

NMS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 24 & 28 OF 1996

**BEFORE: THE HON. MR. JUSTICE RATTRAY, PRESIDENT.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE WALKER, J.A. (Ag.)**

REGINA

V.

**KEVIN MYKOO
MARTIN DIXON**

Lord Gifford Q.C., and Maurice Manning for the Applicant Dixon.

Miss Janet Nosworthy for the Applicant Mykoo.

Hugh Wildman and Ms. Valrie Stephens for the Crown

December 18 & 19, 1996 and April 14, 1997

RATTRAY P.:

The applicants were convicted in the Home Circuit Court on the 15th February 1996 of the murder of one Jamai Vega. Mykoo was convicted of capital murder and Dixon of non-capital murder. They have both applied for leave to appeal their convictions and sentences.

The facts as evidenced by the prosecution witnesses Noel Brown and Surphina Taylor were that on the night of Sunday 3rd July 1994 the deceased, a visitor to the island, was a patron in a bar at Tamarind Tree, Runaway Bay, known as the 'All Nations Club' having drinks with a relative. The deceased had

a camera with him. The bar is situated upstairs the building. Whilst there, Noel Brown the brother of the bar operator saw a black Pathfinder van passing by going in the St. Ann's Bay direction. The van turned around and returned and parked outside the club. Four men came out of the van. The men came upstairs to the bar and one of them spoke to Mr. Brown's girlfriend, one Tracy, who was riding a bicycle in the bar. The man sat beside the witness. Another of the men went around the back of the bar. A third man identified by the witness Brown as the applicant Kevin Mykoo sat in a corner of the bar where he was joined by a fourth man. Tracy came and sat in Brown's lap. She then asked him to buy a Wrigley's chewing gum which he bought at the bar and returned to give her. As he did so he saw Mykoo "grab up the youth with the camera and have a gun pan him." The deceased Jamai Vega who was "the youth with the camera" held on to the gun and they both wrestled. The other man ordered the witness at gun point to lie down which he did. He saw this man shoot the deceased who at that time was wrestling with Mykoo. The deceased was shot twice. The deceased let go the gun and ran. He was also shot twice by Mykoo. The witness also heard a shot fired around the back of the bar where the third man had gone. The deceased fell over a wall and dropped downstairs. The men robbed them of jewellery and money and also robbed the bar. They then left and drove away in the Pathfinder.

On the 19th July, 1994 Mr. Brown identified Mykoo at an identification parade at the Central Police Station, Kingston. He also identified some of his jewellery which had been taken from him at the same time. The evidence establishing what took place at the time of the identification parade was that the witness then said of Mykoo: "He favour him."

Surphina Taylor was the bartender at the 'All Nations Club' on the night of the 3rd of July 1994. She gave evidence of the deceased being at the bar having a drink and that the bar was well lit. Two men came upstairs to the bar and walked around. Then afterwards two other men came upstairs. One of the men grabbed up the deceased and demanded what he had in his pocket. The deceased flashed his hand away. The man then took out a gun from his side. The deceased held his wrist and struggled with him. Another man came and shot the deceased twice in his side. The deceased tried to run out of the building and the man with whom he had been wrestling also shot him twice in his side. She ran around the back and another man held her at gun point and ordered her back to the front to join the other persons there. The men ransacked the bar and took money, liquor and jewellery. She identified the applicant Mykoo as the man with whom the deceased was wrestling and who had shot him twice. She pointed him out at an identification parade at Central Police Station on the 19th July 1994.

The scenario now shifts from the 'All Nations Club, Runaway Bay, to the Boulevard, Spanish Town Road in the vicinity of the New Heaven Church where later that Sunday night on the receipt of instructions as evidenced by Det. Sgt. Mevarol Smith a roadblock was mounted by the police with objects including metal barriers and an armoured truck. Immediately after the roadblock was put in place Det. Sgt. Smith saw a large motor bike being ridden at a very fast speed approaching the roadblock from the St. Catherine direction with a black Pathfinder van behind it. The police signalled the motor bike rider to stop. The rider pulled a gun and opened fire on the police. The police returned the fire. The rider swerved, collided with the armoured vehicle and fell into the road. The

Pathfinder slowed down avoiding the roadblock and continued up the Boulevard. Det. Sgt. Smith recognised the driver of the Pathfinder as the applicant Martin Dixon. He also recognised in the Pathfinder the applicant Mykoo with a third man also in his view. At the check point the occupants of the Pathfinder opened fire on the police who returned the gun fire. The Pathfinder drove over the motor cycle pulling it along. There were sparks on the roadway and the Pathfinder burst into flames. Sgt. Smith was following in his police service vehicle. He saw the applicant Dixon jump from the driver's seat of the van, a left hand drive vehicle, and the applicant Mykoo jump from the passenger's seat. They ran on to a foot bridge into the car park at Duhaney Park Shopping Centre and through some bushes into a gully. The police gave up the chase at this point.

From the burnt van Sgt. Smith recovered resting on the driver's seat an Inter Arm Rossi .38 millimeter gun with the handle completely burnt, from which he took four spent shells and one live round. The motor cycle rider died. Taken from his body also was a firearm. Det. Sgt. Smith knew both Mykoo and Dixon before for a very long time. The check point was very brightly lit. He knew Mykoo whom he also called, 'Bus-up', for about seven years and Dixon for about four to five years. He knew them from the Grants Pen area. When the rider of the bike crashed and fell into the road at the roadblock both applicants pushed their heads out of the Pathfinder and looked into the road. He saw them clearly and recognised who they were. Again he saw them clearly when they jumped from the Pathfinder, ran onto the foot bridge into the Duhaney Park Shopping Centre and then into the gully.

On the 5th of July a police party of which he was a member went to the home of Mykoo at 13½ Grants Pen Avenue at about 4:00 a.m. He told Mykoo

who was found in bed "that I was investigating robberies in St. Ann, St. Catherine, the murder of a tourist in St. Ann and the shooting at Washington Boulevard on the morning of July 4." Mykoo said to him:

"Officer, me glad oonu never shoot mi Mi wi tell
oonu how it go."

Mykoo was wearing some gold chains. Det. Sgt. Smith enquired where he had got them. Mykoo replied:

"A some of the things dem mi get from the robbery a
country."

Other gold chains, rings and bangles were handed over to him by Mykoo. He took Mykoo into custody and handed him over and the jewellery to the Special Anti-Crime Headquarters where all the jewellery was placed in an envelope and handed over to Det. Insp. White of the St. Ann Police.

Later that day, about 7:00 p.m. to 8:00 p.m., he went to the home of Martin Dixon at Donmair Close where he identified himself to Dixon and cautioned him. He told Dixon that he was investigating the murder and robberies in St. Ann, St. Catherine and the shooting at Washington Boulevard and further told him that he had seen him jump from the van. Dixon said:

"Officer, a drive me drive the man dem."

He was taken into custody.

Det. Sgt. Dadrick Henry of the Anti-Crime Task Force was at a point on the Spanish Town Road before reaching the roadblock. He saw the motor cycle, the Pathfinder and a Suzuki Swift motor car travelling behind the Pathfinder. There is a turn off between where he was now positioned and the Washington Boulevard. He turned on his flashing lights and siren and drove behind the vehicles. The vehicles drove out of his sight. As he came to the

Boulevard he saw from his position behind the Pathfinder which was approaching the police trucks, two hands sticking out with guns firing, one on either side of the Pathfinder. He along with the policemen in his vehicle opened fire on the Pathfinder. There was a gun battle. He witnessed the Pathfinder catch afire. He saw a man with a gun jump from the Pathfinder and run across the foot bridge. He then saw the applicant Mykoo whom he had known for nine years come from the right side of the Pathfinder with a gun which Mykoo fired in his direction. Mykoo jumped into the gully course. A third man came from the left front of the Pathfinder, the driver's side and he also jumped into the gully. He witnessed the recovery of the firearm from the burnt Pathfinder by Sgt. Mevarol Smith. He returned on foot to the roadblock area where he saw the body of a man lying in the road. He recognised the man as Leonard Crew otherwise called "Mark", a person whom he had known for over twelve years. He took from Crew's body a .38 Titan Tiger revolver with spent shells and two live rounds. The area was well lit where he recognised Mykoo.

He led the police party which included Sgt. Smith to Mykoo's home on the early morning of the 5th of July 1994. He woke Mykoo in his bed. Mykoo then said:

"All right, don't kill me."

He gave evidence as to the recovery of jewellery from Mykoo, and in an outside bathroom he found in a pail of water a brown jeans pants and multi-coloured clothes, which he recognised as the clothes Mykoo was wearing when he saw him run from the Pathfinder on the Sunday night.

At the Anti-Crime Task Force Headquarters at about 7:30 a.m. - 8:00 a.m. Mykoo told him that he would carry him and give him the gun. On

Mykoo's instructions he drove back to the Boulevard to where the Pathfinder had been burnt. Mykoo, himself and two other policemen went into the gully and Mykoo pointed out an area of thick shrubs and told him that he had put the gun there. He retrieved from that spot one .380 semi-automatic pistol containing a magazine with five live rounds. Mykoo said the gun was his.

Dr. Fiona Henry-Pinnock conducted the postmortem examination on Jamai Vega. Among her findings were four entry gunshot wounds. She recovered a bullet from his neck.

At an identification parade at which Mykoo was represented by an attorney-at-law he was identified by Surphina Taylor. But Noel Brown who also came to identify him pointed him out in the No. 9 position using the words: "The No. 9 favour him."

Assistant Commissioner Donald Brown took a voluntary cautioned statement from Dixon which after a voir dire was admitted in evidence. He also saw Mykoo and told him:

"That I was assisting in the investigation into the murder of Mr. Jamai Vega and the robbery of Pathfinder and that I had information that he was connected with these crimes."

After caution Mykoo said:

"Mi go wid dem but me nuh shoot anybody. Mi will co-operate."

He asked Mykoo if he wanted to give a statement and Mykoo said yes. A cautioned question and answer statement was also taken from Mykoo who signed it. It was also admitted into evidence.

Counsel for Dixon applied to have Mykoo's statement edited to delete all references to Dixon but the application was refused.

I record in full Martin Dixon's statement and questions and answers and this is followed in full by Kevin Mykoo's statement and questions and answers:

"Saturday night, about 7:30 p.m. to 8 o'clock, me was at a barber shop on Manning's Hill Road. Sit down after me get a trim, wen ah see a Lada taxi drive up wid Mark, Head and Bus-up. Mark said dat dem a goh a airport goh pick up a van and dat dem want me fe drive de van fe dem. Me goh inna de taxi dem and dey drive to Norman Manley Airport road, below where dem sell roast fish. De taxi stop an Mark, Head and Bus-up and me come out and de taxi-man turn back and goh back to town.

Before de taxi stop, me see a Pathfinder back on the de right side of de road going toward airport. Mark seh, 'Me waan dat one,' and de four of us walk up to de Pathfinder, de three a dem juck de man wid dem gun.

Mark have two speshi gun, Head have one six-shooter special and me and Bus-up did have a three eight. Mark ask de man fe de key an' de man seh it inna de switch. Dem tell me fe drive de Pathfinder and me goh in and Mark, Bus-up and Head come into de van me drive off.

Mark seh dem a go check a him people down a Ocho Rios. Before me did drive off de van, de three man dem did search dis man and tek some money from his pocket and him watch from his hand and when ah go into de van, he fin' some more money inna de pocket, inna one a de pocket. De four a we drive straight to Ocho Rios. We stop at de big gas station at de round-about ah Ochie and buy \$500 gas. We leave de soh and drive pass Puerto Seco Beach and stop ah one club and buy some beer.

We den leave and goh to a dance near to Falmouth. Me nuh know weh de place name. We stay a de dance 'till morning and me goh down on de beach and kill deh until day.

We left de beach about 5 o'clock and we a cruise and come in. We reach Puerto Seco and we stop; buy some food. We left deh soh about 7 o'clock inna de night and come pon de road. Wen we reach Run-away Bay, we stop ah one upstairs bar and de four a we goh upstairs and Bus-up tell me to goh back

downstairs and see if me see a car dat suppose to pilot we back to town wid Mark, Bobo, Showah and a man into it. I got down back downstairs and sit down on a wall beside de upstairs bar and a look fe de car. While I was here, me hear three shot fire from upstairs de bar. Me decide fe run up deh and see wah happen. Wen me a goh up, me se a yout run, ran downstairs pass me wid blood a come out he belly like him get shot.

Wen me reach upstairs, Bus-up seh ah mus goh and line up de van fe drive off. Before he left, me see him tek money from de bartender. Some people, dem jump from de balcony to the ground and run. Me goh fe de van and park wid de engine, park wid de engine on in front of de bar. De three man dem left from upstairs and rob de grocery shop down stairs and den dem run inna de Pathfinder. Me see Bus-up carry a tape and throw it inna de van. Dem seh me mus' drive and me drive wid de three a dem.

Wen we reach Ochi we circle de town to see if we fin' a place fe rob, but de place too busy, soh we decide to drive back to Kingston. After we leave Fern Gully and reach Coal Gate, we see a shop open and me stop. We stop opposite de shop and turn on de hazard light. Mark, Bus-up and Head come out de van wid dem gun inna dem han' and go into de shop. He come out de van and stan' up outside.

Dem ask who a de owner, den close dem close de shop door and leave de window dem open. De see dem ask de owner who look like a Indian fe money and de man give dem some paper money. Him son, two rum head, man and a woman did inna de shop. Dem ask fe more money and de owner seh him have \$4,000 inna him buffet and Mark carry him son goh fe it. Mark come back and seh, 'Me nuh find no money.' Soh, Mark tek de owner and go into a house wid Bus-up following dem. Wen dem inna de house me hear one or two shot after Mark and Bus-up ran from de house and Head run from de shop and three a dem come in a de van and me drive off. Mark seh de man get shot because him did a hol' on pon him gun.

We left from deh soh an' drive to Faith Pen and de three a dem come out; hol' up two stall and me see dem come back wid chicken and fish and dem seh me mus' drive ad shortly after deh se a woman and Mark seh, 'See one higgler yah,' and me stop and

three a dem goh up to her wid dem gun and seh give dem de money weh yuh have an' de woman seh, 'See de money yah; \$2,000 alone me have.' An' dem tek de black handbag and while me drive, dem search it and seh dem find money inna it.

Me continue fe drive an' after we leave Ewarton, me see a man ride a motor bike and Mark seh me mus' turn back and catch him. After me turn back and drive down, de man an' stop in front of him and de three a dem jump out and hol' up de ride wid dem gun an' Mark tek it and goh pon it and we turn back and drive toward town.

Wen we reach Spanish Town a Corolla drive pass me and blew me and one man inna it and a drive come from Grants Pen.

Wen we reach de round-about at Old Harbour Bay by-pass me hear police siren and Mark drive up a de door an' seh, 'Drive', and me start to drive fast. Wen me reach on de Mandela Highway, Mark was in front of me. Wen we reach de overhead bridge by six miles, I see one police truck block de road and de motor bike wid Mark crash inna de back a police truck and a motor bike crash an' drop inna de road near de truck and mash, fly inna de air, drop inna de road. I pass de van, de bike.

...

And de van push it as far as Duhaney Park Plaza, that is, along Washington Boulevard and de van crash, catch afire. Me, Head, Bus-up jump out de van and run through Duhaney Park and come up through Patrick City to Meadow Brook Estate and den to Chancery Street, where me take a taxi and goh home. After me jump out a de van, me nuh see de other two men.

On de 8th of June, 1994 at about 8 o'clock de police come up me house and tek me and dat a all a it, big man, from start to finish.

The foregoing statement was read over to me and I was told I could correct, alter or add anything I wished. The statement is true; made of my own free will.

Signed: Martin Dixon, dated 5/7/94.

Signed: B.B. Burgess,
Detective Sergeant No 1382, dated 5/7/94."

The Questions and Answers read as follows:

2:00 p.m., Tuesday, 5th July, 1994, at the Anti-crime Office, Ruthven Road. Present: Detective Senior Superintendent Brown, Detective Sergeant Belvin Burgess and Martin Dixon.

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Question 1: What is your name?

A: Martin Gary Dixon.

Q: Where do you live?

A: 8 Donmair Close, Kingston 19.

3: In your statement you mentioned these names, 'Head', 'Bus-up', Mark and Showah, where could they be located?

A: In Tom's River, and I don't know its correct name.

Q: What is the correct name for 'Bus-up' and where is he from?

A: Kevin Mykoo. He is from 30 Grants Pen Road.

5: What is Mark's correct name and where is he from?

A: I would not know. I only know him as Mark and dem also call him 'Butta'. He is from Shortwood Lane.

6: What is 'Showah' correct name and where is he from?

A: I only know him as 'Showah'. He is Mark's brother and 'Showah' is from Shortwood Lane.

Q: The car you mentioned about in your statement, what that was, he was to 'pilot you' where and when did you first saw the car?

A: I saw the car drove up after shooting and robbery at Run-away Bay wid Showah and de driver in it, but I drive away and leave it at the round-about at Spanish Town and Old Harbour and then it pass me on the extreme right-hand side at Cremo near to Ferry.

Q: Did you have a gun?

A: Yes.

Q: You did come back after he robbed the bike?

A: Yes.

Q: Did you have a gun?

A: Yes, wen we did come back after we rob de bike, Mark give me a shine speshi.

Q: What you did with the gun?

A: I leave it in de van wen I ran out of it at the boulevard. I am sorry, 'Washington Boulevard.

Q: Did you see who shot the man at the bar at Runaway Bay?

A: Didn't see who actually shoot him, but when dey come back in de van, Head seh de man hol' on pon him gun and him one him and Mark seh dat him one him too.

Q: What do you mean by 'one' him?

A: Dat him shoot him.

Q: Did you receive any money or anything else from the robberies?

A: I never received any money because we

plan dat when we reach town, we share up everything."

KEVIN MYKOO'S STATEMENT

"Wen me was at mi home at Grants Pen Road, Saturday night gone and me see Martin drive a grey Pathfinder van and Mark Head dem. Mark and Head pick up me and Showah along Shortwood Lane. Mark tell me seh dem a goh a country and Ochie way and dat me and Showah must come wid dem, because Showah know down de good.

Me goh into de van and all five a we drive goh straight to Ochie. Wen a reach de gas station, Martin stop and buy gas. He goh straight to where two sound a clash near to Falmouth. De five a we goh inna de dance an' we see some guys and a lady who dem talk to and we spen', some time inna de dance 'til late an' den we goh an' den we go a lady and her boyfriend is Foreigner, yard and sleep. We stay 'til morning and we eat and stay deh 'til 5:30 p.m. to 6:00 p.m.

A yout name Freak who drive a Corolla motor car was der. We leave de lady and Showah who is Mark brother goh into de car an' me, Mark and Martin and Head went in de van. We was driving towards Kingston and on de way, Mark seh, 'I waan some money.'

Wen we reach Run-away Bay, Head seh, 'See one shop open deh an a bar,' to Mark. Sorry, To Mark. 'Mek we deal wid' Dem Mark and Head and Martin goh upstairs and Martin come down back downstairs, seh him a goh lookout. Me deh inna de car and Showah and Treak of Freak Sorry. Me leave dem upstairs an' come back downstairs fe cover de shop downstairs.

Den me hear one shot upstairs and me see a lot of people running and jumping from upstairs. Me did have a three eight gun weh Mark gimme and den Head and Mark come down and goh into de shop and juck down an' him tell de lady to han' over all de money an' me did get a bag, scandal bag from de lady an' put in de money. Head and Mark pack up a carton box wid some grocery an' Head give me to tek to de van.

Wen we was about to leave, me see a car drive up wid Showah and Freak an' tell me seh me must goh and

lead de way. Me give a good distance, but me couldn't see de car. We turn back and look for it, but we did not see it, soh we turn back and drive through Ochie and den up Fern Gully.

Wen we come thru' Fern Gully me see a next shop and Mark tell Martin to stop an' him stop 'bov de shop. Mark did wear a police ves'. Mark Head and me goh inna de shop and Mark juck down de owner of de shop an' tell him to goh up a de house wid him and give him some money and video. Mark goh into de house an' Head hold de man and carry him inside de house an' de man push him out and lock de door, but him never know seh Mark inside de house an' Mark tell him to open de door, while Head try to kick de door open. Head kick off de door goh into, go in an' me hear two shots fire into de house after some people start fe bawl fe tief and hear Mark run from de house wid a video and tape and we drive off quick and drive 'till we reach Faith Pen and stop an' de four a we stop a de chicken place an' head juck down de chicken man and tell him to give him everything weh him have and de man seh is not fe him place and dem wake up de next man and rob him some money. Mark tell me to stay down deh and watch him and me stay wid him. Dem walk up goh up a one next chicken place and juck it down an' wen dem come back to de vehicle and I drive off an' wen we goh further on the road, we see a lady and dem seh she sell chicken and Martin stop and Head goh and rob de lady and tek her hand bag.

We still a drive and wen we nearly fe reach flat bridge me see a man park up on a bike Mark seh, he waan de bike and Martin turn back an' Mark rob de bike and tell de man fe run and de man run. Mark jump pon de bike and ride back of us. We driving coming and wen we reach near to Spanish Town, I hear a siren and Martin turn off inna Spanish Town an' Mark went on de next way.

Wen we reach back on the highway, Mark pass me an', me hear like a shot bus and me did a drive fast an' pass as Mark lick inna de truck and crash an' de Pathfinder run over de bike and pull it an' me hear gunshot an' me hear an explosion and de van start blaze and we jump out and drop inna de gully an' stay in de 'till early inna de morning and me gun drop inna de gully and me leave it deh.

Tek a bus to town an' den tek one to Barbican an' den goh a Martin yard and tell dem what happen to him, an' den me go a mi yard. De police up a me yard, come a mi yard fe me 'bout 4:30 a.m. de morning an' me give dem jewellery we get a country from de robbery an' de police tek a watch too and den after carry de police dem which part me drop de gun.

Dem tek up de gun and carry me goh up a Acid Office an' a soh it goh, sah.

...

Question 1: What is your full name?

A: Kevin Mykoo.

2: Are you called by any other name?

A: Yes, sir, they call me 'Bus-up'.

3: Where do you live?

A: 13½ Grants Pen Avenue, Kingston 8.

4: In your statement, you made mention of Martin, 'Showah' and 'Head'. Who is Martin and where does he live?

A: I don't know Martin right name, but he live at White Hall Avenue and drive a bus.

Q: How long did you know Martin?

A: About a year now are friends.

Q: Who is Mark and where does he live?

A: Mark is Lenard Crew and he lives at Shortwood Lane.

7: Who is 'Showah'?

A: 'Showah' is Mark brother. He live at Shortwood Lane.

8: What about 'Head'?

- A: He stays at Shortwood Lane, but don't live there. He lives at Tom's River.
- 9: Is Martin, 'Head', Martin and 'Showah' all your friends?
- A: Yes, sir, an' I know dem long time.
- 10: You made mention of Freak, who is he and where he is from?
- A: I don't know his right name, but he drives a brown Corolla; see him at same place where we sleep wen we goh to a dance.
- 11: That was the first time you saw him?
- A: Yes, sir.
- 12: Have you ever been to St. Ann before with the men you mentioned?
- A: No, sir, it is the first time.
- 13: In your statement you mentioned that when you reach Run-away Bay, 'Head' said, "See one shop deh, mek we deal wid it," what do you understand that to mean?
- A: To mek we rob it, sah.
- 14: Showah take any part in the robbery?
- A: No, sir.
- 15: The woman's yard that you said you stayed in the country, did you know her before?
- A: No, sir, and did not know the place either.
- 16: In your statement, you said you handed over some jewellery to the police. Where did you get the jewellery?
- A: One of the chain come from one a de man

a Faith Pen an de other was given to me as a gift from my mother and mi girlfriend, Keyonia.

17: What happened to the tape, video and goods that were robbed in Run-away Bay and above Fern Gully?

A: Everything burn up in de van.

Q: When you heard the shots fire at the bar at Run-away Bay, did you know that a man was shot and killed?

A: No sir.

19: What was the purpose of your visit to the country?

A: I decide to follow 'Showah' an' de man dem.

20: Did you see the men with guns when you travelled with them?

A: Yes, sir.

21: The gun you had, where did you get it from?

A: Mark give me."

Det. Insp. Robert White of the St. Ann police visited the scene of the murder at about 8:00 p.m. on the 3rd July, 1994. He saw the dead body of Jamai Vega. He carried out searches next morning in the area of the bar. He found two damaged lead bullets which appeared to be .38 and one spent .380 cartridge casing. He later went to the office of the Special Anti-Crime Task Force at Ruthven Road where he saw Senior Superintendent Brown who handed him the statements and questions and answers from Martin Dixon and Kevin Mykoo. He then identified himself to both men and cautioned them. Martin said:

"Mi drive the man dem go a country."

Mykoo said:

"Mi go a country with the man dem mi no know bout no murder."

The men were handed over into his custody. At the same time he received two envelopes - one from Det. Sgt. Smith and one from Det. Sgt. Henry, and both contained the quantity of jewellery. He was present at the postmortem carried out by Dr. Fiona Henry-Pinnock when she removed one lead bullet from the body which bullet she handed over to him.

He kept the spent casing and the two lead bullets which he had found on the scene of the crime on the 4th, as well as the Exhibit which was the bullet handed over to him by Dr. Pinnock, until the 8th of July when he took them to the Ballistic Expert where he handed them over. The Ballistic Expert is Mr. Daniel Wray, Assistant Commissioner of Police. In the envelope which had jewellery taken from Kevin Mykoo, Mr. Noel Brown identified two chains and a ring belonging to him. After an identification parade held at the Central Police lock-up he arrested and charged Mykoo and Dixon with murder and other offences. When cautioned Mykoo said: 'Mi no kill no body.' Dixon made no statement.

Daniel Wray retired Assistant Commissioner of Police and Government Ballistic Expert attached to the Forensic Laboratory in Kingston gave evidence in relation to spent shells and bullets that were given to him. The important part of his evidence is his conclusion that the shell which was recovered from the bar by Inspector White was from the Shelly automatic pistol which

belonged to Mykoo and which was recovered by the police at the place to which Mykoo had taken them.

The bullet found in the neck of the deceased was fired from the .38 Inter Arm Rossi millimeter gun which was partly burnt and which was taken from the seat of the Pathfinder van.

In his defence Kevin Mykoo gave a short unsworn statement in which he denied being present upstairs the bar on the 3rd of July 1994 and that the jewellery belonging to Noel Brown was ever taken from him. The applicant Dixon gave sworn evidence. He denied that he was ever at Runaway Bay on the 3rd of July, and claimed that he gave his statement as a result of being beaten by the police.

In this application for leave to appeal Lord Gifford QC representing the applicant Dixon has urged on us that the learned trial judge erred in failing to direct the jury on an issue which arose for their consideration, that issue being:

"Whether the appellant knew or intended that any robbery should be carried out in the said bar, or whether the robbery and shooting which occurred in the bar was an act of his co-adventurers which went beyond the scope of any joint enterprise."

In his cautioned statement, which the jury clearly accepted he had voluntarily given to the police, the applicant admitted that he participated in the robbery of the Pathfinder van on the evening of July 2, 1994. His fellow participants were Mark (now known to be Leonard Crew the rider of the motor bike which crashed at the check point and who was killed), 'Bus-up' who is Mykoo and 'Head'. He drove the Pathfinder. This is where the mission commences. Here is identified the genesis and purpose of the common design of armed robbery. According to Dixon the other three men were armed with

powerful weapons at the scene on the Palisados road when the man in the Pathfinder was robbed of his watch and money. The men remained together and travelled to Ocho Rios, past Puerto Seco Beach to Falmouth where they went to a dance. They kept together on a beach in Falmouth until 5:00 a.m. when they continued on their journey. At Runaway Bay at the bar, the scene of the murder, all four went upstairs. 'Bus-up' (Mykoo) told him to go downstairs to look for a car which would pilot them to Kingston. He heard gunshots while so doing and he ran up to see what was happening. The victim passed him obviously seriously injured. He took instructions from 'Bus-up' (Mykoo) to go and bring up the van to drive off. He is here being a key part of the getaway. He witnessed the robbery of the bartender and the downstairs grocery shop before he drove them off in the Pathfinder. He drove the Pathfinder on that journey in which the men were involved in a number of other robberies. At no time did he disassociate himself from what was taking place. He, therefore, was part of the common design. What took place included the armed robbery of the motor bike which Mark (Leonard Crew) rode ahead of the Pathfinder. His evidence, therefore, corroborates the police evidence of the motor bike crashing at the roadblock, the van pushing along the bike, the conflagration, the men jumping from the Pathfinder and running through Duhaney Park. In the questions and answers he speaks of being given a gun after the robbery of the bike. This gun was left in the van when he jumped out of it. His evidence corroborates the evidence of the finding of the charred Rossi in the Pathfinder van. As it turned out that weapon was the gun which fired the bullet found in the neck of the deceased by the doctor.

The statement, therefore, exposes a scenario of one continuous joint enterprise commencing with the robbery of the Pathfinder and executed on the common design of all who participated, including the applicants. Of course, this statement is evidence only against himself but it places him as one of the participants in this episode resulting in murder and robbery. Further, the prosecution witness testified that four men came upstairs to the bar and were present throughout the robbery and shooting.

In the circumstances of this case I find no fault in the judge's summing-up on the common design which on the evidence the Crown was seeking to establish, those words of the learned trial judge being:

"The person or persons who were involved in this particular enterprise were acting as part of a common plan, a common design to rob the person or persons at this bar; not only the bar, well, the bar is where the killing took place but the person or persons at this particular premises including the bar. And that in those circumstances they are relying on what is known in law as the doctrine of common design. And where that doctrine operates it operates where two or more persons actively engage in carrying out a common plan or act together effecting a common plan or a common purpose; the plan or purpose here, to hold up and rob person or persons who were present at that place. And the evidence speaks volumes as to that."

The learned trial judge in relation to Dixon asked the crucial question:

"Was Martin Dixon one of the persons who went along on this escapade which took him to that bar. Now, this is a crucial question and the crown has advanced what I would prefer to call a four pronged evidenced in seeking to establish that both accused persons participated in a varying way, to a varying degree in the events that took place that night?"

Lord Gifford QC in my view is not assisted by the facts in *Lascelles Fitz-*

Albert Anderson and Emmanuel Morris, 50 Cr.App.R. 216 which he cited to

us, or the law in *Director of Public Prosecutions v. Bailey* [1966] 44 WIR 327 as Dixon's cautioned statement included no matter which, if accepted, could raise a prima facie case that he was not involved in the common design to rob which resulted in the murder of Jamai Vega.

The second ground of appeal advanced was in respect of the direction of the learned trial judge on the identification by Det. Sgt. Smith of the applicant in the events at the roadblock. The learned trial judge gave the full *Turnbull* directions in relation to the dangers inherent in visual identification. He dealt with the situation at the bar and latterly at the roadblock at Washington Boulevard which he described as "clearly one of pandemonium and confusion", and "one which was of a fast moving situation." The learned trial judge said:

"... clearly, for the Pathfinder to just continue up Washington Boulevard, it must have gone through the police road-block, it certainly did not fly over it, and it is in that situation that you really have to ask yourselves, with this vehicle going about thirty to forty miles per hour, because that is the evidence of Detective Sergeant Smith, no matter how excellent an officer he might have been, that he would have had time to see and make out the two accused, one driving, the other on the other side, away from him, of that Pathfinder where he was positioned, he would have had, certainly, a better view of the left side of the Pathfinder, ..."

Further in dealing with Sgt. Smith's evidence as to the identification he says:

"... it is a matter for you, as to how truthful and credible he has been, that he had some thirty seconds at the barrier to make out these persons."

The learned trial judge in reviewing the evidence had said:

"Noel Brown and Surphina Taylor purport to identify the accused, Kevin Mykoo, at the scene of the shooting and killing of Jamai Vega, the deceased. Detective Sergeant Smith purports to identify both accused at the road block, the barrier, and again at the point where the Pathfinder crashed and caught fire

as they made good their getaway from the blazing Pathfinder."

Thereafter he gives the fullest directions on identification with the necessary warnings. He discounted the identification of Mykoo by Noel Brown at the bar because Brown's position at the time he purported to identify Mykoo, as well as the manner in which he purported to identify him at the identification parade, appeared to him to be uncertain. When he dealt with mistaken identify he said inter alia:

"You have heard learned counsel Mr. McFarlane stress that fact to you and you have heard an officer, Mr. Smith, Detective Sergeant Smith, say that he has never had that experience either. But you are to understand that human error has been known to occur and mistakes have been made even in the most ideal situations. In that regard therefore you need to warn yourself that even an honest witness or witnesses can make mistakes in identifying someone who is purported to have committed a particular crime, even where, as in this case, the two officers have said that they knew the two accused persons for what was a long time before. Detective Sergeant Henry had even said he knew Mykoo for about twelve years when he was stationed at Constant Spring Police Station, and Detective Sergeant Smith said he knew one of the accused for about five years, and the other one for about four years."

Nearer the end of his summing up he said:

"So it's against the background, as I told you, of the directions I gave you as to visual identification in relation to Surphina Taylor that apply equally in relation to the purported visual identification by these two police officers along the Washington Boulevard."

The attack by Lord Gifford QC on the learned trial judge's summing-up on identification is, therefore, in my view without foundation.

With regard to Mykoo, Miss Janet Nosworthy for the applicant submitted that the judge misdirected the jury as to how the statement made by the applicant to Det. Sgt. Mevarol Smith: "Me glad oonu never shoot mi. Mi wi tell oonu how it go," should be treated.

The learned trial judge after citing the words of Mykoo directed as follows:

"This is hours after, you know, the exchange of gunfire on the boulevard, 'Me glad oonu neva kill me.' what is he speaking about if you believe he said so? You are entitled to draw reasonable inferences as well from proven facts in the case."

However, after giving directions on reasonable inferences to be drawn he went on as follows:

"What interpretation you place on it? What weight do you attribute to such a statement and most importantly, what is he referring to? What else could he be referring to because he was told about the murder and the shoot-out on the boulevard and he said, 'Me glad oonu neva kill me.'?"

So using your common sense and experience, he could only be referring to what happened on the Boulevard, you may well say. There certainly wasn't any shoot-out at the bar."

The difference in the words allegedly spoken by Mykoo is pointed out by the learned trial judge:

"Sergeant Smith says that Mykoo said 'Mi glad oonu never kill me,' and the other officer is saying that Mykoo said 'Don't kill me' or words to that effect."

And again:

"As regards the oral statements now, because I told you this is a case with mixed statements, you have the caution statements, and the alleged recorded questions and answers on the one hand and you also have oral statements being made by both accused persons. You have one officer saying that at Mykoo's

yard when he was told about the incident that had taken place at Runaway Bay and along the Boulevard, he said 'Mi glad oonu never kill me,' this is what Mr. Scott is saying, sorry Smith, Detective Sergeant Smith. The other officer says, that is Mr. Henry, what he heard was the accused saying 'All right, don't kill me'."

Mykoo's short unsworn statement does not state what he told the policemen on the occasion of their visit to his home, or if he told them anything at all. All this was a matter for the jury to whom the learned trial judge gave extensive directions as to how to deal with facts, discrepancies and inconsistencies. This ground of appeal in my view must, therefore, fail.

Miss Nosworthy further submitted that the learned trial judge's directions to the jury on identification was inadequate. This is not supported by the transcript of the summing-up to which I have already referred in respect of the application of Martin Dixon.

Finally, Miss Nosworthy submitted that the trial judge was in error in not editing the cautioned statement of Dixon to delete references to Mykoo. The learned trial judge told the jury:

"Let me just say from the outset that insofar as any oral statement or any caution statements and questions and answers alleged to be made by each of the accused persons are concerned, those statements can only be evidence which intends to incriminate the maker. What I mean by that is, that anything said in either statements or in answer to the questions and asked by the officers, by the officer, Assistant Commissioner Brown, can only implicate the person who is the maker of the statement. It can't implicate, in other words, the co-accused, it is not evidence against him, only evidence against the maker. So, insofar as anything in the statement, caution statements or in any of the oral statements made by Mykoo, accused Mykoo, for example, which seeks in any way to say that Martin Dixon was involved in this matter or on the scene or in anyway involved in it that is, into the evidence against Martin Dixon, you understand me, and vice-versa, if there is anything in

Martin Dixon's statement or in the questions and answers or in any oral statement in which he purports to say that Kevin Mykoo was involved in this offence, that is not evidence against him."

There was, in my view, no need for the editing of Dixon's statement in view of the clear and sufficient directions given to the jury by the learned trial judge as to how to treat this statement.

In the event, therefore, the application of Martin Dixon for leave to appeal must also fail.

Consequently, the applications of both convicted persons for leave to appeal are refused.