Privy Council Appeal No. 4 of 1993

(1) Arthur Mills
(2) Garfield Mills
(3) Julius Mills and
(4) Balvin Mills *Appellants*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH FEBRUARY 1995

Present at the hearing:-

LORD KEITH OF KINKEL
LORD GRIFFITHS
LORD BROWNE-WILKINSON
LORD LLOYD OF BERWICK
LORD STEYN

*[Delivered by **Lord Steyn**]*

On 22nd August 1987, in the parish of St. Catherine, Jamaica, Peter Batchelor died as a result of wounds inflicted in a vicious attack by machete. The four appellants were charged with the murder of the deceased. On 16th November 1988, after a two day trial, the four appellants were convicted of the murder of the deceased by the unanimous verdict of the jury. The trial judge, Mr. Justice Rowe, sentenced Arthur Mills and Balvin Mills to death. He sentenced Garfield Mills and Julius Mills, who were juveniles, to be detained during Her Majesty's pleasure. The appellants applied to the Court of Appeal for leave to appeal. The Court of Appeal treated the applications for leave to appeal as the hearing of the appeals. On 26th June 1990 the Court of Appeal dismissed the appeals for reasons which were handed down on 19th July 1990. On 24th December 1992 the sentences passed on Arthur and Balvin were commuted to life imprisonment. Arthur, Garfield and Julius Mills were granted special leave to appeal on 17th December 1992 and Balvin Mills on 12th May 1993.

THE SHAPE OF THE CASE.

It will be convenient first to describe the shape of the case in outline. The Batchelor and Mills families lived in close proximity in a rural district of St. Catherine. For many years there had been a feud between the two families over a roadway within the Mills' property. The last eruption of discord had taken place in July 1987. At about 9.30 p.m. on 22nd August 1987 Peter Batchelor sustained major injuries in an attack by machete. The injuries included multiple wounds to his legs; his left hand was severed at the wrist; and he had a serious wound to his left shoulder. He died within minutes of the attack. The thrust of the prosecution case was that the attack had been carried out by four members of the Mills family, namely by Arthur Mills (also known as Jules) and his three sons Garfield, Julius and Balvin. The prosecution contended that the appellants knew that the deceased would be returning home from a local bar and were waiting for him. The attack as described by prosecution witnesses fell into two parts. First, two of the appellants attacked the deceased and caused a wound to his leg. The deceased then got away from his attackers. Secondly, prosecution witnesses described a frenzied attack by the four appellants, each armed with a machete, on the deceased. The prosecution case critically depended on the accuracy of the visual identification of the four appellants by four prosecution witnesses. In has to be noted, however, that the prosecution witnesses did not all testify to the entirety of the events. To this description of the prosecution evidence it must be added that one prosecution witness said that the mortally wounded man said shortly before he died: "Jules and him bwoy dem chop me up". In this context "Jules" was a reference to Arthur Mills.

It is important to bear in mind throughout that from the appellants' point of view this was a family affair. When the appellants were arrested a few hours after the attack Arthur Mills, the father, and Garfield and Julius Mills denied that they were involved but each said that Balvin was involved. (For conciseness the appellants will hereafter be referred to by their first names). When Balvin was arrested he accepted that he had wounded the deceased.

The family had engaged Mr. Gillman, an experienced member of the Jamaican Bar, to defend all four appellants. The defence put forward at the trial by Arthur (the father), Garfield and Julius was one of alibi. Counsel conducted the case on the basis that the prosecution witnesses were mistaken in their critical visual identifications. The defence of Balvin was different. His case was that the deceased attacked him with a machete, and that the deceased slipped and fell to the ground. Balvin then struck at the deceased three times with a machete. Counsel never put in cross-examination to any prosecution witness that the deceased had a machete. Counsel put

forward Balvin's case on the basis that the prosecution witnesses were also mistaken in their identification of Balvin. None of the appellants sought to answer the prosecution case by oral evidence. Each appellant put forward his defence in an unsworn statement.

THE ISSUES ON THIS APPEAL.

The nature and scope of the issues which arose on this appeal can now be summarised. The appeal fell into two parts. First, there were the grounds advanced on behalf of Arthur, Garfield and Julius, i.e. the grounds of the three appellants who put forward alibi defences. Essentially, Mr. Thomas Q.C., who appeared on this appeal on behalf of these three appellants, invited their Lordships to consider four issues:-

(a) whether the trial judge adequately directed the jury in accordance with the guidance given in *R. v. Turnbull* [1977] Q.B. 224;

(b) whether the trial judge adequately directed the jury in respect of the correct approach to adopt in the event of the jury rejecting the alibi defences;

(c) whether in the light of the admission in evidence of the deceased's last words and the judge's directions about that evidence the three appellants have a sustainable ground of appeal;

(d) whether the judge misdirected the jury about the terms of the deceased's last words.

Before the Court of Appeal of Jamaica Mr. Daly Q.C., a member of the Jamaican Bar, appeared on behalf of all four appellants. On behalf of Balvin he relied only on the matters covered by issue (c) above. On this appeal Mr. Nice Q.C. raised three entirely new issues, namely -

(e) whether there was a conflict of interest between those appellants, who raised alibi defences, and Balvin, who relied on self-defence and provocation, which precluded counsel from doing justice to Balvin's case;

(f) whether counsel failed to put Balvin's case properly before the jury;

(g) whether the trial judge failed to direct the jury properly in regard to the need to consider Balvin's case separately.

The last ground caused no difficulty. On the other hand, the criticisms of counsel inherent in grounds (e) and (f) had to be examined without all the necessary materials. Sadly, Mr. Gillman died before the appeal was heard by the Court of Appeal. When an appellant seeks to raise a ground of appeal based on counsel's failure to do justice to his case, which exceptionally may afford a ground of appeal, it is necessary, subject to the necessary waiver of privilege by the appellant, to invite

the response of counsel on the merits of the complaints. That could not be done in this case. Despite this circumstance their Lordships will examine the submissions advanced by Mr. Nice on behalf of Balvin on their merits.

THE STATE OF THE EVIDENCE.

It is necessary before the grounds of appeal can be examined to describe the state of the evidence in more detail. All four eye witnesses called by the prosecution lived in the same small community as the Batchelor and Mills families. They all knew each other. The first witness was Dorant Mitchell. He said he was with the deceased in a local bar from 6.00 p.m. until 9.10 p.m. While he was there Garfield, Julius and Balvin came in and "circled" them and left. The deceased also left. He walked with Richard Brailsford. Mitchell heard a commotion. He ran in that direction and found the deceased badly injured in the road. Richard Brailsford, the second witness, said he was walking back from the bar with the deceased when Garfield and Balvin jumped out from under a shade tree. Garfield struck the deceased on the foot with a machete. The deceased ran off. He said Balvin shone a flashlight at the deceased. Balvin and Garfield ran after the deceased. He said he was able to see by the light of a kerosene lamp shining from a nearby house. He heard a shout and ran in that direction. He found the deceased dying on the road. Ronald Brailsford (Richard's cousin) was the next witness. He said he was in a nearby shop playing a game. The deceased ran up. The deceased had a wound behind his foot. The witness was going to take the deceased home but was interrupted by someone finding money on the ground. The deceased walked on towards his house. Next Ronald saw the deceased on the ground, surrounded by a group one of whom had a flashlight. He said the four appellants were attacking the deceased with machetes. The men then ran off. Dopson Wynter, a security guard, was in the vicinity. He heard shouting. He then saw a group of men, illuminated by flashlight, who attacked someone on the ground. He identified the four assailants. He knew Arthur by name and his sons by sight. He then described how the assailants ran off. He approached the deceased. Another man named Leonard Gordon, who did not testify, also approached the deceased. The witness heard the deceased say to Gordon: "Jules and him bwoy dem chop me up". The last three eye witnesses were cross-examined at length as to the reliability of their identifications in the context of the available light, obstructions and the distances involved.

Two police officers testified. Inspector Grant went to the appellants' home the same night. He spoke to Arthur. The latter denied involvement but he said Balvin was involved. Balvin said to Inspector Grant:-

> "Yes, mi chap him up fa him call mi pussy hole, and if yu tink a lie, ask mi breda Gary (Garfield). Him se no fi chap him no more."

Inspector Grant said that Balvin handed him a machete which appeared to have blood on it. There was no forensic examination of the machete. Detective Sergeant Forrest arrested and charged the appellants. He said that Arthur, Garfield and Julius denied involvement but each said Balvin was involved. Balvin said he had already given Inspector Grant his account.

Notwithstanding what was plainly a formidable prosecution case none of the appellants testified. But each appellant made an unsworn statement. Arthur, Garfield and Julius said they were not at the scene and were not involved in any way. Arthur said he was in the house of a Mrs. Scott. Garfield and Julius said they were at home. None of the appellants called any alibi witnesses. Balvin said that he had been walking home, carrying a machete, when he was confronted by the deceased. The deceased said to him "Boy weh yu dedeh. Tonight me a kill aff the whole a unno. Every minute unno a carry mi name go a station and mek mi caan stay in a mi District because of Police". Balvin replied: "Move from here. You caan kill we". The deceased then took a machete from behind his back and chopped at Balvin's head. Balvin said: "Him skid and drop and I mek a chop at his foot. I mek two more also and I run". It is to be noted that Balvin's account in his unsworn statement was to the effect that he responded to the deceased's actions by striking three times at the deceased while he was on the ground. Balvin did not call any witnesses.

It will be convenient to consider the relevant parts of the summing up in dealing with the specific grounds of appeal.

THE THREE APPELLANTS WHO DENIED INVOLVEMENT.

Identification: Issue (a).

The background to counsel's submission must now be filled in. This was not a fleeting glance case. It was a classic recognition case. It is true that the critical events occurred during the hours of darkness. There was no evidence that it was a moonlit night. Equally there was no evidence that it was pitch dark. Indeed the eye witnesses whose credibility was not in issue professed to be able to recognise bystanders and participants in the attack, and not only when lighting from the nearby house and the flashlight assisted them. It is also relevant to note that counsel did not suggest at the trial that the quality of the evidence was so poor that the judge should have withdrawn the case from the jury. Mr. Thomas Q.C. said that the case was not strong but he did not suggest that the judge should have withdrawn the case from the jury. Their Lordships consider that the eye witnesses' accounts created a very strong prosecution case. And that case was eventually not contradicted by any oral evidence. The jury must have been unimpressed with the defences.

But counsel argued that the judge failed to direct the jury properly in regard to their approach to evidence of visual identification. He drew their Lordships' attention in the first place to the following part of the summing up:-

> "The issue which I come to at this point is the issue of identification where the prosecution's case rests wholly or substantially on evidence of visual identification, then a jury must be careful in how it assesses that evidence because it is possible that a person who says I saw so and so, a perfectly honest witness can make a mistake and a mistake is no less a mistake because the person is an honest person. So a jury has to be warned that it is dangerous to convict persons on 'I see' evidence unless they are satisfied that the people who come along and claim that they have seen the accused have the kind of opportunity to make the identification and to recall the circumstances of the identification, and you the jury can be quite sure that the person is not making any mistake at all. You can be satisfied that it is a true and correct identification."

The judge then turned to consider the relevance of the fact that it was a recognition case and the suggested weaknesses in the case. Counsel acknowledged that the judge gave the usual warning about identification evidence in correct terms. But he fastened on to the following words of the Lord Chief Justice, Lord Widgery, in *Turnbull, supra* at page 228C-D:-

> "... he [the judge] should instruct them [the jury] as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken."

The judge, of course, did not use the words "a mistaken witness can be a convincing one". Counsel suggested that it is always incumbent on a judge to say to a jury that a mistaken witness can be a convincing one. Their Lordships emphatically reject this mechanical approach to the judge's task of summing up. *Turnbull* is not a statute. It does not require an incantation of a formula. The judge need not cast his directions on identification in a set form of words. On the contrary, a judge must be accorded a broad discretion to express himself in his own way when he directs a jury on identification. All that is required of him is that he should comply with the sense and spirit of the guidance in *Turnbull* as restated by the Privy Council in *Reid (Junior) v. The Queen* [1990] 1 A.C. 363. In the present case the judge emphasised that a perfectly honest witness can be a mistaken witness. That was entirely apt to convey to the jury that the fact that they regard the witness as credible is not enough. It focused their attention on the separate issue of reliability. See *Rose v. The Queen*, Privy Council Appeal No. 3 of 1993, judgment delivered 10th October 1994.

Counsel further said that the judge's direction was inadequate in that he did not expressly say that a number of convincing witnesses may be mistaken. He suggested that this was a serious defect. But the jury would have understood the judge's directions on the risk of mistakes in identification cases as relevant to the case before them which involved a number of eye witnesses. Moreover, speaking generally the judge referred in the plural to "people who come along and claim that they have seen the accused" who may be mistaken. In their Lordships' view this argument was wholly unmeritorious. Equally hopeless was the argument that the judge failed to direct the jury that a witness who claims to recognise a defendant may be mistaken. In this case the judge told the jury that it was a recognition case but he nevertheless directed them as to the dangers inherent in that evidence and asked them to consider whether the witnesses were mistaken. Nothing more was required.

That leaves one last point in respect of the judge's directions on identification. The judge fairly exposed the defence case on potential weaknesses in the visual identification notably in respect of the state of the light. The judge then observed:-

> "The suggestion was you are mistaken the light was not good enough. They said we are country people we don't have any electric light in our area. We go up and down and what we use to see is flashlight and our eyes and if there is a little light we make use of it. We are all up and down the road at 9.00 o'clock at night or 9.30 at night and we manage to see where we are going."

Counsel said that there was no evidence to support this observation and that it was unnecessarily dismissive of the defence case in respect of the poor lighting conditions. In reality the judge's observation was in the nature of a very mild and moderate comment on the evidence. It did not exceed the permissible bounds of judicial comment.

It follows that their Lordships reject all submissions on the judge's treatment in his summing up of the identification evidence.

Alibi defence: Issue (b).

Counsel drew attention to another passage in *Turnbull*, *supra*. The Lord Chief Justice said at page 230F-H:-

> "Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to

> support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward can fabrication provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was."

In the present case the judge did not give such a direction. However, he did direct the jury in the following terms:-

> "Mr. Arthur Mills and the two sons, Garfield and Julius, they say we were not present. We were elsewhere. Alibi. Now, a person can't be in two places at one and the same time. Although they have raised the alibi they don't have to prove the alibi. The prosecution must satisfy you that they were present, they were not as Mr. Mills said, at some lady's house talking, or as the boys said, in their house with their mother."

Counsel submitted that this direction was insufficient and that there was a material failure to direct the jury properly. The Court of Appeal had rejected a similar argument as misconceived. The Court of Appeal observed:-

> "Where an accused makes an unsworn statement, no such directions [about the impact of the rejection of the alibi] can or should be given. The jury is told to accord to such statement such weight as they fully consider it deserves." (Insertion in brackets supplied.)

The last sentence reflects the guidance given by the Privy Council in *Director of Public Prosecution v. Walker* [1974] 1 W.L.R. 1090, at page 1096C-E. Counsel submitted that the Court of Appeal erred. Logically, he said that there is no reason why the Lord Chief Justice's observation about the impact of a rejection by the jury of an alibi defence raised by oral evidence should not be equally applicable to such a defence put forward in an unsworn statement. Since at first glance there appears to be some force in this appeal to the inevitable march of logic the argument must be examined with some care. But it must be examined in the appreciation that the pursuit of logical symmetry is not the ultimate goal of the law.

When *Turnbull* was decided in 1976 a defendant in a criminal trial in England still had the right to make an unsworn statement. That right was only abolished in 1982: section 72 of the Criminal Justice Act 1982. There is nothing in the passage quoted from *Turnbull* to indicate that the Lord Chief Justice had in mind an alibi put forward in an unsworn statement. On the contrary the references to evidence and witnesses tends to suggest that the Lord Chief

Justice did not have in mind an alibi defence in an unsworn statement. And counsel's researches have revealed no case in which before 1982 the Lord Chief Justice's observation was applied to an alibi put forward only in an unsworn statement. That is not surprising. After all, in the late seventies and early eighties the right to make an unsworn statement was already regarded in England as an historical anomaly: The Criminal Law Revision Committee, Eleventh Report (1972), Evidence (General) Cmnd 4991, paragraphs 102-106.

It is also relevant to take into account the guidance given by the Privy Council in 1974 at the request of the Court of Appeal of Jamaica in *Director of Public Prosecutions v. Walker, supra*. Lord Salmon observed (at page 1096C-E):-

> "... the judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing. The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; that it could not be because he had any conscientious objection to taking the oath since, if he had, he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and by the court. The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should give the accused's unsworn statement only such weight as they may think it deserves."

Even before *Turnbull* was decided the Privy Council elucidated the evidential status of an unsworn statement in terms which qualitatively treated it as significantly inferior to oral evidence and permitted trial judges to direct juries to explain the inferior quality of an unsworn statement in explicit terms. That guidance has been understood by the Court of Appeal of Jamaica as comprehensively describing what a trial judge generally needs to say to a jury in directing them about the value of an unsworn statement. Their Lordships agree with the interpretation of the Court of Appeal of Jamaica about the effect of the decision in *DPP v. Walker*. Moreover, their Lordships would add that, taking into account the interests of justice to the Crown and the defence, it would be unwise, and needlessly complicate the task of

trial judges, now to introduce a new and further direction about unsworn statements. Their Lordships regard the guidance given in *DPP v. Walker* about unsworn statements as requiring no qualification. It governs the present case.

For these reasons their Lordships reject counsel's submissions regarding the judge's direction about the alibi defences put forward in the unsworn statements.

The dying declaration: Issues (c) and (d).

It will be recalled that shortly before he died the deceased in the presence of Dopson Wynter uttered to Leonard Gordon the following words: "Jules and him bwoy dem chop me up". This piece of evidence emerged unexpectedly at the trial. The prosecution had intended to call Leonard Gordon. He could not be found. In the circumstances counsel for the prosecution decided not to call the evidence of the last words of the deceased. She so informed counsel for the defendants. But, as sometimes happens, Dopson Wynter blurted out the piece of evidence. Counsel for the defendants sought no ruling from the trial judge, and he did not cross-examine on the point. No doubt his strategy was to play down the importance of this evidence. To some extent the judge in his summing up went along with this approach. The judge said:-

> "The prosecution has one other little piece of evidence and that is what the deceased himself is alleged to have said 'Jules and his boys dem chop me up'. Obviously you haven't seen the deceased he hasn't given any evidence before you but the present rule of law is that if the deceased made a statement shortly before his death in connection with his death and there is no suggestion that he had a motive to fabricate then you the jury can consider the statement as part of the evidence in the case and give it what weight you know it deserves.
>
> We are told that the deceased had been taken to court about two years before by Arthur Mills and he was put on probation. You will take that into consideration and you will take into consideration also the relationship which existed. It was about relationships for thirteen years when you're considering how much weight if any to give to the statement 'Jules and his boys dem chop me up'."

It is against this background that the relevant grounds of appeal must be examined.

Counsel submitted that the admissibility of the deceased's last words must be tested against the law governing dying declarations. The rule is usually stated to be that a statement of a deceased is admissible as evidence of the cause of his death at a trial for his murder or manslaughter if the deceased was under a settled hopeless expectation of

death when he made the statement: *Nembhard v. The Queen* [1981] 1 W.L.R. 1515. Counsel said that this ancient rule had come to the end of its useful life and should be rejected by their Lordships. He said that there was merit in a more pragmatic approach allowing the admission of the final words of a deceased victim, whatever his state of mind, provided that strict warnings are given by the judge to the jury as to the weight of the words. Counsel said that the exception governing dying declarations was based on the religious view that no man "who is immediately going into the presence of his Maker, will do so with a lie on his lips": *R. v. Osman* (1881) 15 Cox C.C.1 at page 3. The theory was that impending death acted as a substitute for the oath.

Their Lordships accept that the modern approach in the law is different: the emphasis is on the probative value of the evidence. That approach is illustrated by the admirable judgments of Lord Wilberforce in the Privy Council in *Ratten v. The Queen* [1972] A.C. 378 and Lord Ackner in the House of Lords in *Regina v. Andrews (Donald)* [1987] A.C. 281, and notably by the approach in the context of the so-called *res gestae* rule that the focus should be on the probative value of the statement rather than on the question whether it falls within an artificial and rigid category such as being part of a transaction. *Non constat* that their Lordships should now reject the exception governing dying declarations. On the contrary, a re-examination of the requirements governing dying declarations, against the analogy of *Ratten* and *Andrews*, may permit those requirements to be re-stated in a more flexible form. How far such a relaxation should go would be a complex problem. On an extra-judicial occasion Lord Maugham, in criticising the narrow limits of the exception, stated the case for a substantial relaxation: Observations on the Law of Evidence with Special Reference to Documentary Evidence, (1939) 17 Canadian Bar Review 469. Lord Maugham said at page 483:-

> "If a man, who subsequently dies of poison, tells someone that he became ill shortly after visiting a named acquaintance who gave him a cup of coffee, I cannot see any sensible reason for excluding this evidence for what it is worth. If the friend has recently purchased poison of the same kind as that which caused the death and the statement of the dead man is admitted, there is some chance of convicting a horrible murderer."

See also Glanville Williams, The Proof of Guilt: A Study of the English Criminal Trial, (1963) 3rd Edn., 200-203. But such a development would only be prudent in the light of a detailed analysis of the merits and demerits of such a course than was afforded by the argument in the present case. It is also unnecessary to embark on such a course in order to dispose of the present appeal since

it is self-evident that the deceased's last words were admissible under another exception to the hearsay rule, namely the so-called *res gestae* rule.

In the present case the deceased's last words were closely associated with the attack which triggered his statement. It was made in conditions of approximate contemporaneity. The dramatic occurrence, and the victim's grave wounds, would have dominated his thoughts. The inference was irresistible that the possibility of concoction or distortion could be disregarded. In fact the judge was not asked to rule that the evidence was inadmissible. If a ruling had been sought the trial judge would inevitably have ruled that the evidence of the last words of the deceased, once it had been blurted out by the witness, were admissible. By emphasising to their Lordships the high probative value of the deceased's last words counsel underlined the inevitability of a ruling that the evidence would have been ruled admissible if one had been sought. While in a sense something had gone wrong at the trial, good sense and fairness did not require the judge to exclude highly probative evidence which the jury had heard.

Counsel further argued that the judge erred in not giving an express ruling on the admissibility of the evidence. Since the defence sought no ruling, the judge was not called on to embark on an investigation which could have had only one result, namely the admission of the evidence.

Finally, relying on *Nembhard*, counsel submitted that the judge failed in not giving a separate direction about the fallibility of the identification inherent in the deceased's last words. The judge had already fully directed the jury on the dangers of visual identification. There had been no separate cross-examination on the danger of the deceased mistakenly identifying his assailants. Fairness did not require a repetition of what the judge earlier said. The judge's directions were fair and sufficient.

It follows that all the grounds of appeal advanced on behalf of Arthur, Garfield and Julius are rejected. It further follows that none of these grounds avail Balvin.

THE SEPARATE GROUNDS OF APPEAL OF BALVIN.

Multiple representation: Issue (e).

Mr. Nice Q.C. argued that the representation of Balvin (whose defence was one of self-defence or provocation) by the same counsel who represented his three co-accused (who put forward alibi defences) inhibited the proper deployment of Balvin's defence. He argued that there was a clear and substantial conflict between Balvin and his co-accused. Consequently, he said, Balvin did not have a fair trial. Since on his own version Balvin struck the deceased three times while he was lying on the ground, self-defence realistically did not arise. If counsel's argument had

prevailed, it could at best have resulted in the reduction of Balvin's crime from murder to manslaughter on the ground of provocation.

It is axiomatic that counsel engaged on behalf of more than one defendant in a criminal case must consider whether there is a conflict of interest between them which might inhibit his proper and effective defence of one of them. Counsel must consider the matter in the light of the prosecution case and the instructions he receives from the defendants. If there is, or might be, a conflict of interest, he must promptly advise separate representation. Any doubt must be resolved in favour of separate representation. Those duties of counsel arise as soon as he is engaged. It is, however, a continuous duty. If at any time before the trial a conflict arises, counsel must advise separate representation of the defendants. If contrary to all expectations such a position arises at trial, counsel may be obliged to seek a discharge of the jury in order to enable separate representation at a new trial. These propositions flow from the right of an accused to have his defence properly and effectively placed before the jury. It is an integral part of his constitutional right to a fair trial. But their Lordships add one qualification. The province of the law is practical affairs. The question is whether there is, or might be, a real risk of a conflict of interest inhibiting counsel in the discharge of his duties on behalf of one or more defendants. In a practical world wholly theoretical or fanciful risks can be disregarded.

One is entitled to approach the submission with an initial scepticism. The idea that there might be a real conflict of interest plainly did not occur to counsel for the defence at the trial. He was apparently experienced. This new point was never put to him. The trial judge, who dealt with this case in an admirably fair way, saw nothing wrong in the multiple representation. And it is worth repeating that the overriding duty of a trial judge is to ensure that a fair trial takes place. New counsel engaged for all four appellants to represent them before the Court of Appeal did not raise the point. This counsel was a senior member of the Bar of Jamaica. It also did not occur to the three members of the Court of Appeal as is apparent from the careful reserved judgment.

Nevertheless their Lordships propose to address the merits of counsel's argument. The position is that the Mills family engaged counsel to act for all four defendants. That was on the basis that from the start Balvin admitted involvement while the other three denied involvement. It is true that on the police evidence the other three suggested that Balvin was involved. But Balvin admitted it. So far there was no potential conflict of interest. But the real question is: what were counsel's instructions? Unfortunately, due to the death of Mr. Gillman, that remains obscure. But their Lordships are

willing to accept counsel's invitation to assume that the content of the unsworn statements of the defendants reflects counsel's instructions. On this basis three defendants raised alibi defences and the fourth self-defence and provocation. That fact did not by itself raise any conflict of interest. Clearly, identification was always going to be a major issue on behalf of all the defendants. On that aspect there was a common interest. But his multiple representation did not in any way preclude counsel from exploring, in cross-examination on behalf of Balvin, the defences of self-defence and provocation. What counsel in fact did, and the justification for it, will be considered later. But their Lordships do not consider that counsel, in acting for Balvin, was in any way constrained or inhibited by instructions on behalf of the co-accused.

Balvin in his statement to the police was alleged to have said, by way of explanation of his conduct in striking at the deceased with a machete, that the deceased called him a "pussy hole" and Balvin then said words to the police to the effect "If you think I am lying ask my brother Garfield". From Garfield's point of view that might have been an unhelpful statement since it suggested at the very least, contrary to his account, that he might have been present at the attack. But, as counsel was entitled to anticipate, the judge correctly told the jury to ignore that evidence in the evaluation of the case against Garfield. In any event, no complaint of unjustified multiple representation is made on behalf of Garfield. It certainly cannot assist Balvin's ground of appeal that he should not have been represented by counsel also engaged on behalf of Garfield.

Taking into account everything that has been submitted in support of this ground of appeal, their Lordships consider that at no stage was there any potential conflict of interest, which might have inhibited counsel in acting for Balvin. The interests of justice did not require separate representation. This ground of appeal is rejected.

Counsel's alleged failure to put Balvin's case: Issue (f).

So far as he represented Balvin counsel's strategy was simply to seek to persuade the jury that the prosecution eye witnesses were or might have been mistaken. He did not put to those witnesses that, if they were able to see properly, they must have witnessed the deceased striking with a machete at Balvin before the latter retaliated. And that would have been relevant to self-defence and, more realistically, provocation. He did, however, challenge by cross-examination the admissions Balvin allegedly made to the police. Essentially counsel relied on Balvin's unsworn statement to put forward his positive case. Stripped of insubstantial points counsel's failure to put to witnesses that the deceased had and used a machete is the *gravamen* of the argument that counsel, who appeared at the trial, failed to put Balvin's case properly before the jury. Relying on *R. v. Clinton* [1993] 1 W.L.R. 1181, counsel submits that

the critical question is whether the effect of this failure was to render the conviction unsafe and unsatisfactory. This approach was endorsed by the Privy Council in *Sankar v. The State of Trinidad and Tobago* [1995] 1 W.L.R. 194, at page 200G-H.

It must be remembered that if counsel's strategy on behalf of Balvin had been successful Balvin could not have been convicted of murder on the basis of the prosecution case. The verdict would have been not guilty or, more realistically, guilty of manslaughter on the basis of provocation. It is therefore not a case where Balvin's interests were overlooked by counsel. Moreover, counsel had no material justifying an attack on the credibility of the eye witnesses. He was merely able to challenge their reliability. No criticism is made of this part of the defence. In these circumstances counsel may have felt that it was unlikely to help Balvin's case to say to the eye witnesses "You must have seen a machete in the deceased's hand". One does not have to agree with counsel's strategy to conclude that it is impossible *ex post facto*, and without any knowledge of discussions between counsel and Balvin, to condemn it. Their Lordships consider it surprising that, faced with a strong prosecution case, Balvin was not called to give oral evidence. That is, however, a decision which has not been criticised and is, in any event, in line with the strategy usually adopted by defence counsel in Jamaica. In the context of all these circumstances there is no basis for concluding that the strategy adopted at the trial by counsel renders his conviction unsafe and unsatisfactory.

Direction on separate consideration of the case against each defendant: Issue (g).

The judge directed the jury as follows:-

> "One of the rules which you will bear in mind throughout the case is this, the prosecution has a duty to prove the case against each of the accused to your satisfaction, so that you can feel sure of his guilt. Although they are all four charged together, the prosecution has to prove the case against each one, and you must, therefore, look at the evidence to see if there is evidence against each man before you can arrive at a verdict, and that the evidence satisfies you so that you can feel sure of the guilt of that particular person."

Counsel concedes that this was a proper direction. The judge further repeatedly emphasised to the jury that Arthur, Garfield and Julius relied on alibi defences while Balvin relied on self-defence and provocation. No criticism was made in oral argument of those passages in the summing up.

But counsel submitted that in this case the judge should have repeated his general direction on the need for the jury to consider the case against each defendant separately. The charges were grave but the issues were simple and straightforward. There was no need for the judge to repeat his direction. This ground of appeal is rejected.

Conclusion.

Their Lordships will humbly advise Her Majesty that the appeals should be dismissed.