[COURT OF CRIMINAL APPEAL]

1966 *Present :* **T. S. Fernando, J. (President), Abeyesundere, J., and G. P. A. Silva, J.**

S. D. FRANCIS APPUHAMY and 3 others, Appellants, and **THE QUEEN,** Respondent

C. C. A. APPEALS 116-119 OF 1965, WITH APPLICATIONS 140-143

S. C. 287-M. C. Panadura, 80,408

Unlawful assembly-Participation of five persons-Proof-Should the identity of all five persons be established ?-Penal Code, ss. 140, 2,"5/146.

Evidence-Credibility of a witness-Divisibility-Discretion of prosecuting Counselas to the. witnesses whom lie should call-Evidence Ordinance, s. 114 (f).

Five persons were charged with several offences based on the allegation that they " were members of an unlawful assembly ". The evidence in respect of the number and identity of the persons who committed the offences was that of a single witness. She stated that five persons participated in the commission of the offences and identified the five persons charged before the Court. The jury found four of the persons charged guilty, but the fifth not guilty. In the light of the directions given to them by the trial Judge, it could fairly be said that the jury found this fifth person not guilty because very probably they entertained a reasonable doubt about the identity of that person or thought that the witness was merely mistaken in regard to his identity, but not about the participation of five persons in the commission of the offences.

Held, that the convictions of the four persons found guilty were lawful. Jayaram v. Saraph (56 N.L.R. 22) distinguished.

The remarks contained in the judgment of the Privy Council in Mohamed FiazBaltsh v. The Queen (1058) A. C. 167 that the credibility of witnesses cannot be treated as divisible and accepted against one accused and rejected against another (a) was inapplicable in the circumstances of the present case and (b) cannot be the foundation for a principle that the evidence of a witness must be accepted completely or not at all.

Held further, that the discretion of the prosecuting Counsel as to the witness whom he should call from the list of witnesses given in the indictment should not be criticised or unduly interfered with by the Court. There is no non-direction by the Judge when he omits to refer to the presumption under section 114 (f) of the Evidence Ordinance in cases in which the Crown does not call or tender for cross-examination, on the request of the prisoner's pleader, a witness whom the prisoner's pleader had himself an opportunity of calling.

APPEALS against convictions at a trial before the Supreme Court.

G. E. Chitty, Q.G., with Eardley Perera and A. S. Vanigasooriyar, for the 1st accused-appellant.

E. R. S. R. Coomaraswamy, with L. Athulathmudali, Miss Barr-Kumarakulasinghe,Anil Obeyesekere, N. M. S. Jayawickrama and Kumar Ameresekere, for the 2nd accused-appellant.

Colvin R. de Silva, with E. R. 8. R. Coomaraswamy, Eardley Perera and MissManouri de Silva, for the 3rd and 4th accused-appellants.

Neville Wijeratne (assigned), for all four appellants.

A. C. de Zoysa, Crown Counsel, for the Crown.

Cur. adv. vult.

March 29, 1966. **T. S. FERNANDO, J. -**

The four appellants (as the 1st to the 4th accused) along with another man named Don Stephen (as the 5th accused) stood their trial at the Kalutara Assizes on an indictment consisting of no less than 15 charges. The first eight of these charges were based on the allegation that the five persons accused were members of an unlawful assembly. Of these eight charges, the first was what I might term a charge of unlawful assembly simpliciter ; the second to eighth charges were based on an imputation of vicarious criminal liability for the acts of one or more members of the aforesaid unlawful assembly in killing two persons and attempting to kill five others. The remaining seven charges, namely the ninth to the fifteenth charges, had been framed, also against all five persons, on an imputation that the killings and the attempts to kill the persons referred to above were done in furtherance of the common intention of them all. The jury by a divided verdict of five to two found the four appellants guilty of the offences specified in all fifteen charges. By a similarly divided verdict they found the 5th accused, Don Stephen, not guilty of any offence. Each of the appellants was sentenced to death in respect of the convictions on the charges of murder and to terms of imprisonment in respect of the convictions on the other charges.

Apart from the medical evidence, the evidence of the Government Analyst and formal Police and other evidence, the case of the Crown rested on the sole testimony of a single eye-witness, a woman by the name of Irene Rodrigo, the mistress of a man called Edwin alias Ediman, who had herself received certain gun-shot injuries on the fingers of her left hand in the course of the firing which she alleged caused the deaths of two men and injuries on four others on the night in question. Shortly stated,

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her evidence was to the effect that she had accompanied Ediman about 6 p.m. on the night of the 7th July 1963 to an evening party at Ratmalana to celebrate the wedding of a police constable. Ediman took along to this party a friend of his, a man named Gilbert, and Gilbert's mistress Sumanawathie and four men, Tyrell, Christie, Anthony and Ariyadasa, who were all musicians and who, along with about six others, provided the music at the party. They travelled to the party from Panadura in two cars, picking up the musicians on the way at Moratumulla. Liquor appears to have been served liberally at the party which broke up about 11 p.m. On the way back Ediman and Irene, Gilbert and Sumanawathie got into Ediman's car. Three of themusicians, Tyrell, Christie and Anthony, also got into it and sat on the front seat beside Gilbert who took the wheel. The other three sat on the rear seat, Irene between Ediman and Sumanawathie. Irene in her evidence described Sumanawatl ie and herself as being the only persons who were sober. The others had all partaken of liquor at the party.

At a place described as the junction between De Mel road and Fonseka road a carwhich Irene recognized as the car of the 1st accused came up and halted about 8 feet away from the car in which she was travelling, blocking its progress. She raised a cry " There is Shelton Bass's car ". {Shelton Bass is a name by which the 1st accused is commonly known.) As the car halted she recognised the 4th accused getting down from its driving seat with a gun in his hand. (The 4th accused is the car driver of the 1st accused.) Almost immediately thereafter the 3rd accused, who is a cousin of the 1st and 2nd accused got down from the rear seat of the car, also carrying a gun. Irene cried out to her husband almost instinctively " They are trying to shoot ". At the same moment the 5th accused got down from the front seat with a pistol in his hand. (The 5th accused is a car driver employed under the 2nd accused who is a brother of the 1st accused.) Thereafter the 2nd accused, and finally the 1st accused, also got down from the rear seat of the same car, each of them carrying a gun. All of them then moved as if in a row towards the left of Irene's car. None of the occupants of her car made any attempt to get down. As the 4th accused aimed his gun at them, Irene, shouting to Ediman to duck, held him by his head and pressed him down. That shot rang out and Ediman collapsed on to the floor of the car. Then, as the 3rd accused stepped forward to fire, Irene put her arm round the shoulder of Sumanawathie and shouted " Bend down ". Both women ducked the shot fired by the 3rd accused which Irene thought struck some portion of the rear seat of her car. As the two women raised their heads thereafter, Irene saw the 2nd accused aim his gun in the direction of the front seat of the car and fire. Tyrell cried out, and Irene assumed Tyrell had been injured by that shot. The 1st accused then aimed his gun in the direction of the car and fired. A silence of about two minutes followed. Irene raised her head and looked round. None of the accused was then to be seen, but immediately thereafter she again saw the 4th accused go up to the other car, take over a gun from one of the persons in that car, step forward towards Irene's car and fire in the direction of the front seat.

As a result of that firing Christie's head slumped towards the left and Irene thought that shot struck Christie. The 4th accused next got into that car which then drove off in the direction of the main road. In answer to a specific question as to whether she saw the 5th accused do anything, Irene replied that while the other firing was going on the 5th accused was seen firing three or four times shaking the pistol.

After the car in which the accused had come there had driven off, Irene raised cries and a crowd collected. The other car which carried the rest of the musicians also came up about this time, and Gilbert and Sumana-wathie were taken to hospital in that car. Ediman was lying unconscious on the floor of his car. Irene raised him on to her lap. Anthony got off the front seat. He was the only person of the seven who travelled in Ediman's car who had escaped injury. Tyrell and Christie lay slumped on the front seat. Some man who had come up there for the cries that were raised drove Ediman's ear to the hospital carrying in it the injured Ediman, Irene, Tyrell and Christie. In all probability Tyrell and Christie were then already dead. The medical evidence was to the effect that Tyrell and Christie had received gun shot injuries killing them almost instantaneously. Ediman had several gun shot wounds on his face and head and Gilbert similar wounds on his chest and abdomen. The two women had also received gun shot injuries, but they were relatively minor ones.

The investigating police found at the scene of the firing certain spent cartridges, wadding etc. which were examined by the ballistics expert who expressed the opinion that at least six, possibly seven, shots had been fired that night. If one or more of those who fired with guns did not reload their guns at the scene they would in all probability have the spent cartridge still in the gun at the time of driving away from the scene, and in that event there were probably more shots fired than even the seven which was the estimate of the expert. There was damage on Ediman's car that could have been caused, in the opinion of the expert, by at least two bullets from pistols. This expert evidence went some way towards corroborating the evidence of Irene that she heard

seven or eight shots being fired before the 4th accused fired the last shot just before the other car drove off.

It was plain at the trial that Irene must undoubtedly have been in the company of the persons who were killed or injured on the night in question. She claimed that apart from the lights of the cars there was a bright street lamp at the junction. The jury by its verdict showed that it accepted and acted on her evidence except so much of it as related to her identification of the 5th accused.

The main ground of appeal relied on by counsel for all four appellants was that the verdict on the first to the eighth charges (the unlawful assembly charges) was unreasonable in the light of the acquittal of the 5th accused. As Irene stated that only the 1st to the 5th accused were present at the firing, and because the jury was not satisfied that the 5th

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accused was one of those so present, they contended that only four persons were proved to have been present, thus making it obligatory on the jury to return a verdict of not guilty in respect of all the charges dependent upon the existence of an unlawful assembly. An assessment of this argument requires an examination of Irene's evidence in regard to two matters, (1) the number of persons who participated in the firing and (2) the identity of those persons.

In regard to the number of persons, Irene was never in doubt that there were five persons who got down from the 1st accused's car. She had. known the brothers, the 1st and the 2nd accused, from her childhood. Their cousin, the 3rd accused, she had known for 15 years. She had known the 4th accused for some 10 years, and had also known that he was for the last 6 years the car driver of the 1st accused. The 5th accused she had known for a relatively shorter period of 2 years, but she knew that he used to drive the car of the 2nd accused. Her cross-examination elicited an answer from her that when she made a statement to the police she had not mentioned the name of the 5th accused because she could not remember it at the time. That part of her statement was, however, proved by the defence at the trial-(vide 4 D3)-and showed that what she had stated to the police was that she "did not know the name of the person who fired two or three shots with a pistol ". She had described that man as a driver who lives at Katubedde junction, not even as a driver employed under the 2nd accused whom she had earlier in that statement named as a participant in the firing. This aspect of her testimony was referred to by the learned trial judge in his charge to the jury in the following words :-

" Then gentlemen, in regard to these people, she says that she knew them ; she knew them by name ; but she says in regard to the 5th accused, she knew the man, but she had forgotten his name. Now there, gentlemen, comment has been very legitimately made by the defence, " Well, in that case why did she not say to the police I know the man, but I Lad forgotten his name".....

If, in view of that discrepancy, you think that it was not the 5th accused that she referred to at that time, but some other man, and that later she has brought in the 5th accused saying that it was Podda's (2nd accused's) driver, then, the benefit of that doubt must be given to the 5th accused that she has not correctly identified, and, gentlemen, if she has made you to come to the conclusion with certainty that she has not correctly identified ; I mean it is not just a question of giving the benefit of the doubt to the 5th accused, but you are certain in your mind, then you must see the impression on your mind in regard to her story in regard to the other accused ; whether you believe her evidence or not. "

This is a direction which indicates that the trial judge was telling the jury that if they entertained a reasonable doubt about correct identification of the fifth man, the 5th accused had to receive the benefit of that doubt :

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but that if they went further and concluded that Irene was either testifying falsely in respect of the 5th accused or was quite mistaken in regard to his identity, then they had to consider whether her evidence in respect of the identification of the other four (the appellants) is also not tainted thereby. The jury's verdict can fairly be taken as indicating that they merely entertained a reasonable doubt about the identity but not about the presence of a fifth man.

We should, moreover, not overlook another direction which the trial judge gave the jury. Referring to a suggestion made by counsel for the defence, he said :-" If you think that she did not know the assailants, or if you think that she never saw the assailants because they never got out of the car, then you will remember, if that is your opinion, that you are disbelieving Irene ; or in your consideration of the evidence you come to the conclusion that that is possible, then there is no use in going further,, for then Irene has told a false story in the box. "

Dealing finally with the unlawful assembly charges, the trial judge stated :-

If Irene's evidence has satisfied you that the 1st, 2nd, 3rd, 4th and another man were there, because if you have doubts in view of Irene earlier having said that it was a man she knows but did not give the name of the man, or that it was Podda's driver-though she said it was a driver-if that creates a doubt in your mind with regard to the 5th accused, then the 5th accused is out. If you accept Irene's evidence that these five people were there, or the 1st, 2nd, 3rd, 4th accused and another man were there, then gentlemen, we have to consider the Crown charge that there was an unlawful assembly."

As we construe it, the charge in the indictment alleged that these four appellants and the 5th accused were that night members of an unlawful assembly. In other words, the allegation was that there was an unlawful assembly of five persons there that night at the junction, and that the persons charged at the trial were identified as those five persons. There were two matters the Crown undertook to prove, (1) the existence of an unlawful assembly, and (2) the identification of the persons who formed the membership of that particular assembly. We do not consider that the way in which the learned judge addressed the jury on the question was unfair in the circumstances, nor can we agree with the contention that in his charge to the jury the judge was setting up a new case altogether from that which the prosecution alleged and the defence had to meet. As he put it, " if you accept Irene's evidence that she saw the 1st, 2nd, 3rd and 4th-you might possibly have some doubt whether the 5th was there in view of what I told you earlier-If you have that doubt whether the 5th accused was there in view of Irene's evidence saying " I know the man ", then the question is whether there were five persons. Now Irene said right along that there were five; she never swerved from that position. The fifth man she had said was the 5th accused. Even if you doubt that it was the 5th accused, there was a fifth man according to her, So then the fifth man and these four people would form the unlawful assembly.'

In returning verdicts of guilty on the first eight charges, it is undeniable in the circumstances that the jury was satisfied that there were that night five persons, four of whom, they were confident, were the four appellants. We were referred to the remarks contained in the judgment of the Privy Council in the case of Mohamed Fiaz Baksh v. The Queen [(1958) A.C. 167.] that the credibility (of witnesses) could not be treated as divisible and accepted against one and rejected against another. These remarks, it must not be overlooked, cams to be made on an appeal from the Court of Criminal Appeal in British Guiana where that Court had made an unusual order. The appellant and his co-accused (who had each relied on an alibi) had been convicted of murder. At an appeal taken to the Court of Criminal Appeal, that Court permitted to be produced and proved before it statements, which had not been available at the trial, made to the police by the three main witnesses for the prosecution. The Court found that a comparison of the statements with the oral

evidence given by those witnesses at the trial disclosed material discrepancies. In respect of the appellant's co-accused the Court said that in the interest of justice the value and weight of the new evidence should be determined by a jury and not by that Court, and his conviction was quashed and a retrial ordered. In the case of the appellant the Court said that different considerations applied, that nothing favourable to him could have been obtained from the statements which were not available at the trial and held that the jury's verdict could not be disturbed. In regard to the distinction the Court of Criminal Appeal made, the Privy Council observed that "if the statements afforded material for serious challenge to the credibility or reliability of the witnesses on matters vital to the case for the prosecution, the defence by cross-examination might have destroyed the whole case against both accused or, at any rate, shown that the evidence of those witnesses could not be relied on as sufficient to displace the evidence in support of the alibis. The remark that credibility of witnesses could not be treated as divisible came to be made in the circumstances related above. We do not think this remark can be the foundation for a principle that the evidence of a witness must be accepted completely or not at all. Certainly in this Country it is not an uncommon experience to find in criminal cases witnesses who, in addition to implicating a person actually seen by them committing a crime, seek to implicate others who are either members of the family of that person or enemies of such witnesses. In that situation the judge or jurors have to decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true. In the instant case, in the light of the directions given by the trial judge, it is, in our opinion, not permissible to infer that the jury considered Irene's evidence in respect of her identification of the 5th accused to be false. The high probability is that they concluded she was merely mistaken in regard to the identity of the fifth man, the man with the pistol. Certainly, they found on her evidence that five persons did come along with firearms and participated in an attack substantially in the manner she described.

We do not consider, as we have already indicated above, that there is much substance in the argument that the defence was taken by surprise by a case of an allegation of unlawful assembly composed of the appellants and an unidentified man " being sprung upon it for the first time " during the summing-up of the trial judge. The charge was that the five persons named in the indictment were members of an unlawful assembly. So long as the Crown was able to establish the presence of the requisite number of persons with a common unlawful object, the unlawful assembly was complete. All that was thereafter necessary was identification of those proved to be present. As Bose J. stated in delivering the judgment of Supreme Court of Indiain Dalip Singh v. State of Punjab [1 (1953) A.I.R. (S. C) at 366.], " this isnot to say that five persons must always be convicted before section 149 can be applied. There are cases and cases. It is possible in some cases for judges to conclude that though five were unquestionably there the identity of one or more is in doubt. In that case, a conviction of the rest with the aid of section 149 would be good ". In the local case of The King v. Fernando et al. [2(1047) 48 N.L. R. 200.], one of the two reasons given by this Court for the dismissal of an appeal of four appellants who had stood their trial (along with a fifth man who was acquitted) on charges of unlawful assembly and murder was that " while there was overwhelming evidence that the four appellants and another took part in the transaction which resulted in the death of the deceased, there were circumstances which involved in some doubt the identity of the fifth person ". This case was sought to be distinguished in a decision given by a single judge, Pulle J., in Jayaram v. Saraph [3 (1954) 50 N. L. R. 22.], but the distinctionwas based on the manner in which the charge had been there framed. The charge in Jayaram v. Saraph was that the accused " did form members of an unlawful assembly ", i.e. they constituted the unlawful assembly, and not, as here, that they " were members of an unlawful assembly ".

References was made also to the case of Harry Margulas [4 (1922) 11 Cr. A. R.3.] and cases which have purported to follow it. In all those cases, however, the jury on evidence of the same weight had in the case of one or more of the accused persons returned a verdict of guilty while

acquitting another or others. Such a result would, of course, be unreasonable ; but that is not the position in the instant case where the distinction drawn by the jury can be shown to be based on sufficient reason.

Another argument addressed to us was that the verdict shows that the jury was satisfied beyond reasonable doubt only in respect of the presence of the four appellants. If there was a reasonable doubt in regard to the presence of the 5th accused, so counsel argued, such a doubt could not in any circumstances amount to proof beyond reasonable doubt of the presence of a fifth unidentified man. While we must, of course, agree that a doubt in respect of the presence of a named man cannot amount to proof beyond reasonable doubt of the presence of an unnamed man, the verdict in the light of the directions given to the jury

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by the trial judge meant that the jury was quite satisfied that five persons were present doing the acts attributed to them by the witness Irene. In our opinion the main ground relied on by the appellants fails.

We can now turn to the examination of the other two grounds of appeal that were urged. The first of these related to an alleged inadequacy of the directions in regard to proof of common intention. In framing the ninth to the fifteenth charges, the Crown had placed reliance on the principle of law embodied in section 32 of the Penal Code. In respect of these charges, it was urged that the directions actually given to the jury were inadequate. We need only say, however, that in directing the jury on these particular charges the learned judge placed the burden on the prosecution at the highest possible level when he stated :-

" In other words, did each of them have a murderous intention, and did they agree among themselves to commit the act in which case it becomes a common murderous intention. "

This was repeated at a later stage of his charge when he stated " but if they had all agreed, then the murder by A is murder by all ". The verdict shows that the jury was satisfied that the appellants had agreed to kill. Indeed, an acceptance of Irene's evidence in respect of the appellants did not leave room for any other inference. The blocking by an armed ganp' of the car in which the victims were travelling and repeated firing by all at the cornered victims could not have been explained on any other theory but that of a prearrangement to kill. The plan of the appellants in all probability was to kill Ediman, but the manner of the execution of that plan left little room for doubt that they were determined also to kill any one else who might be in the way of the achievement of that object. The directions to the jury in so far as they affected the ninth to the fifteenth charges were neither inadequate nor unfair. That ground of appeal also therefore fails.

The remaining ground of appeal revolved round the omission of the Crown to call certain witnesses (occupants of Ediman's car at the time of the firing) whose names were on the indictment in the list of witnesses for the prosecution. After the Crown and the Defence had closed their respective cases, counsel for the 4th and 5th accused began his address to the jury and concluded it on the next day. Thereupon Crown Counsel addressed the jury, followed by counsel for the 1st, 2nd and 3rd accused. He had not concluded his address at the time the Court adjourned for the day, and, on the following day, before counsel could resume his address, the foreman of the jury asked the judge whether it was possible (a) to call Gilbert as a witness and (6) to make a visit to the scene. For reasons which appear to us to be adequate, the trial judge declined to order either of the steps indicated by the jury to be taken. It was conceded by counsel for the appellants that in so far as a discretion lay with the judge that discretion could not be said to have been exercised wrongly or unfairly. It was contended, however, that the directions to the jury on the question of omission to call the witness Gilbert and/or other similar witnesses was

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wrong and was contrary to the presumption that could have been drawn as shown in illustration (/) to section 114 of the Evidence Ordinance. What the learned judge did say was as follows :-

" The Crown has called one person. The Crown has called that person to tell youwhat happened. The Crown has not called the others. Well, you may infer that the Crown did not call the others because they are not in a position to speak to the assailants. You may infer that they are witnesses who do not help the prosecution case. The defence says, well, you cannot expect us to call prosecution witnesses because we will lose the right of cross-examining them for they are likely to be adverse and so on. I think the simple point for you to decide is this : do you accept the testimony of Irene ? If you feel that you want to hear other witnesses, it is because you don't rely on the evidence of Irene. If you are doubting the evidence of Irene, then you must acquit the accused."
At the stage the jury made the inquiries specified above, it is highly probable they did so because counsel who addressed them on behalf of the accused had made comments unfavourable to the Crown's case on account of the failure to call the other witnesses. The direction given to the jury to acquit the accused if they doubted the evidence of Irene put the matter as favourably as possible to the defence, and we saw no substance in this last ground of appeal.

This Court has dealt with a similar point in The King v. Chalo Singho [1 (1947)42 N. L. R. 269.] where Soertsz J. stated on behalf of the Court that " there is no non-direction by the judge when he omits to refer to the presumption under section 114 (f) of the Evidence Ordinance in cases in which the Crown does not call or tender for cross-examination on the request of the prisoner's pleader a witness whom the prisoner's pleader had himself an opportunity of calling. Indeed, it would be a misdirection for a judge, in those circumstances, to tell the jury that they may apply the presumption ". The law on this point has been understood in the manner above stated and has been so applied in this Country for nearly a quarter of a century, but we were invited by learned counsel for the 1st accused to consider whether it should not be reviewed in the light of the recent decision of the English Court of Criminal Appeal in R. v. Oliva [2(1965) 3 A.E.R. 116 at 122.]. Lord Parker, C.J., there observed :-

"Accordingly, as it seems to this Court, the principles are plain. The prosecution must of course have in court the witnesses whose names are on the back of the indictment, but there is a wide discretion in the prosecution whether they should call them, either calling and examining them, or calling and tendering them for cross-examination. The prosecution do not, of course, put forward every witness as a witness of truth, but where the witness's evidence is capable of belief then it is their duty, well recognised, that he should be called, even though the evidence that he is going to give is inconsistent with the

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case sought to be proved. Their discretion must be exercised in a manner which is calculated to further the interest of justice, and at the same time be fair to the defence. If the prosecution appear to be exercising that discretion improperly, it is open to the judge of trial to interfere and in his discretion in turn to invite the prosecution to call a particular witness, and if they refuse there is the ultimate sanction in the judge himself calling that witness."

We would like to observe, with respect, that we find nothing in the above enunciation of the relevant principles to induce us to attempt to modify the salutary dictum in Chalo Singho's case (supra) we have quoted above. Indeed, it is our experience that in this Country where unfortunately for several years there has been too great a time lag between committal and trial-a time lag which still disfigures the calendars of the courts-there is particular reason not to criticise or interfere unduly with the discretion of prosecuting counsel as to the witnesses he should call.. As Erie C.J. stated in R .v. Edwards, Underwoodand Edwards [(1848) 3 Cox C .C , at 83], "

generally speaking, we ought to be careful not to overrule the discretion of counsel who are, of course, more fully aware of the case than we can be ".

For the reasons we have now set down we dismissed at the conclusion of the argument the appeals and the applications for leave to appeal of the four appellants.

Appeals and Applications dismissed.

- End -