3206/1999

IN THE CAYMAN ISLANDS COURT OF APPEAL

Criminal Appeal No. 18 of 2000
(Indictment No. 57A of 1999)

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

KENNETH RICHARDS

Appellant

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Honourable Mr. Justice G. Collett, Justice of Appeal
The Honourable Mr. Justice I. Rowe, Justice of Appeal

Douglas Schofield instructed by Hunter & Hunter for the Appellant.
The Attorney-General, David Ballantyne, and Cheryll Richards for the Respondent Crown.

Heard: August 13th and 14th 2001 Reasons released: November 30th 2001

REASONS FOR JUDGMENT

ROWE, J.A.

William Myles, a security guard employed to Shield Security Company, was mortally wounded on the steps of the Bank of Nova Scotia, George Town, Grand Cayman, on April 4th 1999 a short time after 1:10 a.m. He was shot twice, once to the torso and once to the left ankle. The bullet to the torso entered just above the iliac crest at the back, on the right side, where it shattered on impact with the right iliac bone. A fragment of this bullet was recovered from the iliac

bone by the pathologist Dr. John Obafunwa, and when it was examined by criminologist Robert Hart of the Miami Dade Police Department, he opined that the bullet fragment could have come from a 9 mm firearm but could not have come from a .38 Beretta. Mr. Myles endured severe soft tissue damage to the large vessels supplying the pelvic organs and the right lower limb. He died on April 6th 1999.

The appellant was convicted of the murder of William Myles after a trial by Smellie C.J. sitting alone. This came about on the election of the appellant, pursuant to section 127(1) of the Criminal Procedure Code (1995 Revision), which provides:

> "If an accused person is of the opinion that, due to the nature of the case or of the surrounding circumstances, a fair trial with a jury may not be possible, he may, at any time before the jury is empanelled, elect to be tried by a Judge alone."

The trial judge imposed the mandatory sentence of life imprisonment for the offence of murder. Four other offences had been joined to the charge of murder in the indictment, to wit, grievous bodily harm, possession of unlicenced firearm with intent and possession of unlicensed firearm. Except as to the sentence that was imposed on count 5, which charged the appellant with possession of an unlicensed firearm, there were no grounds or argument on appeal before us, on these four additional counts.

Mr. Schofield filed six amended grounds of appeal which he supplemented with seven "issues". The amended grounds set out the following complaints:

> "1. The learned trial judge erred in law by misdirecting himself on the law of the Cayman Islands relating to corroboration.

2. The learned trial judge erred in law by misdirecting himself on the law relating to partial admissions and self-serving statements, otherwise known as "mixed" statements.
3. The learned trial judge failed in his duty to first make findings of fact and then to draw from them inferences of fact in accordance with established principles of law.
4. The learned trail judge erred in law by misdirecting himself on the law relating to the burden of proof and the standard of proof in a criminal trial and by failing therefore, to instruct himself according to the correct principles.
5. In the alternative, the learned trial judge erred in law by not directing himself on the law relating to the burden of proof and the standard of proof in a criminal trial.
6. The sentence imposed by the Court in respect of Count 5 in the Indictment (Possession of an Unlicensed Firearm) was, in the circumstances of this case harsh and excessive and wring in principle.

The seven issues that Mr. Schofield elicited from his grounds of appeal are set out below:

1. Did trial judge correctly instruct himself and then correctly apply the principles applicable to so-called "mixed" statements?
2. To be capable, in law, of being corroboration of accomplice testimony, is it necessary that the evidence in question implicate the accused in one, some, or all of the specific ingredients of the crime(s) with which the accused is charged?
3. Is a trail judge entitled to use corroborated evidence interchangeably, without identifying the particular crime(s) it relates to?
4. Is evidence of money found capable of corroborating murder?
5. Does the trial judgement reveal a proper approach tot he drawing of inferences?
6. Should the trial judge have set out clearly in his judgment the burden and standard of proof in criminal trials, in the manner required of judges' in summing up to the juries?
7. Does this judgment meet the requirement of a judge alone trial so that justice is not only done but seen to be done?

What was the case presented by the crown? Evidence was adduced from (a) David Samuel Ebanks, the surviving security guard; (b) Delbert Baker, Desmond Bailey and Alphonso Smith, all three of whom were treated by the trial judge as accomplices; (c) police witnesses who testified as to statements made by the appellant in interviews with the police; (d) police witnesses as to

tangible objects found at the scene of the crime; (e) production of firearms and ammunition related to the prosecution and (f) miscellaneous witnesses.

The robbery that was enacted on the night of Saturday April 3rd 1999, had been in the planning stage from sometime in 1998. Delbert Baker testified that the originator of the plan to rob the Shield Security van that collected money late at night from various business places in George Town for lodgement at banks, was Alphanso Smith, who at the time said he was employed at Foster's Food Fair. Smith provided information to the appellant and to one Peter Bogle, also known as "Brownman" that the Shield Security guards did not carry guns, of the approximate times of the pick-up from Foster's, and expressed the opinion that it was an easy thing to take the money. Baker testified that on the night of Saturday April 3rd 1999, he had in his possession a cellular telephone, number 916-1780, the property of one Christine Burke who was in Miami with Alphonso Smith for the weekend. He met the appellant and Brownman at the Punta Latino night-club on Burke Road and there the appellant asked Baker to give him the number of the cellular phone as Brownman was expecting a call from someone. Baker provided the telephone number. Baker drove the appellant and Brownman to Brownman's apartment on Wahoo Close off North Church Street. Both men alighted from Baker's car, entered the apartments and returned a short time later. Baker, under instructions from Brownman, drove the two men to the Bank of Nova Scotia parking lot. As Baker approached the parking lot, his cellular phone rang and Brownman answered the call. Brownman and the appellant alighted from Baker's car and Brownman told Baker that they are "going to mash a works around the corner". Baker was told by Brownman to pick them up at the parking lot by Goring Avenue, next to the Atlantis submarine office on the waterfront.

Baker testified that as he drove off he heard three shots. He contemplated abandoning the men but recalling that they had his cellular phone, he drove to the rendezvous point as instructed and saw the appellant and Brownman standing there. The appellant was carrying a bag on his arm. Baker drove the two men to the appellant's apartment in Windsor Park. Baker further testified that on the way he heard Brownman remark to the appellant: "You never see the man don't want to drop the money. I have to shot him". When he got to Windsor Park, the appellant gave to Baker the cellular phone and told Baker to "check him tomorrow".

At 9:00a.m. on the Sunday morning, Baker returned to the appellant's apartment. There the appellant gave Baker a bag of money saying, "this is $13,000.00", and the appellant told Baker to keep his mouth shut. The appellant told Baker on that morning that the appellant had money for Alphonso Smith. Baker went home and counted the money. He found CI$9,000.00 and US$4,000.00 in the bag.

Baker drove to the airport on the following day and picked up Alphonso Smith who had then returned from Miami. Baker told Smith about the robbery and that the appellant had money for Smith. Baker drove Smith to the appellant's home that day where the appellant handed Smith a parcel of money. Baker further testified that he subsequently met and spoke to the appellant in Mandeville, Jamaica. In that conversation the appellant told him that the appellant had begged Brownman "not to kill the man", that on the night of the robbery they had two guns, - a black 9 mm automatic and a brown Beretta, that the appellant had fired two shots hitting a security officer in his leg and that Brownman had fired two shots, hitting a security officer. Baker also testified that the appellant had told him, either in Jamaica or at some other time, that the appellant was carrying the black 9 mm and Brownman the brown .38 Beretta.

Desmond Bailey had pleaded guilty to being an accessory after the fact to the robbery and to handling monies known or believed by him to be the proceeds of the robbery. He testified that the appellant gave him $13,000.00 to be delivered to Peter Bogle (Brownman) who had by then left the Island. Bailey testified that he used his own money to purchase an airline ticket in his own name which he gave to Brownman and that Brownman travelled to Jamaica on the ticket although it was in Bailey's name.

Alphanso Smith, an employee of Foster's Food Fair from October 1987 to April 1988, testified that he was approached in 1998 by Delbert Baker, his close friend, who asked him for information concerning the pick-up time of money from Foster's by the Shield Security van. Baker, himself, Brownman and the appellant discussed the matter for a time. Smith said he protested to the men that as an employee of Foster's he could not participate in the scheme to rob the security van, to which they said Brownman and the appellant "will go up front" and Smith would only be the drive. As time went by Smith and Baker took to discouraging the appellant from carrying out the scheme and Smith said that he came to believe that the men had given up. A year went by and he went to Miami with Christine Burke, leaving her cellular phone with Baker. When Smith returned from Miami on April 5th 1999, Baker told him something and took him to the appellant's home. There the appellant gave him $5,000.00 and told him about the robbery. Smith said that he was surprised to learn of the robbery and asked the appellant what kind of foolishness they had gone and done. Smith testified that the appellant told him that Brownman's back was against the wall as Brownman had a drugs case coming up, his lawyer had advised him to plead guilty, that Brownman had decided not to plead guilty and that Brownman wanted some money to take with him to go home to Jamaica and that is why he did it.

Smith testified that the appellant told him that Baker dropped him and Brownman behind the Bank of Nova Scotia, that a security guy at Cable and Wireless used a phone booth to alert him that the Shield Security van was approaching the bank, that they rushed to the front of the bank just in time to catch the two security guards on the step depositing the money, that the appellant shouted "Don't move", that Brownman grabbed the bag with the money from the security guard who pulled it back, that the money scattered on the ground, that Brownman put down the gun on the ground while picking up the money, that the security guard tried to grab him and that he picked up the gun and shot the security guard. Smith continued to relate that the appellant told him that the other security guard was coming to the assistance of the first security guard that got shot. The appellant said that he was guarding Brownman's head, so he shot that security guard in his leg. The security guard staggered and sat down. They then left the scene, went by Goring Avenue near Kentucky Restaurant where Baker was sitting in the car waiting for them and Baker drove them to the appellant's home on Windsor Park. Smith testified further, that Brownman had left for Jamaica the previous night, that Smith kept the money that the appellant had given him as this was the largest amount of money he had received in his life, and that on April 18th 1999 when he went to the appellant's home, the appellant showed him a female known as Princess who the appellant said would be taking Brownman's share to Jamaica.

The appellant did not contest the testimony of Smith that on April 18th 1999, the appellant gave Smith two guns to keep for him as the appellant was going to Jamaica on the following day and that Smith returned the two guns to the appellant when he returned from Jamaica two and a half months later. Smith testified that he received the guns from the appellant in a plastic bag together with some rounds of ammunition and a brown gun holster. Some of the ammunition was

contained in a pill vial that Smith had earlier given to the appellant. Smith asked the appellant if the guns had been used in the robbery and the appellant had told him no. Smith said that although that appellant had promised to tell him the name of the security guard from Cable and Wireless who had informed of the approach of the Shields Security van, the appellant had not done so. Smith identified the firearms and ammunition that were examined by Mr. Robert Hart, the criminologist, as the ones that he had received from the appellant on April 18th 1999 and returned to him on the appellant's return from Jamaica.

David Samuel Ebanks had worked with the deceased for 12 years making night deliveries for Foster's Food Fair in the Shield's Security van driven by the deceased Myles. They completed the pick-up at 1:10 a.m. on April 4th 1999 and drove the short distance to the Bank of Nova Scotia. There, Myles alighted, went to the bank depository, looked around, and when he found the coast to be clear, signalled to Ebanks to bring the deposit bag which contained 5 smaller money bags. When Myles had deposited 2 money bags and was in the act of depositing the third, Ebanks heard a shot, saw Myles sink to the ground, then he saw a man step over the fallen Myles and demanded of him "give me the bag". That man held the bag. There was a brief resistance by Ebanks before another shot was fired that hit Ebanks in his left lower leg. The bag was grabbed from Ebanks spilling the two smaller bags to the ground. As the assailant bent down to retrieve these bags, Ebanks saw a gun trained on him. Ebanks observed a second man standing 2 to 3 feet from Myles towards the corner of the bank building. This man ran away with the one who had robbed Ebanks.

Mr. Ebanks was unable to identify either of the two men. The one who stood by the corner of the building was tall, dark, and slim built. Mr. Ebanks who was quire seriously injured radioed for police and ambulance assistance.

Sergeant Manley Berry was one of the first police officers on the scene. He found 4 spent shells which were later examined by the criminologist who found that 2 of the shells were fired from the .38 Beretta firearm and one was fired from the 9mm hi-point that he also examined.

The police came into possession of the two firearms in a curious way. The appellant was interviewed by the police on July 25th 1999 and he admitted going to Jamaica on April 19th 1999 with some CI$8,000.00. He denied knowledge of the murder. On the following day, July 26th 1999, the appellant elected to make a cautioned statement, which is set out in full below:

> "One evening Brownman and em went to look for chef, Brownman sey him ah borrow him phone, him lend him. Anyway he tell Brownman to drop he home cause I want to catch a movie. So the next day early in the morning Brownman stop by my house, gave me a bag with a camera and some money then he took out some money and gave me and say, give Chef this and this phone ya. Then him give me two gun and five thousand dollars and some change, and say get rid of the gun dem, so me get rid ah dem."

At the completion of this cautioned statement the police officers went to Windsor Park, where in the presence of the attorney for the appellant, the police searched an open lot and found a fully loaded 9 mm firearm. At the home of Roy Richards where the appellant was living the police recovered a .38 Beretta pistol, a holster and a vial containing 22 bullets. These were the guns and ammunition that the criminologist examined. There was never any objection at trial to the introduction into evidence of the record of the interviews with the appellant or to the cautioned statement which he gave. At the close of the prosecution's case, the appellant elected not to give evidence and not to call witnesses.

Mr. Schofield in his skeleton argument and in ground 3 of the grounds of appeal raised the issue of the proper approach to be taken by a Grand Court judge who is sitting as both judge and jury to try a case pursuant to section 127(1`) of the Criminal Procedure Code (1995 Revision). As a matter of principle a judge who sits alone without a jury should find the facts specifically and state separately his conclusions of law thereon. His judgment would then follow. In *Smith v R. Ebanks v R.*, 1988-89 Collett C.J. was dealing with appeals from the Summary Court and he said that:

> "Without a proper record of the proceedings and without a record of the reasons which led the magistrate to his decision it is extremely difficult for the court charged with hearing an appeal to determine whether the decision of the magistrate was arrived at properly."

Harre J. considered that it is "now a fundamental principle of justice that parties to litigation are entitled to know the reasons for decisions of courts of law" – *Bertolino v R.*, 1990-91 CILR 112. In a commentary in Current Law to a provision in the Northern Ireland (Emergency Provisions) Acts of 1973, 1991 and 1996, were trial by judge alone was introduced into Northern Ireland in serious criminal cases, and where reasons for judgment are statutorily mandated, the learned editors say that "the judgment is, for appeal purposes, the equivalent of a judge's direction in a jury trial. It is a requirement of the provision that the judgement should contain every reason or detail relied upon by the judge in coming to a guilty verdict".

Over a period of years the Court of Appeal of Jamaica has provided guidance to judges of the Supreme Court and resident magistrates who try and decide criminal cases sitting without a jury in Jamaica. In *R. v Locksley Carrol* (Jamaica) (unreported) SCCA 39/89. Rowe, P. (as he then was) said:

> "We hold that… judges sitting alone in the High Court Division of the Gun Court, when faced with the issue of visual identification must expressly warn themselves in the fullest form of the dangers of acting upon uncorroborated evidence of visual identification. In this respect we hold that there should be no difference in trial by judge and jury and trial by judge alone".

Wright J. A. advised the trial judge that:

> "He must demonstrate in language that does not require to be construed that in coming to the conclusion adverse to the accused person he has acted with the requisite caution in mind. Such a practice is clearly in favour of consistency because the judge will then be less likely to lapse into the error of omission whether he sits with a jury or alone." – *R. v George Cameron*, SCA 77/88 (Jamaica)

Carey J.A. drew attention to the difficulty of an appellate court which has the duty to determine whether the trial judge has fallen into error by applying some rule incorrectly or not applying the correct principle. He said:

> "If then the judge inscrutably maintains silence as to the principle or principles which he is applying to the facts before him, it becomes difficult, if not impossible for the court of categorize the summation as a reasonable one" – *R v Clifford Donaldson and others*, (unreported) SCCA 70,72 and 73 or 1986 (Jamaica)

When a trial judge sitting alone has advised himself of the applicable principles of law, and given himself any necessary warning, he must indicate clearly in his judgment his reasons for acting as he did in order to demonstrate that he has acted with the requisite degree of caution in mind and has therefore heeded his own warning. No specific form of words is necessary for this demonstration. What is necessary is that the judge's mind upon the matter be clearly revealed. *R. v. Simpson and R. v. Powell*, (1993) 3 LRC 631. We respectfully adopt the principles of law as

stated in the cases referred to above and apply them to the resolution of the issues of law raised in this appeal.

We have diligently considered the format adopted by the learned Chief Justice in his judgment under review. We are satisfied that he has demonstrated in the judgment that he was fully aware of (a) the necessity to provide a reasoned judgment in the case, (b) of the importance of fully articulating the applicable legal principles which governed his conduct of the particular case before him, (c) of the importance of warning himself in relation to special category evidence, to wit, accomplice evidence, (d) of the necessity to set out the evidence on which he intended to rely for his decisions, (e) of specifically and specially determining ultimate facts from that evidence and drawing inferences therefrom, and (f) of coming to a conclusion and judgment based on his ultimate findings of fact and the applicable rules of law. In coming to this conclusion we made allowances for style and notwithstanding the strictures of Mr. Schofield, we did not find the approach of the Chief confusing.

We have considered the lament of Mr. Schofield that there is no entrenched constitutional right to a fair trial in the Constitution of the Cayman Islands, the reference of the Attorney-General to section 28 of the Evidence Law (1995 Revision) and to *Hadjianastassiou v Greece*, 16 EHRR 219, para. 33, and we hold that in this case it was demonstrated beyond a peradventure that the appellant was afforded a fair trial.

As Issue No. 1, it was submitted on behalf of the appellant that the trial judge failed to instruct himself and then correctly apply the principles of law applicable to so-called "mixed" statements. In so far as the Crown's case rested on statements allegedly made by the appellant to

witnesses who testified and statement made by the appellant to the police, these statements were not identical and they did not all implicate the appellant in the murder for which he was on trial. When he was reviewing the evidence of the witness Baker the trial judge stated that he did not accept the exculpatory part of the account given by the appellant Baker, to wit (a) that the appellant had fired one shot that hit the "officer in his leg" and (b) that "he had begged Brownman not to kill the man". The trial judge gave his reason for this decision:

> "Insofar as this reported statement of Richards – if Baker is to be believed – would be exculpatory, I do no accept it. I am, of course entitled to accept or reject such aspects as, in my discretion, I consider to be so treated. This is on the authority of *Sharp* [1988] 1 WLR 7 – even while the statement is admissible in its entirety."

On page 24 of his judgment, the Chief Justice said:

> " Smith, moreover, recounts Richards' description of the incident such that Brownman is placed as the assailant who grabbed the bag from the officer (inferentially David Ebanks) while "he (Richards) covered Brownman's head" while dealing with the other, inferentially, Myles. These are admissions against self-interest made separately to witnesses, albeit accomplices, but neither having any apparent motive to seek to implicate Richard's any more seriously than they would Peter Bogle.
>
> Finally, as to the evidence on the Crown's case, I make note of what the defendant said to the police in his various cautioned interviews and statements. These were read in evidence without objection from the defence. These provided the only record of the defendant's version of events because the defendant, as was his right, elected not to give evidence.
>
> In his first interview, while denying any involvement in the offences, and denying allegations already made by Baker that he was involved and which were put to him by the police, Richards nonetheless admitted having $8,000.00 which he took to Jamaica and used to buy a car. This is money he claimed to have saved, not at a bank, but at home, and this for a man who had only modest income as a construction labourer. The further significant sum of nearly $3,000.00 which the police removed from his apartment he claims to have won gambling.

He admitted in his latter cautioned statement to having received $5,000.00 from Peter Bogle (Brownman) along with the guns and Bogle's request to get rid of them for him. He also speaks of having been given money by Brownman to give to chef (Baker), as well as a telephone.

The exculpatory aspects of this statement I reject. They would suggest, taking the statement by itself, that Richards' involvement was entirely incidental and *ex post facto* and can offer no plausible reason why Peter Bogle would choose to hand over the tainted weapons to Richards alone with large sums of money for himself and for another, Baker, without so much as an explanation for do doing.

The statement is inculpatory in that it admits to possession of the firearms; to possession of money which could only have come from the robbery; and as to the possession of the cellular telephone obtained from Baker.

To that extent I regard it as being corroborative of the evidence respectively given by Richards' accomplices.

I regard the second interview statement in which he sought to expand upon his caution statements in which he sought to expand upon his cautioned statement as to be treated in the same way as self-serving.

Mr. Schofield submitted that to the extent that I find his inculpatory statements and indeed by his plea – his admitted possession of the firearms – to be as consistent with Richards' involvement as being only after the fact, as it is with involvement as a principal offender, the more favourable inference is to be drawn. In that event, Richards should be convicted only for being an accessory after the fact….

While it is in principle always correct that of reasonable inferences that most favourable to an accused is always to be drawn, I find that when the evidence in this case is taken as a whole, the irresistible conclusion is that the defendant Richards was involved as a principal offender…"

It was submitted that the trial judge rejected the exculpatory portions of the appellant's statement without clear or compelling reasons before he proceeded to consider the effect the inculpatory portions of the statement and that the trial judge improperly relieved himself of the duty to consider the entire mixed statement. This Court considered the manner in which a jury should be directed to consider so-called mixed statements in *Walton v R. Bonner v R*, 1990-1991

CILR 272. In that case A.S. Smellie, Solicitor General, appeared for the Crown. It is sufficient to refer to a portion of the headnote of the report:

> "In its treatment of a mixed statement the court should put the whole statement before the jury with the direction that the incriminating parts were likely to be true whereas the excuses and explanations would not carry the same weight."

Kerr J.A. who gave the judgment of the Court referred fully to the speech of Lord Havers in *R. v Sharp* [1988] 1All E.R. 67, and the quotation form Lord Lane C.J. in *R. v Duncan*, 73 Cr. App. R. 365. The directions of the trial judge were found to be unduly favourable to the defendant. In *Randall v R.* 1992-93 CILR 522, Zacca P. reviewed all the relevant authorities prior to *Sharp* which considered the treatment of "mixed" statements. He adopted squarely the issue that had been before the House of Lords in *Sharp*, to wit:

> "Where a statement made to a police officer out of court by a defendant contains both admissions and self-exculpatory parts do the exculpatory parts constitute evidence of the truth of the facts alleged therein".

He also adopted the reasons proffered by Lord Havers for preferring the approach of Lord Lane in *Duncan*, which stated in utmost clarity, that in such cases the whole statement should be left to the jury as evidence of the facts with a discretion to the judge to give further directions as to weight. Zacca P. stated the applicable law, appropriate to that case and of course to all similar cases as follows:

> "The learned trial judge ought to have told the jury that the whole statement, including the excuses or explanations, must be considered by them in deciding where the truth lies. The trial judge withdrew the exculpatory parts of the statement as evidence of the facts and left it to the jury to consider only as going to the appellant's attitude at the time the statement was taken".

The appeal was allowed.

The issue of "mixed" statements again came before the Court in *Roper and Manderson v R.*, Criminal Appeals Nos. 9 and 10 of 1996 in which the judgment of the Court was delivered by Zacca P. on August 20th 1999. It was unclear whether the out of court statement by one of the defendants amounted to a mixed statement. The Court stated the applicable law to be:

> "In *Aziz* [1995] 3 All E. R. 149, the House of Lords held that both the inculpatory and exculpatory parts of a mixed statement made by a defendant were admissible as evidence of their truth in a criminal trial."

In our view the law on this matter is settled. Where the Crown introduces evidence in support of the prosecution that contains out of court statements made by the defendant which can fairly be construed to contain both inculpatory and exculpatory elements, the tribunal of fact, is obliged to consider the entire statement. That tribunal of fact may assess and assign different weight to the two parts of the statement, depending upon all the circumstances of the case. It may determine that all parts of the statement are true and therefore give effect to the explanations and excuses offered by the defendant in the statement. The tribunal of fact may also give greater weight to the inculpatory portions of the statement and after mature consideration, determine that the explanations and excuses are simply not true.

In this case the trial judge was obviously aware of the principles applicable to the treatment of "mixed" statements as far back as 1992 in the *Walton and Bonner* case. The trial judge, imprecisely stated that he had a 'discretion', as to whether to give weight to the exculpatory portions of the appellant's statements. However, he analyzed the statement of the appellant to show the overwhelming improbability that the appellant would be in possession of the weapons

and a large sum of money on the morning of the robbery without so much of an explanation as to why he was selected to be the holder of these incriminating articles and why he accepted the articles when they were offered to him. The learned trial judge went further. He carefully analyzed the evidence of Baker and found him to be a witness of truth. The learned trial judge assessed the evidence of Baker, Bailey and Smith, and at page 27 of his judgment he said:

> "I accept the evidence of Baker, Bailey and Smith as truthful on the most material issues on which they testified."

This is in our view a demonstration that the learned trial judge was not just exercising "a discretion" as to whether to give weight to the exculpatory portions of the statements of the appellant. He was performing the essential functions of a tribunal of fact to consider all the evidence, apply the appropriate legal principles, and then come to a conclusion on the credit-worthiness of that evidence. Our view, is not diminished by the fact that the trial judge is recorded at page 25 of the judgment as saying:

> "I regard his second interview statement, in which he sought to expand upon his cautioned statement, as to be treated in the same way – as self serving."

The Judge had rejected the scenario projected by his attorney that the involvement of the appellant was *ex post facto* the murder of Myles. He had specifically dealt with the cautioned statement of the appellant, which was indeed the heart of the appellant's defence and he had rejected the exculpatory portions of that statement for reasons which he stated at page 25 of his judgment and which have been quoted earlier. He was saying no more in the impugned passage quoted above, that he found the explanations given in the interviews following the cautioned statement to be wholly incredulous for the reasons already given and an excuse which was false.

The short had phrase "self-serving" used by the trial judge is unfortunate but in out view, it does not demonstrate that he was adverting to an old and now disfavoured view that the exculpatory portions of a "mixed" statement can have no evidential value. In the overall we found no merit in this ground of appeal.

The third and fourth issues discussed by the appellant were as to whether the trial judge was entitled to use alleged corroborative evidence interchangeably without identifying the particular crimes to which it relates and whether evidence of money found is capable of corroborating the crime of murder. At the outset, Mr Schofield had challenged the correctness of the directions that the learned trial judge had given to himself on the issue of corroboration. Before us he resiled from this challenge and from the assertions in his skeleton argument in support thereof. As it was vigorously contented that the matters relied upon by the trial were incapable of amounting to corroboration in law, or were equally consistent with guilt as with being an accessory after the fact, we set out first the directions that Smellie C.J. gave himself on corroboration in this matter:

> "The directions I give myself on this issue of corroboration are to be applied in respect of all the accomplices' evidence. They follow the well-established principles settled in *Baskerville* [1916] 2 KB 650 and reaffirmed in the cases ever since, including *Powery v R.* 1994-95 CILR 373 by the Cayman Islands Court of Appeal.
>
> In order to be capable in law of constituting corroboration, evidence must be:
>
> (a) admissible in itself;
> (b) from a source independent of the evidence requiring of corroboration; and ,
> (c) such as to tend to show, by confirmation of some material particular, not only that the offence charged was committed, but also that it was committed by the accused.

I also remind myself that mutual corroboration as between the evidence of accomplices, the evidence of each in practice requiring that corroboration be sought, is not usually permitted: *Cheema* [1994] 1 WLR 147, at 149-155. As was observed by Lord Hailsham in *Reg. v Kilbourne* [1973] A.C. 729 at 747:

> "The danger (of relying on their uncorroborated evidence) is not less, but may be greater, in the case of fellow accomplices. Their evidence is not "independent" in the sense required by *Rex v Baskerville* [1960] 2 K.B. 658 – and a jury must be warned not to treat it as corroboration."

This jurisdiction's rules of evidence still require that the evidence capable of amounting to corroboration, if so found, is stipulated."

Four specific matters were found by the trial judge to amount to corroboration and he set them out at pages 26 to 27 of his judgment as follows:

> 'The inculpatory aspects of Richards' caution statement, in particular as to his possession of the firearms as early as the morning after the robbery. This is to be inferred from the context described in his statement and, of course, his continued retention and control of them.
>
> The defendant's possession of large sums of money about which he first lied to the Police and which in his cautioned statement he admits having obtained under circumstances which could only have been connected to the robbery.
>
> His role as distributor of the funds described as per Baker and Smith is confirmed insofar as he admits having had money to be given to Baker.
>
> The recovery of the very same pill vial which Smith testified that he gave to the defendant and which, when recovered by the police along with the .380 Beretta firearm, contained bullets for the weapon. When taken with Shoya Heath's testimony of Peter Bogles' request for the very same calibre bullets is evidence beyond peradventure, of the link between Richards and Peter Bogle in the conspiracy."

In *Isaac Rogers v R.* [1914] Cr. A. R. 276, the defendant was convicted of carnal abuse of a girl under the age of 13 years. The defence contended that the condition of the girl was due to self-abuse; the doctor admitted that this was possible, though not probable, but that her condition was

equally consistent with causes which were not put forward by the prosecution. The conviction was quashed on the basis that the age of the girl was not proved. In addition the Court held that as the evidence put forward by the prosecution was equally consistent with either the innocence or the guilt of the appellant the conviction must be quashed. Reading L.C.J. said at p. 277:

> "Corroboration was necessary, but what he appears to have overlooked is that the medical evidence established that the general condition of the girl was equally consistent with cases which were not put forward by the prosecution and was equally consistent with either the innocence or the guilt of the appellant. On that ground also we are of the opinion that the conviction must be quashed."

The appeal was allowed in the case of *R. v Holland and R. v Smith (Douglas)* [1983] Cr. Law Review 545 on the basis that the trial judge failed to point out to the jury that what he had instanced as corroborative evidence was equally consistent with the defence of handling stolen goods as it was with burglary. In *R. v Ram Saran*, [1885] 1 L.R. 8 All. 306, the facts were that a boy had been murdered and 4 days after he had been last seen alive, his dead body was discovered. On that same day a quantity of jewellery that the deceased had been wearing when he disappeared was found buried in the home of the appellant. Straight J., in giving the judgment of the Court said, *inter alia*:

> "The only other circumstances affecting Ram Ghulam, is that he produced jewels from the corner of his house on the afternoon of Saturday the 20th June. I have given much anxious consideration and reflection to the question whether this case can be regarded as corroboration showing that Ram Ghulam participated in the murder. It would no doubt be corroboration of the evidence of an accomplice that the prisoner participated in a robbery, or that he had dishonestly received stolen property, but in my opinion, it can be carried no further."

These authorities were the main planks on which the submissions of Mr. Schofield rested on the issue of corroboration. The learned Attorney-General submitted that the more relevant authority in

this area of the law was *Attorney General of Hong Kong v. Yip Kai-Foon*, [1988] 1 A.C. 642, an appeal to the Privy Council from Hong Kong. Two months after two armed robberies had been committed the defendant was found in possession of some of the stolen property and two firearms. He was tried on indictment charging, *inter alia*, two counts of robbery, of which conviction of handling stolen property was a statutory alternative open to the jury. Lord Ackner, in giving the opinion of the Board, said at p. 656:

> "The jury were required to approach the matter by two stages. First, they had to ask themselves whether they were satisfied beyond reasonable doubt that the defendant was guilty of robbery. This would involve rejecting the defendant's evidence, and then being satisfied so that they felt sure, that the ballistic evidence linked the defendant with the robberies or either of them. If they were not so satisfied, they would then proceed to the second stage and ask themselves whether the prosecution had satisfied them in relation to each of the ingredients of the alternative offences of handling stolen goods."

The Attorney-General relied on the statement of the law by Hare, J. in ***Bertolino v R.*** 1990-91 CILR 112, at 119, where he said that except in cases covered by the Practice Direction (Submission of No Case) [1972] 1 W.L.R. 227, the tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it.

In *R. v Baskerville*, [1916] 2 K.B. 658, at 663, Lord Reading C.J. said that "in considering whether or not the conviction should stand, this court will review all the facts of the case, and will bear in mind that the jury had the opportunity of hearing and seeing the witnesses when giving their testimony". The Attorney-General submitted that the trial judge was entitled to consider all the evidence from the accomplices and the out of court statements made by the appellant before coming to his final conclusions in this case. He submitted further, that the trial judge provisionally

accepted the evidence of the accomplice witnesses subject to corroboration and that when he found that there was corroboration he made his final decision to convict.

It was a further submission of the Attorney-General that the Crown can rely upon circumstantial evidence to supply the element of corroboration in a criminal case. In *Baskerville* (*supra*) p. 667, Lord Reading C.J, said:

> "The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime."

We have carefully considered the submissions as to whether the particular pieces of evidence identified by Smellie C.J. were capable of amounting to corroboration in a material particular of the offence of murder that was preferred against him. We were satisfied that he was entitled to consider all the evidence in the case, and more particularly, the accomplice evidence, the evidence of the criminologist who examined the firearms, the spent shells and the fragment of bullet removed from the body of the deceased, the evidence of the security guard Ebanks that there were two men at the scene of the crime who ran away together and the unchallenged evidence from the police officers of the statements made by the appellants as well as the finding of the tangible objects on the scene of the crime. We were equally satisfied that he was entitled to draw the inference that the appellant was not just an accomplice after the fact but he was a participant in the murder.

This, in our view, was not a case in which evidence led by the prosecution was equally consistent with the offence of accessory after the fact as well as to participation in the offence of

murder. There was positive evidence from Baker that the appellant was a participant in the murder. There was the admission that the appellant had the weapons used on the scene a matter of hours after the murder was committed together with large sums of money, the proceeds of robbery. There was evidence that the appellant had lied to the police when he was first interviewed. In following the opinion of Lord Acker, it was therefore a matter for the tribunal of fact to determine first whether these facts were consistent with participation in the murder. The learned trial judge, having given himself the appropriate directions in law, concluded that the facts and circumstances pointed in one direction and one direction alone, that being that the appellant was a participant in the murder of William Myles. This he was entitled to do and accordingly we found no merit in this ground of appeal.

It is sufficient for us to adopt the submissions of the Attorney-General that the trial judge structured his approach to first assess the potential credibility of the accomplice witnesses and having made an initial assessment that their evidence was capable of belief, he then looked for corroboration of the evidence. The trial judge was particularly clear in dealing with the evidence of the witness Baker and the trial judge demonstrated that his decision was made on the evidence as a whole. We found no error in his approach.

The Crown was not called upon to reply to the ground of appeal that complained that the trial judge failed to clearly set out in his judgment the burden and standard of proof. The Chief Justice quoted from the decision of the Privy Council in *Chang Wing-Sui and others v The Queen* [1985] 1 A.C. 168, that the prosecution must prove beyond reasonable doubt the participation of each assailant in a common design case. The trial judge stated that the appellant had a right not to adduce evidence, a right which he exercised and finally he held that he was satisfied so that he felt

sure that the appellant was one of the two assailants, who acting entirely together and in concert, robbed and shot William Myles, the shooting of which caused his death as a direct and proximate consequence. We therefore held that he had sufficiently demonstrated the burden and standard of proof applicable to this case.

The Court expressed its gratitude to counsel for the great assistance that it received in the appeal. For these reasons the appeals were dismissed and the sentence affirmed.

Zacca P.

Rowe, J.A.

Collett, J.A.