Privy Council Appeal No. 54 of 1999

Alfred Flowers *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 30th October 2000

Present at the hearing:-

Lord Hoffmann
Lord Cooke of Thorndon
Lord Hutton
Lord Hobhouse of Woodborough
Lord Millett

*[Delivered by **Lord Hutton**]*

On the evening of 2nd February 1991, Douglas Williams, aged 26, arrived home in the parish of Clarendon in Jamaica by motor car with his mother and step-father, Rachel Douglas and Silburn Douglas, from the supermarket where they all worked. At their home they were held up by a group of armed men who robbed Rachel Douglas and Silburn Douglas and in the course of the robbery Douglas Williams was shot dead. The appellant was charged on 6th April 1991 with the capital murder of the deceased. The particulars of the offence were that he murdered the deceased in the furtherance of a robbery.

The appellant has been tried on three occasions on the charge of capital murder. The first trial took place in December 1992 when the jury disagreed and a retrial was ordered. The second trial took place in September and October 1994 when the jury again disagreed and a retrial

was ordered. The third trial took place in January 1997 when the appellant was convicted of capital murder and was sentenced to death. He applied to the Court of Appeal for leave to appeal against his conviction by notice dated 15th May 1998. The application was heard on 26th May 1998 and the Court of Appeal dismissed the application on 14th July 1998. The appellant now appeals with special leave to their Lordships' Board against the decision of the Court of Appeal.

Two separate grounds of appeal have been advanced to the Board by Mr. Andrew Nicol Q.C. on behalf of the appellant. One ground of appeal was that the trial judge had erred in a number of respects in his directions to the jury and that in consequence the appellant had been deprived of the substance of a fair trial, his conviction for capital murder was unsafe and unsatisfactory, and the Court of Appeal should have allowed his appeal and quashed the conviction entirely or should have substituted a verdict of guilty of non-capital murder. The second ground of appeal related to the issue of delay in the trial at which the appellant was convicted and to abuse of process.

Capital murder

In Jamaica section 2(1) of the Offences Against the Person Act provides that, subject to subsection (2), a murder committed in the furtherance of robbery is a capital murder, but section 2(2) provides, in effect, that if two or more persons are guilty of such a murder, only the person who uses violence on the victim is guilty of capital murder, and any other party guilty of the murder who does not use violence is not guilty of capital murder. This distinction is colloquially referred to as the "triggerman" test. Therefore at the trial in January 1997 on the evidence adduced by the prosecution there were two principal issues for the jury to determine. One issue was whether the prosecution had proved beyond reasonable doubt that the appellant was one of the gunmen who carried out the robbery of Rachel Douglas and Silburn Douglas, in the course of which the deceased was shot and killed, and, if so, the other issue was whether the appellant was the gunman who had shot and killed the deceased.

The prosecution case

The prosecution evidence can be briefly summarised as follows. Rachel Douglas, Silburn Douglas and the deceased arrived home in a car driven by Silburn Douglas and he parked in the yard at the rear of the house. The deceased and Mrs. Douglas got out of the car and entered the house through a back door to the kitchen leaving Mr. Douglas seated in the car. As the deceased and Mrs. Douglas went into the kitchen three men came into the yard who were unknown to Mr. and Mrs. Douglas.

In her evidence Mrs. Douglas said that two of the three men entered the kitchen and the first man who entered (and whom she subsequently identified as the appellant) was carrying a handgun. Her son, the deceased, pushed her aside and began to wrestle with the first intruder. In the course of this struggle the first intruder fired his gun once, hitting her son in his hand which started to bleed. He and the intruder continued to struggle, and while this was taking place Mrs. Douglas could hear the other two intruders in the bedroom talking to her husband. The intruder struggling with her son then fired his weapon a second time, hitting her son in the chest which started to bleed. Her son then ran to the front of the house, the intruder who had been struggling with him went outside and Mrs. Douglas hid herself in the bathroom. About four minutes later the first intruder, who had wounded her son, entered the bathroom armed with a knife and robbed her of her bag, which contained about $16,000 to $20,000 and her watch. He then took her to a bedroom where he stole a watch, a sewing machine and a table fan.

Mrs. Douglas said that during the time the intruder was struggling with her son in the kitchen the electric light was on and the kitchen was well lit. She watched the struggle in the kitchen for about three minutes and during that time she was having a good look at the intruder's face. During the time that the first intruder was present with her in the bedroom the electric light was on and they were together in the bedroom for about four minutes during which time she also had a good look at his face. After the first intruder, who was then accompanied by one of the other intruders, had stolen the items from the bedroom, Mrs. Douglas heard a gunshot across the street from her home

and heard someone calling "Chipy, Chipy, come back". The first intruder and the other intruder who was with him then ran from the bedroom and ran out from the back of the house. Mrs. Douglas then went to look for her son and found him lying wounded and dying on the veranda.

In his evidence Mr. Douglas said that whilst he was still outside the house in the car he saw three men, all armed with handguns, enter the house. He heard gunshots and then one of the men (who was not alleged to be the appellant) came out of the house, and pulled him out of the car and began searching him. He took his wallet from him containing $1500 in cash, a Canadian bill and some personal documents. He then pushed Mr. Douglas into a bedroom in the house. Inside the bedroom Mr. Douglas saw one of the intruders (whom he subsequently identified as the appellant) holding a gun to the head of his young daughter, Melissa. This man threatened to kill Melissa if Mr. Douglas did not give him money. This man struck Mr. Douglas on the head with his gun and continued to demand money. After about three minutes the man left the room and Mr. Douglas ran out and went to his neighbour's home. When he returned to the house the intruders had left and he saw the deceased, who appeared to be dead, lying on the veranda. He said that in the bedroom, during the three minutes when the man was pointing a gun at him and demanding money, the electric light was on and he was looking at his face.

At some point during the evening of 2nd February 1991, the appellant was admitted to the Spanish Town Hospital. He was unconscious and suffering from a gunshot wound to the abdomen. No evidence was adduced by either the prosecution or the defence as to the time of his arrival at the hospital or as to the circumstances relating to his arrival there.

In his evidence District Constable Evans said that at 8.00 a.m. on 3rd February, 1991, he went to the Spanish Town Hospital on instructions to guard a particular individual in a ward. In the ward there was a second person who was the appellant. Detective Inspector Grant then came to the ward and as a result of instructions from the Detective Inspector he went to the bedside of the appellant together with Detective Corporal Davey (who

has since died). He (District Constable Evans) asked the appellant his name and he gave his name as Alfred Forbes. Detective Corporal Davey then searched the appellant, but found nothing on him, and he then searched a bedside table beside the appellant's bed. Detective Corporal Davey searched inside the drawer of the bedside table and took out from it toothpaste and clothes and also a wallet. Detective Corporal Davey opened the wallet and took from it two drivers' licences together with an National Insurance card and a Canadian $5 bill. Detective Corporal Davey then showed the wallet to the appellant and asked him to whom it belonged and the appellant told Detective Corporal Davey that it belonged to his uncle.

Detective Sergeant Graveney gave evidence that on the morning of 3rd February, 1991, he went to the Spanish Town Hospital where a wallet was handed over to him by Detective Corporal Davey. He saw that the wallet contained documents belonging to Mr Silburn Douglas which included an alien registration card, a driver's licence and a Canadian five dollars or one dollar bill. He cautioned the appellant and asked him where he got the wallet and the appellant replied that the wallet was his uncle's. Subsequently at May Pen Police Station Mr. Silburn Douglas in the presence of the appellant identified the wallet as belonging to him. The Detective Sergeant cautioned the appellant and the appellant replied to the effect that he (the Detective Sergeant) was going to hear him tell the court where he had got the wallet. In his evidence Mr. Douglas also stated that after the wallet had been taken from him by one of the robbers he saw it again at the May Pen Police Station. The wallet then contained the documents which it had contained on the night of the robbery but not all the money which it then contained.

Inspector Cross gave evidence that at Central Police Station on three occasions, 2nd March 1991, 16th March 1991 and 30th March 1991, he requested the appellant to take part in an identification parade which would be attended by a Justice of the Peace but the appellant refused to take part in any such parade. In consequence the police arranged another method to give Mr. and Mrs. Douglas the opportunity to see if they could identify the appellant as one of the robbers. Mr. and Mrs. Douglas gave evidence that in April 1991 they went to Lionel Town Police

Station. They were taken separately to a cell in which the appellant was being detained with a number of other men. Both of them gave evidence that the cell was dark and that in order to be able to see the features of the men inside it was necessary to shine a flashlight on their faces. They both identified the appellant as one of the robbers.

Inspector Williams gave evidence as to the identification made by Mr. and Mrs. Douglas. He said that before they were brought to the cell he spoke to the appellant in the presence of his sister, Jasmine Flowers, and a Justice of the Peace. He told the appellant that he was going to conduct an identification parade and asked him to come out from the cell, but he refused to do so. The Justice of the Peace and his sister also appealed to him to come out of the cell but he refused their appeals. Mr. and Mrs. Douglas were then brought separately to the cell where they identified the appellant. Inspector Williams said that, including the appellant, there were about seven men in the cell.

The defence case

The appellant gave evidence that on the evening of 2nd February 1991 he left his home about 7.00 p.m. and travelled by taxi to Spanish Town in order to purchase some bags for his peanut business. He said that shortly after buying the bags he was confronted by a group of men who shot him and robbed him. He lost consciousness and awoke to find himself in the hospital, wearing a pair of pyjamas. He said that he had not had either a wallet or a tube of toothpaste in his possession before he went into hospital. The appellant denied that the wallet belonging to Mr. Douglas had been found by a police officer in the table beside his bed in the hospital. He said that District Constable Evans had approached him on the morning of 3rd February, 1991, and had asked him if he was the man who had been robbed the night before. The appellant said that District Constable Evans had then taken a billfold from his own pocket and had shown him the contents, asking if he recognised it as one of the items which had been stolen from him the night before. The appellant denied that he told the police officer that his name was Forbes, or that he had ever said to a police officer that the wallet belonged to his uncle.

The directions of the trial judge

In his application for leave to appeal to the Court of Appeal the appellant submitted that there were errors in the directions of the trial judge on the issue of whether he was one of the intruders who robbed Mr. and Mrs. Douglas and on the issue of capital murder. The Court of Appeal rejected these submissions and held that the summing-up, taken as a whole, was fair and adequate.

In considering the submissions that the judge's directions led to a miscarriage of justice it is necessary to do so in the context of the facts of this particular case. An important issue which the jury had to decide was whether on the morning after the robbery the wallet taken from Mr. Douglas by one of the robbers was found by the police, as they said in evidence, in the table beside the appellant's hospital bed (giving rise to the clear inference that he was in possession of the wallet when he was admitted to the hospital) and that he said to the police that the wallet was his uncle's, or whether the wallet had been planted on him by the police, which was the effect of his evidence. It is clear from their verdict that the jury accepted the evidence of the police. Once it is accepted that the appellant was in possession of the wallet when he arrived in the hospital, such possession provides extremely strong evidence supporting the correctness of the identification of the appellant as one of the robbers by Mr. and Mrs. Douglas, and this is a factor which their Lordships take into account.

Mr. Nicol advanced three main submissions in respect of the judge's directions relating to the issue of whether the appellant was one of the robbers.

1. Failure to direct the jury as to the significance of delay

In charging the jury the trial judge said at pages 176 and 177 of the record:-

> "Now, I told you that there were discrepancies which were pointed out. In most criminal trials, it is always possible to find variations in evidence of different witnesses, or in the evidence, at different stages of their testimony, especially when the facts about which they speak are not of recent occurrence, and you will recall that this incident took place almost six years ago,

February 1991. We refer to them as discrepancies, inconsistencies or contradictions.

They might be slight, or serious, material or immaterial. If they are slight, you would probably think they do not really affect the credit of the witness on that particular point. On the other hand, if they are serious, you may say that because of them it would not be safe to believe the witness on that particular point at all.

It is a matter for you to say, in examining the evidence, whether there are any such discrepancies, and if so, whether they are slight or serious ...

So Mr. Foreman and members of the jury, the inconsistencies pointed out, did they really affect the whole substance of the case? Do they go to the root of the case? Because of these inconsistencies, do you say that the evidence of Mr. Douglas is discredited? Do you say the evidence of Mrs. Douglas is discredited? Remember as I told you before that in cases of this nature, you are bound to find inconsistencies because if two of us should go outside, or all of us go outside and see some event happening, and you are later asked to recount that event, some of us might say something different, we might say the second man had on a brown shirt, or that the third man had on a brown shirt, whilst others may say differently, but that does not take away from them the fact that they saw what happened."

Mr. Nicol submitted that this direction was inadequate because it failed to warn the jury of the risk that with the passage of time the evidence of witnesses could become ossified and he relied on the judgment of the Board in *Charles v. The State* [2000] 1 W.L.R. 384 at page 391C-E where in that case such an argument was accepted. However their Lordships consider that in the circumstances of this case there was no risk of ossification of evidence leading to a miscarriage of justice, because the conflict of evidence between the police and the appellant as to the presence of Mr. Douglas's wallet in the bedside table was stark and the evidence was unlikely to be affected by the passage of the years. Their Lordships also consider that

there was little risk of injustice being caused by ossification of evidence relating to the circumstances of the identification of the appellant in the cell by Mr. and Mrs. Douglas.

2. <u>Inadequate directions on identification</u>

Mr. Nicol pointed out that the evidence differed about the quality of the light in the cell; Mrs. Douglas said that it was not possible to see faces properly and Mr. Douglas said that the use of a flashlight was needed in the cell. All agreed that a flashlight was shone into the cell to aid vision. Because of the circumstances of the informal identification nothing was done to see that the other men in the cells were of the same build, height or physical appearance as the appellant. Mr Nicol accepted that the judge directed the jury to consider whether the informal identification was a fair procedure, but he submitted that even if the appellant had no good reason for objecting to a formal identification parade, the deficiencies of the informal procedure as a means of identification were still a matter for the jury to take into account in assessing the identification by Mr. and Mrs. Douglas and that the directions failed adequately and fairly to convey to the jury the weaknesses which existed in the identification.

In his summing-up the judge clearly warned the jury at page 147of the record of the special need for caution before convicting in reliance on the correctness of the identification and he also told the jury that an honest and convincing witness may nevertheless be a mistaken witness. Later at pages 153-155 referring to the identification in the cell the judge said:-

> "Now, in the light of those circumstances, you will have to consider whether this was fair to the accused, because you could not say that he refused to attend the identification parade, therefore if he had committed an offence that would be the end of the matter. No, not so.
>
> The object of an identification parade is to test the ability of the witness to pick out from a group of persons if he is present, who the witness has said that he has seen, previously on a specific occasion, and this parade should be fair and you will have to consider

whether, in all the circumstances, this informal parade was fair.

The defence is saying that this informal parade was not fair because he was not placed on a regular parade, but as I told you, he objected to that, for whatever reason, he objected to being placed on the parade.

The defence is also saying that there were not sufficient men from which to pick out the accused; that there were scar in the accused face and that the scar should have been masked. But you must recognise that the accused man is not submitting himself to anything like that, he says he is not going on this parade, he is not submitting to it, so the Police Inspector could not be expected to go and place any tape on his face to prevent the witness from seeing the scar, because that would be, in effect, assaulting him. So that is what the Prosecution is saying, all that was open to the Inspector to do, he did.

The defence is also saying that the Inspector pointed this flashlight at the accused only. Now, what did the witnesses tell you? They said no, it was shone on all the men. That is what Mrs. Douglas tells you and also what Mr. Douglas told you. So it is a question of fact whether you believe the Douglas' and the inspector, or whether you believe the accused man himself.

The defence is also saying that there was another man there who was not of the same colour and height. No measurements were taken. Again, Mr. Foreman and your members, this accused man did not subject himself to that so how could the Inspector go and measure him? So, he did what he called his best, and on this question of whether the light was shone only on the accused, you must bear in mind that even the accused is saying that inside the cell was not dark, you could see.

You will have to ask yourselves, how did the witness - I think it was Mr. Douglas who says that one of the men was of an Indian extract. If the light was only shone on the accused, how did the witness see the other person? It's a matter for you, when you are

considering the credibility of these witnesses, that is to say, the Inspector and these two witnesses who came on the identification parade. ...

But Mr. Foreman and your members, here, care should be taken not to direct witness's attention to the suspect, that is to say, the identifying witness should not be assisted in any way in identifying the suspect.

In this case what the defence is saying, is that the Inspector, who was on that parade, assisted the witness by using his flashlight, but of course you heard the witness denied that they were assisted. The light was shone on all the persons there."

Their Lordships are of the opinion that this part of the summing up was sufficient to alert the jury to the criticisms of the informal identification made by the defence and that, having regard to the appellant's possession of the wallet, there was no miscarriage of justice in the jury being satisfied that the appellant was one of the robbers. Mr. Nicol also criticised the judge's failure to direct the jury to guard against using the identification of the appellant in the dock by Mr. and Mrs. Douglas at the trial as supporting their earlier identification in the police station and the judge's failure to remind the jury as to a discrepancy in Mr. Douglas's evidence as to when his glasses were knocked off, but their Lordships consider that those points are lacking in weight.

3. <u>No direction on the significance of lies and misdirection on alibi evidence</u>

Mr. Nicol submitted that the trial judge should have given the jury a full direction on the significance of lies told by an accused person and that he should have told them that they should only take a lie into account as evidence of guilt if they were satisfied that the lie had been told with the intention of concealing guilt of the offence and not for some other reason. He further submitted that it was particularly important that the judge should have given such a direction because at the end of his cross-examination of the appellant counsel for the prosecution, after suggesting to the appellant that he was a liar, made the quite improper comment that he knew who shot him:-

"Q. And after you robbed the Douglas' and shot down the deceased, that is when you were shot.

A. I did not rob anyone or shot anyone.

Q. And I will tell you who shot you. You are a total liar, stranger to the truth, Mr Flowers.

A. I am not a liar, sir, I am speaking nothing but the whole truth.

Q. I know who shot you. Nothing further."

Mr. Nicol also submitted that although the judge had correctly directed the jury that they should not equate a false alibi with guilt and that they should bear in mind they there may be a number of reasons why an accused would advance a false alibi, the judge then failed to direct the jury that a lie told to support an alibi is only evidence of guilt if they are satisfied that it was told with the sole purpose of concealing his guilt of the offence with which he was charged.

The comment by prosecution counsel at the conclusion of his cross-examination was a quite improper one and such a comment should normally call for a strong rebuke from the judge, but their Lordships do not accept the submission that the conviction is unsafe because of the failure to give a detailed direction on the significance of lies or in respect of false alibi evidence. The issue of lies or of a false alibi was not a separate issue but was implicit in the two issues whether the appellant was in possession of Mr. Douglas's wallet when he entered the hospital and whether the identification by Mr. and Mrs. Douglas was correct, and in these circumstances the omission of a more detailed direction did not constitute a failure to give a proper direction.

The directions and the evidence in respect of capital murder

However their Lordships consider that there were a number of errors in the judge's summing-up which, when considered with certain discrepancies in the evidence of Mr. and Mrs. Douglas, rendered unsafe the jury's finding

that the appellant was the robber who shot the deceased and that he was guilty of capital murder. As the judge correctly observed, in many criminal cases there are discrepancies in the evidence of witnesses which do not affect the basic truth of what they describe. But in the present case the crucial question in relation to the charge of capital murder was whether the appellant himself shot the deceased. On this point there was a significant difference between the evidence of Mrs. Douglas and Mr. Douglas. In her evidence, after describing how the robber wrestling with her son fired a shot which struck him in the hand, the evidence of Mrs. Douglas continued:-

"Q. Did they continue wrestling?

A. Yes.

Q. Where were the other two men while this wrestling was taking place?

A. I did hear them talking to Mr. Douglas in the little girl's bedroom on that side.

Q. You hear them with Mr. Douglas?

A. Yes, I heard them talking.

Q. Now, after the shot, the wrestling continued? Tell us what you saw?

A. He fired another shot.

Q. He fired another shot?

A. Yes.

Q. Did you see anything happen to Douglas after the second shot was fired?

A. It caught him here, in his chest and he started to bleed and look like it was mashed up, and he started bleeding.

Q. And after the second shot was fired, did he remain, this accused man, did he remain there or did he leave?

A. He stood up a while and Douglas run through the house, to the front.

Q. So what did he do, the accused?

A. He turned and go outside."

But in his evidence Mr. Douglas said that when he was sitting in the car he saw the three intruders rushing inside the house and he then heard gunshots from inside the house, in the kitchen, and after he had heard the shots one of the intruders pulled him out of the car and took his wallet and then pushed him into a bedroom in the house. Mr. Douglas then described how he saw the appellant in the bedroom and his evidence continued:-

"Q. Where was he when you saw him?

A. He was standing by the room door, the bedroom door ...

Q. Yes?

A. ... along with my daughter.

Q. Along with your daughter?

A. Yes.

Q. And did he have anything in his hand?

A. Yes, that is the time he had the gun pointing at my daughter.

Q. And did he say anything to you up to that point when you saw him pointing the gun at your daughter?

A. Yes, if he didn't get some money he was going to kill her."

Therefore according to Mrs. Douglas at the time when her son was shot by the appellant, two of the robbers were talking to Mr. Douglas in his daughter's bedroom, but Mr. Douglas said in his evidence that when the robbers were talking to him in his daughter's bedroom one of them was the appellant.

The judge did not expressly refer to this discrepancy in his summing up. The Court of Appeal explained the discrepancy at page 13 of its judgment on the basis that Mr. Douglas was still in the car when the shots were fired in the kitchen so that Mrs. Douglas must have heard the talking in the bedroom at a time other than when the shots which wounded her son were fired in the kitchen. This is a possible explanation, but in the opinion of their Lordships the discrepancy in their evidence between Mr. and Mrs. Douglas casts some doubt on the reliability of the latter's evidence that it was the appellant who shot her son. It also appears from the record that Mrs. Douglas gave a statement to the police on 3rd February 1991 in which she said that when the first intruder was wrestling with her son it was the second intruder who fired the shot which struck her son in the hand.

Moreover, whereas Mrs. Douglas said that the robber fired two shots which struck her son, the doctor who carried out the post mortem examination on the body of the deceased stated in his examination-in-chief that the deceased had five gunshot wounds to his body. The first was to the left palm which penetrated through the forearm with the exit wound on the inner aspect of the forearm. The second wound was to the left upper arm which penetrated through the tissues of the upper arm. The third wound was to the left seventh intercostal space, which is the space between the seventh and eight rib. This wound penetrated the abdominal cavity and severed the abdominal aorta and a bullet was found lodged at the right hip. The fourth wound was a grazing injury to the left side of the chest which left burns. The fifth wound was also a grazing injury to the right shoulder. In cross-examination the doctor said:-

> "Q. Dr., were the five injuries you described, did you say they were five independent injuries from five incidents?

A. Yes, five gunshots.

Q. It would have been five gunshot wounds?

A. Yes, sir.

Q. You are saying the fatal one would be number three?

A. Number three.

Q. This is the one to the chest?

A. Yes."

The trial judge made no reference in his summing-up to the apparent discrepancy between the evidence of the doctor and the evidence of Mrs. Douglas as to the number of gunshot wounds. The Court of Appeal considered the apparent discrepancy and explained it by stating at pages 14-15 of its judgment:-

> "Those wounds are quite consistent with the evidence of the witnesses that only two shots were fired by the applicant at the deceased. The first, second, fourth and fifth wounds could have been caused by the first shot, and the third wound by the second shot. It was open to the jury to have seen it in that light."

This is a possible explanation, but, with respect, their Lordships have substantial doubt whether it can be correct, having regard to the agreement by the doctor in cross-examination that the five injuries "were five independent injuries from five incidents".

It is possible that after the deceased was shot twice by a robber in the kitchen he was subsequently shot by another robber, and therefore the evidence of the doctor is not necessarily inconsistent with the evidence of Mrs. Douglas, but neither she nor Mr. Douglas gave evidence of hearing other shots in the house, although Mrs. Douglas said that after she had been robbed in her bedroom she heard a gunshot fired across the street from her house. However the evidence of the doctor as to the number of

wounds does raise a question mark as to the reliability of the evidence of Mrs. Douglas.

The judge told the jury that for the appellant to be guilty of capital murder they must be satisfied that he shot the deceased. As a matter of strict law this was too narrow a direction, because if two robbers fire shots at a victim and only one shot strikes him and he is killed, the robber whose shot does not strike the victim is still guilty of capital murder because he attempted to wound him (see *Tracey v. The Queen* [1998] 1 W.L.R. 1662, 1667), but nothing turns on that point in this case. However in another part of the summing-up at page 146 the judge referred to the doctrine of recent possession and said:-

> "Now, it is a doctrine known as the doctrine of recent possession and what is this doctrine? The doctrine that where goods are found in the possession of persons recently after the stealing then subject to any explanation that he offers, you the jury may presume that he came by these goods dishonestly and that presumption is that he is the person guilty of stealing it. Now, the Prosecution is saying that he was found in possession of the wallet and Mr. Douglas tells you that his wallet was taken from him and this possession was recent – the very next day the wallet was found in his possession and therefore, if you so find, if you accept the evidence that it was so found in his possession, you may draw the inescapable presumption, the inescapable conclusion, the inescapable inference that he was the man who took the wallet from Mr. Douglas, who was engaged in the shooting as the evidence unfolds."

In this part of the summing-up the judge fell into error. If the jury accepted that the appellant was in possession of Mr. Douglas's wallet on the morning of 3rd February 1991 that did not lead to the inescapable conclusion that he was the man who was engaged in the shooting – it would be a quite reasonable inference that the appellant had acquired possession of the wallet because he was one of the robbers but not that he had fired a shot at the deceased.

If each of the discrepancies and errors which their Lordships have described had stood alone, their Lordships

might have concluded that there was no miscarriage of justice in the conviction of the appellant for capital murder. But, when considered together, their Lordships are of opinion that they lead to the conclusion that the conviction of the appellant for capital murder was unsafe. However the evidence clearly established that the appellant was one of the robbers and therefore he is guilty of non-capital murder as a party to a joint enterprise (on which the judge correctly directed the jury) in accordance with the principle stated in *Chan Wing-Siu v. The Queen* [1985] A.C. 168 and *Reg. v. Powell (Anthony)* [1999] 1 A.C. 1.

The ground of appeal in respect of delay and oppression

The second main ground of appeal related to the long delay between the date on which the appellant was charged with the capital murder on 6th April 1991 and the date of the commencement of the third trial on 13th January 1997 and is based on section 20(1) of the Constitution of Jamaica which provides:-

> "Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded fair hearing within a reasonable time by an independent and impartial court established by law."

In addition it is submitted that it was oppressive and an abuse of process to try the appellant on the charge of capital murder after he had faced that charge on two previous occasions and after two juries had failed to reach agreement. The appellant's submissions on this ground were summarised in his written case as follows:-

> "3.1 the trial and conviction of the Appellant after such a long delay was in breach of his Constitutional right to a fair hearing within a reasonable time under section 20(1) of the Constitution of Jamaica;
>
> 3.2 the prosecution was oppressive and constituted an abuse of process by reason of the fact that the Appellant had faced trial on the same charge on two previous occasions, and on both occasions the jury had been unable to agree as to his guilt and had been discharged from returning a verdict;

3.3 the prosecution, trial and conviction of the Appellant on a charge of capital murder constituted an abuse of process at common law, and a breach of the Appellant's common law right to a fair trial, by reason of the inordinate and unjustified delay between his arrest and charge and the commencement of his 3rd trial and by reason of the prejudice thereby occasioned to his defence."

Therefore the appellant submitted that the only appropriate remedy is a ruling that the third trial should not have taken place and that the conviction should be quashed.

The delay between the appellant being charged and the commencement of the final trial was very lengthy, a period of almost six years, and causes their Lordships very serious concern. But in considering the appellant's submission that the conviction should be quashed by reason of delay and abuse of process it is necessary to refer to a number of factors and to consider whether they have a bearing on the issue. One factor is that no argument was advanced by counsel who appeared for the appellant at the trial and in the Court of Appeal in Jamaica that his constitutional rights were being infringed. After the first and second juries had disagreed no argument was advanced that to order a retrial would constitute a breach of section 20(1) or would constitute oppression, and at the commencement of the third trial no application was made to stay the proceeding or to discharge the appellant; rather at the commencement of that trial the appellant's counsel made a strong application for a further adjournment on the ground that the defence were not ready, but the application was refused by the judge.

Their Lordships have been furnished with a lengthy chronology which shows that the case was mentioned before a judge on very many occasions between 22nd April 1992 and 5th November 1996, but in relation to many dates the chronology gives no indication as to why the hearing was adjourned. The judgments of the Board have made it clear that issues relating to delay are matters for investigation by the local courts who are familiar with the conditions and problems existing in their jurisdictions, and that submissions relating to delay should not be raised for

the first time before the Board. In *Bell v. Director of Public Prosecutions* [1985] A.C. 937 the appellant's appeal came before the Board after the appellant had claimed before the Supreme Court and the Court of Appeal in Jamaica that his constitutional right under section 20(1) of the Constitution of Jamaica had been infringed. In delivering the judgment of the Board Lord Templeman stated at page 953:-

> "The task of deciding whether and what periods of delay explicable by the burdens imposed on the courts by the weight of criminal causes suffice to contravene the rights of a particular accused to a fair hearing within a reasonable time falls upon the courts of Jamaica and in particular on the members of the Court of Appeal who have extensive knowledge and experience of conditions in Jamaica. In the present case the Full Court stated that a delay of two years in the Gun Court is a current average period of delay in cases in which there are no problems for witnesses. The Court of Appeal did not demur. Their Lordships accept the accuracy of the statement and the conclusion, implicit in the statement, that in present circumstances in Jamaica, such delay does not by itself infringe the rights of an accused to a fair hearing within a reasonable time. No doubt the courts and the prosecution authorities recognise the need to take all reasonable steps to reduce the period of delay wherever possible.
>
> Thus, their Lordships accept the submission of the respondents that in general the courts of Jamaica are best equipped to decide whether in any particular case delay from whatever cause contravenes the fundamental right granted by the Constitution of Jamaica."

Lord Templeman then stated at page 954:-

> "The Board will therefore be reluctant to disagree with the considered view of the Court of Appeal of Jamaica that the right of an accused to a fair hearing within a reasonable time has not been infringed. But since no court is infallible, there remain the power and the duty of the Board to correct any error of principle and to reverse a decision which, in the opinion of the Board,

> could only have been reached by a reliance on some irrelevant consideration or by ignoring some decisive consideration."

In *Charles v. The State* [2000] 1 W.L.R. 384 the appellants appealed to the Board from a decision of the Court of Appeal of Trinidad and Tobago. In that case after their convictions for murder were quashed by the Court of Appeal and the jury at the second trial disagreed, a third trial at which the appellants were convicted took place more than nine years after their arrests. In Trinidad and Tobago there was no constitutional right to a trial within a reasonable time, but at the commencement of the third trial an application was made and refused to stay the proceedings on the ground that a trial for a third time after such a long delay was an abuse of the process of the court. The Board allowed the appeal on the ground that to allow the prosecution to proceed a third time on the charge of murder more than nine years after the event was an abuse of the criminal process. In delivering the judgment of the Board Lord Slynn of Hadley stated at page 387H:-

> "Whether there should be a retrial, including the question whether the time between the events alleged and the retrial is such as to make a retrial unfair or an abuse of process of the court, is a matter to be raised in the first place before the trial judge and the Court of Appeal. Their Lordships would generally be reluctant to allow the issue to be raised for the first time before them. Here, the issue was raised squarely before the judge even though it was not raised before the Court of Appeal. In the circumstances their Lordships accept that since the matter was raised before the trial judge the defendants are entitled to raise the issue before them on this appeal."

There may be exceptional cases where the Board would quash a conviction after earlier abortive trials by reason of delay or oppression even though the issue had not been raised in the local courts, but their Lordships consider that the failure to raise the issue before the courts in Jamaica is a factor which weighs against the appellant's submission in this case.

Where the appellant has relied before the local courts on a breach of his constitutional right and raises the issue before the Board, the judgment of the Board in *Bell v. Director of Public Prosecutions* makes it clear that there are a number of factors to be taken into account. The judgments of the Supreme Court of the United States in *Barker v. Wingo* (1972) 407 U.S. 514 identified four factors in considering the sixth amendment to the Constitution of the United States which provides:-

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ...."

The factors are: the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. In *Bell* the Board acknowledged the relevance and importance of these four factors, stating that the weight to be attached to each factor must however vary from jurisdiction to jurisdiction and from case to case.

(1) <u>The length of delay</u>

Powell J. in *Barker v. Wingo* stated at page 530:-

> "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."

In this case it is apparent that the delay between the charging of the appellant and third trial is presumptively prejudicial. Therefore it is necessary to consider the other three factors.

(2) <u>The reason for the delay</u>

Powell J. stated at page 531:-

> "Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility

> for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay."

In this case, as their Lordships have observed, the appellant failed to raise the issue of delay before the local courts who were best qualified to investigate the reasons for it, but it appears probable from the chronology furnished to their Lordships that on some occasions the trial was delayed because instead of counsel for the appellant requesting a transcript of the previous trial as soon as a retrial was ordered, they delayed in making this request until a number of months had passed. Thus the first trial concluded and a retrial was ordered on 9th December 1992 but defence counsel did not request a transcript of the trial until 26th April 1993. The second trial concluded and a retrial was ordered on 5th October 1994 but defence counsel did not request a transcript of the second trial until 13th November 1995, and on 22nd March 1996 defence counsel informed the court that they were still awaiting the transcript.

(3) <u>The defendant's assertion of his right</u>

Powell J. stated at page 528:-

> "We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right. This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right."

And at pages 531-532:-

> "Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is

> entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."

In the present case the appellant wholly failed to assert his right to a trial within a reasonable time before the local courts.

(4) Prejudice to the defendant

Powell J. stated at page 532:-

> "Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past."

Mr. Nicol emphasised the prejudice suffered by the appellant by reason of his very lengthy period of pre-trial incarceration and his anxiety and concern arising from the knowledge that he was facing a charge of capital murder which carried with it the death sentence, the anxiety being increased by facing two subsequent trials. To support his appeal to the Board the appellant swore an affidavit on 21st December 1999 setting out at length the conditions in which he claims he has been held in prison since his arrest. The conditions described by the appellant, if the descriptions are true, are inhuman conditions which would cause their Lordships the greatest concern. However these allegations as to prison conditions were not advanced before the local courts who had no opportunity to investigate them and the affidavit was only served on the Director of Public Prosecutions for Jamaica on 10th July 2000, two weeks before the hearing by the Board. Therefore it is not possible for the Board to form any view

as to the truth of the allegations and their Lordships are unable to base any decision upon them.

Their Lordships further observe that because they are advising that the conviction for capital murder should not stand, the issue discussed in the majority and minority judgments of the Board in *Higgs v. Minister of National Security* [2000] 2 W.L.R. 1368 does not arise in this case.

The appellant has undoubtedly suffered anxiety and concern from facing a capital charge over a very lengthy period and undergoing three trials, but Powell J. stated that the most serious aspect of the factor of prejudice to the defendant is the possibility that the defence will be impaired. In relation to this matter Lord Templeman stated in *Bell v. The Director of Public Prosecutions* at page 952:-

> "The applicant did not allege the death or disappearance of a witness. Where, as in Jamaica, for a variety of reasons, there are in many cases extensive periods of delay between arrest and trial, the possibility of loss of memory which may prejudice the prosecution as much as the defence, must be accepted if criminals are not to escape. Nevertheless in considering whether in all the circumstances the constitutional right of an accused to a fair hearing within a reasonable time has been infringed, the prejudice inevitable in a lapse of seven years between the date of the alleged offence and the eventual date of retrial cannot be left out of account. The fact that the applicant in the present case did not lead evidence of specific prejudice does not mean that the possibility of prejudice should be wholly discounted."

However, in this case, the case made against the appellant that he was one of the group which carried out the robbery in the course of which the deceased was killed was a relatively simple one and his defence was also a simple one. The prosecution was based on the finding of the wallet of Mr. Douglas in the table beside the appellant's hospital bed on the day after the robbery and on the identification of him by Mr. and Mrs. Douglas. The appellant's defence was that he was never at the home of the deceased and that he had been shot by robbers on that

evening in a quite different place. Therefore their Lordships consider that the possibility of prejudice to the defence from the very lengthy delay can be substantially discounted.

The guilt of the appellant

Their Lordships now turn to consider a further and important issue on which the authorities do not speak with one voice. The issue is whether an appellate court should take into account the consideration that the appellant is clearly guilty of a very serious crime in deciding whether to quash his conviction because he contends that lengthy delay has infringed his constitutional right to a trial within a reasonable time. In the present case the crime is the very grave one of murder in the course of a robbery, which is a crime which is very prevalent in Jamaica, and the public interest requires that persons who commit such crimes and whose guilt can be proved should be convicted and punished. In *Bell v. The Director of Public Prosecutions* the Board stated that the right of an individual accused to be tried within a reasonable time is not an absolute right but must be balanced against the public interest in the attainment of justice. Lord Templeman stated at page 953:-

> "Their Lordships accept the submission of the respondents that, in giving effect to the rights granted by sections 13 and 20 of the Constitution of Jamaica, the courts of Jamaica must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica."

Lord Templeman also stated at pages 950-951:-

> "Their Lordships agree with the respondents that the three elements of section 20, namely a fair hearing within a reasonable time by an independent and impartial court established by law, form part of one embracing form of protection afforded to the individual. The longer the delay in any particular case the less likely it is that the accused can still be afforded a fair trial. But the court may nevertheless be satisfied that the rights of the accused provided by section 20(1)

> have been infringed although he is unable to point to any specific prejudice."

In *Barker v. Wingo* Powell J. stated at page 522:-

> "Thus, as we recognized in *Beavers v. Haubert* [(1905) 198 U.S. 77] any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case:
>
> > 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.'"

Mr. Nicol relied on the judgments of the Court of Appeal of New Zealand in *Martin v. Tauranga District Court* [1995] 2 N.Z.L.R. 419 in which there was an important discussion of the principles relating to the right under the New Zealand Bill of Rights Act 1990 to a trial without undue delay. But their Lordships observe that the judgments related to the staying of a prosecution before trial and not to the quashing of a conviction by an appellate court after a fair trial.

Mr. Nicol principally relied on the judgment of the Board delivered by Lord Steyn in *Darmalingum v. The State* (10th July 2000). At page 6 Lord Steyn stated:-

> "The starting point is the Constitution of Mauritius. Chapter 2 contains a Bill of Rights securing to the people of Mauritius fundamental rights and freedoms. It is substantially modelled on the European Convention of Human Rights. Section 10 contains detailed provisions to secure the protection of the law to the people of Mauritius. The relevant provision is section 10(1). It reads as follows:-
>
> > 'Where any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.'
>
> It will be observed that section 10(1) contains three separate guarantees, namely (1) a right to a fair hearing; (2) within a reasonable time; (3) by an

> independent and impartial court established by law. Hence, if a defendant is convicted after a fair hearing by a proper court, this is no answer to a complaint that there was a breach of the guarantee of a disposal within a reasonable time. And, even if his guilt is manifest, this factor cannot justify or excuse a breach of the guarantee of a disposal within a reasonable time."

And at page 10:-

> "The normal remedy for a failure of this particular guarantee, viz. the reasonable time guarantee, would be to quash the conviction. That is, of course, the remedy for a breach of the two other requirements of section 10(1), viz. (1) a fair hearing and (2) a trial before an independent and impartial court. Counsel for the respondent argued however that the appropriate remedy in this case is to affirm the conviction and to remit the matter of sentence to the Supreme Court so that it may substitute a non-custodial sentence in view of the delay. The basis of this submission was that the guilt of the appellant is obvious and that it would therefore be wrong to allow him to escape conviction. This argument largely overlooks the importance of the constitutional guarantee as already explained. Their Lordships do not wish to be overly prescriptive on this point. They do not suggest that there may not be circumstances in which it might arguably be appropriate to affirm the conviction but substitute a non-custodial sentence, e.g. in a case where there had been a plea of guilty or where the inexcusable delay affected convictions on some counts but not others. But their Lordships are quite satisfied that the only disposal which will properly vindicate the constitutional rights of the appellant in the present case would be the quashing of the convictions."

In *Darmalingum v. The State* the appellant was charged with offences of embezzlement and forgery in the course of his work as a bank cashier. These were serious offences, but his being at liberty presented no threat to the safety of the citizens of Mauritius, and it was in such a context that the Board stated that even if the guilt of the appellant was manifest, this factor could not justify or

excuse a breach of the constitutional right to a trial within a reasonable time. The judgment of the Board does not refer to the passage in the judgment of the Board in *Bell v. The Director of Public Prosecutions* which recognises that the right given by section 20 of the Constitution of Jamaica must be balanced against the public interest in the attainment of justice or to the passage which states that the right to a trial within a reasonable time is not a separate guarantee but, rather, that the three elements of section 20(1) form part of one embracing form of protection afforded to the individual.

Therefore in deciding whether the appellant's conviction should be quashed because of the lengthy period of delay their Lordships are of opinion that they are entitled to take into account the considerations that he has been proved on strong evidence to be guilty of a murder in the course of an armed robbery, that this type of offence is very prevalent in Jamaica and that it poses a serious threat to the lives of innocent persons.

Mr. Nicol also relied on the decision of the Board in *Darmalingum* that the constitutional right to a trial within a reasonable time extends to appellate proceedings. Therefore Mr. Nicol submitted that the period of time between the conviction of the appellant on 16th January 1997 and the hearing before the Board in July 2000 should be added to the period of delay commencing in April 1991. In *Darmalingum* there was a period of delay of five years and one month in the proceedings before the appellate court in Mauritius which the Board held was excessive and unjustifiable. However in the present case there has been no undue delay in the appellate proceedings before the Court of Appeal and the Board. Notice of application for leave to appeal to the Court of Appeal was served on or about 15th May 1998 and the Court of Appeal delivered judgment on 14th July 1998. The Board granted special leave to appeal on 24th February 1999 and the hearing before the Board took place in July 2000. Therefore their Lordships are of opinion that the time taken in the appellate proceedings does not assist the appellant's case.

Accordingly, taking account of all the factors which they have discussed, their Lordships are of the opinion that, notwithstanding the lengthy and very regrettable

period of delay between the charging of the appellant and his third trial, the conviction of the appellant should not be quashed by reason of that delay or on the grounds of oppression or abuse of process.

Their Lordships have referred to the failure of defence counsel to request a transcript of the abortive trial where a retrial was ordered and that this appears to have caused part of the delay in this case. Their Lordships desire to emphasise that when a trial judge orders a retrial in Jamaica he should at that time ask defence counsel if they require a transcript of all or part of the evidence which has been given, and at that stage the prosecution and the defence should co-operate to ensure that the further hearing is not delayed because of the unavailability of a transcript.

Their Lordships will humbly advise Her Majesty that for the reasons which they have given the appeal should be allowed to the extent of substituting for the verdict of capital murder a verdict of non-capital murder and the case remitted to the Court of Appeal to pass a custodial sentence for non-capital murder.