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Judgement Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 97 & 98/86

COR: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Bingham, J.A.

REGINA vs. GARTH HENRIQUES & OWEN CARR

F.M.G. Phipps, Q.C., Earle DeLisser & Mrs. Bennett-Sherman for the Applicant Garth Henriques

R.C. Rattray, Q.C., Ian Ramsay, Gayle Nelson and Mrs. Jacqueline Samuels-Brown for the Applicant Owen Carr

Lloyd Hibbert and Canute Brown for the Crown

May 5, 6, 7 and 8, 1987
June 9 - 11, 16 & 17, 1987 &
March 25, 1988

WHITE, J.A.:

At the end of the arguments propounded before this Court in support of these applications for leave to appeal, we took time to consider. After much reflection, we now hand down our decision. We wish to thank the counsel on both sides for the meticulous analysis of the issues which they argued arose from the evidence and the summing-up. In this judgment we will be considering those issues with similar care.

The matter has come before this Court following the conviction of the applicants for the offence of manslaughter, consequent upon their trial on a charge of murder which occupied the attention of Malcolm, J., and a jury for a period of nine (9) days. The hearing of these applications extended over a period of nine days during which the close and searching inquiry was developed along what Mr. Phipps stated were broad areas of complaint: (1) The verdict is unreasonable and cannot be supported in light of conflicts in the evidence of the chief witness for the Crown; (2) The directions which the learned trial judge gave to the jury on the principles relating to common design. (3) The reading into the evidence of the deposition of the doctor who performed the post mortem examination. (4) The concept of manslaughter by flight, which it was contended was wrongly left to the jury by the learned trial judge. (5) The issue of identification in so far as the summing-up treated the caution statement of the appellant Henriques as a confession, and not as exculpatory; and most importantly, the value of the dock identification of the appellant Henriques without a proper direction thereon by the learned trial judge, the chief witness for the Crown having failed to point out the applicant Henriques at the identification parade, although he said he did see Henriques on that parade. (6) The defence of the applicants was not adequately put to the jury.

This abridgement of the sixteen stated grounds of appeal is itself consonant with the criticisms which were levelled at the way in which the learned trial judge dealt with the several issues which arose in the case. It should be stated at the outset that the facts are in a narrow compass in that the chief witness, Junior Blackwood, gave what was essentially a simple story: that the two appellants were present at the beating of the deceased, Clive Gibbons, whom they and the actual beaters were accusing of stealing "the weed" (ganja). The Crown's

case was that the appellants by their questioning of the deceased during the beating were thereby implicated by common design in that criminal activity which resulted in the death of Clive Gibbons. According to Malcolm, J., half of the trial time was "spent in legal matters regarding the admissibility of certain things." He was alluding to the caution statement given to the police by the applicant Henriques, and the admitting into evidence of the deposition of Dr. Venugopal who had left Jamaica and had not returned up to the time of trial. Despite the narrow compass of fact, the attorneys-at-law for the appellants contended that on the evidence in the case and the summing-up several issues arose. Hence, the points of law which were strenuously argued. The thrust was to show that the convictions were vitiated by being based on prejudicial and inadmissible evidence, and that in several areas of the evidence, the summing-up was inadequate and showed imbalance to the prejudice of the appellants, especially bearing in mind that the learned trial judge failed to put their defence to the jury adequately or at all.

To ascertain the validity of those contentions, it is necessary, first of all, to recount the facts of the occurrence which resulted in the death of Clive Gibbons, and about which Junior Blackwood gave sworn evidence, remembering at the same time, that he was the only witness who purported to have seen what happened at the Greenwich Town Beach on the morning of the 19th day of April, 1984. Indeed, as the learned trial judge forcefully pointed out to the jury "the Crown's case stands or falls on his (Junior Blackwood's) evidence." It is necessary, therefore, at the outset, to recapitulate the evidence which Junior Blackwood gave.

The evidence revealed that several persons were engaged in the particular and special relationship with the deceased, several were named by aliases: "Nyah Cawley", "Soldier", "Jubie", "Burbie", who is the appellant Carr. The record discloses that the witness Junior Blackwood told of several occasions between 11th April, 1984, and

19th April, 1984 when he saw one or the other of the appellants, or both of them together with the other persons whose names he called. For instance, he said that he first saw Henriques at about 12 mid-night on the night of the 11th April, at the Greenwhich Town Beach on that occasion he saw Henriques for about two hours in the company of Nyah Cawley and "Burbie". Blackwood asserted that he never saw him during the day on the 11th April, but he saw him in the night as first stated.

On the 13th April, he again saw Henriques on the beach with "Burbie", "Cawley" and "Soldier". They were all moving around. According to Blackwood, "from the incident start every day they on the beach." On the 13th April, "Turkey Buzzard" otherwise called "Juble" otherwise called "Owen Carr", "Burbie" and Nyah Cawley, came to the beach in a car; then they all spoke to "Soldier". On that occasion with the help of fishermen who were on the beach they loaded three boats with "the weed", (ganja). When those boats put out to sea, "Juble" and "Soldier" were among those who left on the boats. On the 14th April, 1984, the boats returned to the Greenwich Town Beach. Thereafter, Junior Blackwood said he saw "Soldier" speak to a young man named "Giant", and they left in the boat towards Port Royal. Later, "Soldier" alone returned on the boat. On the day after, Junior Blackwood said he saw the "whiteman - Henriques" - with "Soldier".

On or about the 16th, Blackwood said he saw when "Soldier" was taking Clive, the deceased, away to go and watch the weed. "Soldier", "Burbie", and Clive had a reasoning together before "Soldier" took away Clive in the boat. On the 17th he saw Clive with "Soldier", "Burbie" and "Cawley". Clive was lifted from the trunk of the car and "Soldier" "was thumping up Clive."

He saw "Cawley", "Burbie" and "Soldier" in the morning and in the evening of the 18th. In the morning Clive was thumped several times.

After this beating on the 18th, "Burbie" and "Cawley" drove away leaving Clive with "Soldier" on the beach. In the evening, "Burbie" returned with Henriques by a car to the beach. "Soldier" again beat Clive with a fishpot stick in the presence of Henriques and "Burbie", and they all questioned Clive about the weed. "Burbie" and Henriques were under a shed at the round cabin where the beating was being administered. According to Junior Blackwood, "Soldier" beat Clive for about five minutes, during which Clive was bawling and protesting his innocence. After the beating, Henriques, "Burbie" and "Soldier" left the beach with Clive at about 4 p.m. on the 18th April; "Burbie" and "Juble" lifted Clive and put him in the trunk of the car. On the following morning, the 19th, before day-break the four of them "Juble" , "Cawley", "Burbie" and "the whiteman, Henriques"- came back with Clive to the beach. On this return Clive was lifted from the trunk of the car by two of the four men in whose custody he was; the other two being present. He was placed before the car, and it was then that Nyah Cawley and "Soldier" began beating Clive. Blackwood said "Soldier" cut Clive over here so (forehead), and under him chin and bus him foot-bottom with the knife."

The witness said that although he did not see Henriques hit Clive, that appellant, during the beating, had a short gun in his hand. He just held the gun in his hand, not pointing it at anyone. During the immediate beating, Nyah Cawley also held a gun in his hand from which he fired a shot in the air. During this time, "Burbie" who was present, held in his hand a piece of iron pipe. He did not strike Clive; but all of them repeatedly asked Clive for "the weed", to which his constant reply was that he knew nothing about it, someone had stolen it from him.

The witness said the car was parked about six yards from the water (the sea) which was to the west, with the front of the car

pointing to the south, down the beach. Clive had nothing in his hand while he was being beaten. After the beating and questioning had lasted for about five minutes, Junior Blackwood told the Court, "Clive get away from them and chucked in the sea." About half an hour after, Junior Blackwood said, "A hear the whiteman said to Cawley say 'come on, you nuh see de bwoy dead!'." The appellants and their companions left the beach together. They drove away in the same car in which Clive had been brought to the beach earlier that morning. After they left the witness came out of hiding.

This place of hinding was "under a boat bow". The witness described the boat bow as being the front of the boat. "It have a piece of cap where you shelter under .... that said part I was under." The boat was on its belly on the bottom. He was hiding there because the four men whose names he called were after him; all of them had accused him also of stealing the ganja: "from them take away the weed, they accusing me." While in hiding, he was about six yards from them when they all were at the car. Although the hour was 4 a.m. he was enabled to see them well by the several lights shining on the beach. For example, "Geddes Grant light and the Oil Refinery"; all these places had "Big bright light" meaning electric lights, and as he put it, light "Whey when a place dark you can see."

The next time he had any knowledge of Clive was when he saw his body floating in the sea on the Good Friday, which presumably, was the day after he had seen Clive "chuck off" into the sea. The floating body was seen about one chain from where Clive had chucked off. He said that after the police took the body out of the sea, he noticed "his foot-bottom bus , and him have a cut over here so, and under his throat."

This recounting of the evidence is a little detailed considering the lines of the cross-examination by counsel for each of the appellants.

Firstly, it should be stated that cross-examination of Junior Blackwood by Mr. DeLisser, who appeared at the trial in defence of the appellant Henriques, revealed that that appellant was wearing "nuf hair on his head" on the night when the truck was driven on to the beach. Then he was clean shaven. At the trial his hair was much lower than on the earlier occasion. He admitted that at an identification parade held in June 1984, he pointed out from a line of men, a man in No. 6 position who was not Henriques. He admitted that although Henriques was in the number 9 position on the identification parade, he did not point him out. All the men on that parade were of the same colour, and had a little beard. In his statement to the police he gave a description of the men involved in the incident with Clive. He said he knew the appellant Carr for a long time, over a few years, during which time he saw him "plenty times."

In reiterating that he saw Henriques for about two (2) hours after midnight on the 11th April when the truck with ganja was driven down to the beach, he said he saw him again on the 12th April, 1984, for about half-a-day, and again on the 13th of April, 1984 for the whole day. He next saw him on the 18th at 4:00 p.m. He could not really remember if he saw him on the intervening days between the 13th and the 18th. When questioned if he had told the Resident Magistrate at the preliminary enquiry that the whiteman, Henriques, was well known to him, the witness said he did not remember. The first time he pointed out Henriques as "the whiteman" he saw on the beach was at the preliminary enquiry, and when he was sitting in the dock.

With reference to his hiding place he repeated that on the 19th April, 1984, this boat was turned north with the bow of the boat facing south. He said he went in head-way under the bow of the boat "because a car fly past me and go down to the beach." This was not the same car in which he had said the four men had arrived at the beach.

He described the covering of the boat, his hiding place, as about five to six feet long. The space under the bow of the boat was about one and a half yards in height. He was positioned about midship or half-way of the covered area. The boat, a 28 feet fibre-glass boat, was five to six yards from the road which leads down to the beach. The bow of the boat was the higher section. While hiding, he saw a second car, which stopped at the stern of the boat; that is, at the north, at a distance away of about half-a-chain.

He was able to have a good view as the front of the boat was resting on a roller, which made the boat tilt. Cross-examination by counsel challenged the witness regarding his previous testimony at the preliminary enquiry on this last point, in that he had said then "the boat was resting on its bottom or keel, and this was resting on the ground." He admitted that if he had told the Magistrate so it would not be true. But he insisted the boat was on a roller, which is for the purpose of preventing the bottom of the boat rotting. Otherwise, the boat could, by means of the roller, be rolled out to sea.

He was cross-examined about when Gibbons was taken from the trunk of the car. He said that on the 19th he saw when two of the men, whose names he had called, lifted Clive out of the trunk of the car. He did not notice anything peculiar about Clive's face, clothes, or feet; he did not remember if he had noticed anything peculiar about his hands. Gibbons did not attempt to fight the men who lifted him out of the trunk of the car. After that Gibbons walked to the front of the car. During the beating, Clive Gibbons did not attempt to defend himself. As far as he could see, there was nothing to prevent Gibbons from defending himself. But he readily admitted that at the preliminary enquiry he had said, under oath, "before they began to beat Clive, I notice that his hands were tied behind him and he was standing." At first he said he could not remember whether anyone had

untied the hands of the deceased. He did not see anyone do so, and added that it would not necessarily be so that he would have seen his hands being untied.

At pages 69-70 of the transcript, he described what he meant by "the chucking off" by Clive"

> "He got away from them and stumbled .....
> fell .... fell off ...... And he
> dropped off .... fell away from them ..."

His further demonstration with his arms outstretched, gave point to his words that he "chucked sideways from them". The hands of the deceased when he chucked were outstretched.

Again at page 105, he amplified his description of the chucking off motion by saying "with his hands outstretched and leaning to the right." At that time his hands were not tied; maybe, he said, this might have happened because his hands were not tied strong enough.

It was suggested to the witness, by cross-examination, that he did not see Gibbons taken from any car trunk, but that as he came from the car he was grabbed by "Nyah Cawley", who took him around a corner. He denied that after they went around the corner, Clive Gibbons jumped into the sea. He insisted that "he chucked off into the sea." From he chucked off, the witness said, "I don't see him."

During cross-examination the witness disclosed that he had been in the custody of the police for approximately two months before the time of his giving evidence. He explained that this had occurred because he had failed to attend court on several occasions. When re-examined by counsel for the Crown, he gave as his reason for not turning up at court that it was because of "well-wishers" who he described as "the same men I live amongst. They were against me, through this incident." ...."is not only down there alone you know. I am really beknown, and people know about the incident ...... whats going on, so I am really afraid, you know I don't trust anyone."

It also transpired from his evidence under cross-examination that everytime the appellants and the others linked with them come to the beach, he saw them. This was because he said "I can't sleep", for which he assigned this reason: "because the men dem come down with their police friend and they accuse me, and say I thief dem weed and I know about it so I couldn't sleep. And they visit the beach often."

He said that while he was in custody, a policeman read his deposition to him once and told him to stick to it. He said the policeman said he was refreshing his memory. This was not due to his wanting to change from what he said in his deposition.

The witness agreed also upon being reminded by Mr. Ramsay, that he had visited Mr. Ramsay's chambers. Then, it was suggested, he had informed Mr. Ramsay that although Owen Carr had nothing to do with Gibbons' killing, he (the witness) had said to the contrary because he was vexed with Owen Carr. The witness said he could not remember whether he had said so. He could not recall telling Mr. Ramsay that he was afraid of the police if he told the truth, and what the judge might do to him. The witness did not remember whatever he might have said to Mr. Ramsay, or whether that attorney-at-law had told him to report it to the authorities, and come to court to tell the truth.

When re-examined by counsel for the Crown, the witness replied that he had gone to Mr. Ramsay's chambers, because "I want the case to finish." He explained this desire through "I don't want to get hurt by the men that I giving evidence against friend." He did not resile from his evidence-in-chief that the four men whose names he had already called, were there on the beach and were together with the deceased. It was not true that Nyah Cawley was the only one who beat the deceased, nor was he the chief one. There was only one whiteman there on the beach that morning. It was not a different person from Henriques who was the whiteman with a gun.

The foregoing then, was the evidence which the jury had to evaluate in the ever-present knowledge that the linchpin of the Crown's case was Junior Blackwood's evidence which presented them with inconsistencies. Overall the facts posed for decision are the following questions; (a) were the appellants on the beach at the material time? (b) were they present at the particular spot where the beating was administered at all material times as Junior Blackwood swore? (c)did they behave as he said they did?

As for the appellants, each made an unsworn statement from the dock. Henriques said "..... the statement I have given to the police is true. However, there are a few things I would like to add. First, being that the reason I left the beach with a young man in the trunk, is that people were hostile towards him on the beach, and I thought it best to get him out there under any circumstances. Secondly, the night of the incident, there was a cousin of mine on the beach .... The reason I did not mention him in my statement is that his wife was about to have a baby and I did not want to get him involved in anything. Last, Nyah Cawley that was mentioned in that statement, is the same Nyah Cawley that was released at Half-way-tree. That is all."

Owen Carr's unsworn statement reads:
"On the night of the 19th April, 1984, what Garth Henriques said is true. Neither of us even so much as touch the youth Clive Gibbons.........or beat him in any way. The witness Blackwood is lying. I didn't have any pipe in my hands. At the preliminary examination, the witness Alvin Innswood contradicted Blackwood. He said that he didn't see me do anybody anything. He also said I didn't have anything in my hands, and he didn't see me standing around when Cawley was beating the youth. He also said that Mr. Rocker's boat was facing the sea, that is east to west, Mi Lord, not north to south.......That is east to west.

"Mr. Rocker's boat was pointing east to west; not north to south. It was Nyah Cawley who beat Clive Gibbons causing him to jump into the sea. I have no idea that Nyah Cawley have an intention of causing the youth any harm. I was so surprised when I heard the youth bawling that I said to Garth 'Lord God, Cawley a go kill the little boy.' At that point we both got out of the car and ran down to there to see what was going on .... We run down to where the incident was taking place where Cawley was beating the youth. As we approach the little boy got away, and jump in the sea. I did not do the little boy anything. This is the truth. I am innocent of this charge."

Neither of the appellants called any witness, despite the appellant Carr's assertion of what Alvin Innswood purportedly said at the preliminary enquiry. Innswood himself was not called at the trial either by the prosecution or the defence. Apart from the hearsay nature of the appellant's reference to what Innswood had said at the preliminary enquiry, there is the fact of it being reported in the appellant's unsworn statement. At page 46, the judge advised the jury that "the unsworn statement is not evidence, but is something you will have to consider and attach what weight you will to it, to see whether the Crown has presented its case, so that you feel sure." At page 18, he reminded the jury about the submissions censuring the failure of the Crown to call Alvin Innswood, reminding them that he was called into Court and made available to the defence. Crown Counsel did not put him up for cross-examination. The judge then advised the jury as follows:

> "I was asked to say that in the interest of fairplay and justice I should force Mr. Pantry to put him there as a witness. I didn't do that, we never heard from him, except obliquely from the views of Mr. Owen Carr. Hence, after Mr. Owen Carr as to what he said, and what was incorrect, the fact remains you didn't hear him."

We in this Court did not have the benefit of reading what arguments were put before the learned trial judge on this point

regarding Alvin Innswood not being called by the Crown, because only selected parts of the transcript were placed before us. Nevertheless, we have to consider the arguments by Mr. Ramsay in this Court that the judge ought to have pointed out to the jury that the Crown did not call the only other eye-witness in the case, considering that Junior Blackwood had been in protective custody, care and control of the police for sometime. He submitted further, it was a matter for the jury whether the failure to call Innswood weakened the Crown's case which rested on the evidence of Junior Blackwood. The terms of the quoted passage from the summing-up were, in our view, sufficient to deal with the issue, especially when at page 20, the learned judge reminded the jury of the criticisms by Mr. Ramsay on the non-failure to call Innswood, which was not corrected by merely offering him to the defence. Nor do we accept that it was any part of the function of the judge to ascertain from the jury whether they wished to hear that witness in order to decide that the Crown has discharged the burden of proof, so that they may feel sure of the guilt of the accused. We are not persuaded that the fact that the Crown did not call him resulted in a miscarriage of justice.

The earlier statement of Henriques to which both appellants referred was a statement which he gave under caution to Detective Assistant Superintendent Owen Johnson. This caution statement was admitted into evidence after the voir dire. According to the summing-up, this caution statement had been dealt with at great length by both sides. The trial judge himself told the jury that they would be free to take it with them into the jury room. So far as he was concerned, he did not intend to read it word for word. The entire statement was not extracted for our perusal, but since it had become evidence we have looked at it. Relevantly, we quote the following from the caution statement, which, firstly, gave an acccount of repairs done to a boat, which was to be used

for the transporting of the ganja. It continues:

> "The early part of April this year I was told that the fishermen who were to load the boat could not find the boat, and they had to put the ganja on a Cay
>
> I was told this by Owen Carr.
>
> This same day Owen Carr suggested to me that we go by Greenwich Farm Beach and eat some fish. We went down there for several hours buying and roasting fish.
>
> Owen Carr and I left in the same car and Owen took me home. The next day I met Owen at Willies Fry Chicken Restaurant along Old Hope Road and he told me to go to Greenwich Farm and tell "Soldier" to bring the youth.
>
> I drove a Toyota Rent-a-Car to Greenwich Farm Beach and there I told (Owen) o/c "Soldier" what Owen had told me. "Soldier brought a youth to the car and the youth had a cut on his head. "Soldier" opened the trunk of my car and told the youth to go inside there. The youth go into the trunk of the car. "Soldier" closed the trunk of the car.
>
> I asked "Soldier" what was all this about. He told me that they had stole some of the ganja off the Cay. I assumed at this point that this youth was one of them that had stolen the ganja.
>
> I drove the car with "Soldier" and the youth to Old Hope Road. At Old Hope Road I got out of the Rent-a-Car. I did not see Owen. I left "Soldier" with the car and the youth in the trunk. The key for the car was left in the switch.
>
> I then drove away in my Alfa Romeo motor car which I had left at Willies Fry Chicken place. I drove away because I did not like what was happening. I went to a lady friend name Jennifer at No. 5 Heathwood Place where I remained until about 9 p.m.
>
> Jennifer took me back to Old Hope Road in my car. I saw the youth sitting in an old car and my Rent-a-car was not there. I saw Owen standing beside his Corolla Rent-a-car and talking to Nyah Cawley. I said to both of them what are you going to do about the youth. Owen said, 'Wait him still here?' at which point he called the youth over to us.
>
> Owen and Cawley started questioning the youth about who took the ganja. The youth said I don't no (sic) because I come from the Country about a week and a half ago and I don't no (sic) the place.

"At this point I suggested that this was not taking us anywhere and we should take back the youth where him come from. Another gentleman named Jim who was there asked for a ride to the Ministry of Education so he and I and Owen got into Owen's car with the youth.

I dropped Jim outside the Ministry and then proceeded to Greenwich Farm Beach. When we got there I parked the car and the youth who was sitting in the back got out.

The youth was standing beside the car. I drove for about 20 or 30 seconds when I saw Nyah Cawley come up to the youth, grabbed him in his shirt collar said 'You gwan show me a who teck away the weed now'. He walked over with him towards the end of the beach around a corner and I could not see what was happening. About a minute and half later I heard screaming from the youth and Owen said, 'Lord God, Cawley a go kill him'. At which point we both got out of the car and went to see what was happening and I saw Cawley trying to hit the youth that was on the ground and the youth was trying to get away.

As we approached, the youth broke away from Cawley and ran into the sea and started swimming towards a boat that was anchored off shore. I said to Owen lets get out of here. I do not like it. He agreed and we left. As we got to the top of the Greenwich Farm Beach Road, I could see Cawley's car lights coming behind me. This was about 12 midnight.

Owen took me home and went about his business. Jennifer did not go with me to the beach because she don't no (sic) anything about this business."

In the summing-up, the caution statement is dealt with in the following manner at pages 36 - 37:

"You remember what Henriques said, took us back to March and about the Moneque $30,000, about Cement Company and weed, and about the Toyota rent-a-car which he drove to Greenwich Farm Beach, about Soldier - ask Soldier what was all this about, he told me that they had stolen some ganja off the beach, and drove away in his Alpha Romeo. Remember how picturesque Mr. Pantry put it, from rent-a-car to Alpha Romeo - think young people call it cris car - pretty - very nice. Nothing wrong with driving a Alpha Romeo, wish I had one.

Rent-a-car, Alpha Romeo. 'I drove away because I did not like what was happening'. And then the part about 'I said to both of them - talking about

" 'Nyah Cawley and Owen - what are you going to do about the youth?' And then, later on, he said that 'At this point I suggested that this was not taking us anywhere and we should take back the youth where he come from.' What was meant? You will have to determine you know. "...not getting us anywhere, man,..' Probably we need a little more pressure man, more beating, may be. Another explanation put to it, another interpretation; carry him back and let him go, man, don't worry about it. Can't get anything out of him. We are wasting our time. You have to decide what all this means you know.

Then he spoke about the incident down at the beach: Screaming from the youth, Owen said, 'Lawd God, Cawley a kill him!' 'As we approach, the youth broke away from Cawley and ran into the sea and started swimming towards a boat that was anchored off shore.' This is what Mr. Henriques tells you and he tells you that what he says here was the truth.

He said, 'I said to Owen, let's get out of here, I do not like it. He agreed and we left.'

'I do not like it.' You will have to decide whether his actions indicated somebody who did not like it. He said things were happening that he didn't like and he decided to get out of there."

The picture which develops from the sworn account given by the witness Junior Blackwood, and the contents of the caution statement of Henriques, together with the unsworn statements of both appellants, is that the two appellants were present on the beach while the beating was being administered.

This depiction is all the more striking because of the questions put to Junior Blackwood about the "whiteman" who he said was on the beach. At pages 107-108, the collocution between Mr. DeLisser and Junior Blackwood appears. Mr. DeLisser had suggested that -

"Q. .... if you saw a white man on the morning of the 19th of April, 1984 when the incident happened, that .... That white man was a different person from the accused Henriques. Different person - sort of look like him but different person."

The witness responded:

> "Is since the incident I know him, you know. ...... Is during the incident sir, I know the white man, and through is four of them and is one white man alone with them ...."

The cross-examiner was not satisfied with the answer. Even when the witness said he knew that 'a whiteman' was there, by further questions the witness was adverted to the preliminary enquiry by the following question:

> "You saw the whiteman sitting beside Burbie (who he had asserted was on the beach) you just feel is the same whiteman who was on the beach, isn't that so?"

The answer was -

> "Is the only whiteman who was on the beach."

The witness insisted on the last answer, even when he admitted that he had pointed out the wrong man at the identification parade. In our view, this must not, however, be taken in isolation, bearing in mind the further suggestion that no whiteman was there with a gun, to which the witness replied "A whiteman was there with a gun." Furthermore, he was insistent that the deceased Gibbons was in the trunk of the car. We note that the suggestion to the contrary sharply conflicts with Henriques saying that "the reason I left the beach with the young man in the trunk is that there were people hostile to him."

In passing, we observe that the words underlined are in agreement with one assertion of Junior Blackwood.

One of the questions raised by Mr. Phipps on this appeal was whether the witness was present, which we note was not central to the case for the defence at the trial. At no time was it ever suggested to the witness Blackwood that he was not present at the beach. The centre-point of dispute was that the appellant Henriques was not on the beach, participating in any beating. If his caution statement and his unsworn statement from the dock are to be given any value by saying

that he was one of the two whitemen who were on the beach, Henriques has placed himself on the beach. And this had to be considered in the light of the sworn testimony by Junior Blackwood that Henriques was there. The important question then arises, what did the witness see, and how was his evidence to be assessed? It was the contention that his status was such that he had an interest to serve by putting himself on the scene. This, it was urged, necessitated a clear warning to the jury, especially, bearing in mind the admitted failure of the witness to identify the applicant Henriques at an identification parade.

The submission was that Blackwood, being a person who believed that he was accused by the appellants of stealing the weed along with the deceased, would have an interest of his own to serve in giving evidence implicating the appellants in the unlawful killing of the deceased. Add to this that he had been in the protective custody of the police on the order of the Court. This interpretation of Blackwood's evidence should have been brought to the attention of the jury with some assistance on the proper assessment of such evidence. Furthermore, it was submitted, the learned trial judge misdirected the jury by failing to direct them, that should they find that Blackwood had an interest of his own to serve in giving evidence, his evidence should not be accepted without there being some independent evidence supporting it. Alternatively, so the argument ran, it would be dangerous to act on Blackwood's evidence in the absence of such support for it. Significantly, contrary to the question "was Blackwood there?", it was submitted, the judge treated the witness as a casual observer, and did not regard him as not being an independent person.

We decline to accept the invitation by counsel for the appellants to say that Junior Blackwood was in the circumstances, a

person with an interest to serve. We were asked to apply the principle enunciated in R. v. Prater [1960] 1 All E.R. 298 at page 300 in which Edmund Davies, J., said "This Court, in the circumstances of the present appeal, is content to found itself on the view which it expresses that it is desirable that, in cases where a person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given. But every case must be looked at in the light of its own facts ...."

It is of strong importance that in Prater, the judicial comments were made on the basis of one co-accused (Welham) giving evidence on his own behalf. At page 299 Edmund Davies, J., said:

> "For the purposes of this present appeal, this court is content to accept that, whether the label to be attached to Welham in this case was strictly that of an accomplice or not, in practice it is desirable that a warning should be given that the witness, whether he comes from the dock, as in this case, or whether he be a Crown witness, may be a witness with some purpose of his own to serve."

The term "may be a witness with some purpose of his own to serve"; from the circumstances in which it was coined, initially and usually, is applied to those who are particeps criminis, or those in analogous situations. It could not be convincingly argued that in this case Junior Blackwood was particeps criminis in the crime of beating Clive Gibbons so that he died. Mr. Phipps conceded as much.

But since the matter has been raised with much insistence, this Court draws attention to several cases in which the characteristics of such a witness was discussed. First, a case of murder, in which the important evidence identifying the appellants as the assailants of the deceased was that of a witness who earlier on the day of the murder, and before the murder, was involved in an altercation with the appellants, and was wounded. The headnote states in part as follows:

> "(1) That there is no duty on a trial judge to deal with the evidence of a prosecution witness on the footing of his being an accomplice merely because it may be said that the witness has 'some interest of his own to serve' - dictum of Phillips, J.A. in Gokool & Gokool v. R. [1968] 13 W.I.R. 477 applied and followed; (2) that the evidence of the witness did not require corroboration."

Fraser, J.A., in delivering the judgment of the Court said:

> "The purpose or interest alleged against CM (the witness) was that the appellants had earlier injured him so badly that he had to go to the hospital for treatment. Because he suffered injury at their hands it was said, a sufficient purpose or interest was disclosed to require the trial judge to direct the jury that this evidence ought to have been corroborated. The submission did not go so far as treating the requirement as a rule of law, but counsel cited the case of R. v. Prater and contended that it should have been held that the relationship between CM (the witness) and the two appellants was such as formed the kind of purpose or interest to which Davies, J., referred in Prater's case."

Fraser, J.A., explicated the topic thus:

> "When reference is made to an interest or purpose of his own to serve in the light of those two cases (viz., R. v. Prater [supra]) and Narine Ramroop v. R. [1960] 2 W.I.R. 259. It is necessary to examine what were the interests with which the Courts were dealing because every case must be looked at in the light of its own facts." (p. 462 I)

The opinion of Phillips, J.A., in Gokool and Gokool v. R. [1968] 13 W.I.R. 477, to which Fraser, J.A., referred are found at page 481E of that report:

> "...... that in the present state of the law there is no duty cast on a trial judge to deal with the evidence of a prosecution witness on the footing of his being an accomplice merely because it may be said that the witness has 'some purpose of his own to serve'. Indeed, having regard to the indefinite and elastic nature of that expression, we are of opinion that the adoption of any such rule might well lead to great uncertainty in the administration of criminal justice. We accordingly reject the

> "second submission of counsel for the appellants. In doing so, however, we are not seeking to derogate from the exercise of a judge's discretion, when dealing with the credibility of a witness' evidence, to give to the jury in proper circumstances, a direction of the kind required to be given in the case of the evidence of an accomplice."

The Court is indebted to Mr. Hibbert, Counsel for the Crown who invited us to apply the decision of the Court of Appeal (Criminal Division) as it is reported in R. v. Wilkins (Frank) [1985] Crim. L.R. 222: The facts were:

"The appellant was tried with a co-accused on account of robbery of a gold chain from a young woman at an underground station. The victim gave evidence at the 'old fashioned' committal but was a reluctant witness at the trial; she repeatedly failed to appear when the case was called and eventually a warrant for her arrest was executed. She was brought to court but refused to give evidence, was tried for contempt; the trial judge was satisfied that she was in contempt and, stating that he had power to imprison her, remanded her in custody and adjourned the trial; after the mid-day adjournment the victim decided to give evidence, whereupon for the contempt she was fined £25 or seven days imprisonment in default. Thereafter the trial began and she gave evidence. The appellant submitted that, since the victim plainly knew that if she continued her contumelious conduct she might have been further dealt with, she had an interest in giving evidence and therefore the trial judge, when directing the jury, should give a direction in the nature of an accomplice warning in relation to her evidence. The submission was rejected. The jury returned a verdict of guilty as charged against the co-accused and of guilty of theft against the appellant. He appealed against conviction on various grounds; in relation to the accomplice-type warning he sought to rely on R. v. Prater (1960) 2 Q.B. 463; Davies v. D.P.P. (1954) A.C. 378 and R. v. Stannard (1965) 2 Q.B. 1.

"Held, dismissing the appeal, that the victim as a citizen was under a duty to give evidence and she was in no special position. It was a matter of general knowledge that if witnesses were reluctant, the court had to deal with them for contempt. The whole point about the need for a warning about an accomplice or anyone who might appear to be in a rather broader group was that the warning was necessary where a person had a motive about what he should say on oath as being the truth - a motive which might lead him to lie. However, to seek to apply the doctrine to witnesses in general was absurd. The argument was based on a false concept. There being no substance in any ground, the appeal failed."

Further, we would direct attention to the passage in the judgment delivered by Ackner, L.J., (as he then was) in R. v. Beck [1982] 1 All E.R. 807 at pages 812-813a:

> "Counsel for the appellant accepts that an accomplice direction cannot be required whenever a witness may be regarded as having some purpose of his own to serve. Merely because there is some material to justify the suggestion that a witness is giving unfavourable evidence, for example, out of spite, ill-will, to level some old score, to obtain some financial advantage, cannot, counsel for the appellant concedes, in every case necessitate the accomplice warning, if there is no material to suggest that the witness may be an accomplice. But, submits counsel for the appellant, even though there is no material to suggest any involvement by the witness in the crime, if he has a 'substantial interest' of his own for giving false evidence, then the accomplice direction must be given. Where one draws the line, he submits is a question of degree, but once the boundary is crossed the obligation to give the accomplice warning is not a matter of discretion. We cannot accept this contention. In many trials today, the burden on the trial judge of the summing-up is a heavy one. It would be a totally unjustifiable addition to require him, not only fairly to put before the jury the defence's contention that a witness was suspect, because he had an axe to grind, but also to evaluate the weight of that axe and oblige him, where the weight is 'substantial', to give an accomplice warning with the appropriate direction as to the meaning of corroboration together with the identification of the potential corroborative material.

> "We take the view that if and in so far as R. v. Prater [1960] 1 All ER 298, [1960] 2 QB 464 was not a decision on its particular facts, it in no way extended the law as laid down in Davies's case [1954] 1 All ER 507, [1954] AC 378. There was material on which a reasonable jury could have concluded that Welham was an accomplice. Equally, there was no such material in regard to Truman. In short, the phrase 'it is desirable that in cases where a person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given' is related to cases where witnesses may be participants or involved in the crime charged."

Again at page 813g, he said in terms similar to those of the judgment in Gokool & Gokool v. R.:

> "While we in no way wish to detract from the obligation on a judge to advise a jury to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an improper motive, and the strength of that advice must vary according to the facts of the case, we cannot accept that there is any obligation to give the accomplice warning with all that entails, when it is common ground that there is no basis for suggesting that the witness is a participant or in any way involved in the crime the subject matter of the trial."

In his judgment in the House of Lords, in R. v. Spencer [1986] AC 348, Lord Ackner himself approved R. v. Beck as having been rightly decided, and said that in a case which does not fall into the three established categories (of cases in which the warning against uncorroborated evidence should be given) and where there exists potential corroborative material, the extent to which the trial judge should make reference to that material depends upon the facts of each case. The overriding rule is that he must put the defence fairly and adequately.

We are therefore strengthened in our refusal to agree that there was any necessity for the learned trial judge in this case to warn the jury against convicting unless there is some corroboration

of the evidence of Junior Blackwood. The circumstances of the case did not so demand. It is not clear upon what the asseveration by counsel was based. It could not have been on the ground of self-interest in Junior Blackwood, because he did not have an interest to protect himself because of involvement in the crime. He was not seeking to exculpate himself from any charge of joint enterprise. If it is looked at from the angle of assumed vindictiveness because the appellants and their friends held the opinion that he had stolen their weed, his evidence would have to be tested in the light of the contradictions and inconsistencies which formed the basis of much argument before us. At the same time, he was alarmed at the fact that they were looking for him causing him to hide himself in the boat, from which vantage point he saw what happened. Surely, his loneness as a witness of fact does not by itself disqualify him from any conclusion by the jury that he was present and saw what he described when he said that the appellants were present and were involved, though not with physical blows, in the beating of Clive Gibbons. Nor was his evidence depreciated and of no worth because the deposition had been read over to him by the policeman while he was in custody.

As stated before in the summing-up the learned trial judge described the position of Junior Blackwood, in the following phrases: "the Crown's case stands or falls on his evidence" (p.6); "Mr. Blackwood, as I mentioned, is the linchpin of the Crown's case, by that I mean the case stands or falls by him." Immediately he adds: (p. 19)

> "You have one witness here. As the Attorney said, you know, if you find that Mr. Blackwood is a consummate liar, through the door goes the case, or, let me put it the other way; through the window goes the case, through the door goes the accused. If you disbelieve Blackwood. If you are not sure about what he is saying, as I tell you, if there is any doubt, the accused is entitled to the benefit."

The learned trial judge reminded the jury that this most important witness had spent a very considerable time in the witness box, during which he was cross-examined by both Mr. DeLisser and Mr. Ramsay. In the light of all this exposure and pressure it is relevant to note that at page 33, the judge posed the question "Is Blackwood speaking the truth? was he speaking the truth? As I say his evidence is of paramount (sic) to the case. (it is clear that the word 'importance' has been omitted in the transcription)." Again, at page 48, the text shows the words. "It is a matter for you, whether you, having seen Junior Blackwood, accept him as a witness of truth and believe that Carr had an iron pipe that night and was standing while the beating was going on." "Junior Blackwood is the Crown's key witness", he reiterated on page 58.

These repeated and particular references to the role of Junior Blackwood could not in our view, have failed to bring home to the jury the status of Blackwood, the nature of his evidence within the context of the repeated directions on the burden of proof, and the caution with which they should evaluate his evidence. It is not for this Court to presume that the jury did not appreciate the questions posed by the evidence of Junior Blackwood. In the light of all that was elicited under cross-examination, and the apparently lengthy address to the jury by experienced and eminent counsel, we are not in a position to say that the jury could not have realised that the pre-eminent issue was the truth or falsity of the evidence of Junior Blackwood. Their verdict amply highlights that they did not find his credibility undermined and destroyed.

In this regard, it was urged that this Court should adjudge that the learned trial judge fell into error when he gave the jury an inadequate direction as to the method by which they should resolve conflicts which arose in the evidence of a prosecution witness at the

trial, and the depositions of such a witness at the preliminary enquiry. The submissions developed into the contention that the learned trial judge omitted to further direct the jury that if they found the inconsistency or discrepancy material, then in the absence of a satisfactory explanation from the witness, they should reject the particular piece of evidence tendered; or disregard the entire evidence of the witness, if in their view it undermined his credit.

Given the understanding by the jury of the importance of Blackwood's evidence to the Crown's case and more importantly, the appraisal that they would eventually have to make, whether he was or was not a truthful witness, it must have been appreciated by them that the evidence of Blackwood had inconsistencies within itself, and contradictions with the evidence of Dr. Venugopal who performed the post-mortem examination. Therefore, it was strongly argued, the nature of the contradictions and inconsistencies demanded a careful presentation by the learned trial judge for the benefit of the jury. For instance, it was said that the witness was unscrupulous in the use of the names and the aliases of the persons who he said were on the beach. It was said he used those names interchangeably to mislead the Court.

It must be noted that three of the very names, "Soldier, Nyah Cawley, Owen" - the witness was allegedly confused about, are mentioned by Henriques in the caution statement. They and he, it is clear from that statement were together for some period of time prior to and up to, the escape of Clive Gibbons from the beating by Nyah Cawley. According to Blackwood those three persons and Henriques were always together over the seven or eight days about which he spoke. They were coming on to, going off, and away from the beach, at different times over that period. Accordingly, we reject the submission that the way in which the names were called and aligned for the various events detailed by the witness, was so confusing as to be a material inconsistency in the evidence of Blackwood. We boldly say we cannot so describe it.

Another inconsistency given major importance in the argument was the position of the boat; and the position of Junior Blackwood in the boat. At pages 19-20 the judge reminded them that:

> "You heard a lot of evidence about position of boat, where it was turned. You heard the submissions by the attorneys. Roller, bow, keel, back, front. You have heard submissions about; if they wanted to kill Clive would they take him to a public beach to kill him where a firearm would attract attention? It's a matter for you what weight - whether you accept these as persuasive argument. It may be that some would say that Greenwich Farm Beach, early morning, when man hear gun fire, him just curl up inna him bed and lock door. I don't know. It's a matter of how you interpret it. Or you may well say Mr. Ramsay has a good point. If they want to kill him - somebody mentioned 'bush' - carry him go a bush and kill him. Consider all these things you know. They were said to dissuade or persuade you as the case may be so you give what weight as I say you wish to these suggestions."

At page 30 the text of the summing-up apropos the position of Blackwood, recalls that:

> "Mr. DeLisser went in some length with Mr. Blackwood about his position in the boat, whether he was stooping. Said he had to stoop on his knees and as to the bow and which was higher and as to what he said at the preliminary; the boat was resting on its bottom or its keel. Shown part of his deposition and he read it. And he mentioned about the roller because it is important as regards the angle of the boat, how it was tilt and he said without roller it still has a tilt. Purpose of the roller is to prevent rolling of boat. Mr. DeLisser says that rollers are put there so that you can roll the boat down to the sea."

We were not told, and we did not see in what way those reminders by the judge made this summing-up on this point of the position of the boat as the hiding place of Junior Blackwood, not adequate in the circumstances of this case. Surely, it was not within the competence of the judge to even insinuate to the jury that the witness could not have seen. There is no evidence to countervail his testimony on this point. The jury's paramount consideration was to discover whether he was present on the beach on the morning of the

19th April, and whether he did see what he related. That was a question of fact. It is a striking but silent commentary on his truthfulness when he said the two appellants did not inflict any blows on the deceased although his evidence speaks to their behaviour otherwise. These references must have struck the jury as the account of a witness who was giving unembellished evidence of events which he had seen.

The attempt to direct the attention on Nyah Cawley as the sole perpetrator was resisted by Junior Blackwood. He refuted that suggestion made by Mr. Ramsay in cross-examination. When it was questioned whether Nyah Cawley, was the chief one; he insisted that Nyah Cawley and "Soldier" were the ones beating Clive, and that the two appellants were also present. Since the 19th April, the day of the beating he had not seen Nyah Cawley.

Again, there was the identity and role of Nyah Cawley. In his caution statement, Henriques mentioned that Nyah Cawley was at one time in conversation with Owen Kerr. It was to them he directed the question "What are you going to do about the youth." His actions at the fateful point was amply described by all who spoke of the incident on the beach. And it should be remembered that in his unsworn statement from the dock, Henriques told the judge and jury that 'the Nyah Cawley mentioned in my statement is the same Nyah Cawley that was released at Half-way-tree."

Miss Heather-Dawn Hylton, a Crown Counsel in the Office of the Director of Public Prosecutions, gave evidence that as the Clerk of Courts for the parish of St. Andrew, she marshalled the evidence at the preliminary enquiry into these charges. She said that during the course of the preliminary enquiry an accused by the name of Vinton Cawley, who, as far as she could remember, was otherwise called 'Nyah Cawley' was brought before the Court, and was in fact charged

along with the two appellants for the murder of Clive Gibbons. She further said that Junior Blackwood was asked if he had ever seen that man, Vinton Cawley, alias Nyah Cawley, and he said no. Consequently, Vinton Cawley (Nyah Cawley) was dismissed from the charge at the preliminary enquiry.

It was submitted to us by Mr. DeLisser and Mr. Ramsay that Junior Blackwood was dishonest in deliberately failing to point out Vinton Cawley o/c Nyah Cawley. We stress that in our judgment there was nothing at all in the evidence at the trial to show that Junior Blackwood was ever asked, firstly, whether the Nyah Cawley, whose actions on the 19th April he had pinpointed, was charged along with the appellants at the Half-way-Tree Resident Magistrate's Court. Most importantly, there is no excerpt from the transcript of evidence to show that he was asked at the trial whether he had said at the preliminary enquiry that he did not know Nyah Cawley who was then at the preliminary enquiry, and that he was consequently released. In the summing-up at page 35, there is a reminder of the evidence of Detective Assistant Superintendent of Police Osbourne Dyer. Mr. DeLisser put to him certain things that he had said or he had allegedly said at the preliminary enquiry; that the accused (Henriques) said "I had nothing to do with it, Nyah Cawley beat the youth" etc., etc., and he said 'it's possible at the preliminary enquiry I said so': Was shown the deposition and he said, "That's what is written there, I couldn't say I am sure": Said that the witness had failed to identify Nyah Cawley. He was talking about Nyah Cawley at Half-way-Tree, the one at Half-way-Tree, light-brown complexion, medium built, 5 feet nine to ten, early forties, also had gold teeth, that was the one at Half-way-Tree. Was cross-examined by Mr. Cruickshank, says, he knew more than one person by the name of Nyah Cawley. 'The one I arrested was because of information received. That description fits the one I cause to be arrested. When arrested the preliminary enquiry had already commenced'.

At page 47 of the summing-up the judge dealt with this person named Nyah Cawley, by reminding the jury that -

> "Lastly, he says, 'Nyah Cawley that was mentioned in my statement is the same Nyah Cawley that was released at Half-way-Tree'. As I told you, Nyah Cawley figures very often in this case, we hear that name more than once. You heard his name mentioned so far as the happenings on the beach were concerned."

Mr. Ramsay submitted that there was enough evidence for the jury to accept that the Nyah Cawley referred to in the evidence was the one at Half-way-Tree. If that were so, the judge should have directed the jury on the effect of this on the credibility of the witness. We repeat that there was no evidence to identify 'the Nyah Cawley' at Half-way-Tree with 'the Nyah Cawley on the beach.' In fact, although, presumably, Blackwood gave a description of the men involved in the incident on the beach, it was not enquired of Blackwood what description of Nyah Cawley he had given to the police. Neither the witness Blackwood, nor Miss Hylton, nor Detective Assistant Superintendent Dyer, was asked to identify in person anyone as Nyah Cawley. Surely, it must have been appreciated that it would have confounded the evidence of Blackwood had the defence been able to resolve the quandary implicit in the unsworn evidence of Henriques about the identity of Nyah Cawley. The jury's perception of the witness Blackwood as a witness of truth must have depended on, firstly, the fact common to both accounts of the incident on the 19th, that one Nyah Cawley was present on the beach; secondly, that he was one of the persons beating Clive Gibbons, the deceased, while the appellants were also on that beach. On the other hand, the jury were faced with divergent accounts regarding the presence of the two appellants on the beach - the one account placing them at the spot, when and where the beating was being administered, and from the commencement of the beating; the contrary report which they made being, that they became aware of

the beating only when they heard the young man bawling, as they came to the shocked realisation "that Nyah Cawley was murdering the boy." Confronting Junior Blackwood with Nyah Cawley might inescapably have made it quite difficult for the witness to explain his denial that he knew the Nyah Cawley who was before the Resident Magistrate's Court, but who, in the unsupported contention of the defence was the Nyah Cawley who was on the beach on the 19th April.

The foregoing observations do become stronger when it is recalled the reason Henriques assigned for previously leaving the beach "with a young man in the trunk." That reason was "that there were people hostile towards him on the beach, and I thought it best to get him out under any circumstances." This was the same young man who he returned to the beach still in his protective custody, but who after they had all returned to the beach was pounced upon by Nyah Cawley, who grabbed him in his shirt collar, when he came out of the car, and took him around a corner. There is nothing hereafter about continuing the protective custody, nor even the raising of any objection to Nyah Cawley taking him away in such a violent manner: Not a word of reprimand for the beating of the youth. Of course, noteworthy is Blackwood's denial of the exculpatory version given by Henriques' caution statement, which version was explicitly accepted by Carr in his unsworn statement. It is possible that the jury considered all these points in coming to their verdict, especially as the following comments of the judge in our view stressed the importance of Nyah Cawley.

At page 20 he posed:

> "The question of whether they were just teaching him a lesson, roughing him up, the question of whether one man - Nyah Cawley ..... what a very prominent unseen part he has played in this case. We would so much would have loved to see Nyah Cawley. And then, when we saw him we wouldn't know if he was the right Nyah Cawley."

Did the judge thereby alert the jury sufficiently on this aspect of the evidence? The comment could justifiably be made that the trial judge should more directly have advised the jury to ascertain whether in fact the evidence referred to one and the same Nyah Cawley who was on the beach, and who was, therefore, properly indicted along with the appellants. Because, an affirmative finding would mean that the credibility of Blackwood would have been depreciated; consequently, the jury would have been justified to view his entire evidence with suspicion, and so would have experienced a reasonable doubt in their minds as to the guilt of the appellants.

Even so for the jury, the overriding question would eventually be, although a Nyah Cawley is not before us, do we feel sure that the witness had not mislead the court and us by saying he did not know the Nyah Cawley who was dismissed at the preliminary enquiry? It is a matter about which any intelligent jury could without specific instructions have made up its collective mind on the totality of the evidence. We do not accept that the summing-up was defective on this point, so as to cause a miscarriage of justice. We go on to state that whoever was Nyah Cawley, the ultimate issue for decision by the jury was, was the evidence in its totality sufficient for them to say that the appellants so acted as to make any reasonable jury conclude they were acting in concert with him and "Soldier" in the fatal assault on the deceased on the morning of 19th April, 1984.

It was further submitted that the credibility of the witness Blackwood was diminished by his conflicting evidence regarding two other matters, viz., whether the hands of the deceased were tied at the time when he chucked off into the sea, and his failure to point out the appellant Henriques at the identification parade although he identified him in court. We fail to see the significance of that as a material discrepancy, bearing in mind that the demonstration of how

Clive 'chucked off in the sea' was by outstretched arms, which could hardly have been likely if his hands were tied behind his back at that material time. This could not have been a material discrepancy especially in view of the declaration by the defence at all times that the hands of the deceased were not tied when he jumped into the sea and swam out to the boat in the harbour.

On this point the passage hereunder quoted give some perspective for the jury's consideration. Said the trial judge at page 25:

> "It's intriguing, and it maybe important, an important intriguing aspect of hands behind, tied. Mr. Pantry gave an interpretation, or what he considered the proper way of looking at it, when he said broke away. Mr. Pantry was inviting you to say that he was free of rope, Mr. DeLisser has on the other hand said - suggest to you, a far more reasonable interpretation, that he broke away - if he was - when he got loose, one might well say he could have broke - the expression would be - broke loose, not broke away. But then, you are the one who will have to interpret what all this means.
>
> Remember the question about anything unusual about him. Anything strange with him, - I don't think strange was the word he used - unusual. But I think we can accept - maybe we is not a right word, - it seems to be an acceptable appropriation, that when he chuck off into the sea, his hands were free, I think we can safely say that. What you may well ask, is, whether he was swimming out to a boat anchored out in the stream, as they say it, in nautical language."

Here the judge has put to the jury the defence which was simply that the deceased escaped from the beating by Nyah Cawley by going into the sea, and swimming out to the ship. He has reminded the jury of "the far more reasonable interpretation" by the defence that the deceased might have broken loose, which reminder itself shows that the judge endeavoured to put a balanced view of the evidence for the jury's consideration. The impact of the witness saying that he did say at the preliminary enquiry that before the beating

the hands of the deceased were tied behind him, whereas at the trial, he said that there was nothing to prevent Gibbons from defending himself, do not accord to the submission such validity as would lead us to give any value to it. The importance of the chucking off - the motion and movement as described by Blackwood, - received further attention when the judge dealt with the deposition of the evidence of Dr. Venugopal, especially in terms of the finding of the doctor as to the cause of death. As this deposition forms the subject of a separate ground of appeal, it will be dealt with later on in this judgment.

It was contended that the learned trial judge did not properly direct the jury on how they should view those discrepancies. Mr. Rattray directed our attention to several passages in elaborating on his submission. Firstly, at pages 6 and 7:

> "You heard during this trial and you saw, depositions taken at the preliminary enquiry being put to witnesses. I refer particularly to Junior Blackwood, because - I say it here and now - that I agree with the assessment, that the Crown's case stands or falls on his evidence. While he was in the witness box, several times he was asked about the preliminary enquiry, 'didn't you say so and so and now you are saying something else', and I tell you this about that aspect of it, if you find a witness giving evidence to a certain effect here, and on an earlier occasion he said something which is in violent conflict with what he said at the trial, the first consideration is that, what he has said at the trial before you is the evidence in the case, and not what he said earlier on, remember that, it is what he said before you, that is the evidence. But I add that - and quite as simply as I have put it - where it has been shown to you that on an earlier occasion a witness said something that is in conflict with what he said before you, then you will be entitled to regard his evidence before you with caution, and sometimes with grave suspicion. In fact, in an extreme case, you could disregard it all, if you like, but what he is recorded to have said earlier is not evidence of the truth of the facts stated therein. Remember it was put in for the sole purpose of showing that you cannot believe him, you cannot rely on him."

In the submissions to us it was rightly stressed that the previous statement which is inconsistent with the evidence at the trial is

not to be regarded as constituting evidence on which the jury should rely. But, it is not so that in those circumstances the evidence given at the trial should be regarded as unreliable on that point in the absence of a satisfactory explanation. In support of this submission, Mr. Rattray cited the well-known cases of R. v. Harris [1927] 20 Cr. App. 144 and R. v. Golder, Jones and Porritt [1960] 45 Cr. App.5.

We draw attention to the opinion of Luckhoo, J.A., in R. v. Wilbourne and Edward Walters [1971] 17 W.I.R. 91, at page 104:

> "The direction which Mr. Taylor (citing R. v. Golder [1960] 3 All E.R. 457) has asked us to say is the proper one in fact is that mentioned in R. v. Harris (1927), 20 Cr. App. Rep. 144. However, as WOODING, C.J., has observed in Mills & Gomes v. R. ((1963), 6 W.I.R. at p. 421), the direction given and approved in R. v. Harris (1927), 20 Cr. App. Rep. 144, 'prescribes no rule of law. It simply provides guidance to a judge as to the nature of the direction he ought justly to give to a jury in the circumstances mentioned'."

We also note that one of the contentions presented to the Court of Appeal of Jamaica in R. v. Baker et al [1972] 19 W.I.R. 278, was "that where a witness is proved to have made inconsistent statements on a material issue in a case the jury should be directed in accordance with the principle laid down in R. v. Harris, which principle it was contended must now be regarded as a rule of law so as to impose a legal obligation to tell the jury that 'the effect of the previous statement taken together with the sworn statement was to render (the person) a negligible witness and that the jury must consider whether the case was otherwise made out." The Court of Appeal of Jamaica, speaking through Smith, J.A., agreed with the views of the Court of Appeal of Trinidad and Tobago, expressed in Mills & Gomes v. R. (supra) and in Slinger v. R. [1965] 9 W.I.R. at page 276. Phillips, J.A., spoke of the much abused case of R. v. Harris which is manifestly no authority for the proposition that the jury should reject not only the

evidence of the witness in relation to which the discrepancy existed but the whole of his testimony relating to the whole incident.

The Court of Appeal of Jamaica has reminded of the context in which the directions were given and approved in Harris' case and has stressed also "That the passage in Mills & Gomes v. R. on which reliance was placed, did not seek to impose any obligation on a trial judge as contended', is made clear in Daken v. R. [1964] 7 W.I.R. 422." Indeed the judgment in R. v. Baker et al at page 289A-C, gave prominence to the following dicta from the judgment of Wooding, C.J. in Daken (supra) at page 444:

> "In our view, then, the directions to be given must have due regard to the facts of each case. No general principle can be enunciated except that it should never be forgotten that in the final analysis, questions of fact are to be decided by a jury and not by a judge. The judge may, and in cases such as we are now considering we think it is his duty to give such directions as will assist the jury in assessing the credit-worthiness of the evidence given by the witness whose credibility has been attacked, but it can be but seldom that the circumstances will warrant his going beyond that. More especially, when a witness has given an explanation how he came to make the inconsistent statement by which his credit is sought to be impeached, it is for the jury to determine whether his evidence is acceptable when set against the inconsistent statement due regard being had to the explanation proferred."

Consequent on the last passage, Smith, J.A., considered the submission that even -

> "if there is no rule of law as contended, it is a rule of practice that has become obligatory on a trial judge. In the further alternative, it was argued that the judge has a duty to tell the jury that the evidence ought not to be accepted in the absence of reasonable explanation, and that the standard of proof of reasonableness of the explanations is the same as the standard required for the proof of guilt."

Smith, J.A., emphatically explained the present day position in the following words on page 288E:

> "The purpose of providing that a witness has made a previous inconsistent statement is to discredit his evidence in the eyes of the jury. It is the jury, and they alone, as the judges of fact, who must decide whether the witness has been discredited and to what extent. No case has yet altered this position."

We further extract the following passage from the judgment of Smith, J.A., at page 289C:

> "Time and again during the argument before us, when what was said to be a material inconsistency in the evidence of a witness, was pointed out, it was submitted that there was a duty on the trial judge to tell the jury that, there being no explanation (if that was the case), the evidence of the witness on that point should be disregarded. After the evidence of the witnesses Blake, Miller, Anglin and Jonathan Smith and the summing-up in relation to that evidence had been examined, it was submitted that because of the unexplained inconsistencies in their evidence the jury should have been told that their evidence should be disregarded, and that they should look elsewhere for proof of the charge; further that they should have been told that the explanations, when they offered any, were worthless and should not be accepted as reasonable. This is the same argument that was advanced in the Daken case, and was based on the Harris and Mills and Gomes cases. If these submissions are right it would mean that the judge would be under a duty to decide questions of fact, thus usurping the functions of the jury. We have no difficulty in rejecting these submissions as not supported by the authorities cited. We, however, agree that in a proper case, and this is one, the judge is under a duty to assist the jury in assessing the credit-worthiness of the evidence given by a witness whose credibility has been so attacked. This duty is usually discharged in our opinion, if he explains to the jury the effect which a proved or admitted previous inconsistent statement should have on the sworn evidence of a witness at the trial, and reminds them, with such comments as are considered necessary, of the major inconsistencies in the witness' evidence. It is then a matter for the jury to decide whether or not the witness has been so discredited that no reliance at all can be placed on his evidence. There is, of course, the inherent power of a judge to withdraw a case from the jury if, in his view, the only witnesses in proof of a charge have been so discredited that no reasonable jury could safely rely on their evidence. If, however, there is evidence in the case in support of the charge apart from the discredited evidence, on which it is open to

> "the jury to convict, the judge in our opinion, has no power to, and thus, no legal duty to withdraw the discredited evidence from the jury, leaving the other evidence only for their consideration. All the evidence must ex hypothesi, be left to the jury as judges of fact with a strong comment by the judge against the acceptance of the evidence which he considers to be so discredited."

The State v. Mootoosammy and Budhoo [1974] 22 W.I.R. 83, records that the trial judge failed to tell the jury how they should regard a discrepancy; nevertheless, the Court of Appeal of Guyana, having regard to the rest of the summing-up and the evidence, conclude that no injustice was done to the appellants. Here again Persaude J.A., stated quite firmly that -

> "It is not the law, as I apprehend it, for a judge to tell a jury that a witness's previous inconsistent statement cancels out his sworn testimony. The jury are required to consider the testimony in court, but they should be told of the previous inconsistent statement; that as a result of the previous inconsistent statement they may well regard the testimony as being unreliable; but that they must not treat the previous statement as substantive evidence. .... But I am unable to hold that a judge should tell a jury that a previous inconsistent statement automatically nullifies the sworn testimony of a witness."

He rightly added the practical observation that -

> "The jury will have heard any explanation which dissipates the inconsistency, and will be able to assess the consequent weight of the testimony."

At page 90C, he continues:

> "Where the inconsistency is irreconcilable, then the direction becomes all-important and necessary, and acting on proper directions, the jury may well reject the testimony as being inconsistent with the previous statement. But I am unable to hold that a judge should tell a jury that a previous inconsistent statement automatically nullifies the sworn testimony of a witness."

We have taken time to draw attention to those dicta, firstly, to show what is oft-times forgotten, that there are such authorities

in our West Indian jurisprudence, which deal with the particular issue, and which relevantly comment on the cases upon which great reliance was placed before us. Secondly, that whether the inconsistency is explained or not, the matter of its immateriality or materiality is for the jury. And where the witness gives an explanation accounting for the discrepancy between a previous inconsistent statement and his evidence at the trial, the judge must leave it for the jury's determination as a question of fact, in that, it is for them to decide whether the inconsistency, discrepancy or contradiction is of so material a nature, that it goes to the fundaments of the Crown's case resulting in the jury not being able to accept the witness' evidence on that point, and in the long run, maybe, reject him as a witness of truth. The issue of credibility is a matter for the jury. Insubstantial contradictions do not, in any way, or to any extent, cancel the effect of the witness' testimony at the trial. If it can be shown, however, that the judge by his remarks has derogated from the effect of the material contradictions, inconsistencies and discrepancies, a Court of Appeal should interfere on that ground.

How did the learned trial judge in this case deal with the matter? Let it be conceded that he did not at all ritualise the directions normally given. But we pay particular attention to his direction, that the first consideration which he placed before the jury is "what he said at the trial before you is the evidence in the case, and not what he said earlier on; remember that it is what he said before you, that is the evidence." (page 7)

Then too, he had earlier spoken of the witness saying something on the earlier occasion which "is in violent conflict" with what he said at the trial. The words "in violent conflict" form a phrase giving sharp focus to the question posed by the learned trial judge: "Was Blackwood a consummate liar?" This ultimate question is

itself subsumed in the directions to the jury of what sort of appraisal they should make of the evidence where a conflict arises. The jury were advised (a) "to regard the evidence before them with caution" (b) "and sometimes with grave suspicion." He finally left to them this direction: "In fact, in an extreme case, you could disregard all if you like." (c) "The deposition was put in for the sole purpose of showing that you cannot rely on him." These are comments by which distinct levels of appraisal were explained for the jury as being requisite, and which they must have appreciated were directed to the strength of the evidence of the sole eye-witness, in the light of the burden of proof, and the standard of proof. This is the light in which one must read the comments of the learned trial judge when he reminded the jury about the failure of the prosecution to call Alvin Innswood. When the judge said at page 19, "Perhaps one of the reasons why I didn't explain to you about discrepancies", he must be understood to be emphasising the fact that as the jury did not hear from Alvin Innswood, he, the judge, did not have to direct them to stand on any contradiction between one witness and another, between him and Blackwood. He added, "I did not tell you about witnesses and one recollection may be better, because Mr. Blackwood, as I mentioned, is the linchpin of the Crown's case. By that I mean the case stands or falls by him." On page 29 the judge says:

> "As I have pointed out, there is nothing wrong in a witness saying what he said at the preliminary. I think what Mr. Ramsay says that you ought to consider is that he was told to stick to it. But, of course, our ultimate objective here is the search for the truth and as I told you, what you have to determine and decide the case on is what is said in court before you here in this court and I have explained to you what the effect is when you find a witness saying something different earlier on."

We have perused the relevant evidence with great care and we are satisfied that the inconsistencies pointed out to this Court were

identified by the learned trial judge to the jury. Although it was strenuously argued that the discrepancies were damaging to the Crown's case, upon deep reflection, after carefully examining the relevant material, we have concluded that the judge gave to the jury the general warning of the considerations which should guide their approach on this point of inconsistency. We are categoric in our opinion that the terms of his directions to the jury which we quoted earlier, were sufficient in the circumstances of this case to alert the jury how to carry out their functions as judges of fact. On the other hand, we do not accept that the inconsistencies were so discrepant that the Crown's case fell apart because of them.

A more substantial point for argument was the admission by Junior Blackwood that he failed to point out Henriques on the identification parade. It was not explained that his failure to do so was due to the difference in the condition of the appellant's hair at that time, compared to the time on the beach. But the fact is that he said he saw the appellant on that parade he did not point him out. Upon this the judge commented as follows at pages 21 - 22:

> "He mentioned people like Dilligan, Patrick and Stewart and Little Bear and Chippie. Saw Soldier everyday - day after on the beach, him and the white man ... and Mr. DeLisser, at that stage - remember - took objection about pointing out any white man because - and I come to it; the question of the identification parade. As you all know, and from the evidence that was adduced, Blackwood went on an identification parade and he pointed out, on the parade he pointed out the wrong man. He was the man in the number six position. And there have been reasons advanced as to why he pointed out the wrong man; different cut of hairstyle, beard, etc.
>
> Mr. DeLisser objected to that identification which we call a dock identification and I tell you now because whenever it is done I warn you that it is not a proper and safe and reliable way. But then we come back to this point; as Mr. Pantry said, "why quarrel about niceties?" Mr. Henriques said he was on the beach, puts himself there. But still, it was my duty to tell you that that identification, that dock identification wasn't proper, not to be encouraged. When I say not to be encouraged I rather put it roundly; not much weight could be placed on it.

"So, I allow the witness and he pointed out Mr. Henriques, the accused. Said he had seen him on the beach; mentioned the occasions when he had seen him; was with Owen Carr, the other accused, Jubbie. Soldier and Carr was there."

The trial was not the first time when the witness pointed out Henriques. The first time he did so was at the preliminary enquiry, while Henriques was sitting in the dock, as was earlier recounted in this judgment.

Although it is mystifying that the witness did not point out Henriques on the identification parade, considering the evidence of having seen Henriques and the others every day from the 11th April up to the date of the incident, the jury had before them suggestions to the contrary, but the witness was adamant that he saw Henriques on the morning of the 19th.

It was contended that the learned trial judge erred in law in allowing the dock identification of the appellant, Henriques, after the witness Junior Blackwood had failed to point him out on the identification parade, or in the alternative, did not tell the jury that the dock identification was completely useless, but instead wrongly told the jury that it did not matter as Mr. Henriques said he was on the beach, puts himself there; bearing in mind that what was important was the identity of the person who, on the Crown's case, had the gun. The passage dealing with the dock identification which was quoted above from the summing-up, shows the trial jduge's strong disapproval of the dock identification to the extent that he told the jury that not much weight could be placed on it. But he was, nevertheless, not in error when he allowed the dock identification, which does not per se become valueless, because identification is a matter of fact for the jury especially when there are other facts supporting the presence of the accused at the scene of the crime. Dicta in the cases impose on the trial judge the duty to warn the

jury in an appropriate case of how weak it is, so that upon a critical examination of the evidence it will be for them to decide whether the prosecution has discharged the burden of proving the accused guilty.

In Slinger v. R. [1965] 9 W.I.R. 271, the two witnesses for the prosecution had not been invited to the identification parade held for the purpose of identifying the person whom they alleged they had seen attacking the deceased. The first time that either of them had seen the applicant after the stabbing incident was when they identified him in the dock at the preliminary enquiry into the murder charge. It was urged that in such circumstances the identification of the appellant at the trial was of no value, and the judge should have so directed the jury. This it was said, was a matter of law. But the Court of Appeal of Trinidad & Tobago speaking through Phillips, J.A., said that questions of identification are essentially matters of fact for determination by a jury, and each case must be decided upon its own circumstances. While, therefore, the identification of the appellant at an identification parade by the two witnesses would have been the better method, it cannot be said that their identification in court at the preliminary enquiry was nugatory. The ipsissima verba of the dictum on this point are quoted from page 275:

> "It is noteworthy that while the headnote to R. v. Cartwright (1914) 10 Cr. App. 219 CCA states:
>
> 'It is improper to identify a defendant only when he is in the dock', nowhere in the judgment is any such statement to be found. All that Reading, L.C.J., is reported to have said on this point is (10 Cr. App. R. 221)
>
> 'The prisoner was not put with a number of other men so that the witnesses might be able to identify this man as the guilty man. It would have been definitely better had this been done.'"

Phillips, J.A., then expressed the decision of the Court of Appeal in the following words, reported at page 275D-E:

> "We are clearly of the view that Cartwright's case (1) is no authority for the proposition that in any case where an accused person is not previously well known to an identifying witness, failure to hold an identification parade would necessarily vitiate his identification, nor have we been able to find any authority which supports such a contention. As regards the present case, while we are of opinion that the identification of the appellant at an identification parade by the witnesses Richards and Boatswain would have been better than the method actually adopted, that is far from holding that the identification was completely nugatory.
>
> In our judgment, questions of identification are essentially matters of fact for determination by a jury and each case must be decided upon its own particular circumstances.

The decision in Slinger v. R. was applied in Herrera & Dookeran v. R. [1966] 11 W.I.R. 1, where the identification of the accused was at the preliminary enquiry.

Then in 1972 the Court of Appeal of Guyana heard the appeal of Kirpaul Sookdeo & Ors. v. The State [1972] 19 W.I.R. 407. In that case despite the presence of the accused on the identification parade, the prosecution witness had failed to point out the accused. The witness, however, identified him in the dock at the Magistrate's Court, and at the trial, as one of the men involved in the commission of the offence. She explained that despite her earlier failure, after she had left the parade she felt that the appellant was one of the persons involved, and spoke to a police officer. The judgment of the Court of appeal, delivered by Bollers, C.J., contains the following relevant passage at pages 412H-413C:

> "Before dealing with the evidence of Gail da Silva and the directions given thereon by the judge, I think I ought to dispose of two subsidiary submissions made by counsel for the appellant under this head, when he argued that this witness' evidence amounted to an identification from the dock which was not a good identification but was nugatory and the jury should have been so directed, and they should have been further directed that in view of the inconsistencies in her evidence, her evidence should be disregarded altogether. In stating that an

"identification from the dock was not a good identification counsel was repeating what is set out in 10 HALSBURY'S LAW (3rd edn.) 440, para. 814, wherein it is stated that the witness should not be asked to identify a person for the first time when he is in the dock but the accused should be previously placed on a parade with other persons and the witness asked to pick him out. The authority for this proposition is R. v. Cartwright (1914), 10 Cr. App. Rep. 219, C.C.A.; 14 Digest (Repl.) 404, 3951. The head-note of that case, however, is not borne out by the judgment of the court delivered by REALING, L.C.J., wherein the Chief Justice merely stated that the prisoner was not put on parade with other men and it would have been infinitely better had this been done. As the Court of Appeal in Trinidad pointed out in Slinger v. R. (1965), 9 W.I.R. 271, questions of identification are essentially matters of fact for determination by a jury and each case must be decided upon its own circumstances; while it is better for an accused person to be placed on parade with other similar persons, it does not follow that identification in court at the preliminary inquiry is completely nugatory. Even though it may be said that Gail da Silva failed to identify the No. 1 appellant at the identification parade but did so at the preliminary inquiry it became a question of fact for the jury to determine whether they should accept the identification from the dock or not."

In addition, we repeat the remarks of Henry, J.A., in R. v. Errol Thomas and others [1978] 25 W.I.R. 495. He pointed out the necessity for the summing-up to deal with the dangers in dock identification, and that in the absence of a careful and positive direction in that case the conviction could not stand. It is worth-while repeating the dangers as they are set out in the text stated at pages 496I-497D:

"In relation to the persons not known to Mr. Blake before the day of the incident he had given only a general description of all of them to the police. He saw them for the first time after the incident in the dock at Half Way Tree charged with the offence. Two of the four persons charged were known to him before and on his evidence he was in no doubt that they took part in the attack. There was in our view a very real danger of the witness identifying the other two merely by association with the two who were known to him rather than by actual recog-nition and recollection. But there was an added danger. It is clear from the evidence

> "that the police could not have identified Hanson and White from the description given by the witness Blake. That identification must have come from some undisclosed source. There was, therefore, the added danger of the witness making his dock identification merely because he believed that the police must have acted on reliable information in arresting Hanson and White. As the High Court of Australia observed in Davies and Cody v. R. ((1937), 57 C.L.R. 170 at p. 182):
>
> 'his natural inclination to think that there is probably some reason for the arrest will tend to prevent an independent reliance upon his own recollection when he is asked whether he can identify him. This tendency will be greatly increased if he is shown the person actually in the dock charged with the very crime in question.'
>
> The circumstances called for the most careful and positive directions from the learned trial judge as to the dangers inherent in this dock identification. No such directions were given although general directions as to the danger of relying on identification evidence were given. We were of the view, therefore, that the conviction of Hanson ought not to stand and counsel for the Crown very properly concede this."

The application of those principles to the facts of the instant case must take note of the efforts of Mr. DeLisser to get Junior Blackwood to admit that it is because he saw the appellant Henriques sitting in the dock at the preliminary enquiry with Owen Carr o/c Burbie, why he said that Henriques was involved in the beating. The reaction of the witness to the suggestion was the bland assertion specifically on the ground "that is only one whiteman (Henriques) was on the beach." This is not an isolated fact, considering that some of the major points of the narrative of the events by Blackwood, were recounted in the caution statement of Henriques, so that, in effect, the jury had to ask themselves, and must have asked themselves, how could Blackwood have been able to give so many details if he was not speaking the truth?

For our part, we do not agree that the directions of the learned trial judge fell short of what is required on the point. He

told them bluntly that "it was not a proper, safe and reliable way..... It was my duty to tell you that identification, that dock identification wasn't proper .... not to be encouraged ...... not much weight could be placed on it."

At the same time, the trial judge made observations on the general question of the circumstances of the ability of the witness to see the appellants. At pages 26 and 27 he referred to the -

> "hiding under the bow of the boat and then he mentioned about the lighting in the area, lighting from the refinery - I nearly said the Esso refinery. But it may not be the Esso refinery, and lighting from other buildings around there. And you may well think that Blackwood had every opportunity - not every opportunity only, but the lighting was very good down there that night, that he could see what happened.
>
> I shan't belabour the question of lighting, because the accused men - and my interpretation of the evidence - that is clearly saying that they were there.
>
> Usually in a case, not always of this sort, you point out about the distance and lighting and obstruction and all the things like that, but they said they were there. Of course, lighting is for to indicate whether Blackwood saw as clearly as he said he saw, he said he saw everything. But, of course, you will recall the statement that he, in his anxiety and in his search to see what was happening, he was also careful not to expose himself."

And when he dealt with the unsworn statement of Owen Carr, the learned trial judge said 'there are certain areas that we have no dispute on. They have put themselves on the spot they put themselves there. So you may well appreciate why I did not go into greater details about this identification parade.' At page 51 he reminded the jury also:

> "As I say, I credit you with having good recollection. Carr continued at that point. 'We both got out of the car and ran down to where the incident was taking place.' Suggestion there is that 'we wern't right at the spot, not right beside thoro. Not standing up to help out with the attacker.' Ran down to where the beating, the incident was taking place, where Cawley was beating the youth."

This is a blunt and forceful way of reminding the jury of the kernel of the defence.

Dealing now with the complaint that the judge was wrong and unhelpful when he told the jury that the dock identification did not matter as Mr. Henriques said he was on the beach, puts himself there. It was submitted that the defence was "we were in the vicinity, but we were taken by 'surprise by the beating.' In other words, they were not there when the beating started, but as a result of the screams of the youth, they went to where he and Nyah Cawley were only to see the youth on the ground trying to get away from Nyah Cawley.

The words of the judge at page 5, when he again reminded the jury "So, you have Blackwood's evidence, Junior Blackwood's evidence, placing the men at the scene, and they have not denied that they were there", did not withdraw from the jury the question of deciding whether the appellants were ~~in fact~~ present at the time and spot of the beating. They, themselves, did not say how far they were from the spot. How far they had to run. Certainly, the car was about six yards from the sea. What the judge has done by the remarks quoted is to remind the jury very shortly of the positions of the appellants, which have to be discovered as the result of a reasonable inference.

This was the ultimate point. The pinpointing of these positions was not, in our considered opinion, grievously damaging as was argued. On the whole of the summing-up it is clear that the judge recognised, as did the jury, that exactly where the appellants were at the material time on the beach was an important part of the case. To say that the judge erroneously lumped together the positions of the appellants as given by them, with the positions alleged by Blackwood, without distinguishing them, is to lose sight of the closeness of the issue of fact as appears from the evidence as a whole. This was not a case of an alibi; but the most important issue of all was, given the presence of the appellants on the beach, what was the role of each in

the assault on Clive Gibbons? The issue of common design to beat, not their mere presence on the beach, was what was important. Separate directions were given on that doctrine.

There was much criticism of the judge's ruling that the deposition of Dr. Venugopal be read at the trial, it having been proven that the doctor had departed the island after the preliminary enquiry, and had not returned at the time of the trial. The attack on the ruling was formulated in that the Crown had not led evidence to discharge the burden of winning the consent of the court. It was contended that the fulfilment of the statutory conditions is not ipso facto a reason for his consent. They are merely the sine qua non whether or not the court will exercise its discretion. In the instant case, submitted Mr. Ramsay, the failure of the Crown to discharge this onus would, therefore, vitiate the importance of the evidence of the doctor, particularly regarding the cause of death, considering that the jury was not able to hear his answers under cross-examination on behalf of the accused.

Mr. Ramsay had submitted to the trial judge that he should exercise his undoubted judicial discretion and exclude the deposition. He urged that that should be so because of the absolute necessity for the evidence to be properly explored on a level for the resolution of the medical issues, which would (absent the doctor) lack the explanation, the elaboration, the challenges and the demeanour of the witness; otherwise there would be hardship on the jury to understand certain of the medical terms. Further, Mr. Ramsay besought the judge not to be swayed by the Crown's argument of inconvenience when raised as against what is the true duty of the court and the jury in relation to the deposition. Also, Mr. Ramsay adjured the judge, the doctor was a principal witness, and not merely a formal witness. In his challenge to the reception of the deposition, Mr. DeLisser conceded that it could not have been anticipated, either by the Crown or by the defence at the preliminary enquiry that the doctor would not be present at the trial.

We note that the deposition records that Mr. DeLisser lengthly cross-examined the doctor as to the probable cause of death, contending even at that time that the deceased was seen swimming out to a ship in the harbour, after he had been beaten by Nyah Cawley, and even then seeking to establish that the deceased had drowned. This seemed to be counter to his submission at the trial that even so at the stage of the preliminary enquiry, the defence would be in the dark as to what was the cause of death. Although Mr. Ramsay was not present at this stage of the preliminary enquiry, counsel holding for him then did not cross-examine, despite the opportunity to do so.

Before us Mr. Ramsay argued that the prosecution had failed to show where the doctor was, and whether it was impossible or even difficult for him to have been brought back to the Court on proper notice. He stressed that the contents of the deposition were such that the jury should have been given an opportunity of seeing and hearing the doctor, and therefore they were at a disadvantage, the accused not being able to show that the Crown did not satisfy the test for admission as laid down in the judgment of Carberry, J.A., speaking for this Court in the appeal of Scott & Walters v. R. SCCA Nos. 163 and 164 of 1980, in which Section 34 of the Justices of the Peace (Jurisdiction) Act was examined, and by the Court of Appeal of Guyana in The State v. Albert Stanislaus Browne [1975] 25 W.I.R. 51. Additionally, he posited, the learned trial judge applied the wrong principle, and in any event did not give to the jury the proper directions on how to deal with the issue. It was urged upon us that this Court should hold that the trial judge should have held a voir dire before allowing the deposition to be read.

It is beyond question that the Crown, through Miss Hylton and Detective Sergeant Pinnock had laid the necessary foundation under section 34 of the Justices of the Peace Jurisdiction Act as a

condition precedent to winning the consent of the judge for the reading of the deposition of Dr. Venugopal into the evidence. In so far as the submissions of the defence were directed at establishing that the evidence adduced by the Crown did not go far enough; this was, in the main, highly speculative.

We are of the view that all relevant conditions were considered by the learned trial judge. The admissible evidence led by the prosecution was the basis for his accepting that the doctor was not in the island at the time of the trial, and therefore, he could allow the deposition to be read. Moreover, there were the submissions made to him on the question by Mr. Ramsay and Mr. DeLisser. These submissions made him fully aware of the principles to be applied when he came to give his ruling on this point.

This is not a case such as the State v. Browne, where the admission of the deposition was treated as a matter of right, and worse still, was read before the judge had made a ruling as to admissibility. Of instant application, are the following words of Lewis, J.A., in Dockery v. R. [1963] 5 W.I.R. 379 at page 374A-B:

> "........ the deposition was admitted under the provisions of sec. 34 of the Justices of the Peace Jurisdiction Law, Cap. 188 [J], which gives to the trial judge a discretion whether or not he will admit the deposition. Unless it is shown to this court that the learned trial judge exercised his discretion on some wrong principle of law, this court will not interfere."

The test of the last sentence has not been passed before this Court. Accordingly, we hold that the judge did not wrongly exercise his discretion, and that no injustice was caused by the reading of the deposition of Dr. Venugopal.

At the same time, we think it profitable to indicate how the judge should deal with the deposition in the summing-up after it has been admitted into evidence. In that regard, to quote the judicial

pronouncement by Haynes, C., in delivering the judgment in the State v. Browne (supra) at pages 57D-58A:

> "However, if the trial jduge admits such a deposition the question then arises: What (if any) special direction is necessary. The law on this has been discussed in a few of the regional judgments. In Bramble v. R. [1959] 1 W.I.R. 473 (supra), HENRIQUES, C.J., for the court, had this to say ((1959), 1 W.I.R. 473):
>
> 'Should a judge in any particular case exercise his discretion and admit the deposition then it may well be that an obligation is cast upon the trial judge in his summing-up to draw to the attention of the jury that the evidence has come to them in a form where they have not had an opportunity of seeing the witness give his evidence, of hearing what he has to say, of observing his demeanour in the witness-box, and of themselves exercising the right, if they choose, to ask the witness questions, and further of hearing the witness cross-examined by the accused, if he so desires. In other words the jury should be directed to view such evidence with caution. Such a direction we suggest might obviate any possibility of any injustice being done to the accused by the reading of the deposition.'
>
> The Chief Justice spoke tentatively—'There may be' (not 'is') 'an obligation to advise caution.' In R. v. Boyce (1971), 17 W.I.R. 54 (supra), where the trial judge warned the jury 'to exercise caution' in dealing with the evidence as they had not seen the deponents nor had their evidence tested by cross-examination before them, the court said it could 'find no fault' with this direction. And in Sutherland v. The State (1970), 16 W.I.R. 342 (supra) LUCKHOO, C., put it this way ((1970), 16 W.I.R. at p. 346):
>
> 'Further, even when the evidence is submitted, it might still be necessary for suitable directions to be given depending on what is revealed by the evidence in the circumstances of the case. Where there is really deep controversy and dispute in what is tendered, it might become advisable not only to remind the jury that they have not had the benefit of the demeanour of the deponent, but to warn them that caution should be exercised in accepting what is heavily disputed under the handicap of the witness's absence.'
>
> It depends on what is in the deposition. If it is not vital evidence, or even if vital is not disputed, there might be no need for a cautionary discretion.

> "But if vital evidence is disputed and the honesty and credibility of the deponent would or could determine or assist materially to determine belief or disbelief of it, then the jury is obviously at a disadvantage and this might make a strong caution essential. But any caution must be adequate. As the learned editors of PHIPSON ON EVIDENCE (11th edn.) (1970), para. 1424, said of such evidence: "Its weight, however, is of course affected by the loss of the demeanour of the witness", and the jury must understand that this is so.."

We must, of necessity, recite the doctor's deposition as given by the judge to the jury. This is in order to test whether by reason of the absence of the doctor the defence was deprived of a most critical opportunity of demonstrably destroying the credit of the witness Blackwood, who had testified that he had seen the infliction of injuries in life to the deceased, but the doctor said one was post-mortem.

As regards the taking of the deposition itself, and the opportunity for defence counsel to cross-examine, during the trial the learned trial judge adverted to Miss Hylton's evidence, which he described as "merely priority to the getting in of the doctor's statement." In addition, he pointed out that "the Crown puts it to you to say that every opportunity was given at the preliminary enquiry to ask Dr. Venugopal questions or what questions he thought necessary, and Mr. DeLisser did in fact ask questions of the doctor."

The passage to be quoted from the transcript shows not only the contents of the deposition itself, but the comments of the learned trial judge thereon. Due regard must be paid to his directions on how the jury should treat the evidence of an expert witness, to which no objection has been taken. It must be remembered also that the evidence contained in the deposition was described by the judge "as the much discussed and much debated evidence of Dr. Venugopal" - a comment which tells volumes as to the assiduity with which the counsel in the case must have presented the matter to the jury.

At page 11 the judge directed the attention of the jury, in respect of the contentions regarding the cause of death, as follows:

> "You come to a little more controversial area. You ask yourself: What was it that killed the deceased? Not 'who', what caused his death? Dr. Gopal - and I shall deal with his evidence a little later on - says, in his opinion ..... note the words, 'In my opinion death was due to shock and haemorrhage caused by injuries inflicted by blunt force.' or words to that effect. I will go into it more later because it was being canvassed and suggested as a possibility that he drowned and remember the doctor said he found no water in the lungs. So he came by his death in that sense. What the doctor said; death due to those reasons."

Appropriately, the judge directed the jury on how to treat the evidence of Dr. Venugopal, an expert. His directions are on page 17 and are as follows:

> "I mentioned about expert evidence. Now, Dr. Gopal's evidence was read to you. Normally, you would have heard him from the witness box, but the lady, you remember her, the Crown Counsel, came and gave you the background as to what happened. Who was there, opportunity to cross-examine etc. Arguments, Police Officer saw him off, gone away. It was argued that I shouldn't allow it to be read as the Doctor should be here. I used a term that maybe strange to you, 'Balance of convenience'. Not using it again, I merely say that I wanted you to consider all the elements of it. I could allow it to be read to you, and I did. It was mentioned that no reason was given for his not being here, his absence. I will repeat at the risk of sounding morose, (sic) I allowed it in.
>
> When an expert gives evidence like a Doctor, and it tells you about cause of death, wounds here, blood in the cavity, cause of death was so and so, it may well be that you will accept, as I mentioned earlier on, his opinion as to what the cause of death was. Because he is an expert, that's his field. I don't know if any of you adopt that, and maybe able to say, 'But I know of Medicine, I was at school for three years and didn't finish, what Dr. 'Gopal says, it don't sound right to me, foolishness.' Here, you know what the law says, you don't have to accept what he says. Like any other witness, you may disregard his evidence. But I merely relate and say, that he is trained in the (sic) field, and you mostly hesitate to say that the Doctor don't know what he is talking about. It is his line. But I merely mention that, because - not because he is an expert witness, you have to swallow

> (sic)
> "line and sink/of everything he says, but I
> mention again that he was trained, that is
> his court, his field, and you may well accept
> and you may well find yourselves impelled to say
> that he doesn't know what he was talking about."

It seems to us that if one were to accept the word 'doesn't' in the last line of that quotation as the word which was actually used by the learned trial judge to bring home to the jury the likely result of their consideration of the doctor's evidence, in effect, he would seem to be telling the jury that the doctor's evidence is to be regarded negatively. On that interpretation, no harm was done to the defence. On the other hand, it may very well be a mistranscription, and the word used was really 'does' ....., in which event, the whole tenor of the passage would be that the jury are the ones to evaluate the evidence of the doctor. However, one looks at the passage, no justifiable complaint is tenable because the acceptance or rejection of the doctor's opinion was left to the jury.

At the same time we wish to pinpoint the inappropriateness of the phrase 'Balance of convenience' which the judge uttered while dealing with the deposition of the doctor. He did not wish to repeat the term. He said, "I merely say I wanted you to consider all of it: (the deposition)." This aside to the jury is not sufficient to invalidate the exercise of his discretion. However, the actual test of his ruling after submissions as to why the deposition should not be admitted as evidence, is this, "I was attempted (sic) sorely to go over into an academic explanation on the laws of Balance of Probability, but it has occurred to me that that was not part of Mr. Ramsay's - Mr. Ramsay mentioned the question of hardship, whether the jury would be able to appreciate certain technical terms like subdural, subarachnoid haemorrhage and contused, and of course, both Mr. Ramsay and Mr. DeLisser know that if we come to that point, I will tell the jury that the evidence of an expert can be rejected like the evidence of any other witness in the case. I will attempt to do

"what Lord Atkin (alluded to by Mr. Ramsay) suggested to deal with finality and justice; I will allow the document."

In the result, although the phrase 'balance of convenience' was complained about, we do not accept that the judge wrongly exercised his discretion to admit the deposition into evidence.

Although there were sedulous attempts to keep out the deposition, once it was ruled admissible, the defence at the trial made use of it to the extent of saying that there were serious contradictions between the stated findings of the doctor as regards the injuries seen on the deceased, and the evidence of Blackwood as to the wounds he said were inflicted by "Soldier". It must be stated that the cross-examination of Blackwood on this score took place the day before application was made by the Crown to have the doctor's deposition read into the evidence.

That cross-examination was directed to getting Blackwood to admit that he would not be telling the truth about the knife wounds to the throat and to the foot bottom which he said he saw "Soldier" inflict on Clive. On the one hand the witness said if the doctor said there was no knife wound under the throat, he Blackwood would not be telling the truth; on the other, he would not agree with the doctor that the wound under the foot bottom was post-mortem.

The text of the summing-up recording the deposition is at pages 40-44:

"Madam Foreman and members of the jury, when we took the adjournment I had mentioned Dr. Venugopal's deposition and that it had been read to you. I will remind you of what he said, because it is important. Registered Medical Practitioner, on the 5th of May he performed a post mortem examination on the body of Clive Gibbons. On external examination he found the following injuries:

(i) A laceration above the left eyebrow, measuring two inches by one inch;

"(ii) A contusion below the chin, measuring two inches by one inch, and this was reddish in colour;

(iii) A contusion on the right side of the chest measuring four inches by three inches;

(iv) A post mortem incised wound at the sole of the left foot measuring six inches by half inch.

"The crown has pointed out injuries that the doctor has found, and it invites you to say that he corroborates what Blackwood has said, that certain injuries were inflicted on Clive Gibbons. The doctor said that on internal examination he found that the back of the left side of the scalp was contused and it was reddish in colour. The base of the brain and the cerebellum were covered with sub-dural and sub-arachnoid haemorrhage. You can see the difficulty I am having with the words, but I think you understand what they mean. Sub means below the scalp. I must not set myself up as the doctor, but Mr. Ramsay has been kind enough to tell us what the dictionary says about these words. He goes on: "The skull did not show any fracture. The basal lobe of the right lung was lacerated. I think basal means base. The left lung was congested. The heart was also congested. The right side of the chest cavity contained one thousand millilitres of blood. The abdominal organs were congested. Those were the findings of internal examination. 'In my opinion death was due to shock and haemorrhage as a result of injury to the head and chest caused by blunt external force.' Injury to the head and chest caused by blunt external force, what was the external force? You have been invited by the prosecution to say that it was the beating administered to the youth Gibbons that caused all these things that the doctor tells you about, especially on internal examination, congestion, hard congested chest cavity, blood, death due to shock and haemorrhage as a result of injury to head and chest occasioned by blunt external force. I hasten to remind you that the

"evidence is that neither of these two accused were seen to strike any blow or deliver any blow on Clive Gibbons.

"The doctor goes on to say that: 'I am unable to say with what degree of force injuries were inflicted. Congestion of any organ is usually due to loss of blood and lack of oxygen. I would say that death in this case was immediate upon the sustaining of the injuries.'

I have in the margin of what I have read, a little note, a mark I made under the word oxygen - Congestion of any organ is usually due to loss of blood and lack of oxygen. I mentioned to you what I conceive the law to be and I tell you if they were beating him up and he escaped and fled and went into the sea and drowned, the offence would be manslaughter by flight. He goes on: 'If I had seen any water in the lungs or the stomach, I would have made a note of this. In this case the injuries were obvious and I ruled out drowning as the cause of death.' Well this is what the doctor says. I have told you already about expert evidence. The doctor performed the post mortem examination, made his findings and expressed the opinion as to the cause of death, and he has stated that he rules out drowning as the cause of death.

"He was cross-examined and this is what he said: 'I cannot give the exact time of death in this case, because of many factors. In my opinion death was within a range of a few hours to thirty-six hours before discovery of the body; from information I got this body was discovered on the 20th April, 1984, at 10:15 a.m. Death is usually described as occurring instantaneously or immediately; by immediate death, I mean death within three to seven minutes of the infliction of the injury.

"If a person goes off into the sea and is moving, I would expect that that person is alive. If such a person goes under the water and dies, I would expect to see water in the stomach and the lungs, if that person had swallowed water.'

"I would expect that it does not take a doctor to tell you that if a person goes off into the sea and is moving that that person is alive. The doctor said, in view of the injuries he saw, if such a person chucks off into the sea and goes under the water and his body is found floating some time after, he may or may not have found water in the stomach. This depends on whether or not this person had inhaled and swallowed water.

"The doctor continues" 'Because of the nature of the head injuries and injury to the chest and lung this person might not have been in a position to ingest water when he entered the sea - he may have been in a state of semi-consciousness, so he may or may not have ingested water. A person is semi-conscious when he is dazed. Such a person would still be breathing. The chances of water entering the stomach depends on how hard the person is struggling in the water. If an unconscious person is immersed in water, it is possible that he would ingest water. If a semi-conscious person is immersed in water, the only way there could be no water ingested, is if the person holds his breath. If a normal person, not injured, goes under water, the person would ingest water only if he was not holding his breath. I am not able to say whether or not the deceased was conscious or semi-conscious when he chucked off into the sea, with the injuries I saw.' That is the doctor's view. 'If a person chucks off and at the same time or in the process, he passes out or stops breathing or dies, I would not expect to see any water in the lungs or in the stomach.'

"Madam Foreman and members of the jury, we do not know when the chucking-off took place and the body hit the water, we don't know whether it was a lifeless body or not. The doctor suggests that if the body was alive, it would ingest water and that is how I see it; but these are matters for you for your interpretation.

"The doctor continues: 'If the person tried to swim after chucking off into the water, it would mean that the person did not die as he chucked

" 'off.' Remember that Mr. Henriques said he saw Gibbons swim off towards a boat that was anchored somewhere off the shore there. "The fact that I found no water in the stomach means that it is possible that the person could have been thrown in the water after he died.' That view was canvassed and expressed that there is the possibility that maybe he came back and was beaten to death and then thrown back into the water. We are not here to speculate, but it was mentioned. The doctor continues: 'If a person chucks off into the sea with the injuries I saw, and was trying to swim, I would not say that it is more likely that water would be in his stomach and lungs, if he dies in the water. I would only say that it is possible.' And then the last line, no cross-examination by Mr. Ramsay who is now present.

"Mr. Ramsay had an opportunity to ask him questions, but as I mentioned before had the witness been here, no doubt Mr. Ramsay might have asked him questions. So we have the doctor's testimony saying that in his view, death was due to beating up."

A careful reading of the foregoing text must leave one with the impression that Malcolm, J., endeavoured to put the two theories regarding what caused death to the jury. In the event, his commentaries interspersed while reading the deposition, were relevant and appropriate. Furthermore, and more important in the state of the evidence, he did ask the jury to consider all the elements in it. And although it could be said that the wound on the foot bottom was not contributory to the death, the judge did remind the jury at page 32 to remember that Blackwood had said that if the doctor said that the cut on the foot bottom was after death, the doctor would be lying; the judge brought home to them that -

> "There are a lot of little question marks about this case. Attorneys have dealt with the flashing of the knife. Was it by 'Soldier'? Soldier flash

> "the knife under the chin or neck, forehead, foot-bottom. The doctor says the wound on the bottom of the foot was a post-mortem wound, it was a wound that occurred after death. At one stage in the submissions I started thinking about people's body being in the sea and rubbing against objects and I said I better stop this speculation because we are not here to speculate. The doctor says it was a post-mortem wound so I said there are some question signs. Possibly to some of them I cannot suggest an answer but that does not relieve you of your duty to think about them.
>
> The witness said, 'I saw Soldier cut the deceased under his throat.' And you heard very instructive dissertations about wounds, laceration, incised, sharp, jagged. Mr. Pantry countering with: When a man flashing a knife and you are at a distance of six yards, you really don't know quite sure what is happening. You just see a hand motion."

Here, for what it is worth, is a great deal of the defence in their argument on the question of alleged inconsistencies and contradictions, and the judge has brought forcefully to the attention of the jury, all the aspects of the defence. Incidentally, the appellant Henriques stated in his unsworn statement that when 'Soldier' brought the youth to him, "the youth had a cut on his hand." This is the youth who had been put in the trunk of the car to protect him from persons on the beach who were hostile to him. The only apparent direct conflict between the witness Blackwood and the doctor was the nature of the superficial wounds. The doctor did find evidence of blunt external force applied to the body - the injuries were obvious. From the nature of the head and chest injuries and the injury to the lung, he ruled out drowning as the cause of death. Significantly, the judge asked the jury:

> "Was it a dead body that hit the water? Who knows. The doctor says there was no water in the lungs. ..... So I don't know, its a matter for you. But you think it may well be you will accept the doctor's evidence that death took place as a result of what he said? The beating. Because he found no water in the lungs, and that is what you would expect to find."

He even placed before the jury what must have been propounded by the defence in a moment of idle speculation -

> "it might have been someone who came back, and someone beat him, kill him

> "and throw him back into the water."

But he rightly warned the jury -

> "I don't want to go into the realm of speculation. Let us stick with what we have before us. There was talk by Mr. Henriques about swimming out to boat that was anchored."

Turning now to the issue of common design, the appellants being tried on the joint charge of murder, it was necessary for the judge to point out to the jury that on the evidence, it was necessary for them to consider whether the appellants were acting together and were participants in the assault on Clive Gibbons, which would make them guilty of the offence of murder or manslaughter as, on proper instructions, the case may be. It is true that neither of the appellants nor both of them could have been found guilty of either offence unless by reason of the doctrine of common design. Mr. Ramsay argued that there was no common design to inflict the fatal injuries. He rightly stressed that mere presence at the scene of the crime is not enough to make a person guilty therefor along with the actual perpetrators of the crime. There must be, in addition to presence, an intention to encourage, as well as actual encouragement to do the criminal act. In the instant case, the prosecution presented its case on the basis that although the appellants had not struck any blows, their being present coupled with their displaying lethal weapons during the period of the beating of Clive Gibbons, and the simultaneous questioning demands of him by all present at the scene, were sufficient, to make them liable for the acts of the others. The denials of the appellants must have been set against the behaviour of all the named parties toward the deceased, even prior to the beating. It must have been of significant relevance for the jury in their deliberations, whether they all were acting together to commit the offence charged.

In his summing-up at page 13, Malcolm, J., gave an exposition of the doctrine of common design wherein he did stress the insignificance

of mere presence, but on page 14, he left it to the jury for them to decide if there was any common design between these men. It is right to quote his directions "about this doctrine of common design that the crown is relying so heavily on". He said this:

> "So, members of the jury, assuming you can infer from the evidence that you have heard in this case, and you feel sure that there was a common design between all the men, you heard their names mentioned, Berbie, Soldier, a host of names. Then the act of one, becomes the act of any other person engaged in this common design. All persons engaged in a common design, to commit a felony of violence, are guilty of murder, although only one strikes the fatal blow. I repeat, that, and the law has said this, on the point, that when in the course of a concerted attack by certain persons without any intention of killing or doing grievous bodily harm, one participant develops an intention to kill or to do grievous bodily harm and, in fact, kills, then the second participant who did not develop such intention, will nevertheless be guilty of manslaughter, if the act - conduct of the offence is in the scope of the concerted act."

He continues in that vein on page 15 to say:

> "So, as I say, if you find that these persons were acting in concert - and when I deal with the evidence, as I say not in great detail - the evidence was that Henriques had a gun and that Mr. Carr, Owen Carr, Berbie, had a piece of iron pipe. No blow struck by them, but bearing in mind what I am saying, being near enough to give assistance and to render aid if it became necessary, although neither of them struck a blow, if you find the other ingredient there, they would be guilty as if they struck the fatal blow."

These passages follow on from the general directions earlier referred to which concentrated the jury's mind on two or more persons embarking on a joint enterprise, "each being criminally liable for the acts done in pursuance of the joint enterprise including unusual consequences arising from the execution of the joint enterprise."

Mr. Ramsay's repeated complaint was that the learned trial judge summed up on the assumption of an agreed plan. It must be appreciated that the joint enterprise need not have been planned. It is sufficient

to attract the doctrine that there is a joint acting together to effect the criminal purpose. In this case, the appellants and others over a period of several hours before his death had Clive Gibbons in their custody. In this regard, the whole course of their conduct from the first point of custody in the trunk of the car to when "the youth who was suspected of having stolen ganja off the Cay, chuck off into the sea, after the beating", was explicit of a joint acting together towards the deceased, so as to make each criminally liable for the act of the other or others.

Henriques' question at Old Hope Road when he spoke to both Nyah Cawley and Owen: "I said to both of them, 'what are you going to do about the youth'?", tells of this joint enterprise. The youth was called over to them, and "Owen and Cawley started to question the youth about the ganja" is expressive of the joint enterprise. "At this point I suggested this was not taking us anywhere and we would take back the youth where him come from." We repeat here the judge's comment when he remarked that "What was meant? You will have to determine you know .... not getting us anywhere, man. Probably we need a little more pressure man, beating may be another explanation put on it, another interpretation, carry him back and let him go, and don't worry about it, can't get anything out of him we are wasting our time. You have to decide what all this means." These are germane considerations.

The foregoing were matters within the purview of the jury, extended as it must have been by the evidence of what Blackwood said he saw while he was in hiding. In the circumstances it could not be fairly maintained that the directions of the learned trial judge were inadequate and that the appellants were wrongly convicted on the ground of common design.

The recital of facts from Henriques' caution statement, and the unsworn statement by Carr endorsing as truth the contents of that

caution statement must have been weighed by the jury. In so doing they had this piece of advice referring to Carr from the judge:

> "So, even if he was there and Nyah Cawley was doing the beating, he had no idea at all that Nyah Cawley had this evil intent: As I told you earlier on when I was telling you about common design, if one person goes outside the scope of the agreed plan, the others cannot be held responsible because he is acting outside the scope of the agreed plan."

When Mr. Ramsay argued that by this direction the judge is stressing an agreed plan, he seems to have lost sight of what the trial judge was concerned to get across to the jury. It was, as we see it, that if in fact the jury found that there was a beating of Clive Gibbons, they would have to discover who were the persons so involved. Then, considering that he died, was it that all persons so involved were intent on causing him such injuries as resulted in his death? Any of the persons who went outside the common design of merely beating him, were the only persons who could be found guilty of the felonious killing of Clive Gibbons. In view of Carr's account, on that basis of action outside the common design he would not be guilty at all. This is clear: the foregoing considerations do not justify the criticism of Mr. Ramsay that the judge did not give Carr the benefit of his defence, but distorted it to the jury when the accused said he had no idea that Nyah Cawley had an evil intent. He argued further that the jury were entitled to the assistance of the learned trial judge on the nature and content of the defence which took it out of common design, as well as proper directions in law on the case for the defence. We are of the view that those remarks are unjustified when the summing-up is carefully read. The learned trial judge put the defence which was simple, and there is no need to repeat it here. No complaint was made about the statement of the general law applicable. And in his particular directions regarding Carr's involvement, the judge clearly instructed the jury:

"Now, when you are considering the question of common design, you have to think about all this (what Carr had said) that was said and try to fit it into the pattern of the law as I told you." Together with that is the judge's directions to the jury that the case against each accused must be considered separately; even bearing in mind the applicability of the doctrine of common design; the caution statement given by Henriques may make the jury believe what he says; "it may cast doubt on the crown's case and weaken it. It may have that effect." Then as regards Blackwood's evidence incriminating the appellant Carr, "It is a matter for you whether you, having seen Junior Blackwood, accept him as a witness of truth, and believe that Carr had an iron pipe that night, and was standing by while the beating was going on." He reminded the jury at the last point of his summing-up that "the burden of proof lies on the Crown, and if there is any doubt in your mind, you must resolve that doubt in favour of the accused men." (pages 54-55) This was further stressed when Mr. Ramsay brought to the judge's attention that:

> "In relation to Carr, your Lordship did read his statement, but you had not told the jury that if they accept - that if they believe what he has said or if it raises a doubt in their minds, they should acquit both of murder and manslaughter."

Recognising that there was substance in what Mr. Ramsay had pointed out, the learned trial judge said to the jury -

> "You heard what Mr. Ramsay said, I endorse it. You heard what Carr said, if you believe him, raises a doubt in your minds - then you should acquit of any offence."

To the judge's enquiry "Have I covered it?" Mr. Ramsay answered, "I am much obliged." The purpose of pointing out those extracts from the record is to show that the judge did deal with the defence, even to the extent of the speculative supposition argued to the jury by the defence, and propounded before this Court. It was said if the deceased got into the sea alive and did not die by drowning, and was swimming, then it raises for the consideration of the

jury whether the injuries which caused death were not inflicted by someone else. This argument, speculative as it is, could not have the same weight as the evidence of Blackwood, if accepted by the jury, that shortly after Clive Gibbons entered the water, Henriques used words to show that he realised that Clive Gibbons had died.

In that atmosphere of mind, the jury were told that the following verdicts were open to them; (1) guilty of murder; (2) not guilty of murder; (3) guilty of manslaughter; (4) not guilty of any offence. It is not simplistic to say that the jury accepted the evidence of Blackwood, and were, therefore, satisfied according to the standard and burden of proof that they were not guilty of murder, but guilty of manslaughter. On page 14 the judge spoke to the jury about a verdict of guilty of manslaughter in circumstances of a concerted attack by certain persons without any intention of killing or doing grievous bodily harm. Those who did not go outside the concerted plan in that they did not develop the intention to kill "will nevertheless be guilty of manslaughter, if the act/conduct of the offence is in the scope of the concerted act."

On the same page, the judge left manslaughter to the jury, not only on the basis of lack of intent, but also on the basis of manslaughter by flight. (p. 14):

> "I am going to leave two, guilty, not guilty, guilty of murder or guilty of manslaughter. Mr. Pantry put it very picturesque at one stage that if the intention was to 'bus' his 'shut', you know what 'bus' his 'shut' means, I believe it means rough up, rough up, give him a proper trashing, but not to kill or to cause grievous bodily harm, then the verdict would be manslaughter, or to teach him a lesson. Mr. Pantry mentioned, too, and I consider it the law, I won't worry to cite the name of the case to you, and even Mr., I think Mr. Ramsay touched on it, the question of when did he die, at what stage. Mr. Pantry mentioned manslaughter by flight. It's a peculiar type of being attacked, chasing you, guy with knife and one with gun, before they can meet you, you jump off and break your neck or you run in the sea and drown, manslaughter by flight. Those are the two aspects of manslaughter, ..."

On this point again at page 20, this appears as part of the summing-up:

> "So, I have indicated to you that apart from murder you will have to consider the question of manslaughter on the two heads I have mentioned to you. The question of whether they were just teaching him a lesson, roughing him up, the question of whether one man - Nyah Cawley...what a very prominent unseen part he has played in this case. We would so much would have loved to see Nyah Cawley. And then, when we saw him we wouldn't know if he was the right Nyah Cawley. But in case I hadn't done it, I will tell you that manslaughter is the unlawful killing of another without the intention either to kill or to do serious bodily injury. Told you what the verdict of manslaughter could bring that in and I tell you what manslaughter is in law: An unlawful and dangerous act committed against the person of another resulting in his death is manslaughter. It is not sufficient that the act is unlawful. If it is such an act as any ordinary responsible person would recognise must subject the other person to at least the risk of some harm resulting therefrom, even though it might not be serious harm.

The recapitulation by the judge of Crown Counsel's submission to the jury, regarding manslaughter by flight, occasioned much argument before us, in that Mr. Rattray contended that on the evidence manslaughter by flight did not arise at all. The learned trial judge advised the jury that they could find manslaughter by flight if they rejected the doctor's evidence, but as Mr. Rattray rightly said, there was no basis on which the jury could reject the doctor's evidence that Clive Gibbons did not die from drowning, but from what amounted to severe beating.

The concept of manslaughter by flight was formulated by the Privy Council in their advice after hearing arguments in <u>D.P.P. v. Daley & McGhie</u> [1978] 27 W.I.R. 260. Lord Keith of Kinkel stated at page 264g-h:

> "....... the essential ingredients of the prosecution's proof of a charge of manslaughter, laid upon the basis that a person has sustained fatal injuries while trying to escape from assault by the accused. These are (1) that the victim immediately before he sustained the injuries was in fear of being hurt

> "physically; (2) that his fear was such that it caused him to try to escape; (3) that whilst he was trying to escape, and because he was trying to escape, he met his death; (4) that his fear of being hurt there and then was reasonable and was caused by the conduct of the accused; (5) that the accused's conduct which caused the fear was unlawful; and (6) that his conduct was such as any sober and reasonable person would recognise as likely to subject the victim to at least the risk of some harm resulting from it, albeit not serious harm. Their Lordships have to observe that it is unnecessary to prove the accused's knowledge that his conduct was unlawful. This was made clear by Lord Salmon speaking with general concurrence in a slightly different but nevertheless relevant context in DPP v Newbury [1977] AC 500.v It is sufficient to prove that the accused's act was intentional, and that it was dangerous on an objective test."

The gravamen of Mr. Rattray's submission is the confusion consequent on the directions about manslaughter by flight. He cast his further arguments in the mould that there was no proof of the cause of death, and once the judge put manslaughter by flight he was inviting them to say that death was due to drowning as a result of flight, instead of by the beating which the doctor opined as the cause of death. This opinion was surely severely questioned at the preliminary inquiry, and it is inconceivable that there was not a great deal of argument put to the jury on it. While the judge left two grounds of manslaughter for their consideration, the jury's primary role was to enquire whether on the evidence the appellants were or were not guilty of murder or manslaughter.

"It is incumbent on the trial judge to give directions to the jury which will not lead them into the trackless realms of speculation and conjection." Mr. Rattray under-pinned his submissions by these words of Kerr, J.A., in his judgment in the appeal of Junior Burton v. R. SCCA No. 73/81, delivered on January 11, 1982, in a case in which the Crown, depending upon circumstantial evidence, had not proved that the appellant was guilty of the murder. In fact, the circumstances presented by the prosecution did not in any event

necessitate directions on self defence or provocation. There was nothing to show with certainty that the deceased in that case (a) had died from other than natural causes;;or (b) her death was caused by the appellant. The difference between that case and the present case is obvious. The evidence in this case shows who committed the offence and there were obvious indications of what contributed to death.

On these considerations, it is clear that Junior Burton is of no help on the question raised on the point of the summing-up confusing the jury in this case. Even R. v. Samuel Moxan [1973] 12 J.L.R. 1251 does not give that support for which it was tendered. In that case the accused was said to have been deprived of a chance of complete acquittal because the judge left manslaughter to the jury. In the view of the Court of Appeal, the fault in the summing-up was that the judge directed the jury to concentrate on a verdict of manslaughter, when in fact there was no evidence on which the jury should have been asked to consider a verdict of manslaughter. This was so because the evidence disclosed two diametrically opposed versions of the circumstances culminating in the death of the deceased. The Crown sought a verdict of guilty of murder, on the basis of a violent, unprovoked attack on the deceased. The appellant was found not guilty of that offence. On the other hand, the appellant's case was that the deceased had made a violently aggressive attack upon him, and in the ensuing struggle the deceased fell on his own knife with which he had stabbed the appellant. Therefore, opined the Court of Appeal, there was no need for the jury to consider provocation as reducing the offence to manslaughter. In fact, in Moxan, apart form the denial of the Crown's case, the real defence was accident, albeit that the deceased himself was violent. In that case, "If ever the summing-up was calculated to confuse a jury this one certainly was"; per Graham-Perkins, J.A.

We have looked at other cases regarding the likelihood of the summing-up confusing the jury where there has been an excess of

direction in law. In Baldeo Dihal v. R. [1960] 2 W.I.R. 282, the judge had directed the jury on the relevance and importance of cooling time as an ingredient of provocation. This direction was given although no time had elapsed between the provocation and the retaliation. In addition to which there was no assistance given to the jury in relating the facts to the law, Rennie, J.A., in the Federal Supreme Court, saw the summing-up possibly causing some confusion in the minds of the jury. There was a further short-coming in the summing-up, namely, the directions on self-defence were not related to the facts. Because of these failures, the Federal Supreme Court did not apply the proviso.

The judgment of the Court in R. v. Thomas, Hanson and Bailey [1978] 25 W.I.R. 496 considered the submission that, as regards the appellants Thomas and Bailey, the directions of the trial judge were confusing. In the case of Thomas it was submitted that this confusion 'may have led the jury away from concentrating on the main issue in the case which was identity.' In the case of Bailey it was submitted that 'by virtue of the confusion, the jury were deprived of the appreciation of the alternative verdict which was returnable on the evidence in this case.' The factual matrix of the case was the application of the doctrine of common design in the use of an explosive substance resulting in death, which was the determinant of whether the proper verdict should be guilty of murder or guilty of manslaughter. On the evidence, manslaughter by reason of provocation did not arise. In holding that the jury were not in fact confused, Henry, J.A., speaking for the Court, reasoned thus at page 498B-E:

> "Insofar as Thomas is concerned there can be no doubt that portions of the summing-up are confused and may initially have given rise to some confusion in the minds of the jury. Counsel for the applicant has pointed to the fact that the jury, after deliberating for some ninety minutes, returned with a specific request for instructions 'on the subject of manslaughter and the subject of acting in concert both in relation to murder and manslaughter'. This he submitted, is a clear

> "indication of the confusion caused by the directions of the learned trial jduge. It is not perhaps surprising that the jury made the request that they did because the learned trial judge, after exhaustive directions on the law involved, left them to consider manslaughter on the basis of provocation (which did not arise on the evidence), and intention as a result of common design (from which, as we have indicated, manslaughter could not arise). He did, however, make it clear that, the defence being an alibi, the question of identity was one of the utmost importance. There may be cases where directions are erroneously given on issues which were not raised by way of defence, or which did not arise from the evidence. Such directions may sometimes tend to confuse the jury and hinder them in reaching a true verdict. See D.P.P. v. Leary Walker [1974] 1 W.L.R. 1090; 21 W.I.R. 410. This result is usually clearly demonstrated, however, in cases where they have arrived at an alternative verdict (e.g. manslaughter) on the basis of the uncalled for or unwarranted defence being left to them. From their verdict in this case it does not appear that the jury were in fact confused and for this reason this ground of appeal by the applicant Thomas also fails."

The present appeal that the jury were confused by the judge leaving for their consideration a possible verdict of manslaughter on one of the bases either of lack of intent, or manslaughter by flight, must therefore be examined in the light of the evidence in the case particularly on the insistence by the defence that the deceased escaped from the beating, fled into the sea, and continued swimming out to a boat, as against the Crown's case that it was the beating which caused death, before he entered the water.

It is apparent from the comments of the learned judge that counsel for the Crown, did present the question of manslaughter by flight. The judge left it to the jury. Although we have seen no record of the addresses of other counsel in the case, nor did the judge mention whether defence counsel dealt with the matter, we observe that it was certainly not a new theory which was put forward by the judge of his own volition and for the first time in the summing-up. If this were so, it might be that the argument by the defence

might have had some validity. We take some guidance from a relevant extract from the judgment of Lord Reading, L.C.J., in George Joseph Smith [1915] 11 Cr. App. R. 229 at pages 238-239:

> "There are four other points which may be dealt with as one. It is contended that the judge in the course of his summing up put forward a new theory which had not been discussed by counsel, and which was mentioned for the first time in the summing up. He said it was possible, according to a demonstration given when summing up, that the body had been lifted into the bath in a manner which he illustrated. It is contended, and rightly, that no such suggestion had been made in the course of the proceedings. He also made suggestions as to the headaches before the deaths which have been criticised. During the case theories had been put forward by the prosecution, one as the main theory, and a possible second, how the death had occurred, and the defence had also put forward a theory. The judge stated the principle correctly; he said, 'It is not necessary for you to be clear in your mind as to the exact mode, if you are satisfied that the prisoner killed the woman.' That is not challenged; the woman's death was caused by drowning, the exact method was not proved, but that was not necessary so long as the jury were satisfied that the death by drowning was caused by the prisoner. We think it would have been better if the judge had not put forward a new theory, but it is clear that amongst a number of suggestions he has added one possible one, and that he told the jury they must come to their own conclusion about it. In that he was perfectly right."

The complaint that the judge introduced a new theory as to the way the crime was committed, was also made in R. v. Want [1962] Crim. L.R. 570. In that case the Court of Criminal Appeal (Lord Parker, C.J., Winn and Brabin, JJ.) held:

> "....... there were great dangers in a judge, however tempting it might be, putting forward a theory which had not been canvassed during the evidence or in counsel's speeches. The court was far from saying that that of itself was enough to vitiate a conviction but if a new theory were put forward it was imperative that the difficulties inherent in it by reference to the evidence should be pointed out to the jury. It was not enough merely to leave it to them. They must be guided as to how far the evidence supported or negatived it. It was

> "quite clear that the trial judge did not do that in the present case: if he had he would have been bound to point out a number of matters which would have made acceptance of the new theory, to say the least, difficult. If the theory put forward by the trial judge had been the only theory which would dispose of the alibi the court could not have applied the proviso to section 4(1), Criminal Appeal Act, 1907. But the alibi evidence or almost all of it could be true on the theory that W. wore a plastic cap under the black wig. The evidence against him was overwhelming and a jury on a proper direction, omitting any reference to the new theory, would have been bound to convict. The appeal would be dismissed. [W. G.]"

R. v. Smith and R. v. Want were referred to in R. v. Isaac [1965] Crim. L.R. 174, in which it was held that the theory advanced by the judge was rightly left by him to the jury, and to invite them to consider what a piece of evidence meant, although neither the prosecution nor the defence had dealt with this piece of evidence, for the case against the appellant was overwhelming.

Were the jury, in this case, confused and hindered in reaching a true verdict and so diverted from the due and orderly administration of justice? We are not of that view; we find pertinent the remark in the judgment of the Privy Council in D.P.P. v. Daley and McGhie (supra) that on an indictment which charged murder it is open to the jury to return a verdict of manslaughter (regardless of the category) where there is sufficient evidence to support such a verdict. Even if the evidence is not sufficient to support a finding of manslaughter by flight, we do not see in what way the appellants have been prejudiced. By leaving the possible verdicts in the way it was left, the trial judge did not, by his excessive direction mislead the jury as to the offences to be considered. It was either murder or manslaughter. As to the latter he did not leave it on the basis of manslaughter by flight only, which might have been confusing. It is right to reflect that the verdict of the jury does indicate that over the period of 55 minutes of their deliberation they did give the issues

some consideration. In the result, we cannot uphold this submission, that the jury were confused.

Lastly, it was submitted that the several arguments raised and which this judgment has considered, created a general imbalance in the summing-up In general terms the summing-up in our opinion, did not disclose such fundamental failures by the trial judge as must necessarily be described as fatal to the verdicts of guilty of manslaughter returned against the appellants. We, therefore, conclude that the verdict of the jury was not unreasonable, nor has any miscarriage of justice been occasioned by the terms of the summing-up.

All the points argued before were points of law. Accordingly, we treat the applications as the hearing of the appeals. The appeals are dismissed. The convictions and sentences are affirmed.