone and called "some hotel". Mr. Ebanks said Mr. Powell had Curtis Seymour's number on a piece of paper in his pocket. He called that number a couple of times. Mr. Ebanks said he wanted to leave but Mr. Powell told him to hold on as the man was coming in half an hour. (That last statement does not appear in the version of the conversation testified to by Detective Constable Powell, who also created his own record of the statement, but I am satisfied it was made).

Mr. Ebanks said that the taxi came and picked him up. It was Curtis Seymour driving. Mr. Powell told him that he lived at Flowers Apartments. Mr. Ebanks said that when they got to that location, Mr. Powell "questioned as to say at what number he lived at". Detective Constable Powell quoted Mr. Ebanks as saying Mr. Powell said, "Which one I live at again?". Mr. Ebanks said he looked at Powell "surprisingly" after he said that.

When Mr. Seymour stopped the van, Mr. Powell grabbed him from behind with his two hands and said, "I want my money. I want my money". Curtis Seymour said "I done a deal with you and that already". Mr. Powell kept asking him and Mr. Seymour said to open the dashboard. (Detective Constable Powell's version was that Mr. Ebanks said, "Look on the dashboard".

Mr. Ebanks said he opened the dashboard and found some money. He said it was about $200.00 in change. He said he looked in Mr. Seymour's face and told him to give Mr. Powell his money. Mr. Seymour said he, "Would deal with him and that later". Mr. Powell told him to pass the knife because the "pussy hole boy had done seen we face and he know it". Detective Constable Powell added that he recalled Mr. Ebanks saying that Mr. Ebanks was in the process of getting out of the van when the defendant Powell said that. Mr. Ebanks told the police that he had the knife but it fell out of his pocket when he was getting the money. Mr. Ebanks said he felt on the floor, he found the knife and gave it to "Bryan".

Mr. Ebanks said, "Bryan took the knife and it was like a horror movie". He said, "With both hands over Curtis Seymour, he came down with the

knife two times". Mr. Ebanks said Mr. Powell had already stabbed him before that. He said Seymour leaned to the right and he could hear the blood dripping on the carpet. He said that he could smell the blood also which made him want to vomit. He said Mr. Powell got out of the van and said, "What we going to do, what we going to do?" He said Mr. Powell ran around to the driver's side of the van and tried to pull Mr. Seymour out but he could not. Mr. Powell went back to Mr. Ebanks and said, "What we going to do, what we going to do?" Mr. Ebanks told Mr. Powell "to get rid of that thing" meaning the knife. (Detective Constable Powell's version of that was, "throw that thing away, man".) Mr. Ebanks said that Mr. Powell should throw it in the bush.

Mr. Ebanks said he went to the driver's side door and released the seat belt. Then Mr. Powell dragged Mr. Seymour out, dropped him on the ground and searched him. He said Mr. Powell dragged him by one foot to the dumpster. He said he came back to the van and then went back to the dumpster. Mr. Ebanks said that when Mr. Powell came back he wanted to drive and Mr. Ebanks told Mr. Powell "No". Mr. Ebanks said he was going to drive. He said there was so much blood in the seat he had to put his jacket down to sit on it.

He said he drove the van to where it was found and tried to "dump it" by putting a rock on the gas pedal, but it got "bogged". He said they left the area of the van and Mr. Powell then asked him where the van keys were. Mr. Powell did not want to get them because he thought Mr. Ebanks was going to leave him. However, Mr. Powell went back to the van because "his fingerprints would be on it". He said he threw the keys in the bush and Mr. Powell threw the radios away.

Mr. Ebanks said he and Mr. Powell went through the bush and came out by the Rugby Club on South Sound. He said that while they were going through the bush he saw Mr. Powell with "the man's cellular phone" and he wanted to call someone to have that person pick them up. Mr. Ebanks said to Mr. Powell, "are you crazy, if you make any call from this phone the police can trace the last call and it would be right after the murder". He said Mr. Powell threw the phone away then. Mr. Ebanks said he didn't know where as he didn't know at that time what part of Cayman he was in.

Mr. Ebanks said he took off his shirt and Mr. Powell took off his. Mr. Ebanks gave his shirt and jacket to Mr. Powell and Mr. Powell threw them away. Mr. Ebanks said he didn't know where they were thrown. Ebanks said he walked from the rugby club to another road next to Eden Rock. They came out in Walker's Road and went through behind the Hospital. They went through "Triple-C" and through the Racquet Club and came out by the Zodiac. (At this point, Detective Constable Powell

> remembers Mr. Ebanks saying, "Bryan was full of blood".) Mr. Ebanks said a tall dark man whom Mr. Powell knew had brought a shirt. He said they caught a bus to West Bay from a bus stop across from Funky Tangs.
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> At this point, Detective Constable Campbell asked Mr. Ebanks if she should put what he had said into writing. He said, "No, I do not want to". He said he wanted some time to think about it. He wanted to tell the truth but he did not want to go to prison for something he did not do. He said he wanted to go to Court first and take his chances, because the most he could get charged with is accessory to murder."

Ebanks did not give evidence at any stage of the trial. There was a challenge on Ebanks' behalf to the admissibility of the evidence from Constable Campbell and Detective Powell and a *voir dire* was conducted by the trial judge in that behalf. Ebanks did not give evidence during the *voir dire*. At the close of prosecution case Ebanks elected to offer no evidence.

Powell elected to give sworn evidence at trial. At pages 1048 to 1051 of the record, the trial judge summarized the evidence that Powell gave at trial. Powell said that he knew the deceased (Curtis) at the Cayman Islands Marine Institute (CIMI) around 1994 to 1995 when he was a student at CIMI and Curtis was a teacher there. They lost touch. In about 1999, Curtis approached Powell and requested him to sell 5 ounces of cocaine and they would split the profit equally. Powell said he received and sold the drugs and paid over the money to Curtis. In November 1999 Curtis gave Powell 5 ounces of cocaine to be sold on the same basis. The cocaine was stolen from the place where Powell had hidden it and he reported the loss to Curtis who became angry. Two months later, on January 16th 2000, Curtis came to his home and offered to consign to him a further amount of cocaine for sale and requested Powell to meet him at the Blue Marlin

Restaurant on the following night. Powell had been given the name of the taxi service at which Curtis worked and so when he got to the Blue Marlin he telephoned Curtis who picked him up and drove him to the Flowers Apartments where he expected to receive the cocaine. When the taxi stopped, Curtis inquired if Powell knew why they were there and when Powell responded that he was there to pick up the cocaine, Curtis said he wanted his cash for the previous consignment. Powell said he told Curtis that he had no cash. Whereupon Curtis asked Powell if he wanted to die and pulled out a knife, put it to Powell's throat and said "this is going to be the night you pay for it".

Powell said, "I can see in his eyes that something bad was going to happen. I grabbed the knife and we started fighting. He was trying to stab me. It fell close to where we was. I managed to get the knife. I shoved him off of me, but he kept on coming into me. I was shoving the knife at him to get him to back off. He just kept coming at me. He opened the car door and fell out. I ran around to see if he was breathing. I was so frightened that I didn't know what to do. While in the taxi, I did not know I had stabbed him. While we were fighting I did not have enough time to get the door opened. I tried to keep him off of me. We were in the front fighting, then we got close to the back. I was so frightened I just grabbed him (meaning the body, at this point). I saw a trash can so I put him there. I jumped in and drove off."

In the preceding paragraph Powell provided an explanation that would entitle him to a complete acquittal of the offence charged. He adamantly and repeatedly maintained

that he was alone with Curtis in the taxi and that Ebanks was not present during the encounter with Curtis on that night.

Powell's further explanation of his subsequent conduct, was that he threw the knife in the bushes, that he drove the taxi down to the dykes and tried to dispose of it in the canal and the he did not call for help as he was frightened and the altercation was about drugs.

Powell gave the following explanations for his various statements to the police: (a) on February 5th 2000 he did not know what to tell them; (b) the statement he made on February 9th 2000 blaming the killing on Ebanks was due to the fact that he had learned by then that Ebanks had stolen the cocaine in November 1999 and he intentionally lied to get Ebanks into trouble; (c) the third statement was as a result of police beatings; they were torturing him and he gave them a story so that they would leave him alone. Finally, Powell said he got information from certain sources that it was not Ebanks who had stolen his cocaine and consequently he withdrew his false allegations against Ebanks in his trial testimony.

THE CASE OF THE APPELLANT POWELL

The single ground of appeal argued by Mr. Kinch on behalf of Powell was that his conviction is unsafe and unsatisfactory in all the circumstances. Six separate reasons

were advanced in support of this proposition. As these reasons were the basic submissions of Mr. Kinch we will set them out in full.

1) "At an early stage of the investigation, the Appellant confessed to the police that he had been involved in a robbery of the deceased during which the co-accused had unexpectedly used a knife to stab and kill the deceased. The Appellant took the police to the areas where the murder weapon and blood stained clothing had been hidden. The Appellant confessed to robbery and being an accessory after the fact to murder. The Appellant was later asked to make a witness statement against the co-accused in which he repeated his account. The content of the admissions was consistent with the other evidence in the case. The learned judge never considered the veracity of the confessions.

2) At trial the Appellant gave evidence that he had acted alone and had killed the deceased in self-defense. The learned Judge found that the Appellant was lying. It is conceded that was a proper finding. However, the learned judge failed to consider why the lies had been told. His approach was wrong in law and this led to the risk of a miscarriage of justice. In particular:

   a) The Learned Trial Judge failed to satisfy himself that there was no "innocent" reason for the telling of the lies such as the protection of a co-accused. If such an explanation may have been the reason for the telling of the false account then there would be no basis for considering the Appellant wielded the knife.

   b) The Learned Judge erred in selecting part of the Appellant's evidence relating to the stabbing of the deceased and deeming it truthful without having satisfied himself that the reason for the appellant telling lies was to conceal his guilt of the offence charged.

   c) The reasons given by the Learned Judge for accepting Powell as the man who had stabbed the deceased applied with equal force to the co-accused.

   d) The Learned Judge erred in giving some weight to the confession of the co-accused Kurt Fabian Ebanks that pointed to the appellant as the man who had stabbed the deceased. Insofar as the Learned Judge considered the confession of

Ebanks, he took into account irrelevant and inadmissible matters.

e) The Learned Judge's reasoning took him beyond the factual basis on which the case had been put by the Crown. The Crown had asserted that the appellant had lied to protect his co-accused and that his original confessions were true or substantially true.

f) The Learned Judge failed to give any weight to the contribution of the appellant to the investigation and to the circumstances of the Appellant's confession to robbery and acting as an accessory after the fact to murder. Once the Appellant's evidence was rejected, unless the learned Judge could satisfy himself that the confessions were untrue or significantly incomplete, the Appellant was entitled to a verdict of not guilty of murder. Insofar as he failed to consider these matters, the learned Judge omitted relevant matters from his consideration.

g) This Appellant was entitled to have his case considered on the totality of the evidence against him. The reasoning of the Learned Judge has resulted in a conviction for murder because the Appellant lied in evidence, without a proper consideration of the whole of the evidence in the case".

Mr. Kinch submitted that the conviction of Powell was unsafe because there was a risk that he was convicted solely because he had lied in court and not because of the weight of the evidence against him. He said that it was entirely inconsistent for the trial judge to accept a part of the statement of Powell as being truthful unless he was satisfied as to the reason why Powell lied in the other parts. He said that the trial judge accepted Powell's admission that he wielded the knife that killed Curtis without deciding whether Powell might be lying to protect Ebanks. Mr. Kinch was driven to say that if indeed Powell was lying to protect Ebanks he perforce had to maintain that he acted alone and that it was he himself that used the knife. He submitted that it was illogical for the judge to extract a part of the evidence of Powell and accept it as true if the judge found that

Powell was in other respects lying. He said that there was no prosecution witness who had stated positively how the stabbing took place so that if the court rejected the evidence of Powell it could then fall back on the evidence of another prosecution witness. The court, he said, could not act upon the disputed out of court statement by Ebanks that Powell had done the stabbing, because Ebanks had not given evidence at trial.

Mr. Kinch relied on portions of the judgment of Henderson J. when the judge was summarizing the case against Ebanks at p. 1045-6 and 1047 of the Record, and at pages 1051, 1052 and 1053 of the Record in his analysis of the case of Powell. We will set out the impugned passages below:

p. 1045-6: "He admits to knowing that Mr. Powell would use the knife to kill Curtis Seymour because Mr. Seymour had seen their faces and knew at least one of them. To convict Mr. Ebanks, I must be sure that Mr. Ebanks actually said these words and that they are true."

p. 1047: I must also take into account the sworn testimony of Bryan Powell as, if it is true, or if it raises a doubt in my mind, it would be evidence that Mr. Ebanks was not even present during the killing of Curtis Seymour. I will review that testimony now".

p. 1051: I have no hesitation in rejecting most of the evidence of Mr. Powell. I accept his admission that he stabbed Curtis Seymour, but I do not believe it was in self-defence. Neither do I believe that Mr. Powell acted under the influence of any provocation from Curtis Seymour."

p. 1052-53: "In addition to all that, I observed Mr. Powell's demeanor on the witness stand closely. I infer from it that he was lying. I am satisfied beyond a reasonable doubt that Mr.

> Powell's evidence, insofar as it suggests a defence of self-defence of self-defence or provocation is not true. I am sure those parts of his evidence are lies."

Henderson J. found that the story that Powell gave in the witness box was highly implausible. He found it implausible that a drug dealer who had not seen Powell for several years would trust him with five thousand dollars worth of drugs, particularly when this drug dealer had to work as a taxi driver to earn his living. Then he continued:

> "It is implausible that a drug dealer would wait two months to accost Mr. Powell about missing drug money. It is implausible that Mr. Seymour, who was seated in the driver's seat when he was fatally stabbed and bled to death, would have been attacking Mr. Powell from that position without any assistance. It is implausible that Mr. Powell would show the presence of mind that he did immediately after this "horrifying" event and dispose of the body and the incriminating articles. It is implausible that in three interviews with the police Mr. Powell would not reveal anything of what he said happened to him that night. It is implausible that Mr. Powell would phone the taxi company and know, as he said in his evidence, that Mr. Seymour was coming. There were other taxi drivers on duty that night.
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> In addition to all that, I observed Mr. Powell's demeanor on the witness stand closely. I infer from it that he was lying. I am satisfied beyond a reasonable doubt that Mr. Powell's evidence, insofar as it suggests a defence of self-defence or provocation, is not true. I am sure that those parts of his evidence are lies.
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> I am sure that Mr. Powell administered the fatal knife wound to Mr. Seymour, as he admitted in evidence, but that it was administered in the course of a robbery and not in the course of a struggle. The absence of defensive wounds on Mr. Powell, the fact that there were two stab wounds on Mr. Seymour's chest and two on his neck, the fact that Mr. Seymour defecated during the struggle and the angle of entry of some of the wounds are all significant pieces of evidence inconsistent with self defence and consistent with a deliberate killing. I find that Mr. Powell intended to cause the death of Mr. Seymour and so did."

Mr. Kinch drew our attention to the decision of the Court of Appeal in England in *R. v Goodway* [1993] 4 All E R 894. In that case a man was stabbed to death in a fracas between two groups of people. The appellant's knife was found under the man's body and much blood on the appellant's clothing was of the same blood group of the deceased. When interviewed by the police officer after his arrest, the appellant denied being anywhere near the victim. The prosecution at trial relied on the fact that the appellant had lied to the police when interviewed as support for the evidence of identification put forward by the Crown. The appellant's defence was that one "C" was responsible for the killing. In his summing up the trial judge did not give the jury any direction as to how they should approach the fact that the appellant had falsely denied that he was near the victim when interviewed. Lord Taylor of Gosforth CJ in delivering the judgment of the court said at p. 900 that:

> "It is well established that where lies told by the defendant are relied on by the Crown, or may be relied on by the jury as corroboration, where that is required, or as support for identification evidence, the judge should give a direction along the lines indicated in *R. v Lucus* [1981] 2 All E R 1008, 1011; [1981] QB 720 at 724. That is to the effect that the lie must be deliberate and must relate to a material issue. The jury must be satisfied that there is no innocent motive for the lie and should be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame, or out of a wish to conceal disgraceful behaviour."

The court went on to hold that there was no reason in principle or logic for drawing a distinction between corroboration and identification cases and any other case in which lies may be relied upon in support of prosecution and that a *Lucas* direction should be

given, save where it is otiose as indicated in *R. v. Dehar* [1969] NZLR 763, 766, whenever lies are, or may be, relied upon as supporting evidence of the defendant's guilt.

The Court of Appeal in New Zealand in *Dehar's* case was dealing with a fact situation in which the appellant's statements to law enforcement officers and his evidence at trial did not contain any admission of guilt of the crime charged. All his statements, in and out of court, were that he could not remember his movements at the critical time. Turner J. in the course of his judgment said:

> "There may be cases, as for instance, *R v Dunster* an appeal [unreported] that came before this Court in April 1967, where the rejection of the explanation given by the accused almost necessarily leaves the jury with no choice but to convict as a matter of logic".

R v Burge and Pegg [1996] 1 Cr. App R 163, arose out of a conviction for murder that was committed during a robbery. Mr. Bulgin relied on that decision in this case to support the decision of the learned trial judge. *Goodway*, *Lucas* and *Dehar* were fully considered by the Court. Kennedy L.J. said at p. 172 of the report:

> "The point we wish to make is that a *Lucas* direction is not required in every case in which a defendant gives evidence, even if he gives evidence about a number of matters, and the jury may conclude in relation to some matters at least that he has been telling lies. The warning is only required if there is a danger that they may regard that conclusion as probative of his guilt of the offence which they are considering."

Goodway, the Court said, comes into play where the prosecution say, or the judge envisages that the jury may say, that the lie is evidence against the accused; in effect,

using it as an implied admission of guilt. If a *Lucas* direction is given where there is no need for such a direction (as in the normal case where there is straight conflict of evidence) it will add complexity and do more harm than good.

At page 731 of the report, the Court summarized the four circumstances, which may overlap, in which a *Lucas* direction should be given:

> "1. Where the defence relies on an alibi;
>
> 2. Where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from the other evidence in the case and amongst that other evidence draws attention to lies told, by the defendant;
>
> 3. Where the prosecution seek to show that something said, either in or out of court, in relation to a separate and distinct issue was a lie, and rely on the lie as evidence of guilt in relation to the charge which is sought to be proved.
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> 4. Where although the prosecution have not adopted the approach to which we have just referred , the judge reasonably envisages that there is real danger that the jury may do so."

No *Lucas* direction was given in *R. v Hill* [1996] Crim. L R 419, a decision of the Court of Appeal Criminal Division. In that case the appellant admitted causing death of the deceased but denied that he had either the intent to kill or to cause really serious injury. He admitted spending the night at the deceased's flat but explained that during the night he was awakened by the deceased attempting to unzip his trousers whereupon he struck him with a backhanded blow causing the deceased to fall and hit his head on a chair in the middle of the room. The prosecution led unchallenged evidence that the cause of death was strangulation leading to asphyxia. At trial the defendant changed his version

of events to accommodate forensic evidence called by the Crown to show that there were a number of bloodstains near the door, while maintaining throughout that he had no intent as charged. He was convicted of murder and his appeal was dismissed. The court held that a *Lucas* direction was not required simply because the jury rejected the evidence of an accused about a central issue in the case since that situation was covered by the general directions on the burden and standard of proof. The court said that the only issue in the case was whether the defendant had one of the intents charged; that their decision on that issue depended on the inferences to be drawn from the forensic evidence and not at all upon whether they believed that the defendant was being truthful when he said that he could not remember strangling the deceased. In commenting on this case, the learned author of the Criminal Law Review note observed that "If, as in the present case, there is a central conflict of evidence to be resolved, and the defendant has been less than consistent about his side of the account, there is likely to be far less of a need for any special guidance than if the lie is about a peripheral issue which, though relevant, has no direct bearing on the matter to be resolved and which the jury might get out of proportion".

It was held in *R v House and Meadows*, [1994] Crim L R 682, and *R v Tucker* [1994} Crim LR 683 that where lies are used by the prosecution merely to challenge the credibility of the defendant and not to lead the jury into thinking that the defendant must be guilty because he lied, there is no obligation on a trial judge to give a *Lucas* direction.

Henderson J. was sitting alone. There was no jury. The trial judge received full assistance from defence counsel on how to treat the issue of lies if he found that Powell had lied in his evidence. It is well to quote a portion of Mr. Kinch's arguments before us. "When arguing Powell's case before Henderson J., counsel argued that in the event of the judge finding that Powell had lied in his evidence, the court would have to ask why the lies were told. In certain cases when lies concern the central facts of the case, it may not be necessary to carry out this exercise." (See paragraph 13 Argument at trial). It seems to us that the trial judge clearly found that this was a case in which Powell lied on the central facts of the case. The prosecution had evidence of the bloodstained fingerprints of Powell on the gatepost ot the enclosure in which the body of Curtis was discarded; the prosecution had evidence of the fingerprints of Powell on the dashboard of the taxi of the deceased; the prosecution had evidence that Powell knew exactly where the weapon that killed Curtis was thrown and the prosecution had evidence not only of the bloodstained clothes of Powell but that Powell knew where they had been hidden. These pieces of hard evidence clearly linked Powell with Curtis on the night that Curtis was killed. As in the case of *R. v Hill* (*supra*), the central issue was whether Powell acted in self-defence. Powell's self-defence scenario was rejected by the trial judge because it was a totally implausible account. Henderson J. was at pains to point out the major areas of implausibility which convinced him that Powell was not speaking the truth when he said that he was attacked by Curtis with a knife, managed to disarm Curtis and used the knife as a shield against the repeated attacks by Curtis. The angle of the injuries to Curtis confirmed the trial judge in his views that Powell could not be believed when he said he acted in self-defence or under provocation.

Henderson J., sitting in his capacity as judge and jury, had the opportunity to observe the demeanor of Powell and after examination of his demeanor was able to find that certain areas of his evidence were credible and other areas were not to be believed. This is a function that a jury normally performs and juries are routinely directed that they can reject so much of a witness' testimony as they find to be untrue. There were objective signs from the evidence that Powell's account that he acted alone was highly implausible. Curtis was seated in the driver's seat when he was stabbed and the volume of blood discovered in that seat pointed to that conclusion. Curtis defecated and the unchallenged scientific evidence was that this was a reaction to great fear. The pattern of blood stains and marks on the ground from the parking lot to where the body was found indicated that the body was lifted off the ground at some points and dragged along the ground at another point. The inescapable inference was that more than one person was involved in the removal of that body. In his role as the jury, the trial judge was struck by the fact that Powell had cooperated with the police by assisting in locating the murder weapon and the blood stained clothing; had given voluntary statements to the police and yet had not until trial said one word about the attack upon him by a murderous Curtis which attack he was only able to repel with grace and luck.

The trial judge did not, as Mr. Kinch submitted, use any portion of the out of court disputed statement by Ebanks to come to his conclusion that Powell wielded the knife that killed Curtis. Powell admitted this fact in sworn evidence before the Court. He was represented by very senior and experienced counsel and the import of this admission

must have been apparent to Powell. In the context of the case in which Powell's presence at the scene of the crime was never disputed, the trial judge who saw and heard Powell in examination and cross-examination was in the best position to decide if Powell was speaking the truth on this point.

In our view the decisions in *R. v House and Meadows* and *R. v Tucker* (*supra*) make it clear that where the trial judge determines that credibility of the witness is the only live issue, it is unnecessary to embark upon a *Lucas* direction to himself. This case, in any event, falls squarely within the exception that has been recognized in *Dehar's* case in that it would be otiose to give a direction on lies, where the rejection of the explanation that Powell acted in self-defence would inexorably leave the judge to conclude that Powell was the man who stabbed and killed Curtis in the course of a robbery.

It is true that where the tribunal of fact finds that the witness has given untruthful evidence in its totality, the result is the same as if he had given no evidence at all. An alibi witness may be completely rejected. It might not be the same where the witness was undoubtedly present at the scene of the crime but had made mistakes in part of his/her testimony or has deliberately lied as to other parts of the testimony. It would never be sufficient for a trial judge to direct a jury that if they found the witness to be lying on any part of his/her testimony they must necessarily reject the entire testimony of that witness. The dictum of Lord Devlin in *R. v Bathurst* [1964] AC 441 at 457 that in normal circumstances "a case in which an accused gives untruthful evidence is no different from one in which he gives no evidence at all" cannot be interpreted to mean that a jury should

reject all of an accused testimony if they found him to be lying on any part of that evidence.

In our view, the complaint that the trial judge unreasonably and illogically selected portions of Powell's evidence as being true and rejected other portions for no good reason, is not well founded.

For the reasons contained herein we did not find merit in any portion of the ground of appeal argued on behalf of Powell and we dismissed his appeal and affirmed his conviction and sentence.

THE CASE OF THE APPELLANT EBANKS

We now turn to deal with the appeal by the appellant Ebanks. We have already set out the factual basis presented by the Crown in support of the indictment against Ebanks. The sole ground of appeal raised on behalf of Ebanks was the alleged failure of his counsel in the proper conduct of his defence at trial.

Before us Ebanks was represented by Mr. Schofield who did not appear at trial. Ebanks' in his second amended grounds of appeal alleges that the verdict was unsafe and unsatisfactory on the following bases:

"1. The Appellant says that:

(a) the sole evidence against him consisted of his alleged statement of 17 February 2000 to the investigating police officers W.P.C. Angela Campbell and D.C. Wayne Powell;

(b) The alleged statement of 17 Feb 2000 was not reduced to writing and signed by him; and

(c) He continually and consistently instructed each of his defending counsel that he had not made the alleged statement and that it was a fabrication by the police officers.

2. In the premises, the failure of the Appellant's counsel to call him to testify on the *voir dire* proceedings, in defiance of or without proper instructions, was a failure of judgment so fundamental in nature that the Appellant was deprived of due process of law and did not receive a fair trial.

3. Furthermore, the conduct of counsel discouraged, impeded, and prevented the Appellant from testifying that he did not make the statement alleged, resulting in a material irregularity in the course of his trial".

Ebanks filed an affidavit on October 25th 2001 that raised the issue in his appeal. Responsive affidavits were filed by attorneys Philip St. John Stevens, David Thomas McGrath, Gregory Link and Neville W. Levy. These were the attorneys referred to by Ebanks in his affidavit and Ebanks issued a Release of Privilege, dated 22 October 2001, thereby releasing his attorneys from attorney/client privilege in relation to communications between them in respect of his arrest and trial for murder in this case.

In paragraphs 1 through 9 of his affidavit Ebanks alleged that he knew WPC Campbell from 1994 at a time when she was married to the father of his best friend and that she disliked him from that time; that after his arrest she tried to coax him to give a statement on February 9th 2000; that he refused; that she tried again on February 17th and he adamantly refused; that he called for attorney Neville Levy who attended at the police

station and advised him not to make any statement; and that when WPC Campbell repeated her request for a statement he bluntly refused to give one. She left him in great anger saying, "It's your life, it's your life".

In paragraphs 9, 11, 12 and 13 of the affidavit, Ebanks said:

> "9. I told my attorney, David McGrath, from the beginning, that I did not make any statement on February 17, 2000, or at any other date. I told him that the police officers were lying on me. I repeated all of this to Mr. St. John Stevens, my English attorney. I told both of them this more than once.
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> 11. When the *voir dire* started concerning my statement, I was expecting Mr. St. John Stevens to charge right to the two police officers who were lying and try to discredit them. But he didn't and he kept telling me "This way is better. They gave you a truncated form of your rights". They also kept saying to me, "You've told me that you did not make the statement, but I'm going to attack it this way. They kept you in custody too long without charging you. I'll get the statement thrown out because of oppressive conduct". Never once did he put to the officers the fact that I didn't make the statement at all. I sat in the court and listened to the two officers' lies and kept thinking that I would have my chance to talk later. At all times, I wanted to testify and tell the judge under oath what I have stated in this affidavit. Then the time came and I was talked out of it by the two lawyers. They made me think that they knew best and so I put all my trust in them.
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> 12 During the testimony of Angela Campbell when I heard her lying about a number of things, I got upset and I raised my hand and said, "I want to testify. I want to tell my side of the story". Mr. Stevens jumped up and rushed back to me and said, "Be careful what you're doing, Kurt. They haven't proven anything against you. They're not hurting you, they're not hurting you, so relax and behave and keep quiet. And don't put yourself in the stand and give them a chance to cross-examine you". I told him, "I don't have any problem going on the stand. I'm not guilty of anything. I don't have anything to hide". He told me that if I took the stand and rebutted whatever the officers were saying the judge would more than likely believe them over me and in doing so my ground of appeal "would be thrown out the window". If I didn't testify they would

have a chance for an argument on the appeal. Mr. Stevens said that was the best way to approach the case.

13. At lunchtime on that day, Mr. McGrath came to see me about taking the stand. Mr. McGrath did not actually play much part in my trial. He was not in court everyday and it was Mr. St. John Stevens who conducted my defence. On this day, Mr. McGrath gave me the impression that Mr. Stevens had sent him to talk to me. He said, "This is the turning point in your case. We have to make a tactical decision. I know you were adamant from day one that you gave no statement to the police officers. I said, "yes sir". He then said, "it will be better to approach the case this way since nothing is damaging you". He just talked and talked and I got confused and thought and said, 'Well he is the lawyer", and he talked me out of testifying. Because of that, the judge never got to hear what was the most important thing and that was that those police officers fabricated a statement, I have been convicted of a murder I did not commit and had nothing to do with."

Mr. Levy gave an affidavit in which he said he had no record of having provided any advice to Ebanks in connection with this case but it was his usual practice, in such matters, to advise accused persons to say nothing.

Attorney Link swore in his affidavit that although he assisted Mr. Stevens from time to time in the conduct of the case due to the absence of Mr. McGrath on another case, he did not attend any pretrial conferences with Ebanks.

We set out below the pertinent paragraphs of the affidavit of Mr. McGrath:

4. From a very early stage the appellant's instructions were firm and unequivocal in a number of regards:

(i) He would contest the allegation;
(ii) He would elect trial by judge alone;
(iii) He disputed the making of the alleged confession;
(iv) At no stage in the proceedings would he give evidence.

5. The appellant alleges that his case was presented in defiance of his instructions. This is untrue. The conduct of the case at trial was entirely consistent with the appellant's particular instructions. Whilst it is correct to say that no positive case was ever put in relation to 4 (iii) above, this was upon the appellant's instructions.

6. The instructions that he would not give evidence in the proceedings remained a central tenet of his position throughout.

7. The consequences of his not giving evidence were discussed in great detail with the appellant, both prior to the arrival of leading counsel and in the presence of leading counsel. The decision not to give evidence in the trial created tactical considerations and decisions for the appellant.

8. I explained to the appellant and advised him how this decision might affect his trial. I was present when leading counsel advised the appellant how this might affect his trial. I am satisfied that the appellant understood the advice and that he understood the implications of the decision not to give evidence.

9. The appellant chose to challenge the alleged confession on the basis of its admissibility. Upon instructions it was argued on the *voir dire* that the Crown could not satisfy the tribunal to the requisite criminal standard that what the police officers alleged had been said, had been said voluntarily. I am satisfied that the appellant understood the advice offered and the instructions he was providing in relation to the conduct of the *voir dire.*

10. On the *voir dire* the learned trial Judge ruled against the appellant and in favour of the Crown in relation to the submission that the alleged confession should be excluded. The potential consequences of such ruling had been discussed and were discussed with the appellant before and during the trial. Because he would not give evidence, the appellant chose not to put his case about not making the confession to the police officers in the course of the trial proper. This was a topic which was discussed with him in some detail. I am satisfied that the appellant was aware that, having provided such instructions, the only triable issue for him would be admissibility of the alleged confession.

13. Paragraph 11 of the affidavit is not true. Mr. St. John Stevens was instructed to challenge the admissibility of the alleged admission on the *voir dire.* At no stage did the appellant indicate to me any

desire to testify in the proceedings. I did not "talk [him] out of it". I explained to the appellant on many occasions that the decision whether to give evidence or not was his and his alone. I explained that he could not be compelled to give evidence, neither could anyone stop him from giving evidence. Mr. St. John Stevens did not, as far as I am able to say, put any undue influence or pressure upon the appellant not to give evidence.

15. I did have many conversations with the appellant in the cells during the course of his trial. Mr. St. John Stevens did communicate to me that the appellant had become upset in the dock during the proceedings and there had been a short adjournment. The words which the appellant attributes to me in paragraph 13 of his affidavit are inaccurate in detail and in substance. At no stage did I say or would say, "We have a tactical decision to make". I made it clear at all stages that the decision about testifying, as well as other substantial decisions were matters for the appellant and not matters for me or for leading counsel. I did not talk the appellant out of anything. There was never any change of instructions in relation to the appellant's decision not to give evidence, nor in the way he wished his case to be conducted."

The final affidavit in this matter came from Phillip St. John Stevens. He swore that his initial instructions from David McGrath were, *inter alia*, that the appellant was contesting the matter; he did not wish, indeed would not give evidence and that he would elect a trial by a judge alone. Then he continued:

"In the week before the trial commenced I conducted a conference at HMP Northward with the Appellant and Mr. McGrath. I confirmed the instructions that the Appellant would not give evidence at any stage. I explained fully the ramifications of not giving evidence, the tactical considerations and how he wished his trial to be put".

In response to the accusation of Ebanks that his trial was conducted in defiance of or without proper instructions, Mr. St. John Stevens said:

"2.1 The Appellant's case was presented in accordance with and upon clear and unequivocal instructions.

2.2 I am satisfied that at each material stage both before and during the trial the Appellant's instructions that he would not himself given evidence was unequivocal.

2.3 I am satisfied that those instructions were given and confirmed after the ramifications of not giving evidence, whether it be during the *voir dire* or at the trial, had been explained in detail by myself and David McGrath, both together and independently, and that the Appellant fully understood that advice.

2.4 The ramifications of not giving evidence was discussed and advice given in the context of, the *voir dire*, the trial and potential grounds of appeal."

Mr. St. John Stevens concluded his response by stating:

"(a) The Appellant's instructions were that the Crown should be put to proof as to establishing that the confession in issue was made voluntarily and that no positive case would be put over and above that issue;

(b) These "bedrock" instructions did not change. Up to the time of verdict, the Learned Judge retired for three days to consider his judgment, the Appellant was quite satisfied with the conduct of his defence and understood the avenue of appeal;

(c) He was satisfied that the Appellant's case was presented in accordance with and upon clear and unequivocal instructions;

(d) He was satisfied that the instructions were given upon careful consideration both before and during the trial and that advice was fully understood;

(e) He was satisfied from all he had seen and heard and read that the Appellant's instructing attorney acted at all times with and upon proper instructions."

The Court did not permit viva voce evidence from Ebanks to supplement his affidavit. He had filed no affidavit in response to those from his former attorneys although there was opportunity for him to do so had he so wished. Mr. Schofield referred us to recent authorities that have developed the principle that grossly ineffective assistance of counsel can lead to a miscarriage of justice and hence the quashing of a conviction in certain circumstances. It is an accepted principle that a barrister acting for a defendant should advise his client as to whether or not to give evidence in his own defence but the decision must be taken by the client himself. See the Bar Council "Written Standards of Work" issued with the *Code of Conduct*, Archbold's Supplement p. 3031 at Cap. 12.4. In *R. v. Clinton* [1993] 2 All ER 998, the Court found on the evidence before it, that the correct view of the appellant's attitude was that, although reluctant to give evidence, he was not in such a state of mind that he would have disregarded appropriate advice from his counsel supported by appropriate reasons. The appellant did receive such appropriate advice from his counsel. It is enough to set out the headnote of that case:

> "The circumstances in which the court was entitled to overturn the jury's verdict in a criminal trial when the grounds of appeal consisted wholly or substantially of criticism of defence counsel's conduct of the trial would of necessity be extremely rare. Where defence counsel made decisions regarding the conduct of the trial, particularly whether or not to call the defendant, in good faith after proper consideration of the competing arguments, and where appropriate, after due discussion with his client, his decisions could not render a guilty verdict unsafe or unsatisfactory nor could allegations of incompetence on counsel's part amount to a material irregularity. Conversely, and exceptionally, where it was shown that defence counsel's decision whether or not to call the defendant was taken either in defiance of or without proper instructions, or when all the promptings of reason and good sense pointed the other way, it was open

> to the appellate court to set aside the verdict of the jury ... if counsel's conduct of the trial rendered the verdict unsafe or unsatisfactory."

In the instant case the appellant is seeking to bring his case within the category of "the exceptional". He alleges further that his counsel were in breach of the practice recommended by the Court of Appeal in England in *R. v. Bevan* [1994] 98 Crim App R 354. There, Watkins L.J. said that where a defendant takes a decision not to go into the witness box, it should be the invariable practice of counsel to record that decision and cause the defendant to sign that record, indicating clearly first, that he has, of his own free will, decided not to give evidence and, secondly, that he has so decided bearing in mind the advice, if any, given to him by counsel. This is salient advice and in our view should be adhered to by all counsel in this jurisdiction. That is not to say, however, that where this record is not available the court is powerless to come to a decision as to whether or not the appellant was given such advice and did in fact, of his own free will, voluntarily decide, after advice, that he would not give evidence.

The issue in *Boodram v. The State*, Privy Council Appeal 65 of 2000 from the Court of Appeal of Trinidad and Tobago, was concerned with the gross incompetence of counsel who represented the appellant at her second trial for murder. Counsel was unaware of the first trial until near the end of the retrial and even then he did not make an effort to obtain a transcript of the earlier proceedings to see what could be done to reduce any prejudice or potential prejudice to the defendant on the retrial. Their Lordships considered this the worst case of the failure of counsel to carry out his duties and that his conduct revealed either gross incompetence or a cynical dereliction of the most

elementary professional duties. The Board expressed the view, in agreement with the Chief Justice of Trinidad and Tobago, that where counsel's misconduct has become so extreme as to result in a denial of due process to his client, there is a miscarriage of justice.

Ebanks was being represented by experienced attorneys. Mr. McGrath has sworn that Ebanks gave clear instructions from the inception of the case that he would not give evidence at any stage of the proceedings and that he conveyed those instructions to Mr. Stevens. Both Mr. McGrath and Mr. Stevens have sworn that they had over and over again given detailed advice to Ebanks as to the ramifications of his decision not to give evidence and of the possible consequences and that Ebanks understood those instructions. Mr. McGrath said that he met with Ebanks several times in his cell and Mr. Stevens said that his first conference with Ebanks was a week before the trial commenced. This was not a case in which the defendant did not have access to his counsel and only saw them briefly before his trial. On the affidavits before us we are completely satisfied that Ebanks took a deliberate, constant and continuous decision not to give evidence and instructed his counsel accordingly. It would have been most improper for defence counsel to have suggested to prosecution witnesses W.P.C. Campbell and D.C. Powell that they were lying and had fabricated the account that they were giving unless defence counsel were prepared to call Ebanks as a witness. This much would have been clear to Ebanks and that is why his defence was conducted in a way that no positive case was put forward on his behalf. He had decided to put the Crown to proof and notwithstanding full and appropriate legal advice, maintained that position throughout.

We were not persuaded that defence counsel for Ebanks failed to call him as a witness on the *voir dire* in defiance of or without proper instructions and accordingly we found no merit in his appeal.

Zacca, P.

Rowe, J.A.

Taylor, J.A.