JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 148 & 149/81

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BEFORE: The Hon. Mr. Justice Zacca, J.A.
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Carey, J.A.

[redacted]

Mr. P. Atkinson for Sutcliffe

Mr. E. Witter and Mr. D. Morrison for Barrett

Mrs. Z. Holness and Mr. P. Brooks for the Crown

9th 10th 11th 12th March &
10th April, 1981.

To: Mr. Daniel Lawrence
Fr: M. Thompson
DPP.
Please copy Judgment per your request.
18/2/04

CAREY, J.A.

At about 4.00 p.m. on Sunday, 10th July, 1977, five men who were armed with firearms including these two applicants carried out a robbery at a petrol service station at a district in St. Mary called Pontabelle. They relieved Mrs. Talsie Walter the operator of this service station of cash and jewellery. They left from this place to Runaway Bay in St. Ann where the police, who had been alerted, stopped the car in which they had been seen at Pontabelle. While being escorted from the car one of the five (not being either of these applicants) removed a bag which, unknown to the police, concealed a sub-machine gun. He managed to get ahead of the other prisoners and the police escort and was able to open fire. He killed two of the police escort and in the ensuing gun battle, one of the prisoners was also fatally shot. Four escaped. There was

a man-hunt, in the course of which two others were shot and killed and these applicants were held at different points in St. Ann.

At the trial before Rowe, J. sitting with a jury in the Circuit Court Division of the Gun Court between July 10 and 27, 1978, on an indictment containing two counts which related to the murder of the two policemen who had been killed, the applicants were convicted and sentenced to death.

Two grounds of appeal for which leave to argue were sought and obtained were put forward in respect of the applicant, Sutcliffe. They were as follows:

> "1. There was no evidence of Common Design to implicate your Applicant Sutcliffe with the offence of Murder. It is submitted that the evidence on the contrary does suggest that the applicant was not acting in concert with the person who fired a shot.
>
> 2. That the evidence relating to identification was fundamental and was manifestly improper and inadequate in so far as your Applicant Sutcliffe was concerned."

With respect to the other applicant, different grounds were submitted but two of these were similar to those urged on behalf of the applicant Sutcliffe.

The remaining three were as follows:

> "3. The Learned Trial Judge erred in law in admitting evidence of an offence or offences alleged to have been committed by the Applicant and others in the Parish of St. Mary, prior to the fatal shootings .
>
> 4. The conviction of the Applicant having been based, manifestly, upon the purported identification of Exhibit 3 (Lady's Seiko wrist watch) and Exhibit 4 (Gold ring with blue stone) by the witness Talsie Walter and the testimony of Constable Canute Hamilton that these articles were found in the possession of the Applicant, the verdicts cannot be supported having regard to the

relevant evidence which, it is submitted, was unreliable.

5. The learned trial judge erred in law in failing to leave to the jury the alternative verdict of manslaughter which, on the evidence, it was open to them to return."

In the light of the grounds which were debated before us it becomes necessary to rehearse in somewhat more detail the catalogue of events which the jury was required to consider in support of these charges. In the interest of brevity, however, we propose to adopt the summary of the facts which appears in the summing-up of the learned trial judge. We would, in doing so, like to pay tribute to his identification of the important issues of fact, his comprehensive collation of the evidence relating to those issues and his exposition of the relevant law. At page 826 he said.

> "There is a district in St. Mary which is Heywood Hall and in that district resided two young men, Everton Clunies and Everton Morgan and they say that on the 10th of July last year they saw five men at the home of Everton Clunies. The five men had travelled or certainly left those premises in a Peugeot motor car and the time at which this blue Peugeot finally left those premises was estimated by Everton Clunies as between 1:30 and 2:00 p.m. There is evidence about which there has been considerable discussion and with which I must deal when the time comes as to whether or not these two accused were two of those five men, but Everton Morgan said the five men were seen by him to have guns in their possession while they were at those premises. He said he actually saw the accused whom he was saying in court is the accused, Sutcliffe, with a gun at his side somewhere in his waist and that he saw the person whom he was saying in court is the accused Barrett with a gun at one time in his waist and at another time in his hand. As I say, the question as to whether or not he can be believed or what weight is to be given to his evidence that it was the accused Sutcliffe and the accused Barrett is something which I will come to.

The prosecution's case, further, is that these five men had been seeking to get petrol for the motor car and found themselves at Fontabelle in St. Mary at what I think is somewhere between about 4:00 o'clock. Mrs. Talsie Walter said about 4: o'clock she was at her station and the blue Peugeot drove up. Five men were in that blue Peugeot and Mrs. Walter said that her station was robbed of money. She was personally robbed of jewellery and in the course of the robbery all five men displayed guns. One of them put the gun to her side and she said it is the accused Sutcliffe. One man took the gun and hit a man in his head who had been disobeying the command of the robbers to lie down and she says that man is the accused Barrett and according to Mrs. Walter again I remind you I will have to deal in some detail with this evidence of Mrs. Walter where she purports to identify the men but the prosecutions's case goes on that the five men escaped from the premises of Mrs. Walter in this blue Peugeot motor car having been at the station in the estimation of Sybrant Wilson for about twenty minutes, in the estimation of Mrs. Walter I add it up to something like ten to twelve minutes, And Mrs. Walter said she chased the car for a little bit, the car turned in the Ocho Rios direction and she went along to the police station at Oracabessa and made a report to the police.

The next step in the prosecution's case is that Oracabessa police radioed through to the St. Ann's Bay police and somehow we do not have the distance between St. Ann's Bay and Oracabessa, but we are told it is on the main highway on the north coast and I am not inviting any of you gentlemen and ladies to put the mileage in, but Jamaica is rather a small place and you probably have gone around the island many many times.

The police in St. Ann's Bay in the person of Mr. Buddle, I don't think I will come back to him, the police said, he having got this radio message was trying to contact Runaway Bay to relay the message, and just about then he saw the motor car which he had been told about going through the town of St. Ann's Bay with five men aboard, and he got on the telephone and spoke to the gentleman we now know to be his squad-mate at Runaway Bay Police Station, to say a car with five men is heading in your direction.

The next thing we know is that,, according to Mr. Buddle, he made the call at about 4.40 p.m. and we have Mr. Delmas Brown saying he received the call, but not at 4:40 p.m.

He gave it as 5.33 p.m. that he actually received the call from St. Ann's Bay. So there is a time lapse in those two versions, but one imagines that these people are giving us approximate times.

Then we have the incident at Runaway Bay police station. In that incident we know that five men had left the motor car under the direction - let me use a neutral word - of three police officers and entered that police station; there is no controversy that shortly after there was the commencement of the entry into the police station of these persons, there was the firing of a gun or of guns and that three people lay dead - the two persons referred to in the indictment as the deceased and another man identified as Noville Smith. Four men who had been in the police station escaped, this time not in the motor car in which they had come, because the police had taken the keys away, but in an Escort motor car, and the prosecution says that at Discovery Bay, some four miles down the road, Mr. Forbes had left his car outside his home and when he was approaching it an Escort motor car - a white Escort - came up; one man came from that Escort, demanded his keys, he gave them over, and this man had what appeared to be a gun with him. He said there were at least two other people along with this man in the Escort, and they all got into his Lancer motor car and drove away leaving the Escort motor car behind.

The prosecution takes us next to Lillyfield which we are told is some sixteen or seventeen miles away from Discovery Bay, but which would mean travelling up to Brown's Town and on the road from Brown's Town towards Bamboo. That is the area of Lillyfield. It was not yet dark although nobody gave us the time, and I think that from our own experience we would say that we cannot play cricket in Jamaica at night notwithstanding what is happening in Australia; but Mr. Derrick Halsall told us that he was watching cricket and he was able to see this Lancer motor car crash on the road at Lillyfield and after the Lancer crashed a man came from the Lancer, approached him, demanded his keys, took away his Landrover and drove away, and he identified this man as the accused Sutcliffe. By that time, he said, it was three men who went off in the Landrover. We are told that the next time Mr. Halsall saw his Landrover was the same evening at a place called Kemo, about three miles and a half away from where it had been taken, it was undamaged; it was by a marl hole. This was on the late afternoon of the 10th July.

We are told by Sergeant McLeish that he went off at about 8.00 o'clock that night with a party of policemen, and he went up into this area of Kemo. He had a large armed party and he searched, and on the afternoon of the 11th of July

> he saw three men in the bushes, and from where they were he heard gunfire. The fire was repeated by the police and when the firing died down he found two men dead, one man with a submachine gun and ammunition, and the other man clean; the third man he cannot say what happened to him. Those two men have figured in this case in a certain way, and we heard the names D'Aguilar and Blair, from time to time. Mr. D'Aguilar and Mr. Keith Blair....Then we are told that at 4.10 a.m. on the 11th July, Mr. Hamilton, a police constable, saw the accused Barrett on the roadside. Mr. Hamilton was then travelling in the Bamboo Brown's Town area and he saw this accused, Barrett by the side of the road, and he took Barrett into Custody, and he found a rag and certain articles with the accused Barrett. About this I will tell you very much later.
>
> Mr. McKenzie and Mr. Whitehorn told you of seeing the accused Sutcliffe in the Spring Garden area on the afternoon of the 11th July; they say they saw him with a gun carrying in a bunch of bananas, and eventually Mr. McKenzie held the accused Sutcliffe and handed him over to the police."

May we also express our appreciation for the great assistance which we have received from counsel who appeared in this matter, and if we disagree with the arguments which were raised, it is not for want of clarity on their part.

Mr. Atkinson submitted in support of his Ground 1, that once the five men were taken into police custody the plan or common enterprise terminated so that the fact that one person took advantage or capitalised on some act done by another co-adventurer, viz. the shooting of the policemen would not retrospectively have the effect of making him a co-adventurer as regards these killings. It was urged that any plan to avoid capture or prevent apprehension had been frustrated by reason of the detention of the five men; the question of any repudiation or withdrawal from the joint enterprise could only arise where the joint enterprise had not been concluded. As Mr. Witter on behalf of the applicant, Barrett made the same point, it is convenient to deal with this ground in respect of both. He adopted the submissions of Mr. Atkinson in this regard and added that the

applicant, Barrett, had done nothing nor said anything to indicate that he was acting in concert with D'Aguliar who discharged the submachine gun and killed the two men.

It was argued on behalf of the prosecution who were asked to respond to these arguments by these applicants, that the five men who set out in the Peugeot motor car from Clunies' house in St. Mary did so on their joint venture, each being to the knowledge of the other armed with firearms. This joint venture continued and was continuing at the time the men were directed into the Runaway Bay Police Station by the police. It was in continuance of that joint enterprise that D'Aguliar used the firearm which was in the joint possession of the others in order to effect their escape. The others had done nothing to disassociate themselves from the joint venture and under the doctrine of common design each person would be liable for the act of the co-adventurer. The common venture was robbery with the use of firearms and prevention of apprehension, if necessary, by the use of these firearms with such force as was necessary; this extended to effecting their escape. In the circumstances of the instant case the men could not be said to have been taken into police custody in such a manner that would effectively end the common design.

The arguments which were forcefully developed on behalf of the applicants by both Mr. Witter and Mr. Atkinson are, we think, attractive but fallacious. Neither counsel was able to produce any authority which supported their proposition. The law with respect to common design is well established. We refer first to the headnote in

R. v. Anderson and Morris (1966) 2 All E.R. 644.

> "Where two persons embark on a joint enterprise, each is liable criminally for acts done in pursuance of the joint enterprise, including unusual consequences arising from the execution of the joint enterprise; but if one of them goes beyond what has been tacitly agreed as part of the joint enterprise, the other is not liable for the consequences of the unauthorized act...."

It is plainly the law that where two or more persons agree or join together to commit an offence and that agreement is carried out and the offence committed, then, each person who takes an active part in the commission of the offence is guilty of that offence. Such a person cannot be convicted of the full offence unless he is present at the commission of the offence and actively aids, abets and assists in its commission.

The learned trial judge at page 946 of the summing-up dealt with the matter of common design thus:

> "Mr. Foreman and members of the jury, the Crown opened and told you that they are relying upon common design to be able to prove the charge against the accused. Where two or more persons agree or join together to commit a specific offence and that offence is afterwards committed then all persons who agree to commit the offence and who were present at the time when it was committed and were actively assisting or aiding or abetting in the commission of the offence are equally guilty of the full offence. Each person who has embarked upon the joint criminal enterprise is liable for the acts done in pursuance of that joint enterprise including liability for unusual consequences if those consequences arose from the agreed joint enterprise. If however one of the adventurers goes beyond what has been expressly or tacitly agreed as part of the common enterprise and commits an act not authorised by the other co-adventurer, those other co-adventurers would not be liable for the unauthorised acts. In every case it is the province of the jury, having regard to the evidence, to determine firstly what was the scope of the common enterprise and secondly, whether what was done was part of the joint enterprise or went beyond it and was an act unauthorised by that joint enterprise.

To amount to murder the prosecution must prove to your satisfaction so that you can feel sure that the common design or the joint enterprise included the use of such force which either kill or cause serious harm to the victim. In relation to the instant case, in order to prove a case of murder the prosecution is required to prove so that you the jury can feel sure, that five men including the accused Sutcliffe and including the accused Barrett or either of them, armed themselves with guns to the knowledge of each other and agreed to go out and rob persons of their possessions and, I repeat, and as part of that general agreement they agreed expressly or tacitly upon each and all of the following matters; one, that they would make use of their guns in the course of the robbery resorting to such amount of force as was necessary to achieve the robbery and two, that should they or any of them escape from the scene of the robbery, they would use their loaded firearms to prevent apprehension by the police or anybody else by shooting either to kill or to cause serious bodily harm, thirdly, that those men would continue to aid and comfort and support each other in their bid to escape from the scene of robbery until when they had returned to what they considered apparent security. It was in pursuance of that agreement that the man with the yellow bag, sometimes referred to as D'Aguliar, took from that bag a submachine gun and fired at Constable Dillon and Constable Fairclough intending to kill or to cause serious bodily harm and this shooting was in order to effect the escape of co-adventurers who had been detained by the police at Runaway Bay. You must be satisfied about all those things before I say the prosecution could prove murder in this case against either accused.

The five men who came up in that little Peugeot motor car was stopped by three armed policeman. Constable Brown told you that he had his firearm in his hand. If there was indeed a plan by the five armed men in that car that they would resist apprehension by resorting to their guns, ask yourselves, could it ever be in their contemplation that the police upon whom they might happen to fall might not be harmed? If you should say that it could be and indeed was in the contemplation of the five armed men in that car that any policeman who tried to stop them would in fact be armed, what would those armed men have decided to do in those circumstances? Would they be deciding merely to draw their guns, point them to scare off the armed police or would it be their decision to shoot their way out? It is you the jury, having regard to the evidence, who have to say what was the scope of the common design, if you find that there was indeed a common design. It has been said

> and I think quite rightly that there must be many cases where the jury feel driven to the conclusion that the common purpose of adventurers extended to everything that in fact occurred in the course of the raid or to permit the escape of the marauders without fear of subsequent identification. Would armed men who had successfully carried out a robbery on a Sunday afternoon drive blithely along on the main highway running from the North Coast of Jamaica passing police station after police station knowing what police communications in 1978 in Jamaica are like and have formulated no plan of action should the police dare to challenge them? And if they had such a plan what would that plan be? This is a matter for you and you alone to decide."

No complaint was made in relation to the direction of the learned trial judge in this regard and we are clearly of opinion that those directions cannot be faulted. It is important to appreciate that one of the first considerations for the jury would be the scope of the plan as it involved those five men on that Sunday afternoon. The evidence shows that all five men were armed and that their mission was robbery which involved the use of firearms. They did commit a robbery at Pontabelle in which firearms were used. It is an inescapable inference that these five armed men would not tamely surrender to the police; that they would resist apprehension or capture with the use of the weapons which each had and which each knew the other and in his possession. So, it follows that the plan which the jury must have accepted amounted to this, that those men would, having completed their robbery, use every endeavour to avoid arrest even if that involved the use of firearm, The argument put forward by learned counsel for the applicants is based on the absurd assumption, it seems to us, that the plan must have been to rob and then to surrender if and when the police intervened. At Runaway Bay the applicant, Sutcliffe, was in possession of a firearm

and after the car was brought to a halt by the police officers it was necessary to disarm him; he did not surrender his firearm. One of their number who was killed on the scene, was also found to be in possession of a firearm. The men who were seated in the front of the car intimated to the police that they were soldiers and, "they had a man for the police." One of them even produced an identification card in support of his contention. The jury must have regarded that as part of the strategy to escape apprehension by allaying suspicion and that all five men were party to the plan to escape. It is reasonable to infer that the others were aware that D'Aguilar had concealed in the carry-all a submachine gun and when he retrieved it from the car it must have been clear to them that he intended to use that weapon to effect an escape. At all events, none of them by word or conduct indicated that they were disassociating themselves from the common enterprise.

The conduct of the men after the shooting, is also relevent in this connection. The evidence adduced shows that after D'Aguilar had commandeered the car he beckoned to the remainder of his colleagues, that he D'Aguilar went into the rear of the car and one of the others drove the car away with them all. With respect to the applicant, Barrett, it was said that he had done nothing to show that he was part of the plan for use of the firearm to escape, but the principle is equally applicable to him. He was one of those who participated in the robbery; he too was armed. It must have been within his contemplation that firearms would be brought into play in order to avoid capture by the police. The case of R. v. Barry Reid (1976)

62 Cr. App. R. 109: was referred to in argument.

> "Where two or more joint adventurers go out together in joint possession of offensive weapons such as revolvers and knives intending at least to cause fear to the victim, there is always a likelihood that, in the excitement and tensions of the adventure, one of joint adventurers will use his weapon in a way which will cause death or serious injury. If one of the adventurers deliberately fires a revolver and kills the victim, the others, if death or serious injury was not intended by them, must be acquitted of murder, but will be guilty of manslaughter, as the enterprise at the outset envisaged some degree of violence, and death of the victim was "a mere unforeseen consequence" of the lawful joint possession of the offensive weapons and not "an overwhelming supervening event" relegating into history "matters which would otherwise be looked on as causative factors."

We are of the view that the case of R. v. Barry Reid supra. did not assist the applicants in any way as that case is easily distinguishable from the circumstances of the present case. In that case the applicant and 2 others (O'Conaill and Kane):

> "were supporters of a terrorist organisation, the I.R.A. that they intended to kill the officer commanding the Otterburn training camp, a Colonel Stevenson; that they in the early hours of April 8, 1974, armed with weapons they went to his house to kill him. One of them rang the bell. Colonel Stevenson opened the door, O'Conaill then shot him dead, firing three times. The three men left the scene together.
>
> The three accused put forward different defences. O'Conaill alleged that this appellant alone was the one who intended to kill Colonel Stevenson; that he had gone with him to the house, not intending to do any harm to the Colonel; and that when the door began to open he had fired at the door, not expecting the bullets to go through it. Kane's story was that O'Conaill had suggested kidnapping the Colonel and that he had gone to the house to do just that. He had been astonished when O'Conaill fired the revolver.

> The appellant put himself forward as an opponent of I.R.A. terrorist. He said that he had heard that the other two, who worked in the same hotel as he did, were supporters of the I.R.A. During the evening, after he had a lot to drink, he decided to find out whether they were what local gossip said that they were. He sought them out; pretended to be a supporter himself; found himself let into their plan to kill the Colonel and invited to go with them to do so. He went, not intending to take part in any unlawful act but in the expectation that the other two would reveal themselves as bombastic talkers, not doers of deadly deeds."

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

We cannot, therefore, agree that the mere fact that the police had stopped the car with these five fugitives and were in the process of escorting them into the police station that it could be said that the joint enterprise had been frustrated so that when D'Aguilar fired and killed the two police officers, these two applicants were not equally liable for the commission of the offence. The detention of these men merely brought another phase of the plan into operation as, in the event, all but four escaped from the scene. In our judgment, a person who wishes to show his withdrawal from a joint enterprise must demonstrate by words or action that he is no longer a part of that plan. He must repent effectively. This approach respects the authority of R. v. Beccera & Cooper 62 Cr. App. R. 212 in which a dictum of Sloan J.A. in R. v. Whitehouse (1941) W.W.R. 112, at p. 115, 116 was applied. We cite the relevant portion of this dictum.

> "After a crime has been committed and before a prior abandonment of the common enterprise may be found by a jury there must be, in my view, in the absence of exceptional circumstances, something more than a mere mental change of intention and physical change of place by those associates who wish

> to disassociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of that crime. I would not attempt to define too closely what must be done in criminal matters involving participation in common unlawful purpose to break the chain of causation and responsibility. That must depend upon the circumstances of each case but it seems to me that one essential element ought to be established in a case of this kind: Where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to disassociate themselves from the contemplated crime to those who desire to continue in it. What is 'timely communication' must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw. The unlawful purpose of him who continues alone is then his own and not one in common with those who are no longer parties to it nor liable to its full and final consequences."

That ground, therefore fails.

The second of Mr. Atkinson's grounds related to the identification of Sutcliffe. What was being said was that at the time of the identification parade Sutcliffe's face was in such a condition by reason of it being swollen that he would readily be identifiable. Two civilian witnesses confirmed the condition of this applicant's face as being swollen. The officer in charge of the parade was not quite certain that it was, but at all events did not regard the condition which he saw as of significance. Another police witness gave evidence in direct conflict with those who spoke of its swollen condition, Mr. Atkinson, therefore, submitted that this was a circumstance which created an atmosphere of unfairness about the parade and rendered any evidence in that regard unsafe.

Learned counsel accepted the candour of the witness, Angelle Murphy as established, because she supported his contention that the applicant's face was swollen. But she said that the condition of his face played no part in recognising him; she remembered his eyes.

It seems to us that in the light of that evidence there was nothing unfair about the parade. Whatever suggestion of unfairness there might have been was dissipated by the direct and truthful evidence of Miss Murphy. That evidence was sufficient to put this applicant on the scene at Runaway Bay when the police officers were shot. In relation to the similar ground put forward on behalf of the applicant, Barrett, it was conceded by Mr. Morrison who followed Mr. Witter, that the learned trial judge had removed the evidence of visual identification of this applicant from the jury's consideration and had been severely critical in the course of his summing-up with respect to the manner in which this identification parade had been conducted. In these circumstances, therefore it is wholly unnecessary to consider the evidence in that connection and nothing more need be said about it. At a later stage of the judgment, we will consider the ground (ground 4) which criticised the evidence linking this applicant, Barrett, with the crime.

We can therefore, turn to Ground 3 of the applicant Barrett's grounds of appeal. It was said that the events in St. Mary were so far removed in time, in character, in degree and in place from the events at Runaway Bay that the former bore no relevance to the latter and the evidence ought not to have been led because it was wholly prejudicial. It is obvious that the events that occurred at Fontabelle in St. Mary provided the background and was explanatory of the events at Runaway Bay. It was the robbery at Fontabelle in St. Mary which led to their apprehension in St. Ann and provided the evidence justifying their lawful apprehension. They were escaping felons intent on avoiding capture. It is sufficient to add that motive is always admissible as part of the circumstances which may be admitted in evidance in a case of murder. We do not think that there is any merit in this ground.

Ground five in which the learned trial judge was criticised

for failing to leave the alternative verdict of manslaughter to the jury must now be considered. At page 951 of the summing-up the learned trial judge said this:

> "If the evidence satisfies you so that you can feel sure that the accused Sutcliffe was one of the five men who came from the Peugeot motor car at the Runaway Bay Police Station on the afternoon of the 10th July, 1977, but either you are not satisfied that he was a party to the common design to shoot to kill or to cause serious bodily harm to anyone who might attempt to prevent their escape, including policemen, or you are not sure whether he was a party to such agreement or not, then the act of a single person like D'Aguilar in shooting at the policemen in the police station would not in my view be the act of Clyde Sutcliffe; it would be an overwhelming departure from any previous common design, if there was any, in which the accused Sutcliffe might have been involved and the accused Sutcliffe would in those circumstances not in any way be responsible for the act of D'Aguilar in shooting in the police station, and Sutcliffe would not be guilty of murder."

In the light of that direction, counsel seemed to have preferred that manslaughter should have been left for the jury's consideration, but if that course had been adopted it would have been open to him to argue thereafter that the learned trial judge had put forward a theory incompatible with the nature and conduct of the defence and unwarranted by the evidence - R. v. Want (1962) Cr. L.R. 571.

Ground 4 - This was argued by Mr. Morrison on behalf of the applicant, Barrett. As to this ground, it was said that the conviction of the applicant having been based upon the purported identification of stolen articles, the evidence of the identification of these articles was of crucial significance and such evidence as was adduced was wholly unsatisfactory. A police officer had testified that early morning of July 11, he had accosted the applicant on the road between Bamboo and Brown's Town. These stolen articles were found in a rag which this applicant was using to staunch the flow of blood from a gunshot wound to his ankle. Counsel submitted that the story was

...lausible. It was wholly unsatisfactory also that ...er could only identify her watch and her gold ring by ...eral appearance. In a case as important and grave as this, ...ce should be more cogent. Moreover, although other ...icers were present when the articles were found, none gave ...n support. He also urged that even if it were a fact ...rticles were found in possession of the applicant that ... give rise to several inferences none of which placed him ...s at Runaway Bay. Further, that the learned trial judge ...wise impeccable summing-up had erred when he said this

> "So ask yourselves if the police constable, Hamilton is speaking the truth about finding the jewellery mentioned on Barrett at 4.20 a.m. and if you believe Mrs. Walter when she said they are hers, it would point only to the fact that it is the accused Barrett who either got them directly from Mrs. Walter or from somebody who was there and had taken if from Mrs. Walter. In fact if I may say so it would put him in the car which left from Fontabelle, and if it put him in the car when it left from Fontabelle there were a series of cars, you know, and I mentioned them yesterday, and I mention them again: car to Runaway Bay, car to Discovery Bay, car to Lillyfield, car to Kemo marl pit."

...rror lay in the part of the final sentence underlined. ...pute that Mrs. Walter identified the jewellery by ...ppearance but the significant fact which should be ...as that among the articles stolen from her were two ...ing the description of articles found in the possession ...t. That coincidence is of significance and would ... jury to the inescapable inference that these ...d to Mrs. Walter and were, in fact, those stolen ...amination of the direction to which learned counsel ...ows that the learned trial judge had properly given ... the law relating to recently stolen property, and ... jury as he was entitled to do in arriving at a true ...ned the view that the finding of those articles ... robbery could only mean that the applicant was the ...n the car with the other robbers and was present at

Runaway Bay and had escaped from Runaway Bay when he was apprehended near Brown's Town. This was a view plainly open to the jury on these facts. We are of the opinion that on the evidence presented, the jury were entitled to accept both Mrs. Walter and the police officer who recovered the items as truthful.

Finally it was argued that the applicant's presence at Runaway Bay rested to a great extent on the evidence of Superintendent Wray that a fragment of a bullet extracted from the ankle of the applicant, Barrett, had been fired from a gun by one of the police officers at Runaway Bay. Superintendent Wray had not demonstrated what criteria he had applied. Photographs which could have been produced in court and which would have been helpful to the jury had not been forthcoming. Because the findings of Superintendent Wray were not capable of articulation and were not demonstrable it was submitted that his evidence should be treated as unreliable especially since it bore on a crucial issue of identification. Mr. Morrison however frankly conceded that there was no evidence called contrary to what had been said by Superintendent Wray.

We are of opinion that at the end of the day although it could perhaps fairly be said that the findings of Superintendent Wray were dependent on his 'say so' and had not been demonstrable, it was nevertheless open to the jury to regard him as a witness of truth. His evidence was positive that there were signs on the fragment sufficient to indicate that that fragment was part of a bullet fired from a particular revolver.

Having given the matter our best consideration, we are of the view that the evidence against these applicants was overwhelming and we can find no reason to disturb the findings of the jury. As questions of law were raised on appeal, we treated the applications for leave to appeal as the hearing of the appeals, dismissed the appeals and affirmed the convictions and sentences and in fulfilment of our promise we set out herein our reasons for so doing.