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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 193 & 194/99

COR: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J. A.

REGINA
V
KEVIN MAYNE
JEFFREY MILLER

Delford Morgan for Mayne
Leroy Equiano and **David Morales** for Miller
Lisa Palmer, Assistant Director of Public Prosecutions
and **Laurel Gregg, Crown Counsel** for the Crown

May 21,22 and July 17 , 2001

WALKER, J.A.:

On November 15, 1999 in the Home Circuit Court, Kingston before Algernon Smith J sitting with a jury the applicants were convicted of the capital murder of Valerie Williams during the course or furtherance of a robbery. As a consequence of these convictions both applicants were sentenced to death.

The case for the prosecution consisted of evidence which was wholly circumstantial. It spoke to a series of events which commenced on October 30,1997. On that date at about 10:30 a.m., the applicant Miller and another man were seen speaking to the deceased who was then seated in her taxi

cab at Strachan's gas station in Christiana in the parish of Manchester. At about 11:00 a.m., at the same place, both applicants were seen to enter the deceased's motor car. Afterwards the car was driven away by the deceased with the applicants aboard in the direction of Coleyville from where the applicant Mayne hailed. In the early afternoon of the same day the car collided into the rear of a motor car being driven by Mr. Steve McDonald, a businessman. At that time there were only two occupants of the car, both male, one of whom McDonald identified as the applicant Miller. According to McDonald the car was then being driven by the other man. Immediately following the collision, and at McDonald's request, Miller produced the papers for the car. These papers were contained in a pouch later identified to be the property of the deceased. Included among the contents of the pouch was a photograph of the deceased which was hastily extracted by Miller but not before McDonald had got sight of it. Thereafter Miller handed the pouch, minus the photograph, to McDonald who, having inspected the papers in it, retained the pouch and its contents. In reply to McDonald's enquiries of "where is the lady for the car?" and "where is your licence"? Miller said that the lady was gone to town to look about the licence. All the time both men begged McDonald for "a chance" while saying that they did not want the police to become involved. Eventually McDonald left the scene and went directly to the Spauldings Police Station where he reported the accident and handed over the pouch and its contents. On the same day at about 3:00 p.m. at Tweedside district in the neighbouring parish of Clarendon the applicants were seen in the deceased's car. At that time the

car had run out of gasolene and the applicants, who were the only two occupants of the car, were enquiring whether gasolene was sold in that area. Eventually gasolene was obtained and the car was driven away for a short distance by the applicant Mayne with the applicant Miller as his passenger. Shortly afterwards at about 5:10 p.m. both applicants were apprehended by the police after being detained as suspicious persons along with the car by citizens of the district. A subsequent search of the car by the police produced the deceased's driver's licence. When questioned by the police the applicant Mayne gave a false name and address and the applicant Miller, while giving his correct name, gave for himself the same false address as Mayne did. After being cautioned by the police and questioned about the car the applicant Mayne said that the car belonged to a man named Durval of Alston district in Clarendon. Furthermore he said that the man, Durval, had lent him the car and was awaiting its return. After being taken by the police to Alston about 7 ½ miles away in search of Durval and waiting there for thirty minutes no one was seen. Later that day the police took possession of a gold chain which the applicant Mayne was wearing around his neck as well as a gold ring being worn by the applicant Miller. Upon being questioned by the police about the ring Miller's first response was "Is me baby mother a town". For his part when asked about the gold chain the applicant Mayne said nothing. Subsequently, both items of jewellery were identified by the deceased's sister as being the property of the deceased and jewellery which the deceased was accustomed to wear. At that time the applicant Miller

revised his explanation as to his possession of the ring to say "Is Kevin mi get it from, mi no know nothing bout it".

On October 31, 1997 the lifeless body of Valerie Williams was found by the police in a cave located at Ticki-Ticki district in the general area of Coleyville. The cave, known as the Gurie Cave, was sited in desolate country described in the evidence as "bushy like a wilderness" and like a "forest". In terms of distance it was situated three quarters of a mile from the nearest house, about two miles from Christiana and about one mile from Coleyville. It had thirty four steps leading down to the bottom. The body of the deceased was found on the floor of the cave. It was partially submerged in a shallow pool of water where a broken kitchen knife was also found. The hands of the deceased were tied behind her back and a piece of cloth was tied around her throat. The actual spot where the body was found was about ninety yards away from the nearest driveway outside the cave. A post mortem examination revealed that the deceased had suffered the following injuries:

(1) Dislocated neck;

(2) 1 ½ " deep cut to the left side of the neck;

(3) ½ " stab to the left supra-clavicular fossa;

(4) 2" skin deep cut to the left neck, 4"above the left clavicle and 2" below the left ear;

(5) 2 cuts to the left breast near the armpit;

(6) ½ " cut to the left chest, 6" below the armpit in the mid-axillary line penetrating the left lung;

(7) ½" cut to the left chest, 5" below the armpit and 1" from the posterior axillary line;

(8) ¾" muscle-deep cut to the left buttock in the mid-axillary line to the ischial;

(9) 14 - ½ " stab wounds to the upper back, all penetrating down to bone.

In total there were about 20 stab wounds which were inflicted with a fair or reasonable amount of force. The dislocation of the neck required the use of a high degree of force. The cause of death was asphyxia from pneumothorax due to the stab wound to the chest. As to her physique, the deceased had been heavy-set, of an estimated height of 5'6" – 5'-8" and an estimated weight of 150-170 lbs. The sister of the deceased agreed that in life the deceased was a big woman, fat. Additionally, the evidence of the forensic analyst revealed human blood of the applicant Miller's blood grouping on a shirt and human blood (not grouped) on a pair of trousers being worn by Miller at the time of his apprehension. That evidence also revealed the presence of human blood (not grouped) on sneakers taken from the applicant Mayne. Forensic examination of the deceased's motor car revealed no trace of blood and no evidence of trauma inside the car.

In defence both applicants denied any knowledge of the circumstances in which Valerie Williams met her death.

The appeal of Kevin Mayne

The sole ground of appeal complained that the trial judge erred in failing to withdraw the applicant's case from the jury on a no case submission made on his behalf. More particularly it was submitted that the applicant's

case should have been withdrawn from the jury by reason of the insufficiency of the identification evidence relating to him.

Firstly, Mr. Morgan argued that the identification of the applicant by the witness, Timothy Edwards, amounted to dock identification and that, as such, it was worthless. He argued that the circumstances of that identification called for the holding of an identification parade, a procedure which was not followed . We do not agree. The unchallenged evidence of the witness was that the applicant had been previously known to him "from he was a baby". The applicant and himself had grown up together in the district of Coleyville and had attended the same school. In such circumstances an identification parade would have served no useful purpose, as we find. Secondly, Mr. Morgan advanced a similar argument in relation to the identification of the applicant by the witness, Fernando Matthews, at Tweedside district. Again, the uncontradicted evidence of Matthews was that the applicant had been previously known to him for about fifteen years. In these circumstances an identification parade would have been useless. In the final analysis it was in either case a matter for the jury to determine the effectiveness of the identification evidence. Accordingly, this being the extent of the applicant's complaint, we conclude that the trial judge was correct in leaving the applicant's case for the consideration of the jury. This ground of appeal must, therefore, fail.

The appeal of Jeffrey Miller

Several grounds of appeal were advanced on behalf of the applicant Miller. Firstly, Mr. Equiano submitted that the applicant's case should have been withdrawn from the jury by the trial judge on the basis of a general insufficiency of evidence against him. Having examined the record we are driven to say that this submission needs only to be stated for the hopelessness of it to be appreciated. We think that there was in fact a mountain of evidence that was capable of implicating the applicant in the murder of the deceased. Secondly, it was argued that the trial judge should have directed the jury that the identification of the applicant by the prosecution witnesses Woodfine, McLeish, Johnson and McDonald was tainted and of no weight because:

> "(a) Miller gave evidence that he had seen and spoken to McLeish and possibly Woodfine at a gas station a week before the 30th October, 1997. There was a real risk that McLeish and Woodfine had mistakenly given evidence about events they believed had taken place on the 30th October, 1977 which had in fact taken place the week before;
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> (b) Miller gave evidence that he was exposed to the view of potential witnesses at Mandeville Police Station and at the front of the Black River Police Station on the morning of the 8th November, 1997 (both prior to the commencement of the identification parades);
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> (c) None of the witnesses had mentioned in their police statements that the man that they later identified as Miller had any outstanding mark or feature. Miller had a red dyed patch or streak of hair on his head on the 30th October, 1997 and the police witnesses acknowledge that this was an outstanding feature".

We find no merit whatever in this argument. As to the circumstance that the applicant wore a red patch of hair at the time of the incident, it is a fact that in his summation the trial judge pointed specifically to the failure of at least one of the prosecution witnesses to mention that distinguishing feature as a weakness in the identification of the applicant. That direction was given in terms which would have indicated to the jury that it was intended to be of general application and the jury could not have failed to understand it in that way. It ran thus:

> "Then also too, it was accepted - I think there is no dispute - that the accused Miller, he said so, that he had this red patch in his hair. And remember that one of the witnesses, they did not give that description to the police. That one is a weakness in the identification evidence; we will look at that. But these are little things that you must remember, that it is for me to point out certain weaknesses in the identification evidence to you. It is for you to say though what as judges of the facts, what you make of them."

With respect to the complaint of unfair exposure, in reviewing the evidence the trial judge directed the jury in the following terms:

> "Then he went on to say that at Mandeville, the police at the police station in Mandeville, they had him in the walkway right at the front where people come to visit the station. Now, members of the jury, the import of this, he is saying that he was exposed to all and sundry, that anybody could see him and therefore he would be exposed to witnesses, he said, who would have come on the parade to identify him. You must consider that and say what you make of it. There is no evidence, there is no evidence from any of the witnesses that they saw him in Mandeville. That is important because you have to look at the evidence. You can't just act on speculation. Now you know you have to look at the evidence and remember that you can draw inferences from facts that have been

> proved to your satisfaction but there is no evidence that any of the witnesses who identified him saw him in Mandeville".

In our opinion those directions adequately addressed the matter.

Next the applicant complained that the identification by two witnesses, namely Timothy Edwards and Fernando Matthews amounted to dock identification and, as such, was impermissible. As to this aspect of the evidence of Edwards the trial judge directed the jury in this way:

> "Let me just tell you this; where a person does not know someone before - remember I told you about identification parade, to test the person's ability- the proper thing to do is put the person on an identification parade where persons looking alike or looking like the person would be on the parade and give the person a chance to see whether he can pick out this person. But where a person having not known the person before, and the first he is seeing the person after the incident is in the dock, that is what we call dock identification, and that is not desirable. You should not attach any weight to purely dock identification. So you must bear that in mind. Say for example, Mr. Edwards, he did not know- he said he knew one before, so that would be dock identification, but he didn't know the other man before. So when he told you he saw these two accused and point to them, as far as Miller is concerned, that would be dock identification. And if it were that alone, there would be nothing against Mr. Miller."

Having said that later on in the course of his review of Matthews' evidence, the trial judge said:

> "What you have to remember Mr. Foreman and members of the jury, you have to be looking at the evidence in this sort of way: He is saying that he saw these two men by Nev's gate, one putting gas in car, the other driving, then they drove off. Shortly after they drove off, went back in truck and some distance quarter mile from Tweedside shop, Mr. Johnson's shop, there he saw the car again.

> Nobody was in the car but he saw these same two men in the crowd there. So you must ask yourself now, is he mistaking these two men for others that he had seen earlier on? Because that is the burden of what the defence is saying. That is what you have to consider and you remember that he said that he knew Kevin before but as to the other person he didn't know him before. So in court here when he said, 'This is the man; Miller is the strange man,' that is what you call the dock identification. So you have to bear that in mind, members of the jury".

Those directions were, in our view, adequate and would have left the jury in no doubt as to how they should treat the matter of dock identification.

The next ground of appeal was framed as follows:

> "Detective Corporal Wade gave evidence in chief that someone in the crowd pointed out the two accused men who were standing beside the car and as a consequence they were arrested. There was no evidence forthcoming from a prosecution witness that he or she, as a member of the crowd, pointed out the two accused men as the occupants of the car. The learned judge reminded the jury of DC Wade's evidence in his summing-up without a direction as to how they should treat it.
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> The evidence was inadmissible implied hearsay. The person pointing did not give evidence but his or her action of pointing out the two accused men implied that they were the occupants of the car. The learned judge should have directed the jury to disregard the evidence entirely".

In this regard these were the trial judge's directions:

> "The sequence of events, the next witness would be Corporal Hemford Wade. Remember he is the police who said that he got phone call and he went to Tweedside. So let's look at what Corporal Hemford Wade had to say. He told you on the 30th of October, 1997 he was the scene officer at Frankfield and at about 5:00 p.m. – remember,

> you see, most of these persons are giving approximation time, about – he received telephone call from a citizen and along with other policemen he went to Tweedside District in Clarendon. He saw a crowd surrounding a car and the two men standing beside the car which was parked along the roadway. A truck was parked near the car; car was dark grey Nissan registered PP669C. Someone in the crowd gave him a key to the car and pointed out the two accused men in the dock. The accused men and the car were taken to the Frankfield Police Station. The two accused men were placed, he said, in the police jeep and another policeman now drove the car. At the station he searched the car and in the presence of both accused men he found a driver's licence in the front passenger seat".

Nowhere in Corporal Wade's evidence as summarised above is there contained any material that could, even remotely, be described as hearsay evidence, or as Mr. Equiano put it "implied hearsay evidence". On the contrary, we think that the evidence of the witness was straightforward and admissible. It would have been quite wrong for the judge to have directed the jury to disregard it entirely as suggested by counsel.

The next ground of appeal was framed in this way:

> The learned judge gave directions to the jury on how to treat lies in respect of parts of Miller's evidence an excessive number of times and/or where it was inappropriate to give such a direction thereby implying to the jury that the learned judge believed that Miller was lying. For example, the direction was given as to whether Miller knew Mayne, whether Miller travelled back to the police station in the same jeep as Mayne and whether Miller had any scratches to his neck.
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> Miller's evidence, was simply in conflict with some of the prosecution's evidence and the jury could and should have been left to assess the witnesses without a direction as to treat lies at all. Alternatively, one general direction as to how to

> treat lies should have been given without relating it to any specific part of Miller's evidence."

The legal framework within which lies should be evaluated and assessed was stated by the trial judge in these terms:

> "The Crown is saying from quite a few eye-witnesses that these two men were seen to go entering the car and exercising some control over the car that the Crown is saying belonged to the deceased. So clearly – how should I put it? – you may well find, it is a matter for you, that it is a material issue as to whether or not they knew each other; that that is a material issue whether or not they had seen each other before. You might well find that this is a material issue. But not only must it relate to, the lie relate to a material issue and this is important, members of the jury, the motive for the lie must have been a realization of guilt and a fear of the truth. Let me repeat it. The motive for the lie must have been a realization of guilt and a fear of the truth.
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> But you must remember, members of the jury, that people sometimes lie for different reasons, various reasons, sometimes just to bolster up a just cause and even a good defence and if you should find that the lies were born out of any of these factors then, of course, you could not use it to strengthen the inference of guilt. You could not use it against them if you find that it was just born out of, you know, just to bolster a good defence or some good cause. But that's an important thing because you must be sure that the only reason for the lie would be a realization of guilt and a fear of the truth".

In our view this direction represents a correct statement of the law. We reject entirely Mr. Equiano's submission that the jury should have been left to assess the evidence of the several witnesses without a specific direction as to how they should treat lies. We also reject Mr. Equiano's alternative submission that a broad direction only should have been given by the judge

without reference to any specific aspects of the applicant's evidence. This ground of appeal is wholly without merit.

Finally, the applicant complained on the ground that there was insufficient evidence for the trial judge to have left capital murder to the jury and, therefore, insufficient evidence to justify a conviction for that offence. Expanding on this ground, Mr. Equiano submitted that taking the prosecution's case at its highest even if one assumed that there was sufficient evidence from which one could infer joint enterprise to commit murder in the course of a robbery, there was insufficient evidence from which it could be inferred which one of the applicants, if either of them, inflicted violence upon the deceased. This submission brings into sharp focus ss.2(1) and 2(2) of the Offences against the Person Act (the "Act") which provide as follows:

> "**2.**(1) Subject to subsection (2), murder committed in the following circumstances is capital murder, that is to say –
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> (d) any murder committed by a person in the course or furtherance of—
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> (i) robbery;
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> (ii) burglary or housebreaking;
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> (iii) arson in relation to a dwelling house; or
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> (iv) any sexual offence
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> ...
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> (2) If, in the case of any murder referred to in subsection (1) (not being a murder referred to in

> paragraph (e) of that subsection), two or more persons are guilty of that murder, it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used violence on that person in the course or furtherance of an attack on that person; but the murder shall not be capital murder in the case of any other of the persons guilty of it". (emphasis supplied).

In the present case the trial judge correctly defined the offence of murder and then went on to explain to the jury the offence of capital murder and to relate the relevant law to the evidence. In so doing, he directed the jury as follows:

> "Well, having looked members of the jury, on murder and on the other factors that I have just looked at, I am going to now consider capital murder, because remember the accused persons are charged with capital murder.
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> Let me put it this way members of the jury. If you are convinced, that is, you are satisfied beyond a reasonable doubt, or you are sure about it, that both accused men jointly attacked the deceased, each intending to kill her or to inflict really serious bodily harm, and the combined effect of what they did was to kill her, then in those circumstances, as I told you before, it would be open to you to say that they are guilty of murder, just murder.
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> However, if at the same time you are equally satisfied and sure about it that they killed the deceased in the course of or in furtherance of a robbery, and that each of them used violence on her, that is, on Valerie Williams, in the course or furtherance of an attack on her, then members of the jury, it would be open to you to say that each accused man is guilty of capital murder. So here members of the jury, you have to find that each person used violence on Valerie Williams before you could find each of them guilty, and

that must have been done in the course or furtherance of robbery.

Now, once you find that each of them used violence, then it wouldn't matter who, because who inflicted the fatal injury, it wouldn't matter, but you have to find that each of them used violence on her in the course of robbery and that resulted in her death.

In this case members of the jury, the prosecution is contending that the deceased Valerie Williams, was killed during the course of or in furtherance of a robbery. So it is for you to say whether or not she was killed in the course of robbery. It is not in dispute as I said before, that she was killed. So you should not have any difficulty in finding, coming to that conclusion. And members of the jury, there is evidence from which you can find that she was robbed. Remember I defined robbery to you earlier on; her car was taken in a violent fashion; there is evidence of that. So you must say what you make of it; she was stabbed several times you recall, and the crown is also saying that her chain and ring were taken from her.

Now, if you are sure that these two accused persons acting together killed her in the course of robbing her of her car and her jewellery, and at the same time you are equally sure that each of them used violence on her in the course or furtherance of an attack on her, then it would be open to you to convict each of them of murder. So I put it a slightly different way but repeating what I said before. Remember you have to consider the evidence against each accused separately; you must remember that.

If you members of the jury, find that violence was used on her, that is Valerie Williams, by one or the other but you are not sure which one used that violence, then you cannot find any of them guilty of capital murder; you will have to find them guilty of non-capital murder. Bear in mind how I already defined murder to you. The crown is contending that each of the accused persons must have used violence on her, that is what the

> crown is contending. Because much was said about size, she is a big tall woman, heavy, and the size of these accused persons. The number of stab wounds that were described to you by the doctor and the police and also by the Forensic Scientist, and the crown is asking you to find that her hands were tied behind her, that part of her blouse or shirt was cut off and that it was used to tie her hands behind her. Then there was this thing tied around her neck, then her body was deposited in a cave which is some distance from the main road, and you have the main step going down in the cave. Then there was more evidence, there was no trauma or evidence of blood in the car, and other things too. You heard Miss Llewellyn, that in light of these things, one of them could not have done it. So the crown is saying that the inescapable inference, the crown is saying, if you accept these things - because you are judges of facts - you have to say what you accept as fact.
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> The crown is asking you to accept them and the crown is asking you, if you accept these things, the inescapable thing is that both of them or each of them would have used violence against Miss Williams. You should not speculate, it is a matter for you to consider the evidence, to say what you find of it. You must consider these members of the jury, in light of the entire evidence and say whether or not you are satisfied so that you are sure that the inescapable inference is that each accused used violence against the deceased.
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> If the crown fails members of the jury, to make you feel sure that violence was used on Miss Williams by one or other of the accused, but that that accused who used no violence on her aided and abetted the other in the commission of the offence of murder, then you would not return a verdict of capital murder against such a person who did not use violence whilst committing the offence of murder by way of aiding and abetting the actual killer. Such a person would only be guilty of murder as we have said before and not capital murder.

Later on in the course of his summation the trial judge went on to say:

"Let me just remind you of certain things. You remember I told you earlier on, when I was dealing with the law, that if you, having considered the evidence against each accused person, if you are convinced, that is, if you are satisfied beyond reasonable doubt or feel sure about it that the accused men jointly attacked the deceased, each intending to kill her or to inflict really serious bodily injury or harm and the combined effect of what they did was to kill her, then in those circumstances it would be open to you to say that they are guilty of murder. Murder, not capital murder, just murder.

If however, at the same time you are equally satisfied and sure about it, that they killed the deceased in the course of or in the furtherance of a robbery, and that each of them used violence on her, that is, on Valerie Williams, in the course or in furtherance of an attack on her, then it would be open to you to say that each accused man is guilty of capital murder and you must remember, members of the jury, that you have to consider the evidence against each of them separately. You take one, you look at the evidence against him, and you take the other and you look at the evidence against him and if you find that violence was used on her, that is, Valerie Williams, by one or the other but you are not sure which, then you cannot find any of them guilty of capital murder. However, what the Crown is saying is that each of them must have used violence on her, that is assuming that you find that they are guilty of the murder, that each of them must have used violence on her because of the comparative size, that is the accused person's size and the deceased's size - size of the deceased, the number of stab wounds, or stabs that the doctor spoke of, her hands were tied behind her, and her body deposited in a cave which is some distance from the main road. One person, the Crown is contending, could not have done it. It must be both. That is what the prosecution is saying.

On the other hand, you remember, both accused persons are saying they know nothing about the death of Valerie Williams. So, members of the jury, you must consider these in the light of the

> entire evidence and say whether or not you are satisfied so that you are sure that the inescapable inference is that each accused person used violence against the deceased.
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> If the Crown fails to make you feel sure that violence was used on her, that is Miss Williams, by one or other accused, but that that accused who used no violence on her aided and abetted the other in the commission of the offence of murder, then you would not return a verdict of capital murder against such a person who did not use violence against the deceased whilst committing the offence of murder by way of aiding and abetting the actual killer. Such person, of course, members of the jury, would only be guilty of murder and not capital murder; and let me remind again, it takes repetition, that you must consider the evidence against each accused person separately".

In our opinion those directions were altogether flawless. They were comprehensive and set the case in proper perspective. It was left fairly for the jury to determine what was the proper verdict. The only question remaining is whether the jury's verdict of capital murder is sustainable on the evidence having regard to ss. 2(1) and (2) of the Act. Miss Palmer for the prosecution submitted that the verdicts in respect of both applicants are perfectly justified, particularly so in light of the evidence as to:

(1) The physical size of the deceased, she having been a big, fat woman of a height of 5' 6" - 5' 8" and weight of 150-170 lbs;

(2) The manner of her restraint. Her hands were bound together behind her back and she was gagged and tied around the neck;

(3) The place where the body was found in a remote cave about 90 yds. away from the nearest driving surface;

(4) The nature and extent (particularly the multiplicity) of the injuries inflicted upon the deceased.

We find great merit in Miss Palmer's submission and would, ourselves, point to the evidence which showed that the applicants remained constantly together and in company with one another between the time they were first seen to enter the deceased's motor car and the time of their apprehension some seven hours later the same day. From all the circumstances of this case it was an irresistible inference for the jury to draw that each of the applicants himself used violence on the deceased in the course of the devastating attack mounted upon her. Accordingly, we see no reason to interfere with these verdicts of capital murder.

In the result we treat the hearing of these applications for leave to appeal as the hearing of the appeals. The appeals are dismissed and the convictions and sentences affirmed.