C.A. Criminal Law — Murder — Trial — Evidence — Caution statement — Voire dire — Common design — Further directions to jury [Caution statements, bearing of, on voire dire] Case admitted in evidence after hearing of voire dire] Appeals dismissed Convictions and sentences affirmed (Cond for fwd) ✓ comp

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 32 & 33/89

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (AG.)

Evidence — Criminal Practice

R. v. MICHAEL FULLER
WALFORD WALLACE

Maurice Saunders for Fuller

Richard Small with Miss D. McIntosh-Bryce for Wallace

Miss Paula Llewellyn Deputy Director of Public Prosecutions with Miss Paulette Williams for the Crown

22nd, 23rd, 24th, 25th, 29th, 30th, 31st October, 1st November, 1991 & 24th February, 1992

FORTE, J.A.

On Friday 22nd May 1987, two young men, Fitz-Albert Hall, and Lennox Francis were found dead, their bodies lying on the floor in a room of a two bedroom house at Housing Drive at Kintyre in the parish of St. Andrew. Both bodies were tied together at the neck with a piece of sash cord, and their hands tied behind their backs with electric cord. Also found in the room were seven (7) pieces of bullets, shattered bullets, six spent shells, and a wooden-handle machete with blood-stains on the blade.

A postmortem examination done on the body of Fitz-Albert Hall on the 29th May 1987 revealed four gunshot wounds described by the pathologist as follows:

(1) a through and through gunshot wound on the left side of the head. This wound travelled obliquely upwards to the right and exited on the right frontal scalp;

(2) a gunshot entrance wound located in the area of the left temple about 3 inches below injury no. (1). It travelled through the left cheek and exited on the right cheek;

(3) a gunshot entrance wound on the left side of the neck. This travelled through the muscles of the neck, the bullet lodging in the cervical vertebrae i.e. the bone in the neck;

(4) a through and through gunshot wound on the anterior aspect of the left shoulder which travelled obliquely downwards and exit approximately 3 inches below the entrance wound;

(5) a two inch laceration on the right side of the chin.

In the doctor's opinion death was due to multiple gunshot wounds.

With respect to the postmortem examination on the body of Lennox Francis, the following were revealed:

(1) A gunshot entrance wound, circular and 3/8 of an inch in diameter, on the right side of the neck which travelled horizontally through the muscles of the neck and exited on the left side of the neck.

(2) A through and through gunshot wound on the lower right side of the neck which travelled obliquely downwards and exited on the lateral aspect of the left chest.

(3) A 3½ inch long horizontal incised wound extended across to the nasolabial fold.

(4) A 1½ inch jagged laceration to the upper lip.

(5) A laceration to the right side of the forehead.

(6) A laceration to the right cheek.

In the doctor's opinion, death was due to multiple gunshot wounds.

The bodies having been discovered, investigations under the supervision of Det. Snr. Supt. Isadore Hibbert were commenced and in the end caution statements were taken from the two

applicants. These statements formed the total basis of the Crown's case, and the circumstances under which they originated were strenuously disputed at the trial. Nevertheless, they were admitted into evidence after the holding of a voire dire. The result was the conviction and sentence to death of both applicants, on a two count indictment each charging both applicants for the murder of each deceased. This is an application for leave to appeal against their convictions. Before us the applicants through their attorneys, argued several grounds of appeal largely concerned with the evidence in relation to the caution statements, and several alleged errors made by the learned trial judge in his summation to the jury.

The grounds of appeal, however crystallised during the arguments to the following issues which affect the cases of both applicants:

1. (a) Did the learned trial judge fall into error when he ruled the caution statements of the applicants admissible, in circumstances where the applicants contended that they signed documents presented to them because they were beaten and deceived Wallace by certain police officers who were not called to testify by the Crown?

   (b) Were the directions given to the jury on this issue, adequate?

2. (a) Did the learned trial judge err when he refused to edit the statements of both applicants?

   (b) Was there any prejudice to the applicant Wallace, by the admission into evidence of the fact that he was otherwise called "Macca", the name which appeared in the statement of the applicant Fuller. In addition what was the effect of the learned trial judge reminding the jury of this fact in the process of his summation?

3. In the voire dire is it permissible to enquire of an accused, whether the content of the alleged caution statement is true. If the answer is 'no', was such a question asked in this case, and if so what effect does that have on the learned trial judge's ruling on the admissibility of the caution statements?

4. What were the possible interpretations of the content of the caution statements in respect of both applicants, and were the directions to the jury by the learned trial judge correct in this regard. In other words, were the directions on common design, adequate and correct having regard to the possible interpretations that could be given to the statements?

5. On the return of the jury for further assistance, were the further directions given, sufficient and accurate?

1. (a) Ruling on voire dire on the admissibility of the caution statements

In advancing this contention counsel for both applicants contended that the evidence of the Crown remained tainted because of the failure of the Crown to call witnesses who were available, to rebut the allegations of violence and oppression made by the applicants as to the circumstances under which the statements came into being and in those circumstances the learned trial judge could not have been satisfied as to their voluntariness.

Before dealing with this specific complaint it may be useful to examine what is now settled law in relation to the duties of a trial judge in determining whether a caution statement is admissible. The whole question is comprehensively dealt with in the speech of Lord Morris of Borth-Y-Gest in the case of **D.P.P. v. Ping Lin** [1975] 3 All E.R. 175 at page 177 as follows:

> "My Lords, in the judgment of the Privy Council delivered by Lord Sumner) in **Ibrahim v. R**, it was said that it had long been established as a positive rule of English criminal law that

> "no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement. ... Lord Sumner explained or illustrated what he meant by a voluntary statement. He meant a voluntary statement 'in the sense' that it had not been obtained either by fear of prejudice or hope of advantage the fear being as he put it 'exercised' by or the hope being 'held out' by someone whom he described as a person in authority. ... In the circumstances posed a judge must decide whether the prosecution have shown that a statement was voluntary. His decision will generally be one of fact. He may perhaps in some cases before giving his decision derive help from a consideration or perusal of reported decisions but he will always remember that most of these reported decisions merely record what the ruling of another judge has been in another case and in the particular circumstances of that case and on the basis of its own particular facts. ... What is a clear and straightforward rule need not be obscured by subtleties and complications. The rule is one which in a fair-minded way can readily be applied by a judge once he has clearly ascertained the facts."

In the same case, Lord Hailsham of St. Marylebone advanced his own views thus:

> "But on the subject of confessions, English law is not wholly rational. It is subject to the general rule, described by Lord Sumner as a 'rule of policy' to which I have already referred, viz that, before a confession is to be admitted in evidence it must be proved by the prosecution beyond reasonable doubt, 'as a fundamental condition of its admissibility', that it is 'voluntary in the sense that it has not been obtained by fear of prejudice or hope of advantage excited [if I am right in my emendation] or held out by a person in authority.' ...

> "I cannot myself help regarding the issue as basically one of fact. The trial judge should approach his task by applying the test enunciated by Lord Sumner in a common sense way to all the facts in the case in their context much as a jury would approach it if the task had fallen to them. In the light of all the facts in their context, he should ask himself this question, and no other:
> 'Have the prosecution proved that the contested statement was voluntary in the sense that it was not obtained by fear of prejudice or hope of advantage excited or held out by a person in authority or (where it is relevant, as is not the case on appeal here) by oppression?'..."

It has long been established therefore that on the voire dire, a trial judge must determine whether on the facts, the prosecution has proven the voluntariness of the statement before he can determine its admissibility. In doing so he is exercising a duty similar to the jury in determining facts in any case, though the ultimate decision as to the admissibility of the statement must be a question of law.

It follows then that in assessing any complaints in relation to a judge's determination of facts based on the evidence adduced on the voire dire, it must be remembered that, in the words of Lord Lane C.J. in **R. v. Rennie** [1982] 1 All E.R. 385 at page 389:

> "... The person best able to get the flavour and effect of the circumstances in which the confession was made is the trial judge, and his findings of fact and reasoning are entitled to as much respect as those of any judge of first instance."

What then was the evidence upon which the learned trial judge in the instance case, determined the admissibility of the caution statement?

The evidence in relation to each applicant as must be expected is different.

FULLER - VOIRE DIRE

The main witness for the Crown, was Det. Deputy Superintendent Brown, who was one of the investigating officers and who recorded the statement allegedly dictated to him by the applicant Fuller in the presence of Mr. Douglas, a Justice of the Peace and also Det. Sgt. Miller.

In his testimony Det. Brown spoke of going to the Elletson Road Police Station on the 10th June 1987 at about 12.45 p.m. as a result of a message he got from Det. Sgt. Benjamin who had informed him that the applicant was desirous of giving a statement concerning the murders, the subject matter of the instant case. There he saw and spoke to the applicant, who agreed that he was desirous of giving the statement. As a result he summoned Mr. Douglas to be present during the taking of the statement. On the arrival of Mr. Douglas, he (Mr. Douglas) also asked the applicant if it was true that he wanted to give a statement, and the applicant replied in the affirmative. After the usual caution, which was written down, he dictated the statement, which was duly recorded by Det. Brown, at the end of which it was read over to the applicant who signed it, his signature thereafter witnessed by Det. Miller and Mr. Douglas, Justice of the Peace. The evidence of Det. Brown was supported and indeed coincided with that of Mr. Douglas who was called by the Crown as a witness on the voire dire. Det. Miller was however not called as a witness.

The applicant then gave evidence, in which he stated that he had been arrested on the 9th June, 1987 taken to several police stations including the Elletson Road Police Station in the course of the day, before being locked away in the cells of the Cross Road Police Station. On the following day he was returned to Elletson Road, and discovered on arrival that the mother of

his baby was there in the station apparently being questioned by the police. This factor was not really developed either at the time, or during the course of the trial as being a contributory factor to the signing of the statement. He stated that, during his detention, and before he was taken back to Elletson Road Police Station, he had been the subject of beatings by the police officers whom he named to be a Mr. Chambers, Hezekiah Laing and Det. Sgt. Benjamin. On the day of his return to Elletson Road, present were the same three police officers who had beaten him before. It was put to Det. Brown in cross-examination that in his presence the applicant was beaten and was threatened in order to compel him to sign a document which was placed before him, that on his continuous refusal to do so, Det. Benjamin obtained an electric cord, which he plugged into the outlet and placed it on his penis causing great pain and thereafter he signed the document. He denied having dictated the statement and in addition maintained that he signed the document placed before him as a result of the violence meted out to him and the other oppressive treatment to which he had been subjected before. All the allegations of the beatings in the presence of Det. Brown, were denied by Det. Brown, as also Mr. Douglas, Justice of the Peace who witnessed the taking and signing of the statement. The applicant, however called as a witness Dr. Leo Campbell whom he had seen on the 18th November, 1987 and who treated him at that time for an ulcer which was seen on his penis. The applicant maintained that the ulcer which the doctor saw, was in fact the result of burns he had received from the shocks administered by Det. Benjamin and that he had been seen by several doctors prior to being examined by Dr. Campbell in November 1987. The doctor's evidence, however proved equivocal. He stated that the applicant complained of an electric shock to his penis. On

examination he found an infected ulcer on his penis which was consistent with the complaint of the applicant. In cross-examination however, the doctor conceded that the ulcer could have been caused by "any infected wound," and not necessarily one caused by an electric shock. He estimated that the ulcer he saw would be consistent with a wound received at least 10 days before he examined the applicant, and up to 5 months before.

Three significant factors emerged from the testimony of the applicant, all in cross-examination.

1. The applicant denied the presence of Det. Brown, when he was forced through violence to sign the document. This occurred in the following questions and answers given:

"Q. You heard Supt. Brown say he knew you before?

A. I dont know him.

Q. Did you hear him say he knew you before?

A. Yes, here so.

Q. Yes.

A. Yes, him say that.

Q. And he also said that he knew that you know him - that you know him before?

A. I dont know him before.

Q. Did you hear him say that?

A. I hear him say that, but I dont know him before.

Q. So, during this whole time when you said you were beaten and you were given a paper to sign did you see Supt. Brown?

A. No, I dont remember seeing him.

Q. So where is the first time you see Supt. Brown?

"A. First time me see Supt. Brown is when him and the Justice of the Peace, and me hear say him a Justice of the Peace, and me hear Judge a Gun Court a put off the case and me see she call him.

Q. So you are saying you first see Supt. Brown at the Gun Court?

A. Yes ma'am

His Lordship: Is that what you are saying?

A. Yes sir.

Q. The Supt. Brown who gave evidence in this case?

A. Yes

Q. First time in your life you were seeing him was up at the Gun Court?

A. Yes. I dont know him all the while.

By this evidence, the applicant was obviously contending that Det. Brown was not present at the time when he was allegedly forced to sign the document. This of course was inconsistent with the suggestions made to and denied by Det. Brown, that the beatings which resulted in the signing of the document by the applicant and in particular the shock to his penis took place in his presence.

2. It appears from questions asked of the applicant by the learned trial judge during the course of his testimony on the voire dire, that the applicant was denying that the document which he signed was indeed the caution statement, the admissibility of which the learned trial judge was determining. The applicant was taken by the learned trial judge through the entire caution statement and he denied that he had signed each and every signature in his name appearing on the document. The following questions and answers then occurred:

"Q. All right. So then, Mr. Fuller, You have not signed your name anywhere on that document I just showed to you? Is that right?

A. Sir, mi name pon the paper, sir. I sign the paper that them give me and they shock me to sign what is at the bottom. Me sign mi name.

Q. I heard that. I understand that, but I am talking about a special paper now, this one, and I asked you to look right through it.

A. Yes, sir.

Q. So what you are telling me is that you have not signed your name anywhere on this paper that I just showed you?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. You haven't written any date on this paper that I just showed you?

A. I write mi name pon the paper but it don't look like that paper, sir.

Q. Well, now, I am only dealing with this paper. You understand me? You want to look again?

A. Don't look like that paper, sir.

Q. So what you have told me then is that you haven't signed your name anywhere on this paper that I just showed you?

A. I sign my name on a paper.

Q. Not a paper, this paper.

A: No, not the paper them show me fi sign.

Q. This paper does not look like the paper that they gave you to sign.

His Lordship: Your name on?

A. No, sir.

Q. And you just looked at all of those signatures a while ago?

"A. Yes sir.

Q. And you tell me now that none of those were made by you? Is that correct?

A. Not me write pon that. I write down the bottom. Me write me name on a piece of paper, not like that, in the middle and which part the officer just show me down the bottom.

Q. Well, look at those at the bottom of the paper, you didn't make those either?

A. Don't remember.

Q. You want to look at them again? Do you want to look at the one at the bottom again?

A. That paper don't look like the paper that them give me to sign my name. That is not the paper they give me to sign my name.

Q. That document that I just showed you?

A. Yes, sir, is

Q. Is not the document that you signed your name on? Correct?

A. What you say, sir?

Q. This document that you just looked at is not the document that you signed your name on at Elletson Road?

A. Don't look like that document, sir.

Q. Not that it don't look like that. So you do not admit then having made any of those signatures? I want to know what to write. You understand me? What are you telling me?

A. Sir, when them bring the paper into the room and me see them pon the desk while them did a beat me is me sign me name at the bottom.

Q. When you see your signature, something that you make, you can't recognise it? When you see your own signature you can't recognise it?

A. Yes, sir.

"Q. Well, that is why I showed you. Do you recognise any of these?

His Lordship: being written by you?

A. Don't remember none of them, sir. Don't remember.

Q. You don't recognise any of them?

A. Don't remember none of them, sir. Them did a beat me. Me never see the paper. Them only give me and say me must sign my name.

Q. I want to be clear in my mind about what you are saying, you know. Are you saying that you could have written them? Show him again, Mr. Registrar. Could you have written that one at the first one on page 1? Is it possible that you could have written that signature?

A. You say possible a while ago. What you really mean when you say possible, sir - if it possible?

Q. Is it possible that you could have written that?

A. When you say possible, what you mean, sir?

Q. Did you write it - let me put it that way, did you write it?

A. Sir, I don't remember writing my name. I remember them tell me to sign my name on the bottom. Them don't give me nothing to sign.

Q. So if you saw a signature that you made, you couldn't remember it?

A. Yes, sir, but how them did have me, sir, how me did a get beating, and how me did feel, them all a burn me.

Q. So with all of that are you saying that it is possible you could have written it? It is possible you could have written those signatures?

A. Which statement? Me could a do it and don't know, but I don't remember those. A through me get the shock, me burn up right here so. Me don't remember say me sign my name at the bottom of the paper. I don't remember.

I have set out the above questions and answers to show that in his testimony the applicant Fuller, was maintaining first that the signatures appearing on the caution statement were not his, then at other times he appeared to be contending that he did not remember signing the particular document and at another stage saying quite categorically "that is not the paper they gave me to sign my name."

3. Also of importance is the reason given by the applicant for the signing of the document. (page 164):

"Witness: Him start to shock me and burn me.

Q. Was anything said to you when that happened?

A. The paper what me fi sign, that is why him put it on me, and after him put it on me and it shock me, me couldn't do anything more than sign the paper what him put before me.

Q. Why did you sign the paper?

A. Through the shock and the burn from the current.

And at page 178 - 179:

Q. Were you feeling well at the time that you signed your name?

A. No; No, sir.

Q. About how long before the time that you sign your name had you eaten or had anything to drink or to eat?

A. From the 9th, the morning of the 9th, after I was collecting the book them. I remember I drink a sky juice up there.

Q. Were you hungry at about the time when they wanted you to sign your name to this paper?

> "A. Through them a beat me and how me did feel me never really feel like me would a eat; to how me did feel me never feel hungry. Police them a beat me before I sign the paper; I never feel like I would eat anything."

The inevitable conclusion from these passages must be that the applicant, while alleging that he signed "a paper" placed before him, and that he did so as a result of the beatings culminating with the shock to his penis, was nevertheless denying that he signed the caution statement exhibited and in any event signed no document in the presence of Det. Brown.

This was therefore the evidence upon which the learned trial judge had to decide whether the caution statement tendered for admission into evidence was taken in circumstances that would make it admissible. In the end, he decided in favour of admitting the statement and on the face of the evidence, his decision, in our view, is supported by the evidence.

However, counsel for the applicant complains not so much in respect of the evidence before the learned trial judge, but in relation to evidence which he asserts ought to have been led by the prosecution, and contends that failure so to do, should have resulted in the non-admission of the caution statement. He refers, of course, to the police officers, whom the applicant alleged, subjected him to beatings from the previous day and who were responsible for detaining him without food or water for at least 24 hours before he signed "the paper". Both Mr. Saunders for the applicant Fuller, and Mr. Small for the applicant Wallace, contended that in the absence of these witnesses, to rebut the allegations of both applicants, the evidence of oppression and violence testified to by the applicants remained unchallenged and consequently, at

the end of the voire dire, the circumstances of the taking of the statements had remained tainted and the statements should therefore have been rejected. For this proposition they relied on the judgment of this Court in **R. v. Hazel and Eldon Grant** R.M.C.A. 60/89 (unreported) delivered on the 19th March 1990. The case concerned the conviction of a bank officer on several charges of fraud, and the relevant passages of the judgment of the Court delivered by Wright J.A. on which the applicants rely, relate to the admission into evidence of a statement made by the offender to her superior officers in the bank. The major roles, in the taking of the statement, were played by two senior bank officers, one of whom gave evidence, the absence of the other leading to the following comments per Wright J.A. at page 46:

> "... Hazel Grant was sequestered in Mr. Ryan's office for some five hours with persons in authority, was not allowed to see her husband and was subjected to oppression. Although we do not agree that Mr. Ryan's attempt to call the Police was any evidence of oppression we nonetheless have some reservation about the circumstances in which those admissions were made. Mr. Holman is alleged to have shown much hostility to the appellant, who was the junior officer among those present, and inasmuch as he was not available to allow his conduct to be examined by the Court the taint of oppression remains and we conclude that the impugned evidence ought not to have been admitted." ...

Counsel laid great emphasis on the Court's purported conclusion that the absence of the witness Holman resulted in the taint of oppression remaining, and contend that in the instant case the same approach must be given to the absent witnesses who, it is alleged, inflicted violence upon the applicants. In our view, and as we have earlier recalled by reference to the case of **D.P.P. v. Ping Lin** (supra), the question of admissibility of a caution-r statement must be decided in the circumstances of

each particular case, as it is basically a question of fact upon which the trial judge comes to his decision. The dicta of Wright J.A. in the Grant case (supra) must therefore be viewed in the context of its particular facts. It was a case in which the witness called by the prosecution, and who was one of the senior officers who questioned the offender, admitted material allegations made by the offender as to the circumstances in which the statement was given.

In reviewing the facts of the case in relation to this aspect Wright J.A. stated:

> "... Mr. Ryan had made a list of the names in the files but when he read them Mrs. Grant said she had granted hundreds of loans and could not recall any 'just off the bat.' So Mr. Ryan presented her with the ments from the files one at a time but to no avail. After this had lasted for about an hour Mr. Ryan decided to call in the Police. He took up the telephone and began dialing when Mrs. Grant said 'Mr. Ryan, don't call the police'. He did not complete the call. He said to her, 'Why, do you have something to say?', to which she replied, 'Yes'. But when she said nothing more he asked her if she wished to speak to him in private and when she said yes' the others present left the room. As recorded in the Notes of Evidence this is what transpired between herself and Mr. Ryan: 'I said 'Are these loans fictitious'. She said 'Yes'. I said 'All of them?' She said 'Yes'. I asked if there were anymore loans in addition to those - she said 'No'. I asked her if she had a list or some sort of control she might have stating what accounts are involved. I asked her what she had done with the money. She said she was not in a position to tell me. I said 'it is over a million dollars, you must know what you did with the money you stole'. She said 'I did not steal any money, I borrowed it and I had all intention of paying it back'. I asked her how she was going to pay it back. She indicated that her husband had real estate developments and it would be paid from sale proceeds.'

> "Mr. Ryan called the others back into his office and reported to them what had just taken place. He still pursued enquiries with a view to ascertaining whether 'there were any other accounts in the book that she might have borrowed to which she said no'. He then asked 'if she would give a written statement confessing that she had granted these fictitious loans and had not tampered with any other loans' and she said 'yes'." ...

Later in the judgment Wright J.A. deals with the testimony of the witness in cross-examination thus:

> "... Regarding the writing of Exhibit 33 he said Mrs. Grant wanted to know what she should write. He also disclosed that she had told him of the fate of the files before she wrote the statement which was written on a regular bank scratch pad. In his evidence-in-chief he had stated she did ask what she should write after it was disclosed that the loans were fictitious and that he had told her to write that the loans were fictitious."

In her testimony, the offender stated (per Judgment of Wright J.A. page 30):

> "I look at Exhibit 33. I wrote and signed it. Mr. Holman and Mr. Ryan kept on telling me that 25 loans are fraudulent. I kept denying this for about 5 hours. Then Mr. Holman threatened to have me arrested. This after the telephone incident. He told me I should write what he said to me. They gave me this piece of paper and I wrote. Mr. Holman and Mr. Ryan dictated this. I did not grant any fictitious loans. I did not destroy any files. Exhibit 33 was not prepared of my own free will."

In addition to all other admissions the Crown also admitted that the offender was kept for five hours, and prevented from seeing her husband who had come to the bank, to collect her. In our view the dicta of Wright J.A. must be viewed

in the context of the facts hereinbefore outlined. This was a case in which the prosecution and the defence were in almost total agreement in respect of the improprieties that surrounded the taking of the statements, not the least of which was the admitted 'dictation' by persons in authority as to what should form the content of the statement. The only other witness who could possibly disagree with the defence remained absent. In those circumstances, based on the evidence before the court, the correct decision should have been to reject the statement. It must therefore have been these factual bases that led Wright, J.A. to find that "the taint of oppression remained."

The question therefore is whether in the instant case, in the absence of certain witnesses in the voire dire, the learned trial judge was incorrect in finding nevertheless that the statements were admissible.

The applicant alleged -

(1) That he was detained by police officers by the names of Chambers, Laing and Benjamin on the day before he gave the statement.

(2) That throughout this period he was beaten periodically, and was detained without food or drink.

(3) That at the time he signed 'a paper' he was beaten, and was shocked on his penis with an electric cord, and thereafter having signed the paper, he was 'a bit unconscious.'

(4) His counsel cross-examined to suggest that at the time he was 'forced' to sign the document, he was beaten in the presence of Det. Supt. Brown. The applicant, however stated in his evidence that Det. Brown was not present when he signed the paper, and that Mr. Douglas, Justice of the Peace attended after he had already signed.

(5) That it was the beating and the shock that he received immediately before the signing that were the effective reason for doing so. He denied that his hunger had any influence on his signing the document.

The Crown on the other hand, alleged that the statement was given free and voluntarily and dictated to Det. Brown in the presence of Mr. Douglas, Justice of the Peace as also Det. Sgt. Miller. That Det. Benjamin was not in the room at the time of the giving of the statement, and police officers by the names of Chambers and Hezekiah Laing were not known to Det. Brown. The allegations of beatings etc immediately prior to the taking of the statement were all denied by Det. Brown in cross-examination. In so far as the voluntariness of the statement was concerned, the learned trial judge, had two diametrically opposed stories. As the relevant purported beatings allegedly took place in the presence of Det. Brown, the learned trial judge could if he accepted Det. Brown as a credible witness reject any evidence of beatings at the time the statement was taken. And this without hearing evidence from the persons who were accused of directly inflicting violence upon the applicant.

On the other hand, the evidence of the applicant though alleging the beatings, is not clear as to whether the violence imposed on him was in relation to the exhibited caution statement, as he denied placing his signature thereon. Nevertheless, assuming that his case was that the signing of this document was the result of the violence, it really was reduced to a simple finding on the evidence for the learned trial judge to come to his conclusion. In our view, therefore the failure to call these police officers as witnesses, given the circumstances of this case, was not fatal to the proof of voluntariness.

WALLACE

In dealing with the case of Fuller, and the examination of the Grant case (supra), the principles expressed there, are of course applicable to the applicant Wallace viz: the dicta of Wright J.A. should not be regarded as setting down any general principle which a trial judge should follow in his decision as to the voluntariness of caution statements, but must be considered in the context of that particular case.

The facts surrounding the taking of the cautioned statement of Wallace are briefly set out hereunder:

Two witnesses gave evidence of being present when the applicant gave his caution statement i.e. Detectives Brown and Hibbert.

Det. Hibbert, was called from his office at about 3 to 4 p.m. on the 2nd July, 1987 to go to the Admiral Town Police Station. Det. Brown went along with him. There he spoke to Det. Supt. Tracey, and as a result the applicant was brought to him. On being told that Det. Sgt. Benjamin had told Det. Hibbert that he (the applicant) wanted to see him urgently, the applicant said:

> "... last night I was at the cell and I started to pray and a spirit tell me to tell you everything about the murder at Kintyre and the murder at Dallas."

Det. Hibbert, then cautioned him and the applicant agreed to give a statement in writing. He thereafter dictated a statement which was taken down in writing by Det. Hibbert and which was signed by him after Det. Hibbert had read it over to him. The statement was witnessed by Det. Brown, who in his testimony gave support to the evidence of Det. Hibbert as to the circumstances under which the statement came into existence.

The Crown's case therefore left no room for any finding of violence which would affect the admissibility of the statement, nor was there any cross-examination of either witness to suggest that they took part in any oppressive activity towards the applicant. It was however suggested to both witnesses that the applicant did not dictate the statement, but that it was in fact Det. Hibbert's narrative. These suggestions were denied.

The applicant in his sworn testimony on the voire dire spoke of being detained on a Wednesday - the date unremembered, in Morant Bay and taken to the police station there, and subsequently brought into Kingston on the Friday because they had nothing upon which to arrest him in St. Thomas. In Kingston he was taken to the Ellerson Road Police Station, where he was handcuffed to a chair in a room in which there were three police officers, Det. Benjamin, Chambers, and Hezekiah Laing. Det. Benjamin and the others beat him on his foot, face and on his knee, saying they were going to charge him with murder. No one was present to heed his call for help. He was thereafter taken to Central Police Station.

The following morning he was taken to a room at the Central Police Station where there were six police officers including Det. Hibbert and Det. Brown. Det. Hibbert and Det. Brown asked him questions. In fact all of the policemen asked him questions. He thereafter signed a paper given him by Det. Hibbert who requested him to sign it. This was apparently Questions and Answers put into evidence by the defence, and which Det. Hibbert admitted taking from the applicant, freely and voluntarily on the 27th June, 1987. The applicant then spoke of being taken to Admiral Town Police Station where he was detained from Saturday to Thursday. The officers Benjamin, Laing and Chambers, came and took him from the cell, into a room,

where they handcuffed him to a chair and beat him on his leg, knee, hands and on his shoulders. During this beating Benjamin was saying that he was going to charge him for murder and he was denying that he knew about any murder. They threatened, "You nuh want talk? I going beat you then" and continued to beat him. Then the following evidence is recorded in the transcript:

> " Same time I see Hibbert walk in when Mr. Hibbert walk in I see a next police name Brown came in.
>
> His Lordship: So were you being beaten at the time they came in?
>
> Witness: Yes when them come in him see them beating me.
>
> His Lordship: More than one was beating you?
>
> Witness: Three of them was there beating me.
>
> His Lordship: So Mr. Hibbert and Mr. Brown could have seen?
>
> Witness: Yes, they come in and see me sit down and getting beaten. And say 'stop now. All right!
>
> His Lordship: Who said that?
>
> Witness: Mr. Hibbert say 'stop now'. Him say 'stop, we going to charge him for murder'. Him say 'stop I am going to charge you for murder, and I want you to sign this charge sheet for me. I say 'How you must charge me for murder and I dont do no murder? Him say 'Anyway I still going charge you so you just sign here, you sign and I go ahead and sign."

The applicant denied that he told Det. Hibbert that he had a dream and that he was cautioned by Det. Hibbert. He however identified his signature on the caution statement which he said was presented to him as charge sheets.

The applicant's case on the voire dire was therefore that he was beaten, and deceived into signing the caution statement on the pretence that he was signing a charge sheet. Significantly, however neither Det. Hibbert nor Det. Brown was asked about the applicant being beaten in their presence, nor was it suggested to Det. Hibbert that he deceived the applicant into signing the statements by telling him that they were charge sheets.

Though the applicant alleged that violence was inflicted upon him, it appears from his evidence in the voire dire, that he maintained that he signed the document believing it to be a charge sheet. The material questions for the learned trial judge related to -

(i) whether he was in fact beaten by the police officers and if so whether that caused him to sign the statement, and

(ii) whether he was deceived into signing by Det. Hibbert.

The failure to call Chambers, Benjamin and Hezekiah Laing may have some relevance to the question whether the applicant was in fact beaten, but certainly would have no relevance to the question whether Det. Hibbert deceived the applicant as he has never alleged that the beating was the reason for his signing the document. The determination of these matters was really for the learned trial judge, who in the state of the conduct of the defence on the voire dire would be justified in rejecting the account of the applicant.

Counsel for the applicant, did not in the course of the testimony of Det. Hibbert and Det. Brown suggest to either of the officers, that the applicant was beaten in their presence, nor was any suggestion made to Det. Hibbert that he told the applicant that he was signing a charge sheet. These witnesses were never

therefore given a chance to deny that any such acts took place. Nevertheless, the applicant gave evidence making those allegations. In those circumstances, it would be reasonable for the learned trial judge to find that the account given by the applicant was unreliable and did not warrant rebuttal by the named persons.

We do not, for these reasons find any merit in this complaint.

1. (b) <u>In the absence of witnesses - were the directions to the jury correct?</u>

This ground was based on the fact that after the caution statements were admitted into evidence, the defence again challenged the circumstances under which they came into existence, and again maintained that both applicants were subjected to beatings by the same three police officers, and in spite of this the prosecution failed to call those officers to deny the allegations. This submission also related in the case of the applicant Fuller, to the failure of the prosecution to call Mr. Douglas, Justice of the Peace on the return of the jury. Though both counsel relied on this contention, it was Mr. Saunders for the applicant Fuller who developed the submission in detail. He maintained that the learned trial judge should have told the jury that the absence of the witnesses would affect the weight and reliability of the caution statement, as also the weight and reliability of the prosecution witnesses. Mr. Small on his part also contended that it was the duty of the learned trial judge to review with the jury evidence, or in this case the lack of evidence which should affect the weight to be attached to the statements. It appears, however that the learned trial judge did just that. In his summation he reminded the jury that the witnesses were not called, and directed them, (correctly in our opinion) as to the manner in which this should be approached in assessing the evidence. He directed them thus:

> "The defence for both accused men say to you, Mr. Foreman and Members of the Jury, that their clients were beaten by three policemen, in particular Benjamin, Hezekiah and Chambers; and defence Counsel say to you, in the light of the suggestion, why didn't the Crown call one or all of these police officers to deny that they beat any of these accused men, if indeed that is the truth; and it seems to me that that observation of Counsel for the defence is valid, it is pertinent, because the Crown could have called Benjamin, who we know is in Jamaica, to say that he did not beat Wallace or Fuller, but they didn't do so. Why didn't they call Benjamin, why didn't they call Hezekiah, or Chambers? because, apparently, Benjamin, Hezekiah and Chambers operated together at all times. So if one of them came he could say that neither he nor any one of the other two beat any of these 2 accused men, but none of them came, and you may find yourselves asking the same question, why didn't any one of them come. That would be a failing on the part of the prosecution in this case, if you feel that you wanted to hear from Hezekiah or Benjamin or Chambers. All that the witnesses in this case can say, that is Detective Senior Superintendent Hibbert & Deputy Superintendent Brown, is that no beating took place in their presence. It has been suggested that this trio of policemen beat these accused men at times when neither Hibbert nor Brown was present. So even one of the three of them could really tell us whether that was so or not, but the fact of the matter is that the prosecution has failed to bring any of the three of them here to satisfy you that neither of these accused men is speaking the truth when he says that he was beaten by any one of the three of them, or all three of them."

In respect of the absence of the three police officers, the learned trial judge clearly directed that if they were of a state of mind which required hearing evidence from these police officers then, the prosecution would have failed to satisfy them that the applicants were not speaking the truth. In relation to the absence of the person who witnessed the caution statement of

Fuller i.e. Mr. Douglas, Justice of the Peace, the learned trial judge after reminding the jury of the importance of that evidence directed the jury as follows:

> "If you feel you wanted to hear Mr. Douglas then it would mean that the prosecution would have failed in that duty in discharging that burden which rests on it to prove beyond reasonable doubt that the statement was voluntarily given."

In these directions, the learned trial judge was incorrect in his expression of the necessity for the prosecution to prove to the jury, after the very question had been decided on the voire dire, that the statements were voluntary. The decision of the Judicial Committee of the Privy Council in **Chan Wei Keung v. The Queen** [1967] 2 W.L.R. 552, as it appears in the headnote settles this principle:

> "... where evidence of a confession was sought to be adduced by the prosecution, the admissibility of the confession as evidence is a question for the judge to decide; voluntariness was only a test of admissibility (post, pp 556e-g 557g), and that where the judge decided to admit the confession as a voluntary statement, the only question for the jury to consider with reference to the confession so admitted was its probative value or effect, ..."

The learned trial judge by inviting the jury to determine in view of the failure of the prosecution to call certain witnesses, whether the prosecution had discharged its burden to prove that the statements were voluntary, was being extremely generous to the applicants, as the jury would then only be concerned with determining the probative value or effect of the statement, though the circumstances under which the statement was taken would be an essential consideration in determining what weight or effect should be given to the statement.

In our view, the learned trial judge in the end, assisted the jury adequately, as to how they should deal with the evidence in the light of the absence of witnesses, and gave directions favourable to the applicants when he suggested that if they were in doubt re the failure of calling the witnesses the prosecution would have failed. This ground also fails.

2. (a) **Editing of Caution Statements**

At the trial, before each caution statement was admitted into evidence, counsel appearing for the applicants applied for the statements to be edited, as there were in the statements evidence which was highly prejudicial to the other accused, and which had no probative value except in respect of the maker of each statement. The learned trial judge refused both applications indicating that in the interest of justice, he would have to make sure that the statements were intelligible to the jury and that in order to protect against prejudice he would, when summing-up the case to the jury give the appropriate warning in that regard.

Before us, both Mr. Saunders and Mr. Small, contended that the learned trial judge fell into error when he refused these applications. Each suggested that the substitution of letters of the alphabet for the names of persons named in the statements except for that of the maker, would have resulted in an avoidance of any prejudice which otherwise existed. The warning, they submitted, was not adequate enough to erase the prejudicial damage which the content of the statements would do to the case of the co-accused.

It has not been challenged and could not be successfully challenged, that the statement once proven to be voluntarily given was admissible in evidence against the maker of the statement. Nevertheless, a trial judge would have a discretion if evidence highly prejudicial against a co-accused is contained in the statement to

order separate trials. No such application was made in this case, and the circumstances do suggest that such an application would have been unsuccessful. Counsel therefore requested editing of the statements.

The decision whether or not to edit a caution statement is dependent upon the exercise of the trial judge's discretion having regard to the particular circumstances of each case. As was said by Carey, J.A. in **R. v. Dennis Lobban** S.C.C.A. 148/88 (unreported) dated 4th June, 1990, there is no rule requiring a trial judge to edit such a statement. The passage from the judgment on this point is as follows:

> "In the case where one co-accused makes statements implicating his co-accused, we are not aware of any rule requiring a trial judge to edit such a statement. Indeed, in our judgment, it would be wholly unfair to the maker of the statement who would be entitled to have the statement in its entirety placed before the jury. A trial judge has an undoubted duty to ensure a fair trial but that cannot mean fair to one, and unfair to a co-accused."

In this opinion Carey, J.A. is ably supported by the following dicta of Lord Goddard C.J., in the case of **R. v. Gunewardene** [1951] 2 All E.R. 290 (or 35 Cr. App. R. 80) at page 294:

> "As we have said there is no doubt that the statement made by the prisoner Harrison incriminated the appellant in a high degree. This is a matter of very frequent occurrence where two or more prisoners are charged with complicity in the same offence. This state of affairs is, no doubt, a ground on which the judge can be asked to exercise his discretion and order a separate trial, but no such application was made in the present case. If no separate trial is ordered it is the duty of the judge to impress on the jury that the statement of one prisoner not made on oath in the course of the trial is not evidence against the other and must be entirely disregarded, and that warning was emphatically given by Hilbery, J., in the present case. It would be impossible to lay down that

> "where two prisoners are being tried together counsel for the prosecution is bound, in putting in the statement of one prisoner, to select certain passages and leave out others. ..."

Indeed Lord Goddard, as did Carey, J.A., recognized the difficulties which could arise in particular cases if this was in fact a rule. In Gunewardene Lord Goddard at page 295 stated:

> "... If we were to lay down that the statement of one co-prisoner could never be read in full because it might implicate, or did implicate, the other, it is obvious that very difficult and inconvenient situations might arise. Not infrequently it happens that a prisoner, in making a statement, though admitting guilt up to a certain extent, puts greater blame on a co-prisoner, or asserts that certain of his actions were really innocent and it was the conduct of the co-prisoner that gave them a sinister appearance or led to the belief that the prisoner making the statement was implicated in the crime. In such a case that prisoner would have a right to have the whole statement read, and could, with good reason, complain if the prosecution picked out certain passages and left out others."

In the instant case the evidence contained in the caution statements tendered by the prosecution formed the sole basis upon which the prosecution sought the convictions of the applicants. The statements, for convenience, are set out hereunder:

> "FULLER'S STATEMENT
>
> I think in January this year Courtney get a house fih Joel and Higgins at Housing Drive and I go up there and live with them for about three months. Them rent the house from Portland. Some time after Portland father come up dch and start to quarrel and said Portland should not rent the house. Portland father said we should leave the house. During the same time Portland use to take out the

"grocery when we buy it. One day Paul who a Portland brother come up at the house and Joel make a complaint to him so Paul start to quarrel with Portland. While we did a live there a youth name 'Macca' carry a 45 matic come deh and Joel take it and put it under a mint tree in a hole. All three a we leave the house and go up a the Reverend Mr. Lawrence fih go look a money from him. We get sixty dollars from them and me leave the two of them up deh and we go over Waterhouse and was a return to Kintyre. When me reach a Housing Drive me buck up Joel and Macka a come down. Them ask me if a me take up the gun and me tell them no because me jus a come. Macka said, 'Jah you nuh go up deh? You nuh go up deh? You nuh go up deh? Fuller and me said no. The three of us go up back at the house and we start to look weh we put down the gun but we nuh find it. All three a we leave and go down a Angola and start to complain to Sammy 'bout the gun. Joel tell Sammy seh him feel seh a Portland tek the gun. Sammy say, 'Don't blame him because a long time the boy deh fih dead. A long time me want kill him. The three a we go back up deh and tidy up the house and I come back down pon the road and we see Portland and him say it better if we leave from up a the yard because it a run a way. Joel tell Portland seh him tief de gun and now him want run him from up deh. Them start quarrel and Portland tell him seh a shot fi shot. Macka, Joel and me go and check Sammy a Angola and him send fih Juicy. Sammy tell Juicy seh him have a boy fih kill long time and that them must go and put on them army gears. Except we three everybody go and put on them army gears.

That same Thursday night in a May Sammy Dread, Juicy, Prince, Macka, Joel and me go up a Housing Drive a Kintyre. Juicy did have a Beretta gun, Sammy have a M-16 9mm rifle. Prince have a 14 9mm. Sammy left we in a open land and go over Portland daddy yard down a the bottom yard and knock him up and come back and say Portland nuh dedeh because him search up the whole house and him

"nuh find him. Joel sey it better we go up a the same house weh him use to live a Housing Drive. The whole a we a go up deh and we knock up the house. Through them have on uniform them go in front. After the door open Sammy go in. Portland think a police so him say, 'Do officer, a me and me youth in ya.' Me and Prince stay outside fih watch. Sammy tell Portland say a fih him gun him tek way and him want it. Sammy call me inside the house and seh me must call Prince with the 14. When Prince go inside Sammy come outside with the rifle. Me heard like them a beat Portland and the next youth inside a the house.
Sammy tell me fih go inside a the house and tell Prince fih give Macca the 14 and him fih kill the boy them and come quick. Me go and tell Prince the message.
Sammy tell me say him find the gun under the sheet. When me and Sammy deh outside me hear about four or five shot inside the house. After the gunshot everybody come out of the house and me see Joel come out with the 45 matic weh Portland did tief. We leave and go back a Angola. When we reach back a Angola Joel a talk how him bus' up the shot in the boy and a long time him want fih kill him. Me start fret fih stay with the man them.
In the early morning we leave and go up a youth name 'Teetman' yard and we eat some food and me go back a Angola and then me wait till Saturday and then me go a 2 Trinidad Road at Waterhouse and stay with my girlfriend, Hyacinth. Macca still a control the matic but it circulate with the other man them.

Signed: Michael Fuller 10.6.87

Witness: D.L. Douglas, J.P. 10.6.87

Hubert N. Miller, Sgt. 10.6.87

The foregoing statement was read over to me and by me. I have been told that I can correct, alter or add anything I wish. This statement is true. I have made it of my own free will.

Signed: Michael Fuller 10.6.87

Witness: D.L. Douglas, J.P. 10.6.87

Hubert N. Miller 10.6.87

"The foregoing statement was recorded by me this 10th day of June, 1987 between 1.15 p.m. and 3 p.m. at Elletson Road Police Station CIB Office. Read over by maker and to maker who signed to its correctness.

Signed: D. Walcott Brown, ASP, 10.6.87."

WALFORD WALLACE'S STATEMENT

"6.30 p.m., Thursday, 2nd June, 1987
Admiral Town Police Station.

Present, A.S.P. D.W. Brown (that is Assistant Superintendent D.W. Brown);

SP Hibbert (which is Superintendent Hibbert) and suspect, Walford Wallace, otherwise called 'Macka'.

Walford Wallace cautioned by Superintendent Hibbert as follows: We are investigating the murder of Fitzroy Hall, otherwise called Portland and Devon Francis, otherwise called Gullymouth at Kintyre on the 21st of May, 1987. You are not obliged to say anything unless you wish to do so and that whatever will whatever you say may be put in writing and may be given in evidence.

Signed: Walford Wallace dated 2.7.87

Witness: D. Walcott Brown, Assistant Superintendent of Police 2. 7. 87.

I, Walford Wallace wish to make a statement. I want someone to write down what I have to say. I have been told that I need not say anything unless I wish to do so and that whatever I say will be given in evidence.

Signed: Walford Wallace. Dated 2.7.87

Witness: D. Walcott Brown, s.7.87

Saith: One day when we were down by Sammy Dread, Michael Fuller tell Sammy say Portland take away him things. The said night, I think it is the 21st of May this year, Sammy, Prince, Fuller, Juicy, Joel and me left from Angola, that is Sammy yard, and walk to Portland father yard at Kintyre. Sammy, Prince and Juicy leave me, Fuller and Joel in the open land and go over the old man yard. They come back and said

"Portland was not there so we decide to go up to Portland house that Joel and Fuller did rent from him. We walk go up there. Sammy knock on the door and said, 'Police'. Portland said, 'It is not police I know it is you, Tallman.' Tallman' is Joel. Joel said, 'Open up! Police and soldier.' The man who was inside with Portland open the door and said: 'A police and soldier, Prince.' Juicy and Sammy Dread were dressed in soldier uniform. The three of them, that is Sammy, Juicy and Prince, go inside the house. Me, Fuller and Joel stay outside and watch. Same time Portland recognized Sammy and said, 'A nuh soldier; a yuh Sammy.' Sammy said, 'Yes, a me Sammy.' Where is the gun you take away from them? A fih me gun." Portland said, 'A nuh me tek it up. Is a youth from down the bottom.' Fuller rushed inside and Joel followed. Fuller and Joel start to tie Portland and the other man with cord which them get from inside the house. The cord is electric iron cord looking like sash cord. Sammy said, 'Put him down in the corner and mek him talk.' Fuller started to search and him take up the gun from under the sheet on the bed. Fuller said, How yuh seh the youth have it? Yuh fih dead fih it.' Same time Sammy walk out and leave Prince, Fuller and me inside and said me must kill him. Me look on Portland and said, 'Me not killing him.' Same time I walk outside leaving Joel at the door and Prince and Fuller with two guns inside. Joel go inside back. Them start to fire. When Prince, Fuller and Joel come out them say the two of them dead. Sammy say, 'Come let us go back down.' Them take out them clothes and other belongings out of Portland house. Fuller and Joel used live there. We went back to Angola to Sammy yard. We sit in and then start to reason. Fuller said, 'Is long time me want to catch Gullymouth and me catch him at the right time.' Fuller said him kill Portland and Prince kill Gullymouth.' Fuller gave back Sammy two handgun fih hide and he go and hide them same place up in the hills behind his yard. Everybody split up. I leave in the morning and go up to Dallas go stay amongst Ribsy.

"Signed: Walford Wallace

Witness: Walcott Brown, Assistant Supt. of Police 2.7.87

I have read over the foregoing statement. I have been told that I can correct, alter or add anything I wish. The statement is true and correct. I have made it of my own free will.

Walford Wallace 2.7.87

Witness: Walcott Brown, Assistant Supt. of Police 2.7.87

The preceeding statement was recorded by me at the Admiral Town Police Station in the presence of Asst. Supt. D.W. Brown between 6.30 p.m. and 7.15 p.m. 2.7.87
It was read over by Walford Wallace who signed as true and correct.

I.D. Hibbert 2.7.87"

In supporting the exercise of the learned trial judge's discretion in not acceding to the request for editing, Miss Llewellyn for the Crown relied on the cases cited (supra), and submitted that the maker of each statement sought to place greater involvement on the other, and in that sense placed themselves in a minor role. In addition, she maintained that to have substituted letters of the alphabet for the names of the other persons referred to in each statement, would 'have disturbed the integrity of the prosecution's case'. With the former submission we agree, and are of the view that the statements were correctly left with the jury in their totality. Both applicants in their statements, placed themselves as watchmen and alleged that they did not participate in the actual shooting of the deceased, and at the same time each placed the other as actively participating in the shooting inside the room, while he was outside.

In those circumstances, in spite of the fact that no objections were made to the application for editing by the co-accused, it may have been important to the maker's case that his

co-accused and others were the major participants in the act, and that he did nothing more than act as a 'watchman'. In addition, we agree with the reason advanced by the learned trial judge for refusing the application, as editing the statements in the manner suggested by counsel, would in our view have made each statement unintelligible to the jury. There is no basis therefore for interfering with the learned trial judge's exercise of his discretion. The learned trial judge however had a duty to impress upon the jury that the evidence contained in the statement of one accused cannot be used as evidence in respect of the case against the other accused. This he did with great clarity and on more than one occasion, the last being just immediately prior to the retirement of the jury, when he directed them as follows:

> "And lastly I remind you in regard to those statements, I remind you of something that I have told you before but it is very important that it is worth repeating. Nothing contained in the statement of anyone of them can be used as evidence against the other one. The statement of the accused, Fuller is evidence only against Fuller. So if he calls the name of Wallace you cannot use anything that Fuller said in the statement against Wallace, and vice versa, the statement of Wallace is evidence only against Wallace and if he mentioned the name of Fuller you cannot use anything that he says against the accused Fuller."

These were very clear and adequate directions emphasizing the importance of the principles that were being explained to the jury, and in our view amounted to a correct and fair discharge of the learned trial judge's responsibility. The directions repeated as they were towards the end of the summing-up, would most certainly have been uppermost in the minds of the jury when they retired.

We hold therefore that the principles outlined in **Gunewardene** (supra), and the dicta of Carey, J.A. in **R.v. Lobban** (supra) were properly followed by the learned trial judge who exercised his discretion in refusing to have the statements edited, and thereafter in his summing-up emphasized correctly and fairly the proper approach the jury must take in considering the statements. This ground therefore fails.

2. (b) **Disclosure of Wallace as also named Macca**

This contention relates to the applicant Wallace. It has its basis in the fact that in the caution statement of the applicant Fuller, the name Wallace is not mentioned. However throughout the statement (supra) the name 'Macca' appears. It was disclosed in the evidence, however, that the applicant Wallace was otherwise called Macca.

Mr. Small for the applicant Wallace contended that that evidence should have been disallowed by the learned trial judge, and had that been done, there would have been no necessity to consider whether the caution statement of Fuller ought to have been edited, as the name Wallace appears nowhere therein. It was a good opportunity he submitted, for the prejudicial effect of the statement upon the applicant Wallace to be avoided. To substantiate this submission he referred us to the fact that Det. Brown in his evidence volunteered the evidence without being asked any question in that regard. The transcript (page 46) records the following, during the examination by Crown Counsel of the witness.

> "Q. When you went to Admiral Town Police Station who did you see there?
>
> A. I saw the accused in the dock, Walford Wallace, otherwise called Macca.
>
> Q. Macca?
>
> A. Macca."

This was indeed the first reference in the evidence to the applicant's alias. However it was not the last. Again when the statement of Wallace was put to Det. Brown for identification, the examination went as follows:

"Q. This was the statement given by?

A. By Walford Wallace, otherwise called Macca."

Then, a passage to which Mr. Small attaches great significance because it appears immediately after the statement of Fuller was read to the jury and was in the examination-in-chief of Det. Brown. It is as follows:

"Q. Supt. Brown, did you know Michael Fuller before May of 1987?

A. Yes ma'am.

Q. What name or names do you know him as?

A. I know him as Michael Fuller.

Q. What about Wallace? Did you know him before May of '87'?

A. Yes.

Q. Did you know him by any other name or names?

A. Yes.

Q. What?

A. Macca.

The name Macca again appeared in the evidence as a result of questions asked by counsel who appeared for the applicant at the trial. This appears at page 309 of the transcript during the cross-examination of Det. Brown as follows:

"Q. Mr. Brown the accused Walford Wallace, you knew him before?

A. Yes ma'am.

Q. By the name 'Macca'?

A. Yes ma'am.

At the end of all this evidence it was quite clear that the applicant Wallace was also called "Macca". The reference to the name Macca in the caution statement of Fuller must therefore have been understood by the jury as a reference to the applicant Wallace. The caution statement of Wallace, however, would have erased all doubt had there been any still existing, as it records those present at the taking of the statement as follows:

> "Present A.S.P., D.W. Brown (that is Asst. Supt. D.W. Brown), S.P. Hibbert (which is Supt. Hibbert) and suspect Walford Wallace otherwise called Macca."

Wallace was therefore clearly established as "Macca" (or Macka").

As has been seen, however, the first reference to the name Macca was unsolicited by counsel and was revealed in circumstances where it would have been difficult to prevent. Mr. Small contends that the possibility of that evidence emerging was evident from the depositions and that Crown Counsel therefore should have been aware, and therefore should have taken precaution to prevent the disclosure. He complains that questions as to the alias of the applicant by Crown Counsel coming as it did immediately after the reading of the caution statement of Fuller, was unfair and may have given the impression of emphasizing the connection of Wallace with the name Macca since that was the name used in the statement. These complaints are prima facie valid complaints and we would express the view that the questions so asked by Crown Counsel should in the circumstances not have been asked, as the content of the statement of Fuller had no relevance to the case against Wallace and this evidence revealed in those circumstances would have given the jury the impression that the content was indeed evidence in the

case against him. It is regrettable also that defence counsel for Wallace also emphasized this evidence, albeit at a time when it had already been revealed.

The question therefore is whether the directions of the learned trial judge was fair and had the effect of erasing any prejudice that would have so arisen. The answer to this question has already been given earlier in this judgment, and nothing remains but to reiterate our reluctance to interfere with the exercise of the judge's discretion.

The complaint in this ground, however relates to the reference to the name Macca by the learned trial judge in his summation. It arises out of the directions where the learned trial judge was in the process of reading the caution' statement of Fuller to the jury. In so far as is relevant the learned trial judge stated:

> "Now let me remind you about this statement of Fuller. Fuller said this, and I quote: 'I think in January this year Courtney get a house fi Joel and Higgins at Housing Drive and I go up there and live with them for about 3 months.' You will have little difficulty, Mr. Foreman and Members of the Jury, I suggest, in finding that the Joel that he is talking about is the Joel who was earlier acquitted in this case. To return to the statement: 'Them rent the house from Portland'. Here, again, you heard that Fitz-Albert Hall was called Portland, and Fitz-Albert Hall's mother told you that she did have a house which her son had rented to some boys, and Fitz-Albert Hall's girlfriend told you more pointedly that Hall had rented that house to the accused Fuller and his friend. So you may think that this is the house that Fuller is talking about."

The learned trial judge continues to read the statement and states:

> "When we reach a Housing Drive me buck up Joel and Macca a come down.' <u>And you will remember that you heard evidence in this case that the accused Wallace is otherwise called Macca."</u>

It is to the underlined words that Mr. Small's complaint is directed. He submitted that these words nullified, or at least confused the directions which the learned trial judge gave to the jury warning them that the contents of the caution statement could not be used as evidence against the co-accused.

The learned trial judge had in fact given the warning immediately before embarking on the examination with the jury of Fuller's statement. He had said:

> "... I will have to tell you something which is very important for you to understand in this case, and it is this: that nothing that is said about accused Wallace in the statement of the accused Fuller can be used against the accused Wallace, and vice versa, nothing that Wallace says about the other accused, Fuller, can be used against that other one. You can only use the contents of the statement of each one of them against that one, and I will remind you again about that because that is important, because each one of them calls the name of the other one in his statement, but you cannot use what anyone says in his statement against the other one. So that whatever is contained in the statement of the accused Fuller you can only use against Fuller; whatever is contained in the statement of Wallace you can only use against the accused Wallace, although each one of them calls the name of the other at some point in time."

In response to this contention, Miss Llewellyn submitted that the words complained of was a simple reference for the benefit of the jury. The evidence having been disclosed in respect of the name Macca, it was incumbent on the learned trial judge to give the warning and consequently to make it more intelligible, since Macca was the name on the statement, a reminder that Wallace was called Macca was necessary. With this submission we agree. In any event the learned trial judge made it very clear and expressed the importance to the jury that the statement of Fuller was not evidence against Wallace. He had done so shortly before the passage

complained of, and again at the end of his summing-up (both passages earlier referred to). Additionally, he reminded the jury as follows:

> "Now what I pointed out to you already is this, that as against the accused, Fuller, the statement that he is alleged to have given is the evidence against him. As against Wallace, the statement that he is alleged to have given is the evidence against him. So if you do not accept that statement of Fuller, if you don't accept that statement of Wallace, that is the end of the case against them. Your verdict must be not guilty in each case."

At the end of the summing-up - given these three passages referred to, the jury quite apart from being confused was well informed as to the fact that the caution statement of one accused was not evidence against the other. This ground also must fail.

3. VOIRE DIRE - Are questions as to truth of caution statement permissible. If not what effect - when such questions asked?

This issue relates to the application in respect of Wallace Mr. Small contended:

> "The learned trial judge erred in permitting the eliciting of evidence in the course of the voire dire which was designed to show that the contents of the statement was true."

For the proposition that no such questions are permissible he relied on the case of **Wong Kam-ming v. The Queen** [1979] 1 All E.R. 939 which reads in the headnote:

> "On a voire dire as to the admissibility of an extra-judicial statement by an accused the prosecution was not entitled to cross-examine the accused as to the truth of the statement, for the sole issue on the voire dire was whether the statement had been made voluntarily, and whether it was true was not relevant to that issue."

Lord Edmund-Davies in delivering the judgment of the Board cited with approval the dicta of Hall C.J. in the Canadian case of **R. v. Hnedish** [1958] 26 W.W.R. 685 at 688 in which the English case of **R. v. Hammond** [1941] 3 All E.R. 318 which allowed such questions was criticised -

> "The sole object of the voire dire was to determine the voluntariness of the alleged confession in accordance with principles long established by such cases as **Ibrahim v. R** [1914] AC 599, [1914-15] All ER Rep 874. This was emphasized by this Board in **Chan Wai-Keung v. R [1967] 1 All ER 948, [1967] 2 AC 160, while the startling consequences of adopting the Hammond** [1941] 3 All ER 318 were well illustrated in the Canadian case of **R. v. Hnedish** where Hall CJ said: 'Having regard to all the implications involved in accepting the full impact of the Hammond decision which can, I think, be summarised by saying that regardless of how much physical or mental torture or abuse has been inflicted on an accused to coerce him into telling what is true, the confession is admitted because it is in fact true regardless of how it is obtained, I cannot believe that the **Hammond** decision does reflect the final judicial reasoning of the English courts. ... I do not see how under the guise of 'credibility' the court can transmute what is initially an inquiry as to the 'admissibility' of the confession into an inquisition of an accused. That would be repugnant to our accepted standards and principles of justice; it would invite and encourage brutality in the handling of persons suspected of having committed offences.' "

R. v. Hammond was therefore overruled.

The answer to the question for the decision of the Board was answered 'no'. The question was as follows:

> "During the cross-examination of an accused in the voire dire as to admissibility of his challenged statement may questions be put as to its truth."

This case therefore establishes that no question as to the truth of a caution statement should be asked of an accused during the course of the voire dire to determine its admissibility, as any such question would be irrelevant to whether or not the statement was voluntary.

What then were the circumstances of the instant case?

Although the ground of appeal alleges that the questions were designed to show that the content of the statement was true, it evolved that the questions complained of were in fact asked by the learned trial judge himself and related not to the statement but to a document containing questions and answers resulting from an interview which Det. Hibbert had with the applicant on an earlier date and which had in fact been put in evidence by the applicant's counsel during the voire dire. The questions arose in the following context:

"His Lordship: Can you recognize that document just by looking at it? See it in front of you.

Witness: I see the name on it but I don't recognize it more than so.

His Lordship: You can't tell me anything else about it except that your name is on it?

Witness: Nothing more.

His Lordship: You can't tell me if that's the document you signed at Central?

Witness: No I could'nt tell you.

[The document allegedly signed at Central was the document containing the questions and answers ...]

His Lordship: You say at Central you were questioned by Mr. Hibbert?

Witness: Yes sir.

His Lordship: And you gave him answers to these questions? Did you answer them?

" Witness: Him ask me some name and I tell him say I dont know those names.

His Lordship: Did he ask you among the names, 'Sammy Dread?'

Witness: Yes him ask me 'Sammy Dread' and I tell him I don't know 'Sammy Dread'

His Lordship: Did he ask you about the name Juicy?

Witness: And I told him I don't know him.

His Lordship: Did he ask you about the name 'Prince'?

Witness: Yes. I told him I dont know.

His Lordship: Did he ask you about the name 'Joel'?

Witness: And I told him I dont know.

His Lordship: Did he ask you about a name Michael Fuller?

Witness: Him ask me about Fuller and I said I dont know nothing about that name. ...

His Lordship: At Central did Mr. Hibbert ask you if you know anything about an incident at Kintyre in which a man named 'Portland' and Lennox Francis otherwise called 'Gully Mouth' were shot and killed?

Witness: I tell him ...

His Lordship: Did he ask you?

Witness: Yes, and I tell him I dont know nothing about that.

His Lordship: And was that the truth? Was that the truth, that you knew nothing about the murder at Kintyre?

Witness: I dont know nothing about it."

There was in fact no questions asked in the voire dire relating to whether the content of the caution statement was true. It appears that when the learned trial judge begun to ask questions of the applicant Wallace, it was in the context of

Wallace's insistence that he could not identify the document shown him i.e. the questions and answers. The questions were designed not to discover the truth of the content of the document, but to determine whether the document before the Court was in fact the document containing the questions and answers which the prosecution alleged was signed by the applicant at the Central Police Station. This interpretation however would find great difficulty in acceptance as the reason for the question of the learned trial judge as to the truth of whether he (the applicant) knew anything of the murders at Kintyre. It was however related to the 'questions and answers' document and not to the content of the caution statement in which it has been seen that the applicant is alleged to have admitted not only knowing about the murders at Kintyre, but also participating in their commission. Mr. Small contended that even though the question did not relate to the caution statement, nevertheless it explored the issue of a matter that was contained in the caution statement and would therefore be in breach of the principle settled in **Wong Kam-Ming (supra).** The caution statement, however, does not contain any allegation by the applicant that he did not know about the murders at Kintyre, and to the contrary the applicant is alleged to have expressed therein knowledge of the murders. The learned trial judge's enquiry therefore did not attempt to discover the truth of the content of the caution statement, but related to the 'questions and answers,' document, which the defence having put in evidence could not be said to have challenged its admissibility. It may be true to say however that the truth of the content of the 'questions and answers would have no relevance to the real question of whether the caution statement was voluntary, but in any event could

have no possible effect on the judges consideration in respect of the voluntariness of the caution statement.

In our view, though the question ought not to have been asked, given the circumstances of this case, this evidence cannot be said to be so irregular, as to affect the validity of the Judge's ruling. We therefore find no merit in this ground.

4. Interpretation of Caution Statement - Wallace

The complaint in respect of this issue is detailed in grounds 1 and 2 of the application of the applicant Wallace. They are as follows:

> "1. The learned trial judge's directions on common design were defective in that he failed to bring to the jury's attention that the assertion by the applicant Wallace in the caution statement,
>
> 'Exhibit 2'
>
> 'Me look on Portland and said me not killing him' was capable of supporting an inference that the Appellant Wallace never formed a common intention to kill or cause grevious bodily harm to the deceased. The learned trial judge thereby also failed to fully direct the jury in the law relating to the scope of the common design.
>
> 2. The directions by the learned trial judge on withdrawal from the common design were defective in that he failed to direct the jury on how they should resolve the issue if they were not sure as to whether or not the appellant Wallace was withdrawing from the common design."

The caution statement has already been set out in full earlier in this judgment, but a reference to the particular section, is again necessary in dealing with the submissions of counsel. It reads:

> "... Fuller and Joel start to tie Portland and the other man with cord which them get from inside the house. The cord is electric iron cord looking like sash cord. Sammy said, 'Put him down in the corner and mek him talk.' Fuller started to search and him take up the gun from under the sheet on the bed. Fuller said, 'Hou yuh seh the youth have it? Yuh fih dead fih it.' Same time Sammy walk out and leave Prince, Fuller and me inside and said me must kill him. Me look on Portland and said, 'Me not killing him.' Same time I walk outside leaving Joel at the door and Prince and Fuller with two guns inside. Joel go inside back.' Them start to fire. When Prince, Fuller and Joel come out them say the two of them dead. ..."

The passage of the summation in respect of which complaint is made appears at pages 454-455 of the transcript. It states:

> "... Further down in his statement Walford Wallace said, and I quote: 'same time Sammy walk out and leave Prince, Fuller and me inside and say we must kill him. Me look on Portland and say me not killing him. Same time I walk outside leaving Joel at the door and Prince and Fuller with two guns inside.' So what, if you believe that, do you make of it; what do you think he meant when he said, 'me look on Portland and said me not killing him'? You have to interpret what he meant by saying this, if you find that he said it. Did he mean that he personally was not going to shoot but that he was still in agreement with somebody else doing the shooting? Was he saying that he didn't want to be the one to fire the gun, but that it would be quite all right if any of the others did it, being still part of a common intention with the rest of them to kill? Or was he saying, I am not agreeing with the killing?
> If you think, Mr. Foreman and Members of the Jury - because I suggest to you that these are two possible interpretations - if you think that Wallace did say those words, and that what he meant was that he was not in agreement with any killing,

> "... Me look on Portland and said, 'Me not killing him.' Same time I walk outside leaving Joel at the door and Prince and Fuller with two guns inside. ..."

He contended that in those circumstances, two issues ought to have been left to the jury:

> (1) Can the jury be sure that the applicant was a part of a common design to kill or cause grevious bodily harm.
>
> (2) If yes, does the statement and action of the applicant amount to a withdrawal of that common design.

In relation to ground 1 (as also issue 1) above, earlier in his summation the learned trial judge in directing the jury on the principles of common design, instructed them thus:

> "The Prosecution is relying in this case on a legal doctrine called the doctrine of common design, and what common design means is this, that where two or more persons agree or join together to commit an offence and that agreement is carried out and the offence is committed, then each person who takes an active part in the commission of the offence is guilty of that offence. Such a person cannot be convicted of the full offence unless he is present at the commission of the offence and actively aids, abets and assists in it's commission. It is sufficient in law if with the intention of giving assistance a person is near enough to afford such assistance, should the occasion arise. So it would be sufficient in law for a person who is acting with others in the way I have described, is outside a house watching so as to prevent interruption or surprise while his companions are inside the house committing the crime. But of course, such a person must be near enough to render assistance, and this is what the prosecution is saying happened in this case, Mr. Foreman and Members of the Jury. The

> he wasn't going to kill anybody, and he wasn't in agreement with any killing, then you will have to find him not guilty of this charge of murder, because a man can change his mind, however late, as long as it is not too late and up to that point in time nobody had been killed; and even if a man intended to kill in the beginning, if he suffered a change of heart, he changed his mind, he is entitled to be credited with that, and if what Walford Wallace was saying was, I am not in agreement with any killing, I am not killing him, then you will have to find him not guilty of these charges of murder, both charges. But if you find that he said those words but that what he meant was, me not killing him but one of you can go ahead and kill him, is all right with me, then his liability would remain, because he would still have in his mind the intention to kill although he wouldn't want to do it personally. If he had the intention in common with the others, but just didn't want to do it personally, and the others did it, then he would be as guilty as any one of them who did it, who fired the gun, of the crime of murder."

Mr. Small in advancing these grounds, submitted that there was nothing expressed in the caution statement which indicates the scope of any unlawful act that was intended. The inference, if one could be drawn from the statement, that there was a common design and that the scope of the common design was an unlawful act, has to be juxtaposed with any evidence or any inference which would support that if there was a common design either (a) the applicant Wallace was not part of it or (b) the scope of it did not extend to killing or causing grevious bodily harm. He submitted that there is a statement and an act, capable of an inference that the applicant never had any intention to kill, or was seeking to put it beyond doubt to the others who may have thought that he was part of such a scope. The statement and act to which counsel referred are of course included in the caution statement -

> "prosecution is saying that neither Michael Fuller nor Walford Wallace actually had the gun and pulled the trigger which fired the bullet into the head of FitzAlbert Hall or Lenox Francis. What the prosecution is saying, their role was the role of watchmen in the case of both of them."

The learned trial judge, in those words indicated to the jury the role that it was open to them to find that the applicant played in the incident which left the two unsuspecting men dead in their room. There was sufficient basis existing in the caution statement upon which the jury could be asked to come to the conclusion that the applicant was a party to a common design which must have included the use of violence upon Portland. His statement admitted to being one of six persons going in search of Portland in connection with the alleged theft of a gun by Portland. That three of them were dressed in 'soldier uniform' and immediately on arrival the gun was demanded and the two men tied together which must if accepted, have indicated to the jury an intention in all, to subject these men to extreme violence. It is also obvious that the men went there armed because the applicant Wallace speaks of leaving Prince and Fuller in the room with two guns. As only one was found in the room, the other must have been taken there. In any event, the amount of bullets and spent shells found in the room and the injuries to the deceased suggest that more than one gun was used in the murders. In our view, these were certainly factors upon which the jury could come to the conclusion that the applicant was a party to a common design to use extreme violence and, a fortiori, to kill or cause grevious bodily harm.

This view is consistent with the judgment of this court in the case of R. v. Wayne Spence S.C.C.A. 202/88 delivered on the 18th June, 1990 (unreported).

In delivering the judgment of the court and in a reference to the case of **Mohan v. R** [1966] 11 W.I.R. 29 Rowe P had the following to say:

> "In **Mohan's** case (supra) the Privy Council held that where one assailant strikes a fatal blow and the other is present aiding and abetting him the prosecution does not have to prove that they were acting in pursuance of a pre-arranged plan."

Later in his judgment Rowe P also cited with approval the judgment of Lord Lane C.J. in the case of **R. v. Slack** [1989] 3 W.I.R. 513 and which is summarised in the headnote as follows:

> "... on a trial for murder in the case of a joint enterprise, proof was necessary that the principal party intended to kill or do serious harm at the time he killed; that, albeit the secondary party was not present at the killing or did not know that the principal party had killed or hoped that he would not kill or do serious injury, nevertheless the secondary party was guilty of murder if, as part of their joint plan, it was understood between them expressly or tacitly that, if necessary, one of them would kill or do serious harm as part of their common enterprise; that the precise form of words used in directing the jury was unimportant provided that it was made clear to them that, for the secondary party to be guilty, he had to be proved to have lent himself to a criminal enterprise involving the infliction, if necessary, of serious harm or death or to have had an express or tacit understanding with the principal party that such harm or death should, if necessary, be inflicted; ..."

In the instant case the learned trial judge's directions appear to pre-suppose that the content of the statement leaves no other interpretation but that the applicant Wallace was originally a party to the common design to kill or cause grevious bodily harm. His invitation to the jury to determine whether Wallace is admitting his role as a watchman "whose purpose was to prevent interruption

or surprise while his companions were inside the house committing the crime"- indicates that he saw the use of violence as a part of the original plan and not an intention created at the scene of the crime. In our view, the content of the statement admits of no other interpretation. In this regard we refer to the dicta of Sir Robin Cooke in the case of **Chan Wing Sui v. The Queen** [1985] 80 Cr. App. R. 117, and which was cited with approval by Rowe P in **R. v. Wayne Spence** (supra) at page 21 as follows:

> "Sir Robin Cooke suggested a simple direction which might be applicable in most cases of common design. A jury could be asked:
>
> '... did the particular accused contemplate that in carrying out a common unlawful purpose one of his partners in the enterprise might use a knife or a loaded gun with the intention of causing really serious bodily harm?"
>
> On the issue of remoteness Sir Robin Cooke observed that if the party accused knew that the lethal weapons, such as a knife or a loaded gun, were to be carried on a criminal expedition, the defence that the risk contemplated was so remote as not to make that party guilty of murder should succeed only very rarely."

This dicta, has found approval in several subsequent cases, culminating in the case of **Hui Chi-ming v. R.** (1991) 3 All E.R. 897 in which Lord Loury at page 909 in a reference to **Chan's** case stated:

> "... But, as appears from Sir Robin Cooke's judgment in Chan's case (and as was recognized by Lord Lane CJ in R. v. Hyde (1990) 3 All E.R. 892 departing in this respect from some of the observations contained in the earlier judgments in the Slack and Wakely cases) the secondary party may be liable simply by reason of his participating in the joint enterprise with foresight that the principal may commit the relevant act as part of the joint enterprise."

In the instant case the general directions of the learned trial judge on common design, would have left the jury with the view that unless the applicant was a party to a plan to kill the deceased, then he must be acquitted. He did however direct the jury in the following words:

> "In this case the prosecution is not saying that either one of these two accused men fired the fatal bullet which killed either one of the two deceased. The prosecution is saying that that was done by other persons. But applying the legal doctrine of common design, the prosecution is saying that these two accused men, although not the ones who actually had the gun and fired the gun, had the intention to kill or to cause really serious bodily injury and was at the time acting in concert with the person who fired the gun."

In our view the issue of whether the applicant was a part of a common design to kill or cause serious injury was effectively and clearly left to the jury for determination, and we would conclude that there was adequate evidence to result in such a finding.

With respect to the second issue for the jury as posed by Mr. Small, the learned trial judge did instruct the jury on how to approach the interpretation of the caution statement in order to determine whether the applicant's words and action indicated a withdrawal from the common design to kill or cause grievous bodily harm. The following words taken from the summing-up, but repeated here for convenience clearly indicate that the learned trial judge left it to the jury to decide whether those words, demonstrated that the applicant at no time intended to be a party to a plan to kill the deceased, and if so, that he was there and then withdrawing from any such plan. The extract is as follows:

> "... if you think that Wallace did say those words, and that what he meant was that he was not in agreement with any killing, he wasn't going to kill anybody, and he wasn't in agreement with any killing, then you will have to find him not guilty of this charge of murder, because a man can change his mind, however late, as long as it is not too late and up to that point in time nobody had been killed; and even if a man intended to kill in the beginning, if he suffered a change of heart, he changed his mind, he is entitled to be credited with that; ..."

In addition, the learned trial judge returned to this subject at a time when the jury having retired, returned and requested further directions. He directed the jury thus:

> "In the case of Wallace, however, I pointed to a part of his statement and I invited you to consider that part and to interpret it in the way you feel it should be interpreted, because if you interpret the one way, it would mean that Wallace at that stage before anybody was shot had determined that he was going to be no part of the killing, that he wasn't going to kill, himself, and that he wasn't in agreement to kill anybody. If you interpret it that way, that part of the statement that way, then you would be bound to find him not guilty of murder. But if you feel that what he said meant, 'I am not going to kill him myself but I don't mind if one of you kill him; I am in agreement with killing; it's just that I am not going to do it myself', that is how you would interpret it, if that is how you interpret that part of the statement, then he would be just as guilty as the man who killed inside on the basis of the doctrine of common design."

This issue was in our view adequately and correctly left for the consideration of the jury, on the basis of the two issues advanced by Mr. Small, and consequently we are unable to accept as meritorious the position contended for by the appellant Wallace.

We turn now to the second complaint of the applicant on this issue, and that is that the learned trial judge failed to direct the jury on how to resolve the issue if they were not sure as to whether the applicant was withdrawing from the common design. It is contended that the learned trial judge did not specifically in relation to this issue inform the jury that if they are in doubt as to the applicant's withdrawal that they would nevertheless be obliged to acquit him. As has already been stated, the prosecution's case rested on the caution statement. Had the jury rejected it, then there would be no evidence against the applicant. In his general directions, the learned trial judge properly instructed the jury on the burden and standard of proof. In addition inter alia, the learned trial judge instructed the jury (albeit after their return) thus:

> "If you believe either one of them that force was used on him, this is of course, assuming that you accept that the statement was made, if you believe that either of them was induced to make that statement by force or in the case of one, force and deception, then you have to make up your minds as to the probative value and effect of that caution statement. What does it mean? What does each one say? What does it mean? What is the probative value and effect of each statement?
> If having considered all of this you find yourselves left in a state of reasonable doubt as to what the truth of the matter is, because that is what we are trying to arrive at, Mr. Foreman and Members of the Jury, the truth. The crown is saying what is contained in those statements represents the truth. So if having considered the totality of the evidence you find yourselves left in a state of reasonable doubt as to where the truth lies, you are bound to give the accused person the benefit of that doubt and find him not guilty.
> If having considered the totality of the evidence you believe that what is in the statement is the truth, that what is in the statement of each of them represents the truth about what really happened, then on that basis it would be open to you to find each one of them guilty of murder.

> "In the statement of Wallace, he is saying that his role in the whole affair was as a watchman. In the case of Fuller, he is saying his role in the whole affair was a watchman and a messenger, as I described to you. In each statement the accused says that he was one of six people who went to this house that day. He is saying he remained outside while his companions went inside. If you feel that what happened inside amounted to murder, and that those who were standing outside had joined together with those inside to do what was done inside, that they had this common intention to kill, in pursuance of which some of them went inside and killed in circumstances which amounted to murder, then each one of them would be guilty of murder. In the case of Wallace, however, I pointed to a part of his statement and I invited you to consider that part and to interpret it in the way you feel it should be interpreted, because if you interpret the one way, it would mean that Wallace at that stage before anybody was shot had determined that he was going to be no part of the killing, that he wasn't going to kill, himself and that he wasn't in agreement to kill anybody. If you interpret it that way, that part of the statement that way, then you would be bound to find him not guilty of murder."

This summation taken in its totality clearly shows that in respect of their consideration of the caution statements, the jury were made to understand that in determining the truth of the statement, they had to be sure before they could use it adversely in regard to the applicant. Immediately thereafter the learned trial judge reminded them that if they interpreted the words in the caution statement to indicate a withdrawal by the applicant they should acquit. Given the full context of these directions, it is clear that the jury must have been aware that the test of reasonable doubt would apply to the question of their interpretation of the statement.

For those reasons in respect of Wallace this ground of appeal also fails.

FULLER

This applicant filed and argued the following ground of appeal in this regard:

> "The learned trial judge erred in law in that he failed to give the jury adequate directions in relation to common design and joint enterprise; in particular he failed to give adequate directions as to a common intent to kill or some tacit agreement between the assailants so to do."

The dicta cited earlier from the judgment of Rowe P in the case of **R. v. Wayne Spence** (supra) relying on principles enunciated in the cases of **Mohan v. R** (supra), **R. v. Slack** (supra) and **Chan Wing Sui v. The Queen** (supra) as also that in **Hui-Chi-Ming** (supra) are naturally as relevant to the application of Fuller, as they are to the application of Wallace.

In the case of Fuller, the learned trial judge after giving the initial directions on common design (earlier outlined when dealing on this point in relation to the applicant Wallace), dealt specifically with the caution statement of this applicant. He said:

> "In the case of Fuller, what the prosecution is saying is that Fuller in his statement said 'me and Prince stay outside fi watch', making him a watchman. What the prosecution is saying is that he even carried the message to kill as evidence by what he says in that statement, namely, and I quote, 'Sammy tell me fi go inside a di house and tell Prince fi give Macca the 14, and him fi kill the boy dem and come quick. Me go and tell Prince the message'. So the prosecution is saying that is the role Fuller played, he carried the message to kill, apart from standing watch outside."

The learned trial judge there indicated to the jury that the prosecution's interpretation of the caution statement of this applicant was that it was an admission (assuming they felt they could act upon it) of participation in the offences in that he was a "look out" person and also a "messenger".

Mr. Saunders, however, submitted that the jury ought to have been instructed to consider that the applicant was not a party to a common design to kill or cause grievous harm.

In order to determine the validity of this complaint it is necessary to make reference to the relevant parts of the caution statement of the applicant which has already been set out earlier in this judgment. This is on the background of the general directions on common design given by the learned trial judge to be found at page 457 of the transcript and which also has been earlier recorded here.

In his statement the applicant admitted the following:

> "(1) All three a we leave and go down a Angola and start to complain to Sammy bout the gun. Joel tell Sammy seh him feel seh a Portland tek the gun. Sammy seh 'dont blame him because a long time the boy deh fih dead. A long time me want kill him'. ..."

From the very commencement of the episode the applicant had knowledge of Sammy's views and his intention towards Portland, the deceased, who it was alleged stole the gun.

> "(2) Macca, Joel and me go and check Sammy a Angola and him send fi Juicy. Sammy tell Juicy seh him have a boy fi kill long time and that dem must go and put on them army gears."

Here again Sammy is declaring his intention to kill and apparently, having regard to his conduct, with the acquiescence of the applicant.

> "(3) That same Thursday night in a May, Sammy Dread, Juicy, Prince, Macka, Joel and me go up a Housing Drive a Kintyre. Juicy did have a Beretta gun, Sammy have a M-16 9mm rifle, Prince have a 14, 9mm."

The applicant here expresses knowledge that three of his companions were armed with <u>guns</u> which could be described as heavy weapons.

"(4) The whole a we go up deh and we knock up the house. Through dem have on uniform dem go in front. After the door open Sammy go in. Portland think a police, so him say 'Do officer a me and me youth in yah'. Me and Prince stay outside fih watch."

Here he admits going to the home of deceased with men armed with guns, knowing that the intention was to kill Portland who had stolen a gun. In those circumstances he admits to being the 'watchman' or 'lookout' man.

"(5) Sammy call me inside the house and seh me must call Prince with the 14. When Prince go inside Sammy come outside with the rifle. Me heard like them a beat Portland and the next youth inside a the house. Sammy tell me fih go inside a the house and tell Prince fih give Macca the 14 and him fin kill the boy them and come quick. Me go and tell Prince the message. ... When me and Sammy deh outside me hear about four or five shot inside the house."

Here he admits to being a participant taking messages from one co-planner to the other and continuing his watch.

The statement when considered in its totality clearly leaves no other interpretation but that the applicant, well knowing that there was an intention not only to recover the stolen gun but also to kill went along with five other men, three of whom were armed with guns, to the house of the deceased to carry out their common enterprise. Following the principles outlined in the cases cited (supra) the jury, once they decided to act upon the content of the statement, would have had no difficulty in returning the verdict that they did.

In those circumstances, we find also that this ground is without merit.

Before leaving this ground, however, we should add in one short statement, that we find Mr. Saunders' contention, that on the

basis of the caution statement the learned trial judge should have invited the jury to consider the offence of manslaughter, untenable, having regard to earlier views expressed as to the admissions made therein by the applicant.

(5) **Further directions on jury's return**

The complaints of both applicants in this regard arose out of the following account as recorded in the transcript (page 462 et seq).

The jury having retired at 3.22 p.m. returned to the court room at 4.22 p.m. The Foreman, on being asked in relation to both applicants, whether the jury had reached a verdict, replied in the negative. Consequently, the learned trial judge enquired if he could be of any further assistance in their deliberations. The Foreman answered "Possibly your Lordship", and when the learned trial judge enquired as to what area he could be of assistance the following dialogue occurred.

Foreman: There are some areas that the members of the jury are not too sure, in the sense of accepting in its totality the crucial statement.

His Lordship: Is there anything else Mr. Foreman?

Foreman: No your Lordship.

His Lordship: Are you able to be any more specific in relation to what area of the caution statement you find difficulty with?

Foreman: No your Lordship:

The learned trial judge then proceeded to give further directions in relation to the caution statements, and it is out of those, that the following complaints are made in this appeal.

Both applicants complained of the following:

(1) That in the further directions the learned trial judge misdirected the jury by instructing them that the only evidence from the defence that the caution statements were involuntary or that they (the caution statements) were not statements given by the applicants, were the unsworn statements given by the applicants.

(2) That the learned trial judge failed to direct the jury on the evidence of the Doctor and Mrs. Mitchell which were capable of supporting the contention of the defence that the statements were involuntary.

(3) That the learned trial judge failed to direct the jury to take into account in determining the circumstances under which the statements were taken, the failure of the prosecution to call the three police officers whom the defence alleged were responsible for the beatings of the applicants.

Were the jury instructed that the Unsworn Statement from the dock constituted the only evidence of the involuntariness of the caution statement?

Counsel for the applicants contended that the learned trial judge should have made further enquiries so as to isolate what was the difficulty the jury was having. If he was unable having tried, to identify the problem, it was incumbent upon him to give a direction which was at least as expansive as his original directions, and this, particularly having regard to (i) the fact that the assistance needed was in relation to the caution statements upon which the Crown's case rested and (ii) the several areas of dispute in relation to the statements:

(a) whether the statements were given voluntarily;

(b) whether the jury could believe what was contained in the statements;

(c) whether the content which were believed amounted to proof of the criminal liability of each accused.

It was contended, that rather than expand on his directions, as he ought to have done, the learned trial judge truncated the defence, and in effect withdrew important considerations such as are detailed in (1), (2) and (3) above, from the jury's deliberation.

In order to determine the validity of these complaints it is desirable to allude to the further directions given by the learned trial judge. Before doing so, however, it is necessary to state specifically, that there is no rule that requires a judge, when asked by the jury for further assistance on a point of law, or some other point, to deliver in effect what would be a second summing-up covering all the important issues of the case, which have already been dealt with in his charge to the jury. The learned trial judge in such circumstances, must however attempt to deal with the specific issue which he perceives from the jury's request to be the issue giving the jury some difficulty. In this case, the learned trial judge did attempt to ascertain from the foreman of the jury, the specific problem they had in relation to what the foreman described as the 'crucial statements' which all have interpreted to be the 'caution statements'. His attempt, however was unsuccessful and on that background he embarked on his further directions.

1. The first complaint (supra) alleges that the learned trial judge misdirected the jury to the effect that the only "evidence" for the defence in relation to the voluntariness of the caution statements existed in the content of the unsworn statements given by them during the course of the trial.

This is how the learned trial judge directed the jury:

> "As I indicated to you earlier, if you think it was not made or you are in doubt as to whether or not it was made, then your verdict would have to be one of not guilty against each of them. However, if you are satisfied that the statement was made, then you have to go on to consider the probative value and effect of it. You have to go and consider what it means, whether what is contained in it is true or not. And in doing so you have to take into account all the

> "circumstances in which the statement was made, including the allegation of violence if you think that those allegations may be true. Those allegations of violence come from the unsworn statement of each accused. It is what is said down there, what each one said is the basis of the allegation of violence and force. Apart from that you heard questions put to the witness for the prosecution, but all the witnesses denied that any violence was used, so on the prosecution's case there is no evidence that violence was used to any of them at any time. It is they who say that violence was used. Each of them has said so and they said so in their unsworn statements."

And again at page 467:

> "So you really have to make up your minds as to what weight you are going to attach to each of those unsworn statements that they made in court, because that is where they tell you that they were forced to sign Exhibit 1 and 2. It comes from nowhere else."

And at page 468 he said:

> "... So if you didn't believe what they said in their unsworn statements from the dock, all the evidence of force and coersion and violence would go by the board, if you don't believe what they say."

It is clear from the cited words that the learned trial judge was indeed directing the minds of the jurors to the fact that the **only** place in the defence where there appears any allegation of the applicants being beaten in order to induce them to sign documents placed before them, or in the case of Wallace that he was deceived into signing the statement, was in the unsworn statement that each applicant made in his defence. Prima facie that was a correct and accurate statement of the circumstances. In relation to the applicant Fuller, the witness called on his behalf was the Doctor who had treated him for the ulcer on his penis, and whose evidence which sought to give support only in relation to that injury proved to be equivocal.

In any event he did not attempt to support the applicant in his contention that the signing of the statement was as a result of the applicant being subjected to severe beatings by the police officer. That "evidence" came from the applicant himself. In the case of the applicant Wallace, the only witness he called was his aunt Mrs. Mitchell, who gave no support to his contention of violence being used against him, and who was called to testify to the applicant's inability to read.

The evidence therefore supported the directions of the learned trial judge, which are the subject of complaint. The allegation of violence did come from the unsworn statement, - the unsworn statements were indeed the basis of the allegation of violence - and the allegation that they were "forced to sign" came from nowhere else.

2. In any event, the evidence of the doctor, was adequately dealt with by the learned trial judge before the jury retired on the first occasion, and this in relation to its possible support of the applicant Fuller's contention that violence was used against him.

It cannot be assumed that the jury because they returned for assistance must have forgotten or disregarded all the other directions given. The jury must therefore be taken to have used the further assistance in the context of what they were earlier told by the learned trial judge. The fact that the allegations of violence came only from the unsworn statement, necessitated the learned trial judge's reminding the jury that in their deliberations an important fact was what weight they would attach to the unsworn statements of the applicants, because that would be an important consideration in determining what weight, if any, they could give to the caution statements.

In relation to the evidence of Mrs. Mitchell as it applied to the applicant Wallace, in our view that evidence had no direct bearing on whether the statement was voluntary or not except to say that it attacked the credibility of the Crown's witnesses particularly Det. Brown who had testified to hearing the applicant Wallace reading back his statement loudly, before signing same. In any event, the learned trial judge dealt adequately with that issue in his earlier directions to the jury, directions which must have been still fresh in the jury's mind when they returned for assistance.

3. **Non-direction re prosecution's failure to call certain witnesses**

The learned trial judge had amply dealt with this issue in his summation, and as stated earlier in a manner highly favourable to the applicants. At the risk of repetition, we emphasize that the request from a jury for further assistance cannot result in an assumption that the jury erased everything thing previously told to them, from their minds. In the context of the further directions which reminded the jury that they had to determine if the statements were made, and if so in what circumstances and then what weight to attach to them, rather than assume that the jury would determine these matters in vacuo i.e. discarding all the evidence and directions they had heard, it ought to be presumed that they would determine these issues on the evidence they had heard, and upon all the directions in law, and assistance in assessing the facts, which the learned trial judge had given them throughout the entire summing-up.

For the reasons given we grant the applications for leave to appeal, treat the hearing as the hearing of the appeals - dismiss the appeals and affirm the convictions and sentences.