

V.M.S.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 65 AND 73 OF 1996

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

REGINA

VS.

MICHAEL FAIRCLOUGH

ELVIS THOMAS

Norman Godfrey for Fairclough

Delano Harrison for Thomas

***Kent Pantry QC, Senior Deputy Director of Public
Prosecutions, and Miss Deneve Barnett for Crown***

June 9, 10, 11 and July 31, 1997

RATTRAY, P.:

On the morning of the 5th of July 1994 at about 8:00 a.m. Delroy Cranston otherwise called Rio left his home at Goshen, St. Elizabeth along with his common-law wife Claudine Chin travelling in his red Honda Civic motor car. He left Miss Chin at the Grocery shop which she operated at Top Hill in St. Elizabeth. Mr. Cranston was the operator of the Temptations Club in Santa Cruz and was also engaged in the trading of US currency. Miss Chin next saw the

dead body of Delroy Cranston in the hospital in Mandeville at about 2 p.m. on that very day. When they left their home together Mr. Cranston had his burgundy brief-case with about J\$50,000.00 in it as well as a dagger knife which also had a burgundy handle.

On that very morning Winston Pryce was driving his truck from Swansea in Clarendon which he departed around 7:30 a.m., to Bull Savannah in St. Elizabeth. After passing Toll Gate in Clarendon he was hailed from a bus stop by the applicant Fairclough whom he knew before and who requested from him a drive to Santa Cruz. He told Fairclough he could only take him as far as Gutters. Whereupon, Fairclough called out and two men whom Fairclough described as "mi brethren" ran from behind the truck and boarded it on the back. Pryce purported to identify one of the men as the applicant Thomas. They stopped at Spur Tree where Pryce had breakfast. Going down Spur Tree Hill a red Honda car driven by the deceased Cranston came fast around the corner and was flagged down by Pryce at Fairclough's request. Whilst Pryce was parking the truck Fairclough came out and was talking to the driver of the car. Pryce recognised the driver of the car as a man who had a club in Santa Cruz to whom he had sold twenty bags of flour and who owed him for that purchase. It was the deceased Cranston otherwise called Rio. Fairclough and Cranston were in conversation. The time was approximately 9:30 to 10:00 a.m. Pryce tried to collect the debt from Rio but Rio told him to check him at his business place the following week. Pryce drove off with Fairclough travelling with him in the front of the truck and the other two men on the back. He left all three men at Gutters.

At about mid-day on the same day one Diana Dennis saw Fairclough sleeping on a settee at the night club operated by Cranston. At about forty-five minutes afterwards Cranston arrived in his car and engaged in a conversation with Fairclough.

At about 2:30 p.m. on that very day Detective Inspector Cleston Pinnock of the Mandeville Police received a report which caused him to travel to Spur Tree, Manchester. He found parked near a dirt road leading off the main Spur Tree road a red Honda motorcar with blood on the front seat. About one chain away was the dead body of Delroy Cranston lying in a pool of blood. He had several stab wounds to his body. There were three blood stained knives lying beside the body. At the scene too, he found a briefcase with documents with the name Delroy Cranston. The briefcase and one of the knives were later identified by Claudine Chin as the property of Cranston which he had with him when he left home that very morning. There was no money in the briefcase.

On the 17th of July 1994 Dr. Derrick Ledford performed a postmortem examination on the body of the deceased Delroy Cranston. He had several stab wounds to the upper part of his body. The fatal wound was an incision to the left jugular vein caused by an instrument like a knife.

A witness Beverley Mowatt gave evidence that on the 8th of July 1994 she saw the applicant Thomas with another man at Old Harbour in St. Catherine where she lives. She did not know him before. The applicant held her hand and was making certain loving advances to her which she did not encourage. In conversation he asked her if she had heard of the killing at Spur Tree Hill. Her evidence continued:

"I told him yes, that I hear about the killing wah gwaan a Spur Tree. Him sey is him do it and him friends. ...

He said is him and him friend do it and him stab, stab him up and cut him throat and let the blood run like goat."

On the 25th of August she pointed him out at an identification parade held at the Black River Police Station.

On the 4th of August 1994 Fairclough was taken into custody at his home at Sandy Bay in Clarendon. He was cautioned by Detective Sergeant Masters who told him that he was investigating the murder of Delroy Cranston in respect of which he was a suspect. Fairclough said:

"Officer a noh me kill the man, sir. The man a mi fren. A Elvis and Jerky cut the man throat."

On the way while taking Fairclough to the Station the applicant Thomas was pointed out as he was standing at the piazza of a shop about three chains from Fairclough's house. Detective Sergeant Masters told Thomas that he was investigating the murder of Delroy Cranston and that Thomas was a suspect. Thomas said:

"Mi noh know nothing bout no murder. Mi noh know nothing bout noh man."

At the Mandeville Police Station Fairclough said to the Detective Sergeant while sitting on the prisoner's bench with Thomas:

"Mr. Masters, di man a mi friend, sir, and a Jerky and Elvis kill him."

Both Fairclough and Thomas volunteered to give a statement. Justice of the Peace Eric Sanderman was sent for and arrived at about 8:00 a.m.

Thomas gave a cautioned statement which was witnessed by Mr. Sanderman, J.P. and a Constable Hunt. The cautioned statement reads as follows:

"Mikey came to me and Jerky at Sandy Bay, Clarendon, and told us that he has a friend by the name of Rio. He said that we can show him a fake gun or anything that look like a gun and get money from him. I asked Mikey how that is possible and he said the man say an Indian man pay some man to kill him, Rio, and he wanted a gun to buy. So that is how we can get money from him by showing him anything that look like a gun. 'Style' came to Jerky house with a lighter that looks like a gun. This was before Mikey talked to me. Jerky was in possession of the lighter at the time of the conversation. Jerky show Mikey the 'gun lighter' and Mikey said that was perfect because we don't have to give him in his hand. We only have to show him.

The following day the three of us boarded a bus at the train line, in Sandy Bay. The bus broke down at Four Paths. We got a ride on a goods truck marked 'Blue Mule Three'. Mikey went into the truck front and me and Jerky went into the truck back while the truck was going down Spur Tree Hill. Mikey saw Rio and the truck man stop him. Mikey came out of the truck and talk to Rio and the truck man wait for him. I heard Mikey told Rio that he has the thing now and now is his chance to get it. Rio told him that he soon come, he is going to Mandeville to buy shocks for his car.

We went back on the truck and it carry us to Gutters. We took a taxi from Gutters to Santa Cruz. Mikey show us the man club. Mikey then send me and Jerky on a taxi back to the corner where the man should meet us. Me and Jerky went there and wait. We were there waiting for over an hour before Mikey and the man returned from Santa Cruz in a Red Honda C.R.X.

The place where we waited for Mikey on Spur Tree is near the Pine Tree, down in a dirt road where they dump garbage.

When Mikey and the man came, the man reverse down in the road. The two of them come out of the car and Mikey call us. The four of us went under a tree. I was behind the man and Mikey and Jerky was in front. They were discussing the price of the gun which was a lighter.

Mikey whink to me and I held the man and Mikey took out his knife and stabbed the man several times in his

chest, which weakened him and he fell to the ground. I help to force him down.

The man was shouting out for help. Mikey put his hand over his mouth while Jerky was in his pocket and I was holding him down. After Jerky done search him, Jerky said, 'come now,' and Mikey let go off his mouth and I kneel down in his back and Mikey strip off the rings off his fingers, burst off his chains, and a chaperita. They were blood up and he gave them to me. I put them in one of my rag and pushed them in my pocket. Jerky was still insisting on us to come.

Jerky ran off and went into Rio's car followed by me and Mikey. I tried to start the car but it couldn't start. Mikey ran out of the car and hop on a truck, with himself blood up and we could not catch the truck.

I had blood on my hand. I ran up the top of the hill to a house where I wash my hand in a bath with some soap water. No one was at the house. After I wash my hand I saw Jerky was still running up the hill and I ran after him, this was about 12:30 to one o'clock. Every time I hear a car coming I start to walk.

I catch up with Jerky and I turn off on a road where some truck a carry marl go dump. we hop in a Seddan Atkinson that was carrying the marl and it took us back out to the marl pit and we walked from there, the round about, into Mandeville.

Jerky went into the bus park and count the money near some Jerk man that know him well. He told me that it's One Hundred and Ninety-three U.S. and Forty Pounds Sterling. There was no Jamaican money. He changed the money in the bus park with the dollars man and gave me One Thousand Eight Hundred Dollars. I took a bus named 'Genus' back to May Pen.

I bought a walkman stereo for One thousand One Hounded Dollars, open a bank account for Three Hundred Dollars, bought some groceries for Three Hundred Dollars, and kept One Hundred Dollars in my pocket.

I left May Pen and come to Sandy Bay. When I came down, I remember the jewellery in my pocket. I shared it with Jerky. I took one chain and one ring. Jerky get one chain, two rings and the chaperita. I lend Prentis

my ring and chain. I know Jerky gave Mikey some money but I don't know how much.

When we were leaving the scene the man was still calling Mickey, begging him not to leave him."

Then Fairclough, after Thomas had left the room, came in and gave a cautioned statement also witnessed by Mr. Sanderman, J.P. and Constable Hunt.

The Crown's case relies very heavily upon these cautioned statements which were only admitted in evidence after a voir dire. They came under great challenge on the basis, in respect to Thomas, that it was not voluntary and that he had been severely beaten by the police.

The cautioned statement by Fairclough was as follows:

"First place it was a Saturday, in June, like the last Saturday in June. We went down by Santa Cruz, me and a boy name Ruddy. We check Rio, me and him have a talk and him tell me him want a firearm to buy. We never have no firearm to sell him the same Saturday. We left back to Sandy Bay.

The Monday I told Jerky and Eric or Style that if they have a gun they can go to Santa Cruz and make some money, fi sell one of my friend a gun.

The Tuesday morning Elvis come wake me out of my bed and told me that the Jerk man is waiting on me, right out a de road.

We took a mini bus at the train line, in Sandy Bay. On the way to Mandeville the bus broke down at Toll Gate and we got a ride on a truck marked 'Blue Mule', driven by a guy by the name of Dave that live in May Pen.

The truck took me to Spur Tree and we saw Rio on Spur Tree Hill. I stopped him and talked to him and Jerky show him the gun. Rio told him to leave the man them at Gutters and me went ...'

HIS LORDSHIP: Rio what?

WITNESS: Just a minute, sir. 'Rio told me to leave the man at Gutters and me must go to his club and wait for him.

The truck left us at Gutters and we took a car to Santa Cruz and I took Jerky and Elvis to the taxi stand in Santa Cruz, put them in a car and told them to wait for me at Gutters. I wait at the club for Rio.

Me and Elvis left the club about ten o'clock, and drive to Gutters in Rio's car. When we reach Gutters, we don't see the man them. We drive go further up on the road until we see Elvis sit down across the road and Jerky hiding in a bush and said, he can't come up front because him have the arms.

The car parked right on the roadside and me call them and tell them fi come do business with the man. Jerky sit on a stone and said him have the gun. We were discussing the price and Rio said that him only have Five Thousand Dollars on him. He said he has One Hundred and Forty U.S., Ten Pounds Sterling. He said he has to go to Black River to pick up Fifty U.S. for his girl and we are to come back the following Saturday for the money.

As he said that Elvis grabbed Rio around his neck and start to stab him. Rio called out to me saying, 'Mickey, Mickey help me, Mickey. Yu a go mek dem kill mi?' This was right on the roadside. I saw blood coming from his chest and face. He dropped on his face and he was saying, 'Mickey help.'

Elvis a strip off the ring and chaperita and chain. Jerky search the man, take out his money out of his pocket.

Rio was still calling out, 'Mickey, help me.' I covered his mouth with my hand. Jerky stabbed Rio in his face. I never stabbed Rio, only Jerk, and Elvis.

Elvis take the jewellery and put it in a black scandal bag. Elvis tried to drive the car, but the car couldn't move. I jumped out, hopped a truck and left the two of them on the scene.

The truck dropped me near a man-hole on the highway. I took a taxi and paid Ten Dollars to come

into Mandeville. In Mandeville, I begged a ride on Justice Bus marked 'Shaka', to Sandy Bay.

About 6 p.m. the evening, I saw Jerky and Elvis. I saw Elvis with a walkman over his ears. I asked him where is the money because they kill the man and left the attache-case of money.

I asked Jerky how much money he got and he said he changed the money, he got Three Thousand Dollars. He said he took the English Pounds for his expense.

After that I saw Jerky wearing the ring and chain."

The learned trial judge admitted into evidence following a voir dire the cautioned statement given by the applicant Fairclough to the police.

After the giving of the statement and on the departure of the Justice of the Peace, Detective Sergeant Masters wanting to put further questions to Fairclough again cautioned Fairclough in the terms of Rule III(a) of the Judge's Rules and Fairclough signed the caution.

He asked Fairclough twenty questions to which answers were given. They were taken down in writing by Constable Taylor who at the time of trial was deceased. However Fairclough refused to sign the question and answer document saying: "Mi a get miself in a further and further trouble." The question and answer statement was as follows:

"Question No. 1: Whose knife did Jerky use to stab Rio?

Answer: Jerky did have fi him knife, a 'kitchen-bitch'.

Question No. 2: How many times did Jerky stab Rio?

Answer: I couldn't say one or two times but I saw him searched his pocket.

Question No. 3: After you stab Rio and leave him, what did you do with the knives?

Answer: All three knives were left on the scene.

Question No. 4: What is the name of the Indian man, who paid to have Rio killed?

Answer: I don't know.

Question No. 5: Who was to kill Rio?

Answer: I don't know.

Question No. 6: Do you know a man from Kingston by the name of?

Answer: No.

Question No. 7: Do you know a man by the name of Sugar?

Answer: No.

Question No. 8: How did Rio's car came to be parked across the dirt road?

Answer: Rio parked it over there.

Question No. 9: Did you tell a woman in Old Harbour that you shot and stab Rio?

Answer: No, I told her who did the act because I was there and he was my friend.

Question No. 10: Did you tell anybody else that you did not stab Rio but you shot the bwoy in him side?

Answer: No.

Question No. 11: How did you come to meet Rio?

Answer: 'Grandpa-Dread' and 'Jah Works' introduced me to him.

Question No. 12: What kind of business you and 'Grandpa-Dread' and 'Jah Works' were involved in with Rio?

Answer: Counterfeit U.S. and counterfeit cheque, U.S.

Question No. 13: Who was the boss in the counterfeit operation?

Answer: 'Jah Works' get the leaf them from town and give them to Rio. Sometimes if them nuh type him give me them and me get them type up.

Question. No. 14: Do you know the person who 'Jah Works' get the cheques from?

Answer: No, mi only hear him name. Him name Boddy.

Question No. 15: Where do you get the cheques type?

Answer: I did it at Jamaica Broilers, one time.

Question No. 16: Was there a falling out between 'Grandpa-Dread', 'Jah Works' and Rio over the payment of the cheques?

Answer: Yes.

Question No. 17: Have you ever witnessed any quarrel or falling out between Rio, 'Jah works' and 'Grandpa-Dread'?

Answer: Yes.

Question No. 18: When you answer 'Yes,' what you do mean?

Answer: I witnessed 'Jah Works' back a machete pon Rio and I hold him and quiet down the argument.

Question No. 19: Could it be that the person who threatened to kill Rio be 'Jah Works' or Bobby.

Answer: I don't know, but it is possible.

Question No. 20: Where is 'Jah Works' living?

Answer: Burnt Savannah, where Rio comes from."

Should the question and answer statement have been admitted? Was it a proper exercise of the Judge's discretion? Rule III(b) of the Judge's Rules reads as follows:

"It is only in exceptional cases that questions relating to the offence should be put to the accused's person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement."

An examination of the question and answer statement does not disclose that these questions would have been asked for the purposes permitted by the Judge's Rules. Furthermore question 3 reads as follows:

"Question No. 3: After you stab Rio and leave him, what did you do with the knives?"

Answer: All three knives were left on the scene."

The question is based on a false premise that in his cautioned statement Fairclough had said that he had stabbed Rio when in fact he said no such thing.

How did the learned trial judge deal with this in his direction to the jury?

He said:

"You will remember that Sergeant Masters said that Fairclough did not sign the question and answer document at the end. He said that he only signed underneath the caution. He said that he refused to sign at the end when he was invited to do so because, according to Sergeant Masters, Fairclough said that he did not want to get himself into further and further trouble. You must determine, Members of the Jury, first of all, whether or not questions were asked of Fairclough after a statement was given by him. If that is your conclusion that the statement was, in fact, given by him, whether he was cautioned and that whether he signed it and whether he answered the questions shown on the question and answer document

admitted in evidence; and you have to determine, Members of the Jury, the circumstances in which these were made, if in fact they were made. Were they made? Were these answers given by the accused man as the prosecution alleges? Did he give the answer to Question 3? The prosecution placed great emphasis on this. The question was in these terms. 'After you stabbed Rio and leave him, what did you do with the knife?' Answer, 'All three knives were left on the scene.'

But, of course, Members of Jury, you will remember that Detective Inspector Pinnock said that he found three knives beside the body of the deceased. But what has been pointed out to you, Members of the Jury, and you may consider this, is it that the question before this question was asked, there was no answer given by Fairclough in terms of the earlier questions? Is it that there was no answer given by him that he stabbed the deceased so the question was asked, 'After you stabbed Rio and leave him what did you do with the knife?'

Now, this was not a question asked in court by a lawyer, it was asked by a policeman. You may think, nevertheless, it was a leading question by the question suggested in the term that question was answered. But to the question, was the answer given that the three knives were left on the scene? Did you after examining it - you have to first of all determine whether that answer was given and whether that answer assisted you in determining whether or not Fairclough was present at the time Cranston received the injuries and whether or not he participated in inflicting the injuries and whether or not he used one of the knives?

What does the questions and answers mean in the light of other evidence that you have heard and in the light of the fact of what you have come to hear from other evidence in the case?"

Quite apart from whether or not the question and answer document should have been admitted, the manner in which the learned trial judge dealt with it would suggest to the jury that question 3 was a proper question to which an answer was given that the applicant Fairclough had stabbed the deceased. This would have established an admission by Fairclough to this effect. Furthermore, the reference later on in the judge's directions: "... that as a

result of their acting together they inflicted the stab wounds on the deceased as a result of which one wound proved fatal" would suggest to the jury that there was evidence that they both inflicted stab wounds on the deceased. Such evidence in relation to Fairclough could only come from the answer which was given to question 3 which in my view was misleading and should not have been admitted. Later on the trial judge said:

"... you see, Members of the Jury, even if you are not sure which one inflicted the fatal injury, if you find that they were stabbing and that in the stabbing they intended to kill and to inflict any serious bodily harm and that they each used violence on the deceased, Cranston, you are sure about the deceased, Cranston, and you are also sure that the killing was done in the course or furtherance of a robbery, it would be open to you to return a verdict of guilty of Capital Murder in relation to each one."

The cautioned statement given by Fairclough to the police before the question and answer interrogation and which was properly admitted placed Fairclough on the scene and as a participant.

The learned trial judge gave the appropriate directions on common design, as well as, the ingredient of a killing in the course or furtherance of a robbery required to designate the murder as capital murder.

The learned trial judge however made no specific reference to Section 2(2) of the Offences against the Person Act which reads as follows:

"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."

The trial judge's directions on capital murder in respect of each, quite apart from his directions on common design, rested upon each of them stabbing the deceased. Although Fairclough's participation is established there is no admission by him that he stabbed the deceased. In his cautioned statement he emphatically says he did not.

It is true that in his cautioned statement Fairclough said that when Rio cried out "I covered his mouth with my hand." With reference to that the learned trial judge said:

"... If you accept what he said, would he not have been present and would he not have been playing a part in what happened to Rio? According to him, others stabbed Rio and when Rio was bawling out he held Rio on his mouth."

What the learned trial judge was exploring at this stage was the evidence capable of establishing Fairclough's participation in the murder and the existence of a common design whoever struck the fatal blow. When he came to direct the jury on the question of which participant could be convicted of capital murder and why, his directions solely related to the infliction of stab wounds by each and there is no evidence to support this in respect of Fairclough.

These directions were as follows:

"The indictment charges capital murder, members of the jury, and the prosecution must prove that the accused men killed, each accused man murdered Delroy Cranston in the course or furtherance of a robbery."

He later stated:

"If the prosecution has made you feel sure, having regard to all the evidence, including what each accused man has told you from the dock, that each was present on the scene and that each was acting together and that as a result of their acting together they inflicted stab wounds on the deceased as a result of which one wound proved fatal, then, if you are sure about all that and that they intended to kill or to inflict really serious bodily harm and you are sure about all that and that it was done in the course or furtherance of a robbery, then it would be open to you to find both accused men guilty of Capital Murder."

And still further:

As I told you, consider the evidence against one separately and determine whether the prosecution has proved their case against each one. It is only where you are sure that the prosecution has proved their case against each one, in relation to the offence of murder that you can say that that one is guilty of murder and only where you are sure that the prosecution has proved that the killing was done in the course or furtherance of a robbery that you can say that each is guilty of Capital Murder because, you see, Members of the Jury, even if you are not sure which one inflicted the fatal injury, if you find that they were stabbing and that in the stabbing they intended to kill and to inflict any serious bodily harm and that they each used violence on the deceased, Cranston, you are sure about the deceased, Cranston, and you are also sure that the killing was done in the course or furtherance of a robbery, it would be open to you to return a verdict of guilty of Capital Murder in relation to each one."

What was required from the learned trial judge was a direction:

- (a) that murder committed in the course of robbery was capital murder, however,
- (b) where two or more persons are charged with capital murder, even if found that the murder was committed in the course of robbery, it is only capital murder in respect of any person found by the jury:
 - (i) by his own act to have caused the death of the deceased, or

- (ii) who inflicted or attempted to inflict grievous bodily harm upon the person killed, or
- (iii) who himself used violence on the person killed in the course or furtherance of an attack on him.

The absence of a clear direction in this regard and the reference to both applicants stabbing the deceased which is not supported by the evidence and therefore a serious misdirection could have been the elements which led the jury to find capital murder in respect of the applicant Fairclough.

In these circumstances we are of the view that the verdict of capital murder against Fairclough cannot stand and that a verdict of guilty of non-capital murder should be substituted.

We have therefore treated the application for leave to appeal as the hearing of the appeal which is allowed. We enter a verdict of guilty of non-capital murder. The sentence of the Court below is set aside and substituted therefor is a sentence of imprisonment for life. In view of Section 3B((3) of the Offences against the Person Act (as amended), we will adjourn the issue of sentence to be determined on a date to be fixed by the Registrar.

The applicant Elvis Thomas in his defence made an unsworn statement from the dock in which he narrated his whereabouts and movements at the time of the murder and which would have placed him between Old Harbour, Sandy Bay and May Pen far away from the scene of the crime. If accepted this statement would establish an alibi.

Counsel for the applicant Mr. Delano Harrison has submitted that the learned trial judge gave no assistance to the jury as to how they should properly

approach an alibi defence, and consequently the applicant was denied a fair trial.

The learned trial judge told the jury in respect of the unsworn statement of the applicants:

"You ... should take into account the statement given by each in determining whether or not the prosecution has proved their case in relation to each of them."

He had previously summed up as follows:

"Members of the Jury, the accused men each gave unsworn statements from the dock. Neither of them went into the witness box. Neither of them, Members of the Jury, was bound to give evidence, sworn evidence. Each could sit back and require the prosecution to prove their case against each of them and while you have been deprived of the opportunity of hearing the story of each one tested by cross-examination, the one thing you must not do is to assume that each is guilty because he has not gone into the witness box."

He went on later to state:

"You may perhaps be wondering why each accused elected to make an unsworn statement. It could not be because each had any conscientious objection in taking the oath; if he had he could affirm. Could it be that each accused was reluctant to put his evidence to the test of cross-examination? If so, why?"

Each had nothing to fear from any unfair questions because he would be fully protected from these by his counsel and by the court.

Members of the jury, it is exclusively for you to make up your minds whether what each accused man told you from the dock has any value and so what weight you should attach to it. It is for you to decide whether the evidence for the prosecution has satisfied you of the guilt of each accused, so that you feel sure about it. And in considering your verdict in relation to each accused man, you should give the statement of each accused only such weight as you think it deserves.

... Whether the statement is short or not, you as I say, should take into account the statement given by each in determining whether or not the prosecution has proved their case in relation to each of them."

In dealing with the statement of the applicant Thomas the trial judge said:

"The accused man Thomas told you that he managed to get a job with one Jerky and one day Jerky took him to May Pen, got some seasons and sent him back to Sandy Bay because you know he went back to jerk the chickens and then went to Old Harbour. He did that, jerk chickens. He went to Old Harbour and later that day at about six o'clock Jerky returned. He went into Old Harbour and worked, that is the jerk chicken business.

The following morning Jerky gave him Eighteen Hundred Dollars, he said he went to May Pen and bought a walk-man stereo. When he returned to Sandy Bay, Jerky was gone."

The trial judge then dealt with other parts of the statement which had to do with how, according to the applicant, hearsay information as to the death of the deceased came to his knowledge.

The direction given by the learned trial judge to the jury as to how to treat the unsworn statement follows closely the guidance given by their Lordships of the Privy Council in *DPP v. Leary Walker* [1974] 1 WLR 1090 at p. 1096 on "the objective evidential value of an unsworn statement".

Was more required from the trial judge in terms of:

- (a) pointing out to the jury that the defence raised by the unsworn statement of the applicant was an alibi and;
- (b) that their rejection of the alibi thus raised still left them with a duty to assess the other evidence in the case to determine guilt or innocence of the applicant?

Mr. Harrison referred to several cases in our jurisdiction in which the Court of Appeal allowed appeals on the basis that the jury were not directed on a defence arising out of an unsworn statement by the accused person. In *R. v. Teddy Wiggan* (1966) 9 JLR 492 the defence was an alibi raised in the unsworn statement of the appellant. The judgment of the Court of Appeal delivered by Moody, J.A. stated inter alia:

"In the course of argument by the appellant's counsel, learned counsel for the Crown drew the attention of the court to the case of *R. v. Tillman*, wherein is stated the duty of the judge to put the nature of the defence, no matter how weak it may be, to the jury.

The learned President observed that in the instant case the learned judge had not given any directions whatsoever to the jury as to how they were to deal with an alibi, nor were the circumstances adequately put of the appellant's alibi as previously mentioned. In our opinion, this is a grave omission in the course of the trial. The appellant has lost the substance of a fair trial, and, in our view, the interest of justice requires that there should be a new trial, ..."

It is to be noted that *Wiggan* is prior in time to *DPP v. Leary Walker* (supra). The most recent case cited is *R v Mills* [1995] 3 All ER 865 in which an alibi defence was raised in an unsworn statement of the accused and the headnote of which reads inter alia:

"Where an accused was entitled to make an unsworn statement and did so raising an alibi defence the trial judge was not required to give any directions to the jury about the possible impact of the rejection of the alibi on the identification evidence but should merely tell the jury to accord to the accused's unsworn statement such weight as they considered it deserved."

Lord Steyn delivering the judgment of the Board in *Mills* pointed out at page 871 that:

"Notwithstanding what was plainly a formidable prosecution case none of the appellants testified. But each appellant made an unsworn statement. "

As in the instant case the appellants did not call any witnesses to support the alibi.

In the judgment of the Board at p. 874 Lord Steyn said:

"Even before *Turnbull* was decided the Privy Council elucidated the evidential status of an unsworn statement in terms which qualitatively treated it as significantly inferior to oral evidence and permitted trial judges to direct juries to explain the inferior quality of an unsworn statement in explicit terms. That guidance has been understood by the Court of Appeal of Jamaica as comprehensively describing what a trial judge generally needs to say to a jury in directing them about the value of unsworn statement. Their Lordships agree with the interpretation of the Court of Appeal of Jamaica about the effect of the decision in *DPP v Walker*. Moreover, their Lordships would add that, taking into account the interests of justice to the Crown and the defence, it would be unwise, and needlessly complicate the task of trial judges, now to introduce a new and further direction about unsworn statements. Their Lordships regard the guidance given in *DPP v Walker* about unsworn statements as requiring no qualification."

The Board found as sufficient the trial judge's direction which stated:

"Mr. Arthur Mills and the two sons Garfield and Julius, they say we were not present. We were elsewhere. Alibi. Now, a person can't be in two places at one and the same time. Although they have raised the alibi they don't have to prove the alibi. The prosecution must satisfy you that they were present, they were not as Mr. Mills said at some ladies house talking or as the boys said in their house with their mother."

In the instant case, as already pointed out, the trial judge:

- (a) did tell the jury to take into account the unsworn statement in determining whether or not the prosecution had proven its case against the applicant;

(b) gave the **Leary Walker** directions on the question of the weight to be given to the unsworn statement; and

(c) gave the appropriate directions in the course of the summing-up on where the burden of proof lay.

We are of the view that in so doing the learned trial judge fulfilled what was required of him with regard to the sufficiency of his directions concerning the defence put forward by the applicant.

Decisions of the Judicial Committee of the Privy Council are binding on the Court of Appeal of Jamaica and we are not entitled to disregard the law as stated by the Board on a specific issue, especially when the determination of the Judicial Committee was in respect of an appeal coming from this jurisdiction as indeed was **R. v. Mills** (supra). The authority of **Mills** is therefore binding and we are obliged to follow it.

Consequently, we have treated the application for leave to appeal by Thomas as the hearing of the appeal which is dismissed.

RE: SENTENCE

The Court is satisfied that at the date of the offence the appellant Thomas was under the age of eighteen years. The sentence of death imposed at the trial is therefore quashed and in substitution therefor the Court sentences the appellant to be detained during Her Majesty's pleasure in accordance with the provisions of section 24(1) of the Juveniles Act.