JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL Nos. 158 & 159/81

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Carberry, J.A.

R. v. BRADLEY GRAHAM & RANDY LEWIS

Carlton Williams for the appellant Graham

Gayle Nelson for the appellant Lewis

Garth McBean for the Crown

May 27 - 30; & June 26, 1986

ROWE, P.:

This judgment represents the consolidated efforts of the members of the Court. The story began at Coleyville in the parish of Manchester on the night of March 31, 1978, at the premises of Ramsay Chang (the deceased) a baker, who had in his employment several men, owned a number of bread-vans and operated his own bakery under the name and style "Coleyville Bakery". Much activity was in progress about 9:30 p.m. on that fateful March evening: the bread-vans were drawn up and parked with their backs towards the bakery; the mechanics were engaged in servicing the vans; men were transferring trays packed with bread from bread-tables in the bakery to the bread-vans; these trays when

received at the rear of the vans were passed to men standing inside the vans who laid out the trays therein in orderly fashion.

Suddenly four strange men entered the premises and on one version they made some vague enquiries concerning bread. At that time it seems the deceased was supervising the loading operations. Mr. Vercy Smikle, a driver/salesman was in the body of one van receiving bread while Carlton Carter, another salesman, was inside a second bread-van receiving bread from Errol Hyman. The premises were well lit. Inside each bread-van there was light but as one would expect, such light was dim. Outside the premises was illuminated by a big bright bulb and on the inside of the bakery there were some 9 lights, five from florescent bulbs and the other four, by ordinary light bulbs.

One of the four strange men and who was wearing a mask, pointed towards the deceased and said "See him there". Thereupon two of these men went towards the deceased, and took him into the office. One man came to the back of the bread-van in which Smikle was standing and used words "This is a hold-up". This incident was described as a "sticking up" from which the inference can be safely drawn that the man pointed something at Smikle. This something Smikle described, saying:

> "He had a gun. It resemble a gun.
> It must be a gun."

In other passages in the testimony of Smikle he referred to the fact that the man who stuck him up and who later kept guard over himself and other workers inside the bakery, "had the gun pointing at us". It can be deducted from the evidence that this same man who stuck up Smikle, went to another bread-van and accosted Carlton Carter.

He pointed up something covered with a rag which had the appearance of a gun towards Carter and ordered:

"Boy come down out a the van."

Carter rejoined asking if this man thought he was a wrong-doer, and this drew the further order:

"Go inside the bakery."

Smikle, Carter, Hyman,one Dixon and a fifth man, one Findlay, were herded into the interior of the bakery. The two men who had gone to Mr. Chang, were both carrying something in their hands. Smikle could not determine the nature of one of these things because it was covered with a piece of dark cloth but the other thing he said, at p. 409 of the record, was a gun. These two men asked Mr. Chang to give them his gun and they took physical hold of him and carried him from the floor of the bakery into his office which was reached by steps leading from the interior of the bakery to what appears to be akin to a mezzanine floor. Constructed partly of board and party of glass, the office could also be reached by one standing on a table resting on the bakery floor and then climbing up through an opening in the glass, if as happened in this case, a hole was shattered through the glass.

Evidence was led by the prosecution before Wright J. and a jury in the Manchester Circuit Court at a trial lasting between the 20th and 27th October 1981 that Ramsay Chang, the baker, was shot by one of the four men who invaded the premises and that he died as a result of massive internal haemorrhage with haemopericardium haemothorax producing hypovelonic shock. He was shot three times at close range insomuch so that there were indications of powder burns on the skin. One gunshot wound was one inch in front of the tragus of the right ear and the missile passed into

and lodged in the opposite maxillary area. The second wound was to the right side of the chest wall at the level of the fifth right costal chondral junction. The projectile caused a small hole in the pericardium, right atrium, inter atrial septum, left atrium, left lower lobe of lung and fracture of the fifth rib posteriorly. The bullet was found lodged subcutaneously over the posterior chest wall. There was a comminuted supracondylar fracture of the left humerus, and the bullet was found in the posterior compartment of the arm.

At that trial the two appellants were convicted of the murder of Ramsay Chang and sentenced to suffer death in the manner authorized by law. Both convicted men applied for leave to appeal. When the application reached this Court in May of 1983, the Court was informed by counsel that he had tendered advice to the relatives of the appellant Graham that in counsel's view there was no arguable point in the application on Graham's behalf. An adjournment was granted by the Court to give the applicants an opportunity to be represented. When the matter next came before the Court there is no record that either applicant was represented by counsel and the Court proceeded to consider and to dismiss both applications.

By letter dated March 25, 1986, His Excellency the Governor-General, acting on the advice of the Privy Council, referred the whole case to the Court under section 29 (1)(a) of the Judicature (Appellate Jurisdiction) Act, which provides that:

> "The Governor-General on the consideration of any petition for the exercise of Her Majesty's mercy ..... may if he thinks fit at any time, either:

> (a) refer the whole case to the Court and the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted; or ....."

The instant reference is in relation to both the appellants and as the whole case is referred to the Court we are obliged to consider all aspects of the convictions and the several grounds of appeal put forward on behalf of both appellants.

Counsel appearing for the appellants were in the happy position of getting a second bite at the cherry when they had as a guide the contents of the full petition to His Excellency which grounded the Reference to the Court and they made a most painstaking and full presentation which deserved and received our commendation.

Mr. Chang was murdered. Commonplace defences such as self-defence, provocation, accident, diminished responsibility, could not be and indeed were not advanced during the trial. Issues of great moment much canvassed at trial and critically scrutinized before us concentrated upon the identification evidence which sought to implicate the appellants, and the law relating to joint enterprise or common design. Before turning to look at the grounds of appeal which contained a series of sustained attacks upon the summing-up of the learned trial judge, we will recount the evidence in some detail.

At the very commencement of the trial, that is to say, before a jury was empanelled, defence counsel invited the trial judge to visit the locus to familiarize himself with the lay-out of the bakery and the position of the several lighting fixtures. Firmly, yet gently, the judge pointed to the futility of such a procedure and indeed to

its danger, seeing that questions of facts were for the jury. He, however, granted an adjournment to defence counsel, who was enabled to visit the scene, and in the process one day's hearing was lost. Late starts, requests for early adjournments, absence of prosecution witnesses, lengthy defence cross-examinations, exasperated an otherwise patient judge into making one or two injudicious comments. We think that caustic comments from the bench are best left, if they have to be made at all, until the case has been fully disposed of and a verdict returned.

Three of the deceased's employees who were present at the bakery on the night that he was shot gave evidence for the prosecution. Mr. Smikle, to whom reference has already been made, said that the man who stuck him up, saying, "This is a hold-up" and who had what resembled a gun, or what was a gun, was only about 1½ yards away from him while he Smikle was in the bread-van. He could see and did clearly see the whole of the body of that man, the whole of his front part, by the aid of the electric lights which were burning in the bakery yard. Smikle said he obeyed the order to alight from the van, and he along with four others were "hurdled together" into the bakery. When inside the bakery, this man, he said, kept walking around the group of five men pointing his gun at them. During that time he, Smikle, could see the whole of the man's body, back and front. That man, he said, was dressed in a ganzie shirt and the lower part of his trousers were cut short. He was no more than a yard from Smikle as he walked around them. Mr. Smikle estimated that from the time he was first stuck up until he was eventually locked into the van by the man who maintained control over them was between 15 and 20 minutes, and throughout this period he had the hold-up man in his view under good

lighting conditions. In the course of the cross-examination Smikle said he saw the men between 5 and 7 minutes before he was marched inside the office, denying the suggestion of counsel that the incident he described would take no more than a matter of 10-20 seconds.

Of the two men who took Mr. Chang to his office, Smikle described one as tall and the other as short. He heard them asking Mr. Chang for money and then he saw the short man run downstairs and outside with a bread bag in his hands which Smikle said contained money. This man re-entered the office and said:

> "The chiney boy no have no money
> so kill him."

Smikle's narrative of the evening's event continued with his assertion that after this short man spoke, a tall man climbed upon one of the bread tables, pointed a gun at the office, fired a shot which shattered the glass into the office. Smikle heard two other firearm explosions and he also heard cries of "Murder" emanating from Mr. Chang. This done, the man who held them at gunpoint ordered them outside. On the way out they came upon other workers at the bakery who were then reporting for duty. These workers together with the original five men were locked into one of the bread-vans by the hold-up man.

It will be re-called that Mr. Smikle had said the short man whose activities are related above was wearing a mask. This mask consisted of some material tied below his nose but covering his mouth and chin. His nose was visible. This man also wore a cap. However, said Smikle:

> "I could see his face. He wear a cap but
> while he was pointing to the boss he ease
> up the mask like this and you could see
> his face and also his beard .....
> I could see under his chin, his beard."

He later said that he saw the face of this man for 3-4 minutes and that when the man was descending the step from the office as also when he returned to the office and spoke he only saw his back. Mr. Smikle said too, that on the night of the incident not only was he able to see the mouth of the masked man but he also saw his teeth and noticed that they were spaced wide apart. He took note of the man's head and of the manner in which his hair grew. Mr. Smikle demonstrated the method by which the man lifted the mask,showed how he peeped inside and in the process leaned his head so that he, Smikle, could see the man's face and his teeth.

Nine weeks after the shooting, i.e. on June 5, 1978, Smikle attended an identification parade in Kingston which was conducted with the use of a one-way mirror, and he identified the appellant Bradley Graham as the person who had held them up at gun-point on March 31. Some 6 weeks later, on July 20, 1978, he attended another identification parade in Kingston and identified the appellant Randy Lewis as the masked man, who inter alia, gave the order to shoot on the night of March 31.

Carlton Carter's evidence corroborated that of Smikle as to how 4 men were taken from the bread-vans into the bakery at gun-point by one man, and how two men, one of whom was masked, took hold of Mr. Chang and carried him to the office. Carter described how the man wore the mask and the cap. He said the cap had a peak but it was so worn that he could see the forehead of the man and observed that the man's "forehead not set like our own, I saw the peak over his forehead". He has a "peak on this forehead, him have a little lamp shade over his head". Carter heard "wrassling" in the office where Mr. Chang and his captors were, but inferentially he could not see what was taking place there. In Carter's picturesque phrase, he "disguised"

himself from his guard and hid under a flour machine from which place he said he could and did observe events in the bakery. Carter heard Mr. Chang bawling for murder and then he saw the masked man run from the office into the bakery and when he reached the outer door he turned to the other intruders in the office and said:

> "Turn back go shoot the b..... c..... chiney boy and come."

A man then climbed upon the table and from that position fired 3 shots. The men ran from the office while the hold-up man took the workers outside. Carter said he was about 1½ chains from the step down which the masked man came, but that man so turned his face that he, Carter, could see him. It is of some importance that Smikle had said in cross-examination that in his view a person hiding under the flour machine could not see into the office, and it is of importance too that Carter's recollection of what was said by the masked man, did not make any mention of money.

Carter identified the appellant Bradley Graham at an identification parade on the 5th June, 1978, as the hold-up man. On that parade he asked that the men in the line-up raise their right hands and he pointed out the appellant Graham after he saw a large scar at the back of Graham's right hand which scar he said was his means of identifying Graham. Carter said he had observed this scar when the man was pointing the object at him as he, Carter, stood in the bread-van on the night of March 31, that although he told the police the clothing being worn by the man he did not mention the scar and that on the identification parade the appellant Graham was the only one with a scar. Called upon to estimate the length of time during which he had observed the face of the appellant Graham, Carter said, "15 or 20 minutes" and

denied that it would be no more than 5 or 10 seconds. From a passage of the deposition taken from Carter at the preliminary examination which was exhibited at trial as also from his evidence, the back of the hold-up man was the only part of his body visible to Carter from he was ordered out of the bread-van to the end of the incident. Carter's ability to estimate time was put to the test and a period of cross-examination of 18 minutes appeared to him to be but five minutes.

The appellant Randy Lewis was identified by Carter at an identification parade on July 20, 1978 as the man who carried Mr. Chang up the steps and who spoke about shooting the chiney-boy. At trial Carter said he noticed that the appellant Lewis "tried to hide away him face from me" on the parade. Carter was quite firm in his answers to counsel for the defence that he was not mistaken in his identification of either appellant and that from his position under the flour machine it was possible to see the events of which he testified. His evidence, however, that the hole in the glass made by the bullet was too small to admit his Carter's shoulders and his evidence that the man who fired the shots did not enter the office, diverged from that of Smikle and that of Hyman.

Hyman had been in the process of taking bread to Carter when he heard the command "don't move" and he saw a man whom he identified at an identification parade on June 5, 1978, as the appellant Graham, standing right in front of him under an electric light holding a gun and a knife in his hands. He observed a scar on the man's right hand and he had the man in view for about 3 minutes when he could see all portions of the man's body. Hyman's version of events was that the men who took Mr. Chang into the office were engaged in a fight with him and he saw Mr. Chang fling an object which broke the glass

of the office. One man who Hyman identified as the appellant Lewis left the office with a parcel of money and went to the bakery door. Then Hyman heard a voice say:

"Shoot the chiney boy and come down."

This was followed by a man entering the office through the broken glass, firing 3 shots, taking up some money from the office emerging through the same hole in the glass and left. Hyman said that the man keeping guard was behind him all the time that he was held-up in the bakery and that after the shooting he Hyman was locked up with others in the van.

Hyman admitted giving a description that the hold-up man was wearing short pants and shirt but he did not remember if he had said anything to the police about the scar on the man's right hand. On the identification parade for the appellant Graham, Hyman asked the Inspector of Police conductin the parade to request all the men in the line-up to pull up their sleeves and when this was done he identified the appellant Graham who was the only man on the parade with a scar. It does not appear that Hyman attended the identification parade for the appellant Lewis and Hyman did not at any time purport to identify Lewis.

Inspector of Police Excle Dias conducted the identification parade for the appellant Graham on June 5, 1978, at C.I.D. Headquarters in Kingston. The Inspector outlined in evidence the procedure adopted by him for holding this parade. A one-way mirror was used. Representing the suspect Graham on the parade were Mr. Soutar, Attorney-at-Law and also present was Mr. C. Brissett, a Justice of the Peace. After having been advised of his right to elect to stand under any of the numerals 1 to 9, to change his position at any time, and also his clothing, the suspect Graham took up position No. 6. Wilfred Garwood, the

first witness on the parade did not point out the suspect. Three witnesses Smikle, Carter and Hyman pointed out Graham. Four other witnesses called on to that parade did not point out Graham. Inspector Dias agreed with defence counsel that in order to ensure fairness of identification parades it was his practice to conceal visible/prominent identifying marks on suspects, and to place similar coverings on all the men in the line-up. This precaution was not taken in the parade for the suspect Graham as he was unaware of the scar on the back of Graham's right hand.

The identification parade for the suspect Randy Lewis was conducted by Inspector of Police Glen Champagne, on July 20, 1978, at the Central Police Station in Kingston. On the morning prior to the parade, the Inspector said that he told Lewis who was then in custody that he would be conducting a parade for Lewis at 1 p.m. that day in connection with a case of murder and that Lewis could have an attorney, a friend or a relative to witness the procedure of the parade. Lewis, said the Inspector, elected to have his brother Bradford Lewis as his representative and in addition the police summoned two Justices of the Peace, Mr. Ivan Miller and Mr. Touzalin, to be present to observe the procedure of the parade. As was the case in the parade for Graham, the first witness called was Wilfred Garwood, who upon viewing the line-up said:

> "A see a man, number 9. A know him but a don't know if he is there."

Garwood was referring to the suspect Randy Lewis. Two other witnesses called on that parade, Smikle and Carter, identified Lewis. In the course of cross-examination it emerged from Inspector Champagne that the height of the men on the parade for Lewis varied from 5 feet to 5 feet 8½ inches. Lewis is 5' 5½", one man was 5' 6½" and 4 of the men were

5' 8" and over. The identification parade forms were incomplete in that the space provided for recording the colour of each man on the parade was not filled in. Inspector Champagne did not concede that there was a dissimilarity in the appearance of the men due to the height differentials. Indeed he said in re-examination that the suspect Lewis, having been told of the impending parade, himself asked prisoners then in the cell-block to volunteer to serve on the parade with him. Earlier in the trial Smikle had admitted that some of the men on the parade for Lewis were taller and some were shorter than Lewis. Mr. Ivan Miller, one of the Justices of the Peace who witnessed the parade for the suspect Lewis, gave evidence for the prosecution. He confessed that that was his first experience of witnessing an identification parade in his 17 years as a Justice of the Peace. He described his role thus:

> "Well I was there, I understand, to be impartial and to observe if any irregularity had taken place and to the best of my knowledge I did not observe any irregularity that could have interfered with justice."

On the occasion when the suspects Graham and Lewis were identified on the parades, neither one made any statement. At the end of the prosecution's case the appellant made a short unsworn statement while the appellant Lewis, after a laconic no case submission by his counsel, also made an unsworn statement. Graham denied any knowledge of Mr. Chang's murder, agreed that he was identified on a parade, but said that four men on the parade including himself wore long sleeved shirts and that he met the appellant Lewis for the first time when he went to the preliminary enquiry at the Gun Court. He said he did not know the identifying

witnesses.

Randy Lewis apart from declaring his innocence said that he was taken into custody at Coronation Market and detained at Denham Town Police Station. One morning his name was called and he saw five policemen one of whom asked him to "skin his teeth", and having complied, a policeman said:

> "You is the man who go and kill Mr. Ramsay Chang."

They left him. He was taken, he said, to Central Police Station and there he was told that an identification parade would be held for him. Lewis said he was asked "who I have to go on the parade, which relative and I told him my mother, and my father, and my brother who I live with" and the officer promised to contact his relatives. On a Thursday morning he answered when his name was called and he was told to get himself ready for an identification parade then. He said he was told that his brother was representing him on the parade and he said further that "I see the police man bring eight man and myself make nine" to the parade room. Lewis said he agreed that he was ready for the parade before the first witness was called. That witness, whom he could not see, used words:

> "I know that man but I don't know if he was there."

Another witness said:

> "That man is the man who did have on the mask";

and a third witness said:

> "That is the man that come and kill Mr. Ramsay Chang."

Grounds of appeal both original, as contained in the Petition to the Governor-General in Privy Council of June 29, 1983, and Supplementary, filed on May 27, 1986, dealt with two major issues, viz common design and visual identification. As far as visual identification is concerned, the evidence in relation to each appellant was somewhat different but the applicable rules of law are exactly the same. We begin by reminding ourselves that the only evidence connecting the appellants with the crime consisted of visual identification in the case of the appellant Graham by three witnesses and in the case of the appellant Lewis by two witnesses. Counsel for both appellants argued on the basis that the decision of this Court in R. v. Oliver Whylie [1978] 25 W.I.R. 430; 15 J.L.R. 163 authoritatively sets out the principles of law which a trial judge is bound to apply when directing a jury on the issues of visual identification.

The decision in Whylie's case came a year later than R. v. Turnbull and others [1976] 3 All E.R. 549; [1976] 3 W.L.R. 445; 63 Cr. App. R. 132 and Whylie's case was to a great extent fashioned after the judgment in Turnbull's case. Judges in Jamaica had for a long time before Turnbull been accustomed to direct juries of the ever present possibility of mistaken identity and in doing this they drew from their own experiences and invited the jury to have regard to their personal experiences in that area of ordinary human intercourse. During the preparation of the judgment in Oliver Whylie's case, one of the judges was so impressed with a passage from the judgment of Lord Widgery C.J. in the Turnbull's case which empowered a trial judge to withdrew a case from the jury if in his opinion the identifying evidence was poor, that he sought and obtained the permission of the Court to put in a separate opinion utilizing the provisions of Rule 61 of the Court of Appeal

Rules 1962. All the Judges of the Court of Appeal read in draft the judgment in R. v. Oliver Whylie, supra, before it was pronounced. In Turnbull's case, Lord Widgery, C.J. had said at page 553 (b) of the All E.R. that:

> "Where in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on the fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

In Whylie's case we considered that if this passage was taken too literally the lines separating the functions of the judge and the functions of the jury could become blurred. We thought that if there was insufficient evidence to support the prosecution's case, a no case submission would succeed and that if the prosecution witnesses were discredited to the extent that they became manifestly unreliable, the rule laid down in the Practice Direction by Lord Parker of 1961, at (1962) 1 All E.R. 448 would equally apply and a no case submission would be upheld. We hesitated to lay down a special rule for visual identification evidence which would be anomalous having regard to the general rule that the jury are in the best position to attach weight to admissible evidence from whatsoever source it might arise.

We were much pressed in the Whylie case to adopt a principle similar to the rule of practice which obtains in sexual offences cases that a jury should look for corroboration of the evidence of the complainant in some material particular when dealing with visual identification. The further argument was that the first rule as adumbrated by the Court of Appeal in England in Turnbull's case required both

a general warning as to the special need for caution when considering visual identification, and the reason for the need of such a warning, consequently if such a double warning had not been given, notwithstanding the quality of the evidence, the omission should lead to a quashing of the conviction. Our Court of Appeal was not prepared to establish such an absolute rule and formulated the applicable principle thus:

> "We have considered the decision in the cases of Arthurs v. A.G. for Northern Ireland; R. v. Turnbull; R. v. Peggy Gregory; R. v. Desmond Bailey; R. v. Dennis Gayle and from these cases we extract the principle that a summing-up which does not deal specifically, having regard to the facts of the particular case, with all matters relating to the strength and weaknesses of the identification evidence is unlikely to be fair and adequate. Whether or not a specific warning was given to the jury on the dangers of visual identification is one of the factors to be taken into consideration in determining the fairness and the adequacy of the summing-up." (Emphasis added)

The passage quoted above was deliberately formulated in that manner to allow for the gradual development of the law as it relates to the value and importance of visual identification evidence. An earlier passage in the judgment in Whylie's case had laid it down that:

> "The trial judge should alert the jury to approach the evidence of identification with the utmost caution as there is always the possibility that a single witness or several witnesses might be mistaken."

Somehow, with the passage of the very few years since 1977, this judicial duty seems to have become blurred in the minds of some trial judges.

It is not within the discretion of the trial judge to determine whether or not he will give a general warning on the dangers of visual identification, and to elaborate and illustrate the reasons for such a warning. That is the starting point from which he ought not to swerve. Judges, however, are human and due to an oversight in a particular case a judge might omit to give the general warning although he alerts the jury to the possibility of mistaken identity. Such a lapse might not be fatal if there are elements in the identification evidence which renders the acceptance of the identification evidence inevitable. In the recognition cases where the accused is said to be well-known to the witness for an extended period the true test might be that of credibility rather than of an honest witness making a positive yet mistaken identity. Therefore the language of the general warning to be given in the recognition cases might differ in detail from that which is to be given where the accused was not known to the witness previously.

Henry J.A. underlined the necessity to give a general warning and to adumbrate the reasons therefor in his judgment in R. v. Daniel McLean S.C. Criminal Appeal 52/77 when he acknowledged that both Turnbull and Whylie -

> "Stated that in appropriate cases a jury ought to be warned of the dangers of relying solely on identification evidence and of the need for caution in convicting on such evidence."

That learned judge did not go on to specify what he meant by "appropriate cases" but the context in which the phrase was used clearly refers to all not just some of the cases in which the prosecution's case rests wholly or substantially upon visual identification evidence. Henry J.A. made it clear

that a trial judge was not tied to the use of any particular form of words in conveying the warnings to the jury when he said:

> "If a jury is alerted to these dangers the method adopted is immaterial."

Two decisions of the English Court of Appeal later in time than Whylie's case explains the decision in Turnbull's case and offer some slight limitations to the application of that decision. In R. v. Oakwell [1978] 1 W.L.R. 32; [1978] 1 All E.R. 1223 at 1235 Lord Widgery C.J. himself explained:

> "Turnbull is intended primarily to deal with the ghastly risk run in cases of fleeting encounters ....."

Scarman L.J. in R. v. Keane [1977] 65 Cr. App. R. 247 made it clear that the supporting evidence which can go to strengthen visual identification evidence does not fall within the technical rules elaborated in relation to the legal concept of corroboration. What Henry J.A. said in R. v. Daniel McLean supra was in all probability fashioned after the remarks of Scarman L.J. in Keane's case.

In a closely reasoned judgment in R. v. Champagnie et al S.C.C.A. 22-24/80 Kerr J.A. had to consider the effect upon a summing-up when no general warning as to the dangers of visual identification was given and on the facts of that case, he held that the summing-up could not be considered unfair or inadequate, because there was other cogent evidence implicating the appellant.

All the decisions of this Court since the decision in R. v. Whylie, supra, of which those referred to herein are but a small sample, have reiterated the principle that there is a duty on trial judges to issue the warning referred to in Whylie's case where there is dependency upon visual identification by the prosecution in proof of the charges

preferred. This Court cannot over-emphasize that trial judges should not only pay lip service to the existence of the decision in R. v. Oliver Whylie supra, but that they should faithfully endeavour to sum up in accordance with those guidelines. These views accord with the opinion of the learned authors of Archbold Criminal Pleading, Evidence and Practice, 41st Ed. at para. 14-7 where it is said that the Turnbull guidelines "should invariably be followed".

We turn now to consider ground 2 of the grounds of appeal argued on behalf of the appellant Bradley Graham, in which he complained that the evidence as to identification was so poor and or manifestly unreliable that no jury properly directed could have convicted thereon. The strength of the evidence against Graham lay in the fact the lighting was good, that the witness Smikle had several minutes over which to observe his features, that both Carter and Hyman had the opportunity to see his face when they alleged that he accosted them pointing up an object at them. Carter and Hyman said that they were able to observe the scar at the back of the right hand of the man who pointed up a weapon at them, and this was the kind of peculiarity which could assist them in their later identification. Carter had described the clothing the man was wearing but did not recall mentioning the scar. Hyman, too, recalled giving a description of the clothing but could not recall if he had mentioned the scar. Smikle did not rely upon the presence of the scar to identify Graham but both Carter and Hyman expressly called for the men in the line-up to show their right hands before making the identification.

This is a prime example of the situation which called for a comparison between the description given soon after the incident to the police and the person who is

eventually identified. We said in Whylie's case that the trial judge should direct the jury to consider what description, if any, the witness had given to the police, as this was one of the factors which would assist the jury to determine the quality and cogency of the identification. The use of the words "if any" might be construed to mean that there is no general obligation on police officers who either write their own statements or who take down the statements of witnesses to include in those statements the description of the person who is alleged to have commited the offence. A description is obviously necessary and of the highest priority. The police, having received the complaint must go out and try to locate the criminal. True, the police might gather information from several different sources, but if they are going to rely heavily upon the visual identification of those who saw the person committing the crime or fleeing from the scene of the crime, the police will want to have as exact a description as the circumstances of the observation allow . Every allowance must be made for the mental condition of the complainant or other eye-witness soon after the offence, who might still be in a state of shock or be physically injured, as well as for the level of intelligence of such a person, but notwithstanding, there should be as full a description as possible recorded in the statement in which one would expect a mention of all prominent peculiarities.

It was counsel for the appellant Lewis who drew our attention to an article at pages 125-126 of the Criminal Law Review, 1986, written by Anthony Heaton-Armstrong, a barrister, on "Identification, - Descriptions of Suspects", in which the writer makes the point that whereas Rules exist for making written and signed records of the proceedings at identification parades, there are no similar rules for the

making of a contemporaneous note of the descriptions of suspects as soon as possible after their disappearance from view which is suitable for use as a memory refreshing document in Court. This writer appreciated that persons complaining to the police would become very impatient if in many cases the police did not set off immediately to try to locate the suspect. The lapse of time between the oral report and the time it would take to reduce it to writing might be crucial to the solution of some cases. Although we have been invited to lay down some general rule giving authoritative guidance that when civilians lose sight of a suspect they should on first contact with the police be invited to make their own written note of the description or signify approval in writing of what a police officer has written down at their dictation and that in the case of a police officer he should make his own written record at the earliest opportunity, we do not consider that these suggested guidelines would always be practicable. We believe, however, that descriptions once given should be available to counsel on both sides at trial and that a witness should be encouraged to refresh his memory from his statement as to the description he had previously given.

We do not think that the failure of the police officer who conducted the identification parade for Graham to cause the defacing scar at the back of his right forearm to be overlaid with tape and to provide similar coverings for the others on the parade was an irregularity in the holding of the parade. The scar was in the nature of a secret mark, its location being its own adequate covering.

The failure of Wright J., to administer the general warning as to the dangers of acting upon visual identification and his failure to refer to the weaknesses in the identification evidence are two important factors to be taken into consideration when evaluating the quality of the identification evidence. On Smikle's evidence alone, the jury would in all probability have convicted the appellant Graham. He appeared to have been a convincing witness who had every opportunity to observe the hold-up man. He did not have resort to the scarred forearm as an aid in identification and whatever weakness appeared from the evidence of the other two identifying witnesses did not in any way impact upon the testimony of Smikle.

Garwood and four other witnesses called on the parade for Graham did not identify him. This was an apparent weakness in the prosecution evidence which ought to have been brought to the attention of the jury. It was not so done, but we do not think this evidence has the significance suggested by counsel for the appellant Graham. Garwood was not one of the original five victims herded into the bakery. There was no evidence as to who the other four persons who went on the parade were and inferentially they could be in the batch of workers pounced upon and imprisoned in the van by the hold-up man in his retreat from the premises. Their opportunity to observe, recognize and identify the hold-up man would be immeasurably less than the witnesses Smikle, Carter and Hyman.

Enough has been said above to indicate how stringently we conceive that the Whylie guidelines should be followed. In applying them to the instant appeal we are of the view that the identification evidence was of such

overwhelmingly high quality that the short-falls in the summing-up did not render it unfair and inadequate especially as we do not overlook the fact that the learned trial judge did tell the jury that if they thought the identifying witnesses were mistaken they should find the appellant Graham not guilty.

On behalf of the appellant Lewis, Mr. Gayle Nelson submitted that the identification parade conducted on July 20, 1978, was in breach of the rules governing identification parades made under the Jamaica Constabulary Force Act and published in the Jamaica Gazette on July 29, 1939, and amended by the Jamaica Constabulary Force (Amendment) Rules, 1977. In so far as is material these Rules provide:

> "552 - Identification Parades
>
> In arranging for personal identification every precaution shall be taken:
>
> (a) to exclude any suspicion of unfairness or risk of erroneous identification through the witness' attention being directed to the suspected person in particular instead of indifferently to all the prisoners paraded, and
>
> (b) to make sure that the witnesses' ability to recognize the accused has been fairly and adequately tested.
>
> 553 - It is desirable therefore that:
>
> (i) .....
>
> (ii) .....
>
> (iii) The accused shall be placed among not less than eight persons who are as far as possible of the same age, height, general appearance and position in life.

"554A. One-way Mirrors -

Notwithstanding the provisions of Rule 553 one-way mirrors may be used for the purposes of identification parades and on such use a witness shall not be required to touch any person whom he purports to identify. Without prejudice to the generality of the foregoing the following provisions shall apply whenever a one-way mirror is used for the purpose of an identification parade:

(i) An Attorney-at-Law subject to sub-paragraph (iii) hereof, and a Justice of the Peace shall be present and both shall be placed in a position to be decided by the officer conducting the parade.

(ii) The Attorney-at-Law shall be one chosen by the prisoner so, however, that if the prisoner chooses no particular Attorney-at-Law, or if the Attorney-at-Law of the prisoner's choice is not available for the parade, the Attorney-at-Law shall be either drawn from a Legal Aid Clinic or selected by the officer conducting the parade from among Attorneys-at-Law willing to undertake the assignment.

(iii) When an Attorney-at-Law fails or is unable to attend for an identification parade the identification parade may be postponed once and if on the date set for the postponed parade an Attorney-at-Law does not attend but a Justice of the Peace is present the identification parade may be held in the absence of the Attorney-at-Law.

(iv) Neither an Attorney-at-Law nor a Justice of the Peace when present at the parade shall speak to any witness or to any person, other than the accused, being paraded.

(v) In this Rule 'one-way mirror' means a pane of glass or other similar material so treated that when viewed from one side (hereinafter referred to as the 'obverse side') it presents a reflection of the viewer but does not permit the viewer to see through it persons or objects which may be on the other side (hereinafter referred to as the "reverse side') and when viewed from the reverse side it permits the viewer to see through it persons or objects which may be on the 'obverse side.' "

The first breach, said Mr. Nelson, occurred in the selection of the volunteers to be placed on the parade, in that the heights of the men ranged from 5 feet at the shortest to 5' 8½inches, of the tallest man. At least 5 people on the parade were taller than the suspect and one man was considerably shorter standing as he did at 5 feet tall. The similarity of the general appearance of the men on the parade could not be tested as the officer failed to complete that section of the prescribed form. Breach number two, consisted in the failure of the police to ensure the presence of an Attorney-at-Law at the parade to protect the interests of the appellant Lewis.

Inspector Champagne clung doggedly to his view that the disparity in measured heights of the men on the parade did not give a general appearance of dis-similarity. Crown counsel on appeal argued that the placing of the men in the line-up would not necessarily cause the suspect to be conspicious and indeed the matter was much debated before the jury and consequently they could not have failed to take those differences into consideration. Leading questions on matters in issue are not permissible during examination-in-chief or re-examination yet crown counsel at trial was permitted to introduce explanations as to the difficulties faced by the police to find other persons bearing marked similarity to the suspect as to height etc. In this exercise the learned trial judge ought to have exercised greater control over his Court. There was, however, in this instance no positive breach of Identification Parade Rules 552 and 553 (iii) to warrant this Court to follow the course adopted in R. v. Cecil Gibson [1975] 13 J.L.R. 207. It was essentially a jury matter. What however is not free

from criticism is the learned trial judge's apparent acceptance of the explanations given for the disparity in heights, but in the final resort the issue was fairly left to the jury for their consideration.

The matter of the similarity of the men on the parade for the identification of the suspect Lewis had another dimension. Inspector Champagne gave unchallenged evidence that Lewis actively participated in the selection of the volunteers. This led the trial judge to comment strongly that it was unlikely that Lewis in his own self-interest would select people with whom he had no real resemblance. That comment to the jury did not take account of what Lewis had said in his statement from the dock, which when properly interpreted not only contained no admission of participation in the selection process but could fairly bear the meaning that he had no opportunity to and did not take part in the selection. This is the dilemma in which defence counsel is apt to find himself when sworn unchallenged evidence is pited against an unsworn statement from the dock which is unclear and imprecise. The learned trial judge did recount before the jury all that Lewis said in his unsworn statement and in our view he was not obliged to go further. There is no substance in this complaint.

Apart from informing the suspect Lewis that he was entitled to be represented by an Attorney on the parade, the police took no further steps to secure the attendance of one when the suspect said he wished to have his brother on the parade.

In the experience of the members of this Court, this is the first appeal in which an argument has been raised on the effect of the absence of an Attorney-at-Law from an identification parade conducted with the use of one-way mirrors. The traditional method of conducting identification parades was complemented in 1977 by the introduction of a system whereby the suspect and the identifying witness did not come face to face on the parade. To ensure fairness of the new system the concept contained in Rule 553 (vii) of the 1939 Rules that whenever possible ..... a Justice of the Peace shall be present at the identification parade "if practicable" was strengthened by making his presence obligatory and by the addition of the requirement for the presence of an Attorney-at-Law. The obligation cast upon the police who wish to make use of a one-way mirror has therefore been raised to the level of what Graham-Perkins J.A. called a "positive duty" in R. v. Cecil Gibson supra and in the instant case an Attorney-at-Law of the choosing of the suspect Lewis or if he failed to nominate one, an Attorney drawn from one of the Legal Aid Clinics or from Attorneys-at-Law willing to accept Legal Aid assignments ought to have have been invited to attend the parade. Provision is made for the postponement of the parade once, to facilitate the attendance of an Attorney-at-Law. No such steps were taken in this case, apparently out of ignorance of the provisions of the 1977 Regulations which had been in force for only 7 months before the parade on July 20, 1978. What the officer in charge of the parade did do was to summon not one, but two, Justices of the Peace to watch the parade. On the face of his actions therefore, he cannot be convicted of acting in callous

disregard of the rights of the suspect. Notwithstanding the imperative nature of the language used in Regulation 554A that an Attorney-at-Law ..... "shall be present" we decline to interpret this provision to mean that his absence will, in all circumstances, except those provided for in 554A (iii), invalidate the parade and render an identification made thereat a nullity. We think that the Regulations are procedural only and any positive breach will have the effect of weakening the weight to be given to an identification made at such a parade. If the parade in R. v. Cecil Gibson supra had been considered a nullity, then any evidence flowing therefrom would have been inadmissible and there would then be no basis for ordering a new trial. If Mr. Nelson is right in his submissions before us that the Regulations are mandatory then the parade for Lewis was unlawful as being in breach of the statutory Regulations. We decline to so hold.

Did the absence of an Attorney-at-Law on the parade lead in the instant case to the possibility of a miscarriage of justice? Mr. Nelson argued that had one been there he might have brought to the attention of the officer in charge the fact that the heights of the men on the parade did not provide a fair test for the proposed witnesses and would have noted any dis-similarity in colouration for use at trial if the matter reached that distance.

These we think are legitimate considerations but when presented against the background of the presence of the two Justices of the Peace and of the evidence of Mr. Miller J.P. we think that the complaint is one of form rather than of substance and cannot avail the appellant.

Wilfred Garwood who attended at the identification parade apparently knew the appellant Lewis and said so, but Garwood also said he did not know if Lewis was present on the night of Mr. Chang's murder. We have shown earlier that such

a statement was not necessarily to be used as detracting from the quality of the evidence of Smikle, as Garwood was not one of the persons initially attacked that night.

It is commonsense to hold that if a person is wearing a mask and a cap the visual identification of such a person would be rendered difficult or impossible unless other factors existed. The prosecution witnesses Smikle and Carter both spoke of the masked man lifting up the mask and they demonstrated this action before the jury. One can argue that lifting up the mask and exposing his face so as to enable witnesses to see his entire face is an act inconsistent with the purpose for which a mask is worn but a general assumption of that nature cannot be used in substitution for positive evidence that this act of lifting the mask occurred and so it became a jury matter, firstly as to the creditworthiness of the witnesses for the prosecution, and secondly whether the limited opportunity presented was sufficient to enable those witnesses to make the observation leading to identification several weeks later.

The very pointed weakness in the identification evidence was the assertion by the witnesses that they observed the peculiar shape of the forehead of the appellant Lewis and yet failed to include this feature in the description given to the police. This specific weakness was not emphatically drawn to the attention of the jury neither was the general warning discussed earlier in this judgment given. Again we are faced with the effect which these judicial lapses, from the well-trodden path of what has been held to be appropriate and sensible matters to be left to the jury, ought to have upon the conviction for murder in the instant case. We have not had the opportunity to see the appellant Lewis and to observe the "little lampshade" over his forehead, an opportunity which the jury had. In our view, if the jury accepted Smikle and Carter as witnesses of truth, the unique feature possessed by the appellant Lewis, albeit not referred to in the earlier description, would lead inevitably to a conviction and we so hold. The grounds of appeal relating to identification therefore fail.

Full and careful arguments concerning the learned trial judge's directions on common design were earnestly presented. Mr. Williams for appellant Graham submitted in effect that the judge's general directions on common design were inadequate and not in keeping with the relevant statement of the law as set out in the English case of Anderson and Morris (1965) 50 Cr. App. R. 216; (1966) 2 Q.B. 110; (1966) 2 All E.R. 644 and as was done in the summing up by the learned trial judge in R. v. Sutcliffe and Barrett, Supreme Court Criminal Appeal Nos. 148 and 149/78, and approved by this Court in the judgment delivered 10th April, 1981. Further, that it was for the jury in every case to determine the existence of the common design and whether or not the appellants were within the ambit of that design and accordingly, the learned trial judge misdirected the jury in relation to these issues and in particular when he advised them thus at p. 361:

> "As Mr. Ballentine admitted, the question is identity, and if you settle that question of identity against the accused then that is it."

Mr. Williams urged that having regard to his earlier directions this particular statement was in essence a withdrawal of these issues from the jury and in that regard it was immaterial that the defence was an alibi. He cited in support R. v. Lovesey; (R. v. Peterson) (1969) 2 All E.R. 1077; (1970) 1 Q.B. 352.

In reply Mr. McBean for the Crown submitted that the directions on common design when viewed as a whole had had the effect of leaving it to the jury to determine whether the common design was murder or merely robbery and the killer went beyond the scope of the common design to rob; that the particular passage to which Mr. Williams adverted must be viewed against the propositions put forward by Mr Manning, attorney for the appellant Lewis, and against the background of the whole summing-up.

When so considered he contended, it must have been clear to the jury that it was for them to determine whether or not the appellants were within the common design to kill using such force as may be necessary to overcome resistance or prevent apprehension and subsequent identification.

Now in the English case of Anderson and Morris (supra) after considering the statements in R. v. Betty (1963) 48 Cr. App. R. 6 and the judgment in the then unreported case of Smith (1961) [now reported at (1963) 3 All E.R. 597], the following statement of the law relating to common design was approved as set out in the headnote at p. 216:

> "Where two adventurers embark on a joint enterprise, each is liable for acts done in pursuance of it and also for the unusual consequences of such acts, provided that they arise from the execution of the joint enterprise; but if one of the adventurers goes beyond what has been tacitly agreed as the scope of the enterprise, his co-adventurer is not liable for the consequences of that extraneous act.
>
> Where, therefore, two persons take part in a concerted attack and one of them departs completely from the scope of the common design and forms an intent to kill or cause grievous bodily harm and uses a weapon in a manner in which the other party had no reason to suspect he would act, and so causes death, the other party is not necessarily liable to be convicted, and may be entitled to an acquittal, of manslaughter."

Further, implicit in the judgment was the approval of the submission of Geoffrey Lane, Q.C., counsel for appellant Morris: " ... it is for the jury in every case to decide whether what was done was part of the joint enterprise or went beyond it and was in fact an act unauthorised by that joint enterprise."

This case was referred to for the broad propositions stated above as the facts are clearly distinguishable in that, p. 217:

> "The case for the prosecution, in effect, was that Welch met Anderson's wife, a white person - Anderson and Morris being coloured - and a convicted prostitute; she apparently took Welch back to her flat where, it was said, he tried to strangle her, she ran into the street, pursued by Welch, met Morris, told him what had happened, and Morris and Welch fought. The time came when Anderson arrived, learnt from his wife what had happened, got a knife in Morris's presence, and went off with his wife and Morris in a car to find Welch. It was said that, when Welch was found, there was a fight as a result of which Anderson stabbed Welch to death."

Morris' defence was to the effect that he was unaware that Anderson had armed himself with the knife and that he took no part in the fight which resulted in Welch's death. No such issue arises in the instant case as this was an armed expedition to rob.

In R. v. Lovesey; R. v. Peterson (supra) the facts as summarised in the headnote read at p. 1077:

> "The appellants were charged with robbery with violence and murder arising out of an incident in which a jeweller was found handcuffed to a railing in the basement of his shop suffering from severe head injuries from which he died. Blood was found on the stairs and ground floor of the shop which was in disorder, and valuables were found to have been stolen. There was no direct evidence of how many men had been involved in the crime or of their individual roles. The appellants denied all knowledge of the crime, but there was certain circumstantial evidence connecting them to it. The jury were correctly directed on the ingredients of both offences and on the guilt of participants in a common purpose, but they were told that the two offences stood or fell together. The appellants were convicted on both counts."

They appealed against the convictions for murder. The learned trial judge after giving unobjectionable directions on common design concluded thus at p. 1079 (p. 356: Q.B.):

> "So much, members of the jury, for the offences that you have got to consider in this case, and in the particular circumstances of this case, as [counsel for the Crown] said, and I think everybody agreed, obviously these two offences stand or fall together."

In giving the judgment of the Court, Widgery, L.J. said, p. 1079, (p. 356: Q.B.):

> "In fact, the two offences did not necessarily stand or fall together. As neither appellant's part in the affair could be identified, neither could be convicted of an offence which went beyond the common design to which he was a party. There was clearly a common design to rob, but that would not suffice to convict of murder unless the common design included the use of whatever force was necessary to achieve the robbers' object (or to permit escape without fear of subsequent identification), even if this involved killing or the infliction of grievous bodily harm on the victim."

And after referring to the inculpatory inferences that were open to the jury, continued thus at p. 1079 (p. 356:Q.B.):

> "There must, in our view, be many cases of this kind where the jury feel driven to the conclusion that the raiders' common design extended to everything which in fact occurred in the course of the raid, but the question must be left to the jury because it is a matter for them to decide, and this is so notwithstanding that the point was not raised by the defence."

In the case of Sutcliffe and Barrett the learned trial judge in his general directions closely followed the statement of the law in Anderson and Morris and then went on to deal with the specific issues in the case. The facts were unusual and worthy of note. On Sunday, July 10, 1977 five men armed with guns robbed a petrol station at a district called Fontabelle in St. Mary. They left there and at Runaway Bay, St. Ann, the police who were alerted stopped the car in which they had travelled from Fontabelle. While being escorted from their car to the police station one of the five men (not either of the

appellants) removed a bag which had concealed in it a sub-machine gun. He moved away from the group, took out the machine gun and opened fire killing two policemen. In the ensuing gun battle one prisoner was shot and the other four escaped. In the man-hunt which followed two were shot leaving the appellants.

The issues and questions raised in this case were complex and called for careful directions identifying the issues and this was done in an impeccable manner by the learned trial judge.

It was argued by appellant's counsel that once the five men were taken into police custody the plan or common enterprise terminated so that the fact that the appellant took advantage or capitalised on some act done by another co-adventurer would not retrospectively have the effect of making him a co-adventurer as regards these killings. The Court in rejecting this argument termed it "attractive but fallacious", not founded on authority, and accepted the submissions of the prosecution that in that case the common venture was robbery with the use of firearms and prevention of apprehension by the use of force necessary, in their opinion, to effect escape. Their detention by the police for investigations did not by force of law determine the conspirators common venture.

Notwithstanding that the issues in the instant case are comparatively simple, in the light of the statements in the decided cases cited it is necessary to consider the directions on common design as a whole to determine whether in effect the cardinal issues were left to the determination of the jury or whether, as Mr. Williams submitted, there was in essence a withdrawal from the jury of the determination as to the existence and scope of the common design.

Early in his direction the learned trial judge said at pp. 356-7:

> "Now the question of common design. If two or more persons join together for the commission of a criminal offence, in law anything which is done by one in pursuance of that agreement is attributed to all the others if what is done is a part of the scheme that was to have been carried out. Now, you will appreciate that that has got to be regarded as a common sense approach. What also has got to be regarded as common sense is that you will never have anybody who can come to you and say, 'Well, sir, the agreement that these men entered into is A, B, C, D.' You will have to infer the agreement from their conduct and you bear in mind - the evidence is, from the three eye witnesses, that they saw these four strange men and from then on it is for you to look and see if there is some sort of togetherness in what happened."

And after giving an example of how different roles including the "watcher without" may be assigned to different persons in a criminal enterprise the learned trial judge continued at p. 359:

> "If all of you are joined together in committing the offence, whatever is done for the purpose of carrying out the agreed offence is, in law, attributed to each one of you. It would be a different matter if the one who goes in the house had a knife and the others did not know. Let us say none of them was armed, so that they are not out for violence. 'If they surprise us, we'll run', but, say one of them had a knife and the others didn't know about it and he pulls out that knife, the law says the others did not know about the knife, so what you do with the knife is your separate act. So, even if you were doing it while on the job, since the others did not know about the knife, they did not agree to the knife being used, so that is your job alone.

> "You have a different situation where several are armed. From the evidence you have heard, one man, said to be Graham, he is holding up a batch of men with a gun. Another one fires through the glass - he is a different man."

He then referred to the nature of the Crown's case as depicted by the eye-witnesses and went on at pp. 360-1 (post):

And later at p. 405:

> "Now, in considering the question of common design and whether murder was involved in it, if you accept that Graham was the man who was holding the group of workers at gunpoint, and that Lewis was the man who said that they were to shoot Mr. Chang, you will ask yourselves how was Graham related to or identified with the act of shooting. He had a gun - if you accept the evidence - so that the whole enterprise involved the use of a gun, and you ask yourselves, well, if he did not intend any shooting to take place, when the man uttered the command to shoot, wouldn't he have said: 'No, no shooting'? But from the evidence, he never uttered a word."

And after reviewing the evidence of the three eye-witnesses said at p. 411:

> "That concludes the evidence of the eye witnesses, Messrs. Smikle, Carter and Hyman. They are the ones on whose evidence you have to rely to see whether the Crown has discharged the responsibility of making you feel sure that Graham was there, Graham was the man who stuck up the men at the bread van, marched them inside, stood guard over them, although he fired no shot and took no money. Ask yourselves whether the person who was acting thus had no part in it."

And finally at pp. 423-4:

> "In the case of Graham, what he is alleged to have said, according to the inspector, is that, 'I did not kill anyone.' Now that is possible and he persisted in saying so and the evidence is that he did not fire any of the shots with his hand. But, the person who occupied the role that had been assigned to him by the evidence - if you find that there was any such person - would, in law, be a party to what was taking place and it is for you to say whether even if the person was there armed with a gun, preventing the workers from going to the aid of Mr. Chang, despite the fact that he, himself, was armed with a gun, he was not a party to the use of any gun. He was making use of a gun and the person who actually fired the shots into Mr. Chang made use of a gun, so it is for you to say whether it is that this man who fired the shots, fired on his behalf and on the instigation of the man who said to shoot Mr. Ramsay - that's the other man who, from the evidence, was with them rounding up the workers, holding them at bay - whether he was not a party or not to it. Because if he wasn't a party to any use of guns he wouldn't be guilty of anything but robbery."

Now the particular sentence of which complaint was made was obviously evoked by Mr. Manning's address to the jury in which he propounded his erroneous concept of the law relating to common design and with which the learned judge, quite correctly, was not in agreement. The learned judge, apparently because Mr. Manning during his address to the jury, repeated this erroneous concept of common design considered it necessary in the course of his summing-up to refer to Mr. Manning's proposition as he dealt with certain aspects of the evidence. The following is illustrative at pp. 354-5:

> "Now you heard repeated references made and this was by Mr. Manning - coming from a lawyer it sounds very strange to me. You may think that Mr. Ballantyne, on that topic, was different in substance altogether. He said, on the question of common design he can have no quarrel with the Crown's position

> "because - as he contends that if you, on the evidence, accept that the accused were there, even though the evidence is that neither of them fired any shot, then that is the end of the case. That is how I would understand it myself but Mr. Manning persists in belabouring the point that the evidence is that neither of them fired a shot and the real murderer is out there walking around somewhere and so if you accept that, that is the end of the case because there is no evidence against them. I know of no law to that effect."

It was after this that the criticised statement occurred in the following context at p. 360-1:

> "But, bear in mind that to tie up the whole fabric of the togetherness, the evidence is that after the accused Lewis ran back down from the office with the bread bag in which Mr. Chang kept money, it was he who turned around and gave the instruction to kill the 'chiney boy', and the order was carried out by another man. Mr. Manning said that that man is the killer and that man is walking out there, therefore he, Lewis, can't be guilty of that.
>
> You have to ask yourself if that were the law, then the law would certainly afford no protection to the powerless. That is not the law. I repeat that whatever is done by one in pursuance of the agreed criminal thing, to be done is, in law attributed to each person who is a party to the doing and you don't have to do everything with your hand, because, in a hold-up like that, you would believe it would be difficult for one man to stick up the working crew and to go over to the office unless they were going to herd everybody in the office and take the money and run out. If he did that, you may find that the men, being closely quartered, they may rush him. No, one is there keeping them captive, and from what they tell you, where the man who fired the shot was, before the order was given to shoot, if you accept that there was more than one person there, the whole thing is caught by the umbrella of common design.
>
> As Mr. Ballentine admitted, the question is identity, and if you settle that question of identity against the accused, then that is it."

In our view, although in his directions on common design the learned trial judge did not strictly follow the formula used in Anderson and Morris, the general directions reveal an appreciation of the principle and issues in that case by drawing a distinction between an accused being unaware of lethal weapons being carried by any member of the enterprise and the instant case where there was an armed expedition.

As regards the particular sentence of which complaint was made, it was necessary for the learned trial judge to deal with Mr. Manning's mistaken concept of the law and in the context in which the sentence occurred we are of the view that this did not detract in any way from the consideration of the relevant issues by the jury. In particular his specific directions in respect to the appellant Graham at p. 423 (ante) were clear, concise, easily comprehensible and eminently fair.

Accordingly, we are of the opinion that when viewed as a whole, the learned trial judge left for the jury's determination the existence of the issue whether the killing was within the scope of the common design and if so, whether or not each appellant was a party to it. We, however, reiterate the advice given in earlier cases, namely, that although a trial judge is not obliged to adhere to any set formula in his directions on a particular issue, nevertheless where a form of words has been authoritatively approved, it is but prudent, when it is appropriate so to do, to use that form in his general directions and so obviate grounds of appeal being argued along the lines urged in the instant case.

In the alternative, Mr. Williams submitted that the alternative issue of manslaughter should have been left to the jury in the circumstances of this case. He pointed out that the robbery lasted for some time; that Graham did no shooting, but only kept guard over the workers and that the shooting occurred

only after the alleged order from someone else. In that regard our attention was adverted to R. v. Brown and Tapper (1968) 13 W.I.R. 361; 11 J.L.R. 82; R. v. Penfold (1980) 71 Cr. App. R. 4 and R. v. Barry Reid (1976) 62 Cr. App. R. 109.

Mr. McBean in reply submitted that the learned trial judge was not in error in not leaving the issue of manslaughter because this alternative verdict was not warranted by the evidence and the nature and conduct of the defence. Further, the case reveal that where the charge of murder rests upon common design, the issue of manslaughter arises for the consideration of the jury where (i) there is evidence from which it can be inferred that the common design is to use unlawful violence short of the infliction of serious bodily harm and the victim's death is an unforeseen consequence in the course of carrying out the common design or (ii) where there is direct evidence that the scope of the common design was an enterprise in which it can be inferred that the intention was not to cause serious bodily harm.

In R. v. Brown and Tapper (supra), the appellants were jointly charged with murder of one John Culverwell. Brown was convicted of manslaughter and Tapper of murder. The deceased was the Secretary of the Royal Jamaica Yatch Club which occupied premises at Fairbourne Road, Kingston. On July 14, 1967 about 10 p.m. three masked men all armed with guns invaded the club premises, robbed him of money and he was shot dead by one of them - the bullet severing the spinal cord and fracturing the base of the skull. The evidence connecting the appellants with the crime came from an accomplice, Francis Strawe, one of the three gunmen, who testified that he went to the club premises that night with the appellants for the joint purpose of stealing. They were each armed, Brown with a revolver, Tapper with a .25 automatic

pistol and he the witness with a .22 automatic pistol. Having got to the club premises all three masked themselves with handkerchiefs. The appellants held up the deceased, while Strawe held up the waiter, one George Clue. Tapper took from the deceased's pockets a bunch of keys and a small brown envelope. Tapper punched the deceased in the mouth while Brown kicked him. They all walked towards the pool, the appellants on either side of the deceased and he the witness, holding a gun to Clue's back. The procession stopped - Brown had his gun pointing at the deceased. Tapper raised his hand, pushed it forward and backward (a jerking movement) and there was an explosion. The deceased fell and all ran away. The witness on August 14, 1957 voluntarily went to the police and gave them a statement. Subsequently he pleaded guilty to a charge of assault with intent to rob and was sentenced to nine months imprisonment.

On appeal Counsel for Brown contended that on the evidence adduced it was a case of murder or nothing at all as Strawe had said that the common purpose was to steal and not to kill or do grievous bodily harm to anyone and the weapons were taken only with the intention of frightening. To this Luckhoo, J.A. in delivering the judgment of the Court said at p. 367:

> "While it is true that the object of the three armed men was to steal, it is necessary to see by what means that object was to be achieved. Here all three men were armed with lethal weapons which were in fact used in concert in effecting the hold-up of the deceased and of Clue. Clearly, each of the armed men knew that the others were similarly armed. It must have been within the contemplation of the armed men that the deceased might offer some resistance and that if this were done one or other of them might use his weapon on the deceased. Incidentally, actual violence was used prior to the act of shooting by both appellants on the deceased though not by use of these weapons. In these circumstances, we feel that it was open to the jury to convict the appellant Brown of manslaughter."

In R. v. Barry Reid (supra) the prosecution's case as summarised in the report was that the appellant and two others, O'Conaill and Kane, (who were self-styled supporters of the I.R.A.) in the early hours of April 8, 1974, armed with weapons went to the house of one Colonel Stevenson, the officer commanding the Otterburn training camp to kill him. One of them rang the bell. Stevenson opened the door, O'Conaill then shot him dead firing three shots. The three men left the scene together.

The three accused put forward different defences: O'Conaill's defence was that Reid alone was the one who intended to kill Colonel Stevenson and that he O'Conaill had gone to the house not intending to do any harm to the deceased and that when the door began to open he had fired at the door not expecting the bullets to go through it. Kane's defence was that O'Conaill had suggested kidnapping the Colonel and he had gone to the house to do just that. He had been astonished when O'Conaill fired the revolver. The appellant Reid, alleged that he was an opponent of the I.R.A. terrorists. He had heard that the other two, who worked in the same hotel as he did, were supporters of the I.R.A. During the evening he had had a lot to drink and decided to find out whether what was being said about them was true. He sought them out, pretended to be a supporter; found himself let into their plan to kill the Colonel. He went with them not intending to take part in any unlawful act but in the expectation that the other two would reveal themselves as "bombastic talkers, not doers of deadly deeds."

O'Conaill and Kane were found guilty of murder and the appellant guilty of manslaughter. The issue of manslaughter was left to the jury in directions of the trial judge which the Court of Appeal regarded as adequate.

In giving the judgment of the Court, Lawton, L.J. said at pp. 111-2:

> "On the findings implicit in the jury's verdict, the appellant did not share the murderous intent which O'Conaill and Kane had had. As the jury must have rejected Kane's alleged purpose of forcible kidnapping, all that remains is the appellant's evidence that he was an interested but innocent spectator (and the jury rejected that) and the jury's finding that he was in joint possession with the other two of the weapons. This, it was submitted, was not enough to support a verdict of manslaughter unless there was either a common design to use them in some way which was reasonably likely to cause some harm, short of serious injury, to Colonel Stevenson and did cause his death or the appellant personally had an intention to use them in some way reasonably likely to cause such harm with the same result. This is so.
>
> The intent with which the appellant was in joint possession of the weapons with the others has to be inferred from the circumstances. He did not share the murderous intent and according to his own evidence he had no intent to do harm. ..... The appellant did not intend either death or serious injury. On the jury's findings O'Conaill must have gone beyond anything he may have intended.
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> In Anderson and Morris (1965) 50 Cr. App. R. 216; (1966) 2 Q.B. 110, a distinction was drawn between a mere unforeseen consequence of an unlawful act and 'an overwhelmingly supervening event which is of such a character that it will relegate into history matters which would otherwise be looked upon as causative factors', see the judgment of Lord Parker C.J. at pp. 223 and 120. Was O'Conaill's deliberate firing of the revolver 'a mere unforeseen consequence' of the unlawful possession of offensive weapons? We adjudge it was. When two or more men go out together in joint possession of offensive weapons such as revolvers and knives and the circumstances are such as to justify an inference that the very least they intend to do with them is to use them to cause fear in another, there is, in our judgment, always a likelihood that, in the excitement and tensions of the occasion, one of them will use his weapon in some way which will cause death or serious injury. If such injury was not intended

> "by the others, they must be acquitted of murder; but having started out on an enterprise which envisaged some degree of violence, albeit nothing more than causing fright, they will be guilty of manslaughter. ..... We are satisfied that the basis for the jury's verdict was their finding that he had been in joint possession with the others of the offensive weapons. This was enough to justify the verdict."

In R. v. David Penfold and William Penfold (supra), both appellants were charged with murder but convicted of manslaughter. The facts, taken from the judgment at page 5 are as follows:

> "On a Sunday night in October, 1977 three men wearing stocking masks drove to a house where there lived an aged gentleman named John Baker and his daughter Violet. The men knocked at the door and, when it was opened by Mr. Baker, they thrust him inside and entered the house. When Miss Baker screamed one of the men (it was said to be David Penfold) called out, 'Can't you keep her quiet.' Ward attempted to silence her. In the process he struck her a blow with his fist which fractured the angle of the jaw. The medical evidence was that this injury could have resulted from a blow of moderate force. The consequence of it was, however, tragic for the resultant bone displacement impeded the passage of air to her lungs and she died of asphyxia."

Counsel for the Crown distinguished, and in our view quite rightly, Penfold's case from the instant appeal in that this case concerns armed men whereas in Penfold all the robbers were unarmed. Nevertheless as the robbers, while they may not have desired to inflict any real harm, must clearly have contemplated the use of violence to overcome any resistance, and so were properly convicted of manslaughter and robbery. This was not an "overwhelmingly supervening event" but merely an unforeseen consequence of an unlawful act, and so within the scope of the common design.

R. v. Errol Thomas, Errol Hanson and Michael Bailey (1978) 15 J.L.R. 264, it is enough to refer to the salient features of the case as set out in the headnote at p. 264:

> "The applicants were convicted for murder. The principal prosecution witness, a brother of the deceased, identified them as part of a large group of men armed with stones, bottles and guns who attacked the deceased and himself, apparently for political reasons. The attack, according to the witness, was entirely unprovoked and during the course of it he heard an explosion and saw his brother fall engulfed by flames and smoke. The applicants Thomas and Bailey were known to the witness before the day of the incident but Hanson was not. The witness gave the police no recognisable individual descriptions of the men who took part in the attack and he next saw the applicants in the dock."

The appeal of Hanson was allowed on the basis that the dock identification of this appellant called for the most careful and positive directions of the trial judge as to the dangers inherent in it and in the absence of such a direction the verdict could not stand.

In dealing with a submission that in the case of Bailey by virtue of alleged confusion in the directions of the learned trial judge on the issue of common design the jury were deprived of an appreciation that a possible alternative verdict of manslaughter was returnable on the evidence. Henry, J.A. in delivering the judgment of the Court said at p. 266:

> "In our view, manslaughter did not arise on the evidence in this case. The deceased died as a result of burns sustained apparently in consequence of the explosion described by the witness Cornel Blake. There was no evidence as to the particular person responsible for the explosion but it took place during the course of the attack on the two brothers. The Crown relied on the doctrine of common design. Where there is a common design to use violence and death ensues manslaughter arises if the violence contemplated by the common design does not extend to the infliction of grievous bodily harm but death results unexpectedly from the use of violence of the degree contemplated. Where, however, death is the result of an act of violence beyond the scope of the common design the parties to the common design (other than the person who actually caused the death) are not guilty either of murder or of manslaughter if the common design does not

> "extend to the infliction of grievous bodily harm. On the other hand, if the common design extends to the infliction of grievous bodily harm or death and death results, all the parties to the common design are guilty of murder, even although the particular act of violence which resulted in death was not contemplated. ..... Manslaughter, therefore, would not arise."

We see no conflict in the principle so clearly enunciated in R. v. Thomas, Hanson and Bailey (supra) and the propositions in the cases - Anderson and Morris; Brown and Tapper; Barry Reid; or Penfold.

The general principle as set out in the headnote to R. v. Thorpe (1925) All E.R. Rep. 383;18 Cr. App. R. 189, that "where a prisoner is charged with murder and there is evidence on which a verdict of manslaughter could be found, it is the duty of the judge to leave to the jury the question whether the crime committed has or has not been reduced to manslaughter, even though that defence has not been raised and even though that defence is inconsistent with the defence actually raised", is so well known as to be considered trite. Indeed the evidence raising the issue may come from a witness of the prosecution, from a co-defendant or by inference from the circumstances of the killing.

In the cases of Anderson and Morris and Barry Reid there was evidence from the defence to make the issue of manslaughter worthy of the jury's consideration. In Brown and Tapper, there was direct evidence that the enterprise contemplated was stealing and the weapons were carried to frighten and not to inflict serious bodily harm, and similarly in Barry Reid from the defence that the enterprise envisaged some lesser degree of violence than causing grievous bodily harm while in Penfold's case, the invaders were unarmed and from the facts it was a reasonable

inference that the violence contemplated in the enterprise was less than causing grievous bodily harm. As was said: "It was not surprising the jury did not convict of the charge of murder."

In Sutcliffe and Barrett, this Court with concise clarity distinguished the Barry Reid case thus at p. 13:

> "The most conspicuous factor was that in Reid the applicant went into the witness box and gave evidence as to the scope of the joint venture and said that he was not part of that joint venture, but in the instant case neither of the applicants went into the witness box nor made any statement indicating the nature and scope of any joint enterprise. Far from making any such assertion, their defence was an alibi," per Carey, J.A.

In the instant case, there was not one shred of evidence to raise an issue alternative to the inescapable inference to be drawn from the facts, that a gang of men, armed with such lethal weapons as firearms embarking on an expedition to rob, must have contemplated the use of the firearm if the necessity arose to overcome resistance, prevent apprehension or subsequent recognition.

We find the following statement of Widgery, L.J. in R. v. Lovesey and Peterson (supra) at p. 1079 (p. 356: Q.B.) an appropriate response to an invitation by counsel for the appellant to substitute a verdict of manslaughter on the facts and circumstances of the instant case (p. 356: Q.B.):

> "In the present case the degree of violence used against the victim showed a clear intention to inflict grievous bodily harm, and if this was within the common design the proper verdict against all concerned was one of murder."

With respect to the appellant Lewis, Mr. Nelson advised that he was adopting such of Mr. Williams' submissions as were relevant to Lewis. However, he frankly conceded that if the

jury accepted the evidence as to the words allegedly used by Lewis, then that appellant's position would be worse than Graham's. On the other hand in view of the differences between the witnesses as to the actual words used, he submitted it was open to the jury not to accept that evidence and in that event as there was no positive and clear evidence that Lewis was armed, then those submissions would be even more favourable to the case of Lewis.

As to the evidence of the words used, it must be remembered that the witnesses were giving evidence of an event that occurred some three and a half years before. It was both a test of memory and of their ability to give in direct speech the directions of the apparent ring-leader of the enterprise. In intent and effect the words attributed to Lewis by the witnesses were substantially the same, namely, an order to shoot the deceased and that order was promptly carried out. Such differences in the words alleged by the witnesses would seem too insignificant for the reasonable rejection of their evidence in this material particular, and it is clear that the jury accepted it.

In any event, the directions of the judge would cover the position of Lewis in the unlikely event that the jury found that he was merely present but did not by word or deed aid, abet or counsel the killing of the deceased. He said at p. 411:

> "It is also from the evidence of those three witnesses that you have to conclude whether or not you feel sure the accused Lewis was the one who had the mask over his mouth, had on a cap, with the peak in his forehead and the teeth not so close. He went upstairs to the office and came back with the money bag and it was he who gave the command to shoot the chiney man and come. If you feel sure about that, that is where you can return a verdict of guilty. If you don't feel sure, you have no other evidence on that and you would have to return a verdict of not guilty."

And at p. 429:

> "The important question is, "Were you there? Were you a part of this joint effort, this joint enterprise? Did you play an active part?", because, you see, if somebody is just standing by as a mere visitor, mere spectator, when a crime is being committed, you can't, for your mere presence, be held guilty. You must be taking part.
>
> Of course, you can be standing there and not necessarily taking part but in such a position that you are aiding and abetting those who are actually taking part. You see, by your presence you prevent somebody from raising resistance. So, if you find that any of these accused were there as just bystanders, not at all involved, then you wouldn't convict them."

For these reasons we find that the directions on common design as against both appellants were fair and adequate and that in the circumstances of the case the issue of manslaughter did not arise for the jury's consideration.

The appellants were properly tried and convicted and we can find no reason to interfere with the verdicts in this case.