1988 Crim

CAYMAN ISLANDS

IN THE CAYMAN ISLANDS COURT OF APPEAL
C.I.C.A. No. 31/87 (Criminal)

BEFORE: THE HON. PRESIDENT
THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE HENRY, J.A.

WILLIAM G.S. POWELL

VS.

REGINA

Mr. Lamontagne, Q.C. for appellant

Mr. Smellie for the Crown

15th & 16th August, and 1st December 1988

Kerr, J.A.:

On July 31, 1987, in the Grand Court at George Town before Hull C.J. (Acting), the appellant was convicted for the murders of Charles Edward Ebanks and Gaynell Marion Ebanks committed on the night of June 23, 1986 and sentenced to death. The first to occur was that of Charles Ebanks at his home at Sheddon Road, George Town: the second was at Cloret Anglin's yard, Birch Tree Hill, West Bay. In the absence of evidence no close kinship between Charles and Gaynell can be assumed as the surname 'Ebanks' is very popular in Grand Cayman. After two days of arguments we dismissed the appeal against the convictions. Herein are our reasons for so doing.

Harley Welcome, a landscape gardener, was living at the house of Charles up to the time of his death. His evidence was that on the night of June 23, he was among certain acquaintances by the laundromat at Mary Street, George Town when at Charles' suggestion he and the deceased set out for home. On arriving there he saw and recognized the appellant whom he knew for a "couple of years" before, sitting on the porch of Charles' house. At Charles' request he gave him his only cigarette and Charles in turn gave him a dollar and asked him to purchase a pack of cigarettes. He set off on his errand leaving the appellant still on the porch with the deceased standing nearby. On his return some five minutes later the appellant was gone. He then went upstairs their house and in an apartment there he saw the body of Charles lying on the floor.

When there was no answer to his call he took a closer look and saw "a hole in his throat and a heap of blood" around the deceased. He was frightened by the sight and ran to where he had left his companions at Mary Street. Not getting a satisfactory reaction to his alarming news he ran further up the road where he saw and spoke to one Kendal Myles. Myles returned with him to the room where deceased lay. They then set out with intent to inform the police. On the way to the station they met a patrol car and made a report to the patrol officer Michael Gooding. In cross-examination he said that when he entered the yard, Rita Dilbert was sitting at her doorway at the other end of the yard and her radio was playing but not loudly. On his return from purchasing the cigarettes Rita was as when he left. Rita's hearing was not too good. He admitted that in his first statement to the Police he omitted to mention the appellant's name because he was frightened and confused. Myles' evidence supported Welcome's as to his informing him, visiting the scene and informing the police.

Michael Gooding, the Patrol Officer, said that acting on the reports of Welcome and Myles made at about five minutes after midnight according to his watch, he visited the home of Charles Ebanks and there saw the dead body. He communicated by radio to the Central Police Station and shortly after Sergeant Innes and Constable Elliott arrived and took charge of the investigations.

About ten minutes after midnight as a result of a radio communication he drove to Walker's Road, picked up Sergeant Beatrice Ebanks and drove to Cloret Anglin's yard where he saw the dead body of Gaynell Ebanks lying on the ground beside a mattress. The ambulance crew was already there.

Direct evidence of this murder was given by Austin Kempton Ebanks. He had gone to Cloret Anglin's yard some time after 11 o'clock that night. Gaynell (deceased) was lying in a hammock. He was there in conversation with her for about twenty minutes when appellant drove up. The witness was sitting on a box and appellant stopped the car beside him and said "This is what you are doing". The appellant came out the car with gun in hand and fired three shots at Gaynell. The witness ran, chased by Powell who fired a shot at him. The shot missed and he ran into a bush. From there he saw appellant jumped into his car and drove away towards Barkers. He had known the appellant for about four years. He recognized him by the flood light that lit Anglin's yard. Appellant was dressed in beige shirt and jeans. The car appellant drove was a white Charade. In cross-examination he described the gun the appellant had as a black gun

apparently a .38. His opinion on this was based on his seeing policemen with guns of similar calibre. He estimated the time as around midnight. He was cross-examined as to previous convictions. He admitted only two - one in 1968 when he was 16 years of age and in 1982 for ganja and served a term of six months imprisonment.

Cloret Anglin in evidence said that in her yard and near her bedroom there is a hammock beneath naseberry and guinep trees and on the ground nearby a mattress. Gaynell (deceased) was a guest in her house. On the night of the 23rd June she retired to bed about 11 p.m. She was awakened by cracking sounds and she heard Gaynell's voice saying "No William". She went outside and found Gaynell lying on her side on the ground making gurgling sounds. Before she came out she had heard the sound of a car "screaming away". George Hennington Webster was with her that night. She had known the appellant for several years before that night. She knew him as 'William' and 'Puggy' and had seen appellant and Gaynell together. She last saw him on the evening of the 22nd June when he came to her home and said he wanted to speak with Gaynell. She told him he could do so but he was not to make any trouble. She so spoke because on the Friday before he had come to the yard "grabbed Gaynell by the hair and wanted to kick her". On both occasions appellant drove a white Charade. Hennington Webster went for the police. Evidence of the incident on the Friday was given by Hank Ebanks and Lennon Ebanks.

Hank Ebanks who said he parted the appellant from Gaynell said he actually kicked her while Lennon said he kicked at her but could not say if the kick landed.

Rommel Ebanks' evidence was that on the night of June 18, Gaynell, his aunt, was in the parked car of one Bonnie at Crab Hole Road when appellant drove up and tried to pull Gaynell out the car. He told appellant he was not going to allow him to hurt his aunt. He said appellant told Gaynell that if she did not get off the island quick he was going to kill her. In cross-examination he said that as far as he knew, appellant and Gaynell had a relationship going and it would break up sometimes and she would go home to her father.

In our view, there was sufficient evidence to support the adverse inference that as far as appellant was concerned in relation to Gaynell his was the fury of a jealous and discarded lover. But counsel for the Crown generously conceded that there was no specific motive for either murder and the trial proceeded on that basis.

Hennington Webster, the bedfellow of Cloret Anglin, said he heard the shots, looked out and saw a man standing under the naseberry tree. The man got into a white Charade and drove away. He went out and saw the gravely wounded Gaynell lying on the ground near the mattress and he hurriedly drove for the Police at the West Bay Station 1½ miles away.

The white Charade was recovered later that day by Inspector Courtney Myles. According to Kenny Ritch of Avis Cico Rent-a-car it was on hireage to the appellant at the material time.

THe third act in this tragic affair was the arrest of the appellant. Ladner Watler, then detective constable, attached to the C.I.D. on Tuesday 24th June, acting on information and accompanied by two other officers drove to Mary Street and leaving the other officers in the car entered an old residence - the childhood home of the appellant. He had known the appellant all his life. He called out "Puggi" and the appellant answered. Ladner went to the back of the house and pulled open the top half of a wooden door. The appellant was standing inside near this door and at Ladner's having assured the appellant he was alone he unbolted the door. Ladner then enterd. The appellant had a revolver in his right hand and as he walked into a kitchen followed by the witness he said "Lad you come for me". Ladner said "Yes". He took a few steps, sat in a chair and said "I'm Sorry Lad, not this time" brought his gun to his chest and shot himself. Ladner went out and reported to the other officers in the car. When they returned, the appellant with blood gushing from his chest, struggled to the threshold where the gun fell from his hand. Sergeant Clifford took possession of the gun. The appellant was taken in an ambulance to the hospital where he was treated.

Ladner was unarmed - it had been agreed, by the police officers, that no force would be used until he Ladner had spoken to him.

The bullet which had been fired by appellant was on the floor. The revolver had four live rounds and a spent shell and these exhibits in due course were submitted to the ballistic expert, Robert Sibert.

The case for the prosecution was strongly supported by the evidence of the experts Noel Clinton March, the Consultant Pathologist and Robert Sibert, the ballistic expert. March performed post-mortem examinations on the body of both deceased. With respect to Charles Ebanks he visited the scene at about 1:45 a.m. and saw the dead body of Charles lying on the floor of the kitchen-diner complex. There was clotted and liquid blood in nose and mouth and around and under the body. There was an entry bullet wound between the right second and third ribs in the anterior lateral aspect of the chest wall. The exit was at the left posterior lateral aspect of the chest wall between the sixth and seventh ribs. The bullet went through the upper lobe of the right lung, trachea, oesophagus and the descending portion of the aortic area and through the chest wall. Death was due to shock from the haemorrhage from those wounds. From the absence of powder marks on the clothing he was of opinion that the nozzle of the firearm was not within 15 - 18" of the entry wound. From a chair in the room a bullet was extracted. From his observations and the measurements he took he concluded that the deceased was shot while sitting in the chair.

With respect to Gaynell Ebanks he visited the scene and saw the dead body as it lay on the ground under the shade of the tree and near the old mattress. He found:

1. A bullet entry wound on the left shoulder in the area where collar bone and shoulder meet. The path of this bullet was slightly downwards and to the right causing several areas of fracture to the left collar bone and upper part of the breast plate, the upper lobe of the right lung and ending up between the fifth and sixth ribs from where this bullet was removed.

2. An entry wound of a bullet in the left breast 2½" above the nipple with exit about 3" below the nipple.
3. An entry wound of a bullet left of the mid-abdominal line 4" above the navel with exit just to the right and 6" above the navel.
4. An entry wound of a bullet slowing down and stopping at an angle through the upper anterior part of the thigh. This was caused by the bullet at 3 above.

The positions of the wounds were consistent with the deceased lying in the hammock in a semi-curved position when she was shot. In his opinion the wounds were caused by the two bullets found. The wounds to the breast, abdomen and leg by one bullet - although separate shots could have caused the same results.

Robert Sibert, Special Agent with the F.B.I. assigned to the Firearm Identification Unit of the F.B.I. Laboratory in Washington, said he had been there for sixteen years. He holds, inter alia, the B.Sc. in forensic science and he had given expert evidence in Courts over 350 times. He gave evidence as to receipt of certain exhibits which included the bullet from the chair in Charles Ebanks' house, the bullets from the body of Gaynell Ebanks, the bullet fired by appellant through his chest, the revolver taken up by Sergeant Clifford with four live cartridges and a spent shell. He gave evidence of the tests performed by him, of microscopic comparisons between the bullets received from the police and the bullets he fired for the test purposes and came to the conclusion that the four bullets, which were of similar calibre and type, were all fired by the revolver produced and no other. The spent shell was also fired by the same revolver. This revolver was a .357 Magnum Astra manufactured in Spain. The serial number had been obiterated. He produced photographic enlargements illustrating the similarities between the exhibited bullets from the police and those he test fired.

He was cross-examined at length about the tests he carried out and about literature on ballistic science. On the absence of powder marks on the clothing of both deceased, his opinion differed from Dr. March as to the maximum distance from which deposits would be found if the revolver exhibited was used. He said that the revolver would deposit residue up to a distance of six feet.

Nothing turns on this discrepancy. In any event, he did specific tests for that purpose and his evidence would be preferred. Towards the end of his evidence he had this to say (p. 75)

> "There are some cases in which if you fire two consecutive bullets from the same gun and give to expert he could not say they came from the same gun. That is not the case here. I have 4 bullets which I have not only identified with each other from two different scenes but I find that these marks are also reproduced on 4 test fired bullets, therefore over at least 8 firings the identifiable marks have been reproduced faithfully, in my opinion."

Evidence of a finger print found at Charles Ebanks' home, though identified as appellant's, had no real probative value as the appellant had been a frequent visitor there and the learned trial judge properly and prudently so addressed the jury.

The Crown tendered photographs of the loci of the murders. The jury, however, had the benefit of viewing the locus at

(1) Charles Ebanks' house
(2) Cloret Anglin's yard
(3) Appellant's mother's house at Mary Street.

At the close of the case for the prosecution, the defence rested on the submissions of Counsel. Mr. Lamontagne reviewed the evidence in detail and addressed the jury to the effect that there were uncertainties and weaknesses in the evidence tendered by the prosecution and in particular the civilian witnesses and accordingly proof of guilt beyond reasonable doubt had not been established.

Before us Mr. Lamontagne frankly conceded that the summing-up was fair and even favourable to the appellant. However, his first ground of appeal contended that in ruling certain evidence inadmissible the learned trial judge erred. He submitted that the excluded evidence was admissible as part of the res gestae and was "highly relevant and crucial to the defence". He cited in support a number of cases including Ratten v Reginam [1971] 3 All E.R. 801; R v Andrews [1987] 1 All E.R. 513.

The question arose during the cross-examination of the patrol officer, Sergeant Gooding, as appears in the Judge's notes of evidence at page 17:

> "Both of them Myles and Welcome were talking at the same time, rather excited.... Welcome said he'd just found the body."
> (Questioned evidence emphasised.)

In the absence of the jury Mr. Lamontagne urged that that statement was part of the res gestae. The learned trial judge held it was not and ruled the evidence inadmissible.

In Ratten v Reginam at page 806 Lord Wilberforce in a scholarly judgment considered evidence admissible under the heading of res gestae thus:

> "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 questions 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 Oleary v Regem (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 577:
>
> 'Without evidence of what, during that time, was done by those men who took any significant part in the matter and specifically 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 R v Bedingfield (1879) 14 Cox C.C. 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 on the opaque or at least imprecise Latin phrase rather than on 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."

He then went on to comment on the different standards applied in certain cases because of the academic concentration "on the opaque or at least imprecise latin phrase rather than on the basic reasons for excluding that type of evidence", namely (i) uncertainty as to the exact words used because of transmission through the evidence of another person" and (ii) "the risk of concoction of false evidence" by a victim. He said (i) went to weight but (ii) "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 tests which judges in fact should apply" and later went on to say: (p. 807)

> "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."

But as Lord Wilberforce carefully pointed out:

> "Facts differ so greatly that it is impossible to lay down any precise general rule: it is difficult to imagine a case where there is no evidence at all of connection between statement and principal event other than the statement itself, but whether this is sufficiently shown must be a matter for the trial judge."

Ratten v R was applied in R v Andrews. In the latter case Lord Ackner at p. 520 in summarising the position confronting the trial judge when an application is made to admit evidence under the 'res gestae' rule, identified the following general criteria for admissibility:-

> (1) "The primary question which the Judge must ask himself is: can the posssibility 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 oppurtunity for reasoned reflection or the pressure of the event would excude the possibility of concoction or distortion, providing that the statement was made in conditions approximatebut 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 fairly be stated that the mind of the declarant was dominated by the event. Thus the Judge must be satisfied that the event which provided the trigger mechanism for the statement was still operative."

From the notes of evidence it is apparent that both men made reports to patrolman Sergeant Gooding. In that event a fair interpretation of the evidence is that the police officer was giving the conclusion which he drew from the reports which they made. Accordingly the risk of distortion could not be ruled out. Further, the fulcrum of Mr. Lamontagne's argument that the statement was sufficiently contemporaneous to be part of the res gestae

rested on his interpretation of immediacy in the statement "he had just found the body". Waiving aside for the moment that a landscape gardener in Grand Cayman is not expected to speak with academic preciseness, this interpretation is unwarranted and unjustified.

The witness had given a detailed account of his movements from seeing the appellant on the porch until his report to the police and an estimate of the time frame within which those activities occurred. In examination-in-chief he said he arrived home at some minutes to midnight - that his errand to buy cigarettes took five minutes, three or four minutes to get to the road, five minutes to Myles and five minutes to call the cops "18-19. 20-21 minutes the most of my estimation". In cross-examination he said that he arrived at home about fifteen minutes to twelve. Twenty to twenty-one minutes elapsed between the time he last saw Charles alive and the time he stopped the police car.

When his attention was adverted to this time-table, Mr. Lamontagne maintained that it was sufficiently contemporaneous to be part of the res gestae.

Assuming that though in indirect speech the officer accurately reported the words of the witness Welcome on the question of spontaneity it was clear that those words removed by time and circumstances to the finding of the body were not evoked by Welcome seeing the dead body on the floor. On this important factor in determining whether a statement was admissible as part of the res gestae, Lord Wilberforce in Ratten v Regina at page 808 said:

> "In an earlier case in the High Court (Brown v R (1913) 17 CLR 570) where evidence was excluded, Isaacs and Powers JJ in their joint judgment "(1913) 17 CLR at 597 put the exclusion on the ground that it was a mere narration respecting a concluded event, a narration not naturally or spontaneously emanating from or growing out of the main narration but arising as an independent and additional transaction.
>
> In People v De Simone (1919) 121 NE 761 the Court of Appeals of New York admitted evidence that a passer-by immediately after a shooting had shouted 'He ran over Houston Street". Collin J referred to deeds and acts which are -

> "forced or brought into utterance or existence by and in the evolution of the transaction itself, and which stand in immediate causal relation to it."
>
> The evidence was, expressly, not admitted as part of the res gestae, because it was not so interwoven or connected with the principal event (i.e. the shooting which the person did not see) as to be regarded as part of it."

and later approving of the ruling of the trial judge in Ratten's case said: (p. 809)

> "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 statement in Ratten case was apparently made by the victim shortly before she was murdered. In the instant case the statement was not associated in time and place either with the shooting which the witness did not see or with the finding of the body of the deceased. The witness was merely making a report to a police officer. It was a "mere narration respecting a concluded event"; it lacked both contemporaneity and spontaneity. In our view the learned judge was correct in ruling that the reported statement was not part of the res gestae.

Alternatively, Mr. Lamontagne admitted that even if the statement could not technically be classified as part of the res gestae as no objection was taken by Crown Counsel, it was not open to the trial judge proprio motu to exclude the statement. He frankly admitted that his research failed to unearth any case in which it was expressly ruled that the exclusionary rules of evidence did not apply to the evidence sought to be tendered by the defence. However, he sought some comfort in the following obiter observation in R v Bradley [1980] 70 Cr. App. R. 203"

> "It is right to say that when that evidence was tendered no objection was taken. Nonetheless it is the duty of the presiding judge to ensure that no evidence is introduced into the prosecution case which is not properly admissible."

That statement referred to the particular circumstances of the case. It is a non sequitur to deduce from that statement that the judge would have had no power to exclude otherwise inadmissible evidence when tendered by the defence. We do not interpret it as opening the door to the admission of inadmissible evidence on the bases it was being tendered by the defence. We decline to create such an opening.

The point was being pressed because, as Mr. Lamontagne admits, the statement would obliquely tend to discredit the witness Welcome, particularly in relation to the timetable of his activities from going for the cigarettes to informing the Police. The time frame element was relevant as it was the case for the prosecution that both murders were committed by the same person and that fact was in issue.

It is enough to say that the admissibility was never urged on the basis of inconsistency; it was never put to Welcome as such. Although the principle as stated in Ratten v Reginam was not expressly limited to cases where the person making the statement was unavailable, the cardinal importance of a ruling in such cases as Ratten lay in the fact that there was no other means of proof because the maker of the statement was unavailable. Here the witness was available to give evidence of his actual utterance and the circumstances under which it was made.

In that regard, Lord Ackner in R v Andrews (supra) had this to say: (p 521)

> "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 all the relevant material facts before the court, so as to ensure that justice is done."

It is a good rule which works both ways. The defence ought not to be allowed to use the doctrine as a device to getting what is in reality secondary evidence when the witness who allegedly made the statement was not only available but had given evidence but was not questioned as to whether or not the statement attributed to him had been made and if made, the circumstances under which it was made. Accordingly neither on the technical question of admissability nor on the probable detriment to the appellant did we find any merit in these arguments.

The other ground argued was that the convictions are unsafe and unsatifactory. Mr. Lamontagne submitted that the one assassin theory is open to very strong doubts. In support he argued -

(1) that it was impossible to place any reliance on Welcome's estimate of time and refers to the discrepancy between his evidence that at the station the time by the clock there was 11:15 p.m. and Sergeant Gooding's evidence that Welcome's report was made at 12:05.

(2) that even without the excluded evidence referred to in his first ground it is hard to believe that at least eleven minutes elapsed between the time when Welcome found the body and he made his report.

This doubt as to the two assassin theory, submitted Mr. Lamontagne, would cast serious doubt on the opinion of the Ballistic Expert, Mr. Sibert.

Now Sergeant Gooding's evidence that he received a report of the West Bay incident approximately 15 -20 minutes after Welcome's report and that he took 10 -12 minutes to reach West Bay has not been challenged. Dectective Constable Ainsworth Myers of the West Bay Police Station said that the report was made there by Webster at about 12:10 a.m. and Webster had taken 2½ - 3 minutes to drive from Cloret Anglin's yard to the Police Station.

Nurse Cynthia Marie Brisbow of the George Town Hospital said that the call for an ambulance was made from the George Town Police Station at approximately 12:09 and she arrived by ambulance at Cloret Anglin's yard at 12:19 a.m.

In addition to whatever personal knowledge the jurors may have had of George Town, West Bay and the environs, they had the added benefit of visiting the loci of the two murders. On the evidence before us, in particular that of Sergeant Gooding as to the time he took from Charles Ebanks' home to reach Cloret Anglin's yard at West Bay, despite Mr. Lamontagne's endeavours at arithmetical probabilities we see no difficulty in the two murders being committed by one person who had a motor car to his use.

As regards the ballistic expert's evidence, it was wholly independent of Welcome's. Accordingly, unless there is some internal weakness in the expert's evidence, want of credibility or cogency in Welcome's could have no adverse effect on it. Now there was no serious challenge to Welcome's evidence as to the opportunity for recognizing the appellant at Charles' house. Nevertheless the learned trial judge gave full and careful directions to the jury as to the approach to visual identification and the risk of mistaken identification.

Further, after disagreeing with Crown Counsel's description that Welcome's evidence, if accepted, "was damning evidence" of appellant's guilt he said: (p. 139)

> "I think that is substancially overstating the position. I think myself that if that was all the evidence there was against William Powell in respect of the charge involving Charles Ebanks - if the only evidence was the evidence of Welcome that they were together five minutes before Ebanks was found dead, and that when he came back, Ebanks was shot, I should say, not dead, that Ebanks was shot and Powell was gone - then I must say that I do not believe this case would ever have been launched against William Powell.

> What I am saying is that speaking in relation to the charge of killing "Charles Ebanks, if that was all the evidence - and of course it is not all the evidence the Crown rely on - but if it was, that would not be enough even to begin a prosecution."

He then went on to deal specifically with Welcome's evidence of visual identification and the weaknesses in his evidence and in particular the manifest inconsistency of his omission to name the appellant in his first statement to the police. He said, inter alia: (p. 141)

> "But what you have to do in a criminal case, or in any case involving evidence is to say to yourself, is there an inconsistency there, and if there is, is it an important one? Does it tell us something about the quality of a person's evidence, or is it the natural kind of inconsistency that people do make but does not really go to the issue? Well, I think in this case you will have no trouble whatsoever in coming to the view that this is a very material inconsistency, because the importance of Mr. Welcome is that he is saying that on the night concerned Mr. Powell was with Charles Ebanks at Charles Ebanks' house - that is what he is saying in this court room, that is his evidence. But that has to be weighed against the fact that immediately after this episode, on the day of 24th, "he made a statement to the police in which he did not mention Mr. William Powell. You have to decide what you make of that. It appears to me, which is why I mention it in this context, that that is a material factor in the question of how good his identification of William Powell is. And I think having made that point, I will leave it at that."

Now despite the lengthy cross-examination of the Ballistic Expert, Robert Sibert, we were not adverted to any area of weakness or any inconsistency in his evidence. Indeed, at the trial the learned Chief Justice was moved to obseve: (p 131)

> "And I also have to say this: that although Mr. Lamontagne cross examined Mr. Siebert at some length in the witness box, properly of course, to test him, when it came to Mr. Lamontagne's summing up, he did not, as Senior Counsel in this case acting for the defendant, in his final speech, see fit to particularly mention to you any specific criticisms of Mr. Siebert's evidence."

The evidence of the expert that two murders were effected by shots fired from the same gun with which appellant shot himself was indeed cogent evidence linking the two murders and tending to implicate the appellant.

With respect to the murder of Gaynell, in addition to the circumstancial evidence, there is the direct evidence of Austin Ebanks. He gave a graphic and credible account of the shooting. The only discernible flaw in his evidence was in cross-examination as to credit when he lied about the number of previous convictions which he had.

The learned trial judge, after describing him as a crucial eye-witness, said: (p 148)

> "And as Mr. Lamontagne has pointed out to you - I am bound to point this out to you - you must give careful consideration as to how safely you can rely on that man's evidence, because it is perfectly clear in this case that when he was giving evidence before us in this courtroom in relation to this very case he did lie - no question about that, both sides acknowledge that. So you must keep in mind, you must say, "Well, in my view of that, what do I think of Mr. Austin Ebanks' testimony?", because he is also asking you to believe that nevertheless the other things he said in the case, the things that go right

to the point in the case, are true."

The treatment of this point by the learned trial judge is illustrative of the commendable diligence with which he carefully reviewed the evidence and consistently adverted the jury's attention to every conceivable point or interpretation of the evidence that may be urged in favour of the defence.

The evidence scrupulously and carefully led by Counsel for the Crown presented a very strong case against the appellant, and the summing-up of the learned acting Chief Justice was, in our view, impeccable. We commend appellant's Counsel for his industry in research. Without decrying his efforts, we are constrained to say, there is no merit in this appeal.