tidy and in order."

wanted her in running it the previous Saturday and it had been left

and noticed as he did so that the store had been ransacked. He had called the deceased but there was no reply. He began looking for her door leading from the house to the store had been broken open. He

the house and found the back door open. He entered and found that the

Her outside lights were on, which was unusual. He went to the back of

Next morning he went to the deceased's house about 7:30 a.m.

went himself to bed and the night passed without disturbance.

outside lights of the deceased's house were off which was normal. He

house. Before retiring he went to his porch and noticed that the

saw the deceased into her house and returned with his wife to their

wife went to church. They returned after service about 8:45 p.m. He

On Sunday December 12, 1982, the deceased, Mr. Yates and his

which she operated. Next door lived her brother Jesse Belmont Yates.

Una Riva Yates (the deceased) lived at West Bay in a building

which housed not only her living quarters but also a variety store

JUDGMENT

HEARING DATES: June 4th, 5th, & 6th, 1990
Judgment delivered 9th August, 1990

Mr. Anthony Smellie, Principal Crown Counsel for the Crown

Mrs. Priya Levers and Mr. Graham Hampson instructed by Bruce Campbell & Co. for the Appellant

APPEARANCES:

The Honourable the President, Mr. Justice Edward Zacca
The Right Honourable Mr. Justice P. Telford Georges, JA
The Honourable Mr. Justice James S. Kerr, JA

BEFORE:

REGINA

v

PHILLIP GLENNON EBANKS

IN THE CAYMAN ISLANDS COURT OF APPEAL
HOLDEN IN GEORGE TOWN, GRAND CAYMAN
CRIMINAL APPEAL NO. 51 OF 1989

9-08-90

He did not find the deceased either in the store or in the kitchen. He opened the bathroom door which was closed and saw her lying partly across the toilet bowl and partly on the floor. He touched her arm and her body slid to the floor. She was dead. He called the police.

Inspector Hall (as he then was) who received the report was the first officer on the scene. Detective Superintendent Dalziel and a team of policemen followed later and examined the scene for evidence. Dr. Grant viewed the body which was later removed. On December 15, 1982 Dr. Davis, Chief Medical Examiner of Dade County performed the post-mortem. Mr. Burton Whittaker, an examiner of physical evidence, examined two cartridges found on the scene, a window screen, which came from the bathroom window and a shower curtain from that bathroom, among other exhibits. He also examined a sawed-off rifle which the investigators recovered but not on the scene.

The physical evidence and the findings of the post-mortem appeared to establish that the deceased had been shot in the forehead while standing in the bathroom facing the bathroom window. Two glass louvres had been moved from the window and had been placed on the ground beneath but the screen had still been in place. The shot to the forehead would have paralysed the left side of the deceased's body but would not have killed her instantaneously. She would, however, have lost consciousness.

The intruder or intruders must then have gained entrance to the building by moving five louvres from the bedroom window and moving the screen of that window. The deceased was then shot a second time in the neck at fairly close range. This shot separated the spinal cord from the brain. This would have caused instantaneous paralysis of the body below the neck. Breathing would not have been possible.

The cartridges examined by Mr. Whittaker had both been fired by the same gun a .22 calibre long rifle. That was not the gun handed to him for examination. The projectile from the cartridges could have caused the injuries to the forehead and neck which had killed the deceased.

The only issue of controversy relating to that section of the evidence was the length of the period during which the deceased would have continued breathing in a laboured manner after having suffered the wound to the forehead.

Dr. Davis stated in examination-in-chief that that wound -

> "could result in a dying process which could extend a matter of hours without treatment"

In re-examination, however, he stated that he -

> "would expect laboured breathing to extend for a matter of minutes rather than hours after the wound in the right forehead had been inflicted."

On analysis the statements are not necessarily contradictory. Laboured breathing could last only for a few minutes, thereafter continuing not in a laboured manner during the dying process extending over hours.

On the Friday following the death of deceased, Mr. Yates began tidying up the shop. He was familiar with the stock because he had assisted the deceased in running it usually at weekends. There was no stock book nor did items of stock bear any special marks. He concluded that a pair of yellow suede shoes was missing as was a pair of white shoes. The boxes in which they had been were lying empty on the floor in the store. The pair of white shoes were later found by the back door. Some boxes which had contained "Hanes" briefs were on the floor empty. He also missed some flashlight batteries. The

deceased's bag which contained the proceeds of Saturdays sales, some $250.00, was also missing.

Suspicion early pointed to the appellant. On December 22, 1982 a party of policemen led by Supt. Dalziel searched the house in which the appellant lived on the authority of a warrant which specifically mentioned suede shoes and Hanes briefs. A pair of tan sued shoes was found which the appellant stated was his and 11 pairs of "Hanes" briefs, all apparently new. The appellant explained that he had bought the shoes and briefs at a shop identified as Lucinda's some two weeks before.

In a pile of used and soiled clothing were found 6 pairs of gents shorts all new. The appellant explained that his mother had bought them for him as a Christmas present.

Later that day a box of Berec batteries size D, new and in good condition, was found in the chicken coop in the yard of the house. On that box were the figures and letter "45c" written with a felt pen. Mr. Yates identified the writing as that of the deceased. The record does not disclose whether the box and the batteries were ever shown to the appellant but it is clear that the trial judge concluded that they had placed there by the appellant.

The appellant's explanation that he had purchased the suede shoes and the briefs from Lucinda's was proved false. The explanations that his mother had purchased the shorts for him as a Christmas present was rejected. Christmas presents were not likely to be found three days before Christmas among a pile of used and soiled clothing.

The appellant was charged on the day of the search with the murder of the deceased and the burglary of her home. There was a preliminary inquiry which resulted in his committal on the charge of burglary and his discharge on the charge of murder. He was in due course indicted for burglary and on the advice of his attorney pleaded guilty to handling. The explanation given by the appellant on his

plea of guilty to handling was not given in evidence at the trial from which this appeal arises.

Investigations continued and in 1983 Det. Supt. Gibson of New Scotland Yard came to the Caymans to assist in a number of unsolved cases including that of the death of the deceased. He interviewed the appellant in September 1983. The appellant denied involvement in the murder. In answer to the statement that he had been found in possession of some of the property stolen from the deceased's shop on the night of the murder he replied that he had found it in a box in the bush.

Det. Supt. Gibson also interviewed Israel Carrozana, an important witness at the trial. He testified that Carrozana had given him a verbal account of what he knew but he had not obtained a written statement from him. He had sought to obtain one but had not been successful. It would appear that in time a written statement was obtained from Carrozana and from another witness Bart Collins McCarthy.

A charge of murder was again preferred against the appellant. On this occasion he was committed at the preliminary inquiry. On his trial, which at his election, was by a judge sitting without a jury, he was convicted. Since he was under 18 at the date of the killing he was sentenced to be detained at Her Majesty's pleasure. From this conviction he has appealed.

The Crown sought to establish the guilt of the appellant by establishing four matters-

(a) that property stolen from the deceased's store had been found in his possession some 9 days after the murder;

(b) that shortly before the date of the murder he had been attempting to get hold of a gun and cartridges and had in fact obtained a gun and .22 ammunition of a kind which could have been used in the murder;

(c) that he had admitted that he had a gun which had

been used in a murder buried under tamarind tree and that he needed to get rid of it and get another for his protection; and

(d) that he had on the day after the murder confessed to Bart Collins McCarthy and Israel Carrozana that he had shot the deceased in the course of a burglary.

The Crown also led evidence to establish that a revolver, the property of the deceased, had been in the possession of the appellant on December 14, 1982. The trial judge was prepared to find positively that the revolver which had been recovered under a sofa in the yard adjoining the premises of Mr. Leo Ebanks was the property of the deceased. He was not able, however, to feel sure that the evidence which connected that revolver with the appellant had been sufficiently convincing. According he decided that that aspect of the Crown's case had to be dismissed totally from his mind in the decision making process.

As has been indicated none of the items found at the home of the appellant or in his yard could be positively identified as having come from the store. The closest to positive identification was the box in which the batteries had been. This was marked "45c", writing which Mr. Yates identified as that of his sister.

The findings of the trial judge on this issue were as follows-

> "More importantly, he identified the marking of the figures "45 cents' on the recovered battery box, made by a black felt pen as being in his sister's handwriting. A witness who is familiar with the handwriting of a person is, of course, competent to identify it. No expert evidence of handwriting was called to compare this marking with those appearing on two other battery boxes kept in the Deceased's store. I have, however, examined the boxes carefully and I can see no good reason from their

> appearance to disbelieve the evidence of Mr. Yates on this point which was confidently given. I accept it and I feel sure that the battery box (Ex. 15) discovered behind the chicken coop had in fact come out of the Deceased's store shortly before hand."

No doubt Mr. Yates was confident as well as honest. There was an issue, however, as to whether, having regard to the character of the sample he purported to identify, such a measure of certainty was possible. It is of significance that the prosecution did not seek to buttress his testimony by evidence of an expert, which could have been done. The deceased was a shopkeeper; samples of her handwriting must have been available. The sample for identification was thus very limited. There was no exposition to justify the opinion of identity. This evidence could not be enough to base a finding of certainty beyond a reasonable doubt that the sample was in the handwriting of the deceased.

There remains, however, the fact that a number of items, each of them admittedly commonplace, was found in possession of the appellant. The trial judge dealt with the matter thus-

> "Upon an analysis of this circumstantial evidence it appears to me that, while the finding of any one of these four items [the suede shoes, the underpants, the shorts and the batteries] as described in the Police evidence could not give rise to a legitimate inference that the Defendant was on 22nd December, 1982 in the possession of goods recently stolen from the deceased's store, the finding of all four of these different items, taken cumulatively and in conjunction with at least two false explanations given by him as to how he came by them, are sufficient to lead to an irresistible inference that they were all stolen from that store and that he had come by them dishonestly.
>
> It is a trite doctrine of law that possession in the absence of any reasonable explanation for it [and there is none here consistent with innocence] can justify a conviction for either stealing or handling stolen property. It cannot, of course, by itself justify a conviction for murder of the person from whom the goods were stolen. In the present case alternative charges were proffered earlier against the Defendant for burglary and theft and for handling stolen goods in relation to this possession. He pleaded guilty to the latter charge on legal advice which I regard as soundly given. In consequence, there was no trial of those charges and no finding on the evidence whether or

> not the charge of burglary could be made out. Nor is this court required to reach such a factual determination in the present trial. Nevertheless I find the Defendant's dishonest possession of these items which I am satisfied were taken from the Deceased's store on the night of 12th-13th December, 1982 to be capable of affording cogent support to any other reliable evidence there may be which connects this Defendant with the murder."

Mrs. Levers for the appellant attacks this reasoning in a number of ways. The main thrust of her contention is that evidence of identification of the items as belonging to the deceased must stand independently. It cannot be inferred from the number and combination of articles found. Stated as a broad proposition this must be unacceptable. It offends commonsense. While a single swallow may not make it summer, the appearance of a number of swallows is a reasonable basis for concluding that it is summer. At what point a decision can be reached that a pattern emerges from a series of incidents each of which is of itself explicable on another basis is a matter for the experience and good sense of the trier of fact.

In this case the conclusion is an inference to be drawn from facts which are basically not in dispute. An appellate tribunal would be in as good a position as the trial judge to draw the inference. Nonetheless where an inference has been drawn the appellate tribunal should not interfere unless the drawing of that inference appears plainly to have been wrong. On the facts of this case it cannot be said to be.

Criticism has also been levelled at the assertion that the court was not required to reach a factual determination in the trial for murder as to whether a charge of burglary could be made out. While strictly speaking as a legal proposition this was accurate, in the context it did not apply since on the facts a finding that the appellant was the murderer inevitably involved a finding that he was the burglar.

It must, however, be noted that the final sentence of the passage above cited makes it clear that the trial judge used this conclusion as regards the property as doing no more than-

> "affording cogent support to any other reliable evidence there may be which connects this Defendant with her murder."

It was certainly the consensus that possession of the goods even if positively identified as being the property of the deceased might not have been sufficient to support a conviction for murder. The reasoning and conclusions of the trial judge on this issue are substantially correct.

Evidence of the appellant's possession of a gun and ammunition came principally from Roy Bertram Nicholson and James Patterson Ebanks.

The latter testified that in early 1982, at the appellant's request, he had given something to a man called "Bird Dog" who worked on a boat which had subsequently been wrecked. Later in 1982 the appellant had told him that he had got the gun. He had then gone away and had come back with a gun about 16" long the handle of which appeared to have been sawn off. The appellant had two shots which he had fired off at a lizard. Israel Carrozana had been present. The appellant had then asked them to leave so that he could hide the gun. Israel Carrozana confirmed that he had known that the appellant had a gun and that some time earlier the appellant Patterson and himself had gone to shoot it off in the bushes. He could not remember who had fired the shot. In cross-examination he appeared to accept that the gun fired off that day had been Patterson's, an impression he had formed because Patterson had said that he had got it off some guy on a boat.

Roy Bertram Nicholson's evidence was that a few weeks before the deceased's death, the appellant had asked him if he knew where he could get some shots. Nicholson had promised to ask around and had done so. He had got either 5 or 6 .22 shots which he had given to the appellant wrapped in a piece of paper towelling. This was some weeks before the death of the deceased. He had given the police a statement

about this matter in December (presumably 1988). He had not been questioned before that and had seen no reason to come forward earlier.

Christiana Furnett Ebanks gave evidence of the appellant's admission that he had buried in a plastic bag near a tamarind tree a gun which had been used in a murder. A relationship had developed between the witness and the appellant when she worked at the prison where he was an inmate. After a time she left the job but they corresponded. He managed to escape from custody and had found his way to her house. They had gone into the bushes together and he had pointed to the tamarind tree and had made the admission about the gun, stating that he had to get rid of it and he needed another for his protection. She had first given a statement to the police in 1987. She had not done so earlier because she did not wish to become involved.

P.C. Kenric Morrision accompanied her back to the bushes some time in 1987. She showed him the tamarind tree. The area had been excavated perhaps some six months previously. Nothing was found.

In her evidence she said "while in the bushes at one time the defendant pointed in a certain direction to a tamarind tree and said he had a gun there <u>that was used in a murder.</u>" (Emphasis supplied). In answer apparently to a specific question she said she did not remember saying at the Preliminary Examination that defendant told her he had a gun hidden in the bush, "<u>he said nothing more about it.</u>" (Emphasis supplied).

When confronted with her deposition she said "it is a mistake to have said he said nothing more about the gun, one can make a mistake. I am telling the truth now."

In his judgment the trial judge summarised the evidence of Christiana Furnett Ebanks. He found her to be witness who was "honest though of limited intelligence." He could find no reason why she should some five years after the event tell lies against the appellant. He stated -

> "I have weighed the fact that her statement to the Police given in 1987 does not report the whole of what she now is telling the Court the defendant said about the gun. That is, I think, due to her not being very bright intellectually".

As has been indicated, the record shows that there was an apparent inconsistency between her deposition and her evidence at the trial. However, with regard to the impression which the trial judge formed of the witness and her explanation as to the error, it was open to him to accept her evidence on this issue. On that basis he concluded -

> "An admission that some 1-2 years after the December murder the defendant has a gun concealed in the bushes which he knew to have featured in somebody's murder."

Once the evidence is accepted this conclusion seems unexceptionable.

The Judge noted the support given by P.C. Morrision's evidence, commented on the fact that there were signs of an excavation which could have taken place some six months previously and added -

> "That is consistent with the buried object having been dug up at the spot she indicated."

There is no support for his conclusion. There was no evidence that such excavation as there might have been was connected with any search for any buried object. It would have been reasonable to conclude that the fact of the excavation would have made unlikely the discovery of any object which might have been buried there - but no more.

To the extent that the trial judge may have been persuaded to accept Miss Ebanks' evidence because of his view that the excavation was consistent with a buried object having been dug up at the spot, he was clearly in error. In no way did this support her version. However, there was more credible and cogent evidence of the defendant's possession of a firearm from the evidence of James Patterson Ebanks, Bertram Roy Nicholson and Israel Carrozana. He accepted the evidence of Patterson Ebanks supported by that of Israel

Carrozana on the issue of the firing off of the gun and came to the following conclusion -

> "It shows the defendant in possession of a gun of unknown calibre but of a rifle variety at some time prior to the murder of the deceased."

He also accepted the evidence of Roy Bertram Nicholson and inferred "that the defendant believed that he had a use for .22 ammunition at that time and that in all probability he was supplied with enough to fire a gun of that calibre at least five separate times." This inference is well-founded on the evidence.

In summary he held -

> "This evidence in my judgment taken cumulatively establishes on the part of the defendant proof of an opportunity to commit the offence charged in this indictment by furnishing him with the means to commit the crime if minded so to do. It does not afford any proof that he actually did so, but it indicates knowledge on his part after the event the gun had featured in someone's murder, which is consistent with his having been present when it was so used."

The final phrase in that formulation is open to criticism that the facts would also be consistent with the appellant having been told the weapon had been used in a murder. Clearly this is so. But the trial judge did not there state that he had concluded from the facts up till then presented, that he had concluded that the appellant had committed a murder. He had specifically stated the opposite. All he has stated is that the facts were consistent with the appellant's presence and thereafter he continued to examine the remaining evidence to decide whether a conclusion firmer than consistency could be reached.

It was plain both at the trial and at the appeal that the case against the appellant depended on the evidence of Bart Collins McCarthy (McCarthy) and Israel Carrozana (Carrozana). They testified that the morning after the murder the appellant admitted to them that he had shot the deceased.

McCarthy's evidence was that on the morning after the night on which the deceased had been killed his mother had woken him up and had told him something. He had gone out on his porch and shortly thereafter Carrozana had come into his yard. Two police cars had then passed and thereafter the appellant had come to the back of his (McCarthy's) house. Carrozana and himself had walked up to the appellant and had asked him whether he had gone to Bosun's Bay the night before. The appellant had replied that he had gone with Rodney and Dwayne to the house of the deceased. He had to shoot her because she had a gun. He had taken out the panes of the bathroom window. She had walked into the bathroom, a gun in her hand and had said to them "You must come in here tonight. I have something for you" or words to that effect. He had then shot her twice from the outside.

Carrozana's evidence was that his mother had also told him something when he woke up that morning. He had then gone down to the "lands" where he had seen the appellant and McCarthy. He had asked the appellant if he had anything to smoke. The appellant had replied that he had but they were not going to smoke where they were. They had then gone behind McCarthy's house. McCarthy had asked the appellant to tell them about it. The appellant had replied that he did not want to. McCarthy had later again asked the appellant whether he wanted to talk about it. The defendant then had stated that he, Dwayne and Rodney had gone to the back of the house of the deceased and had made some noises. A voice inside the house had then been heard saying "You all coming in here I've got something for you all." He had looked through the bathroom window and had seen the deceased. He had pointed a gun to her forehead, had hesitated for a while and then had pulled the trigger. They had then gone away for about an hour, had come back and had broken into the house. Seeing that she was still breathing he had cocked the gun and had shot her in the back of the head. They had then searched the place, had found $320 in paper and silver and had left.

There was evidence from a defence witness,Leslie Lloyd Hydes, that in November 1987 when both McCarthy and himself had been inmates

at the prison, McCarthy had been taken for an interview with the Director of Prisons and a Mr. Lopes. On his return he had told Hydes that the police had asked him to give a statement against the appellant concerning the deceased's murder. He had agreed to do so if he was given back 78 days remission he had lost. Hydes had asked him whether the appellant had told him anything about the murder and his reply had been that the appellant had not done so.

There was evidence that McCarthy had formed an association with Hydes' girl friend while Hydes was in prison. This was suggested as a reason for his wishing to tell lies on McCarthy so as to make him appear to be a perjurer.

The trial judge was not impressed with McCarthy's manner and demeanour as a witness. He had a shocking record and admitted having been sentenced to prison on 17 occasions. One of his convictions involved the use of a firearm. Although he had difficulties with Hydes' evidence he was unable to disbelieve him entirely. Additionally, the account of the shooting which he testified as having been given by the appellant contradicted the evidence of the medical examiner, Dr. Davis, and of Mr. Whittaker as to the probable position of the deceased and her assailant when the neck wound was inflicted. Both shots could not have been fired from the outside.

As a result he concluded that he was -

> "unable to regard the evidence of Bart McCarthy as advancing the Crown case further against the defendant."

Later he referred to the evidence of Hydes as having achieved "its sole purpose" which was "to neutralise that of Bart McCarthy".

It was otherwise with the evidence of Carrozana. The trial judge found him to have been an impressive witness. He did have 7 previous convictions - 3 for burglary, the last in May 1985. He had served a sentence of imprisonment in 1983. Since his release he had been baptised a Seventh Day Adventist in 1984 and he attended services

there. He worked as heavy equipment operator.

An issue arose as to the effect which the rejection of McCarthy evidence should have had on the assessment of Carrozana's since they were both testifying as to what was admittedly a single occasion on which the admission had been made. It does not follow from the trial judge's opinion of Bart McCarthy as an unreliable witness that everything in his evidence was rejected. Certainly, not on matters of which other credible witnesses had given evidence. Indeed, it is implicit that in accepting Israel Carrozana's evidence as to the occasion of the defendant's confession as well as its contents, such of McCarthy's evidence as was in harmony with Carrozana's must also be acceptable. The major discrepancy between McCarthy's evidence and Carrozana's is as to the actual shooting of the deceased and on that he quite obviously preferred Carrozana's which was supported by the expert evidence of the Pathologist and the Ballistic Expert. As argued by defence counsel, the learned trial judge having accepted Hydes' evidence that McCarthy told him that he proposed to fabricate the confession of the defendant then such acceptance would be out of step with his finding that the occasion of the confession as described by Carrozana did occur and that the confession was prompted by McCarthy. In our view, Hydes' evidence was being considered only as it affected the reliability of McCarthy as a witness. In fact, the Judge was doing no more than applying the principle that a witness's testimony should not be held to be credible if it is established that that witness had made a previous inconsistent statement and was unable to give an acceptable explanation for having done so. Accordingly, McCarthy's statement to Hydes was only relevant to his McCarthy's credibility and could have no effect on Carrozana's. In McCarthy's case his unimpressive demeanour provided additional reason for finding that he was not a credible witness.

Carrozana did not give a written statement to the police until 1987. He had been interviewed by Detective Chief Inspector Gibson of New Scotland Yard in August 1983. Mr. Gibson's evidence was that Carrozana had given an oral account of what he knew but that he

(Mr. Gibson) had not obtained a written statement. He had sought to do so but had been unsuccessful. The record does not indicate any reason for his lack of success.

It was suggested that the prosecution should have sought to elicit that Carrozana had made a previous statement to Mr. Gibson consistent with his evidence at the trial. Such evidence would have been inadmissible. It is excluded by the rule against hearsay. There is an exception to that rule which was applied in the case of Charles Oyesiku (1971) 56 Cr. App. R. 240 but the circumstances giving rise to that exception do not arise here. Carrozana's evidence was being attacked on the basis that he was a consummate liar who had concocted his reported account of the appellant's confession from details of the case published when the first preliminary inquiry had been held on which the appellant had been discharged on the count of murder.

There was no question and answer recording of the evidence given at the trial.

In the paragraph immediately before the penultimate paragraph of the record of Carrozana's evidence-in-chief is set out his account of the appellant's admission. The penultimate paragraph sets out his account of the incident in which the gun was tested - confirming the evidence of James Patterson Ebanks on that issue. In the final paragraph Carrozana is recorded as stating -

> "I think it was some time in 1984 that I first told police officers from Scotland Yard about this. Mr. Gibson was one of them."

It was contended that the final paragraph referred only to the account of the firing of the gun and did not include the account of the confession. On that basis it was submitted that the trial judge had erred when he stated in his judgment -

> "He [Carrozana] first told his story to New Scotland Yard detectives assisting the local police in this investigation in August 1983 but at that time he would not give a written statement. The fact was confirmed by former Detective Chief Inspector Gibson."

While the record does not make it as clear as it could have been made that the final paragraph of Carrozana's testimony was intended to refer to the two immediately preceding paragraphs in which was set out a summary of his pertinent information on the appellant's involvement, the interpretation placed on it in the trial judge's judgment cannot be said to be obviously wrong. He would have heard the evidence as it was given and that would have been an advantage in arriving at an interpretation of what had been said.

Apart from manner and demeanour, the trial judge advanced a number of reasons for finding that Carrozana was a truthful witness.

No motive could be suggested for his having concocted such a damaging story against the appellant.

The account which he gave of the appellant's admission was consistent with the reconstruction of the events based on the medical evidence and the examination of the physical evidence by the competent experts.

The cross-examination of Carrozana did not suggest that he had been coached by policemen to tell the story which he told. The suggestion was rather that he had made it up from the details of the crime published at the stage when the first preliminary inquiry had been held. There was no evidence that these details had been published though it was undisputed that there had been extensive publicity. From his observation of Carrozana as a witness the trial judge rejected this suggestion as to how Carrozana had come by his information. It is within his function as the trial judge so to do.

He considered the effect which the delay in giving a statement should have in assessing Carrozana's credibility. Having noted that Carrozana had first told his story to Mr. Gibson in 1983 he commented -

> "one can understand why. At that time he was in custody and the defendant was also in custody at Northward prison. I do not in the light of those

> circumstances regard his not having given a written witness statement to Police until 1987 as of any real significance. Clearly it was in 1987 that this whole investigation was revived and vigorously pursued once more by Police after marking time since 1983.

While it is the fact that both Carrozana and the appellant were in prison in August 1983 the record does not show that this was ever mentioned as a reason for Carrozana's not having given a written statement then. It is clear that the trial judge does advance it as a reason though there is no elaboration of the basis for this - whether fear or camaraderie. Mrs. Levers criticism that the passage bears the mark of speculation is justified.

The trial judge examined areas of discrepancy between Carrozana's evidence and other evidence which he accepted. Both centered around estimates of time.

Carrozana testified that the appellant had stated that having first shot the deceased through the bathroom window he and his associates had gone from the house for an hour and had then returned and broken into it. The appellant had found the deceased still breathing and had then shot her again. Dr. Davis' evidence was that laboured breathing could have lasted a matter of minutes rather than hours though he had earlier stated that a dying process could have begun after the forehead wound which could have lasted hours.

The judgment makes it clear that the trial judge had all the facts under consideration. In the final analysis he concludes that there was no discrepancy. Carrozana was merely reporting what he had been told. The appellant's estimate of time may well have been faulty. Erroneous estimates of time are very common. Greater reliability can be placed on the sequence of events unless the time-frame is of clear significance. There is no reason in this case to conclude that it was.

The other discrepancy related to the evidence of another witness Debra-Marlene Bush whom the trial judge found to be credible. She testified that the appellant had come to her house "sometime after 7:00 p.m." on the evening of December 12, 1982. Carrozana gave evidence of a conversation he had had with the appellant on that evening. He fixed the time as early evening but agreed that it could have been 8:00 p.m. - if that was the time he had given at the preliminary inquiry.

The trial judge considered this in the following passage-

> "When one appreciates that we are here concerned with lay witnesses giving estimates of time when events occurred several years earlier it would be quite unjustifiable to draw an inference that the evidence of one or either must be rejected on account of apparent discrepancies in those two time estimates. It is far more likely that one or other or both of the time estimates is wrong, than that either witness is lying about the events".

This approach seems well grounded in experience and cannot be described as erroneous.

It would be accurate to state that the Crown's case depended substantially on acceptance of the evidence that the appellant had admitted on the day after the killing to having fired the shots. McCarthy's evidence on that issue was discarded. Carrozana's evidence was believed. The acceptance of that evidence rested largely on his credibility as a witness. The principal matter of concern relating to his credibility was the fact that he had not come forward promptly to state what he knew. When he did speak to the police in 1983 he would not give a witness statement. Between 1983 and 1987 the evidence indicates that his way of life had changed. He had become a church-goer and worked as a heavy equipment operator. He impressed the trial judge and an appellate tribunal should give due weight to

his advantage of having heard and seen the witness. Apart from the discrepancy as to the time with Debra Bush (which is explicable) none of the other evidence casts any doubt on Carrozana's credibility. Rather it gives support to the extent that it shows elements of preparation and possession of property which must have come from the house of the deceased.

Having determined that there was a case to answer the trial judge went on to consider the defence which was an alibi. The witness called to support this was Marcia Gay Bush, sister of Debra Bush to whose evidence reference has already in part been made. Debra Bush's evidence was that the appellant had been at their home in their company on the night of Sunday December 12, 1982 until after midnight. Her mother had called her in saying it was midnight and she had gone in. As she was going in the appellant had been saying goodnight. She left him there and could not say precisely when he left.

Her sister Marcia Bush carried the matter further. She stated that he had left at what she judged to be about 3:30 to 4:00 a.m. on Monday morning. She so judged because the roosters were crowing when he left. She had fallen asleep and the appellant had still been there. She had a few beers during the evening. She is recorded as stating -

> "I have told you that I don't really know when Phillip left because I fell asleep before he left.
>
> I deny that Phillip left at the time Deborah left us."

Contentions were raised as to whether the trial judge had properly directed himself on the law relating to alibis. There was an unexceptionable statement on the burden of proof at the beginning of the summing up. There was no specific direction before the alibi was considered. It is, however, clear that he must have properly directed himself as appears from this passage -

> "But it is fair to say that if the Court did conclude from her testimony that the Defendant was or may well have been in her company until 3:30 a.m. or later as she suggested then this circumstance would clearly weaken the inference to be drawn from the other evidence review that he was at Miss Che Che's house when the murder took

place."

It is clear from this that once the alibi evidence had raised a doubt in the mind of the trial judge he would not have convicted. He reviewed the evidence closely and concluded that while it could be found that the appellant had left after 12:30 a.m. he did not leave as late as 3:30 a.m. He was satisfied that Marcia Gay was asleep when he left, a finding justified on the evidence. He was also satisfied that cockcrow provided no reliable gauge as to the time of day. He noted also, as he was entitled to, that the appellant had elected not to give evidence on an issue on which his evidence could have helped to confirm that of a witness called on his behalf. While he accepted that Marcia Gay was an honest witness he did not find her evidence that the appellant left at 3:30 a.m. was accurate.

Much argument was directed on the issue of the time he left because there was no evidence of the approximate time of the death of the deceased. Dr. Grant who first viewed the body early that morning was not called as a witness. It may well be that he would have been unable to help. Dr. Davis performed the post-mortem 2 days after the death and could give no opinion. The deceased had last been seen alive about 9:00 p.m. The indictment particularised that the appellant had-

> "on the 12th day of December 1982 or 13th day of December, 1982 ... murdered Una Elva Yates"

Even if the evidence as to his departure at 3:30 a.m. on December 13, 1982, had been acceptable it would not have completely covered the period within which the murder may have taken place.

Nonetheless the trial judge did not accept that evidence and concluded that the appellant left at some time after 12:30 a.m. - shortly after Debra Bush herself retired.

In the result three criticisms of the trial judge's judgment can be said to have merit:

Accordingly, the appeal must be dismissed."

process of reasoning by which they were reached."

the findings of the trial judge, the basis on which
to accept the substance of the criticisms affect the
In our view none of these criticisms affect the
ultimate evaluation of Carrozzano's failure to give
an explanation for Carrozzano's evidence
statements to the police to that time. If
case it was speculation that was not supported by the
evidence."

(iii) His comment that both the appellant and Carrozzano were in prison in August 1983 appears to have been offered as an explanation for the evidence of Christiana Ebanks that the appellant had admitted burying there a gun which had been used in a murder."

(ii) He was not justified in drawing the inference that the excavation at the roots of the tamarind tree in any way formed and it was inadequately supported."

was aware of the basis on which that opinion had been the handwriting on the box was that of the deceased." He

(i) He ought not to have accepted Mr. Yates' opinion that