JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 77, 78, 79 of 1989

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

REGINA
vs.
JONATHAN SMITH
LLOYD CLARKE
JIMMY ROBERTS

Dennis Daly, Q.C. for Smith

Howard Hamilton, Q.C. for Clarke

Jack Hines for Roberts

Michael Palmer for the Crown

June 17, 18, 19, 20, 21 and July 29, 1991

WRIGHT, J.A.:

The bullet-riddled body of Constable Norman George Davis in the front seat and of Thelma Bryan on the back seat of an unmarked police patrol car at Queen Hill in the parish of Saint Andrew in the early morning of March 17, 1983, told a ghastly story, indeed. There were twenty-nine bullet holes in Constable Davis' body and thirty-five in the partially eviscerated body of Thelma Bryan. Add to that the fact that the blood-spattered car bore bullet entry holes on both sides as well as in the front and the fact that on the evidence of the Ballistics Expert, Assistant Commissioner Dan Wray, the twenty-eight M16 cartridge shells picked up at the scene, produced by three different manufacturers, had been fired from five different M16s - fifteen fired from one gun, eight from another, two from a third, two from a fourth and one from a fifth. Again, several fragments

of bullets removed from the two bodies were shown to have been fired from three different M16 Assault Rifles. From the evidence of the expert, these are fearful weapons. Designed with a twenty-one inch long barrel they are capable of discharging between seven hundred and eight hundred bullets per minute and these bullets can penetrate metal. They can pass clean through a car without losing their lethal power.

Thanks to swift action by the police under the command of Superintendent Albert Richards in charge of Criminal Investigation islandwide, who had assembled a task force of one hundred and twenty policemen and soldiers, these three appellants were in the hands of the police within hours of the grim discovery and yet no explanation is forthcoming for the delay in bringing the case to trial. At the trial, some six years later, counsel for the prosecution revealed that of the thirty-three witnesses whom the prosecution had intended to call only sixteen were left and as the trial progressed it transpired that that number was further reduced to eleven. Without a doubt, problems which arose during the trial are traceable to this attrition in the number of witnesses available to the prosecution.

Convicted and sentenced to death, after a trial lasting eight days ending May 4, 1989, before Ellis, J. and a jury at the Gun Court Division of the Home Circuit Court, these applicants now seek leave to appeal and we have treated the hearing of the applications as the hearing of the appeals. It is now necessary to relate the facts and then deal with the various grounds of appeal argued on behalf of each appellant.

The first lead which the police had was a trail of blood leading from the scene of the killings through bush down the red-dirt incline to the Duhaney Park Community Centre - estimated to be twenty chains as the crow flies - where the trail was replaced by a pool of blood. A quick check at the hospitals soon led the police to the Spanish Town Hospital where the appellant Jimmy Roberts was seen with gun-shot injury to his

right hand and his scrotum. Superintendent Richards, who had been awakened from sleep and called to the scene at about 3:00 a.m., was early at the Spanish Town Hospital where, after speaking to a senior nurse, he was given permission to speak with Jimmy Roberts, who was in the out-patients ward. He did not know Roberts before but after identifying himself, telling his mission and cautioning Roberts the latter is reported to have said to Superintendent Richards:

> "Sah, me never have no gun. It was Lloydie ..... go out there, and see me get shot yah and them come carry me come yah."

The passage of time seems to have taken its toll as the Superintendent failed to recall what other name Roberts had mentioned. Roberts had been taken to the hospital by his brother Glen Mohan, who testified that at about 4:30 a.m. someone had driven to his home, awakened him and gave him certain information in consequence of which he had gone to the Duhaney Park Community Centre where he saw his brother Jimmy Roberts on the ground in a pool of blood. Why he chose the Spanish Town Hospital instead of the Kingston Public Hospital, where Roberts was eventually taken, was not disclosed. But Mr. Mohan testified that where he saw his brother was not far from the latter's residence on Brook Avenue, Duhaney Park.

Detective Inspector Lester Howell, one of the investigators, testified that he arrived at the Spanish Town Hospital at about 5:20 a.m. where he saw and spoke with the appellant Jimmy Roberts who was then lying on a stretcher. This was sometime after Superintendent Richards' arrival at the hospital. After caution the appellant is alleged to have said to Detective Inspector Howell:

> "A me and Sam Spade, Wasp, Patrick and Lloyd Clarke goh up there fi rob. We see a man and a woman in a car, Wasp tell them and shoot me because me refused fi shoot the people dem."

Armed with this new information, Detective Inspector Howell hurried to 30 Beaconsfield Avenue, Duhaney Park, the home of the appellant Jonathan Smith. The building was cordoned off and when Inspector Howell rushed to the back of the premises he saw the appellant Smith dressed in a white merino and a pair of cut-off pants by the pipe-side washing a pair of pants in an enamel basin in which there were a ganzi and another pair of pants. The water in the basin was red either from blood, red-dirt or both. Said Inspector Howell:

> "He appeared normal. Not even a scratch was on his body."

In the police party of eight was one Corporal Pinnock, who lived in the area, and upon the appellant pointing out his apartment from outside, Corporal Pinnock was despatched with him to search the apartment. Within five minutes they both returned and the result of this brief visit to that apartment provided not only the crux of the case against Smith but as well a controversy involving Inspector Howell and the quality of the evidence admitted against Smith. What Inspector Howell testified as the sequel to the visit had not been disclosed in the six years since the murders and that includes his testimony at the Preliminary Examinations. He said that when Corporal Pinnock returned with the appellant Smith, Corporal Pinnock, in Smith's presence, showed him two rings and told him that he had found them in Smith's room on a window sill to which report Smith "said not one single word". The smaller of the two rings was inscribed "N. G. Davis". He could not recall what was written on the outside of the other.

Further evidence on the identity of the rings was given by Detective Artel Morgan, who testified that like the deceased Norman George Davis he was stationed at the Maverley Police Station and that regularly over a number of years they had been on patrol together. Indeed, they were on the 6:00 p.m. - 8:00 a.m. patrol that night but at about 8:00 p.m. they had parted company

on the understanding that Davis would pick him up at 1:00 a.m. to continue their patrol. But he was not to see him alive again. At 6:00 a.m. he took a taxi-cab to the station to learn of the fate of his companion. He described Davis as being fond of jewellery. He identified the two rings in question as being rings which Davis was wearing when they parted company that night. On the larger of the two rings is written "Cleveland Groover".

From 30 Beaconsfield Avenue, Detective Inspector Howell went to the Constant Spring Police Station taking along the appellant Smith as well as the basin with the water, the two pairs of pants, the rings and the ganzi.

Sergeant Lloyd Haley, a member of the investigating team, taking his cue from the trail of blood, arrived at building "P" Brook Avenue. This is a housing scheme with condominium type buildings. On a concrete pavement at the ground floor he saw what appeared to be a drop of blood. The blood did not lead anywhere. However, ascending a stairway, Sergeant Haley knocked at the door of apartment 18. The time was then about 6:30 a.m. When the door was opened he saw standing before him the appellant Lloyd Clarke fully dressed in pyjamas. He was examined for injuries but he had none. He was told of the investigations but said nothing. Cautioned and asked to account for his movements during the previous night he responded that he had been at the front of the scheme up to about 9:00 p.m. when he returned to his apartment and had remained there since then. Also in the room was a man who gave his name as Barrington Gordon who said he had just come in from the country the previous evening and had slept there that night. Questioned about his movements he said he had come in tired, had gone to bed about 7:00 p.m. and had not left the house.

Sergeant Haley proceeded to search the apartment and on the back of a chair he saw a navy blue shirt, claimed by Lloyd Clarke, with what appeared to be moist blood on its front.

Clarke's body revealed no injuries. Sergeant Haley took possession of the shirt, a heavy green coat and a pair of pants. Asked if he could explain what appeared to be blood on the shirt, Clarke said no. These two items bore fresh earth stains and burs were present on the pair of pants. On a dresser in the room he saw, among several items, a black wallet in which were three photographs, US$31.00, and an address card bearing the name and address of the slain policemen. One of the photographs was of the said victim and the other two of his children. When Sergeant Haley showed Acting Corporal Davis' photograph to Clarke and told him whose it was Clarke said he knew nothing about it; he was there earlier the morning when Sam Spade came and left it there. Both Clarke and Barrington Gordon were taken away to the Constant Spring Police Station along with the exhibits found there.

Mrs. Yvonne Cruickshank, Government Analyst, visited the scene of the crime on the morning of March 17 and took blood samples from the scene, the trail leading to the Community Centre, the pool at the centre and the drop of blood at building "P" Brook Avenue. The blood of both victims proved to be Group O; along the trail Group B and Group O were found. At the Community Centre the Groupings were A, B and O and the fresh clot at building "P" was Group O. Group O blood was found, too, on the right sleeve of the navy blue shirt taken from Clarke's apartment but no blood was found on the green coat. Nor was any blood found on the pair of pants with the burs taken from Clarke's apartment.

The enamel basin in which Jonathan Smith was washing revealed human blood stains in certain areas. The liquid in the basin was a soap solution in which human blood was present. The ganzi in the basin had sero-sanguineous stains on the front, back and sleeves. One of the pants in the basin had in one pocket 4xJ$2 notes and 1xJ$10. That pant also had human blood in sero-sanguineous stains but the other pant in the basin had

no blood thereon. Because of the detergent in the water, there could be no determination of the blood group of the blood stains found on the pants or the shirt which were in the water.

Clothes taken from the appellant Jimmy Roberts were a soiled brown shirt, one pair pin-striped trousers, one soiled blue sweat trousers, a belt and a pair of brief. Human blood of Group B was diffused throughout the last three items. The shirt also had Group B blood but the pin-striped trousers had Group O and Group B - indicating blood from two injured persons.

On March 19, while Jimmy Roberts was in the Kingston Public Hospital, Superintendent Richards visited him in company with Detective Inspector Philp. After cautioning him, Superintendent Richards told Roberts that he was then in possession of information that he had fired some of the shots which killed the two people at Queen Hill. Roberts replied:

> "Mr. Richards, them only trying to build up everything pon me. Me can give a statement as to how everything went."

Superintendent Richards said that there were other patients around as close as six feet away and there were doctors and nurses on the ward. No inducement, he said, was offered the appellant to make the statement which he thereupon dictated. It was recorded by Inspector Philp and witnessed by Superintendent Richards. Because of the injury to the appellant's right hand, which was then in bandage, he signed the statement with his left hand. The statement was admitted into evidence after a voir dire and reads:

> "I, Jimmy Roberts wish to make a statement. I want someone to write down what I have to say. I have been told that I need not say anything unless I wish to do so and whatever I say may be given in evidence.
>
> Signed: Jimmy Roberts, 19/3/83,
>
> Witnessed: Albert Richards Superintendent, 19/3/83
>
> Saith -

"Wednesday night gone me deh down by the road side pan the front of Brook Avenue when mi friend Patrick come call me. Him tell mi sey Wasp call me. Patrick carry mi to Wasp 'round a 'P' building. We stand up and Wasp ask me what's up and mi tell him, nothing, mi a rest off and goh to mi bed. Patrick sey, 'How yuh mean yuh a goh a yuh bed. Yuh noh know sey a bandoolu deal we do?' Mi see a guy name Spade come 'round now and Wasp and Patrick ask him, 'What happen Jeg Jeg?' Them call Spade Jeg Jeg. Patrick told Spade fi let them goh pan the hill and Spade say is time fi dem leave that place alone. Patrick and Wasp goh 'round the building a little time and afterward them come back with two long gun in a dem hand. After dem come 'round me see Lloydie come from whey Patrick and Wasp come. Patrick give Lloydie one of the M-16 long gun. Him Patrick keep a short one. Wasp keep fi him M-16. Mi see Spade with some screw driver and thing. Mi never have any gun. After a little while Wasp dem sey fi come with him, what me a wait for.

We all walk together through Patrick City and Meadowbrook and walk pan the road and tek the hill side a Meadowbrook. When we reach pan the hill now like mi see a silver car and mi sey to dem that a police you know. Wasp sey him noh business if a police, police can dead too and Lloydie, Wasp and Spade and Patrick goh down pan dem knees and creep up to the car. Me tell dem fi come mek we turn back and walk somewhere different and dem just run up to the car and dem start shoot.

Me hear the man in the car sey, 'No, mek mi come out and talk to you'. Mi was behind them and mi shout out, 'No, don't kill the man'. The shooting start again and mi feel mi get a shot on my right hand and my balls and mi drop pan the ground. A shot of M-16 shot me here. When me was on the ground them was going back down the hill and leave me and Wasp sey, 'Wey oonoo a goh? Oonoo noh see this is police? We have to see that it dead'. Wasp go back up to the car and fire some shot with the M-16 in deh and after this him ask the rest what dem going to do with me now for if dem leave me the whole of everything blow up. He also ask them if he should kill me or what. Spade said, 'Secure the youth for is we him come with.'

"Spade then was told by Wasp that since Patrick and him don't have long guns dem fi hold me up and carry me.

Patrick and Spade carry me down as far as Patrick City. Wasp and Lloydie walk with me. Dem carry me down to the back avenue at Patrick City and leave me sey dem a goh for a car. Afterward Wasp come back wid fi him car and Patrick and dem put me in a di car and mi find myself afterward at Spanish Town hospital.

Before dem did tek me up, after me get shot Spade said, 'You see it, the youth never want come and you see what happen now and it look like you want leave the youth pan murder.'

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

Signed: Jimmy Roberts

Witnessed: Albert Richards.

Taken by me this 19/3/83, between 11:00 a m and 12:40 p m at Lower Reitti, Kingston Public Hospital in the presence of Detective Superintendent Richards. It was read over to witness who signed same as true and correct. The maker who says he is right handed, signed with his left hand as his right hand was injured and bandaged at the wrist.

Signed: A.E. Philp, Detective Inspector.' "

Inasmuch as reference is made in the statement to other persons, the trial judge, before accepting the statement in evidence, warned the jury thus at page 141:

"Mr. Foreman and Members of the Jury, when you left us this morning, not at the luncheon adjournment, certain proceedings were held, you see, and I ruled that a bit of evidence was admissible. You will hear it read back to you at a certain point and it will be up to you to decide whether it is usable by you as judges of the facts, as evidence. You will also, let me tell you at this stage, that reference by the maker of the statement will be made to other persons. Again I will remind you of that thing but any reference to any

> "other person other than the maker of the statement is not evidence against the other person. It is not any evidence. You understand? Don't consider it to be any evidence against anybody other than the maker of the statement. Later on you will get further directions as to that."

Mr. Manning, who was counsel for Roberts, challenged the statement on the grounds:

> "Q. I am putting it to you that the accused man was more or less semi-conscious when this statement was taken.
>
> A. No, sir. In my opinion he was fully conscious."

Then he further suggested that a police officer held the appellant's hand with the pen in it and thereafter the name Jimmy Roberts was written in script. This was denied. And then finally this:

> "Q. I am putting it to you that Roberts didn't give this statement here, exhibit 5.
>
> A. Yes, sir, he did."

Although an adjournment was granted to facilitate the attendance of Inspector Philp, who at the time of trial resided in the United States of America, certain misunderstandings prevented him from attending. The prosecution, therefore, had to content itself with the evidence of Superintendent Richards regarding the taking of the statement.

In summary, therefore, the case against each appellant can be stated as follows:

Jonathan Smith

The evidence contained in the testimony of Detective Inspector Howell as to:

(a) The appellant seen washing blood-stained clothes at about 6:30 a.m. at 30 Beaconsfield Avenue not far from the scene of the murders,

(b) The reported finding of the two rings, the property of the deceased N. G. Davis, in the appellant's apartment.

Lloyd Clarke

(a) A black wallet, the property of the deceased N. G. Davis, containing his photograph and photographs of his children found on a dresser in Clarke's apartment within a few chains of the scene of the murders.

(b) A navy blue shirt found in Clarke's apartment and claimed by him was found to be stained with Group O blood, the same as the blood group of both victims.

(c) No injuries on Clarke to account for the blood on his shirt.

Jimmy Roberts

1. Statement made to Superintendent Richards in Spanish Town Hospital on morning of March 17 -

> "Sah, me never have no gun. It was Lloydie .... go out there and see me get shot yah and them come carry me come yah."

2. Statement made to Detective Inspector Howell in Spanish Town Hospital later same morning:

> "A me and Sam Spade, Wasp, Patrick and Lloyd Clarke go up there fi rob. We see a man and a woman in a car. Wasp tell them and shoot me because me refuse fi shoot the people dem."

3. The written statement recorded at the Kingston Public Hospital on March 19.

4. Roberts was injured and in consequence his clothes were saturated with his blood - Group B. But on his pants was found Group O blood, the same group as both victims.

We will now turn attention to the defences raised and the complaints set out in the several grounds of appeal.

Jonathan Smith

In the manner which has become standard practice in murder trials in this country, the appellant, like the other two, presented his defence in an unsworn statement as follows:

"My name is Jonathan Smith also called Patrick. I am a duco man and conductor. Live at Beaconsfield and Conway, the intersection. On the day the police come to my house they didn't take no clothes or ring. They carry me away and on March, 1983 I was living at Beaconsfield with my family; two different family live into the yard, the house and two different side. I hear knocking outside. Look through my window see about eight police and soldier. The lady who live on the other side open the grill. I identify one of the policemen as Pinnock who live four door beside my house. He called me and I answer. They enter into the house, take out my brother, my father and my baby mother and my daughter put them to lie down on the verandah, search on my side of house, come out with nothing and I saw some police coming from round of the back and soldier... Carry me into the car to Constant Spring Station where I see Inspector Howell and Superintendent Richards questioned me if I know anything about the police murder on the hill. I told them no. They ask me if I know one Norrie Campbell, 'Wass'. I told them that he used to live in front of me at the next intersection across the road. I told them that he was moved to Waterford long time. They asked me if I know Lloyd, Jimmy Roberts and Sam Spade. I told them no. I live at Beaconsfield Avenue. I was on bail for several months and working until my trial start. I saw Mr. Pinnock who told me that he was leaving the work because Super Ford force him to tell lies. I don't know anything about this murder at Queen's Hill. Yes, my Lord."

This statement, while not being evidence capable of proving anything, is nonetheless consistent with the defence projected in cross-examination. It challenges the credit of Inspector Howell's evidence that he visited the appellant's home and found him washing blood-stained clothes. It cannot be over-stressed that the prosecution's case against this appellant is contained substantially in the evidence of this witness because if he is not believed or is doubted as to the washing of the blood-stained clothes then the evidence of Mrs. Cruickshank, in relation to the contents of the enamel basin, becomes irrelevant.

Four grounds of appeal were argued on behalf of this appellant by Mr. Daly. He challenged the over-ruling of his no-case submission, the directions of the trial judge concerning the two rings, the manner in which the defence was left to the jury and criticized certain comments by the trial judge.

This latter criticism relates to two separate comments. The first appearing at page 327 of the record arose during the re-examination of a witness by Mrs. McIntosh-Brice. Counsel for the prosecution challenged the propriety of certain questions being asked in re-examination. Mrs. McIntosh-Brice had by then become quite testy. The trial judge, who had displayed commendable equanimity despite certain conduct in Court, in an obvious endeavour to maintain control of the proceedings addressed counsel thus:

> "HIS LORDSHIP: Mrs. McIntosh-Brice, Mr. Hamilton, Mr. Manning, there is a limit. The Defence is not obliged to say what its defence is but equally it ought not to be allowed to manufacture a case as it goes along and none of these questions arise from cross-examination that you are now asking."

Not only did the questions not arise but it was patent that the witness had no knowledge of the matters about which he was being questioned. Mr. Daly coupled this comment with another which was occasioned by Mrs. McIntosh-Brice, after she had completed her re-examination of the witness, making an issue of the judge's previous comment. At page 329 the trial judge's response is recorded thus:

> "HIS LORDSHIP: You are saying what? This judge is not going to sit up here as a mere cipher and see things going un-toward and don't speak."

This comment embraces a manoeuvre concerning the said witness about which more will be said.

The other comment which drew criticism appears during the judge's comments on the fact that the appellants did not

give sworn testimony. His remarks appear at pages 373-4 as follows:

> "Now as judges of the fact you have not heard this witness or these accused men's story under cross-examination and you are entitled Mr. Foreman and members of the jury to ask yourselves why; why did they not put their testimony or their statement to the light of cross-examination; why didn't they put it in the crucible of cross-examination; couldn't be that they are averse to taking oath on the Bible; couldn't be that, because you can always affirm; couldn't be that they had anything to be fearful of un-toward conduct on the part of Crown Counsel, because they have been defended by Queen's Counsel and senior practitioners many years at the Bar who would have objected to any un-toward or any disadvantage being taken of them; would have objected. So you are entitled, although you must be reminded that it is their right to make unsworn statement, you are to be reminded and ask yourselves the question why. Is it that they have something to hide from the eyes or the thrust of cross-examination? matter for you. But remember it is their right to do that."

We are minded to think that these comments were intended to be cast in the mould of permissible comments approved in **D.P.P. v Leary Walker** (1974) 21 W.I.R. 406 at page 411, where the Judicial Committee of the Privy Council addressed the issue of the "objective evidential value of an unsworn statement". Their Lordships said:

> "Much depends on the particular circumstances of each case. In the present case, for example, even on the approach that everything the respondent said in his unsworn statement was true, no jury (unless perverse) could have acquitted him on the ground of self-defence. There are, however, cases in which the accused makes an unsworn statement in which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence. In such cases (and their Lordships stress that they are speaking only of such cases) the judge should in plain and simple language

> "make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing. The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement: that it could not be because he had any conscientious objection to taking the oath since, if he had, he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and by the court. The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it: that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict, they should give the accused's unsworn statement only such weight as they may think it deserves."

It may be commented, indeed, that the impugned directions do not agree ipsissima verba with the language of the Privy Council. We would hold, however, that while the judge's language in places are more explicit than that of the Privy Council he did not violate the purpose which the Privy Council espoused. Furthermore, the Privy Council must not be taken to have issued a formula, though it must be cautioned that a judge will avoid unnecessary criticism if he adheres to approved language which deals adequately with the problem on hand.

We do not agree with Mr. Daly's submission that these comments amounted to a denigration of the defence in the eyes of the jury. A judge must be free to control his Court and to comment as strongly as occasion warrants. These comments did not exceed permissible limits. We find no merit in that complaint. However, the remaining complaints command greater attention.

Whether the no-case submission should have succeeded depends on whether a prima facie case had been made out against the appellant Smith and the answer to this question leads inevitably to the evidence of Inspector Howell and more particularly to the finding of the two rings. Mr. Daly submitted that the only admissible evidence against Smith is the evidence of the washing of the blood-stained clothes which he contended is sufficient to raise a suspicion but not to establish a prima facie case. The evidence concerning the rings is hearsay. On the other hand, Mr. Palmer submitted that the evidence of the clothes and the ring invoked the doctrine of recent possession and the circumstances were such that a reasonable jury, properly directed, could draw the conclusion of guilt. He sought support from **R. v. Christie** (1914) A.C. 545 in considering the response of the appellant to the accusation. In **Christie's** (supra) case the appellant had responded, "I am innocent" when the alleged victim of his crime of indecent assault had identified him and related the incident. In the instant case the appellant said nothing and there is no evidence of any reaction on his part. Mr. Daly submitted that even if that were so the appellant was entitled to remain silent. The House of Lords decided, inter alia, in **Christie's** (supra) case that:

> "There is no rule of law that evidence of a statement made in the presence and hearing of the accused is not admissible as having a bearing on his conduct unless he accepts the statement."

Mr. Palmer agreed that the statement was not proof of its contents but was admitted to show the reaction of the appellant.

In considering these submissions, it must be borne in mind that Inspector Howell's evidence did not escape serious challenge. First, as to his credit. How could he have concealed such vital information for six years? So far as the finding of the rings is concerned, it is to be noted that Inspector Howell did not go to the appellant's apartment and have Corporal Pinnock,

in the presence of the appellant, point out the spot where the rings were found. An important question to be asked is whether, if in fact the rings were found on the window sill, the rings could have been put there from outside? Added to that is the fact that, on the prosecution's case, three other persons were taken from the house. What factor then placed the rings in the possession of the appellant? Further, a matter which required attention, was the fact that although both Inspector Howell and Sergeant Haley testified that they heard Superintendent Richards interrogating the appellant Smith, neither of them could recall hearing him ask Smith about the rings.

With these considerations in mind, the trial judge would not have erred had he acceded to the no-case submission but thinking, obviously, that the credit of the witness Inspector Howell was a matter for the jury, he imposed upon himself a very heavy burden to ensure that the jury received the proper directions especially regarding the rings.

It was complained, and Mr. Palmer conceded, that the trial judge had failed to direct the jury that the reported statement of Corporal Pinnock that he had found the deceased's rings in the appellant's room was not evidence of the truth of that fact and could not constitute a link in the chain of circumstantial evidence against the appellant. Indeed, the evidence concerning the rings is so condemnatory that unless the most careful directions were given the jury would be bound to draw the wrong conclusion. But having regard to the directions given by the judge, it is patent that his mind was not adverted to this consequence. Those directions are at page 389 of the record:

> "Inspector Howell, in answer to a question about the time that it took Pinnock to go in the house, he said he didn't know and he didn't know the exact room which he entered but he knew that Smith went with him. Pinnock has left the Force, is in England and something was made of that, Mr. Foreman and Members of the Jury, and you have to look into that.

> "It is even difficult to get witnesses in Jamaica much more to get witnesses from abroad. You remember the effort with Philp, Ex Inspector Philp; to get a man from England? He was not here. Mrs. McIntosh-Brice says that it is a weak link, because Pinnock is the one who can say where the rings were found.
>
> It's a matter for you. If you find that there was this gap, then you as judges of the fact will have to deal with it and say there is a gap, there is a want of evidence. You have to look into that, but the reason why Pinnock is not there was given."

It is evident that the limited effect of that evidence contended for by Mr. Palmer was not present to the judge's mind so once the jury accepted the statement they accepted the truth of its contents to the prejudice of the appellant.

Paul Smith, the brother of the appellant, testified in his behalf that the family had been awakened by the police knocking at the door and that the grill door was opened by a lady who occupied the other section of the duplex house. Police Officer Pinnock, who lives in the area, entered the house and took Jonathan Smith and his girl-friend from their bedroom and placed them along with the witness and his father to lie on the verandah. The basin in which it is alleged that Jonathan Smith was seen washing was, indeed, belonging to the family and was usually kept behind the house. He did not see the police with the basin neither did he see the rings said to be the property of the deceased N. G. Davis. Two other witnesses were actually called by Smith's counsel but they really had nothing to do with Smith's defence but more of this anon. Apart from the portion of the summing-up dealing with these two witnesses, this is how the appellant Smith's defence was left to the jury at pages 436 - 437:

> "Jonathan Smith said he is called Patrick. He is a duco man, lived at Beaconfield Avenue. Police came to his house. They took no clothes or ring from him. They took him away, he says and his parents, father,

> "brother, baby mother, they were taken away.
>
> He said he was at his house on the morning with his family. Two different families live on the different sides. He heard a knocking outside and he looked and he saw eight police and soldiers. The lady on the other side opened the grill. 'One police Pinnock, live four doors from me and I saw him. He called me. I answered. They entered and took us out, searched my side, came out with nothing.' He said he then saw Inspector Howell and Superintendent Richards who questioned him if he knew anything about a policeman murder. He said no. They asked him for one Norry Campbell. He told them that he didn't know him well but he used to live in the area but he had moved to Waterford a long time ago. They asked him if he knew Lloyd and Jimmy Roberts and Spade and he denied any knowledge of these men.
>
> He said he lived on Beaconfield Avenue and then he told you that he was on bail for several months and he was working up until the trial started. Then he said Pinnock told him that he is leaving the Force because Super Ford forced him to tell lie and him don't know anything about him and he didn't do it and he, Smith, does not know anything about the murder at Queen Hill.
>
> He said the police didn't take any clothes from him, and they didn't find any ring in his house."

It has accordingly been demonstrated that neither in dealing with the prosecution's case nor with the defence of this appellant did the trial judge offer the guidance which would prevent the jury from accepting the evidence given by Inspector Howell concerning the finding of the rings as proof of the truth of the facts alleged. Even with a proper direction, it would have been difficult to divert the jury's mind from drawing the wrong conclusion let alone where no guidance was given. There is merit in this complaint.

It is, we hope, abundantly clear that because of the errors in dealing with the evidence concerning the rings and the manner in which the defence was left to the jury the conviction of this appellant cannot be allowed to stand. The appeal is,

therefore, allowed. The conviction is quashed and the sentence set aside. Even if, which is not the situation in the present case, admissible evidence were available, to order a re-trial after eight years might not seem to be in the best interests of justice. We accordingly enter judgment and verdict of acquittal.

The defence of the appellant **Lloyd Clarke** was given in an unsworn statement as follows:

> "My name is Lloyd Clarke. I am a welder. I used to work in Manchester. On the 17th March, 1983 I were awakened by a knock on the door of the room that I was sleeping in. Mr. Pinnock and other policemen came in and asked me my name. I told them Lloyd Clarke. They asked me if they called me Lloydie. I told them yes. They search the apartment from top to bottom saying they were looking for guns but they didn't found any. They took me and Barrington Gordon to Constant Spring. We were questioned for several hours by different policemen. They asked me about Sam Spade. I told them I knew nothing about him. They say if I don't give them any information they are going to charge me. I told them I have no information and Super Bigga Ford told me I would get away at Circuit. I were later charged. I were on bail for several months. Pinnock knows where I live. I live in the same area he does. I am a contributor of blood, M'Lord. My grouping is "O", M'Lord and I have a recommendation from my employer where I used to work in Mandeville. I want to show this recommendation to the Court, M'Lord, as a proof. ..... With Duncan Stanley and Company laying pipeline, my Lord, between Manchester and St. Elizabeth. That is it my Lord."

Clarke called no witnesses but after Jonathan Smith had given his unsworn statement a ruse, by Mr. Hamilton called a strategy, was brought into play whereby the two witnesses whom Lloyd Clarke wished to testify on his behalf were called by Mrs. McIntosh-Brice, counsel for Jonathan Smith, although these witnesses had no connection whatever with Smith's case. The trial judge chided Queen's Counsel for such a manoeuvre which he admitted he found confusing but counsel defended his action which was designed to secure him the right to the last word which the trial judge said

was used to lecture the jury on legal history. However, before us Mr. Hamilton has thought better and recanted.

The first of the two witnesses called was Barrington Gordon, whom the police had taken from Clarke's house. After the witness had given his name and address he was tendered for cross-examination whereupon Mr. Hamilton, by very gentle cross-examination, elicited the evidence which should properly have been adduced in chief. Although Mr. Gordon is alleged to have told the police he had slept at Clarke's apartment only for the one night in question he now stated he was living there with Clarke for three months and that on the night of March 16, 1983, they had slept together on a three-quarter bed. Clarke, he said, slept and tossed so much that he was aware of his presence in bed throughout the night. So, although Clarke did not say where he was during that night, he, by cross-examination of this witness, raised an alibi. The next witness was Duncan Stanley who testified that he employed Clarke on the bauxite conveyor system which conveyed bauxite from the top of the mountain in Manchester to the Alpart plant in St. Elizabeth. The significance of his evidence is that, having regard to the nature and place of Clarke's employment the finding of red dirt on his clothes is of no significance.

Five grounds of appeal were filed on behalf of the appellant Lloyd Clarke. Ground 1 was not argued. The four grounds argued are as follows:

> "2. The learned Trial Judge failed adequately to put the defence of the applicant LLOYD CLARKE to the jury.
>
> 3. That in the particular circumstances of this case, all reference in the cautioned statement of JIMMY ROBERTS to the Applicant LLOYD CLARKE should have been deleted by the Learned Trial Judge.
>
> 4. The Learned Trial Judge erred in failing to accept the submission of no case on behalf

" of the applicant LLOYD CLARKE.

5. That the Learned Trial Judge misdirected the Jury (at page 434 of the summation) by directing that the statement of the applicant LLOYD CLARKE that 'his blood group was O ... was self-serving'. "

The first ground argued was Ground 4. Mr. Hamilton submitted that the elements of the prosecution's case directed at Lloyd Clarke are the wallet found in his room, the drop of blood on the ground floor of building "P", the blood found on his shirt and the red dirt on his clothes. He contended that the blood did not lead to Clarke's room and the prosecution could not rule out the possibility of the blood on the shirt being that of the appellant inasmuch as no effort was made to say how old were those blood stains. Also, no chemical test was done to identify the red dirt on his clothes with the red dirt at the locus of the crime. Those are valid points but he effectively concluded the issue against himself once he conceded that the issue of the wallet, which was the strongest aspect of the case against Clarke, was a matter for the jury. It could not, therefore, have been a failure on the part of the trial judge not to have accepted the submission of no-case.

Ground 3 was next argued. The contention was that the reference to other persons was purely prejudicial and ought to have been deleted. But Mr. Hamilton was obviously at variance with himself on this point because he next submitted that the name Lloyd Clarke, which is the name he wished to have deleted, is an extremely common name; hence there are so many Lloyd Clarkes who could thus be referred to. Then he criticized the police for not administering a question-and-answer to the appellant in order to ascertain who was the Lloyd Clarke to whom he referred. All this ignored the fact that the jury would still have to be told, as they were told, that the statement was evidence only against the maker. The elucidation clamoured for would undoubtedly do more harm than good.

It should be noted that there is no rule requiring that statements such as those under reference should be edited. This question has been dealt with in many cases and this Court considered the matter recently in **R. v. Dennis Lobban** S.C.C.A. 148/88 delivered 4th June, 1990 (unreported) and upheld that principle. We do not agree with Mr. Hamilton that the statement should have been edited. But as it transpired, no useful purpose would have been served by that exercise because when the appellant Roberts came to state his defence he repeated the offending names in the statement and by having the statement un-edited the unsworn statement of Roberts escaped the criticism of being a recent concoction. Furthermore, it is our opinion that since the statement is being tendered as Roberts' statement he would have an interest in having the whole statement in evidence.

Grounds 2 and 5 were argued together. Two complaints are dealt with here, viz., (a) the defence was not adequately put to the jury and (b) the trial judge wrongly referred to a statement in the defence as self-serving. The second complaint has to do with the trial judge's direction on the appellant's statement that "my grouping is Group O". This was an obvious endeavour on the appellant's part to meet the adverse inference which might have been drawn from the fact that Mrs. Cruickshank had testified that blood of Group O type had been found on the right sleeve of the soiled navy blue shirt taken from Clarke's room. He stated that he was a blood donor and that his blood was Group O. The true assessment of such a statement was that it was hearsay but it was incorrect to regard it as self-serving. This is how it was put to the jury, at page 434:

> "And then he volunteered to you a point that he was a donor, a blood donor and his blood group was Group O. I think I remember telling you that that is self-serving. It's not evidence, no evidence at all. It has not been tested or anything and whether it was group O ... I suppose he is saying that that could explain the blood on his shirt. I don't know but its no evidence. It is clearly self-serving and is of no avail."

Mr. Hamilton submitted that this was a misdirection to have withdrawn a vital area of the defence from the jury and in doing so the trial judge committed an inexcusable error. When all is said and done, however, the fact is that that statement was no proof of the truth of what was stated and that is not affected by the fact that there was no burden of proof on the appellant. A balanced presentation of the evidence on that point should have emphasized that Mrs. Cruickshank stated that the shirt was soiled and although the police took possession of the shirt within a few hours of the killing, Mrs. Cruickshank did not say the blood was fresh nor did she give any age for the stain. Accordingly, no adverse inference could be drawn from the presence of the blood stain. We agree that it is wrong to regard the statement of the defence from the dock as self-serving and of no avail. Any such statement from the dock, regardless of what it purports to advance, must be left to the jury to ascribe to it such weight as they think fit. We would decide that point in favour of the appellant but, if necessary, we would have applied the proviso.

The other point, however, is of grave import. Although the appellant did not, in his unsworn statement, raise the defence of alibi it is clear from the evidence elicited from Barrington Gordon that that is the defence he was advancing. In his general directions, the trial judge mentioned that Mr. Smith and Mr. Clarke made statements that they knew nothing about this, and suggested what we call in this case an alibi. But it is obvious that his mind was so taken hostage by the manoeuvre at the bar that he failed to recognize the evidence which this appellant presented in support of his defence. What happened was that the trial judge regarded Duncan Stanley, who was called to testify concerning the red dirt on Clarke's clothes, as not being able to support the alibi because he said he did not know on what shift Clarke was working at the time but Clarke was not credited with the evidence of Barrington Gordon, who

testified to Clarke's presence in the apartment for the night. Mr. Hamilton prayed in aid the decision of this Court in **R. v. Altimond Chambers and Kenneth Bell** S.C.C.A. 17 & 18/90 delivered March 1, 1991, (unreported) in which failure of the trial judge to put to the jury the evidence called on behalf of the appellants resulted in a quashing of the convictions. On this aspect of the appeal, Mr. Palmer submitted that the defence of alibi was left to the jury though only on the statement and in a general way but that the jury would be left in no doubt what was the defence. It is not our view that that submission answers the complaint that the defence was not adequately left to the jury.

The other area of complaint relates to the wallet alleged to have been found in Clarke's apartment on a dresser. The appellant is alleged to have said it had been left there earlier by Sam Spade. The appellant did not refer to the wallet in his unsworn statement. That, submitted Mr. Hamilton, indicates that the defence was not challenging that evidence which at once exonerates the police (it was not being contended that they had planted it there) and Barrington Gordon, the other occupant of the room. But not only that. The defence contends that if it is credible for that purpose then it must also enure to the benefit of the appellant. However, the record does not support Mr. Hamilton's stance that the finding of the wallet was not challenged. At page 210, Mr. Hamilton himself, while cross-examining Sergeant Haley, did the honours:

> "Q. Now I am suggesting to you that in your -- Lloyd Clarke was just rounded up that morning along with several other people that you rounded up?
>
> A. No, sir. I wouldn't say that.
>
> Q. Let me put it another way. I am suggesting that you didn't find that wallet sitting on a

" dresser in his room or the room where you found him?

A. That is where I found the wallet."

Clearly, therefore, Mr. Hamilton was not correct in his submission. Indeed, he withdrew that submission.

The trial judge, in leaving the issue of the wallet to the jury, pointed out that on the evidence there were two interpretations to be placed on that aspect of the case. Firstly, it was either that the appellant had come home with the wallet and, induced by a feeling of complacency, rather than concealing it had placed it where Sergeant Haley said he found it. The second interpretation was that the police had planted the wallet where they said **they** had found it. In addition, although the appellant made no reference to the wallet in his unsworn statement the judge reminded the jury of the account which Sergeant Haley said the appellant had given him, viz., that Sam Spade had left it there and that the police were searching for Sam Spade. We are, however, concerned about another reference to Sam Spade, which appears at page 402 of the record as follows:

> "You remember, Mr. Foreman and members of the jury,..not that this is any evidence against anybody, but you remember also another individual, Mr. Roberts, made reference to one Sam Spade. Here is this man now making reference also to a Sam Spade. It's a matter for you. Is there a connection between these Sam Spades? Because we don't know. But, people are talking about Sam Spade. One Sam Spade come there and leave it. So he says."

Now, the appellant **Roberts** was credited with making three extra-judicial statements in two of which reference was made to Sam Spade and in his unsworn statement in his defence he had also mentioned Sam Spade. In the first statement to Superintendent Richards he had mentioned "Lloydie" or "Lloyd Clarke". The contention was that by focussing attention on Sam Spade as a real person for whom the police were searching, the trial judge, albeit unwittingly, was transmitting a message

to the jury that "Lloydie" or "Lloyd Clarke" mentioned in Roberts' statements was also involved in the crime. The effect would be to erode the correct directions given concerning those statements and to invest them with an evidential value not accorded them by law. There is, we think, merit in this complaint. The remark was unfortunate.

The failure to adequately present the defence of this appellant coupled with this last complaint secures for this appellant a conclusion that his conviction cannot stand and for reasons already stated a re-trial is out of the question. We, therefore, quash the conviction, set aside the sentence and enter a judgment and verdict of acquittal.

The case of the appellant **Jimmy Roberts** presents greater difficulty because he puts himself at the scene. His unsworn statement in his defence is as follows:

> "My name is Jimmy Roberts. I lives at Delacree Road. I am a welder. On the 16th March, 1983 some men came to me which I know from Waterford say them have a move to go pon up by Queen Hill. One by the name of 'Wass' him say him know where a empty house is where the people dem gone away where we can go bruck it. Another one by the name of Sam Spade, Patrick Bailey and Lloydie. When I went with them, m'Lord, when I reach up by Queen Hill 'Wass' say, 'See a police car deh'. Say 'we a goh kill him'. Me say, 'Me a goh turn back. Me nah goh nuh weh man'. Me and Sam Spade walk off. Shortly after me hear a whole heap a gunshot. Shortly after me hear the whole heap a gunshot me see 'Wass' in front a me say 'Yuh fe dead now bwoy. You a defend police'. Him shot me and me drop. When me drop him shot me again. Sam Spade say to him say, 'Yuh caan kill the youth man ana we carry him up yah'. Then Sam Spade and Patrick Bailey pick me up and carry me down by club centre, Duhaney Park where I didn't know anything more again till I see myself at the K.P.H. These men that I stand beside I do not know any of them until the police carry me at the Gun Court the 3rd of June, 1983. So help me God I didn't go up by Queen Hill to shot anybody or kill anybody. I on bail for several months, my Lord."

This is how the trial judge understood this appellant's defence and so presented it for the jury's consideration at page 428, he said:

> "The Defence, first of all Mr. Jimmy Roberts he has the confession which you will hear; but his statement from the dock tells you that he went up to this place with some individuals, no doubt about that, he went up there with some individuals, but he had no intention to rob. He went, he had no intention to kill anybody. They said they were going to rob an empty house and he went along with them. But you will have to examine his testimony and his statement very carefully, bearing in mind that there is no obligation on him to prove his innocence; but he has said something which you have to examine if it goes so or it makes sense.
>
> Here is a man who is going up the hill through bushes because there is no road and he is going up to Queen Hill and he is going up with these men, according to him, to rob a house, an empty house. When they got up there he says he saw a police vehicle and he says 'I am going to turn back.' Then two of them went over, according to him and he heard a whole heap of gunshots and one of them said to him when he came back, 'Yuh fe dead.' What he is saying there Mr. Foreman and members of the jury - you will see this also in the caution statement something about 'Weh yuh a seh? Yuh nuh know is bandooloo yuh dealing wit'?' What Mr. Roberts is saying is that he was compelled, he was under duress to go up to this Queen Hill with these people. And I have to leave this bit of thing to you, this bit of direction on duress to you, because he has raised it."

Thereafter, he gave directions on duress which gave cause for complaint:

> "Mr. Foreman and members of the jury, duress is words spoken or conduct on the part of some other person which impels an accused person to commit the offence, because he has good cause to fear that he will be killed or seriously injured if he does not do so and which would have impelled a **sober person of reasonable firmness** sharing the defendant's characteristic to have done the same thing. The threats of physical harm or killing

"must be operating on the mind of the defendant at the time the offence was committed. When you are dealing with this defence of duress, this concept that has been raised in relation to Jimmy Roberts Mr. Foreman and members of the jury, you have to ask yourselves three questions or you deal with the matter in three stages: First, you have to ask yourselves what did the accused man Roberts reasonably believe, the statement 'Yuh nuh know a bandooloo yuh a deal wit' ' down in the Duhaney Park area when he went to see the man, Sam Spade. Secondly, you have to ask yourselves whether the accused was forced or impelled by a reasonable belief that if he did not commit the offence he would be killed or injured seriously. If you conclude and your answer to that is no, no reason, you don't go any further. But if to the second question you could say yes, he so believed, then you have to ask yourselves have the Prosecution made out a case to you which you feel sure that there was no duress at all.

When you are considering this thing of duress also, Mr. Foreman and members of the jury, you must remember that if a man chooses to consort with ruffians and callous, heinous people, because according to Jimmy Roberts these people know him, he knows them, Wasp and all, they are so heinous - 'Look we going to kill you' - if a man chooses to consort with those people he ought not to or he should not be heard to say that he acted under duress from these people if he knew from their propensity that they are vicious people and he chose to climb up the hills with them going through the bushes and back down, you can say that he ought not to raise this thing about duress successfully. But it is a matter for you; but I have to leave it. The Prosecution says in all these cases there can be no concept that he was forced."

Much time was spent on duress which is what the trial judge appreciated to be the defence being pursued. In the course of dealing with this defence he pointed out that the appellant did not run when he had a chance while the others had gone to the car which is what would have been expected from one pleading duress, he said. Then in referring to common design on which the prosecution relied, he told the jury (at page 432):

"Before you can convict him - Jimmy Roberts - and you look at all the circumstances, you have to look and find that he was part of this joint enterprise, this common purpose to go up there and to rob and you have to find that during the process of that robbery, there was this contemplation that violence would be used to cause serious bodily harm at least. If you are in any doubt as to whether he was a part of this common design to go and kill, you have to acquit him too. Just as how you have to acquit him if you find that all he went to do is to rob and he is not a part of the common design.

But, if you find that he was part of this common design to go up there and rob and he knew...you see, Mr. Foreman and members of the jury, if persons are going to rob, you know, to hold up people and they have weapon there must be an expectation that the people are going to resist, the victim of the robbery will resist and you are going to use the opportunity of your weapon - what you carrying your weapon for? To frighten them; to tap them on the shoulder and say, 'Be good boys, let me rob you,'? You are going to use it to facilitate your escape or to obliterate evidence against you. And it comes back to what has been said at the Bar down there, that dead men tell no tale.

So, if somebody is going up into a group of men and you know you are going to rob and you know they have guns because M16 is not something you carry in your pocket. Twenty-odd inches of weapon, that you know that it's there. It's a matter for you to say whether he was a part of the common design..."

Regarding the statements alleged to have been made by the appellant at the Spanish Town Hospital, the trial judge pointed out that the appellant said from he was taken to that hospital he knew nothing more until he found himself in the Kingston Public Hospital. Therefore, being unconscious he was contending he did not give those statements. Other directions on the role of the appellant will appear in dealing with the grounds of appeal.

Of the nine grounds of appeal filed, only five were argued. The first ground of appeal complained that the trial judge referred to the cautioned statement of the appellant as a confession. Five times in all he made such a reference. On pages 371-372 there are three such references:

"Mr. Foreman and Members of the Jury, during the trial on a certain day in your absence, I admitted a piece of evidence. It will be your function when you go to deliberate to look at it. It's a confession, to look at it. You have heard some of it read out. You will be entitled to look at it and decide whether or not it is true. And you come to your decision as to it's truth by looking at all the circumstances. That is how you decide whether it's true. And then you will also give it such weight as you think should be attached to it.

Remember I told you before that if you see anything in the confession referring to anybody else it is not evidence against those other persons. If you are not satisfied so that you feel sure as to the truth of the confession, you have to disregard it. And equally if it leaves you in any reasonable doubt as to it's truth you have to disregard it also. But if you believe that it is the truth, irrespective under what circumstances it was taken, even if it was taken when the maker was in severe, excruciating pain, if you believe it is the truth you may act upon it because your function is not to consider anything other than the truth of this statement."

page 428:

"The Defence, first of all Mr. Jimmy Roberts he has the confession which you will hear."

page 444:

"When you look at the confession statement you must not look there and see any reference to anybody else."

The gravamen of the complaint is that a confession is an admission of guilt, which, assuming that the appellant did make the statement, is certainly not what it purports to be. True, it puts him at the scene of the murders but not as a participant. Inasmuch as the extra-judicial statement and the unsworn statement proferred in defence admit the involvement of the appellant in an agreement to commit a criminal offence, to wit, to rob an empty house which was not in the area where the murders were committed, there was the need for a direction as to the scope of that agreement.

Armed as the group was, did the agreement contemplate the elimination of any possible opposition on the way to the robbery, at the scene of the robbery or subsequently thereto in order to make good their escape? And if such was the scope, was the refusal of the appellant to join in the murders a timeous withdrawal or was the effectuating of the common purpose too far advanced for him to effectively withdraw? See **R. v. Becerra** (1976) 62 Cr. App. R. 212 in which it was held that in order to escape responsibility for an act within the common purpose there must be a timely communication from those who wish to abandon the common purpose to those who wish to continue it. On the other hand, if the jury felt or had any reasonable doubt that what the appellant was saying was that the murders were not within the common purpose then he could not be found guilty for those crimes. No such direction appears. See also S.C.C.A. 202/88 **R. v. Wayne Spence** dated 18th June, 1990 (unreported); S.C.C.A. 55/90 **R. v. Norris Taylor** dated 22nd April, 1991 (unreported).

But the directions at pages 371-372 (supra) are objectionable for two other reasons. Firstly, it certainly is not the law that it does not matter what are the circumstances in which a cautioned statement is given. The law as to that is elementary. Secondly, it is not correct that the jury are proscribed from considering anything other than the truth of the statement. Where, as in the instant case, the appellant denies making the statement the jury must first of all determine whether he did in fact make the statement in addition to considering the circumstances of making and the truthfulness of the statement. It is certainly not impossible to think of a situation where the Court could be presented with a statement which is totally true but was not made by the accused person.

The statement of the law by the trial judge reflects a statement on the admissibility of evidence in **Kuruma v. R.** (1955) A.C. 197. The Headnote reads in part:

> "The test to be applied, both in civil and criminal case, in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is it is admissible and the Court is not concerned with how it was obtained."
> [Emphasis supplied]

But that this statement of the law did not relate to confessions was made plain. The Headnote continues:

> "The Board were not qualifying in any degree the rule of law that a confession could only be admitted if it was voluntary and one obtained by threats or promises held out by a person in authority was not to be admitted. **Reg. v. Thompson** (1893) 2 Q.B. 12; 9 T.L.R. 435."

It is abundantly clear, therefore, that the directions to the jury amounted to a misdirection. These considerations really comprehend Grounds 1 and 2, the latter of which contained the complaint in Ground 1 and referred to the judge's remarks as to the circumstances in which the statement was made.

Ground 3 repeats the complaint made in Ground 4 by Jonathan Smith, criticising the judge's comment on why the appellant did not give sworn testimony and requires no further treatment save to point out that the very words complained of were considered by this Court in **R. v. Cedric Gordon** S.C.C.A. 109/89 dated 15th November, 1990 (unreported) and were held not to have offended.

Ground 4 makes the justifiable complaint that without any supporting evidence and contrary to the defence pursued, the trial judge left for the jury's consideration the defence of duress. Quite apart from the fact that duress is no defence to murder, the appellant really did not attempt such a defence. From the previously cited passage at pages 428-429 it is clear to see how the trial judge came to introduce the issue of duress but we are agreed that the statement of the appellant cannot bear such a construction. The grave danger about such a defence is that it implicitly admits the criminal act but denies the mental responsibility - actus reus without the necessary mens rea.

Accordingly, if the jury rejects the absence of the mens rea, a conviction will naturally follow. Accordingly, although the defence was not raised it is not the type of defence which can be said to give the appellant an additional route to an acquittal but carries no prejudice if it fails. In the recent case of **Garth Henriques and Owen Carr v. R.** Privy Council Appeal No. 61 of 1988 dated 27th February, 1991, the Board held that although the trial judge had directed the jury on manslaughter by flight, which was not being put forward by the defence and did not in fact arise on the evidence, there was really no cause for complaint because it offered an additional alternative to murder and as such benefitted rather than prejudiced the appellants. We cannot agree with Mr. Palmer that this additional defence does not prejudice the appellant. There is merit in the complaint.

Ground 7 reads:

> "The learned trial judge erred in directing the jury that because the unsworn statement of the applicant 'puts him on the place' he cannot be acquitted by them if they believed his statement or were left in reasonable doubt."

This is a justifiable complaint, the substance of which has already been adequately dealt with when discussing the question of the scope of the common purpose. The direction ignores the contention of the appellant that his presence at that spot was not occasioned by his participation in the killings but despite his endeavours to persuade his cohorts to leave the car and its occupants alone and let them continue on their mission to rob. In this regard, however, it must be borne in mind that where an accused person gives an unsworn statement in which he offers an explanation for his conduct, the jury are not obliged to accept the explanation as true even if there were no other evidence incompatible with it. See **R. v. McGregor** (1967) 2 All E.R. 267. The rationale is that such explanations have not been tested. So far as the prosecution is concerned, there are factors in the case which, on a proper direction, might well have prevailed

against the appellant's contention. From the appellant's own story, there were five men in the group and the Ballistics Expert demonstrated that there were five M16 rifles in action at the scene and peculiarly only one shot was fired from one of those rifles. Why? Is it that it belonged to the man who got injured and that he was injured in the very early part of the shooting? Then again the nature of his injuries do not seem very consistent with an M16 rifle being fired at him directly to wreak vengeance on him for his non-participation in the killings.

It follows, therefore, that although this appellant admitted to being present at the scene of these horrible murders, the errors complained of are of such a nature that it is impossible to uphold the conviction because the proviso certainly could not be resorted to in such a situation.

Finally, therefore, the convictions of this appellant, as is the case with the other two, are quashed and the sentences set aside. And because the same reasons prevail as affect the other two appellants, a re-trial is not ordered. Judgments and verdicts of acquittal are accordingly entered.