**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NOS: 77, 81 & 93/2003**

**BEFORE:** **THE HON. MR. JUSTICE HARRISON, J.A.**
**THE HON. MR. JUSTICE K. HARRISON, J.A.**
**THE HON. MRS. JUSTICE McCALLA, J.A. (AG.)**

**R v ANNETH LIVINGSTON**
**RAMON DRYSDALE**
**ASHLEY RICKETTS**

**Frank Phipps, Q.C. & Ms. Kathryn Phipps for applicant Anneth Livingston**

**C.J. Mitchell for applicant Ramon Drysdale**

**Delroy Chuck for applicant Ashley Ricketts**

**David Fraser, Snr. Dep. Director of Public Prosecutions (Ag.) Ms. Meridian Kohler, Crown Counsel, & Ms. Nadine White, Crown Counsel (Ag.), for Crown**

**10th, 11th, 12th ,13th, 14th October 2005 & 31st July 2006**

**HARRISON, P.**

These applicants were convicted at the Home Circuit Court on the 10th day of April, 2003 of the murder of Shirley Playfair on 13th April 2000. Each was sentenced to life imprisonment. However, the judge specified that each should not be eligible for parole until sixty (60) years had passed in the case of Anneth

Livingston, fifty-five (55) years in the case of Ramon Drysdale and forty-five (45) years in the case of Ashley Ricketts.

The relevant facts are as follows: On 13th April 2000 at about 12 noon the prosecution witness Hope Dell, whose deposition was read into evidence, was in the reception area of the deceased's office at Seymour Park, Old Hope Road in the parish of St. Andrew. The witness saw two men enter the deceased's office and go directly to the applicant Livingston's desk. They then went into the deceased's own office. Seconds later, she heard the deceased scream. The applicant Livingston, a legal secretary, was then standing at the photocopier. This witness got up and went to the deceased's office door. She saw the deceased sitting in her chair struggling with the two men on either side of her, with her hands protecting her neck. The witness ran to the lunchroom where she saw other employees Miss Thompson, Mrs. Grier and Mrs. Richards seated, and the applicant Livingston therein standing against the wall. Another prosecution witness Sonia Burke, a legal secretary, employed to the deceased also saw the two men enter and go straight to the applicant Livingston's desk. One of the men waved to the witness who returned the wave. She then heard a scream, saw prosecution witness Dell run towards the deceased's office and then run in the witness' direction towards the lunchroom. The witness Burke ran in the same direction.

Verna Richards, a certified paralegal secretary employed to the deceased, on the said day at 12 noon, was in the lunchroom along with Mrs. Grier and Miss

Thompson when she heard a scream. The witness then heard a second scream. She then saw the applicant Livingston standing at the lunchroom door with her hand on the door knob and her back turned to the office. The witness passed the said applicant who "was blocking" her, and went towards the deceased's office. She saw the deceased and a man behind her with a knife at the left side of her neck. The man turned. Mrs. Richards exclaimed "Lawd God", turned back and ran towards the lunchroom. She reached the bathroom beside the lunchroom when she felt someone grab the right side of her neck. She pitched forward and the hand left from her neck. She ran into an open office and bolted the door. She telephoned 119, the police. Subsequently, she saw the deceased's body on the floor in one Dr. Thomas' office, in the said premises and thereafter at the Matilda's Corner Police Station. The witness' blouse and her neck both had on blood in the area where she had been held. At an identification parade held on 15th April 2000 she identified the applicant Drysdale as the man she had seen in the deceased's office with the knife.

Prosecution witness Marjorie Falconer, a legal secretary, was in the bathroom of the office at the time of the incident, when she heard a scream. On opening the bathroom door she saw a young man grab at prosecution witness Verna Richards and say "you come yah". She closed back the door gently and remained there. She later came out. She identified one Williams, who was not at the trial, at an identification parade held subsequently, as the man whom she saw grab at the witness Richards.

Timothy Campbell, a security guard, at the complex in which the deceased's office was located, said that in the morning of the said 13th April, 2000, a 120Y Datsun motor car drove up into the complex and the occupants asked him for the number of the deceased's office. He told them and they left. The said car returned at about noon and "drove slowly to the deceased's office." The car windows were down. Fifteen minutes later, the car drove out. Two minutes later he heard a female voice say "Security them just cut a woman's throat". He went to Dr. Thomas' office and saw the deceased lying with her throat cut.

Cpl. Richard Hepburn and Private Hibbert, both soldiers in the Jamaica Defence Force, along with Constable Eric Lindsay of the Jamaica Constabulary Force, were on patrol in the Whitfield Town area of the parish of St. Andrew when they received a radio transmission and consequently went onto Metcalfe Street, in Whitfield Town and onto certain premises. They heard the engine of a motor car and saw a blue 120Y Datsun motor car come along Metcalfe Street towards them. The two soldiers, with weapons pointing at the car, stopped the car and ordered the men from the car. Two men came from the rear seat. Applicant Drysdale, one of the two men, ran off but was held and brought back. He had droplets of blood on the front shoulder of a white shirt he was wearing. Cons. Lindsay said in evidence that he took from applicant Drysdale's pocket a ratchet knife with blood stains. A discrepancy arose on Cons. Lindsay's evidence because, in a statement written earlier, he had said that he took the knife from

the other man. Cpl. Hepburn stated that the other man, not before the Court, placed a knife on a wall nearby – it was retrieved. When asked, the applicant Drysdale said that they were coming from Maxfield Avenue where some men had tried to rob them. The applicant Ricketts said that the applicant Drysdale and the other man had chartered his car from Maxfield.

The applicant Drysdale, Ricketts and the third man were handed over to Det. Sgt. George Hall at Metcalfe Street on the same day, along with the two bloodstained knives. He took from the applicant Drysdale his blood stained shirt. Constable David Campbell swabbed the hands of the applicant Drysdale and handed the two knives and shirt of the applicant Drysdale and the swab to Miss Sherron Brydson, the government analyst at the Forensic Labaratory.

Snr. Supt. Gladstone Grant on 13th April 2000 took a statement from the applicant Ashley Ricketts, after having cautioned him. The applicant Ricketts, inter alia, said:

> "I know Amin and MN. I always see them at Metcalfe Road off Maxfield Avenue in St. Andrew. I know MN for about one year and about six months – one year and about six months ago, and ...
> I know Amin and MN. I always see them at Metcalfe Road off Maxfield Avenue in St. Andrew. I know MN for about one year and about six months ago and I know Amin for about one year. I know that both of them live at Metcalfe Road. ...
> MN used my robot taxi more – MN more than one time. ...
> MN tek mi car more than Amin and the other one dem. Mi don't remember where mi carry them to. A two time mi carry MN alone. About 8:30 a.m. today

the 13th April, 2000, I was at Spanish Town Road and Waltham Park Road in the parish of St. Andrew in my ...' 'robot taxi', that is where I am '... when Amin and MN come to and tell me fi carry them Uptown on a move. Mi tek them up as usual. Them tell me seh them a goh check a lady. Me noh know the lady name but she have a office enna Seymour Park off the Old Hope Road in St. Andrew. Mi did know the place before for mi drop a lady there already. It is a short black lady. Is a work mi did get. This was about two weeks ago. Seymour Park is off Hope Road about half mile from Mountain View Avenue and it is on the left hand side going up Old Hope Road.'

...

'A security guard is always at the gate and him tek the registration number off the car dem as dem go in. When you go inside, some long upstairs building is inside there, the bigger one them is on the right hand side when you drive in. Plenty car go in and out all the while. Mostly office inside there. Mi did know where dem seh dem a goh soh mi drive up Maxfield Avenue, turn Rousseau Road onto Beechwood Avenue, go on Oxford Road and go Old Hope Road to Seymour Park. Dem never tell me where to drive. When mi reach up there and drive in Seymour Park MN – when mi reach up Seymour Park about nine a.m., 13/4/2000, Amin and MN come out of the car and go to the building to right when you turn in. Mi park the car under a tree on the compound. Is a mango tree and it near to the wall when you drive in and turn right. Mi wait on them and them come back about five minutes after and tell mi seh them no si the lady soh mi drive back out of the park and go up to Papine in St. Andrew. That is at the end of Old Hope Road. About 11:00 a.m. same 13/4/2000 mi and them come back down to Seymour Park. Them come out again and go back upstairs a the lady office.' ...

'Them stay up there about five minutes again. When them run back to the car this time mi si Amin with the knife in his hand and a yellow cap cover him hand and mi si blood on the knife and him hand. MN did have a knife too. The two of them did have knife.

> When dem come back mi ask Amin say how blood get on his hand. Him seh, 'Drive quick.' Mi drive straight down Old Hope Road goh down to Cross Roads and turn on Rousseau Road and goh back down Maxfield Avenue. Mi did a carry them back a Metcalfe Street and as mi turn on Metcalfe Street off Maxfield Avenue mi si the police. Mi try fi drive past, dem block the road. The police tell mi fi come out of the car. Amin seh a hope mi noh tell the police seh a wi goh a Seymour Park go kill the lawyer lady. Mi know Amin and MN because mi girlfriend live at No. 6 Sunlight Street off Maxfield Avenue not so far from Metcalfe Street. Amin and MN never want me to stop when the police block mi car. The car that mi did drive a one blue 120Y Datson, registration plate is 9890AJ. It is a 1976 model and is my car.'
>
> 'When the police tek us out of the car them search all of us and the police tek one knife from Amin and one from MN. Them tek the blood-up yellow cap from Amin. The police dem put Amin and MN in the police car. One police sit in my car and them tell me fi drive to Half-Way-Tree Police Station. MN did give mi money fi buy gas before wi go up a the lawyer office. ... Is when the police stop wi mi si blood on both of them clothes. Amin was trying to tek off his blood-up shirt to hide it from the police. When the police hold mi mi tell them lie; mi never tell them the truth, and mi give the police a statement when wi reach Half-Way-Tree Police Station but mi never tell them the truth in the statement.' ...
>
> 'The statement that mi give the police that mi say a lie, mi did sign it. This statement is the truth."

The witness took a second statement from the applicant Ricketts on 19th April, 2000.

The applicant Ricketts called the witness at the police station and said "Mr. Grant me never tell you everything." The applicant, inter alia, said in this statement:

"Mi live at 44A Maxfield Avenue right before Nelson Road in this parish, Kingston 13. I live there soh from 1974 and I drive car running robut taxi from that time. ... I also meet Mark, Shane, MN, also called MN, Amin, Kevin, Norburt, Duggie, Oneil. I do not know their correct name – I do not know their exact name.' ...

Thursday the 13th April, 2000, about 8:30 a.m. or about 7:30 a.m. or 8:00 a.m. Kevin and Amin come to me where mi park at Spanish Town Road and Waltham Park Road. Kevin first talk. Him say mi must carry the two of them up at Seymour Park off Old Hope Road. Them come in the car and mi tell them say is Two Hundred Dollars to go up there. Mi did carry Mark and Shane up there – mi did carry Mark and Shane up where dem say dem want to go more than one time to CR. Mi hear Mark and Shane call the name CR and dem show mi who name CR for a she always come to dem...'

Yes, Your Honour. '... for a she always come to dem a the car and give dem envelope with money in there. CR is tall and black, broad face, her hair is cream all the while. Mi did see CR at Half-Way-Tree Police Station today and mi tell the police seh a she mi always carry Mark and Shane to at the lawyer office at Seymour Park off Old Hope Road and she give dem ...'
envelope with money. Everytime dem get the money from CR mi get One Thousand Dollars fi carry dem. Mi did ask Mark seh who is CR and him seh, 'a mi girlfriend', soh mi seh.'

'Mi did ask Mark seh who is CR and him seh 'a my girl' so mi seh to him, 'then yuh a deal wid dem big woman deh?' and him seh 'yes'. Sometimes mi carry Tia, who is Mark sister, with them go to Seymour Park to CR, and Tia goh upstairs to CR and Tia and CR come down where mi park the car, and CR talk to Mark and Shane but a mostly Mark she always talk to. When she come downstairs to Mark she always give him a envelope with money and my Thousand Dollars always deh on the top of the envelope.

Thursday now, the 13th of April, 2000, a the first time mi a carry Amin, Kevin and MN up to CR at Seymour Park. Mi carry Kevin and Amin up there first in the morning Thursday when ...'

'Mi hear Amin and Kevin a talk seh because dem a dis wi for a wi fi get the money off the works that the big man give wi fi mash. MN ask Amin say what the girl name again up at Seymour Park that we must go to and Amin say a CR. Mi drive dem to Seymour Park same place where mi use to carry Mark, Shane and Tia. We reach up there about 8:00 a.m. or 8:30 a.m. Mi drive in through the gate where the security guard stay. When mi drive in dem always a look on mi licence plate. When mi goh through the gate mi goh up and turn right between two long building where the lawyer and a doctor office deh. Mi park the car little bit topside the office in a car park and mi turn mi face back out to where mi drive come in. When mi park the car Amin go upstairs to the lawyer office and Kevin stay in the car. Amin stay about five minutes and come back in the car and him say CR seh the lady noh come yet so wi fi come back about 11:00 a.m. or 11:30 a.m. same day. Mi drive away with them at Metcalfe Road.' ...

'Mi drive away with dem and drop dem back pon them corner at Metcalfe Road same place where the police dem hold wi. Dem tell mi seh dem will come back to me in about half an hour and when mi go back up there with me dem will give me a money. Dem come back to me about ten minutes to eleven and Amin and MN come in the car, this time.'

'... Kevin never go back this time. A this time now mi hear Amin and MN a seh a big man give we the works and wi have fi get a big money off a it and MN ask Amin what the woman name that dem must check when them go up to Seymour Park and Amin tell MN say the woman that dem must check is CR. Mi drive up to the gate at Seymour Park about little bit after eleven o'clock. ... about five minutes after eleven mi drive in and turn...'

'About five minutes after eleven mi drive in and turn right and park this time right beside the building where mi can see when they go right up the stairs to the lawyer office. Amin and MN come out of the car. The two of them come out this time and mi si them go upstairs and dem stay about five minutes and dem come back in the car and seh, 'Drive Jerry!' When dem come back from upstairs the two of them blood up. Amin have a yellow cap cover the blood. The two of them did have a knife with blood pon it. When wi di go up there the first time and park Amin go upstairs and me and Kevin stay outside. Amin come back down and tell Kevin say the woman noh come – seh the woman noh come as yet soh mi must come back about 11:30 and then mi si CR come down from upstairs, goh between some flowers like she a goh wash her hand and mi see she look up pon us where we was sitting in the car. Kevin say to Amin, 'Why yuh never tell CR seh mi down yah, man?' ...

'Kevin did seh CR have a big works fi dem goh mash. Thursday the 13th April, 2000, when mi si CR at Seymour Park she did have on a red blouse and red skirt. Mi sure seh a she Amin go to and a she mi show the police at Half-Way-Tree today because mi did see her more than one time. After wi leave Seymour Park the second time mi drive straight to Maxfield Road – after we leave Seymour Park the second time mi drive straight to Metcalfe Road and as mi turn on Metcalfe Road from off Maxfield Avenue mi si police a stop mi. MN seh mi noh fi stop. Amin seh 'goh down pon dem' and ...

mi tell dem seh mi have fi stop because the police and soldier have gun. MN jump out of the car and run. The police fire a shot in the air and MN stop. Amin never run. The police ask me where mi a come from and mi tell dem say Hope Road. The police carry wi to Hunts Bay Police Station and from Hunts Bay wi come to half-way ...

'The police take off Amin and MN blood-up shirt and tek the knife from them."

Dr. Kadiyala Prasad, a registered medical practitioner and consultant forensic pathologist performed a postmortem examination on the body of the deceased on 14th April 2000. He observed incised wounds, (1) 11 cm by 3 cm wide and 6 to 7 cm deep on the left side of the neck severing the larynx, voice box and Adam's apple and the muscles and blood vessels on the left side, (2) 3 cm by 1.5 cm wide, muscle deep to the left side of the neck cutting through wound 1, (3) 4.5 cm by 1 cm skin deep to the left neck (4) 3 cm by 1.5 cm, skin deep to the front of the neck, (5) 8 cm by 3 cm muscle deep (6) 1.5 cm by 0.5 cm on the left side of the face cutting through the cheek (7) 0.8 cm by 0.5 cm. also on the left side of the face cutting through the cheek. (8) 3 cm by 0.1 cm skin deep on the lower half of the right forearm (9) 2 cm by 0.8 cm bone deep on the knuckle of the right index finger. The wounds were consistent with infliction by a knife, with a small or moderate degree of force. The cause of death was due to a sharp force injury to the neck resulting in loss of blood. He handed a sample of the deceased's blood to Miss Sherron Brydson, the government analyst.

Miss Brydson visited the crime scene on 13th April 2000 and took samples from blood stained areas in the administrator's and personnel offices in the deceased's office and from Dr. Thomas' office. She also took the blood stained left foot of the deceased's shoes. On 27th April 2000 she received from the police, a blood stained ratchet knife taken from the applicant Drysdale, exhibit 2, a bloodstained ratchet knife and bloodstained shirt, exhibits 3 and 5,

respectively, belonging to one Dwayne Williams, the assailant who was not at the trial. The analyst conducted tests on the samples and articles and obtained a DNA (deoxyribonucleic acid) profile from each blood sample, each article and the sample of the appellant's blood sample she had received from Dr. Prasad. She compared the profiles and found that they were the same. Using the data obtained from blood banks across the Island and employing international standards, she determined the frequency of distribution of the profile, that is, the random occurrence ratio. Employing this system, the analyst concluded that the probability of the sample of the deceased occurring was 5.6 in 1,000,000,000,000 (one billion) or one in 167,000,000,000. The entire population of Jamaica was 2.8 million. The probability of some other person having the DNA of the deceased was therefore remote.

The applicants Drysdale, Ricketts and Livingston as well as Williams, were arrested and charged for the murder of Shirley Playfair.

Dwayne Williams appeared as an accused at the preliminary enquiry but absconded before the trial.

The defence of the applicant Drysdale was one of alibi. He said, that on the day that he was arrested he had taken a taxi from Half-way-tree to Metcalfe Road where he told the driver to stop. Soldiers and policemen searched him Drysdale but nothing was found on him. He was not guilty of the offence. He knew nothing about the murder.

The applicant Ashley Ricketts, in an unsworn statement from the dock said that what he wished to say was in his statement, referring to his statements that he had given to the police. He said that people take his taxi, but he does not listen to their conversation. He knew these people for a long time. He said that he told then that he was "not going to jail for no one." He did not know the lady and was not a party to the murder.

The applicant Anneth Livingston gave sworn evidence. She said that on the day of the incident she got up to go to the copier in her office when she saw two men appear in front of her. One said "hello," and she in response said: "Hi, I'm Annette, have a seat, I soon deal with you." She said that she had never seen the men before. She went to the machine and was making copies when she heard screaming from the direction of the deceased's office and Miss Dell shouting "call the police, call the police." Miss Dell was running in her direction. She Livingston rushed to the lunchroom "alerting others to call the police." In the lunchroom, she saw Mrs. Grier, Mrs. Richards and Miss Thompson. Miss Dell came in, followed by Miss Burke. She, the applicant, had not seen the deceased before she ran into the lunchroom. After she came out of the lunchroom the applicant saw the deceased coming out of her office with one hand around her neck and beckoning to have door opened. The applicant then saw Mrs. Grier on the balcony to the office saying: "Murder, thief, si dem coming down the stairs there." The applicant rushed to Mrs. Grier on the balcony and said, "Come let us take Mrs. Playfair to the doctor." Having said so, the applicant went back into

the office and "dropped in the settee," confused, nervous and crying. She eventually got up, went downstairs, crying. She did not see the deceased. She gave a written statement to the police on that day. On 15th April 2000 she attended an identification parade but failed to identify anyone. She was then detained and another statement was taken from her. She attended another identification parade on 19th April 2000 and once again failed to identify anyone. On 26th April 2000, with an attorney-at-law present, the applicant participated in a written question and answer conducted by Det. Supt. Errol Grant and Det. Supt. Benjamin. She signed it. She denied that she was a party to a plan to kill the deceased. She denied that during the week prior to the incident that one of the men who was in the dock at the preliminary examination, charged jointly, had come to the office and spoke to her on two occasions. She did not know any of the men before.

Mr. Phipps, Q.C. with the leave of the Court argued five (5) grounds of appeal on behalf of the applicant Livingston.

Mr. Chuck with the leave of the Court also argued five (5) grounds of appeal on behalf of the applicant Ricketts.

Mr. Mitchell who represented the applicant Drysdale filed two (2) grounds of appeal. He advised the Court that although he had filed grounds of appeal in respect of the applicant, he had reviewed the matter. He formed the view that the prosecution's case, based on the visual identification of the applicant by the witness Richards and the DNA evidence, namely, the bloodstained knife taken

from the applicant, with the DNA profile of the deceased, was adequately left to the jury with the proper directions. Counsel acknowledged that the applicant's terse unsworn statement was a defence of alibi and was understandably rejected by the jury. Counsel advised the applicant by letter dated 5th October 2005, a copy of which was on the court file. It was delivered by hand to the applicant on 6th October 2005. He was therefore advancing no arguments in respect of grounds 1 and 2. Leave was granted to counsel to argue the ground that the sentence was manifestly excessive.

**Anneth Livingston**

Ground 2. Mr. Phipps, Q.C. argued that the learned trial judge was in error to reject the submission of no case to answer. He submitted that the prosecution's case was based solely on her conduct on the day of the incident and her knowledge of one of the alleged assailants Dwayne Williams, thereby making her a participant in the common design to commit murder. The fact that she ran to the lunchroom she was doing what others did and so that cannot be construed as knowledge in her of what was taking place. There was no evidence that she was blocking the lunchroom door. Nor was there any evidence that she knew the assailant Dwayne Williams before. No inference may therefore be drawn from her failure to identify him. There was nothing said or done by her to amount to circumstantial or other evidence that she was a party to a plan to commit murder. He concluded that there was no evidence, including that in relation to Dwayne Williams, to amount to a case for her to answer.

The burden of proof in a criminal case is always on the prosecution. The initial burden is an evidential one to adduce sufficient evidence to raise a prima facie case. If there is evidence of the alleged offence which if accepted could entitle a reasonable jury to conclude guilt, the case is properly left to the jury. Lord Lane, CJ in ***R v Galbraith*** 73 Cr. App. R. 124, at page 127, inter alia, said:

> "... where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

The prosecution's case against the applicant Livingston was based primarily on her conduct on 13th April 2000, the day of the murder, and the inferences that could be drawn therefrom. The applicant was at her desk where she could see into the deceased's office, when the men, one of whom was known to the applicant, came directly to her at her desk. The prosecution witness Richards had seen the assailant Dwayne Williams come to the office and speak to the applicant Livingston twice during the week before. On the first occasion, Mrs. Richards said, Williams "came inside the office to Mrs. Livingston." On the second occasion "he came to the staircase, Mrs. Livingston went to the staircase, spoke with him and (they) went downstairs." The witness Hope Dell who was the receptionist on 13th April 2000 saw the men enter the office and go "straight to Mrs. Livingston's desk," leave her desk after 1 to 2 minutes and go into the deceased's office. The applicant Livingston got up and went to the photocopier. Seconds after the deceased screamed. Livingston, next seen in the lunchroom with her hand on the lunchroom door

knob, blocked prosecution witness Richards who was attempting to leave the room to go to the reception area. Richards forced her way around the applicant, went to the deceased's office and saw one of the assailants with a knife in the neck of the deceased. The applicant Livingston attended an identification parade held on 19th April 2000 in respect of the assailant Williams; she did not identify him. The prosecution's case is that the applicant was a participant in the common design to commit murder. The inferences that could be drawn from her conduct on 13th April 2000 were, that she –

(1) assisted the assailants of the deceased, in that she accommodated the men at her desk in the office for "one to two minutes" when they came to her directly, bypassing the receptionist,

(2) directed the assailants to the office of the deceased facilitating them in their purpose,

(3) knew what was happening in the deceased's office within seconds of their entry therein and was indifferent to such acts,

(4) attempted to block an employee from leaving the lunch room in response to the deceased's screams thereby seeking to prevent the identification of the assailant and assisting in non-interference with the attack,

(5) knew one of the men before, that is, Williams, but pretended that she did not,

(6) failed to identify Williams at the identification parade thereby seeking to facilitate his disassociation with the murder.

The acts of the applicant Livingston taken cumulatively were sufficient, as primary facts, from which inferences could be drawn that she was a joint

participant in an agreement with others to commit the offence of murder and performed those acts in furtherance of that joint enterprise sufficiently to answer the charge. The submission of no case to answer was correctly rejected. This ground therefore fails.

In ground 3(a), learned Queen's Counsel complained that the evidence of Richards' identification of Dwayne Williams was inadmissible at the trial, in that, there was no evidence that the person who visited the applicant Livingston was the fourth man charged with the murder. In those circumstances the evidence has no probative value and is irrelevant. In addition, because that evidence was not disclosed to this defence prior to being led at the trial, it deprived the applicant of a fair trial.

The evidence of the witness Richards was that when she left the lunchroom on 13th April 2000, she did not then see the assailant Dwayne Williams. It was the prosecution witness Falconer, who saw the said assailant Williams chasing and grabbing at the witness Richards as she ran away from the deceased's office. Richards, understandably, when she attended the identification parade on 19th April 2000 for Williams did not identify him, because not having seen him at the deceased's office on 13th April 2000, she did not associate him with the murder. It was only when Richards saw the assailant Williams in the dock at the preliminary enquiry that she knew that he, a person she had seen come to the applicant Livingston twice during the week before the incident, was implicated in the murder. The witness Richards, referring to the

assailant Williams as "... the one that escape ... ," said that she "... read of his escape in the paper (newspaper)."

In the cross-examination of Richards it was suggested:

> "... the only time you saw that person, Dwayne Williams, for the first time was at the Half Way Tree Court?"

She responded:

> "No sir..."

In response to the question, if she gave a written statement of having seen the assailant Williams in the dock at the preliminary enquiry, Richards said:

> "I do not recall giving a written statement, but I gave an oral information to the Crown Counsel at the time when I saw the fourth man sitting in the dock."

This is evidence to rebut the suggestion of recent concoction. The wider complaint however is that of non-disclosure.

This evidence, therefore, is led as proof that the witness Richards was not at the trial introducing the identity of the assailant Williams for the first time as an associate of the applicant Livingston. This evidence also supports the evidence of the witness Hope Dell that the men, including Williams, who went directly to the applicant Livingston's desk on 13th April 2000, remained for "one or two minutes," not merely for her greeting "Hi I'm Annette." The evidence is clearly admissible. We examine the principle of disclosure later in this judgment.

In ground 3(b), it was argued that the prosecution should have put in evidence the entire statement of the questions and answers recorded in respect

of the applicant Livingston, having led in evidence some of the answers to questions in that statement.

Det. Supt. Errol Grant had recorded a series of questions and answers at an interview on 26th April 2000 in respect of the applicant Livingston, in accordance with Judges' Rules 1964 (UK) and which were adopted in Jamaica. Learned Queen's Counsel submitted that once the questions and answers were reduced into writing, the best evidence rule required that the document be put in, instead of leading evidence of such questions and answers. That would be seeking to give evidence of the contents of the document. That argument is misconceived.

The transcript reveals some of the relevant questions and answers, at page 803:

> "Q. ... Did you ask her questions with regard to whether any of the men who came to the office that day at the time when Mrs. Playfair was attacked had actually spoken to her? ...
>
> A. (After objection) She said they said 'Hello' or 'Hi'."

and at page 809:

> "Q. ... did you ask her whether having said "hello" or hi" to her what she said to them? ...
>
> A. She says she said to them 'Hi I am Annette. Please take a seat."

The objection to this evidence being led was rightly rejected by the learned trial judge.

The police officer had conducted the interview himself and recorded his questions and answers in writing having cautioned the applicant. The prosecution was therefore at liberty, as crown counsel submitted, to choose to lead the evidence of the oral dialogue with the applicant. No reliance was being placed on the contents of written document. The evidence was clearly admissible. In any event, the defence was in possession of the written document and could have utilized it, if they had chosen to do so. The defence chose not to. This ground also fails.

Ground 3(c) was not proceeded with.

Ground 4(a) complains that there was a procedural irregularity resulting in a miscarriage of justice in that the prosecution did not disclose to the defence prior to the trial, the evidence of the witness Richards of her identification of the assailant Williams at the committal proceedings. Learned Queen's Counsel had objected to the evidence being led on the ground of non-disclosure of a statement of this evidence to the defence prior to it being led.

The transcript, at page 65, reads:

> "Mr. Phipps: The Prosecution ought not to have evidence put before a jury on which they have no instructions; and if they have instructions, the Defence is entitled to have those instructions disclosed to us especially in a case of this nature where this witness has gone way beyond anything that she has alleged to have said before."

and at page 66:

> HER LADYSHIP: But this is evidence that the witness is giving. This is evidence that the witness is giving.
>
> MR. PHIPPS: But, my Lady, can a Prosecutor really lead evidence on which they have no instructions and the Defence is taken completely by surprise and therefore embarrassed?
>
> HER LADYSHIP: Well, I will allow that. The witness has given that evidence. Your objection is overruled in relation to this.
>
> MR. PHIPPS: At an appropriate time I will make an appropriate application.
>
> ...
>
> MISS PYKE: m'Lady, based on what Counsel is saying, I would, at a certain point, having taken my examination to a certain point as far as I can, certainly out of courtesy to Counsel . ...
>
> HER LADYSHIP: Miss Pyke, it is either you have the instructions in relation to this or you don't. The witness is making a statement. Counsel is objecting to the witness making a statement and I am saying I overrule the objection. Where are you going to get that if you don't have the statement? I don't understand what you are saying. Counsel has objected because there is something the witness is saying and you say you have nothing?
>
> MISS PYKE: I don't have it.
>
> HER LADYSHIP: What are you going to give to Counsel?
>
> MISS PYKE: The other option, m'Lady, is to have the witness give a statement as regards all of this and what I would do, m'Lady, I would not ask any further questions at this point until he has been given the statement and I would take my examination-in-chief as far as I can so that Counsel

> can have a chance to look at it and then be prepared. That is all I'm trying to do, m'Lady. It having come out, m'Lady, that is what I would suggest as a solution, m'Lady, so that Counsel could see the full ambit of it and then at the ...?
>
> HER LADYSHIP: Miss Pyke, as I understand it, this is evidence that is coming from the witness. I don't see what purpose is going to be served by taking a further statement at this point. This is evidence before the Court."

As recited in dealing with ground 3(a) above, the prosecution witness Richards gave evidence that she had seen the assailant Williams in the dock at the preliminary examination, along with the applicants and she recognized him as someone who had come to the deceased's office twice in the week before the murder and spoken to the applicant Livingston. No written statement of that fact was collected from the witness Richards, consequently, none was served on the defence.

The prosecution has a duty to disclose to the defence all the evidence that it intends to lead at the trial of an offence particularly of this nature. This is to be done in order that the defence may be made aware of beforehand the case that it has to meet. The test is one of fairness. In ***Linton Berry v R*** [1992] 29 JLR 206, the Judicial Committee of the Privy Council allowed an appeal which complained of the non-disclosure of a further statement of a prosecution witness. Their Lordships at page 210 observed:

> "In relation to the disclosure to the defence of material in the possession of the prosecution, the key is fairness to the accused ..."

This decision re-inforced the dictum of Lord Denning in ***Dallison & Caffery*** [1964] 2 All ER 610 and overruled the stance of the Court of Appeal Jamaica in ***R v Barrett*** [1970] 12 JLR 179. In ***Richard Hall v The Queen*** Privy Council Appeal delivered 15th December 1997 (unreported) their Lordships, following ***Linton Berry v The Queen*** (supra) mandating disclosure of unused witness statements in specific circumstances, stopped short of advocating full and complete disclosure by the prosecution.

Although the decision in ***Richard Hall v The Queen*** (supra) was concerned with an unused witness statement their Lordships held that although the non-disclosure was a material irregularity, there was no miscarriage of justice because of the good quality of another eye witness in the case. In the instant case the proposed evidence of Richards as to the recognition of the assailant Williams should have been disclosed to the defence by means of a notice of intention to adduce along with a written statement of the said identification. This evidence was material to the prosecution's case. Although counsel for the prosecution belatedly sought to do so, the learned trial judge seemed not to have appreciated the necessity for such a procedure. The non-disclosure herein was also a material irregularity. However, there was other evidence in the case against the applicant Livingston, namely, the compelling inferences to be drawn and the circumstantial evidence which together amounted to good proof of guilt. In addition, the circumstance in which the fact of non-disclosure arose, afforded to learned Queen's Counsel ample opportunity to apply for an adjournment, if he

thought that the defence was prejudiced by the said non-disclosure. He declined to do so. Accordingly Learned Queen's Counsel cross examined the witness on the point suggesting that "the only time you saw that person Dwayne Williams for the first time was at Half Way Tree Court." The witness responded, "No sir." The applicant Livingston, in examination-in-chief, expressly denied that she knew the man Dwayne Williams and denied also that during "the week prior to Mrs. Playfair's murder ... that man had come to the office on two occasions and spoken to (her)." It is our view that despite the irregularity the defence was not unduly prejudiced. There was no miscarriage of justice. This ground also fails.

No arguments were advanced in support of ground 4(b) and ground 4(c) was abandoned.

Ground 5(a) complained of a failure by the learned trial judge to give a ***Turnbull*** direction in respect of the identification evidence of Williams, thereby creating a misdirection.

In treating with the identification of the assailant by the witness Richards, the learned trial judge on page 1423, said to the jury:

> "... so when she goes to court at Half Way Tree and she sees Williams, she says to herself, but I remember him and she not only say (sic) it to herself, she said it to crown counsel. She said it to another attorney who is (sic) there ... and she says to you, I saw him come by to Mrs. Livingston the week before the boss was murdered and she tells several people. Yes, we have – I've gone through that. It is for you, Madam Foreman and members of the jury, to say, whether or not you believe her when she tells you this. It is you, who must say, whether or not it is something that she has just made up. It is not

> everything that would be recorded in a statement to the police, it is for you, the jury, to decide whether or not she is a reliable witness and whether or not, you accept her evidence on that point or at all. The prosecution did not base its case on that piece of evidence, but it came out in evidence before you and you alone can say, whether or not you believe it. That is not what the prosecution's case was based on, but it is good evidence if you accept it, but only you can say whether or not you accept it."

The directions on the correctness of visual identification as laid down in ***R v Turnbull*** [1977] Q.B. 224, are required to be given, to a jury, whenever the prosecution's case against the accused "depends wholly or substantially on the correctness of one or more identifications of the accused." In the instant case although the identification of Williams is not the "identification of the accused", the nature of the prosecution's case, based on common design, did give rise to the need for care in respect of this aspect of the evidence of Richards. It was not entirely accurate for the learned trial judge to tell the jury "that the prosecution did not base its case on that piece of evidence." It was relied on to show that the applicant Livingston knew Williams before and was seeking by her subsequent non-identification of him, to distance herself from him. A ***Turnbull*** direction was desirable. However, the learned trial judge gave to the jury correct and extensive ***Turnbull*** directions in respect of Richards' identification of the applicant Drysdale. A jury could not have failed to appreciate that such directions were applicable to identification generally. In addition, in respect of the identification of Williams, the witness Richards was alleged to have seen him prior to 13th April 2000, twice under normal circumstances. On one of the

occasions she saw him for ten minutes, which would be distinctly different from such observation, in the context of an offence being committed. In any event the learned trial judge directed the jury to consider the credibility and reliability of the witness Richards and "whether or not you accept her evidence on that point or at all." With such directions, even if the ***Turnbull*** directions had been given to the jury, specifically, with reference to this evidence, the jury would still have convicted. This ground also fails.

Ground 5(b) complained of the failure of the learned trial judge to direct the jury adequately on the legal principles of common design as it related to the applicant Livingston.

Common design arises where two or more persons agree or join together to commit a specific offence and that offence is committed. In the result all persons who agree to commit that offence and who were present at the time it was committed and were actually assisting or aiding and abetting in the commission of the offence are equally guilty of the full offence. See ***R v Anderson & Morris*** [1965] 50 Cr. App. Rep. 216.

The learned trial judge in directing the jury on the principle of common design, at page 1292, said:

> "... this now, Madam Foreman and members of the jury, is where you have to deal with the accused who were not present in the – at the cutting, who did not themselves actually do the cutting; because what the crown is saying is even though, the accused Ricketts and the accused Livingston, were not present and did not hold the knife, they are saying, that they have brought evidence to you, on which you can find that

> all three, acted together. So, it doesn't matter what one did or didn't do. ... if you find that the intention was there, that the throat should be cut, then you can find that there was this common design, ... To say that even though, the other two men may not have held the knife, if you find that there is common design, all three, would be guilty."

At page 1294:

> "... the prosecution is relying on what is called joint enterprise and I go on to tell you about joint enterprise or common design. It's the same thing as common design, so let us keep it as common design. In essence, what the prosecution is saying is that although it was – they are saying that although it was the accused Drysdale, as well as the other man who is not before you, who wielded the knife that cut Mrs. Playfair, each of these accused before you are (sic) as culpable as if they used the weapon. It matters not which knife caused the injury."

at page 1337:

> "... the third accused is the accused Annette Livingston and for this accused the prosecution relies on three types of evidence, one, circumstantial evidence, two, common design and three, the deposition of Hope Dell. Now, let me deal with common design, Madam Foreman and members of the jury. The prosecution's case is that these three accused persons before you, together with a fourth who is not before you, committed the offence of murder. So the prosecution relies in part on the doctrine of common design to prove its case against the accused. What is the law on that? The law is that, where a criminal offence is committed by two or more persons, each may play a different part, but if they are acting together as part of a joint plan or agreement, to commit it, they are each guilty, that is the law.

> Now, Madam Foreman and members of the jury, the words plan or agreement do not mean there has to be any formality about it. An agreement to commit an offence may arise on the spur of the moment. Nothing need be said at all. A nod, a wink, a look, or just the behaviour of the parties, can infer an agreement. ... Of course, in this case there is no direct evidence of the agreement or arrangement and there is no need for you to prove – for the prosecution to prove any direct – to give you any direct evidence of the agreement or arrangement."

and at page 1349:

> "... mere presence at the scene of a crime is not enough to prove guilt, but if you find that a particular accused was on the scene and intended and did by his or her presence alone, encourage the others in the offence, then that accused is guilty."

The learned trial judge having defined common design to the jury specifically directed them to the areas of evidence from which they might draw inferences of the participation of the applicant Livingston in the murder. The judge told the jury, at page 1344:

> "Now, the accused, Livingston, in respect of accused Livingston, this accused, the prosecution says, was the inside contact person. Accused Drysdale and the other man passed the open door, Mrs. Playfair's open door and she is at her desk and talking on the telephone and then go straight to the accused Livingston. The accused Livingston gets up from her chair, and while she is walking to the photocopier the two men walked into Mrs. Playfair's office. Livingston does not look in the direction. She is at the photocopier when Mrs. Playfair screams the first scream – she is an employer who is good to her, she is the good friend of her employer, 17 years of loyal work and she does not look, she hears a scream and she hears the second scream when the receptionist gets up and the receptionist hears the second

> scream, goes towards Mrs. Playfair's office and the accused Livingston, runs towards the lunchroom because the receptionist is screaming out 'Call the police, call the police.' So Mrs. Livingston runs into the lunchroom, which has no telephone, and says to them in there, 'Call the police, call the police.' When she is asked what she is going to call the police about she says she didn't know and she didn't ask. But call the police. Of course, Madam Foreman and members of the jury, you may want to look into that carefully, that if you call the police you ought to have something to tell them, you ought to know what you are going to tell them and the evidence is that Mrs. Grier's office, the office manager, her office is next door to the lunchroom and there is a telephone in Mrs. Grier's office."

The learned trial judge then directed the jury to the fact that at page 1347:

> (1) "Mrs. Richards said Mrs. Livingston prevented her from going through the door."

that at page 1348,

> (2) "Mrs. Playfair is seen in the office ... holding her neck ... and ... she is making a gesture to open the door ... and ... this loyal employee (Livingston) goes pass her"

that, at page 1348,

> (3) "... Mrs. Grier who is on the balcony shouting 'See the men there, see the men there stop them,' is grabbed by the applicant and pulled off the balcony and told 'Grier Grier come and help Shirley ..."

The learned trial judge directed the jury to look at all these bits of evidence, in the context of common design in order to decide whether there was the relevant participation of the applicant. The learned trial judge could not be faulted in that respect. This ground also fails.

Ground 5(c) complained of a failure to direct the jury adequately on the principle of circumstantial evidence as it related to the applicant Livingston.

The learned trial judge directed the jury that the prosecution was relying on circumstantial evidence to prove the common design and said of such evidence, at page 1351:

> "... the prosecution is relying upon evidence of various circumstances relating to the crime and the defendants, which they say when taken together will lead to the sure conclusion, that it was the defendants who committed the crime."

The learned judge then warned them of circumstances that may weaken the prosecution's case and proceeded to give the accustomed direction in ***R v Hodge*** [1838] 2 Lew CC 227, 68 ER 1136. The jury were then directed specifically to the circumstantial evidence as it related to the applicant Livingston, namely, in relation to the two men who passed the receptionist and went directly to the applicant Livingston, the fact that the deceased could be seen through the glass to her office from the applicant's desk, the men going towards the deceased's office, while the applicant goes to the photocopier, the screams seconds after, the applicant going to the lunchroom without looking in the deceased's direction, the commotion and blocking of Richards by the applicant, the applicant passing the deceased without heeding her gestures for help and the applicant Livingston pulling the witness Grier from the balcony.

The learned judge said:

> "... all of it is pointing to the behaviour of the persons the three accused persons' behaviour pattern, what they did ..."

This Court held in ***R v Loretta Brissett*** SCCA 69/02 dated 20th December 2004 following the House of Lords decision in ***McGreevy v D.P.P.*** [1973] 1 All ER 503 that the direction on circumstantial evidence in ***Hodge's*** case was not mandatory. Therefore no special direction as contained therein is required. It is sufficient, even if the case is based on circumstantial evidence to remind the jury of the standard to which they must be satisfied of the guilt of the accused. A direction on the inferences that may be drawn from primary facts is generally sufficient. In the instant case the learned trial judge gave to the jury more than the requisite direction. This ground also fails.

The complaint in ground 5(d) was that the learned trial judge failed to direct the jury adequately on the good character of the accused.

Whenever in a criminal trial the good character of the accused is raised the learned trial judge has a duty to direct the jury on the manner of treating with it. The jury should be told, in those circumstances, that the accused being of good character, they should consider whether he is more likely to be speaking the truth and the fact that he is unlikely to have committed the offence ***R v Vye et al*** [1993] 1 WLR 471; ***R v Aziz*** et al [1995] 3 WLR 53. The learned trial judge, at page 1411, directed the jury:

> "... in deciding whether the prosecution has made you sure of the defendant's guilt you must give weight to good character. You have heard that she is a legal secretary, and that she has attained the age of forty

> (without) having committed any offence. Given that weight, as with any person of good character, it supports her case that she is telling the truth." (Emphasis added)

and at page 1434, in respect of the evidence of Miss Vinnette Forrester, a defence witness giving evidence of "the good character" of the applicant, said:

> "She has known to (sic) the accused for over twenty years and she has been able to observe her conduct and she says the accused is a very trustworthy person, somebody of good character, no wrongs, not in any wrong doing or unlawful activity, her reputation is not one that she is given to violence." (Emphasis added)

The learned trial judge there demonstrated an awareness of her duty to direct the jury on the defence of good character as it related to the credibility and propensity of the applicant Livingston. No particular words are required as long as the directions so convey to the jury the fact that the applicant is likely to be speaking the truth and unlikely to have committed the offence. In our view this was adequately dealt with by the learned trial judge. This ground therefore fails.

In respect of ground 5(e) the complaint was that the learned trial judge invited the jury to draw inferences unsupported by primary facts. We do not agree. In the first place, the learned trial judge properly instructed the jury on its right to draw inferences. She said, at page 1277:

> "As Judges of the facts, you are entitled to say what evidence you believe, what witness you believe or disbelieve, and what facts you find proved. Now, apart from finding facts, that is the actual facts proved, you are entitled to draw reasonable inferences from such facts as you find proved. By that, I mean that you come to common sense

> conclusions based on the evidence which you accept because it is what you accept as evidence that is important."

and at page 1278:

> "You are entitled to infer from facts proved, other facts necessary to complete guilt. You may draw inferences from proven facts, but you must not draw any inference, unless it is a reasonable one; and the only inference that can reasonably be drawn. Now, drawing inferences is the same as finding facts. Just as I cannot tell you what facts you are to find, so, I cannot tell you what inferences you are to draw. However, when I come to the areas in which you are required to draw inferences, I am going to point them out to you."

Learned Queen's Counsel did not elaborate on the instances of which he complains. The learned trial judge did invite the jury, in particular, in relation to the issue of common design, the primary fact and the possible inference but left it expressly to the jury as a matter for them. We do not agree that her directions in that respect were slanted against this applicant. This ground fails.

Ground 6 complained that the sentence was manifestly excessive. Learned Queen Counsel advanced no arguments in support. It is sufficient to state that the extreme nature of the circumstances of the commission of the offence as a general rule may have required a sentence of the length imposed.

**Ashley Ricketts**

Mr. Chuck in support of ground one, argued that the prosecution had not shown that the applicant Ricketts, a taxi driver performing his normal duties was a part of a plan to commit murder or grievous bodily harm. His cautioned

statement which revealed that he knew that the men were "going on a move" and "had a job fe mash up things" required full directions from the learned trial judge. The inconsistencies in his statements were insufficient to prove he was a participant. The fact that he, a taxi driver, took two passengers from Metcalfe Road and returned them there, accepted money to buy gas, and drove passing by two police stations after leaving Seymour Park, were not unusual nor suspicious enough to draw unfavourable comments by the learned trial judge. There was no evidence against the applicant to leave for the jury to consider, he submitted.

In our view the prosecution's case against the applicant was based on two cautioned statements he gave to the police as well other evidence from which the jury was asked to draw inferences from his conduct.

In his first cautioned statement given on the said 13th April 2000, exhibit 16, the applicant Ricketts said that the men, some of whom he usually transported, took his taxi at the intersection of Spanish Town and Waltham Park Roads at about 8:30 a.m. and,

> "Tell me fi carry them uptown on a move."

and that:

> "They were going to check a lady who have office in Seymour Park."

He took them to Seymour Park. They came out of his car went to the building to the right and returned after a few minutes and said that they did not see the lady. He drove out, went to Papine and returned with them at about 11.00

a.m. The men came out, and "got back upstairs at de lady office." They returned about five minutes and then ran back to the car. He said:

> "... this time mi si Amin with the knife in his hand and a yellow cap cover him hand and mi si blood on the knife and him hand. MN did have a knife too. The two of them did have knife. When dem come back mi ask Amin say how blood get on his hand. Him seh, 'Drive quick'. Mi drive straight down Old Hope Road goh down to Cross Roads and turn on Rousseau Road and goh back down Maxfield Avenue. Mi did a carry them back a Metcalfe Street and as mi turn on Metcalfe Street off Maxfield Avenue mi si the police. Mi try fi drive past, dem block the road. The police tell mi fi come out of the car. Amin seh a hope mi noh tell the police seh a wi go a Seymour Park goh kill the lawyer lady."

He said further that:

> "Is when the police stop wi mi si blood on both of them clothes ... When the police hold mi mi tell them lie; me never tell them the truth ...(in) a statement ... (at) Half-Way-Tree Police Station."

In the applicant's cautioned statement given on 19th April 2000, exhibit 17, he said, inter alia:

> "Thursday now, the 13th of April, 2000, a the first time mi a carry Amin, Kevin and MN up to CR at Seymour Park. Mi carry Kevin and Amin up there first in the morning Thursday ...
>
> Mi hear Amin and Kevin a talk seh because dem a dis wi for a wi fi get the money off the works that the big man give wi fi mash. ... We reach up there about 8.00 a.m. or 8.30 a.m. ... Mi park the car ... Amin go upstairs to the lawyer office ... Amin ... come back in the car and him say CR seh the lady no come yet so wi fi come back 11:00 a.m. ... Me drive way with them a Metcalfe Road ... "

Continuing, he related that he took the men back to Seymour Park "little bit after eleven o'clock," the men went upstairs and returned to the car both "blood up," with knives and told him "Drive Jerry."

The prosecution's case against the applicant Ricketts and which the jury considered was one of common design. He was present, aiding and abetting the commission of the crime. (***R v Anderson and Morris*** (supra).)

This applicant knew that he was taking the two assailants "... uptown on a move" (his cautioned statement of 13.4.2000). Commenting on this evidence, the learned trial judge at page 1329 said:

> "Madam Foreman and members of the jury, what do you make of that expression, carry them uptown on a move? We are all Jamaicans. It is a matter for you."

He was taking them, to check a lady who had office at Seymour Park. He also knew that the said assailants had "... works.. we fi mash" and he was conveying them for that purpose (his cautioned statement of 19.4.2000). When the applicant saw one of the assailants with the knife and blood on the knife and the hand and the yellow cap covering both, he said that he asked how blood got on them. He was told "Drive quick." He complied.

The phrases "... on a move ..." and "... works we fi mash..." in Jamaican parlance convey a significant impact of unlawful acts. The learned trial judge correctly asked the jury to consider, as Jamaicans, the said phrases.

***R v Steve Brown et al*** SCCA 37,38,39 & 40/96 dated 27th October 1997, at page 6, alluding to the participation of the applicant ***Steve Brown*** in a

common design to murder, on the basis of ***R v Anderson and Morris*** (supra) I said:

> "It is quite true, as submitted by counsel, that the applicant's mere presence is insufficient evidence that the applicant was a part of the joint enterprise. If, however, the applicant involved himself in the joint enterprise by accompanying the other men going to 'mash up the works', and the applicant was aware, as in the instant case, that at least one of the men had a lethal weapon, namely, a 9mm pistol, the applicant would be seen as one with the foresight to contemplate that the possible consequence of the venture was death or serious bodily injury."

In the instant case, the applicant Ricketts did not observe the assailants with any knives prior to the entry "upstairs to the lawyer's office." However, his knowledge that they were "on a move" with "...works...fi mash", was sufficient for the jury to consider and find that he would contemplate the commission of unlawful acts and that at least some harm would be caused thereby to the lawyer lady, albeit not serious bodily harm. With that knowledge he continued to participate despite his subsequent awareness of the knives and the blood.

The unhesitating compliance by the applicant Ricketts to the directive "Drive quick" without refusal nor dissent, in the circumstances, was capable of being construed as the action of a participant with prior knowledge of the need for urgency. There was no evidence of any threats or duress exerted on the applicant by the assailants. In ***Dennis Lobban v R*** [1995] 46 WIR 291, the driver of the "getaway" car was dismissed from the case because the prosecution could not negative the defence that he was forced to drive by the use of threats.

In his statement dated 19.4.00, the applicant Ricketts also said that having driven with the men onto Metcalfe Street:

> "...mi see the police. Mi try fi drive past, dem block the road. The police tell me fi come out of the car. Amin seh a hope mi noh tell the police seh a wi go a Seymour Park goh kill the lawyer lady."

By the absence of a response or comment by the applicant to this entreaty to conceal knowledge, the jury could have assumed that the applicant Ricketts was tacitly accepting knowledge of the killing, which knowledge would have come to him before the act. There was no evidence that he had been expressly told of the outcome of the visit to the deceased's office. Furthermore, the attempt to drive down onto the police and soldiers correctly drew the comment of the learned trial judge. The applicant himself gave as the sole reason why he did not drive onto them was because "the police and soldier have gun."

The conduct of the applicant before and after the killing was sufficient to show that he was purposely present to transport the assailants to the scene and thereafter to evade apprehension. The jury could find on the evidence, that in all the circumstances he was present aiding and abetting the assailants and therefore was a participant in the common design. There was some merit however in the arguments in support of this issue. We will return to this later.

Ground 2 was a complaint that the learned trial judge was in error to have rejected the submission that there was no case for the applicant Ricketts to answer.

In keeping with our views in respect of ground one, we maintain that at the close of the case for the prosecution, there was ample evidence on which a jury could have arrived at a verdict adverse to the applicant Ricketts (***R v Galbraith,*** (supra),) on the ground that the applicant was a participant in the joint enterprise.

There is no merit in this ground.

Ground 3 complained that the directions of the learned trial judge on the principle of common design were inadequate and misleading and therefore a misdirection.

The learned trial judge gave full and adequate direction on the principle of common design. She told the jury, at page 1292:

> "... what the crown is saying is even though, the accused Ricketts and the accused Livingston, were not present and did not hold the knife, they are saying, that they have brought evidence to you, on which you can find that all three, acted together."

at page 1293:

> "If you find there was common design between all three of them, though the (crown) is saying the one who used the knife is Drysdale, then the other two would be equally guilty, ..."

And at page 1338:

> "... where a criminal offence is committed by two or more persons, each may play a different part, but if they are acting together as part of a joint plan or agreement, to commit it, they are each guilty, that is the law."

At page 1344, referring to the fact that the applicant Ricketts drove the car slowly out of Seymour Park with the assailants with the windows down and that when the car was stopped on Metcalfe Street, the windows were then turned up, and the applicant Ricketts was with the assailants "... locked up in this car with the bloody men with their knives with blood and sweating profusely in there", said:

> "... that is conduct which shows knowledge and participation in the agreement to murder, not afterwards, not no knowledge that he got afterwards, it is what he knows is a move that these two men were going on."

and at page 1349:

> "Now, mere presence at the scene of a crime is not enough to prove guilt, but if you find that a particular accused was on the scene and intended and did by his or her presence alone, encouraged the others in the offence, then that accused is guilty."

The learned trial judge did tell the jury at page 1408:

> "The evidence of the security guard, if you accept it, is that the windows of the car was down – I think we have gone through that - just as when the car drove in, but the evidence of Corporal Hepburn, is that, by the time they were at Metcalfe Street all the windows were up. Defence counsel says the prosecution must be able to point to an expressed plan, but the law is that an agreement can be inferred on behaviour of fear, which is what the prosecution is saying to you. The prosecution is saying to you, we cannot point to an expressed plan, but you are to infer it from the behaviour of the parties. What you have to be sure of is that the accused took part in an unlawful act, that is providing transportation for the men identified and that when he agreed to wait for them, he

> realized, he knew that they intended to do that unlawful act to either kill or to cause serious injury."

The learned trial judge used the phrase "behaviour of fear" in the context of the applicant Ricketts driving from Seymour Park to Metcalfe Street with the window of the motor car wound up. The jury could not have failed to consider that the "fear" may have been referable to the "fear of apprehension" or the "fear of detection." From the passages of the transcript referred to above and also the various other instances in the summing-up of the learned trial judge to the jury on the concept of common design, it could not properly be said that the jury was not adequately assisted in the manner of applying the said law to the facts.

There is no basis for such a complaint on this ground.

Ground 4 complained of a failure to give a direction adequately or at all on the issue of lies thereby amounting to a misdirection.

Where the prosecution's case is relying on lies, or where lies may be used by the jury to support evidence of guilt, as distinct from the credibility of the accused, the trial judge should give a direction in accordance with ***R v Lucas*** [1981] Q.B. 720; 73 Cr. App. R 159 – (***R v Goodway*** 98 Cr. App. R. 11).

The learned trial judge, in her directions to the jury, referring to the defence counsel's comment on a discrepancy in the prosecution's case, at page 1410, said:

> "Counsel says, there was a discrepancy in the evidence of ... Corporal Hepburn of course, Constable Lindsay was sworn, he said the accused, Ricketts,

> came out of the car, because it would impact on whether or not the accused told the police, that he had said that the men who came out of the car, charter him up Maxfield, I said it is a very long sentence, I hope you have gotten it. But the accused, Ricketts himself, said he lied to the police, so what do you make of this? Matter for you in respect of this accused."

The above direction was relied on to support the complaint that a ***Lucas*** direction was required. The direction was given in the context of discrepancies as complained of by the defence. It was not a reference to the prosecution using lies to support its case. As mentioned previously, the prosecution's case relied on inferences from primary evidence and common design, not on lies told by the appellant (See also ***Courtney Vassell v R*** SCCA 108/98 dated 31st July 2001 (unreported)).

We agree with Mr. Fraser for the prosecution that the learned trial judge was examining the discrepancies in the statements of the applicant ***Ricketts*** as it related to that of the prosecution witnesses Hepburn and Lindsay as to their respective credibilities. The learned trial judge did give proper directions to the jury on the treatment of discrepancies. In all the circumstances there was no need for a ***Lucas*** direction. This ground also fails.

Ground 5 is a complaint that the several comments on the evidence by the learned trial judge were "unfair, injudicious and unsupported by the evidence and therefore was a miscarriage of justice."

A trial judge is not precluded from commenting on the evidence although findings of facts are for the jury. He may do so provided that his comments are

balanced and fair. In ***R v Dave Robinson*** SCCA 146/89 dated 29th April 1991 (unreported), it was held that a trial judge was entitled to make comments to the jury on the facts of the case – strong comments - provided that they are fair and the jury is informed that they may discard his comments if such comments do not coincide with their thoughts on issues in the case.

In the instant case, the learned trial judge, reminding the jury of their functions in respect of the evidence, at page 1276 said:

> "Your duty is in relation to the facts. It is my duty to remind you of the evidence presented by both the prosecution and the defence, which I think may help you. But, you the jury, must take into account anything omitted by me, which you consider important and ignore, if you think fit to do so, any view of the fact which I express ..."

The various comments by the learned trial judge enumerated by counsel for the applicant Ricketts, were in respect of (1) the meaning of the term "on a move" as Jamaicans (2) the applicant saying "me and dem" as distinct from "me tek dem back" (3) the receipt of money by the applicant to buy gas in advance of the journey (4) the applicant's knowledge that the men were going "up to the stairs to the lawyer's office" (5) the absence from the applicant's statement of 19th April 2003 that he was told not to tell the police "we go a Seymour Park go kill the lady" (6) driving the "old Datsun" motor car slowly, in the complex, instead of "fast" as directed, in order not "... to attract attention," (7) driving "skillfully avoid (ing) two police stations", taking the applicant Drysdale "one door away from his home", knowing that "... it is a move that these men were going

on" (8) the reminder of joint participation of "any of these three accused," by means of "... a nod, a wink a look ..." some part in committing it, no matter how small, (9) the fact that the windows of the car were wound up "... somewhere on the road between Old Hope Road and Metcalfe Street," (10) the fact that the men spoke of "going to Seymour Park to mash a works" despite the fact that the applicant said that he did not listen to people's conversation (11) the voluntary act of transporting the men despite seeing the blood on their hands, and (12) the fact that the applicant said he lied to the police.

In respect of each of the above comments, the learned trial judge was referring to an aspect of the evidence, and distinctly told the jury that, it was a question for them or a "matter for you" or "what do you make of this?" These were appropriate comments relating to issues which arose on the evidence. The jury could not have failed to appreciate, in view of the initial direction on the opinions expressed, that they were obliged to reject any expressed views which they did not accept. No prejudice arose.

A further comment of the learned trial judge related to the fact that the "getaway car was" a Datsun and that the deceased had assisted the applicant Livingston to purchase a Datsun motor car. This Court permitted fresh evidence to be led which proved that the Datsun motor car which was driven by the applicant Ricketts on 13th April 2003 was licenced and registered in the name of the brother of the applicant Ricketts. The Court permitted it on the basis that it was relevant to that comment by the learned trial judge, that the evidence was

capable of belief and if led at the trial would have cast doubt on any view that the Datsun motor car being driven by Ricketts was in any way that which had been bought by his co-accused. See ***R v Kenneth Clarke*** Privy Council Appeal No. 93/02 dated 22nd January 2004 following ***R v Parks*** [1961] 46 Cr. App. R. 29.

Having reviewed the fresh evidence we are satisfied that the said comments may well have created some prejudice to the applicant Ricketts. However, despite this, there is ample evidence led which would have led the jury to accept that the applicant was a willing participant in the joint enterprise on 13th April 2003. There was no miscarriage of justice occasioned thereby. This ground also fails.

***Ramon Drysdale***

Supplemental ground one complained of a failure by the learned trial judge to give adequate directions to the jury in respect of the issue of the identification of the applicant which failure amounted to a misdirection.

As stated earlier Mr. Mitchell, counsel for the applicant did not seek leave to argue that ground.

In arguing ground 2 that the sentence was manifestly excessive, counsel referred to the antecedents of the applicant Drysdale and in particular, that in 2003, he was 25 years old and in those circumstances his sentence should be reduced.

In summary, it is our view that the case presented by the prosecution against the applicant Livingston and which was accepted by the jury was based on her participation in the joint enterprise to kill or cause serious bodily harm to the deceased. As we observed earlier, her acts of conversing with the assailants at her desk, her indifference to the screams of the deceased, blocking a fellow employee to aid non-interference, and her failure to identify the assailant Williams whom she knew before, were acts which together with her own testimony fix her as a participant.

In her said testimony, the applicant admitted that after she came from the lunchroom and saw the deceased with one hand around her neck, beckoning with the other for assistance to open the door, she the applicant instead passed her by 5 feet away. Having seen defence witness Mrs. Grier on the balcony overlooking the exit downstairs and hearing her saying "Murder, thief see them coming down the stairs there," the applicant ran to the balcony, pulled on Mrs. Grier and said "Come let us take Mrs. Playfair to the doctor." Having done so, the applicant returned to the office and in her own words, "... dropped in the settee, confused, nervous and crying," no longer desiring to take the deceased to the doctor.

The jury was entitled to find that although the applicant said that when she saw the deceased with her hand at her neck, there was a "lot of blood running down on her blouse", the applicant's refusal to assist to open the door, in response to the deceased's beckoning hand, was the act of a participant

leaving the victim to her intended fate. Without having seen a wound, despite seeing the blood on the deceased's blouse the jury was entitled to infer that the applicant could not have known, without prior knowledge of the assailants' act, that the necessity existed for the deceased to see a doctor.

It would have been revealing to the jury, that on cross-examination the applicant Livingston was asked:

> "Q. ... you said you ran to the corridor where Mrs. Grier was didn't you? ... to the balcony?"

The applicant replied:

> "A. Yes, she was the only one with a car that day to take her to the doctor."

Again, the jury would have been entitled to find, that the applicant could not have known unless she was a part of the plan, that the deceased was harmed to the extent that she had to be taken, by car, to see a doctor. Furthermore, the applicant would have known that Dr. Thomas' office was immediately opposite to the deceased's, to which office the deceased, in her extreme state, went unaided. There would have been no need to use a car. The jury may well have found, correctly, that the true reason for the action by the applicant in calling Mrs. Grier from the balcony was to create a diversion intended to assist the assailants to leave the premises without apprehension. The conduct of the applicant Livingston on the day of the incident, would have compelled the jury to draw the inference that she was consistently indifferent to the plight of the deceased and intent only in lending aid to the assailants.

The applicant Ricketts, having been told by the assailants that they were "going on a move" and "... fe mash up some works" would have been aware that he was transporting them for an unlawful purpose and that this would inevitably cause some harm to the "lady at Seymour Park", albeit, not serious bodily harm. The proper test was as stated by the Court of Appeal (England) in ***R v Church*** [1966] 1 QB 59 at 70, 49 Cr. App. R. 206:

> "... an unlawful act causing the death of another cannot, simply because it is an unlawful act, render a verdict of manslaughter verdict inevitable. For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm."

This test was approved by the House of Lords in ***D.P.P. v Newbury*** [1977] A.C. 500.

The activities of the applicant Ricketts would make him guilty of at least the offence of manslaughter.

Consequently, both applicants Drysdale and Livingston were properly convicted by the jury of murder. The learned trial judge should have given to the jury directions in keeping with the test in ***R v Church,*** supra. The learned trial judge should have left the issue of manslaughter for the consideration of the jury. He may well have been convicted of manslaughter.

Both learned Queen's Counsel and counsel for the applicants Livingston and Drysdale argued that the sentences were manifestly excessive.

The aim of a sentence is to achieve the goals of deterrence, punishment of the offender, the protection of the society and rehabilitation. Sometimes these aims overlap and one goal may assume an ascendancy over the other. The learned trial judge in her comments, in response to counsel for the applicants Ricketts and Drysdale, both of whom asked the Court to take into consideration the environment from which they came, quite correctly said:

> "... I don't know where it has come from that because you are poor you must behave in a particularly depraved manner ..."

and continuing at page 1458 said:

> "I take into account the various roles. This is a murder and all murders are vile from the days of Cane (sic) and Abel it was vile, it remains vile today. It doesn't matter who the victim is. What does matter is the manner in which the murder is committed. The victim is not the important thing. It is how it is done and this is what will be reflected in the sentences."

The learned trial judge seemed to have placed the prime emphasis on the retributive factor.

Brennan, J., in ***Channon v R*** [1978] 20 ALR 1, then a judge of the Federal Court of Australia, in discussing the aims of criminal punishment, referred to the recognized goals and said:

> "The necessary and ultimate justification for criminal sanctions is the protection of society from conduct which the law proscribes. Punishment is the means by which society marks its disapproval of criminal conduct, by which warning is given of the consequences of crime and by which reform of an offender can sometimes be assisted. Criminal

> sanctions are purposive, and they are not inflicted judicially except for the purpose of protecting society; nor to an extent beyond what is necessary to achieve that purpose." (Emphasis added)

A balance must be maintained in the infliction of punishment in sentencing. The sentences imposed may well have been manifestly excessive.

In the circumstances, the applications for leave to appeal against conviction in respect of the applicants Livingston and Drysdale are refused.

The application of the applicant Ricketts for leave to appeal against his conviction of murder is granted. The said application is treated as the appeal. The appeal is allowed. The conviction of murder is quashed the sentence is set aside and a verdict of manslaughter is substituted. The sentence imposed is twenty (20) years imprisonment at hard labour to commence as from 10th July 2003.

The application for leave to appeal against sentence of each applicant Livingston and Drysdale is allowed with regard to the period that each should serve before being eligible for parole. The sentence of each applicant is imprisonment for life. Each shall not be eligible for parole until a sentence of thirty-five (35) years at hard labour has been served. The sentences shall commence as from 10th July 2003.