CRIM PRAC

JAMAICA

CRIM. PRAC.

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 105 & 108/96

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&
NOT TO BE TAKEN AWAY

COR: THE HON. MR. JUSTICE RATTRAY, P
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

COPY 1

R. V. WHYETT GORDON
DWIGHT FLETCHER

Ian Wilkinson for Gordon

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Dennis Morrison, Q.C & Marlon Gordon for Fletcher

Bryan Sykes & Marva McDonald-Bishop for Crown

9th, 10th, 11th, February & May 6, 1998

RATTRAY, P

On the 21st December, 1997 in a trial presided over by Walker J and a jury in the Home Circuit Court, the applicants were convicted of the capital murder of Rajhni Williams, Georgia Shaw and Racquel Fearon.

The evidence established that the three deceased were young persons who attended a dance on the 23rd October, 1993 at Don Juan Lawn in Lionel Town Clarendon travelling in a car driven by Rajhni Williams, and owned by his father. Travelling also to the dance in a taxi were the two applicants and a man known as Sam described as a Deportee". A witness Marcia Harvey o/c Toosie"was a passenger in the taxi.

When at about midnight the dance proceedings were curtailed by rain, Rajhni, Georgia and Racquel returned to the motor car, a green Honda Integra licensed 8559 AR. On the evidence of cautioned statements from Fletcher and Gordon the applicants Dwight Fletcher sometimes referred to as Deon" and Wyette Gordon, sometimes

referred to as "Issy" as well as the man called Sam described as a "Deportee" entered the Honda motor car at the same time and abducted Rajhni Williams and the two young ladies. They were never seen alive again.

The next morning 24th October at about 8.30 a.m. the Honda motor car with three men went to the home of a witness Colin Burgess, o/c "Sooksie" at Salt Spring in the parish of St. James. Fletcher was known to the witness, and he asked the witness to be allowed to leave the car there, but the witness refused. Fletcher identified the other two men to the witness as the applicant Gordon and a "Deportee" named Sam. The witness at the trial identified Gordon as one of the men who had come there with Fletcher. The witness asked Fletcher how he had come by the car and Fletcher replied that "last night him and him friends them juck down a p.... h... in a Lionel Town in Clarendon and take it." Burgess said - "You is a wicked r... c.... you should't do it. That makes it worse." Fletcher told him that the "Deportee" was the one who did it. Burgess wrote down the licence number of the car on a piece of paper. Fletcher drove away the car with the two men who had come along with him.

Fletcher later returned to tell a resident of the house, one Mr. Nick, that he had heard something on the news and the "car get bait up." He would drive the car up the lane and park it and take some other transportation in. The witness reported the matter to the police after hearing the report on the news of the disappearance of Rajhni Williams and the two young ladies.

Reginald Tomlin o/c Myer, gave evidence of Gordon and Fletcher being brought to him. Myer said that the applicants wanted to sell him a Honda Integra motor car. This took place on the 25th of October at Tomlin's business place, Emtak Car Rentals in Ironshore, Montego Bay. The price asked was $200,000. Although the car was not shown to him Tomlin, he thought the price extremely low. Gordon said that he would bring the car the following day but he never did.

On information received Detective Cpl. Paul Thomas found the car parked on a dirt road in Faith's Pen on the 26th October 1993 with its licence plate 8559 AR about 6 yards away from the vehicle. A finger print taken from the vehicle proved to match the fingerprint of Gordon.

On the 3rd of November, 1993 the skeletal remains of Rajhni Williams was found by the police in bushes at Shooters Hill, Manchester off the main road. It was clad in a green floral shirt, green pants and a pair of green shoes which were identified as the clothing that Rajhni Williams was wearing on the fatal night. The head of the corpse was missing as well as both hands which had been cut off. The identification was eventually made by dental evidence, the lower jaw having been found approximately 1 1/2 feet from the skeletal remains. A .38 cartridge shell was found about 1/2 chain from the body.

Sam, the "Deportee" whose name was Edwy Watson was arrested and charged with the murders. However, after the holding of the preliminary enquiry he escaped custody and was killed in a shoot-out with the police.

Fletcher was apprehended on the 21st November, 1993 and brought to the office of Assistant Superintendent Morris in Montego Bay who cautioned him and told him he was a suspect in the murder of Rajhni Williams. Fletcher denied having anything to do with it. He was however interrogated by Assistant Superintendent Morris and said "If me tell yuh 'bout de murder, Sam wi kill me." He indicated that he wished to make a statement, which he dictated in the presence of Mr. Lopez James, Justice of the Peace. In his evidence Superintendent Morris states:

> "The statement was recorded by Detective Sergeant Bowen as dictated by the suspect, Dwight Fletcher, in the presence of Mr. Lopez James, Justice of the Peace in the parish of St. James. The statement, M'Lord, along with a piece of exercise leaf was later handed over to Superintendent Levi Campbell, officer in charge of crime.
>
> Mr. Pantry: Please show him that for me please.
>
> Witness: M'Lord, this is the statement recorded by Detective Sergeant Bowen on the 21st."

The contents of this statement does not form part of the evidence in the case, obviously not having been put in by the Crown.

On the 22nd of November, 1993 at about 9.00 a.m. Detective Sergeant Daley went to Gutters where he saw Fletcher in custody of Assistant Superintendent Morris who handed over Fletcher to him. Superintendent Campbell who was present cautioned Fletcher and asked him if he could show them where they took the two girls who were taken from Lionel Town in Clarendon. Fletcher pointed in the direction of Alligator Pond and said "somewhere down so, but I don't remember where."

On the 24th November, 1993 Detective Sergeant Daley took Fletcher who was in custody at the Mandeville lock up to the office of Superintendent Campbell who cautioned him. Fletcher said:

> "... a what me tell them a Mobay a lie. Me want to tell you the truth now."

Consequently, a cautioned statement was taken in writing from Fletcher and witnessed by Mr. Trevor Williams, Justice of the Peace.

On the 22nd November, Gordon was taken to Gutters and travelled in the direction of Alligator Pond. Superintendent Campbell then cautioned Gordon and asked him where were the bodies of the girls? Gordon replied: "dem over there" pointing towards a cow pasture. As directed by Gordon they went to a place where they found human bones and clothes scattered all over the place. A human skull was also found. The clothing was identified as that being worn by Racquel Fearon and Georgia Shaw on the fatal night. Indeed, the case for the Crown with respect to what took place that night comes from the two cautioned statements one taken from the applicant Gordon on the 22nd November, the other from the applicant Fletcher on the 24th November 1993.

Gordon's statement discloses that after Rajhni Williams and the two young ladies came out of the dance when the rain had brought the proceedings to an end, they walked to the parked car. Sam "jucked" Rajhni with a gun in his side "and said get

inside the car." Fletcher ordered the girls into the back seat of the car. In the front seat was Fletcher, who drove the car, and with him Sam and Rajhni and in the back seat the two girls and Gordon. Gordon searched Rajhni to see if he had a gun but he had none. Rajhni took off his ring and chain and gave it to Gordon and asked him not to hurt him. They drove towards Mandeville and turned off on a road to Kirkvine. Sam told Fletcher to stop the car. "He told Rajhni that he was going to take him up the road that he could get a vehicle to take him to May Pen." Sam walked up the road with Rajhni and returned without him after five to six minutes. The girls were asking where they would be let off to get something to take them back to May Pen. Gordon was conversing with Racquel -

> "I was talking to her telling her that I liked her and that I would like to have sex with her which she accepted under one condition that is not to let anyone else have sex with her which I know I could not prevent because Sam was the one who was in control of everything because he was the one with the firearm. I had sex with her. I told her to put on her dress while I went back down to the car leaving Sam and Deon with the two girls. That is where the body is disposed. That is in Santa Cruz. .Where I had sex with the girl that is where Sam shoot the two girls one bullet each to their heads. Sam took off the clothes off the two girls. The clothes were left same place. After that we get back into the car and drove out to Montego Bay. I just remember something that I must put in. The money that we accumulate from Rajhni which is Three Thousand One Hundred Dollars all of us got a Thousand Dollars each and Deon put the extra One Hundred Dollars under the glove compartment of the car. While we were approaching Mobay Deon hit a white Toyota Corolla car. The driver of the car said he had to get some money for the damage to his car. Deon turned to me and told me I must give the driver Five Hundred Dollars which I had to do. We then get back into the car and drove off to Montego Bay."

The narrative records travels to Montego Bay and attempts to get the car sold as well as to Hanover where the car was left. There was a further attempt to sell the car in Montego Bay and then they took a vehicle back to Clarendon. Further unsuccessful efforts were made to sell the car in Montego Bay and then they decided

to drive the car to Kingston. On the way to Kingston the car punctured in Saint Catherine. They drove up to a little track and wiped off fingerprints. They slept in a bus stop and next morning travelled to Linstead "and from Linstead to Town then we come back to Clarendon."

The cautioned statement made by Fletcher supported the evidence of his travelling in the taxi with "Toosie" to the dance and along with Sam and Issy (Gordon). It supports the abduction of Rajhni, Racquel and Georgia by Sam, Gordon and himself. Sam had a gun, Gordon had a ratchet knife. *Fletcher's statement of Gordon* having a ratchet knife is of course not evidence against Gordon. He, Fletcher was the driver of the car. The statement tells of driving on the Chapelton road and the car getting a puncture. After changing the wheel -

> "We go back in a de car and me start drive again. Sam asked Issy 'which part him did a talk' and Issy say when mi reach deh mi wi stop you. Mi drive far and then when me a drive go dung one hill pon a pretty road Issy say stop yah so and mi stop. Sam say to the bredda 'all right mi a go let you go yah so.' Sam come out a de car and say mi must drive go dung a de road and wait. The bredda did come out a de car with Sam. The girl them did want come out to but Sam say im nah let them go one place. Mi drive off go dung the road a good distance and stop and mi hear, 'bow', an me say 'a wah dat'. The girl them get frighten and say 'a wah dat', Issy say Sam just a frighten the bredda fe im run. Issy wine up the car window and turn up the radio. After dat Sam come back in a de car an say drive, the bredda gone up the road. Me drive now and when mi reach dung in a round-about mi miss the way and Sam start cuss and quarrel. Im tell mi fi stop and mi stop and im start drive until im reach pon Spur Tree road and when him reach the gas station near the foot of the hill im turn left and stop pon dat road and tell the girl them say im a go let dem go over deh so. All a we come out a de car and Sam wine up the window and lock the door. We cross a wire fence and walk across a common and when mi reach a little track mi stop and sit dung and Sam sey im a go tek off the girl them clothes and leave dem in the bush. Sam and Issy and the two girl walk go up in the bush and was up deh fi a long time then mi hear 'bow' 'bout three times but the two last one nearer than the first one. Mi get up because me feel fraid. Sam and Issy walk come back whey mi deh an Sam go so 'bow' with the gun up in a deh air and sey "this yah one sound healty

> than the whole a dem." The three a wi walk go back to the car and when mi go inside mi ask Sam wha happen to the girl them and him sey him tie dem in a de bush. Mi ask him how them a go come out and him sey by day light out good them gone. Sam turn around the car and sey im a go a Bay now." [Emphasis mine]

The statement in the underlined section of Fletcher's statement is of course not evidence against Issy (Gordon).

The statement tells of an accident with a Toyota Corolla motor car and of going to Salt Spring. It narrates also the attempt to sell the car and Sam and Gordon going off to Hanover. Sam left to go back to Clarendon. It tells of the attempt to sell the car at Ironshore and the discussion with the witness Tomlin o/c Meyer. In the night he heard news on the radio about the people who had gone to a dance and were missing along with the motor car. The next day he took a vehicle to Clarendon. Three days after he saw Sam and Issy (Gordon) at Rocky Point "and me sey to dem oonu get me in a trouble now, so what happen to the people dem. Him get vex sey me go wey left dem a Montego Bay and sey me a gawn like me a idot cause him kill two and Issy kill one and dem nah fret so whey me a fret fah, if me murder nobody."

Mr. Ian Wilkinson for Gordon, has argued grounds of appeal which may be thus summarised:

> (a) That there is no evidence linking the applicant Gordon to a common design to commit murder and therefore the trial judge erred in leaving it open to the jury to find on the evidence non-capital murder against Gordon.
>
> (b) That the learned trial judge erred in refusing to permit Gordon to give an unsworn statement on the voir dire taken in respect of the admissibility of his cautioned statement.
>
> (c) That the learned trial judge erred in directing the jury that the material in Gordon's cautioned statement if accepted by the jury was sufficient for the jury to find capital murder.

With respect to (a) the evidence if accepted by the jury clearly revealed a common design on the part of the three men to abduct the deceased and to rob them. Gordon's cautioned statement explicitly revealed this when it states:

> "Sam then started to question Rajhni asking him if he had a gun and told me to search him, which I did and I found no gun. Rajhni was a bit scared and started to take off his jewels which is a chain and a ring. He gave them to me ask me not to hurt him."

The learned trial judge directed on the question of joint enterprise as follows:

> "... where two persons embark on a joint enterprise, each of them is liable for the acts done in pursuant of that joint enterprise even if unusual consequences arise from the execution of the agreed joint enterprise. Both persons are liable for those consequences. In this case the prosecution says these persons were involved, Sam, Fletcher and Gordon.
> However, Members of the Jury, if one person departs completely from what has been expressly or tacitly agreed as part of the joint enterprise, the other person is not liable for the consequence of that unauthorised act. Therefore, inasmuch as the evidence in this case suggests that it was Sam who did all the shooting, before you can convict either of these two defendants on any count of this indictment, the Prosecution must prove first that there was an unlawful joint enterprise (2) That Sam's act of shooting was within the scope of that joint enterprise and (3) that each of these defendants must have agreed to Sam acting as he did and each of these defendants must have foreseen Sam's act as a possible incident of the execution of that joint enterprise and nonetheless, lend himself to it. That is how the Prosecution is putting their case to you. They are saying there was a joint enterprise. What is the joint enterprise? To rob; to rob Rajhni Williams of the car he was driving, of his jewellery, of the money, whatever they could get and to use extreme violence in carrying out that objective.
> The Prosecution is saying all of them, these two defendants and Sam were part of that joint enterprise. These two defendants knew before they moved from Lionel Town that Sam had a gun. Fletcher knew because he saw Sam 'stick up Rajhni wid gun'. Gordon knew because he saw the same thing and said so in his statement. They knew from that time, yet they lent themselves to the scheme. They were quite prepared to go along with him.
> The Prosecution is saying that quite apart from the statement, Fletcher told Mr. Burgess the next day that, 'last night him and him friend juck down', to use his words 'A p.... hole at Lionel Town.' So, if Mr. Burgess

> was speaking the truth, Members of the Jury, Fletcher, he was doing the 'jucking down'; 'Me and him juck down', and he told you what 'juck down' means. It is when you hold up a man with a gun or a knife.
> So, on that basis, Members of the Jury, the Prosecution is saying that all three would be in law responsible for the death of each of these deceased persons. If you find that that is proved, then the Prosecution would have proved against each of them the second ingredient of this charge of murder, that is, that it was the defendants who killed the deceased. So, although it wasn't any of the two accused that pulled the trigger, in law, they would be deemed as culpable as Sam who did pull the trigger."

The accused Fletcher had denied when he gave evidence in his defence on oath having stated to the witness Burgess anything about jucking down anybody. When he was being cross-examined by counsel for the Crown he was asked as follows:

> "Q. Now you know when somebody say them juck down somebody you know what they mean?
>
> A. That suppose to have whole heap a meaning sir.
>
> Q. You know any of them?
>
> A. Yes sir.
>
> Q. Tell me what meaning you know?
>
> A. Meaning like you stick up somebody with a knife or a gun or stick and stone."

It is on the basis of this piece of cross-examination that the learned trial judge told the jury that Fletcher "told you what juck down means. It is when you hold up a man with a gun or a knife." He did not remind the jury that Fletcher said following that statement that it was the "Deportee" who did it.

The question of culpability for the offence of murder was based therefore on the principle of joint enterprise or common design. Clearly, if there was a common intention of robbing the deceased and the carrying out of this common intention resulted in the death of the deceased persons all three would have been guilty of murder. The summing-up in this respect would therefore be unassailable.

With respect to (b), of Mr. Wilkinson's submission, the learned trial judge had conducted a voir dire to determine whether the statement was admissible in evidence. Counsel for the applicant applied to the trial judge to permit the applicant to make an unsworn statement at the close of the evidence on the voir dire. The application was unsuccessful. Mr. Wilkinson has submitted that since the law in Jamaica permits an accused person to make an unsworn statement in his defence, the learned trial judge erred in law in not allowing him to do so as part of the voir dire proceedings. Section 9 of the Evidence Act provides as follows:

> "9. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person:
> Provided as follows -
>
> (a) - (f) ...
>
> (g) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the Court, give his evidence from the witness box or other place from which the other witnesses give their evidence.
>
> (h) Nothing in this Act shall affect the provisions of section 36 of the Justices of the Peace Jurisdiction Act; or any right of the person charged to make a statement without being sworn."

The holding of the voir dire is a stage of the proceedings in the criminal trial. The making of a statement without being sworn is done by the accused, the person charged, in his capacity as a witness for the defence. The right however of the person charged to make a statement without being sworn is a common law right and as to whether it is exercisable during the holding of the voir dire must depend upon whether at common law it existed with respect to the proceedings in the voir dire.

The purpose of the voir dire is to allow the judge to determine whether the challenged statement of the accused is voluntary and therefore admissible in

evidence. It is not a procedure designed to decide the truth of the facts alleged in the statement. That assessment is for the jury after the judge has ruled on its admissibility. The right or privilege of a person charged with a criminal offence to make an unsworn statement had its roots in the period of English history when an accused person was not permitted to give evidence on his own behalf and when representation by counsel was not allowed in a case of felony. The privilege or right of making an unsworn statement was in fact in the nature of an address to the jury by the prisoner. The jury is not involved in proceedings on the voir dire and are kept out of hearing at this time. I can find no learning to support the existence at common law of any right or privilege of an accused person to give an unsworn statement on a voir dire held to determine the voluntariness of a statement allegedly given by the accused person. Consequently, this ground of appeal must fail. I will deal with (c) of Mr. Wilkinson's submissions later.

Mr. Dennis Morrison, Q.C. on behalf of the applicant Dwight Fletcher has challenged the summing-up of the learned trial judge when he told the jury:

> (1) That Fletcher's cautioned statement if accepted was sufficient evidence to convict him of capital murder.
>
> (2) That all the evidence taken together, if believed by the jury was sufficient to support a verdict of capital murder.
>
> (3.) That the trial judge in breach of the Judges Rules permitted the evidence to be adduced by the Crown of questions asked of Fletcher by the police officers after he had been arrested and charged.

With regard to (1) the learned trial judge told the jury in respect of Fletcher that:

> " 'I agree with Mr. Pantry' (Counsel for the Crown) when he told you that if you accept the statement of Fletcher, that would be enough evidence to convict him of capital murder depending on your findings in relation to certain other matters as I will direct you."

and later:

> "... if you accept exhibit 21 (Fletcher's cautioned statement) "and you find the other ingredients of capital murder are proved it would be enough to convict the defendant Fletcher of capital murder on all counts of this indictment."

There was clear evidence accepted by the jury that although the shooting of the three young persons was not done by either of the applicants since there was no evidence to support that, they would be caught, if the evidence was believed, by the doctrine of common design as being part of a joint enterprise. The learned trial judge dealt fully with this. He told the jury however that if they believed the statement of the applicants "... robbery was committed that night and that would make murder, capital murder, if you find robbery was committed."

He then directed in terms of the provisions of Section 2(2) of the Offences against the Person Act and continued:

> "So then, members of the jury, 'Sam' would be the person who would obviously be guilty of capital murder, because he would be the person who by his own act, that is the act of shooting, caused the death of each of these three young people, if you believe the evidence for the prosecution. But, 'Sam' is not here before the court, these two defendants are before the court, and what the prosecution is saying, that they are guilty of capital murder because they fall under the fourth limb of this definition. Each of them, the prosecution is saying, is someone who himself used violence on each of these deceased persons in the course or furtherance of an attack on that person."

Section 2(1) of the Offences against the Persons Act lists the categories of murder which are designated as capital murder and Section 2(2) states as follows:

> (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."

Subsection (e) of 2(1) has to do with murders committed as a result of a contract or arrangement for the payment of money or anything of value and therefore does not apply in this case.

In analysing the evidence to determine whether there was any evidence which the jury could consider in order to determine "whether anyone of the defendants himself used violence on Rajhni or Racquel or Georgia" in the course or furtherance of an attack on them the learned trial judge directed as follows in respect of the applicant Fletcher:

> "If you believe the evidence of Mr. Colin Burgess that Fletcher told him that he and his friend dem juck down a pussyhole at Lionel Town in Clarendon and took away the car, and Fletcher himself told you what juck down means, he said juck down means like you would stick up somebody with a knife or a gun or use stick and stones, if you believe that evidence, then that is evidence on the basis of which you could say that Fletcher himself used personal violence on Rajhni Williams that night: Me and him juck down so and so.
>
> On count two in which Shaw is involved, dealing with the same Fletcher, if you believe the evidence and you accept the statement that he made, Fletcher made, then it was he who drove away that car, he was the driver of that car that took away the three deceased. In relation to the two women, the two young girls, it would have amounted, that act of guilt would have amounted to forcible abduction. There is evidence in this case on which you could find that those young people were taken away against their will, driven far into the country, driven from Clarendon to St. Elizabeth against their will. I direct you that if you accept that that was what happened that act of Fletcher's would amount to using violence on Shaw. The crime involved would have been forcible abduction.
>
> In relation to count three, same Fletcher, count three charges the murder of Racquel Fearon. If you accept the evidence it would be forcible abduction of Fearon as well. Driving her away against her will. So on each count for those reasons I direct you that there is evidence on which you could say that Fletcher used personal violence, himself used violence on each of the three deceased."

With respect to Gordon he directed as follows, and this is relevant to Mr. Wilkinson's submission (c) on Gordon's behalf.

> "If you accept Gordon's statement, he actually robbed Rajhni Williams while they all sat on the back seat of that car. He personally took Rajhni's chain and his ring in circumstances which amounted to robbery. That is how you could find. Robbery is a crime which involves the use or display of violence. So, on his own statement, that is Gordon's own statement, you could find that he himself used violence on Rajhni Williams that night. He robbed him of his chain and his ring having put Rajhni Williams into a state of fear.
>
> I remind you of Gordon's own words, if you accept the statement, 'Sam then started to question Rajhni asking him if he have a gun and told me to search him, which I did, and I found no gun. Rajhni was a bit scared and started to take off his jewels which is a chain and a ring. He gave them to me and asked me not to hurt him.' So he had put him into a state of fear and taken those things. So if that is what you find in this case and you accept Gordon's statement, then that is evidence on the basis of which you could say Gordon himself used violence on Rajhni Williams that night, and that violence was used in the course or furtherance of an attack on Rajhni Williams. Because on Gordon's own statement again, Sam had pushed the gun into his side already and ordered him to get into the car.
>
> In relation to count two, Gordon, if you find that he was a party to this common design, this joint enterprise, was really performing the duties of a guard in the back seat of that car. The driver and Sam were in front, he went into the back not just to relax, you could find as jurors that his duty in the back was the duty of a guard to guard those three young people; otherwise they could jump out and run. And if he was operating in that capacity as a guard over those three young people in the back seat, then he also, and that they were all driven away, he also would have committed forcible abduction of those three young people.
>
> You see, Members of the Jury the prosecution is saying everybody had a role to play amongst those three men that night. The defendant Fletcher was the driver, the defendant Gordon was the guard, and Sam was the executioner. So if you interpret the evidence in that way and you accept the evidence of the statement of Gordon you could find that Gordon himself used violence to Georgia Shaw in the course or furtherance of an attack on her.

> In relation to count three, as far as Gordon is concerned there would be forcible abduction of Racquel Fearon again, and in addition to that if he had sexual intercourse with her, as he says he had, that would have been a sexual assault upon her. He would have committed the crime of carnal abuse. So if you accept his statement, again that is evidence on the basis of which you could say that Gordon on count three himself used violence on the person of Racquel Fearon in the course or furtherance of an attack upon her. So, it means, Members of the Jury, depending on what conclusions you come to and what facts you find, it would be possible for you to find both of these defendants guilty on all of these counts of the indictment; guilty of capital murder on all counts, if you take the view of the evidence that I suggest it is possible for you to take."

Mr. Morrison, Q.C. has submitted, and his submissions would be equally applicable in the case of Gordon, that the learned trial judge erred in the way in which he interpreted the provisions of section 2(2) of the Offences against the Person Act to the jury. The learned trial judge said:

> "So robbery was committed that night, and that it would make murder capital murder if you find robbery was committed."

What the learned trial judge relied upon as evidence to meet the requirements of Section 2(2) of the Act with respect to the applicant Fletcher were as follows:

> (1) An interpretation of the meaning of the words 'juck down' used in relation to what happened outside the dance hours before the murder took place and as related in the conversation between Fletcher and Colin Burgess.
>
> The applicant had denied using these words in conversation with Mr. Burgess and in relation to the summing up by the trial judge on the specific point of capital murder the trial judge did not remind the jury that the applicant had denied using these words. Nor indeed did he remind the jury that immediately following Fletcher had said to Burgess that the "Deportee" was the one who did it.
>
> (2) The fact that Fletcher was the driver of the car in which the three deceased were abducted. This "forcible abduction" would in the judge's direction bring Fletcher within the ambit of section 2(2) of the Act.

The provisions of Section 2(2) of the Act were considered by the Court of Appeal in ***R. v. Oniel Simpson, Kwarmie Codrington & George Saddler,*** SCCA 44, 45 & 46/95 in a majority judgment delivered by me on the 27th of January, 1997 in which I stated:

> "In ***Leroy Lamey v. The Queen***, Privy Council Appeal No. 56 of 1995, their Lordships of the Privy Council in a judgment delivered by Lord Jauncey of Tullichettle in considering Section 2(1)(f) of the Act stated:
>
> > 'The starting point in any consideration ... must be the fact that its object was to reduce the categories of murder which attracted the death penalty. It follows that a construction which produces little or no reductive effect is unlikely to be correct. Furthermore regard must be had to the general principle that a person should not be penalised in particular, should not be deprived of life or freedom unless on the clear authority of law (Dennions Statutory Interpretations 2nd Edition page 574).'
>
> The interpretation of Section 2(2) must be approached in the same manner. In the absence of any evidence as to what the appellant did to the deceased at the time that the deceased was shot it is my view that the offence cannot fall within the category of capital murder under Section 2(2) of the Act which specifically identifies those who would be guilty of capital murder where the evidence implicating the accused person rests upon the common design of two or more persons. See also SCCA No. 151/95 - ***R v Aldon Charles*** judgment of the Court of Appeal delivered by Gordon JA at page 9:
>
> > 'Perhaps because of the proclaimed finality of the sentence the legislature prescribes that the culprit must be personally involved in the infliction of the violence on the victim. The evidence must therefore be direct or the inference of guilt must be absolutely inescapable.'
>
> In my view the purpose of the section demands a restrictive interpretation. There must be an identifiable act carried out by the appellant and directed at the person murdered as distinct from the creation of an atmosphere of general fear.
>
> The Legislature has not provided as it could have if it so intended that 'It shall be capital murder in the case of any of them present and armed on the occasion of the murder."

This issue was further explored by their Lordships of the Privy Council in ***Dalton Daley and Milton Montique v. The Queen*** P.C. Appeal No. 65/96 in a judgment delivered on the 8th December 1997 by Lord Hope of Craighead. In response to a request for guidance by the Crown the Board stated:

> "The phrase used in section 2(2) to describe the third test must be read as a whole and in context. The subsection was intended to limit the imposition of capital punishment. Its context is the case where two or more persons are guilty of the same murder, either because of their own act or on the principle of joint enterprise. Its purpose is to separate out those whose participation was on the principle of joint enterprise from those who must answer for their own acts by the imposition of the death penalty. The other two tests are concerned with the direct use by the person of violence on the victim - in the one case by his own act causing the death, in the other by inflicting or attempting to inflict on him grievous bodily harm. The words of the third test, 'who himself used violence on that person', follow the same pattern. They indicate that here also some form of contact with the victim is required. Merely to be acting in the course or furtherance of an attack is not enough. The words 'on that person' suggest that the violence must not merely have been directed at the victim, as in the case of threats, but that it must have made some form of contact with him physically. To construe these words so widely as to include acts such as threatening or chasing the victim, albeit in the course or furtherance of the attack, would be to deprive the subsection of most, if not all, of its limiting effect. That cannot be what was meant when it was decided to include this third test."

It does not appear that the majority judgment of the Court of Appeal in ***Oneil Simpson et al*** was brought to the attention of the Board, but there is a coincidence of approach in both judgments. In relation to the strict interpretation which is required in respect to section 2(2) of the Act, the jury must be satisfied on clear evidence that Fletcher was armed with a weapon and used that weapon personally to inflict personal violence on the deceased persons. Such an interpretation cannot arise from the evidence of Mr. Colin Burgess and could not form, in the words of the learned trial judge "the basis on which you could say that Fletcher himself used personal violence" on any of the

deceased. Even more wide of the mark is the learned trial judge's direction that the act of Fletcher in driving away the car against the will of the deceased was a forcible abduction which involved the using by Fletcher of personal violence on each of the three deceased consequent on which Fletcher would be caught by the provisions of section 2(2) of the Act.

It is clear also "in the furtherance of an attack on that person" must in the context of the legislation mean the attack which resulted in the death of the person. The learned trial judge was therefore in error in directing the jury that there was any evidence on which they could find that the involvement of Fletcher came within the provisions of Section 2(2) of the Act so as to make it capital murder and that there was evidence which if believed could lead them to find Fletcher guilty of capital murder.

With respect to Gordon the fact of Rajhni giving his chain and ring to the applicant does not in my view provide the evidence which is necessary to create a foundation for the application of section 2(2) of the Act and my comments on "forcible abduction" with relation to Fletcher applies equally in relation to Gordon.

This leaves therefore for consideration, the fact that Gordon in his cautioned statement said that he had had sexual intercourse with Fearon. This act was not in the course of furtherance of an attack on her which had any connection with her death. The attack which caused the death of all three persons was the shooting of them by Sam the "Deportee". There was no evidence to link that act with the shooting or even that Gordon was present at the shooting.

The learned trial judge was therefore in error in directing the jury as he did that there was evidence as pointed out by him on which the jury could find capital murder with respect to Gordon because of the provisions of section 2(2) of the Act.

His directions on non-capital murder cannot be faulted and there was sufficient evidence to support the jury's verdict in this regard with respect to both applicants.

We treat the applications for leave to appeal as the hearing of the appeals which are allowed and the verdict of guilty of capital murder in respect of each set aside and substituted therefor in each case a verdict of guilty of non-capital murder on each count of the Indictment in which they were charged. This however, leaves for consideration the provisions of section 3(1A) of the Principal Act as amended which provides that a person convicted of non-capital murder shall be sentenced to death if he has -

> "(b) been convicted of another murder done on the same occasion."

Section 3B(3) provides that where as in the instant appeal the Court of Appeal substitutes a verdict of guilty of non-capital murder for the verdict of capital murder "the Court shall nevertheless determine whether the sentence of death is warranted by subsection (1A) of section 3, and shall confirm the sentence if it is found to be so warranted."

In the case of each appellant the convictions are in respect of multiple murders done on the same occasion. The sentence of death therefore imposed on Fletcher by the trial judge is hereby confirmed.

In the case of Gordon, because he was under the age of 18 years at the date of the commission of the offences the trial judge as mandated by section 29(1) of the Juveniles Act sentenced him to be detained during Her Majesty's Pleasure. He however further recommended that Gordon should not be released from detention until the expiration of a minimum period of thirty (30) years. The provision in section 3A(2) of the Offences against the Person Act is not applicable to the sentence imposed on a Juvenile under section 29(1) of the Juveniles Act, and the trial judge was in error in this regard. The appropriate sentence with respect to Gordon consequent on his age is that he be detained during Her Majesty's Pleasure.