In the Cayman Islands Court of Appeal
Holden at George Town, Grand Cayman

CICA # 9/95

Before: The Rt. Hon. Mr. Justice Edward Zacca P.C., O.J. President
The Rt. Hon. Mr. Justice Telford Georges P.C., J.A.
The Hon. Mr. Justice James Kerr J.A.

RICKY RANKINE V REGINA

2319/94 ATTEMPTED MURDER

December 5, 1995 & April 12, 1996

Appearances:
Mr. John Furniss for the Appellant.
Mr. William Helfrecht for the Crown.

JUDGMENT

ZACCA, President

On March 28, 1995, the appellant was convicted by a jury of attempted murder of Simon Julio Newball, committed on the night of June 8, 1994. He was sentenced to 15 years imprisonment. The verdict of the jury was by a majority of five to two.

Direct evidence was given by Simon Julio Newball who received injuries as a result of gun shots to the back of his head and to his shoulder.

The evidence as related by Newball was that at about 11.00 p.m. on Wednesday, June 8, 1994, he was driving his brother's car along Goring Avenue when he saw the appellant Ricky Rankine standing by a new parking lot. He was able to see him by the bright lights of his car and the street lights. He estimated the distance he was from the appellant at about fifty feet when he first saw him. This distance was, however, estimated to be about 50 yards by Inspector McKay who paced it out.

Newball stated that he knew Rankine for about 7 - 8 years and he knew him by the name "Ish". As he got closer to the appellant, he saw that he had a shot gun which was aimed at him. He was then about 4 feet from the appellant. Newball ducked down in the car and was shot in the head and he blacked out and received a second shot in his shoulder. He lost control of the car which ran off the road into a fence. He opened the door and started running. He jumped over several fences and got to the main road. A white car came along and he was placed in the car. On seeing that the driver was a police officer, he jumped out but he was subsequently placed in the car and taken to the emergency room

of the hospital. The driver of the car was Detective Constable Earl White. It appears that Newball was wanted by the police.

Newball also stated that when the gun was fired he had crossed the appellant. This is borne out by the fact that he was shot in the back of his head.

There was evidence from Detective White that at the emergency room of the hospital he asked Newball who had shot him and he replied that it was Ricky. He asked him a second time and he again replied "Ricky". Having been asked the third time, he replied: "Ricky Rankine, Ish". The admissibility of this evidence has been challenged and will be dealt with later.

In cross examination, Newball stated that it was a terrifying experience that it all happened very quickly. He was shot when he was by Sheila's Restaurant and it was at that spot that he first saw the gun. He had seen the person earlier but did not then recognize him. It was at that point [Sheila's Restaurant] that he saw the person's face.

The evidence as disclosed in the transcript at page 29 is worthy of quote :

> Sugg: It was only immediately before you were shot that you saw the person who shot you.
>
> Answer: I saw the person earlier. I did not recognise him, but it was only at that point that I saw the person's face.
>
> Sugg: The only time you did recognise him was immediately by Sheila's Restaurant , immediately before you were shot, only for that brief instant.
>
> Answer: Yes sir, I drove pass him. I did not turn around. I had mirrors in the car.

Simon Newball was a reluctant witness. He admitted having been hiding from the police and having previous convictions. He admitted having told William Powell that it was not Ricky Rankine who shot him and he did not know who it was. This was, however, not true and he was lying. He denied having told Curtis McLean, Police Officer Gail Elliott and Patty Whittaker that it was not Ricky Rankine who shot him.

The evidence of Gail Elliott was received by way of her statement being read to the Judge and jury. She recorded a statement from Simon Newball in which he stated that it was Ricky Rankine who had shot him.

Patty Whittaker was called as a witness for the Crown. Under cross examination she stated that she saw Julio Newball sometime in January 1995. He told her that Ricky did not shoot him.

Tessa Nixon gave evidence on behalf of the appellant. She stated that Newball told her that he had given a statement to the police to the effect that Ricky Rankine did not shoot him.

Curtis McCoy a defence witness also stated that on the 9th June, 1994 Newball at the hospital told him that he was not shot by the appellant. At a later time he saw Newball at Northward Prison and he told him it was Ricky who shot him.

Michael McLaughlin also gave evidence on behalf of the appellant. He stated that he was a cousin of the appellant and that on a Tuesday during the hearing of the case he saw Newball outside the Court and spoke to him. He said

to Newball: "Why don't you go into the Court and set Ricky free 'cause you know it wasn't him who did the shooting". Newball replied that he wanted to set him free but he was being pressured by the police.

Dwight Wright's evidence was that he saw Rankine by the Zodiac Club on the night that Newball was shot. It was about 9.00 p.m. He heard the appellant say that he had three shots, and he was going to use one on Gary Hurlston, one on Julio Newball and one on Joel Smith.

Evidence was led by the Crown to the effect that on Friday, June 3, 1994, the appellant was set upon near the Zodiac Club by Gary Hurlston and Joel Smith. They had come there in a car driven by Julio Newball. There was also evidence that on the Monday before the shooting, Newball went to the appellant's premises to look for one Mario. The appellant on seeing Newball ordered him out of his yard.

Newball also stated that he spoke with the appellant at Northward prison about the shooting. He told him that he would not wish to give evidence if the appellant paid the hospital bill and for the damages to his brother's car. Appellant replied that he would pay it but he could not because he was in jail.

Detective Inspector McKay in his evidence stated that the lighting in the area of the shooting was not very good. The lighting in the area where the shot gun cartridges were recovered was poor.

Evidence was also led that on June 6, 1994, a white Honda Civic car was rented from Hertz for the appellant. There was evidence that the appellant was

seen driving a white rented car on the morning of June 8, 1994 and a white Honda Civic car was seen leaving the scene of the shooting. The defence also led evidence to the effect that Hertz had forty four white Honda Civic rental cars in June 1994. There was also sixteen white Honda Civic Cars at Avis.

The appellant did not give evidence at his trial. He relied on an interview which was tendered in evidence by the Crown. He also called several witnesses.

The defence was an alibi in that the appellant could not have been at the scene of the crime because he was in the West Bay area about the time the shooting took place. Witnesses whose statements were read to the jury as part of the Crown's case were relied on by the appellant as showing that he was in the West Bay area. The appellant also relied on these witnesses in an attempt to establish that he was not by the Zodiac Club at about 9.00 p.m. This was in answer to the Crown's evidence that he was seen by Dwight Wright and who stated that he heard the appellant say that he had three shots and he was going to use one on Gary Hurlston, one on Julio Newball and one on Joel Smith.

Mr. Furniss for the appellant raised two main issues on the appeal. Firstly, he submitted that the identification evidence was not credible in that Newball had only a fleeting glance of the person who shot him.

The identification took place at night where the lighting was poor. It happened very quickly and he was able to see him only for a brief instant. Mr.

Furniss also submitted that after the incident, Newball told several persons that it was not the appellant who shot him.

Secondly, it was submitted that the statement made by Newball to Detective Constable Earl White was inadmissible and the learned trial Judge was in error in allowing that evidence to be admitted for the jury's consideration. The Court was asked to hold that the conviction was unsafe and unsatisfactory.

At the trial it was contended by Counsel for the appellant that the statement made by Newball to Detective Constable White at the emergency room of the hospital was inadmissible. Detective White's evidence was that whilst on patrol duty in an unmarked police vehicle, he heard gun shots. He saw a male person running towards the police car. This was Julio Newball who was eventually placed in the vehicle and taken to the emergency room at the hospital. He asked Newball who shot him and Newball replied that it was Ricky Rankine, Ish. He stated that he saw Newball about 15 to 20 seconds after hearing the gun shots. The statement was made to him at the hospital about one to two minutes after hearing the gun shots.

In admitting the evidence the learned trial Judge in his ruling stated :

> "The question of the time that elapsed between the shooting and the statement to the police officer at the hospital is a relevant factor, but it is not, taken by itself, to be a decisive factor.
>
> Instead, I approach that aspect of the matter from the point of view of whether that lapse of time considered in the overall context of the assault, the anguish of the injuries sustained and the entire concatenation of events, whether that lapse of time in those circumstances was such as to afford an opportunity for concoction.

> I am of the view that the witness would have naturally been so preoccupied with the anguish of his own predicament as to remove any real concerns of that possibility. I am also of the view that there is sufficient association in time, place and circumstances between the crucial events and the statement in question as to bring the statement within the exception.
>
> Subject to the appropriate directions to be given to the jury at the appropriate time, I rule that the evidence of the statement made by the witness Newball, to officer White at the hospital, is admissible. "

The issue as to whether the statement was hearsay but admissible under the ***Res Gestae*** rule will now be considered.

In ***Ratten VR***. 1972. 56 ***CR. APP, R.*** 18. the appellant was charged with the murder of his wife by shooting her with a shot gun. The defence was one of accident. There was evidence that the deceased was alive and behaving normally at 1.12 p.m. and that less than 10 minutes later she had been shot. To rebut the defence, the prosecution called evidence from a telephone operator as to a telephone call which she had received at 1.15 p.m. from the deceased's home. She said the call came from a female who sounded hysterical and who said: "Get me the police, please".

The Judicial Committee held that the telephone operator's evidence had been rightly received. They concluded that the evidence was not hearsay. However, Lord Wilberforce proceeded to deal with the appellant's submission on the assumption that the words were hearsay. He said at p. 25 :

> "The expression "*"res gestae"* like many Latin phrases, is often used to cover situations insufficiently analysed

in clear English terms. In the context of the law of evidence it may be used in at least three different ways:

1. When a situation of fact [e.g. a killing] is being considered, the question may arise when does the situation begin and when does it end. It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertion of the knife, without knowing in a broader sense, what was happening. Thus in ***O'LEARY v. R*** [1946] 73 C.L.R. 566 evidence was admitted of assaults, prior to a killing, committed by the accused during what was said to be a continuous orgy. As Dixon J, said [at p. 577]:

   > "Without evidence of what, during that time, was done by those men who took any significant part in the matter and specially evidence of the behaviour of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event."

2. The evidence may be concerned with spoken words as such [apart from the truth of what they convey]. The words are then themselves the ***res gestae*** or part of the ***res gestae***, i.e. are the relevant facts or part of them.

3. A hearsay statement is made either by the victim of an attack or by a bystander - indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to depend on whether it was made as part of the ***res gestae***. A classical instance of this is the much-debated case of BEDINGFIELD [1879] 14 COX 341, and there are other instances of its application in reported cases. These tend to apply different standards, and some of them carry less than conviction. The reason why this is so, is that concentration tends to be focused upon the opaque or at least imprecise Latin phrase rather than upon the basic reason for excluding the type of evidence which this group of cases is concerned with. There is no doubt what this reason is: it is twofold.

> The first is that there may be uncertainty as to the exact words used because of their transmission through the evidence of another person than the speaker. The second is because of the risk of concoction of false evidence by persons who have been the victim of assault or accident.

The first matter goes to weight. The person testifying to the words used is liable to cross-examination: the accused person [as he could not at the time when earlier reported cases were decided] can give his own account, if different. There is no such difference in kind or substance between evidence of what was said and evidence of what was done [for example between evidence of what the victim said as to an attack and evidence that he [or she] was seen in a terrified state or was heard to shriek] as to require a total rejection of one and admission of the other.

The possibility of concoction, or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordships' opinion, this should be recognised and applied directly as the relevant test: the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words [or vice versa], the differences in location being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it. And the same must in principle be true of statements made before the event. The test should be not the uncertain one, whether the making of the statement should be regarded as part of the event or transaction. This may often be difficult to show. But if the drama, leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received.

> The expression *"res gestae"* may conveniently sum up these criteria, but the reality of them must always be kept in mind: it is this that lies behind the best reasoned of the judges' rulings. "

After reviewing a number of cases in England, Scotland, in Australia and America, Lord Wilberforce at p. 29 stated :

> "These authorities show that there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions [always being those of approximate but not exact contemporaneity] of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused. "

Again at p. 30 :

> "In the present case, in their Lordships' judgment, there was ample evidence of the close and intimate connection between the statement ascribed to the deceased and the shooting which occurred very shortly afterwards. They were closely associated in place and in time. The way in which the statement came to be made [in a call for the police] and the tone of voice used showed intrinsically that the statement was being forced from the deceased by an overwhelming pressure of contemporary event. It carried its own stamp of spontaneity and this was endorsed by the proved time sequence and the proved proximity of the deceased to the accused with his gun. Even on the assumption that there was an element of hearsay in the words used, they were safely admitted. The jury was, additionally, directed with great care as to the use to which they might be put. On all counts, therefore, their Lordships can find no error in law in the admission of the evidence. They should add that they see no reason why the judge should have excluded it as prejudicial in the exercise of discretion. "

In ***Bryan Nye and Nicholas Warde Loan v. R*** [1978]. 66 CR. APP. R. 252 the test enumerated by Lord Wilberforce in ***Ratten v. R*** was applied.

The case of ***R v Turnbull*** [1985] 80 CR. APP. R 104 dealt with the admissibility of statements made by a victim shortly before death. The victim having been stabbed, staggered into a public house at about 8.00 p.m. The police and ambulance were sent for. The ambulance arrived at 8.38 p.m. The policeman arrived some minutes before the ambulance. On being asked by the policeman what happened and who stabbed him he gave the name "Ronnie Tommo". Again in the ambulance on the way to the hospital he was asked who stabbed him and he repeated "Ronnie Tommo". It was the prosecution's case that this was an attempt by the victim to say "Turnbull", which the witnesses were hearing as "Tommo".

At page 108, O'Connor, L.J., said :

> "If "Ronnie Tommo" was a correct identification of the appellant, it was of course powerful evidence of his guilt. It is submitted, however, that the learned judge should not have admitted the evidence of these conversations. They are admissible [if admissible at all] as exceptions to the hearsay rule, because they are reports by witnesses of something said to them. Normally evidence of that kind is not admitted, but there are exceptions to the rule. There are two exceptions which might be invoked in the present case. In certain circumstances a declaration by somebody on the point of death is admissible in evidence reported by the person who hears it. In the present case that was not the ground on which the evidence was admitted. The other ground used to be called the ***res gestae*** rule, namely something said at the time so closely connected with the event to which it referred that the speaker had no time to concoct a story because he had not time to

think about it."

Reference was made to ***R. v Ratten*** and Lord Willberforce's judgment. It was held by the Court of Appeal that what the man said in the public house and in the ambulance was properly admitted in evidence.

R. v Andrews [1987] 84 CR. APP. R 382 was a House of Lords decision. Statements made by a victim, several minutes after being stabbed, identifying his attackers was admitted into evidence.

The cases of ***R v Ratten*** and ***R. v Turnbull*** were considered and applied. The reasoning of Lord Wilberforce in Ratten's case was extensively quoted by Lord Ackner and approved.

At page 391 Lord Ackner said :

> "I do not accept that the principles identified by Lord Wilberforce involved any extension to the exception to the hearsay rule. Lord Wilberforce clarified the basis of the ***res gestae*** exception and isolated the matters of which the trial judge, by preliminary ruling, must satisfy himself before admitting the statement. I respectfully accept the accuracy and the value of this clarification. Thus it must, of course, follow that ***Bedingfield*** [1879] 14 Cox C.C. 341 would not be so decided today. Indeed, there could, as Lord Wilberforce observed, hardly be a case where the words uttered carried more clearly the mark of spontaneity and intense involvement.
>
> My Lords, may I therefore summarise the position which confronts the trial judge when faced in a criminal case with an application under the ***res gestae*** doctrine to admit evidence of statements, with a view to establishing the truth of some fact thus narrated, such evidence being truly categorised as "hearsay evidence":

1. The primary question which the judge must ask himself is - can the possibility of concoction or distortion be disregarded ?

2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.

3. In order for the statement to be sufficiently "spontaneous" it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading.

4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. In the instant appeal the defence relied upon evidence to support the contention that the deceased had a motive of his own to fabricate or concoct, namely, a malice which resided in him against O'Neil and the appellant because, so he believed, O'Neil had attacked and damaged his house and was accompanied by the appellant, who ran away

on a previous occasion. The judge must be satisfied that the circumstances were such that having regard to the special feature of malice, there was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the accused.

5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error. In the instant case there was evidence that the deceased had drunk to excess, well over double the permitted limit for driving a motor car. Another example would be where the identification was made in circumstances of particular difficulty or where the declarant suffered from defective eyesight. In such circumstances the trial judge must consider whether he can exclude the possibility of error. "

Again at page 392 Lord Ackner stated :

> "Where the trial judge has properly directed himself as to the correct approach to the evidence and there is material to entitle him to reach the conclusions which he did reach, then his decision is final, in the sense that it will not be interfered with on appeal. Of course, having ruled the statement admissible the judge must, as the Common Serjeant most certainly did, make it clear to the jury that it is for them to decide what was said and to be sure that the witnesses were not mistaken in what they believe had been said to them. Further, they must be satisfied that the declarant did not concoct or distort to his advantage or the disadvantage of the accused the statement relied upon and where there is material to raise the issue, that he was not activated by any malice or ill-will. Further, where there are special features that bear on the possibility of mistake then the juries' attention must be invited to those matters.

> My Lords, the doctrine of ***res gestae*** applies to civil as well as criminal proceedings. There is, however, special legislation as to the admissibility of hearsay evidence in civil proceedings. I wholly accept that the doctrine admits the hearsay statements, not only where the declarant is dead or otherwise not available but when he is called as a witness. Whatever may be the position in civil proceedings, I would, however, strongly deprecate any attempt in criminal prosecutions to use the doctrine as a device to avoid calling, when he is available, the maker of the statement. Thus to deprive the defence of the opportunity to cross-examine him, would not be consistent with the fundamental duty of the prosecution to place the relevant material facts before the court, so as to ensure that justice is done. "

Both the Court of Appeal and the House of Lords held that the evidence was correctly admitted.

In the instant case, the declarant gave evidence to the effect that he told Detective White that it was Rankine who shot him. We have come to the conclusion that the evidence of what Newball said to Detective White at the emergency room of the hospital was properly admitted. The reasons given by the learned trial Judge for admitting the evidence cannot be faulted and no criticism can be made of the way in which the learned Judge left it to the jury.

However, if the evidence of identification of the assailant is of poor quality, then the statement made by Newball to White is of little weight. It is necessary therefore to examine the evidence which the Crown relied on for identifying the appellant as the person who shot Newball. Evidence of visual identification was given by Simon Newball. His evidence was to the effect that the incident happened very quickly and it was a terrifying experience. He

admitted that he recognised the appellant who he had known for seven or eight years immediately before he was shot and only for a brief instant. On seeing the gun he ducked down in the car. Appellant who was then about four feet from him was wearing black pants and a rasta tam. He was able to recognise him by means of the car lights.

He was shot in the back of his head which suggests that he had already passed his assailant when he got shot. The car in which he was travelling was moving. It is reasonable to assume that when he passed his assailant he would not be able to recognise him as he stated he ducked down in the car when he was four feet away from him.

Inspector McKay's evidence was that the lighting in the area was poor. It is clear that the identification was under difficult conditions and in circumstances where the lighting was poor and the recognition could be regarded as a fleeting glance.

In his directions to the jury, the learned trial Judge stated at page 111:

> "For how long did the witness, in this case Julio Newball - have the person said to be the defendant in sight? Here we know - if you accept what Julio Newball said in cross-examination - that he saw the person as he approached him from some distance away some 50 yards away - the bright lights of his car were on - but it was not until he got closer, when he got to the area opposite the building referred to as Sheila's Restaurant [Atlantis House] that he recognised the defendant. It was then, said the witness, that he saw his face.
>
> If you accept that then it would have been immediately

> before he was shot that he recognised the defendant as the assailant. You will bear that in mind.
>
> You should also however, bear in mind the witness had said, if you accept it - that the person was turned "face on" to his car as he approached and you may take account of the fact that Newball knew the defendant quite well before."

The learned trial Judge also directed the jury in these words at page 112:

> "You should also take account of the fact that the incident happened at night and, in effect, the evidence of the lighting available is that Julio Newball would have been depending really on the head lamps of his car to make out his assailant. You will recall the evidence of Inspector MacKay that the lighting at that spot was poor - so very little if any, of the surrounding light from the light poles and the building would have illuminated that area where the assailant was standing. It is therefore a matter for you, relying also on your own experience and common sense, to conclude whether the illumination from the high beams, the bright lights, or the car as Julio Newball described it, and if you accept his evidence, whether that would have been light enough by which to recognise someone he knew before, standing on the roadway, or by the side of the road way as he approached him. And of course over what would have been a brief moment of time."

The evidence seems to suggest that the assailant was standing opposite the building known as Sheila's restaurant. It was at that spot that Newball stated that he recognised the assailant as the appellant. However, he ducked down in the car when he was four feet from the assailant. Would he then have been in a position to recognise his assailant when he reached up to him ?

Newball admitted in evidence that he had told William Powell, a witness for the defence, that it is not the appellant who had shot him. He was, however, lying when he told him this.

Patty Whittaker a witness called by the prosecution, stated that in January 1995 she saw Newball and that he told her that the appellant did not shoot him.

Michael McLaughlin a witness for the defence stated that on a Tuesday he saw Newball outside the Court room. He spoke to him and asked him : "Why don't you go into Court and set Ricky free 'cause you know it wasn't him who did the shooting". To this Newball replied that he wanted to set him free but he was being pressured by the police.

Curtis McCoy another witness called on behalf of the defence stated that on the 9th June, 1994 he saw Newball at the George Town Hospital. He told Newball he heard that he had got shot - Newball replied that he did not get shot by Ricky. Some time later he again saw Newball at Northward Prison. On this occasion he was saying that Ricky shot him.

The prosecution also relied on the evidence of Dwight Wright. He stated that on the night Newball was shot he saw the appellant at about 9.00 p.m. by the Zodiac Club. He heard the appellant say that he had three shots, and he was going to use one on Gary Hurlston, one on Julio Newball and one on Joel Smith.

The statements of several witnesses were read into evidence as part of the prosecution's case. The appellant's case was that these statements showed that

he could not have been at the Zodiac Club at 9.00 p.m. as stated by Wright. There was therefore conflicting evidence as to whether the appellant could have been seen by Wright at 9.00 p.m.

It was also submitted by Counsel for the appellant that witnesses relied on by the prosecution placed the appellant in the West Bay area up to about 11.00 p.m. It was argued that there was no evidence to suggest that the appellant would have known that Newball was going to be driving by Sheila's restaurant on that night at that time in order to give him the opportunity of way laying him to shoot him.

The evidence of Dwight Wright in itself does not support the evidence of Newball as to the identification of the person who shot him. Again if the evidence of Newball cannot be relied on, then the evidence of Wright takes the case no further.

There was evidence from Newball that the appellant had told him that he would pay for the damage to the car and the expenses for his injuries but he could not because he was in jail.

It would be a matter for the jury to consider whether, if accepted, this was evidence of an admission that he had shot Newball.

The strength of the prosecution's case rests principally on the identification of the assailant by the witness Simon Julio Newball. The rest of the evidence by itself cannot be sufficient to found a conviction. If the visual

identification evidence is credible, then that evidence may be of supporting value.

The witness Simon Newball is not of unblemished character. He was a reluctant witness and gave conflicting evidence. His credibility is in question and he cannot be accepted as a reliable witness. The possibility of a mistake cannot be ruled out.

Looking at the evidence in its entirety we are of the view that the verdict of the jury is unsafe and unsatisfactory. In the circumstances the appeal is allowed, the conviction and sentence set aside and a verdict of acquittal entered.

____

President

____

Judge of Appeal

____

Judge of Appeal