NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 44, 45 AND 46 OF 1995

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

REGINA

VS

ONEIL SIMPSON
KWARMIE CODRINGTON
GEORGE SADDLER

George Soutar for Appellant Simpson

C. Dennis Morrison, Q.C. for Appellant Codrington

Delano Harrison for Appellant Saddler

Ms. Audrey Clarke for Crown

September 23, 24, 25; December 20, 1996 and January 27, 1997

RATTRAY P.:

RE: ONEIL SIMPSON AND GEORGE SADDLER;

I have read the judgment of Patterson J.A. in respect of the abovenamed and fully agree with his reasoning and conclusion in respect of each. I likewise agree with the orders proposed which have resulted in allowing the appeals, quashing the convictions, and the entry of a verdict of acquittal in respect of each.

RE: KWARMIE CODRINGTON

I also agree with the reasoning and conclusion of Patterson J.A. with respect to the fact that in relation to Codrington this was a recognition case in which the presence of the appellant Codrington as a participant in the common design of robbery was properly established to the satisfaction of the jury. The question remains however as to whether or not the alternative submissions of Mr. Dennis Morrison Q.C. representing the appellant that the jury erred in finding a verdict of guilty of capital murder is well-founded. This requires an examination as to the nature of his participation.

The witness Daniel Reid had known Codrington for a very long time from school days. I adopt the narrative of Daniel Reid's evidence as stated in the judgment of Patterson J.A. with respect to Oneil Simpson's application:

> "Daniel Reid testified that he along with other persons were in the "top hall" of the home watching television when the gunmen struck. He saw five men, all armed with guns. Four of them entered the house through an open door; the fifth stood in the doorway. It is not clear what, if anything, each of those who entered did. This is what was elicited from the witnesses in his examination-in-chief:
>
> > 'Well when they come in there, sir, they said to Mr. Curtis sey, 'Pussy, a come fi kill you long time and rob you.'
>
> He said after the words were used:
>
> > 'They shoot him, sir ... Him drop on the floor, sir ... They rob him, sir. They go into his pocket, sir.'
>
> It is plain that all four men did not shoot the deceased, as only two bullets entered his body. Nevertheless, the witness was asked the following question:

> Q: What I want to find out from you, when they shot him you were looking at them when they shot him? [Emphasis supplied].
> A: Yes, sir."
>
> [End of quotation from judgment of Patterson J.A.].

Daniel Reid recognised Codrington as "one of those persons who came in". Codrington had a short gun and a long gun.

In the course of his summing up to the jury in dealing with the effect of Section 2(2) of the Offences against the Person Act the Learned Trial Judge directed, inter alia, as follows:

> "So far as violence is concerned what you do is you look to see if there is any unlawful exercise of physical force or any intimidation by the exhibition of weapon or threat of harm. [Emphasis mine].

He further stated:

> "... depending on what view you take of the particular facts presented for your consideration it would be further open to you to say the four who entered with their firearms discharging them are guilty of capital murder. ..." [Emphasis mine].

There was no evidence given that the four men who entered were all discharging firearms, nor indeed which of the four discharged firearms. Clearly all four men did not shoot the deceased who was shot twice, and the number of spent shells recovered at the murder scene does not establish the number of bullets fired. The Learned Trial Judge therefore erred in describing a scenario of four men entering discharging firearms.

Section 2(2) of the Offences against the Person Act (hereinafter referred to as "The Act') provides 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."

In ***Devon Simpson and Others v The Queen,*** Privy Council Appeals Nos. 35, 37 and 38 of 1995 their Lordships of the Privy Council in a judgment delivered by Lord Goff of Chieveley stated that:

> "This is known colloquially, if inaccurately, as the trigger man test".

It is necessary to consider whether since all the gunmen who entered were armed it could be determined that they all "inflicted or attempted to inflict grievous bodily harm on the person murdered" or that Codrington "used violence on that person in the course or furtherance of an attack on that person."

The infliction of grievous bodily harm on the deceased must in my view be evidenced by an act of the appellant which caused injury to the deceased, severe enough to be classified as "grievous bodily harm". The attempt to inflict grievous bodily harm on the person murdered takes place when someone tries to carry out that act.

The presence of the appellant at the time when the deceased was shot, though he was armed with a firearm in the absence of specific evidence of what he did with respect to the murdered victim does not in my view place him in the category of one who "attempted to inflict grievous bodily harm on the deceased." The evidence also does not establish that the appellant himself "used violence on" the deceased "in the course or furtherance of an attack on

that person." In ***Leroy Lamey v. The Queen***, Privy Council Appeal No. 56 of 1995, their Lordships of the Privy Council in a judgment delivered by Lord Jauncey of Tullichettle in considering Section 2(1)(f) of the Act stated:

> "The starting point in any consideration .... must be the fact that its object was to reduce the categories of murder which attracted the death penalty. It follows that a construction which produces little or no reductive effect is unlikely to be correct. Furthermore regard must be had to the general principle that a person should not be penalised in particular, should not be deprived of life or freedom unless on the clear authority of law (Dennions Statutory Interpretations 2nd Edition page 574)."

The interpretation of Section 2(2) must be approached in the same manner. In the absence of any evidence as to what the appellant did to the deceased at the time that the deceased was shot it is my view that the offence cannot fall within the category of capital murder under Section 2(2) of the Act which specifically identifies those who would be guilty of capital murder where the evidence implicating the accused person rests upon the common design of two or more persons. See also SCCA No. 151/95 - ***R v Aldon Charles*** - Judgment of the Court of Appeal delivered by Gordon JA at p. 9:

> "Perhaps because of the proclaimed finality of the sentence the legislature prescribes that the culprit must be personally involved in the infliction of the violence on the victim. The evidence must therefore be direct or the inference of guilt must be absolutely inescapable."

In my view the purpose of the section demands a restrictive interpretation. There must be an identifiable act carried out by the appellant and directed at the person murdered as distinct from the creation of an atmosphere of general fear.

The Legislature has not provided as it could have if it so intended that "it shall be capital murder in the case of any of them present and armed on the occasion of the murder."

In the circumstances therefore, the appellant Codrington cannot be categorised as being guilty of capital murder and I would allow the appeal in this regard, quash the conviction of capital murder and substitute therefor a verdict of guilty of non-capital murder which attracts the mandatory sentence of imprisonment for life. I would further prescribe a period of twenty-five years imprisonment to be served by the applicant before he would become eligible to apply for parole, such sentence to commence on the 9th May 1995.

PATTERSON, J.A.:

On the 28th March, 1995, in the Circuit Court Division of the Gun Court held at Kingston, the applicants were convicted of the capital murder of Cleonoso Curtis in the course or furtherance of robbery on the 31st December, 1992. They were sentenced to death, and each applied for leave to appeal against conviction and sentence. My judgment and the reasons therefor which we reserved at the conclusion of the hearing of the applications on the 25th September, 1996, now follow.

At about 9:15 p.m. on the 31st December, 1992, the deceased, a farmer and butcher, was in the "bottom hall" of his home at Golden River in St. Catherine, engaged in packing meat in a refrigerator, when a group of five gunmen invaded his home. Four of them entered the house, and at least three gunshots were heard. A post mortem examination revealed that the deceased was shot twice; one bullet entered his upper right anterior chest and perforated both lungs; the other went through his left arm. Death resulted from the gunshot to the chest. The gunmen rifled his pockets, and afterwards they robbed other occupants of the home before making good their escape.

The prosecution case depended to a large extent on the correctness of the visual identification of the gunmen by two witnesses, Daniel Reid, a farmer and butcher, and Mark Samuels, a pre-trained teacher. The common-law wife of the deceased, Valda Wilson, also testified, but she did not identify any of the applicants.

Mr. Soutar, on behalf of Simpson, and Mr. Harrison, on behalf of Saddler, both contended that the quality of the identification evidence in each case was so poor that the judge should have withdrawn the case from the jury and directed an acquittal at the close of the prosecution case. Mr. Morrison, Q.C., on behalf of Codrington, did not base his contention on the identification evidence. His grounds of appeal were as follows:

> "1. That the learned trial judge erred in law in leaving a verdict of capital murder to the jury in the light of the evidence.
>
> 2. That the directions of the learned trial judge on the potential effect of the allegations of malice against the witness Daniel Reid were inadequate."

I will now refer to and examine the relevant evidence in relation to the individual applicants in light of the contentions of counsel.

Oneil Simpson's application

The identification evidence against this applicant was given by Daniel Reid and Mark Samuels. However, the circumstances in which the identification was made by each witness are quite different. Daniel Reid testified that he along with other persons were in the "top hall" of the home watching television when the gunmen struck. He saw five men, all armed with guns. Four of them entered the house through an open door; the fifth stood in the doorway. It is not clear what each of those who entered did. This is what was elicited from the witness in his examination-in-chief:

> "Well, when they come in there, sir, they said to Mr. Curtis sey, 'Pussy, a come fi kill you long time and rob you'."

He said after the words were used:

> "They shoot him, sir ... Him drop on the floor, sir ... They rob him, sir. They go into his pocket, sir."

It is plain that all four men did not shoot the deceased, as only two bullets entered his body. Nevertheless, the witness was asked the following question:

> "Q: What I want to find out from you, when they shot him you were looking at them when they shot him? (Emphasis supplied)
>
> A: Yes, sir."

The witness said he knew four of "those persons who came in, Leroy Chin, Bell, Codrington and Oneil Simpson." He had known Simpson for "roughly about five years." He would see him at Rock Hall and in and around Golden River. They "always generally talk and dem way dey, sir, and go near the yard, sir." He called the applicant by the name "Ray-Ray" and the applicant called him "Dan". It would appear, therefore, that this was a recognition case where the witness was purporting to identify a person whom he knew very well. The question of a mistaken identification would, therefore, be secondary to his credibility. He said the applicant entered the house with a short gun. It was put to him in cross-examination that he did not actually see the gunmen enter the house, and that he did not see the shooting. He insisted that he saw both. But what was contained in his written statement to the police given shortly after the incident conflicted violently with his testimony and created a material discrepancy. The statement in that regard was put in evidence, and this is what was recorded:

> "I heard as if some people had returned into the drawing room where Mr. Curtis was and I heard someone said, 'Give me the money - Ah it me come fah.' As soon as that was said I heard several gunshots."

That statement would have the effect of casting doubt on and weakening his identity evidence at that stage. But he went on to say he saw what the men did in the house after they had rifled the deceased's pockets. Surprisingly, he was not asked and he did not testify as to what specifically he saw each person do. He had moved from the top hall to a bedroom where he sought refuge under the bed. But he had the opportunity of seeing the four men again. They entered the bedroom, overturned the bed and drew him out. This is how his testimony continued:

> "Q: Yes, what happened when <u>they</u> draw you out and drape you up?
>
> A: <u>They</u> lick mi into mi head, sir.
>
> Q: With what?
>
> A: A gun, sir.
>
> Q: Yes, what happened next after <u>they</u> hit you in your head with the gun?
>
> A: <u>They</u> shub mi into a corner, sir."
> [Emphasis supplied]

He was taken from the bedroom and placed to sit in a corner in the hall. The men then left him there and went to another bedroom in which Valda Wilson had locked herself. They broke open the door to that room and entered. The witness seized the opportunity to leave the hall and he went to another room.

From there he saw the men leave the house; and when he later went outside he saw them walking towards the road. But although he had those further opportunities of seeing the applicant, he admitted under cross-examination that he never mentioned the name "Ray-Ray" to the police on the night of the incident. He said, "I never give him nuh name on that night, sir, till we go to the identification parade, sir." That explains why the police arranged an identity parade with the applicant as the suspect. The witness pointed out the applicant as a person he had seen "at the yard ... the night when them kill Mr. Curtis." But such a parade served no useful purpose, since the suspect was well known to the witness. Counsel suggested to the witness that he knew the applicant for about 25 years, and his answer was: (p. 21)

> "A: No, sir, nuh so long, sir.
>
> Q: Certainly more than five.
>
> A: I can't say a more than five, sir, or less than five, but I know him long time, sir.
>
> Q: So that when you went on the I.D. parade you were going there to point out Ray-Ray whom you had known before for five years or more, isn't that so?
>
> A: I know him because him come at the yard, sir, that's why I know him, sir. I couldn't say is this man or is that man, and I know is that man, sir. As fool as mi is I couldn't do that, sir."

The witness identified the applicant in court, but the hurdle that the prosecution had to surmount remained. The reason why the witness did not mention the name of the applicant to the police on the night of the incident was not explained. He mentioned the name of Codrington whom he also knew, but

omitted all reference to Simpson. This had a serious effect on his credibility and on the reliability of his identity evidence. So one must look to see if there was any other evidence which could support the correctness of this witness' purported recognition of the applicant. I turn now to the evidence of Mark Samuels.

Mr. Samuels who lived on the premises had just turned on the lights in his bedroom and was about to enter when he heard gunshots. He said the shots were "mingled, but it sounded like three gunshots." It appeared to him that the shots were being fired in the house. He took cover under his bed and shortly thereafter Mr. Reid joined him. Mr. Samuels said he saw four feet come inside the room, "that means two of them came in." The bed was overturned and he saw two men with guns. They ordered both Reid and himself out of the room and they went in the dining room where he saw two other gunmen. He was gunbutted and kicked by one of the men who demanded jewellery, and when he said he had none, that man "demanded" both Reid and the witness to sit in a corner. The first two gunmen held the witness and Reid at gunpoint, while the other two kicked off the door to Miss Wilson's room and entered it. After a while, the first two gunmen also entered Miss Wilson's room. The witness then ran from the house and he said he was "heading to the back of the yard when I saw a fifth gunman. I didn't see him immediately because I was running so fast that I turned to the back of the yard and I saw him. He also had a machete and he held it like this (indicating) and I made a turn and head down the drive way."

The witness pointed out Simpson on an identity parade on the 23rd January, 1993. He had never seen him before the night of the incident, but he said Simpson was the fifth man, the one he saw in the yard outside with the raised machete. He saw him by the light from a nearby pig pen and also the light from a street lamp. He said:

> "Okay, he was standing here beside the car, there was a pen right here, to his right and the pen had about four lights in there and the street light was behind him on the tree ... and there was also light coming from the kitchen section. We had outside lights there too."

He said he did not get very close to the person outside - he pointed out a distance estimated to be 18 feet. He admitted that he could have told the police in his written statement that "the last man was standing in the dark." The witness admitted that he was scared that night, and seized the opportunity to escape when the men left him in the dining room. He was running fast.

Those circumstances, in my view, give rise to the classic example of an identification case which depended on a fleeting glance made not only in extremely difficult conditions, but also in very frightening circumstances. The well known guidelines laid down in *R. v. Turnbull and others* [1977] 1 Q.B. 224 are apposite to this case; there can be no doubt that the quality of the identification evidence elicited from this witness against the applicant was indeed poor, and there is no other evidence to bolster its correctness.

Counsel in the court below unsuccessfully submitted that having regard to the state of the identification evidence the applicant ought not to be called

on to state his defence. The question arises, therefore, whether the learned trial judge should have withdrawn the case from the jury in light of the poor quality of the identification evidence presented against this applicant. When the totality of the evidence is considered, the major discrepancies and inconsistencies in the testimony of the two witnesses are evident and they are quite irreconcilable. What is remarkable is the fact that Reid puts this applicant among the four men that entered the house while Samuels places him outside the house. It would seem, therefore, that it could be urged that there was some evidence of identity and it was for the jury to assess the reliability of the witnesses and decide which they would accept, and not for the trial judge to withdraw the case from the jury in the circumstances. The trial judge followed, it seems, the guidelines laid down in *R. v. Galbraith* [1981] 73 Cr. App. R. 124, in rejecting the submission of no case to answer. However, in *Daley v. R.* [1993] 4 All E.R. 86, the guidelines in *Turnbull* and those in *Galbraith* were examined critically, and I consider myself to be bound by the decision in *Daley* (supra), the headnote of which reads:

> "Although a trial judge ought not to withdraw a case from the jury merely because he considered the prosecution evidence as unworthy of credit, since it was the jury's and not the judge's function to assess the credibility of witnesses, the judge ought to withdraw the case from the jury if it was based on identification evidence which, even if taken to be honest, was so slender that it was unreliable and therefore not sufficient to found a conviction."

It is my judgment, therefore, that relative to this applicant, the quality of the identifying evidence was poor and quite unreliable and, therefore,

insufficient to found a conviction. Therefore, the learned trial judge should have withdrawn the case from the jury and directed an acquittal. His failure to do so has resulted in a substantial miscarriage of justice and, accordingly, the conviction cannot stand. It is obvious that it would not be in the interest of justice to order a new trial.

Kwarmie Codrington's application

The prosecution case was based on the recognition of this applicant by Daniel Reid as one of the gunmen who came in the house the night Mr. Curtis was murdered. There was no question that the witness knew the applicant very well. They had been school mates as boys, and after leaving school, they had worked together at times. Reid said the applicant entered the house, armed with two guns, "short and tall". It was the applicant, he said, who hit him in the head with a gun, when "they draped him up in the bedroom." However, it was not recorded in his statement to the police that it was the applicant who did it. The applicant testified that he knew Reid for "roughly sixteen to seventeen years" - they were friends and co-workers. But in May 1992 he was arrested on a charge of shooting the witness Reid. He remained in custody up to September 1992 when he was granted bail. That case was pending in the Gun Court in Kingston at the time the deceased was shot. The witness Reid admitted that the case was pending then, and that subsequently he heard that the applicant had been acquitted of the charge. He denied having "a grievance" against the applicant because of the case, and that the reason he said he saw the applicant on the night of the 31st December was because he was vexed that

the applicant was out on bail. But the main thrust of the applicant's defence was an alibi. He testified that he spent the day in Kingston, and at the relevant time he was somewhere in the vicinity of the Old Traffic Court and Orange Street where one Paulette and one Pauline were selling foodstuff. He called witnesses to support his alibi. However, the jury, by their verdict, must have rejected the defence of alibi and the suggestion of malice on the part of the witness Reid.

The question of whether the evidence supported a verdict of capital murder must now be considered. Mr. Morrison, Q.C. submitted that the evidence did not establish that the applicant by his own act caused the death of the deceased. Nor did it establish that the applicant "attempted to or inflicted grievous bodily harm against the deceased or himself used violence on the deceased in the course or furtherance of an attack on him." In the circumstances, so he submitted, the jury ought to have been directed that it was not open to them to return a verdict of guilty of capital murder.

This is how the learned judge directed the jury on this aspect of the case: (page 283 of the transcript)

> "So Mr. Foreman and Members of the Jury, based on this principle of common design you may have persons acting together and committing murder. However, according to our law the type of murder committed by these persons acting together may be different. It may be capital murder or non-capital murder depending on what view you, the jury, take of the facts.
>
> Now, capital murder is committed where murder is committed by a person in the course or furtherance of robbery. That is a basic point that you ought to make note of. That where murder is committed by a person in the course or furtherance of robbery that is

"capital murder. But our law in Jamaica qualifies it, our law says only those who actually use violence on the deceased are guilty of capital murder. And any other person who is present and is caught by the principle of common design, in that the person is guilty of murder but that person did not use personal, did not use violence on the deceased, such a person would be guilty of non-capital murder.

So you may have a situation where several men, according to our law, commit murder but some have committed capital murder whereas the others have committed non-capital murder. And that would depend on what view you, the jury, take of the particular facts as to whether some used violence on the deceased and others present did not, but they were part of the common design.

So far as violence is concerned what you do is you look to see if there is any unlawful exercise of physical force or any intimidation by the exhibition of weapon or use of threats of harm. In the instance (sic) case the prosecution is saying four men entered the house with their guns, shots are fired, the deceased is killed, one man according to the evidence of the prosecution, remained at the door.

Now it would be open to you Mr. Foreman and members of the jury, in the light of what I have told you about common design to say that all five have committed the murder but depending on what view you take of the particular facts presented for your consideration it would be further open to you to say the four who entered with their firearms discharging them are guilty of Capital Murder in that they used violence on the deceased, whereas the one who you may classify as a look-out who personally did not discharge his firearm, although guilty of murder in that he is there ready, willing to assist he would be guilty of Non-Capital Murder. That is the law since the 14th of October 1992. So it is important Mr. Foreman and members of the jury, to focus on what the witnesses are saying each day. Focus on their position, the position of the accused as stated by the witnesses. The positioning and activities of the accused."

The Offences against the Person Act ("the Act") was amended by the Offences against the Person (Amendment) Act, 1992, which classified murder committed in certain circumstances as capital murder, and murder outside that classification as non-capital murder. Any murder committed by a person in the course or furtherance of robbery is a capital murder (s. 2(1)(d)(i) of the Act). But there is an important provision contained in section 2(2) of the Act which is this:

> "2(2) If, in the case of any murder referred to in subsection (1) (not being a murder referred to in paragraph (e) of that subsection), two or more persons are guilty of that murder, it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used violence on that person in the course or furtherance of an attack on that person; but the murder shall not be capital murder in the case of any other of the persons guilty of it."

There can be no doubt that the deceased was murdered "in the course or furtherance of robbery". The evidence clearly established that this applicant entered the house along with other men; and that they were all armed. It is unfortunate that the prosecution did not seek to elicit from the witness Reid what specifically each gunman did. However, the prosecution witnesses who were at the home of the deceased at the relevant time, testified hearing at least three shots fired. The evidence of the forensic pathologist established that only two bullets found their mark. The applicant entered the house with two guns exposed, brandishing them, but there was no evidence to prove that he shot the deceased or that he fired his guns. Nevertheless, I am of the view that there

was ample evidence to support a finding of capital murder. The evidence supported a finding that the applicant used violence on the deceased in the course or furtherance of an attack upon him. The ordinary dictionary meaning is to be given to the word "violence", used in section 2(2) of the Act. This was what the court said in *R. v. Peter Blaine & Neville Lewis* (unreported) S.C.C.A. 106 & 107/94 delivered 31/7/95. Violence includes intimidation by exhibition of an intended hostile attack. It is used to include some hostile act not covered by the actual physical infliction of really serious bodily harm resulting in death, or the attempt to inflict such harm, which is mentioned earlier in the section.

The word used in the Act is merely "violence" not "personal violence" or "physical violence", but the comprehensive word "violence" and, in my view, it is not restricted to actual physical force exercised on the person of another. It includes both actual violence and constructive violence. To constitute actual violence, it must be shown that the accused himself used physical force in order to overpower the victim and facilitate the murder. A simple example would be in the case of a person who actually holds the victim so that another may stab him to death. But even when no actual physical force is used, an accused may nevertheless exercise constructive violence. Constructive violence will be presumed where it is shown that the accused himself intimidated the victim by the exhibition of an intended hostile attack. The nature of the intimidation must be such as to at least give rise to a presumption that it must have instilled in the victim fear of immediate death or really serious bodily harm. A simple example

is in the case of an accused who holds the victim at gun-point to allow another to stab him to death. Both men, in my view, would be guilty of capital murder.

The section clearly recognises that it can be capital murder in two or more persons guilty of a murder done on the same occasion. Accordingly, where a number of men, all armed and displaying their weapons, together pounce on their victim with the intent to kill and rob him, and he is eventually killed and robbed, it matters not who it was that fired the fatal shot. It is clear that each and every one of them used violence on their common victim in the course or furtherance of an attack on him. Therefore, not only shall it be capital murder in that one who inflicted the fatal blow, but also in all those who violently pounced on the deceased. The common law principle of common design has not been abrogated, but the statute modifies the principle to the extent that although all those who are present and are part and parcel of a joint enterprise would be guilty of murder, it would be capital murder only in those who actually participated in the manner envisaged by the Act, and non-capital in the others who only played a passive role, for example, a "watchman". Another example of a murder that would be classified as non-capital is one committed by an unarmed man, who in pursuance of a common design to rob, prompted his partner to kill the victim. Mere words, in my view, may not be sufficient to amount to violence, within the meaning of section 2(2) of the Act.

In the case of *Leroy Lamey v. The Queen* (unreported) Privy Council Appeal No. 56 of 1995, their Lordships reminded us that in considering the construction to be placed on the Act as amended, the starting point "must be

the fact that its object was to reduce the categories of murder which attracted the death penalty." In my view, the construction that I have placed on section 2(2) of the Act clearly covers the object and spirit of the amendment. In the instant case, the gunman who did not enter the hall where the deceased was killed, although guilty of murder, would be classified as non-capital murder which does not attract the death penalty, although it would have done so prior to the amendment.

It seems quite clear that the applicant Codrington, armed with two firearms and brandishing them, was one of the four men who entered the home of the deceased and pounced on him with the intent to kill and rob him. That, in my view, is using violence in the course or furtherance of an attack on the deceased. The jury, without doubt, acted on the admirable directions of the learned trial judge and concluded that this applicant was one of those who used violence on the deceased in the course of an attack on him.

The construction which I have placed on section 2(2) of the Act nullifies the submission of Mr. Morrison, Q.C. on the first ground of appeal and, consequently, that ground fails.

The other ground of appeal questioned the adequacy of the judge's directions to the jury on the applicant's allegation of malice made against the witness Reid. Reid denied that his testimony was motivated by the fact that the applicant had been allowed bail on a charge of shooting him with intent to do him grievous bodily harm. The applicant testified as to his arrest on the complaint of Reid. He said he had helped Reid to get a job, and Reid was

envious of his supervisory position and that too motivated Reid to make the complaint.

That evidence was intended to show that the witness cherished vindictive feelings against the applicant and thereby cast doubt on his credibility. And so Mr. Morrison, Q.C. submitted that "although the learned trial judge correctly directed the jury that if the evidence given on behalf of the accused was believed by them, or put them in doubt, they should acquit, he failed to have related that direction to the question raised in the evidence as to Daniel Reid's motive for pointing out the applicant as one of the participants in the attack."

I am obliged to turn to the relevant parts of the summing-up of the learned trial judge to examine the validity of the submission. At page 288 of the transcript, this is what the learned judge told the jury:

> "The case depends on what view you take of the witnesses Daniel Reid and Mark Samuels particularly. You have to consider their evidence carefully. You bear in mind their demeanour, their apparent level of intelligence, and you use your powers of observation and your knowledge of your fellow Jamaicans and in relation to each of the witnesses you decide whether or not you regard that witness as truthful and not only truthful, as reliable.
>
> It is open to you to accept all or to reject all of what a witness has said or you may accept only a part of what a witness has said. And the question of acceptance or rejection of the testimony of a witness depends on what view you have formed of the witness."

The learned judge followed up by telling the jury "not to concentrate only on what I remind you of, you have to consider all the evidence." He reminded them of the evidence of Daniel Reid and in particular, he said: (at pp. 291-292)

> "Now at the time of the incident according to the witness, and indeed there is no dispute on it, it seems the accused man Codrington was on a charge at the Gun Court where Daniel Reid was the complainant in that case. What the defence is saying for your consideration is that Daniel Reid is motivated by malice; that he has grudge against Codrington because Codrington is a progressive sort of person and that he has named Codrington as one of the killers of Mr. Curtis because he detests how Codrington is progressive. You consider that and you determine that. Further, the defence is saying Daniel Reid was so upset that Codrington was on bail from the Gun Court and that that added to his malicious behaviour. Bear in mind that both the accused man Codrington and the witness Daniel Reid are agreed that Codrington at some stage has helped Daniel Reid to get a job. The defence is saying this is how some people reward those who helped them, name them in a murder. It is a matter for you to consider. You decide whether Daniel Reid is speaking the truth or not, whether he is being malicious in relation to Mr. Codrington. You consider that carefully."

The learned trial judge returned to the issue in reviewing the evidence of the applicant. This is what he said: (at p. 300)

> "The accused man Codrington told you further that he helped Daniel Reid with a job, getting a job, and he said that the problem really is that Reid and others are envious of him and that that is part of the reason why Reid has made this complaint, this statement against him, and that he also said that the fact that he was on bail from the Gun Court operated to cause Reid to accuse him of this crime.
>
> Well, Mr. Foreman and members of the jury, it is your responsibility to decide where the truth lies, who you can rely on, who you cannot rely on."

In my view, the directions were quite adequate, and nothing more was required to bring home to the jury the contention of the defence that the witness Reid had a motive to lie. The judge made it quite clear to the jury that it was their responsibility to decide if the witness was in fact lying. The jury has displayed by their verdict that they were quite unimpressed by the defence. Counsel's submissions were wholly unmeritorious, in my judgment, and accordingly this application must be refused.

George Saddler's application

The sole witness who identified this applicant as one of the gunmen was Mark Samuels. He testified that this applicant was one of the two men who came in his bedroom. The first opportunity he had of seeing the applicant came after the bed had been overturned. This is how the transcript of his evidence reads:

> "A: Mr. Saddler, I think the first time I saw him he was the one who came into the room. ... He was the one who stood away. Remember I told you that one was in arms reach. Well, he was the one who stood away."

He was asked how close the applicant got to him and he answered:

> "A: I don't think he got any closer than six feet.
>
> Q: And which part of him you saw?
>
> A: I saw his head, here (indicating). I could make out the relative height, whatever and saw his feet.
>
> Q: You only saw his chest?
>
> A: Head, chest, feet whole of him.

> "Q: From the back, side, front?
>
> A: Front, he didn't turn his back to me.
>
> Q: And, when he was outside now, when he got to the distance that you pointed out, which part of him you saw?
>
> A: His face.
>
> Q: Saddler I am talking.
>
> A: He faced me all the time.
>
> Q: And, which part of him you saw when he faced you?
>
> A: I saw his face, chest, shoulders. I wasn't looking down on his feet.
>
> Q: Now, from the time when the men came in, the two men that you first saw until you ran from the house, how much time would you say passed?
>
> A: Could be ten/fifteen minutes, I don't quite remember."

Both the bedroom and the dining room were well lit by electric light. Prior to that night the applicant was unknown to the witness, but the witness subsequently pointed him out on an identity parade as one of the men "who came to the house on the said date."

But his evidence was not without its weaknesses. His written statement to the police contained this sentence, which was admitted in evidence:

> "If I should see these men again I could only positively identify one of them."

The witness denied that those were his exact words, and he also denied telling the police that, "The last - I only got glimpses of them so I could not identify

them." That was in reference to the applicant Simpson. However, he went on an identification parade and pointed out Simpson as the man he saw outside after he ran from the house leaving four gunmen in the bedroom of Valda Wilson. He went on another parade on the 2nd February, 1993, and identified the applicant. He said he identified him by his "complexion, height and it seemed as if he had a receding hairline, the way the forehead protrudes." But he could not recall if he gave the police a description of any of the gunmen other than the one that was closest to him in the bedroom, and he said that person was not before the court. He admitted that he did not describe the applicant in his statement to the police, but he insisted that he was not mistaken as to his identity. He said the applicant faced him "all the time" and that he was dressed in "casual clothing". He placed the applicant in the dining room as standing somewhat behind another person and approximately 16 feet (demonstrated) from where he was. The time that elapsed from he first saw the two men to the time he ran from the house "could be ten/fifteen minutes, I don't quite remember."

On this evidence, counsel based two grounds of appeal, "(1) That the verdict is unreasonable or cannot be supported having regard to the evidence." "(2) The learned trial judge erred in law in declining the submission, at the close of the prosecution case, that the quality of the identification evidence was so poor that there was no case for the appellant SADDLER to answer."

The first ground seeks the exercise of the jurisdiction conferred on this court by section 14(1) of the Judicature (Appellate Jurisdiction) Act, which reads in part:

> "14(1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or ..."

For this ground to succeed, this court must conclude that under all the circumstances of the case against the applicant, the verdict of the jury is unreasonable, or unsatisfactory. The case against the applicant rested solely on the identification evidence of Samuels, but I think that he was discredited. The evidence clearly showed that he may have had ample time to see and observe the applicant, and therefore to make a reliable identification; but his failure to describe Saddler (as he did the other gunman) clearly indicated that his attention was focused on that other gunman and not this applicant. Although he denied saying so, his admission of his inability to identify anyone other than the man who was nearest to him cannot be brushed under the carpet, as it is consistent with the fact that he did not attempt to describe this applicant to the police. Yet he testified that on the parade, he was able to identify the applicant by his "complexion, height and it seemed as if he had a receding hairline, the way the forehead protrudes." He admitted he was frightened when one of the gunmen held the gun close to him, and that he was really scared when he ran off. What is quite irreconcilable is the evidence of Reid that four gunmen came in the room with that of Samuels that only two

came in. Reid did not identify the applicant as one of those he saw enter the house. Counsel submitted that those factors, which he had pointed out, in sum constituted the basis upon which he contended that the verdict is unreasonable or cannot be supported by the evidence. He said the identification was flawed and the verdict palpably wrong. There is merit in his submission. The identification evidence from the witness Samuels was really of a poor quality, with no other evidence to support it. I conclude that the verdict of the jury is unsatisfactory and cannot stand.

Having regard to what I have concluded on this ground, it is unnecessary for me to consider the merits on the other grounds so ably argued. However, since the third ground criticised certain aspects of the learned judge's directions to the jury, I think it appropriate to recall the sage words of Lord Hailsham, L.C. in *R. v. Lawrence* [1981] 73 Cr. App. R. 1, when he said (p. 5):

> "A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's note book. A direction to a jury should be custom built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts."

CONCLUSION

For the reasons I have stated, it is my judgment that in the case of Simpson and of Saddler, their applications for leave to appeal against conviction should be granted and the hearing of their applications treated as the hearing of the appeal. The appeals are allowed, the convictions quashed and a judgment and verdict of acquittal is directed to be entered in respect of each. However, I respectfully beg to dissent from the judgment of the majority in respect of the applicant Codrington. It is my judgment that the application for leave to appeal is refused.

BINGHAM, J.A.:

Oneil Simpson:

George Saddler:

I have read the judgments of Patterson, J.A. and agree with his reasoning and conclusion.

Kwarmie Codrington

Having read the views expressed in the judgments of Rattray, P. and Patterson, J.A., I am in agreement with conclusions reached by Rattray, P. Given the importance of the matter, however, I wish to state my reasons for doing so.

It is common ground and not in issue that there was no evidence emerging at the trial as to who shot and killed the deceased. Two bullets found their mark on his body. One bullet having entered the left arm made its exit through the arm and is described by the medical expert witness as being a "through and through gunshot wound." The fatal gunshot injury went into the chest cavity, penetrated both lungs and came to rest in the left shoulder joint. This copper-jacketed bullet which was recovered during the post mortem examination was handed to the police officer present at the time. No firearm was recovered by the police in the course of their investigations. There was evidence at the trial from the two eyewitnesses Daniel Reid and Mark Samuels, that all the men who entered the house were armed. Codrington was described by Reid as being in possession of a long gun and a short gun. The

witnesses were not questioned as to who did what in relation to the shooting of the deceased. For the appellant to be brought within section 2(2) of the Offences against the Person (Amendment) Act, 1992, there is no issue that on the basis of the doctrine of common design, all including the watchman were guilty of murder. The Crown, however, had to go further in establishing capital murder against the appellant by adducing positive evidence which established affirmatively that:

> 1. He by his own act caused the death of the deceased.
>
> 2. He inflicted or attempted to inflict grievous bodily harm on the deceased.
>
> 3. He used violence on the deceased in the course or furtherance of an attack on the deceased.

For this it can be seen that to fall within this classification, the act must amount to an assault of a physical nature on the victim. The highest that the evidence went in this area was for Daniel Reid to say that "they shot him". All four men were armed and there was no evidence as to which of the men discharged their weapons. The evidence was that at least two bullets fired from two different guns struck the deceased. There is no evidence upon which one could say that the appellant discharged any of the firearms or that it was one of the appellants' guns which shot and killed the deceased. There is likewise no evidence that the appellant inflicted or attempted to inflict grievous bodily harm on the deceased. Moreso that he used violence on him during the incident.

As Gordon, J.A. remarked in SCCA 151/95 *R. v. Aldon Charles* (at page 9), after having reviewed with extreme care the facts in that case:

> "Perhaps because of the proclaimed finality of the sentence the legislature prescribes that the culprit must be personally involved in the infliction of the violence on the victim. The evidence must therefore be direct or the inference of guilt must be absolutely inescapable." [Emphasis supplied]

As the evidence in this case does not in any way approach the standard adverted to above, the only course open to us would be to allow the appeal against sentence and substitute a verdict of guilty of non-capital murder.

As to the recommendation in respect of the period to be served before parole, I am in agreement with the period to be served before parole as recommended in the judgment of Rattray, P.

RATTRAY, P.:

The judgment of the court is as follows:

In the case of Simpson and Saddler, their applications for leave to appeal against conviction are granted, and in the case of Codrington, by a majority, his application for leave to appeal against conviction is also granted. We treat the hearing of the applications as the hearing of the appeals. In the case of Simpson and Saddler, the appeals are allowed, the convictions quashed and a judgment and verdict of acquittal is directed to be entered against each. In the case of Codrington, by a majority, his appeal against conviction is allowed, and the verdict of capital murder is set aside and the sentence quashed. A

verdict of non-capital murder is substituted therefor, and a sentence of imprisonment for life imposed, and the court specifies that he serves a period of twenty-five years before becoming eligible for parole. Sentence to commence 9th May, 1995.