IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CRIMINAL APPEAL NOS. 16 AND 17 OF 1990

BEFORE: THE RT. HON. MR. JUSTICE TELFORD GEORGES, P.C., J.A.
THE HONORABLE MR. JUSTICE JAMES S. KERR, J.A.
THE HONORABLE MR. JUSTICE KENNETH HENRY, J.A.

LESLIE CHARLES BONNER VS. THE QUEEN

AND

STANLEY CURTIS WALTON VS. THE QUEEN

Mr. Howard Hamilton, Q.C. instructed by
Mr. Keith Collins for Stanley Curtis Walton

Mr. Delano Harrison instructed by
Mr. Neville Levy for Leslie Charles Bonner

KERR, J.A.

In the Grand Court at George Town before Schofield J. with a jury, the appellants were jointly charged and tried with one Nick Romano Smith on an indictment containing three counts. The first, with conspiracy to commit robbery for that they together with Roy Faulkner and Orville Clive Burton conspired on diverse days between 1st and 23rd August, 1989, to rob the Cayman National Bank, George Town. Secondly, that the appellant, Bonner, together with the said Faulkner and Burton on the 23rd August, 1989, did rob the bank of money - CI$175,106.00 and US$14,492.00 - and that the appellant, Walton and the accused Smith, aided and abetted, counselled or procured the commission of the said offence and thirdly, that the appellant, Bonner, at the time of the robbery, was in possession of a firearm with intent to rob the bank contrary to section 18(6) of the Firearms Law.

The jury acquitted Smith on all counts, found the appellant Walton, guilty on the first count but not guilty on the

second and the appellant, Bonner, guilty on all three counts. Walton was sentenced to 5 years imprisonment and Bonner on Count 1 - 5 years imprisonment; Count 11 - 11 years imprisonment; Count 111 - 3 years imprisonment; all sentences to run concurrently.

We dismissed the appeals against convictions but allowed Walton's appeal against sentence by varying the sentences to 3 years imprisonment. Herein are our reasons for so doing.

At the time of the trial Faulkner and Burton, named in the indictment as co-conspirators, having pleaded guilty to a separate indictment, were serving terms of imprisonment for their part in the conspiracy and robbery of the bank and on the trial of the appellants were witnesses for the prosecution. The evidence as to the conspiracy, the planning and robbing of the bank and the involvement of the appellants rested in the main on the evidence of Faulkner. He prefaced his evidence of the facts with the explanation that he decided to testify because his family who supported him thought he should tell the truth as well as on his own discretion.

He is a motor mechanic and at the material time was working at his father's garage adjoining his home at Smith Lane, George Town. His evidence was to the effect that a month before the robbery appellant, Walton, came to him there with the idea of robbing the bank. He knew Walton as an employee of the bank. Although he told Walton he was not interested Walton returned the following day with a plan of the bank showing the entry and exit to the bank, the route to the banking area, an internal staircase to the second floor where there were rest rooms in which there would be hidden guns and clothes for disguise. Walton advised that the best time for the robbery was on a Monday at 3.00 p.m. when the bank would have most money and the head teller in the course of balancing would have the money on the floor beside her. After discussion, Walton burnt the plan. As no firm agreement had been

reached, on a subsequent occasion the accused, Smith, who was also an employee of the bank came to the garage and joined the discussion. Smith approved of Walton's plan. On Walton's suggestion that he should get a close friend to assist in the robbery he approached and persuaded Bonner who was at first reluctant but eventually agreed. Bonner suggested that there should be a third person to drive the getaway car. To that end he enlisted Burton; Bonner was present. Then there was a rehearsal along the route to be taken to and from the bank. The following day, a Saturday, both Walton and Smith came to the garage. He told them of the arrangements. In the weeks leading up to the robbery Walton visited him about 12-15 times and on one occasion he gave Walton a bag with clothes, masks and two small cloth bags to be used in the robbery. The date was fixed for Monday, 21st August. Walton agreed to provide two guns, one loaded, the other unloaded. The unloaded one was for Burton who Walton thought should not be trusted with a loaded gun. Walton gave him two registration plates to be used on the getaway car during the robbery. He rented a Blue Chevrolet car and replaced the plates with Walton's plates.

The attempt on the 21st August failed. Bonner who was unwilling to enter the bank, exchanged roles with Burton but on arrival at the bank, the fearful Burton, instead of following Faulkner into the bank, went his way and Faulkner would not go it alone.

The following morning, in response to Walton's request to repair his sister's car, he went to Walton's place and there told him that the failure of the 21st was due to the fact that "some of the guys were nervous". Smith then arrived and called him and his assistants "a bunch of chickens". On Smith advising that there might soon be changes in the Bank as the head teller would be going on maternity leave, the following day was suggested for the robbery. He told them that because of what happened on Monday he would have to speak with Bonner and Burton.

Later that day Walton came to his garage and after speaking with Bonner, informed him that Bonner had agreed to Wednesday. To Faulkner, Bonner confirmed his agreement and he, Faulkner, changed the Blue Chevrolet for a brown/reddish one. On Wednesday, about 1.00 p.m. to Walton's enquiry by telephone he said they were ready.

He replaced the registration plates on the rented car with those Walton gave him and with Burton driving and accompanied by Bonner they set out at about 2.00 p.m. They arrived and parked as planned by Wood's Furniture Store. He entered the bank followed by Bonner and they went to the rest room where there were the bag with the changes of clothing, the masks, two firearms and the smaller bags. Each man donned clothing and mask. Walton came to the door of the rest room and advised that everything was ready. With the loaded revolver in his hand and Bonner with the unloaded one in his waist they proceeded along the pre-arranged route by way of the spiral staircase into the bank area where the tellers were held up and Bonner, as was his duty, collected in the bags the cash from the floor and from the tellers' drawers. In the course of the robbery he discharged two shots towards the roof. They then left the bank by the exit door, he carrying one of the bags which Bonner had handed to him. They ran and entered the getaway car driven by Burton. The nervous Burton crashed the car against a "chain link fence" in the Walker's Road area. He Faulkner, took over the driving and drove to the dyke road where, as planned, he left Bonner and Burton with money, old clothes and guns. He threw the false registration plates into the dyke and replaced them with the regular plates and drove to his home, parked the getaway car and drove back to the dyke road where he picked up Burton and Bonner. Burton and Bonner had hidden guns, clothes, and money as agreed.

Later that night on Eastern Avenue, Walton, Bonner and Faulkner discussed the events. Later that night, Faulkner and Bonner went to dyke road and removed the money, first to Faulkner's

house, then to a rented room at the Windjammer Hotel. One hundred dollars, rental for the room, was paid out of the stolen money. There they counted the money and later it was removed to Faulkner's home at Smith Road.

The following morning, the Police visited his home, took him into custody, questioned him and he took them to his home and showed them where the money and firearms were hidden. On the plan of the bank drawn by the Police, he traced the route taken by Bonner and himself during the course of the robbery. In pictures of the robbery taken by the security cameras of the bank and which were exhibited he identified one of the masked robbers as himself.

Faulkner was extensively cross-examined by Counsel for Walton. He denied that he was the principal moving force in the conspiracy and robbery of the bank and that he was trying to extricate himself by putting the blame on others. Although he was a customer he would not have known all the inside information from the bank but for Smith and Walton.

He had given three statements to the Police before his arrest. These statements not only clearly contained admitted inconsistencies with each other and the witness's statement given after his arrest in December 1989, but also with his evidence in Court. In his first statement on the morning of the 24th August, 1989, he denied involvement in the robbery. In that of the morning of the 25th he stated that Walton's first approach about the robbery was to Burton and his involvement was limited to the driving of the getaway car while in his statement later that afternoon he admitted that Bonner and himself were the robbers and Burton the driver of the getaway car. He admitted in cross-examination that a number of particulars put to him from those statements were lies.

Cross-examination on behalf of the accused, Smith,

elicited that his first mention of Smith was in his statement of December, 1989. In his December statement he recalled to the best of his knowledge what was true. He denied leading Bonner to believe that he would be participating in a routine security check at the bank.

For his inconsistencies and false statements in re-examination he explained that as regards the earlier statement before he was charged he was confused and just did not know what to do but there came a time when he decided to tell what his participation was.

Burton's evidence was to the effect that he only observed meetings between Walton, Smith and Faulkner. It was Faulkner who said he wanted him to come along with him in the robbery of the bank. He saw Faulkner with a paper which Faulkner burnt. Before the robbery he saw Faulkner with a gun. The aborted attempt was due to his not going into the bank as arranged. On the day of the robbery, he was the driver of the getaway car. When the car hit the fence, Faulkner took over the driving. Faulkner and Walton had a dispute about work done by Faulkner - Walton was not satisfied with the work while Faulkner said that money was owing on the job.

Detective Inspector Brady, in the course of the investigations on the 24th August, went to Faulkner's home at 9.15 a.m. and observed the damages to the hired Chevrolet. He took Faulkner into custody, interrogated him and from information he elicited, went with Faulkner to his home where on Faulkner's directions, a large plastic bag and a bag containing the stolen money were found. It was on the following day when returning to the home with Faulkner that he found at the back of the garage the two firearms used in the robbery - Smith and Wesson with two spent cartridges and two live rounds and a Rohil revolver.

The interrogations and statements made and taken from

Faulkner, Walton and Bonner were admitted in evidence without objections.

Eustace Jeffers, Loans Officer in the bank, in evidence said that the day after the robbery, Smith spoke with him on a number of occasions. Smith said something about the robbery, "that it was supposed to happen on Monday but it happened on Wednesday" but he had nothing to do with it.

Andre Iton, the Senior Vice-President, gave evidence of Smith's unwillingness to discuss the robbery. Smith was not at the bank at the time the bank was robbed.

Judy Ann Walter, another Vice-President, said in evidence that all the money, save the one hundred paid for the room, was recovered. She was at her desk in the bank when the masked robbers entered. The bank was not then open to the public. The tellers were balancing. The robbers went directly to Karen Forbes, the number one teller, and there gathered the money that was on the floor. Other tellers were then robbed. She called the police and left the banking area by the interior stairway. On the fourth floor she saw Walton. It was when the taller of the robbers fired his shot in the air that she realised a real robbery was taking place.

According to Karen Forbes, the men came down the stairs, pushed her and the taller man took the money from the till and the smaller from the floor. In cross-examination she said that at first when the taller man pushed her she thought it was a joke.

Keva Ann McLaughlin, a customer service clerk, who was in the bank at the time of the robbery, ran to the window and wrote down the registration number on the getaway car which she recalled was 25481.

Karen Aiken, an employee of the bank, said she was the girlfriend of Roy Faulkner but this relationship ended in October 1988. Up to then she was in the credit card section of the bank. She never discussed the operations of the bank with Faulkner. He was a customer of the bank during and after the relationship. In cross-examination she admitted that in August 1989, she went to Miami in company with Faulkner for the weekend.

Patricia Verna Wilson, in her evidence said that the money taken in the robbery included decoy money - US$2,000.00. To her knowledge there has never been any discussion between Faulkner and anyone about the staircase.

Elizabeth Ann Ibeh, a sister of Faulkner an office administrator, in offices in the same building as the bank, never discussed with Faulkner the layout of the building.

Peter Burgess - Detective Chief Inspector - first interrogated Bonner and the record of that interview was tendered in evidence without objection. His statement, on arrest, was to the effect that he was led to believe that he was taking part in a security drill.

Vincent Mitchell, student of the University of West Florida and former Detective in Cayman Islands Police Force, gave evidence of Faulkner and Bonner coming to his home in the late afternoon of the 23rd August, 1989. Faulkner remained in the car while Bonner spoke with him at his doorway. Bonner was his close friend. He asked if he had heard of the bank robbery. He replied that he had heard. To Bonner's query why he was not assisting in the investigations he told him that as soon as he was through with a meeting he would go to the Police Station to assist.

At the close of the Prosecution case all three accused declined to give evidence.

Walton called one William Michael Belfour, a computer technician of West Bay. His evidence was to the effect that on the 4th August, 1989, he went to Miami with appellant, Walton and there on the 5th at a pool hall, Family Billiards, he saw Faulkner and Karen Aiken and Faulkner told him that Aiken and he were staying at the Holiday Inn.

Both Aiken and Faulkner admitted being in Miami on that day. Faulkner admitted seeing Belfour at the Family Billiards but both denied that Karen was at the pool hall. Faulkner denied staying at the Holiday Inn then and it was never suggested that he told Belfour that Aiken and himself were staying there.

Bonner called as a character witness one Richard Marshall.

On appeal, Counsel for Walton contended in effect that having regard to the evidence the verdict was unreasonable and inconsistent in that -

> (i) the acquittal of Smith indicated a total rejection of Faulkner's evidence by the jury and as the case for the prosecution rested on Faulkner's evidence and the defence of Smith and that of the appellant were the same, the conviction of Walton was inconsistent with the acquittal of Smith and should not be allowed to stand;
>
> and
>
> (ii) the conviction of Walton for conspiracy and his acquittal on Count 2 was so inconsistent as to merit being set aside.

He submitted that both Smith and Walton admitted knowledge of the plan to rob the bank but denied being part of the conspiracy or participating in the actual robbery. The importance of Faulkner's evidence was expressly brought to the attention of the jury by the Judge in his summing up when he said (p 42):

> "I would suggest to you that the case against Smith and Walton stands or falls on your assessment of the credibility of

> Faulkner. If there is doubt as to his, Faulkner's truthfulness then Smith and Walton are entitled to an acquittal".

Further, the pattern emerging from the cross-examination of Faulkner on the many statements he gave to the police was that from time to time he was minimizing his role and implicating others. There was not one tittle of evidence to support Faulkner's as to the acts of Walton's participation in the robbery as alleged by Faulkner.

Now in R.v. Durante (1972) 56 Cr. App. R 708, the Court of Appeal gave formal approval to the view that an appellant who seeks to obtain the quashing of a conviction on the ground that a conviction on one count was inconsistent with a verdict of acquittal on another count, has a burden cast on him to show not merely that the verdicts on the two counts were inconsistent but that they were so inconsistent as to call for interference by an Appellate Court.

The view was referred to with evident approval in the Jamaican case of R. v. Taylor (1977) 25 W.I.R. 586. In that case the ground of appeal reads:

> "The verdict is inconsistent in that evidence led by the Crown allegedly implicating all the accused was used to convict some and release others. As credibility is indivisible the verdict is incomprehensible".

In the judgment the recognition of this type of inconsistency was stated thus:

> "Accordingly where two or more persons are jointly charged and the evidence against one is materially indistinguishable then an acquittal of the one and a conviction of the other is inconsistent in the sense that the conviction is unreasonable and cannot be supported having regard to the evidence".

Now in addition to the challenge to Faulkner's

credibility, the defence of both Smith and the appellant, Walton rested on what may be regarded as the exculpatory parts of extra-judicial statements tendered in evidence by the prosecution on the basis of admission against interest as some parts of those statements contained material open to an inculpatory interpretation. In the course of his summing up the Judge specifically read to the jury, with running comments, parts of an interview which followed a caution statement and which recorded interview was admitted in evidence without objection or challenge to its accuracy in the following manner (p 215):

> "These questions and answers are, however, worthy of repetition. They come after the statement under caution. That is page 20 of the interview, it is after the caution statement, it is just over half way down.
>
> 'Question - Was the original expectation of Nick and yourself and Royo to share whatever money was obtained when the bank was robbed?
>
> Answer - To be honest I really did not think it would happen so, but if it did I presume he would give us something.
>
> Question - Would you agree then that there was a common agreement in the form of that plan between yourselves?
>
> Answer - Ya. We had knowledge of it, ya.'
>
> Now why would he assume he would get something if he did not assist? Ask yourselves that Mr. Foreman, members of the jury.
>
> 'Question - So then you are saying that your only involvement in the robbery of Cayman National Bank is that you provided information to assist Roy Faulkner, one of the robbers in effecting the robbery?
>
> Am I correct?
>
> Answer - Ya, about the staircase'.
>
> In the caution statement it comes out clear that there was more than just the question about the staircase at the bank when Faulkner was changing money. There seems to have been a second meeting admitted by Walton. He said this .....
>
> > 'I do not know if I should have said this before but this was after he suggested to

> me about robbing the bank. The only other thing that I told him was that after he entered the second floor the stairs was like in, you could see the stairs. Me and him and Nick we did not discuss anything about money like share if we did it, and at that point we did not tell him anything else like the best time or anything like that, when he could the most money when he did it, because to be honest I did not really think he would do something like that'.".

Mr. Hamilton frankly admitted that there were no admissions from Smith comparable to those of Walton in these passages. However, in order to maintain his stand he submitted that this difference in evidence was not sufficient to justify the inconsistent verdicts and, on the basis that all grounds argued against conviction should be considered for their cumulative effect, he sought further support from the arguments under certain specific grounds. Thus:-

> "That the learned trial Judge failed to instruct the jury appropriately that before they should look for corroboration of Faulkner's evidence they should first determine that he was a credible witness and that he should inform the jury that there was no evidence to corroborate Faulkner in relation to the acts of participation in the robbery. Instead, he indicated to the jury evidence that was in fact equivocal as capable of amounting to corroboration."

Now there was no complaint against the Judge's general directions on and definition of corroboration. He quite properly categorised Faulkner as an accomplice and warned the jury of the dangers of relying on his uncorroborated testimony. On the specific directions relevant to the instant case he said, inter alia (p 189):

> "Now Mr. Foreman, members of the jury it is as well to mention here that some of the most damaging evidence, if it is believed, called against these accused, is the evidence of Roy Faulkner and perhaps Orville Burton who have both admitted their own involvement in the robbery. It would be safe to suggest that the prosecution case against Smith and Walton the first two accused stands or falls on the evidence of Faulkner and Burton. And Faulkner and Burton are accomplices, and it is a rule that in the case of accomplice

> evidence we look for corroboration of that evidence".
>
> (p 190)
>
> "If, however, at the end of the day you find there is no corroborative evidence but you are still convinced that the accused or any one of them is guilty of an offence you may still convict him even though there is no corroboration, provided you give yourself the solemn warning that it is dangerous to do so".
>
> and at p 227 -
>
> "I have already indicated to you areas where you may, depending on your views of the evidence, find corroboration. Of course, no amount of corroboration in the case of Smith and Walton will save the prosecution's case if you disbelieve Faulkner. If you disbelieve him the case goes".

In our view the difference between what Mr. Hamilton considers requisite and these directions is merely a matter of style. The Judge's directions on this aspect of the matter were fair and put with lucid simplicity.

In relation to the passage read from the appellant's statement, the Judge said at page 216:

> "Now Mr. Foreman, members of the jury look at the statement and interview record as a whole. Depending on the way you view them the admissions made in them could amount to corroboration of Faulkner's testimony".

In our view the interpretation to be placed on these admissions is a matter for the jury and their interpretation would naturally depend on such other pertinent facts which they might find from the evidence. Accordingly, the directions to the effect that the statements quoted were corroboration vel non, depending on their interpretation, were proper and appropriate.

It was further argued that in relation to Walton's statement the Judge failed to direct the jury how they should treat a statement which was part inculpatory and part exculpatory where the appellant did not give evidence. In that regard, Counsel

submitted that the Judge's comments were made on assumption as to the reason for the appellant's expectation of some of the proceeds from the robbery. As to the proper direction by a Judge to the jury in this type of mixed statement he referred to certain passages in R. v. Sharp (1988) 1 ALL E R 65.

This point was raised and extensively argued on behalf of appellant Bonner and the principles enunciated in R. v. Sharp will be dealt with more fully later in relation to the submissions on behalf of Bonner.

In Walton's case, the admission of knowledge of the plan to rob the bank but with a denial of involvement was the main theme of the defence and rested on the exculpatory parts of the statements. In dealing generally with statements made by the accused the Judge said (p 191):

> "And the second warning is that the accused persons gave statements under caution or interviews under caution to the police. The prosecution has asked you to view these statements and interviews in one way and the defence have asked you to view them in another way. We will go into that later and it is a matter for you what you make of those statements and records of interview whether you accept any given statements as true or indeed whether you accept only given parts of any statement or interview as true".

and in relation to the defence said (p 226):

> "After you have considered the case against Smith, consider the case against Walton. If you have doubt that his involvement amounted to no more than mere prior knowledge, in other words, if there is a doubt as to his actual involvement in the organization then he must be acquitted on both counts. If however you are sure his involvement was greater than mere knowledge decide just what the extent of his involvement was".

All the statements put in evidence were made available to the jury. In those parts expressly referred to by the trial Judge, the appellant admitted:

(i) knowledge of the plan to rob the bank;

(ii) providing useful information about the stairs that could assist the robbers;

(iii) an expectation to participate in the proceeds if the illicit venture was successfully accomplished.

These are damaging admissions. We have not been adverted to any statement among those tendered to contradict these admissions. In the circumstances, the Judge, with nothing more forthcoming from the appellant at the trial, made the most of this limited material by leaving the issue to the jury in the manner he did. We found no fault in his directions on this aspect of the matter.

With respect to the internal inconsistency in the verdicts against Walton, Mr. Hamilton submitted that a verdict will be considered unreasonable if no reasonable jury would arrive at that verdict and that such inconsistency will arise if the general story is the same for both charges as in the instant case. The Court ought not to speculate as to the possible reasons for a jury's verdict.

On the other hand Mr. Smellie submitted that it was open to the jury to take the view that the involvement of Walton was limited to the conspiracy on the basis of his admissions referred to specifically in the summing up but were unwilling to find participation in the actual robbery which rested entirely on the evidence of Faulkner's. In that regard, the jury's verdict was in keeping with directions of the trial Judge as to their approach to the evidence of the accomplice, Faulkner, and his warning as to the danger of relying on Faulkner's uncorroborated testimony. Further, it was open to them to find corroboration in his admissions in relation to the conspiracy. To this Mr. Hamilton replied that if the verdict of guilty rested on the admissions then the furnishing of information on the staircase would be sufficient to convict the appellant of procuring the commission of the offence.

Now it is clear that Count 2 was the carrying out of the unlawful purpose contemplated in the conspiracy and pivoted on the evidence of the activities and events of the 23rd August, 1989. Since the abolition of the distinction between felonies and misdemeanors by the Criminal Procedure Code - Law 13 of 1975 - it is permissible and usual to plead in an indictment against secondary parties to an indictable offence the alternatives "aid , abet, counsel or procure", as was done in the instant case. No objection was taken to the joinder of Smith and Walton and, if taken, would be unlikely to succeed since implicit in a joinder of defendants is that the parties are jointly and severally charged - D P P v Meriman (1972) 56 Cr. App. R at 776.

However, in this case the nature of the case against each is different. Against Walton, the allegations are to the effect that he was present at the scene of the robbery aiding and abetting the actual perpetrators by making available to them the firearms and paraphernalia and tipping them off as to the appropriate time to enter the bank.

Before the Act of 1975 when felony was a separate type of indictable offence from misdemeanor, Walton would be categorised as a principal in the second degree. On such facts as alleged he would normally and appropriately be indicted as a principal offender and this could still be done, having regard to the provisions of Section 18(c) of the Penal Code.

On the other hand, there was no evidence of active participation in the actual robbery against the accused, Smith. The evidence was that he was absent from the bank at the material time; therefore, "counsel or procure" would be the only averments in Count 2 relevant to him.

Had the indictment been framed as indicated above, the trial Judge would not have been required to explain to the jury the

four alternative averments as they relate to each accused. The distinction between the roles of Smith and Walton in the robbery would be obvious. The jury would only be required to consider the evidence relating to the actual robbery in relation to Walton.

So with respect to the apparent inconsistency based upon the range of alternatives in Count 2, we approve of and apply the statement of principle as set out in the headnote to R v Drury (1972) 56 Cr. App. R. 105, that "there is no general rule that the mere fact that a jury has returned inconsistent verdicts on counts in an indictment means that the Court of Appeal is obliged to quash the conviction; the verdicts on the different counts must be so violently at odds as to call for interference from the Appellate Court; it must be shown that no reasonable jury who has properly applied their minds to the facts of the case could have arrived at that conclusion".

In the instant case, it was open to the jury to consider the second count against the appellant, Walton, as one of aiding and abetting the commission of the robbery on the basis of the acts of participation alleged by Faulkner. There was no corroboration on this aspect of Faulkner's evidence and the appellant had in his statement said, in effect, that although he knew of the plan to rob the bank, the robbery on that particular day was unexpected.

In relation to the verdicts open to the jury the Judge said (p 227):

> "If you are satisfied that he left the paraphernalia for Faulkner and Bonner and told them in the toilet they can go, that everything is ready, then he is guilty of aiding and abetting the robbery. If however you are not satisfied his involvement extended to that but you are satisfied he gave information to Faulkner and Burton and actively encouraged their participation in the robbery then he is guilty of counselling and procuring the offence. In either case you will convict him on Count 2 as well as the conspiracy, Count 1, but he must then have been involved

> in the agreement.
>
> It is still open to you Mr. Foreman, members of the jury to find that his involvement did not extend to aiding and abetting, counselling or procuring the offence but that it involved him in the agreement to commit the robbery. Now if that is your finding then you will convict him on Count 1, the conspiracy only. Again with Walton you can find him guilty on both counts or of conspiracy only, but I would direct you it would be inconsistent for you to find him guilty on the second count, aiding and abetting or counselling and procuring, and to find him not guilty on the first count".

The verdict of the jury was, therefore, explicable on the basis of their response to the Judge's directions by limiting Walton's role to being a conspirator as it was open to them to so find on approaching the evidence as indicated above.

Accordingly, we were of the view that there was neither inconsistency between the verdicts of Smith and appellant, Walton, nor such incompatibility in the verdicts in relation to Walton as to merit interference.

For these reasons Walton's appeal against conviction was dismissed.

For the appellant, Bonner, the submissions were in the main to the effect, that the Judge's presentation of the defence to the jury was so inadequate as to deny the appellant a fair trial.

Now the appellant gave no evidence as to how he was led to believe or the bases for his belief that he was taking part in a security drill. However, notwithstanding the obvious deficiencies in the defence, we were mindful of the principle that regardless how tenuous the defence may be, the trial Judge is obliged to leave for the determination of the jury any issue raised in defence. Accordingly, we gave due consideration to the arguments and submissions of appellant's Counsel.

In that regard, the main contention was outlined in the following grounds:

> The trial Judge failed to direct the jury fairly and adequately or at all on the appellant's defence which plainly arose in the prosecution's case. This critical non-direction constituted a fatal misdirection.
>
> The trial Judge gravely misdirected the jury when he charged that even if they disbelieved the evidence of the principal witness, Roy Faulkner, they might nevertheless convict.

In support of the first ground, Mr. Harrison submitted that where there is in evidence a mixed statement (that is one containing exculpatory and inculpatory parts) the trial Judge should have reminded the jury of all the facts in the statement constituting the explanation and any other facts supportive of it and assist them in evaluating the evidence. He cited in support statements from R. v. Sharp [1988] 1 ALL E R 85. Further, that the trial Judge failed to direct the jury that the proper approach where there is a mistaken view of the facts in relation to the nature of his activity, culpability was to be determined on the basis of his mistaken view of the facts. He referred to statements in Beckford v. R [1987] 3 ALL E R 425.

The trial Judge in outlining the nature of the case for the prosecution and for the defence said: (page 193):

> "The prosecution go further in the the second count and allege on the part of each accused something more than just agreement. It is alleged that Bonner took part in the actual robbery. Now of course there is no dispute that there was in fact a robbery at Cayman National Bank on the 23rd August, 1989. But it is said that Bonner took part in the actual robbery, and to prove that he committed the crime alleged the prosecution have to satisfy you, as has been rightly pointed out by defence Counsel, not only that Bonner committed the act of robbery, but that his mind went with that act. In other words he knew he was robbing the bank. His defence is that he thought it was an innocent exercise and it is for

> the prosecution to rebut that defence. Only if you are satisfied that Bonner knew he was robbing the bank can you convict him on the second count, or indeed on any count, because he cannot have been involved in an agreement, so as to be involved in a conspiracy, to rob the bank if he thought it was an innocent exercise ..... So I would direct you Mr. Foreman, members of the jury in regard to Bonner the three counts in the the indictment stand or fall together. You either find that he knew that he was involving himself in a robbery, in which case he took part in the conspiracy, in the actual robbery and he had possession of the firearm with intent to commit the robbery, or if you find that there is a doubt about his guilty knowledge then he is entitled to an acquittal on each of the three counts".

In our view this was a fair and accurate identification of the issues in the case.

Now in R. v. Sharp (supra) in his judgment Lord Havers at page 67 quoted and reaffirmed the approval of the Court of Appeal of the following statement of Lord Lane CJ in R v Duncan 73 Cr. App. R 365:

> "Where a "mixed" statement is under consideration by the jury in a case where the defendant has not given evidence, it seems to us that the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. Equally, where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight. Nor is there any reason why,

> again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence".

The burden of the complaint in R. v. Sharp was earlier described at p 67:-

> "In his summing up the judge treated the defendant's statement as a 'mixed statement', that is a statement that is in part admission and in part exculpatory. He directed the jury that they were entitled to regard that part of the defendant's account in which he said he was in the area at the time of the burglary as an admission and therefore evidence of the fact that he was there, but that the other parts of the statement which explained his reason for being there were exculpatory and therefore were not evidence of the facts related".

These directions were clearly in conflict with the statement of principle in R v Duncan and it is on this basis that the appeal was allowed.

The instant case is clearly distinguishable. Indeed not only was the exculpatory part of the statement left to the jury but as an issue to be negatived by the prosecution to the requisite standard. By leaving the issue open without the adverse comments which are regarded in R. v. Sharpe as appropriate, the directions were highly favourable to the appellant.

The case of Beckford v R is distinguishable and unhelpful to the appellant. Again in Beckford's case, the Privy Council was concerned with positive misdirections and not a complaint of non-direction. Their Lordships were dealing with self-defence as an exculpatory concept and disapproved of the Judge's directions which constrained the jury to find that the accused could have no honest belief of imminent injury to himself in the absence of reasonable

grounds for that belief objectively assessed. Their Lordships did not go as far as to say that reasonable grounds were irrelevant to the determination of whether or not there was an honest belief as Mr. Harrison seems to imply. On the contrary Lord Griffiths in delivering the judgment of the Board said: (page 432):

> "In assisting the jury to determine whether or not the accused had a genuine belief the judge will of course direct their attention to those features of the evidence that make such a belief more or less probable. Where there are no reasonable grounds to hold a belief it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held".

Further, the issue in Beckford did not depend upon an exculpatory part of an extra-judicial statement but the issue was positively raised in a statement from the dock which was permissible in the Jamaican jurisdiction.

Mr. Harrison sought support for the genuineness or reality in the defence from the evidence of the tellers who said that at first they thought the hold-up was a joke.

It is difficult to see what help this could give the appellant's defence. Belief is personal to the believer. The appellant had chosen not to give evidence of the circumstances relevant to his belief. The tellers were in an entirely different position from the appellant, Bonner, and could have no knowledge of the facts and circumstances on which the appellant's belief may have rested.

Another complaint was to the effect that the Judge erred in his direction that there was evidence independent of Faulkner's to support the verdict against Bonner. In that regard the Judge said (p 228):

> "The case against Bonner is entirely different. He having admitted going to the bank. He admitted taking the money. The case against him doesn't necessarily stand or fall with Faulkner. Of course, if you consider that possibly Bonner could be involved innocently in the events of that day that you must acquit him and would acquit him on all charges. If however you consider that you are sure Faulkner's evidence is truthful, and again you will look for some evidence to corroborate Faulkner's that Bonner went along willingly. ..... But even if you consider that Faulkner maybe or is untruthful you must still look at the evidence in its totality and decide whether you are driven to the conclusion having regard to the evidence of Bonner's actions before, during and after the robbery, that his explanation that he was an innocent participant defies belief. Look at all the evidence; even if you consider Faulkner was untruthful you could still find Bonner guilty because you could still, if you are sure that he was a willing participant find him guilty".

In this we are of the same view. The occupation of Faulkner and himself as motor vehicle repairers, the role played by him in the robbery as described by the tellers and admitted by him, his expressed apprehension as to the risks involved, the abortive attempt on Monday and the exchange of roles between Burton and himself were sufficient unchallenged facts independent of Faulkner's evidence to support the jury's rejection of his having an honest belief that he was taking part in a security drill.

Although in the light of this finding the ground of appeal criticizing adversely the trial Judge's directions on inconsistencies and discrepancies in Faulkner's evidence cannot affect the outcome of the appeal against Bonner, nevertheless, it seemed of sufficient general concern to both appellants to merit inclusion in these reasons for judgment.

On inconsistencies and discrepancies, the Judge said: (page 189):

> "I would suggest that you ask yourselves whether any inconsistency or discrepancy is important. And if you find that discrepancies or inconsistencies undermine your confidence in the accuracy of the evidence given by any witness, and you will judge each witness separately, then you assess that witness's evidence accordingly. Your duty in the end is to determine whether the truth emerges on the important aspects of the case despite any inconsistency or discrepancy".

and later during the review of Faulkner's evidence (p 203-4):

> "So Mr. Foreman, members of the jury going nearer to the truth but still quite a long way from it. When cross-examined about the statement again Faulkner admitted lying to the police. It is a matter for you Mr. Foreman, members of the jury, having seen Faulkner, and no doubt having carefully assessed him, whether you consider he was gradually being drawn into a position where he would tell the truth or whether he has throughout told the most convenient story to suit his needs and whether his convenience has been best served by continuing a series of lies to this Court.
>
> One view is of course that he started off denying it, was gradually drawn to the truth, and in the end told the truth, and has continued with the truth in this Court. Another view, and you can only determine this, it is a matter for you Mr. Foreman, members of the jury, is that he has simply throughout the series of statements and interviews and even in Court continued to tell lies for his own advantage, and he has only admitted that which in the end he has been forced to admit. It is a matter for you Mr. Foreman, members of the jury".

The Judge fully and carefully reviewed the evidence of accomplice Faulkner and referred to the inconsistent statement he

had given. Accordingly, in the circumstances, we are of the view that these directions were clear, fair and adequate.

It was also argued on behalf of Bonner that the Judge erred in his treatment of the evidence of defence witness, Richard Marshall. In our view, in the light of the issue raised in defence this evidence of general good character would be of little value. What would be of some help would be evidence tending to show gullibility. Indeed, on the contrary, the evidence was to the effect that the witness had no reason to suspect that the appellant was not a reasonable intelligent young man.

Dealing with his evidence, the Judge told them it was a matter for them to put in the balance when making their decision and having briefly summarised the evidence said (p 225):

> "However, you are entitled to take into account Bonner's previous good character when determining whether he was involved in the robbery as a guilty or innocent participant".

In the circumstances, though concise, the directions were clear and favourable to the defence.

For these reasons Bonner's appeal was dismissed and his conviction and sentence affirmed.

In Walton's appeal against sentence Mr. Hamilton urged that in addition to the submission of antecedent good character, consideration should be given to the fact that the jury by their verdict limited the appellant to being a conspirator and even in that, he submitted, his role was limited to providing information about access to the banking area.

Now the jury by their verdict indicated that the larger role presented by the Crown in the opening of Counsel and on the

pleadings was not established.

In the circumstances, we considered the sentence was clearly and sufficiently excessive to merit the variation we made.