JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 39 & 40/92

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

REGINA
vs.
ROWAN FRASER
AILEEN FRASER

Frank Phipps, Q.C. and Wentworth Charles
for Rowan Fraser

Dennis Daly, Q.C. and Rudolph Smellie
for Aileen Fraser

Glen Andrade, Q.C., Director of Public Prosecutions, and Bryan Sykes
for the Crown

November 8-12, 15-19, 22-26;
December 20, 1993 and July 29, 1994

RATTRAY, P.:

The appellants were charged along with Allison Fraser with the murder of Henry Aubrey Fraser consequent on the finding of a Coroner's jury in an Inquest held in June 1991. In a trial which lasted nineteen days the jury acquitted Allison Fraser and returned a verdict of guilty of murder against the appellants.

The deceased, generally known as Aubrey Fraser, was born in British Guyana, now Guyana, and had held high judicial positions in several Caribbean territories. On retirement from the Bench as a Judge of the Court of Appeal of Trinidad & Tobago, he came to live in Jamaica, where he assumed the post of Director of Legal Education in the Council of Legal Education which had the responsibility for the development of the Norman Manley Law School in Jamaica and the Hugh Wooding Law School in Trinidad & Tobago, a position from which he had also retired. His wife

Aileen is a Jamaican. At the relevant time Mr. Fraser was 67 years of age and Mrs. Aileen Fraser 69 years. They had been married for thirty-eight (38) years. On all accounts their relationship was excellent, and the family was a close and loving one. They had five children, all adults. On the relevant date two lived overseas and the others, Allison, Rowan and Stuart lived with their parents in the family home at 1 Sunset Avenue, Jack's Hill, St. Andrew.

On the 29th of November, 1988, Aileen Fraser was employed part-time at the Radio Unit at the University of the West Indies, assisting in the compilation of scripts and programmes. Aubrey Fraser had been commissioned to be Chairman of an Enquiry into an accident which had taken place at the Jamaica Flour Mills and was so engaged at the material time.

SEQUENCE OF EVENTS:

The evidence disclosed that on the 29th November, Aileen was brought home from work by her son Stuart. Her husband arrived after at about 6 p.m. Stuart who had been at home at various times during the day had prepared a meal of chicken soup for the family dinner. The day before had been his birthday. Aubrey Fraser sat down at the table in the kitchen to eat his meal just as Stuart was leaving, which on Stuart's evidence was a little after 7 p.m. Stuart left behind in the house his brother Rowan and his parents, Aubrey and Aileen Fraser. Stuart told the Court that his father had on a dressing gown when he left but was not dressed for bed. His mother was in the kitchen and Rowan was in the bath-room taking a shower. Just before he left Stuart saw Rowan going into his father's bedroom. A visitor, David Silvera, a friend of Stuart had been at the home with Stuart and his evidence supports this. They left together with the intention of celebrating Stuart's birthday over drinks along with another friend, Peter Daley, whom they intended to collect. Stuart and David went to Peter's house, and leaving there, they bought chips, and chasers for drinks. Having decided to have the celebration at Stuart's

house, they returned to Sunset Avenue at about 10 p.m. or shortly after along with Peter Daley. They were admitted into the house by Aileen Fraser. The three young men went to the verandah to have their celebratory drinks. Aileen Fraser was working in the kitchen at the dining table. At about 10.30 p.m. she came on to the verandah and said to Stuart in the presence of his two friends, that in Stuart's words:

> "...she just come from my father's room, had to look around the door and could see his head covered and she said that she is sure that he was trying a new form of yoga."

No one went to see this spectacle. Aubrey Fraser practised yoga from time to time.

Aileen came to the verandah to tell the young men good night some time between 12.30 a.m. to 1.00 a.m. About a minute or two after she had done so she returned to ask the visitors to leave. She appeared to Stuart to be disturbed. Stuart asked why? She said something which he did not hear.

Mr. Peter Daley who was present gave evidence that Mrs. Fraser told them that her husband was not very well and she was asking them to leave.

Stuart went to his father's room which was the master bedroom where both parents slept. In their bedroom there were two beds sharing a common headboard. The lights were on. His father was on the bed on which he usually slept. Stuart said, "Aubrey, what is wrong?" He got no response. As a result he felt his father's pulse and detected no beating. The fact was that Aubrey Fraser was dead.

NATURE OF INJURIES:

The post mortem examination performed by Dr. Ramesh Bhatt on the body of Aubrey Fraser revealed:

1. Seven superficial circular wounds, about 1/8 of an inch in diameter, in an area of one inch in diameter in the mid-clavicular line on the left side of the chest.

2. Two similar wounds, one inch lateral to these wounds.

"3. Eleven stab wounds ranging from 3/4 inch to ¼ inch in length on the left side of the neck in an area of 1 inch in diameter.

4. Two circular stab wounds, each ¼ inch in diameter just below the left ear.

5. Multiple fractures of the frontal bone of the scalp, that is, just above the two bones of the eyeballs at the base of the skull.

Death was due on the medical evidence to shock and haemorrhage as a result of injuries to the head and multiple stab wounds to the neck.

THE POSITION OF THE BODY:

The body of Aubrey Fraser was lying as described by Stuart in the bed on its back. The lower part of his body was covered with a blanket. The upper part was dressed in a grey sweat suit, which Stuart said he wore sometimes as pyjamas when the weather was cold. There was a towel lying across the top of his head and another on his chest. There was a pillow on the right side of his head. The head was upright and resting on a pillow or cushion. There was a drip of blood on his nose, and some splashes on his upper chest. His chin was down on his chest. The police witnesses described the blanket as being tucked under, and the legs of the deceased crossed.

CONDUCT OF AILEEN FRASER:

Aileen Fraser told Stuart that she had tried to call Dr. Orrin Barrow, a family friend and Medical Doctor but could not get through. Hugh Cholmondeley, a relative of Mr. Fraser, gave evidence that Mrs. Fraser telephoned him to try and contact Dr. Orrin Barrow as she had tried without success, because Aubrey's hands were cold and clammy and he was not well. Stuart asked his friends to leave and they did. He tried artificial resuscitation but Aubrey Fraser did not respond. He realised his father was seriously injured but couldn't accept the fact that he was dead. His mother telephoned Dr. John Martin, a Medical Doctor and next door neighbour, who came promptly, examined the body and said, "Boy, he is gone", interpreted to

mean that Aubrey Fraser was dead.

Dr. Martin, suspecting foul play, rang the Commissioner of Police. The police arrived on the scene, approximately half an hour to forty-five minutes after the telephone call had been made.

DR. JOHN MARTIN:

Dr. John Martin gave evidence of receiving at about ten minutes to one a.m. a phone call from Mrs. Aileen Fraser in which she said, "Dr. John, Aubrey is clammy and cold and I can't manage him, could you come over and help me?" He arrived at the home about two to three minutes after receiving the phone call. Stuart met him and took him to the room in which Aubrey Fraser was, where Mrs. Fraser met him at the door to the room and said, "Sorry John, Aubrey passed." He entered the room and "saw Aubrey flat on his back, his arms crossed in sweet repose." He described the position of the body in the bed. He did an examination and concluded that Aubrey Fraser was dead. During the examination, blood got on his hand. He went into the bathroom to wash it and noticed that in the bathroom which is attached to the bedroom a toilet tank cover was missing. He picked up a phone in the bedroom intending to call the police but that phone was not working. He asked for another phone. He was taken to another room where he was given a phone which was working and he called the Commissioner of Police from that room. He was told that the toilet tank cover had been found on the bed in another room usually occupied by Allison Fraser. On being shown the toilet tank cover he told the Court that in his opinion it could have been used to inflict the injury to the head with a fairly great degree of force.
Mr. Fraser was a big man, approximately six feet two and weighing between 235 and 245 pounds. He thought it unusual for the body to be in the position in which he saw it, because he would have expected it to have been in a defensive attitude, that is, he would have expected him to have put up some sort of struggle.
He gave an opinion as to the time of death which we will deal

with later. He would be prepared to describe Mrs. Fraser's condition when he saw her as being in deep shock. On a suggestion made to him that it was the telephone in the bedroom in which Aubrey Fraser was that was used, he was adamant that "the telephone where the body was, was not usable." This is in conflict with the evidence of other witnesses that it was the telephone wire in Allison's room which was cut and made that telephone unusable. The telephone in the master bedroom was usable and in fact used. Dependent upon the person who hit him, the force used, the weight of the instrument and the strength of the person hit, he admitted that it was possible that if Aubrey Fraser was so hit in the head and rendered unconscious, there would have been no signs of a struggle and no defensive attitude. He described the head wound as severe but maintained that "the minute I saw foul play it was now in the hands of the police and the Government Forensic Medical Doctor. I came over as a friend to see a sick patient."

THE HOUSE AT 1 SUNSET AVENUE:

The Fraser's family home is a large two storey dwelling. At one end is a master bedroom occupied by Mr. & Mrs. Fraser. There are four windows in the corner of the room, two on the south and two on the north. The windows were described as "two part window fram.. 24' across and 4' high" with wooden slat jalousie type shutters on the outside. On the inside the windows are of glass and they slide vertically up and down. They are what are known as sash windows. There is one burglar bar to the top of each glass window, none to the bottom. The wooden shutters can be bolted. If the shutters are open and the glass windows pushed up, entry into the room is unobstructed. The uncontradicted evidence is that is how the Frasers slept, with the windows open. The master bedroom in which the parents slept has its own bathroom. A passage leads from that bedroom to the other end of the house. Along the passageway there is Allison's room, a bathroom, a room used by Stuart for sewing in his craft work, a drawing room, dining room and kitchen and beyond that two bedrooms

occupied, one by Stuart and one by Rowan. Downstairs is a garage and helper's quarters. The sash glass windows are always kept up except for instance when there is a hurricane. From the drawing-room to the master bedroom it is 32 feet and the width of the drawing room 15 to 16 feet and of the dining room 15 feet. Sitting at the dining table as Aileen Fraser was on the fateful night, it is not possible to see the passage leading to the master bedroom.

THE ALARM SYSTEM:

There is an alarm system attached to the master bedroom which according to Stuart is "button activated." The prosecution's evidence is conflicting with regard to what was necessary to set off the alarm. What is established, however, is that on the night of the 29th November the alarm did not go off. On the morning of the 30th, Detective Hyman Smith entered the master bedroom and the alarm went off. Many persons had been in and out of that bedroom before Detective Hyman Smith arrived on the scene and the alarm did not go off. There is a statement taken in writing by the police on the 1st February, 1990, from Mrs. Fraser that "one of the policemen who had come there the night actually set it off." She further stated:

> "The alarm is against the wall and is button activated, if one pass near the wall where it is located it would be set off. The alarm is by the window facing the sea near to the door near to Mr. Fraser's bed. This is one of the things that puzzles me, how the person could pass by and not activate it."

THE DOGS

There were five dogs kept at the Fraser's house. On the Crown's own case, this question of whether the dogs on the premises were fierce or not was a matter of dispute. Ephraim Adams, a former driver of Mr. Fraser who at the time carried out gardening duties at the home said the dogs were fierce as he had been bitten by two sluts on two occasions. He, however, concluded by saying that once you are in the place and the dogs are loose, they would not attack you. Peter Daley could not say that they

were fierce but he is not familiar with dogs and so he would not go in without an escort. Stuart Fraser said the dogs were not fierce and he described them as pets. Three were old Labradors, one an Alsatian, and a mongrel named Princess. When he came home with David and Peter, Princess was barking, and so he took her into the house and locked her in.

THE MISSING ITEMS:

Stuart found the drawers of the sewing machine in his work-room all pulled out and the telephone line cut. Sewing supplies, scissors, needles and threads were missing. When his father arrived that evening he had taken from him a file on the Flour Mills Enquiry which was about six to eight inches thick. When he saw this file after the murder it was only about two inches thick. There were seventy-two photographs taken by Stuart in relation to the Flour Mills Enquiry and these were also missing. They were normally kept in Mr. Fraser's briefcase. Items also missing from the house were one lady's watch, one gent's wrist watch, one Olympus camera, one bedside clock radio with N.C.B. insignia, and a Hitachi AM/FM radio.

THE MEDICAL AND SCIENTIFIC EVIDENCE:

The medical and scientific evidence came from Dr. John Martin, the next door neighbour, Dr. Ramesh Bhatt, the Government Pathologist, who performed the post mortem and Mrs. Yvonne Cruickshank, the Government Forensic Analyst. Dr. Martin's examination could be regarded as cursory, but we will refer to his evidence later in relation to his opinion as to the time of death. From Mrs. Cruickshank's and Dr. Bhatt's evidence it was clear that the weapon which inflicted the injury to the chest or upper neck did not pass through the sweat shirt. They both admitted, however, that this meant:

(a) either that the deceased did not have the sweat shirt on at the time when the injury was inflicted and the sweat shirt was therefore put on afterwards, or

(b) the neck of the sweat shirt was pulled down and the injury inflicted, or

(c) the sweat shirt was pulled up and the injuries inflicted.

With regard to the chest injuries Dr. Bhatt's evidence was that there was no blood but oozing of tissue fluid. This indicated that these injuries would have been inflicted either a few minutes just before death or after death. If inflicted before death the heart would be pumping but feeble. It would be slow because of the haemorrhaging elsewhere. There were no defensive injuries at all, that is, on the hands. The injury to the head itself could have caused death within a few minutes. The injury would have rendered the victim unconscious instantaneously. Therefore death would have been caused either by the head injury or the neck injury or a combination of both. In his opinion the chest injuries were most likely to have been inflicted after the injuries to the head and neck. The stab wounds in that area of 1 inch - eleven stab wounds, might explain the mental status of the assailant at the time. It might show that the assailant was too furious or broken down emotionally. In Dr. Bhatt's opinion these injuries were inflicted when the deceased was motionless. He was asked:

"Q: Having regard to the injuries you saw, the extent of the injuries you saw, how would you regard the position of the body when you saw it at the scene? Was it usual or unusual?

A: Well it all depends on the mode on which he got the injuries, it all depends upon how he received the injuries.

Q: Well, you tell us.

A: If a person is lying down and suddenly he is hit on the head it may render him unconscious, after that, if the neck injuries and chest injuries are inflicted you may see it that way."

It was the doctor's firm opinion that the first blow that was delivered, was the blow to the head. Very probably Mr. Fraser was unconscious when the stab injuries were inflicted and that was consistent with the absence of any defensive injuries. The absence of bleeding from the wounds to the chest was consistent with the head injury having been first inflicted and therefore the subdural haemorrhage would reduce the blood flow. The accumulation of blood on the back of the sweat shirt would not enable him to say whether the deceased was wearing the sweat shirt before or after.

The accumulation of blood on the sweat shirt would be consistent with the deceased being in a reclining position with the sweat shirt on and the blood draining back.

Shown two letter openers which were exhibits in the case Dr. Bhatt said they could have caused the injuries to Mr. Fraser's neck and chest.

TIME OF DEATH - DR. BHATT:

Dr. Bhatt used two factors to assist him in giving his opinion as to the time of death of Mr. Fraser. The first was post-mortem rigidity, the second the contents of the stomach.

Considering both he would put the time of death at about sixteen hours before he carried out the post-mortem examination at 1:30 p.m. on the 30th November.

Taking post-mortem rigidity by itself, with climatic conditions between cool and cold in that area the normal time for post-mortem rigidity in hands and feet was fourteen to eighteen hours. It could go up to twenty hours. Having however been told that Mr. Fraser ate a meal at 6:30 p.m. if he used the time of twenty hours this would put time of death at 5:30 p.m. which could not be correct.

With respect to the condition of the stomach he saw food in the stomach. Presence of food in the stomach is helpful in determining time of death. The emptying time of the stomach is between four to six hours. Partial emptying will start from half-an-hour to one hour. To quote Dr. Bhatt:

> "So considering stomach contents which were just partially digested, food particles were still there and the stomach was full I would put it at half the time of emptying. I put it at two to three hours after the last meal."

What Dr. Bhatt is saying is that after finishing his meal Mr. Fraser's stomach would have been full. Applying emptying time and the condition of the stomach contents which he saw, his opinion was that Mr. Fraser died two to three hours after he had finished this meal.

On the post-mortem rigidity test that time of death calculated sixteen hours before the post-mortem examination at 1:30 p.m. would establish that time to be 9:30 p.m. on the 29th of November.

On the stomach contents test if Mr. Fraser finished his last meal at 7:00 p.m. the time of his death would be between 9:00 p.m. and 10:00 p.m. Although the prosecution put 6:30 p.m. to Dr. Bhatt as the time of the last meal that time is not supported by any evidence. It is based upon an oral statement given by Mrs. Fraser to Asst. Commissioner Wray that her husband had supper at about 6:30 p.m. This extra judicial statement is not evidence against Rowan Fraser, the appellant most affected by a determination as to the time of death.

The evidence of the Crown through Stuart Fraser was that his father sat down to have his meal just as he, Stuart was leaving, which was a little after 7:00 p.m. In this event, on Dr. Bhatt's evidence the death would have occurred then between 9:00 and 10:00 p.m. This does not accord with his opinion given to the Trial Judge that death took place between 7:00 and 9:00 p.m. nor with his answers to Mr. Phipps Q.C. in cross-examination as follows:

> "Q: In answer to my learned friend, Mr. Andrade, did you say that death took place at about 9:30 p.m.?
>
> A: I didn't get that question.
>
> Q: Let me get the actual notes that I have. That is why I want

" to have it clarified. Yes, about sixteen hours, your post-mortem examination was sixteen hours after death?

A: After sixteen hours.

Q: That would take you back to about?

A: 9:30, about 9:30."

On further cross-examination Dr. Bhatt said:

"Q: That means from the condition that you saw, that death would have been between 9:00 and 10:00?

A: 9:00 and 10:00 with the stomach contents."

And then in re-examination by the Director of Public Prosecutions:

"Q: Doctor, could you explain for me? In answer to His Lordship you said as to the time of death would have occurred between 7:00 and 9:00. Do you still stick by that?

A: Yes, sir."

TIME OF DEATH - DR. MARTIN:

As soon as Dr. Martin suspected foul play he recognised it as a matter for the police. He carried out no detailed examination.

It is in this context that we have to examine his evidence as to the time of death of Aubrey Fraser. He gave an opinion as to the time of death as between 7:30 p.m. and 9:30 p.m. He based this opinion upon "rigor mortis - the stiffness of the neck". He admitted the limitations of this circumstance:

"My examination was purely clinical and in my opinion three to four hours was the time of death and I said there are other more accurate methods to determining death, the length of food in the stomach etc. . . ."

He saw the body at approximately 12:50 a.m. A calculation will show that on this evidence, the time of death would have been between 8:50 p.m. and 9:50 p.m. on the 29th November. His earlier evidence was that he was telephoned by Mrs. Fraser about 10 minutes to one in the morning, but it only took him two to three

minutes to get to the Fraser's home where he was met by the door by Stuart.

TIME OF DEATH - MRS. YVONNE CRUICKSHANK:

Mrs. Yvonne Cruickshank, the Government Analyst who arrived at 5:30 a.m. at the home made certain observations with which we will later deal.

However, as to the time of death she maintained that assuming that the deceased had a meal at 6:30 p.m. and there was found in the stomach undigested food and the post-mortem was done at 1:30 p.m. the following day, the meal, if a light meal, would be digested within two hours and if a heavy meal within three hours. The specific meal being put to her would be within three hours. In her opinion death would have occurred by 9:00 o'clock or before 9:00 o'clock. In answer to the Director of Public Prosecutions:

"Q: Between what time?

A: You said 6:30? 5:30 to 9:30 would have completed the digestion.

Q: So within what time death would have occurred?

A: Death had to occur before nine o'clock.

Q: Anytime before?

A: I cannot put a time because I didn't see the contents, whether it was partially ...

Q: Undigested?

A: Undigested can mean anything, sir.

Q: But you would put it up to what time?

A: Nine o'clock.

HIS LORDSHIP: So it would have to be anytime between when the meal was had and nine o'clock?

WITNESS : Yes, sir."

Mrs. Cruickshank's opinion was asked based upon certain assumptions. She was not present at the post-mortem examination by Dr. Bhatt. The meal described to her in her opinion would be totally digested within three hours of eating it. Given the completion of the meal at 6:30 p.m., death had to occur before 9:00 p.m. However when questioned by the Director of Public Prosecutions further her evidence was as follows:

"Q: Anytime before?

A: Yes sir."

The time given to her for Mr. Fraser completing his meal was 6:30 p.m. We have already commented on this with respect to Dr. Bhatt's evidence. Her opinion was given admittedly without having seen the stomach contents. She further admitted not seeing what he had eaten nor the physical condition of the eater, nor the quantity of food eaten. All these are elements required in order to give a firm opinion. Her expertise did not extend to pathology. She admitted also under cross-examination that the emptying time of the stomach varies from two to six hours. She accepted as correct a statement in a publication put to her - Scientific Evidence in Criminal Cases by Moenssens and Bumiban that:

> "Stomach contents may also be examined in determining time of death as well as cause of death. This is done on the basis that the stomach usually empties from four to six hours after the last meal."

MRS. CRUICKSHANK'S FURTHER OBSERVATIONS:

She related that:

> "In the bathroom, the shower of the bathroom, there was earth stained shoe prints. There was a white toilet tank cover which was found on the southern twin sized bed in the northern bedroom, and this could have come from the master bedroom; the toilet tank there was missing."

The body of the deceased was on the southern bed and there was a brown bath towel on the bed with blood present in brown smudges. All locks and bolts to doors and windows seemed intact. Blood was present in small brown droplets on the pillow. There was no evidence of blood on the eastern wall adjacent to the bed-head. There was no sign of things being tossed about in the room. She gave evidence as to the position of the body. She expected blood on the wall or on the bed-head or even the bed-side table. The position of the body seemed unusual to her. The shoe prints in the shower stall appeared to be that of a track shoe. The sweat shirt had no cuts or openings and the absence of those suggested to her that when the person was injured he was not wearing the shirt. There was smudging on the inside of the sweat shirt that would suggest to her that the smudge occurred while the garment was being put on or taken off. She saw the briefcase but gave no instructions in relation to it. She did see a dark blue denim cotton cushion resting on the bed-head by the body and she examined it. There was blood on the cushion. The cushion was left there and was not taken by her. She did not see the injuries to the deceased's chest. She examined the letter openers and found no blood. Asked in cross-examination:

> "Q: Is it possible, Mrs. Cruickshank that if he was first hit in the head and then stabbed in the neck there would be no blood on the wall?
>
> A: I would say there would be no blood on the wall."

In our view the evidence as to the time of death of Mr. Fraser was left in such a condition that:

> (a) death must have occurred after 9:00 p.m. at a time when as will be seen Rowan Fraser had already left the home, or
>
> (b) no jury could properly rely upon evidence left in that state.

ROWAN'S DEPARTURE FROM SUNSET AVENUE:

The Crown's case is that Aubrey Fraser was killed after Stuart Fraser had left the house with David Silvera and before he returned with David and his friend Peter Daley at approximately 10:00 p.m.

Present in the house when Stuart left at seven o'clock or shortly thereafter were Aileen Fraser, Aubrey Fraser and Rowan Fraser. Rowan is an Avionic Engineer who was employed at the time to Air Jamaica at the Norman Manley Airport. The time of departure of Rowan from the home at 1 Sunset Avenue is well established. A witness George Cameron employed to Chin's Transport, a company which is contracted to take employees to the Airport gave evidence that he took up Rowan at the home between 8:50 p.m. and 9:00 p.m. that night to drive him to his job at the Airport and there is no evidence in contradiction of that. Jacks Hill Road from Sunset Avenue, the family home was not passable that night. The time of Rowan's departure will become crucial to a determination of this appeal in respect of Rowan in terms of the evidence before the Court as to the time of death.

THE POLICE INVESTIGATION:

ASST. COMMISSIONER DANIEL WRAY:

At the commencement the police investigating team was headed by Asst. Commissioner Daniel Wray. He arrived at the Sunset Avenue home approximately 1:40 a.m. on the 30th November leaving at about 7:00 a.m. He observed that there were four windows in the master bedroom, two on the southerly and two on the northerly side. The two most westerly windows on the southerly side were closed and the two other windows were open with glass panes pushed up and with a burglar bar across the top. There was no evidence that the windows were forced. The toilet tank cover was on a bed in an adjoining room to the master bedroom. There was no evidence of a struggle in the master bedroom or of ransacking. In the top drawer of a chest of drawers in a closet in the master bedroom was a wallet and keys which he was told belonged to Aubrey Fraser.

Under the window to the south on the ledge were streaks of brown dirt. He saw no impressions under the northern window. In a room which was across the passage from a bedroom beside the master bedroom he saw a black telephone with the attachment wire cut with a sharp instrument. He had reports of missing items which he listed. Mrs. Fraser gave him a narrative of Mr. Fraser coming home at 5:30 p.m., having supper at about 6:30 p.m. and then going into his room as usual to listen to the 7 o'clock BBC News on the short wave radio. Stuart came home at about 10:05 p.m. with his two friends and they went on the verandah to have drinks. As they were speaking loudly she went to the master bedroom to check if her husband was being disturbed. She found the door closed. Pushing it she found that there was an obstruction behind the door. She remained in the dining room until about 12:40 a.m. She went back to the bedroom, found the door still closed and pushing it discovered that what was blocking the door was a carton box of books. The light in the master bedrooom was on. She turned it off and went into the bathroom. She saw her husband's brief-case on the floor open with documents strewn all over the floor. She packed them back in the briefcase, looked across and said to her husband: "Man, what happened to you?" She turned on the room light and saw her husband lying on his back in the position which has been earlier described. She felt him and he was cold. Realising that he was dead, she went to Stuart, told him to ask his friends to go "because something happened to your father". She tried to get Dr. Orrin Barrow, he was not home. She called a Mr. Cholmondeley, a relative of her husband and then she telephoned Dr. John Martin.

Assistant Commissioner Wray said that the place was dusted for fingerprints but the prints of the deceased were not taken. He gave instructions for the toilet tank cover and the brief-case to be dusted for fingerprints and that the towels and pillow along with the garments Mr. Fraser was wearing to be submitted to the Forensic Laboratory.

On the 1st of February, 1990 at 79 Duke Street, Det. Insp. Trevor Chin took a statement from Mrs. Fraser in the presence of Senior Superintendent Hibbert. It was a cautioned statement. This statement was tendered in evidence. Asst. Commissioner Wray gave an opinion based on his thirty-five years in the Police Force as a Criminal Investigator, that in respect of the injuries which were indicated to him "the person who inflicted the wounds was in a rage or was angered". Having regard to the injuries he saw he considered the position of the body unusual. He so concluded because there was no sign of movement. To quote him: "Well, that essentially was unusual, that so many stab wounds and no indication that he had moved at all". The blanket had remained tucked under and the legs of the deceased crossed. Mrs. Fraser had reported to him that a letter opener normally kept on a trolley beside the bed was missing. He was not aware that night that Mr. Fraser had been hit in his head.

The purpose of giving instructions in respect of dusting for fingerprints was to assist in determining whether or not any other persons beside members of the family had been in the room recently. The fingerprints of other members of the Fraser family were taken. He was aware that latent fingerprints were developed from the window ledge and the toilet tank cover. He was aware of the status of the fingerprints on the window ledge, in the bedroom and taken from articles in the premises which included the toilet tank cover and the table top adjacent to the window.

Based upon what he was aware of in relation to these fingerprints the police were in quest of some other person other than members of the Fraser family. In the shower stall there was water settled and some amount of discolouration, but the Assistant Commissioner did not see the pattern of anything. Between his arrival and that of Mrs. Cruickshank there were several persons on the premises. Rowan came on the scene after he did. Mrs. Fraser had told him that Rowan was picked up to go to work at about 8:50 p.m.

If the deceased had received a fatal blow to the forehead as the first blow he would not regard the position of the body in which he saw it as unduly unusual.

From as early as 1st December, 1988 the police had information that material was missing from Mr. Fraser's files. He learnt this during the course of his investigations. The fingerprints of the civilians and other persons there that morning were not taken. The investigation had not been abandoned based on the fingerprints. The investigation was pursued throughout the period 1988 until even after the inquest. Another Senior Officer, Senior Superintendent Hibbert was assigned to the case. Snr. Supt. Hibbert is now Acting Assistant Commissioner in Charge of Crime.

On the 14th of June 1991 he visited 1 Sunset Avenue and requested from Mrs. Fraser the toilet tank cover which she placed in a plastic bag and gave to him.

Assistant Commissioner Wray told the Court that the officer who dusted for fingerprints was Asst. Superintendent Harrison. He was at the time of the trial a Deputy Superintendent and was still in the Force. He was however never called by the prosecution to give evidence. He was later to be called by the Defence.

SENIOR SUPERINTENDENT ISADORE HIBBERT:

Senior Superintendent Isadore Hibbert later replaced Asst. Commissioner Wray as the officer in charge of the case in September 1989. He was asked by the Director of Public Prosecutions if when he took charge of the case, he was "aware of a fingerprint report?" His answer: "Yes".

" Q: Did that report assist you in any way in the investigations?

A: To some extent, yes.

Q: To what extent?"

There was much objection which was however overruled by the Trial Judge and the witness answered:

> "I changed my direction with regard to my investigations. ... In other words, my investigations now turned inwards. That is, within the household itself".

Thus we have on a fingerprint report not put in evidence by the Crown, Asst. Commissioner Wray looking outside the family for the perpetrator, and Senior Supt. Hibbert on the same fingerprint report looking inside the family. He took a cautioned statement from Stuart on the 6th February, 1990. He did not interview Ephraim Adams.

DET. CPL. HYMAN SMITH:

Det. Cpl. Hyman Smith went to premises 1 Sunset Avenue at about 1:15 on the morning of the 30th November having received a radio call. When he arrived there were six policemen at the gate of the premises. Whilst he was entering the room where the body was "as I stepped in the door to the bedroom, a loud alarm went off, bell ringing alarm". A gentleman pushed his arm through the southern window and turned it off. The window was open at that time. The gentleman was Stuart Fraser. He described the position of the body in keeping with the other witnesses. Although lifting the towel from the neck of the deceased he did not see any injuries. Mrs. Fraser said that one of the towels was taken from the bathroom and one from the closet. They are both Mr. Fraser's towels. Rowan arrived after he was there and in a conversation with Rowan and his sister Allison he heard Rowan Fraser shouting "Bull shit, foolishness, tell me something better than that". He regarded Mrs. Fraser as appearing unusually calm. He got there before Asst. Commissioner Wray. He maintained that he did not lean against the alarm to set it off for he did not touch the wall; "it just went off". He was there when Asst. Commissioner Wray arrived and no one had interfered with the body before the Assistant Commissioner arrived.

DET. INSPECTOR NOEL ASPHALL:

Det. Insp. Noel Asphall arrived at the home at approximately 3:45 a.m. on the morning of the 30th November, 1988. He interviewed Aileen Fraser and took a statement from her at about 5:00 a.m. which was reduced to writing. We will deal with the written statements separately.

The witness found a multi-coloured bath towel at the corner of Jacks Hill Road and Sunset Avenue about five chains from the house, and he took it back to the premises. He showed it to Mrs. Fraser and she identified it to be her property and said it had been placed on a table folded in the master bedroom. He checked for fingerprints under the windows of the master bedroom but none was found. He returned to the premises on the 2nd of March, 1989 and collected a patterned blanket from Mrs. Fraser. At the time he took the statement he had not yet even seen the room where the body was. He saw the body at about 7:00 a.m. in the master bedroom on a stretcher. In re-examination he said that he had left the house at about 3:50 a.m. to go to Papine in Hope Tavern to look for one Ephraim Adams. He was unable to find him and so he came back to the home about minutes to five.

The Crown sought to link Rowan Fraser to the towel found at the corner of Jacks Hill Road and Sunset Avenue, but as the road was not passable in that direction the bus taking Rowan to the Airport could not have travelled that way.

DET. SGT. BARRINGTON CAMPBELL:

Det. Sgt. Barrington Campbell got to the scene at about 1:10 a.m. to 1:15 a.m. that morning. He interviewed and collected a statement in writing from Rowan Fraser who arrived at the house about twenty minutes to half-an-hour after he got there. The witness noticed when he entered the master bedroom that the windows in that bedroom were open. He described the position of the body as already stated. During the time he was there he estimated that there were at least fifty policemen there.

SUPT. RUDOLPH DWYER:

Superintendent Rudolph Dwyer on the morning of the 30th of November, 1988 went to premises 1 Sunset Avenue, at about 2:00 a.m. Asst. Commissioner Wray in charge of the investigation was already there. He gave his observations in keeping with those of the other police officers.

In the shower area of the master bedroom he "noticed that there was some dirt on the floor of the shower area, and what appeared to be studs from a track shoes". He was referring to an impression. The area was damp. The bottom section of the window on the northern wall, the northern window, was open. The area outside beneath it was clean and undisturbed. There was no impression on any ledge or anything there. Rowan had on a pair of track shoes. On the 9th of January, 1989 Aileen Fraser telephoned him and told him she was searching her husband's briefcase for some telephone bills and she found a steel letter opener which she believed could be the weapon used to stab her husband. At about 5:00 p.m. that very day accompanied by Superintendent Donald Brown he went, and Mrs. Fraser handed over to him a sword shaped metal letter opener with a round top which appeared to be made from crystal and also a plastic pen with a top, a letter opener. He handed those over to the Police Forensic Laboratory, to Mrs. Cruickshank. On the 19th of January, 1989 accompanied by Superintendent Donald Brown he went back to 1 Sunset Avenue and spoke with Mrs. Fraser and she handed over to him her husband's brief-case. He took possession of it and subsequently also handed it over to Mrs. Cruickshank. He left the island on the 29th of April, 1989 to Africa and was away for a year. Asked whether he noticed a thick substance on the point of the metal letter opener his answer was: "There was something there, sir. I didn't see anything stuck". He denied a suggestion that the two paper knives in evidence were not the ones given to him on the 9th. He had said before that on the 9th of January Mrs. Fraser also gave him a brown briefcase with a number of documents in it but that was a mistake, that was an error with the date. She did hand over the brief-case

on the 19th. It was not true that on the 19th the two paper knives which were now produced were taken by him from a tea trolley beside Mr. Fraser's bed.

So far as was relevant this was the evidence given by the police investigators. I now deal with the written statements given to the police by the appellants.

STATEMENTS IN WRITING TAKEN FROM THE APPELLANTS BY THE POLICE

AILEEN FRASER:

The first statement was taken by Det. Insp. Asphall on the morning of the 30th November. The narrative given is essentially what she had verbally told Ass't. Commissioner Wray. The only areas worthy of note were that her husband arrived home at approximately 6:10 p.m. Stuart left at approximately 6:30 p.m. Her husband after eating supper went to his room "and turned on the radio and was listening to the 7:00 p.m. BBC News". Rowan left at about 8:50 p.m. She noticed when she went to the master bedroom at about 1:00 a.m. that the windows on the north were both closed. This was unusual, the other two were open to the south.

Her second statement taken in writing was a question and answer statement taken by Insp. Trevor Chin on the 1st February, 1990. The only additional feature of this statement relates to:

(a) the alarm system - asked whether it was working on the 29th November she replied: "Yes, because one of the policemen who came there the night actually set it off;

(b) the sweat suit - when Mr. Fraser was listening to the News he was wearing the grey sweat suit which he slept in on occasions;

(c) her answer to a question why she did not call the police herself: "Frankly I did not think about it. I just could not accept he was dead!"

(d) the dogs - they are not vicious but they will bite. She heard no strange sounds between 8:00 p.m. and 10:00 p.m. but the dogs were restless.

Her third statement was taken by Deputy Superintendent of Police Donald Brown on the 9th January, 1989. The statement narrates her finding whilst engaged in a search for a Telephone Company bill and emptying her deceased husband's briefcase a metal paper knife which fell out. She noticed a thick substance on the point. As she had reported the paper knife among the missing items from the home she telephoned Supt. Dwyer and informed him of the finding. She handed over the paper knife to Supt. Dwyer at her home.

Her final statement was taken on the 19th January, 1989 by Deputy Supt. Donald Brown. The narrative in this statement adds little to her other statements. Between the time Rowan left and Stuart and his friends returned as far as she was aware she was alone with Mr. Fraser in the house. She added in her own hand-writing having read over the statement as written by Deputy Supt. Brown: "I also handed over two letter openers and papers in the briefcase." This followed her statement that:

> "On Thursday 16th January 1989, 8:10 p.m. I handed over Mr. Fraser's briefcase to the Police at their request and gave this further statement which I read over and signed to its correctness".

There is a conflict on this point between Supt. Dwyer and Mrs. Fraser, as Supt. Dwyer maintains that it was on the 9th January that the two letter openers were handed over and not as Mrs. Fraser maintains on the 19th January.

ROWAN FRASER'S STATEMENTS

Rowan Fraser first gave a statement to the police taken down in writing on the 30th November, 1988. The statement has a narrative of his movements on the 29th November. He went jogging that afternoon, picked up his sister Allison at an address on Lords Road, and returned to 1 Sunset Avenue where he gave his sister the car. He saw his mother and father getting ready to have dinner. He showered in his bathroom and had his dinner in the television room. Shortly after his arrival at home he heard the dogs barking and being conscious of the security of the premises he checked the master

bedroom. Finding the windows there open he locked them. He watched television until about 8:35 p.m. Going to the kitchen for a cup of coffee he saw his father come to the kitchen and take his orange colour water jug and left towards the master bedroom. He was collected to be taken to work at approximately 8:50 p.m. Shortly after 1:00 a.m. he received a telephone call from his sister Allison with the news concerning his father. He took a taxi from the Airport home.

In a second police statement taken from him on the 20th January, 1989 he explains why he closed the windows in his parents bedroom as finding them open for him was not unusual. The night before a cat had been found in the front of the yard, and he assumed that it had been thrown there to distract the dogs.

There is one aspect of this statement which was submitted to much scrutiny. I quote the section in full:

> "My father was wearing pyjamas when I saw him after locking the windows. I cannot be specific as to the colour; it was long pants and long sleeve top.
>
> The pyjamas my father had on had buttons at the top. I know the difference between a pair of sweat suit and a pair of pyjamas".

The conflict between prosecution and defence was as to whether Rowan had said: "The pyjamas my father had on had buttons ..." or whether he had in fact said or meant as he was later to relate in his sworn evidence: "The pyjamas my father had had buttons". "On" is at the end of the line. The statement continues:

> "When I saw my father at 8:45 p.m. he **was still dressed the way I had seen him earlier that evening**".

Further in the statement:

> "On arrival at my father's home" (that is when he came from the Airport after being summoned by Allison) "I entered his room and saw him in bed dressed in the same pyjamas that I had seen him wearing prior to my leaving to work".

Further:

> "My father owns several pairs of pyjamas and might also wear the top and bottom of the sweat suit as pyjamas".

Since the fact is that when Rowan came home from the Airport in the early morning of the 30th November, 1988 his father was dressed in the sweat suit, there is an apparent confusion and conflict between earlier seeing him in pyjamas which had buttons, seeing him later in the sweat suit and maintaining that the sweat suit is what he had seen his father in earlier.

The prosecution relies on this to support the theory that the pyjamas were changed after the killing of Mr. Fraser and the sweat suit put on afterwards.

There is nothing in the statements of either Aileen Fraser or Rowan Fraser which can be regarded as an admission by either of being involved in the murder of Aubrey Fraser.

The statements therefore have to be looked at to see whether they provide any circumstantial evidence from which an inference can be drawn adverse to the makers of the statement in terms of being a party to the murder of Aubrey Fraser.

Furthermore the statements of Aileen Fraser cannot provide a circumstance adverse to Rowan Fraser nor can Rowan Fraser's statements provide circumstances adverse to Aileen Fraser.

If, as in Rowan Fraser's case the statement given to the police by Rowan on the 20th January, 1989 has within it its own contradictions what inference can be drawn from the making of a contradictory statement?

What the prosecution is positing is that this establishes that Rowan was lying, and is support for the theory of the changing of the pyjamas.

In the contradictory state of what is said in Rowan's statement to the police putting aside Rowan's interpretation and explanation given when he gave sworn evidence in the witness box in our view

no necessary inference can be drawn implicating Rowan or providing evidence to establish that the sweat suit in which Aubrey Fraser's body was found was placed on him after he had been killed. The falsity of the statement has to be proved - [see R. v. Lucas [1981] 2 All E.R. 1008, Lord Lane at p. 1011]:

> "Statements made out of court, for example statements to the police, which are proved or admitted to be false may in certain circumstances amount to corroboration. There is no shortage of authority for this proposition (see, for example, R v Knight [1966] 1 All ER 647, [1966] 1 WLR 230 and Credland v. Knowler (1951) 35 Cr App R 48). It accords with good sense that a lie told by a defendant about a material issue may show that the liar knew that if he told the truth he would be sealing his fate. In the words of Lord Dunedin in Dawson v M'Kenzie 1908 SC 648 at 649, cited with approval by Lord Goddard CJ in Credland v. Knowler (at 55):
>
> > '... the opportunity may have a complexion put upon it by statements made by the defender which are proved to be false. It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had no such false statement been made.'
>
> To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness."

Which of the two contradictory accounts as to the pyjamas in the police statement is true and which is false?

In our view therefore no evidence is to be found in any of the statements which could possibly implicate either Aileen or Rowan Fraser in the murder of Aubrey Fraser.

SUMMARY

To summarise therefore:

1. As against Rowan Fraser the Crown is saying that:

   (a) he was at home at the time the murder was committed;

   (b) the murder was not committed by an intruder but by a family member;

   (c) there were stud imprints found in the shower stall, similar to track shoe imprints and Rowan was wearing track shoes;

   (d) Mr. Fraser's size required more than one person to handle him and change his clothes after death and Rowan was one of the persons involved;

   (e) Rowan was lying when he gave a statement with regard to the pyjamas his father was wearing and the sweat suit.

2. As against Aileen Fraser:

   (i) (a) and (b) above relating to Rowan;

   (ii) her conduct in calling a medical doctor and not the police when she must have known her husband was dead; in sending the guests away, and in not telling Dr. Martin that Aubrey Fraser was dead was guilty conduct;

   (iii) she lied as to the date on which she said she gave the two letter openers to the police.

CIRCUMSTANTIAL EVIDENCE - THE LAW:

The principles governing circumstantial evidence and the conditions in which it can be relied upon to result in a conviction for criminal offence are well-established but will stand repetition. They are clearly stated in the judgment of O'Connor C.J. in R. v. Clarice Elliott, 6 J.L.R. p. 173 at 174:

> "A jury may convict a prisoner on purely circumstantial evidence, but they should be satisfied 'not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.' (Hodge's Case 2 Lewin C.C. 227, 228). Or, as it was put by Lord Hewart in R. v. Podmore (cited in Wills on Circumstantial Evidence 7th edition at page 43), 'Circumstantial Evidence consists of this that when you look at all the surrounding circumstances you find such a series of undesigned, unexpected coincidences that, as a reasonable person you find your judgment is compelled to one conclusion'. Or as Wills puts it at page 320, in what he calls the fundamental rule, 'In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.' Or, as Lord Chief Baron Macdonald enunciated the same rule in Rex v Patch (cited in Wills at page 323) 'the nature of circumstantial evidence was that the jury must be satisfied that there is no rational mode of accounting for the circumstances, other than the conclusion that the prisoner is guilty'."

See also R. v. Elijah Murray, 6 J.L.R. p. 256, the judgment of O'Connor C.J.

In the words of the Lord Chief Justice in Taylor, Weaver and Donovan, 21 C.A.R. p. 20 at 21:

> "It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics."

The circumstantial evidence in order to result in a conviction for crime must connect the accused person with the commission of the crime. Lord Normand in Teper v. The Queen [1952] Appeal Cases 480 at p. 489, put it this way and with a necessary caveat:

> "Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. ... It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

There must however be some established fact from which the appropriate inference can be drawn which points to the guilt of the accused person. Without that foundation of fact no inference can arise adverse to these appellants.

It is therefore within this context that we need to examine the evidence to determine firstly, whether at the end of the prosecution's case, on the submission of no-case to answer made by that counsel for the appellants, the trial judge's ruling that there was a case to answer in respect of one or other or both of the appellants can be sustained.

In assessing circumstantial evidence the usual elements sought to be identified are as follows:

(i) motive; i.e. interest;

(ii) opportunity;

(iii) conduct.

SEE - (R. V. TREACEY [1944] 2 ALL E.R. 239 AT P. 231G)

MOTIVE:

It is accepted that there was no motive established on the evidence why these appellants should wish to kill Aubrey Fraser or would have any interest in Aubrey Fraser's death. It is however not necessary for the prosecution to prove the motive for a crime. The lack of motive however, may well affect the reasonableness of an inference which the prosecution seeks to draw from a particular fact. What also is very relevant in this regard is the undisputed

evidence of the harmonious relationship between the deceased and the appellants.

OPPORTUNITY:

The prosecution set out to establish opportunity in each and both appellants to commit the crime. In so doing it relied upon the evidence which would establish the presence of one or both appellants in the home at the time the murder was committed. That evidence is different in respect of the appellant Rowan Fraser from how it relates to the appellant Aileen Fraser. The evidence of the Crown in terms of time of death of Aubrey Fraser and time of departure from the home of Rowan Fraser does not in our view establish Rowan Fraser's presence in the home at the time of the murder. Indeed it establishes his absence. There can be no dispute that Aileen Fraser must have been in the home at 1 Sunset Avenue at the time her husband was murdered. Her presence there however can by itself provide no adverse or sinister inferences. This after all is the home in which she resided with her husband and family members.

The residence of the Frasers could properly be described as a large house, with the dining room and kitchen in which Mrs. Fraser was working, at the opposite end of the house to the master bedroom in which Mr. Fraser was murdered. If we narrow the criterion of presence to the scene of the crime the situation of the master bedroom vis-a-vis the area in which Mrs. Fraser was working takes on some importance. The inability, as the evidence establishes to see from where Mrs. Fraser was sitting, the passageway to the master bedroom would nullify any inference that even if not involved she must have heard or seen what was taking place in that bedroom. The evidence does not establish Mrs. Fraser's presence in that bedroom at the time of the commission of the fatal act. The approach of the prosecution in this regard was two-pronged - presence of the appellants and the ruling out of the presence of an intruder. The evidence established that it is normal for the windows of the master bedroom to remain open whilst the occupants slept. It was Stuart's evidence that his father always slept with

the windows open. The shutters would be opened and the glass windows were always up. The bottom half of these glass windows were not protected by burglar bars. Indeed when the body was found two windows in that bedroom were open. Entry could therefore be made into that room without a breaking-in. This fact nullifies any inference that because there was no evidence of a breaking-in the crime could not have been committed by an intruder. The evidence also established that the garage door was left unlocked sometimes and might have been on the night of the 29th. The keys are kept hanging beside the door. The back fence of the premises damaged by Hurricane Gilbert which had taken place a short time before the incident had not yet been repaired at the time of the murder. Stuart Fraser saw mud prints on the ledge of the wall beneath the window of the master bedroom.

The police photographer Irving Roye gave evidence that at the back of the house there is a ledge running along the wall. The ledge runs below the window of the master bedroom. An adult standing on the ground below the open window could go through the window into the master bedroom in which the body was found without using a ladder or anything else. The dogs were restless that night. Mud prints, or stud prints were found in the shower stall of the master bedroom.

As against this the police witnesses gave evidence that the ground outside beneath the windows appeared to be undisturbed. The prosecution also drew an inference from the evidence that the stud imprints appeared to be prints made by track shoes and the fact that Rowan was wearing track shoes suggested that Rowan was the person whose shoe prints were left in the shower stall. The alarm did not go off. We will return to examine these two last mentioned features later.

CONDUCT:

The prosecution made much of the fact that Mrs. Fraser although she must have known that her husband was dead called a Medical Doctor rather than the police. It must be recalled that Dr. Martin found her in "deep shock". Neither do we consider it reasonable to conclude

that her decision to call a doctor rather than the police unusual in the circumstances or in any way pointing to guilt on her part. All the police witnesses found herself and Rowan very co-operative during their investigations. There is nothing in the conduct of the appellants from which an inference adverse to them could be drawn.

In viewing circumstantial evidence it must be necessary to consider whether all the circumstances have been looked at and the evidence relating to these circumstances have been put before the Court. In this regard the conduct of the police investigation in terms of depth and effectiveness must come under scrutiny. Our reliance on this factor is not without precedent in our Court of Appeal. See observation of Karr J.A. in George Edwards v. Regina, S.C.C.A. No. 32/83 unreported:

> "Secondly, we are not particularly at ease with the conduct of the investigations".

Although objects were dusted for fingerprints the Crown brought no evidence as to the result of the fingerprint investigation. Although the police witnesses said that in the shower stall in the master bedroom they saw shoe prints of studs of a track shoes no cast was made so as to be able to establish, as they were suggesting that Rowan wore track shoes that evening and therefore these track prints in the bath were from Rowan's shoes. Asst. Commissioner Wray saw only muddy marks in the shower stall, so did Stuart Fraser. Track shoes are common wear in Jamaica. The briefcase was taken by the police three months after the event. The toilet cover, the supposed murder weapon, was not taken by the police until mid June of 1991, just before the Coroner's Inquest. Mr. Fraser was killed in November, 1988. The cushion was not taken by the police. No tests were done on the toilet tank cover to find out if any residue of blood not visible to the naked eye existed. Neither was this done in relation to the bedroom area although there was some oblique suggestion that the blood could have been wiped up, and this would point to the involvement of family members.

The question of whether the alarm system was "button activated" as evidenced by Stuart Fraser or not was left in an unsatisfactory state. The prosecution maintains that the system must have been one activated by an electronic eye. The alarm system was never examined by the investigating police officers to establish whether as a fact it was activated by pushing a button as Stuart said or an **electronically activated system.** If such an examination had been done the evidence would not have been left resting upon inferences and consequently in such a state of speculation.

What then is the series of undesigned, unexpected coincidences that as a reasonable person a juror's judgment would be compelled to one conclusion that being, that the murder was committed by Aileen Fraser, Rowan Fraser or both? It could not be found in the presence of Aileen Fraser or Rowan Fraser or the presence of both of them in that house since they reside there, considering always that the evidence militates against Rowan's presence. It cannot be found in Aileen Fraser sending for the Medical Doctor rather than the police. It cannot be found in the co-operation which they both admittedly afforded the police in their investigations. It cannot be found in any statement made at any time by either of them.

The evidence of the position of the body is explained by the Crown's own medical evidence that if the blow to the head was administered first, the deceased would have become unconscious, would have been unable and indeed could not place himself in a defensive position and would have died in the position in which he was sleeping on the bed. That blow also, thus administered, would subsequently lessen the flow of blood thus explaining why there was no blood splashed on the walls. The absence of any cut in the fabric of the sweat suit is explained by the admission of the very Crown witnesses that had the neck of the sweat suit been pulled down or the bottom pulled up then the fabric would not have been damaged since the murder weapon would not have passed through the

sweat suit to inflict the injuries. This same pulling up and down as is admitted by the experts would create the same smudge on the inside of the upper part of the sweat suit which is being relied upon by the Crown to establish that the top of the sweat suit must have been put on after Mr. Fraser was killed.

The Crown's case is that the evidence lends itself to a joint enterprise. If as the evidence established, Rowan Fraser could not have been in that house at the time of his father's death, who is the other party to the joint enterprise with Aileen Fraser? For the Crown is not putting forward a proposition that Aileen Fraser, a woman of 69 years, could have by herself changed the garment being worn by Aubrey Fraser, six feet two tall and 235 to 250 lbs. in weight. Indeed the Crown's case is to the contrary. The theory therefore of change of garment after death does not survive the scrutiny of the evidence.

ACTING IN CONCERT:

In Reg. v. Merriman [1972] 3 W.L.R. 545, at p. 564 Lord Diplock states the proposition thus in terms of acting in concert where two or more defendants are charged in the same count of an indictment:

> "I conclude, therefore, that whenever two or more defendants are charged in the same count of an indictment with any offence which men can help one another to commit it is sufficient to support a conviction against any and each of them to prove either that he himself did a physical act which is an essential ingredient of the offence charged or that he helped another defendant to do such an act, and, that in doing the act or in helping the other defendant to do it, he himself had the necessary criminal intent".

If such is not established the conviction cannot be supported. In our view these "essential" ingredients were not established against either or both appellants.

The prosecution always has to prove by evidence, be it direct or circumstantial, firstly, that the crime was committed and secondly, that it was committed by the accused persons. It is this latter requirement which is completely absent in this particular case.

THE NO-CASE SUBMISSION:

Although matters of fact are for the jury to be determined on proper directions given by the judge in respect to the law, the judge is required to consider whether a no-case submission is made or not, if the evidence in the case is such that it should be left to the jury. In this case, of course, there was a no-case submission made at the end of the prosecution's case.

In R. v. Galbraith [1981] 2 All E.R. 1060 at 1061 Lord Lane C.J. adumbrated two schools of thought as to how a judge should approach a submission of no-case. Lord Lane stated:

> "(1) that the judge should stop the case if, in his view, it would be unsafe (alternatively unsafe or unsatisfactory) for the jury to convict; (2) that he should do so only if there is no evidence on which a jury properly directed could properly convict. Although in many cases the question is one of semantics, and though in many cases each test would produce the same result, this is not necessarily so. A balance has to be struck between on the one hand a usurpation by the judge of the jury's functions and on the other the danger of an unjust conviction".

He however concluded at p. 1062:

> "(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred".

In Wilbert Daley v. The Queen, Privy Council Appeal from the Court of Appeal of Jamaica [1993] 3 Weekly Law Reports 666 at p. 673 Lord Mustill analysed the position in Galbraith and stated as follows:

> "Furthermore, as regards Reg. v. Galbraith, the principles stated by Lord Lane C.J. at p. 1042, have, so far as their Lordships are aware, been consistently applied in Jamaica; and it may be noted that impetus given to the wider view of the judge's powers by the important change in the basis of a criminal appeal in England brought about by the Act of 1968 was not a factor in Jamaica, where the appellate powers have continued to be expressed in terms corresponding to those of the Act of 1907".

WAS THERE A CASE TO ANSWER?

At the conclusion of the Crown's case in respect of Rowan Fraser:

(i) the evidence did not establish his presence at 1 Sunset Avenue at the time the murder was committed.

(ii) there was no evidence linking him to participation in the murder of Aubrey Fraser.

In respect of Aileen Fraser, although she must have been in the house at 1 Sunset Avenue when Aubrey Fraser was killed, there was no evidence linking her to participation in the murder.

Furthermore, the Crown failed to establish the evidence of a joint enterprise or common design in respect of the two appellants. The circumstances looked at individually and cumulatively did not meet the necessary criterion of being inconsistent with any other rational conclusion than the guilt of the appellants.

Consequently, the trial judge erred in ruling on the no case submission that there was a case to answer. He properly should have withdrawn the case from the jury.

VERDICT UNREASONABLE:

If there was such evidence, however tenuous, which could have been left to a determination by the jury on a careful consideration of the evidence as a whole, including the defence witnesses which included Rowan Fraser, and Aileen Fraser's unsworn statement, the jury's verdict of guilty was unreasonable and against the weight of the evidence. The Crown's case was conducted on the basis that more than one person participated in the commission of the murder since it would have taken more than one person to change the deceased's garments after the commission of the crime. That foundation disappears with the absence of the co-appellant Rowan Fraser from the house at the time of the murder.

Mrs. Fraser in her unsworn statement said she sent away the two guests because she did not wish to involve them in her distress. Her husband too was a private person and would have wished her to do so. How can any adverse inference be drawn against her in respect to this behaviour? Among others, the defence called Supt. Raymond Harrison who developed the fingerprints and who was not called by the Crown. He supplied the evidence that the prints he developed did not compare with all the prints he was given by police officer Mr. Pinnock on the CIB forms. Since the prosecution was seeking to exclude an intruder, this evidence is of some importance although dismissed by the judge in his summing-up as something which "might very well take you into the realm of speculation, the realm into which you are not entitled to venture."

THE JUDGE'S SUMMING-UP:

In view of our conclusions above, it is not necessary to deal in any detail with the judge's summing-up. However, we believe it was deficient at least in one respect. He did not direct the jury on what is the law if they concluded that one of the appellants must be guilty of the commission of the crime but there was no evidence that they were acting in concert or which of them committed the act.

Lord Goddard C.J. stated the law as follows:

> "If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If in those circumstances, it were left to the defendants to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty. FINNEMORE, J., remembers a case in which two sisters were indicted for murder, and there was evidence that they had both been in the room at the time the murder of the boy was committed; but the prosecution could not show that sister A had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove the case".

R. v. Abbott [1955] 2 All E.R. 899 at page 901.

Such a direction was, in our view, absolutely necessary in this case and the learned trial judge failed to direct the jury in this regard. Indeed, it was the right of the appellants that, in those circumstances, the case should not have been left to the jury.

For all these reasons, we allowed the appeal, quashed the conviction, set aside the sentence and entered a verdict of acquittal in respect of both appellants.

GORDON J A (DISSENTING)

"Dr. John, Aubrey is clammy and cold and I can't manage him, could you come over and help me? These words spoken by the appellant Aileen Fraser, at approximately 12.50 a.m. on the 30th November 1988 spurred Dr. John Martin to action. With speed that belied his age this septuagenarian got out of bed dressed, picked up his bag and within 2-3 minutes he was escorted into the presence of the appellant, his neighbour on his immediate left, by her son Stuart. The opinion he formed from the summons he received: "I thought of a heart attack, with the coldness and clamminess, I thought of a heart attack." He was taken to the bedroom by Stuart and at the door he was met by the appellant who said, "Sorry John, Aubrey passed." He entered the room and there on a bed he "saw Aubrey flat on his back, in repose, his arms crossed in sweet repose." He examined him to see if he was dead. He observed dried blood behind his ear and stab wounds on the left side of his neck and the gullet. Dr. Martin testified "his neck was bent to the left and I tried to straighten it." He got blood on his hands, and he went to the bathroom and washed them. Looking down he observed the cover of the toilet tank missing and immediately he left the bathroom, he told the two occupants of the home Stuart and Aileen Fraser "Nobody leave this room, stay here, because I am going to call the police, I suspect foul play."

Dr. John Martin realised he was on the scene of murder most foul. The body of Dr. Aubrey Fraser, retired Judge of Appeal of Trinidad and Tobago, retired head of the Norman Manley Law School, Mona Campus, Jamaica and sole Commissioner of Inquiry into a mishap at the Jamaica Flour Mills, then current, had been so long dead that the stiffness of the neck was a sure indication that rigor mortis was well advanced in his body.

Dr. Martin,(Jamaica Directory of Personalities, 3rd Edition 1990-1991),Registered Medical Practitioner with over 40 years experience, with admitted expertise in post-mortem examinations, a retired Government Medical Officer, Custos Rotulorum for the parish of Saint Andrew, a man of integrity and high esteem, spoke of the instructions he gave as he awaited the arrival of the police. When asked to identify which of the two occupants he addressed he said, "Either Stuart or Mrs. Fraser now, remember, I am also in shock, this is something that shocks me too."

The police arrived shortly after being summoned by Dr. Martin and investigations commenced by them were somewhat protracted, eventually the evidence was considered by a Coroner's Jury and consequent on the verdict of that jury Mrs. Aileen Fraser, widow, Rowan Fraser and Allison Fraser-Hunt, son and daughter of the deceased, were charged for the murder of Aubrey Fraser. On 26th March, 1992 after a trial which commenced on 2nd March, 1992 Mrs. Aileen Fraser and Rowan Fraser were convicted as charged. Allison Fraser-Hunt was acquitted. The applications of the convicted persons for leave to appeal were heard between 8th November 1993 and 26th November 1993 and on 20th December 1993 a majority decision was delivered allowing the appeal and entering verdicts of acquittal. Reasons for this decision were promised. This is the dissenting decision.

The Crown's case was based entirely on circumstantial evidence and the composite is extracted from the evidence of witnesses and from statements given by the appellants to the police mainly on the early morning of the 30th November 1988 soon after investigations into the circumstances of the crime commenced. The appellants at that time were not suspects; indeed the investigators' efforts were concentrated on the possibility of the crime having been committed by an intruder. This direction was encouraged by the fact of an open window in the master bedroom, a disabled telephone, and the purported (reported) loss of articles

from the master and other bedrooms, thus indicating a possible burglary and larceny coupled with murder.

Aubrey Fraser, his wife Aileen and three of their five children namely Allison, Rowan and Stuart resided at 1 Sunset Avenue, Jacks Hill, St. Andrew in a house of five bedrooms. The parents occupied the master bedroom with adjoining bathroom. The house had the usual amenities, living room, dining room, kitchen and a second bathroom. A passage led from the living room to the master bedroom and off this passage were other bedrooms and a bathroom. One bedroom was used by Stuart as a sewing room.

On the afternoon of the 29th November, 1988 Mrs. Fraser was taken home by her son Stuart from the University of the West Indies, Mona Campus where she worked as a Social Worker. The motor car Stuart used was subsequently driven out by Rowan who went to jog two laps on the "ring road" at the Mona Campus. On his way out Rowan passed his father driving home from work. Dr. Fraser was then Chairman of the Committee appointed to enquire into the disaster which occurred at the Jamaica Flour Mills.

Mrs. Fraser in her statement said her husband came home at about 6.10 p.m. "on arrival at home my husband had chicken soup for supper in the kitchen." Their dogs were barking to the front of the house and Dr. Fraser went out to silence them, he then "went to his room and turned on the radio to hear -- to listen to the 7.00 p.m. BBC News. By this time Rowan and myself were in the dining room."

Continuing the narrative, from Rowan's statement he said he left the Ring Road and drove to Lords Road where his sister Allison was staying with a friend. He collected Allison, drove her home and delivered the car to her and she left in it to return to Lords Road in New Kingston. He continued: "upon arrival, I saw my mother and father getting ready to have dinner. Both of them

went to the kitchen where they ate their dinner whilst I sat in the Television room and have (sic) my dinner, after having gone to the bathroom to have a shower." He said he heard the dogs barking to the front of the house, "and being conscious of the security of the premises I checked all the master bedroom windows and make certain they were all securely locked." He said he remained in the television room until 8.35 p.m. then he got dressed for work. He went in the kitchen to have a cup of coffee and his father came in, took his jug from the refrigerator, and returned to his bedroom. At about 8.50 p.m. his transport came for him and he left for the Norman Manley Airport to work as an Engineer. On this statement he was the last person to see his father alive.

Rowan said that when he was leaving for work at about 8.50 p.m. he left his mother "sitting in a rocking chair in the television room sleeping." Mrs. Fraser said when Rowan left for work she was in the dining room.

Stuart had left to visit friends from earlier in the evening. Mrs. Fraser said he left at about 6.30 p.m; he said he left shortly after 7.00: it is agreed that he was away from home for the minimum period of 7.00 p.m. to shortly after 10.00 p.m. When he returned, he had friends with him and they sat on the verandah enjoying themselves as they celebrated with Stuart his birthday which had passed the day before.

Mrs. Fraser said she visited her bedroom about 10.30 p.m. and on pushing the door found it had a heavy object behind it. She found this unusual but pushed it wide enough to see inside. Her husband lay in bed "covered up" the room light was on. She said she went to Stuart and his friends and informed Stuart that his father had "covered his face to sleep." Stuart said his mother then told him that his father was practising yoga. This communication seemed to suggest that they should not make any

noise to disturb his rest.

Mrs. Fraser said she returned to the kitchen and closed the door connecting the passageway to the drawing room. Thereafter she worked in the dining room until about 12.40 a.m. on 30th November 1988, she then went to her bedroom. She pushed hard on the door opened it and turned off the light leaving the bedroom in darkness. She went to the bathroom turned on that light and saw her husband's briefcase on the floor with papers scattered about. She collected the papers returned them to the briefcase called to her husband "and went and turned on the bedroom light."

> "I noticed that there were two towels and a pillow on my husband's neck and face. I felt for his pulse. His hands were cold and his pupils were dilated and fixed. I removed the towels and pillow and noticed that his neck to the left side was bloody with three or four punctured marks and a streak of dried blood behind the ear.
> My husband was lying on his back with his arms on either side, dressed in a grey sweat suit and the lower part of his body covered with a rug. I noticed that the windows on the north were both closed. This was unusual. The other two were opened to the south."

Mrs. Fraser's narrative continues:

> "I went to Peter and David who were still on the verandah, asked them to go home as my husband was not very well. At this time, Stuart was still in the kitchen. He came to me. I told him that I asked his friends to go home and something had happened to his father. Stuart's friends left. He accompanied me to the master bedroom where I telephoned my husband's nephew, one Mr. Cholmondeley and asked him to call Dr. Barrow, our family friend. Shortly after, I telephoned Dr. John Martin, our neighbour, who came shortly after and examined my husband. The police were called and they arrived on the scene.
> I then telephoned my daughter, Allison, who was staying with a friend, Miss McCalla, at Lords Road since Monday the 28th and also called Rowan at Air Jamaica airport.

"On further examination of the house, I found out that the following items were missing from the master bedroom:

1. one lady's wrist-watch;
2. one gent's wrist-watch, the property of my husband;
3. one short wave radio;

I went into Allison's room, made a check and the following items were missing.

1. one camera;
2. one bedside clock radio with the N.C.B. insignia;
3. one radio.

I also noticed that the toilet tank cover in the master bedroom was missing and was found on my daughter's bed."

The police arrived on the scene in large numbers and ranked from constables to Assistant Commissioner Wray. The Government Pathologist Dr. Ramesh Bhatt and the Government Analyst Mrs. Yvonne Cruickshank attended at the scene of the crime, conducted investigations and made observations. Dr. Bhatt conducted a post-mortem examination on the body of Dr. Fraser.

The injuries Dr. Bhatt found on external examination were -

1. (a) Seven superficial circular wounds each about 1/8th inch in diameter between the 2nd and 3rd intercostal spaces in the mid clavicular line, 1½ inches from the midline of the body.

   (b) Two similar wounds 1" lateral to these wounds.

All these wounds were seen to pass through skin and sub-cutaneous tissue to a depth of 1/8th of an inch. There was no blood but oozing of tissue fluids. These wounds he opined could have been inflicted "few minutes just before death or after death."

2. Eleven (11) stab wounds ranging from 3/4" to 1/4" in length on the left side of the neck in an area 1" in diameter;
3. Two circular stab wounds each 1/4" in diameter just below the left ear.

The eleven stab wounds to the left side of neck "were seen to pass through muscles and blood vessels of the neck. One of the wounds was seen to pass through thyroid cartilage and another one was seen to pass through trachea one inch below thyroid cartilage. These wounds ranged from **half inch to two inches** in depth.

"The two circular stab wounds below the left ear passed through the muscles of the neck and entered the oral cavity. They were of depth more than two inches.

The scalp showed contusion on the frontal region. There were multiple fractures of the frontal bone ... "fracture of the cribriform plate that is the skull cavity near the base, just above the two bones of the eyeballs - orbit". There was "fracture of the orbital plates: those are the mounts for the eye-socket inside the skull cavity which you can see in - from inside the skull cavity and body of the sphenoid." The sphenoid was also fractured, there was moderate sub-dural haemorrhage.

In Dr. Bhatt's opinion death was due to shock and haemorrhage as a result of injuries to the head and multiple stab wounds to the neck. The flat side of the toilet tank cover exhibited wielded with a moderate degree of force could have caused the injuries to the head, "the blow was on the forehead." The injury to the head could have caused death "within minutes, say half an hour at the most." The injury to the head "may render the victim unconscious, instantaneously unconscious."

The doctor found no defensive injuries to the arms and in his opinion, probably the neck was exposed in such a way that the victim could be stabbed easily. These injuries to the neck could have been caused by either of two paper knives exhibited, those to the chest more likely by exhibit 9 which was pointed and thin at the tip. The injuries to the neck especially passing through the thyroid cartilage and trachea, could have caused death within a few

minutes. Referring to the injuries to the head and those to the left side of the neck he said: "Either anyone of them or both" could have caused death.

The sweatsuit top that was on the body of Dr. Fraser at the time of discovery of the body was examined by Mrs. Cruickshank and himself in Mrs. Cruickshank's laboratory. They saw no sign of damage to the fibre. "The absence of damage to the fibre" he explained, suggests that the instrument (causing the puncture wounds to the chest) did not pass through it. As to the reason for this he said "most probably he was not wearing it." Further examined he said that assuming he had it on for the injuries to the chest to have been inflicted, "it would be either rolled up or pulled down." Relating the chest injuries to the other injuries he said "I think the chest injuries are most likely to have been inflicted after those injuries." This explains the absence of bleeding therefrom.

The injuries to the chest he said, may explain the status, the mental status of the assailant at that time "... it might show that the assailant was too furious or broken down emotionally."

Evidence re: Time of Death

(a) Dr. Martin said in his opinion, based on the evidence of rigor mortis in the neck, he estimated the time of death of the deceased as being between 7.30 p.m. and 9.30 p.m. He also said "There are other more accurate methods to determining death, the length (sic) (amount) of food in the stomach etc." Dr. Martin never saw the contents of the stomach of the victim.

(b) Mrs. Cruickshank's qualifications as an expert enabled her to give an opinion as to the time of death having regard to the time of ingestion of the last meal before death: on an assumption that the last meal was had at 6.30 p.m. the presence of undigested food in the stomach indicates that death occurred between 6.30 and 9.00 p.m. "Death had to occur before 9.00 o'clock," she said "I

cannot put a time because I didn't see the contents whether it was partially ... undigested can mean anything."

(c) Dr. Bhatt performed the post-mortem examination at 1.30 p.m. on 30th November 1988. He had visited the scene of the crime and made observations of the body at 5.30 a.m. his opinion as to the time of death was influenced by the post-mortem changes --"rigidity"... of rigor mortis "and the stomach contents." The atmospheric conditions at the scene of the crime influenced by its elevation was cool. This would have delayed rigor mortis he said, the post mortem changes could lead to an estimate that death had occurred some 14 to 20 hours before the post-mortem examination was done. At 20 hours this would have placed the time of death at 5.30 p.m. he said but it was known that Mr. Fraser was alive then. He was therefore inclined to the view that death had occurred some 14 to 18 hours before his examination. He said "1.30 p.m. I did it and considering the post-mortem rigidity and stomach contents and all, <u>roughly</u> I put it at about 16 hours after death." This estimated the time of death as 9.30 p.m. [Emphasis supplied]

In response to a question asked by the learned trial judge thus:

> "Between what hours? Between what hours would be the time of death?"

The witness responded that death would have been between 7.00 p.m. and 9.00 p.m.

The rupture of the blood vessels of the neck led the experts, particularly Mrs. Cruickshank to search for evidence of spewing of blood on the walls and on the bedside table. There was no such evidence found. On the assumption that the blow to the head which rendered the victim unconscious was the first injury inflicted followed by the stabs to the neck, Mrs. Cruickshank opined there would yet be "spewing even to turgidity" as life ebbed from the body. The amount of blood in evidence, having regard to the

location of the injuries and the size of the victim, was remarkably small.

Examination of the house revealed no sign of forcible entry, no evidence of breaking. . Dusting for finger prints uncovered prints that were not identified after the fingerprints of members of the family had been eliminated. The fingerprint of the victim, Dr. Fraser, were not taken hence no comparison for the purpose of elimination could be done. Policemen teemed the scene and the evidence showed that no attempt could be made to eliminate their prints, or the prints of other visitors.

In the bathtub of the master bathroom impressions resembling those that would be made by a track shoe were seen. These impressions were faint indeed and could not be preserved for their evidential value. Rowan wore track shoes on the evening and night of the 29th November 1988.

Detective Corporal Smith was the first police officer to enter the house on the morning of the 30th November, 1988. On his arrival in response to the summons he saw other policemen on the premises but none in the house. On entering the house he was directed by Mrs. Fraser to the master bedroom and as he entered the bedroom from the passage a burglar alarm was activated. On his evidence supported by a statement from Mrs. Fraser, Stuart Fraser deactivated the alarm. This he did by approaching the southern window in the master bedroom from without reaching in through the open window and manipulating the switch which was on the wall by this window. This burglar alarm, part of the security system of the house was controlled by three switches. One as shown above in the master bedroom, one in the kitchen and the other in the living room. Other aspects of the security system in place were burglar bars at the upper section of the sash windows and five dogs; 3 Labradors, 1 Alsatian and a Mongrel named "Princess", eave lights, and the alertness of the occupants as evidenced by Rowan's

account of his response to the barking of the dogs. The dogs were described by Dr. Martin as vicious and he declared he would not enter the premises unescorted. Peter Daley, a friend of Stewart and a frequent visitor to the house was afraid of the dogs, he also required an escort to enter the home. Mr. Ephraim Adams, Dr. Fraser's chauffeur for 14 years was a person who frequented the home, he was guarded in his approach to the dogs having been bitten twice in the home by the mongrel, "Princess".

In the questions and answers Mrs. Fraser was asked and responded thus:

"Question 3. Is there an alarm system at the house?

Answer: There is an alarm system, I don't know if the neighbour would hear it because they live in air condition locked-up rooms. The alarm is against the wall and is button activated, if one pass near the wall where it is located it would be set off. The alarm is by the window facing the sea near to the door near to Mr. Fraser's bed. This is one of the things that puzzles me, how the person could pass by and not activate it.

Question 4. Was the alarm system working on the 29th of November, 1988?

Answer: Yes, because one of the police-men who had come there the night actually set it off."

Cpl. Smith said that before the police photographer arrived, he spoke to Allison Fraser. She asked him how long the body would remain in the bedroom and he told her until the police photographer and the undertakers arrived. She said she had already taken photographs of the body. He saw her with a camera.

Mr. Hugh Cholmondeley at approximately 12.45 a.m. on 30th November 1988, received a telephone call from Mrs. Fraser she told him that Aubrey was **not** well, his hands were cold and

clammy and he was not well. She said that she had tried to contact Dr. Orrin Barrow, his friend and a fellow Guyanese, without success. Mr. Cholmondeley promised to assist and at approximately 1.30 a.m. he and his wife arrived at his deceased's uncle's home accompanied by Dr. Barrow. At the home he was told his uncle had died. Mrs. Fraser, he found "was obviously perturbed but Stuart was distraught - 'absolutely distraught'."

Det. Inspector Woel Asphall arrived at the scene at about 3.30 a.m. on 30th November, 1988 and assisted in the investigations. In carrying out a search in the vicinity of the house, he found on the road at the corner of Jack's Hill road and Sunset Avenue a multi-coloured bath towel. This towel was identified by Mrs. Fraser as one which was placed on a table in the master bedroom.

Other policemen involved in the investigations secured articles as exhibits; bedding, towels, toilet tank cover. As part of their investigations and prior to the finger of suspicion pointing at them, statements were taken from the applicants by the police. These statements together with questions administered under caution and answers given in response were part of the body of evidence presented by the prosecution.

A fact which could not have escaped the notice of the jury despite the emphasis placed on the position of the body as photographed by the police photographer and tendered in booklet form, is that there had been some interference with the corpse and its environs by the appellant Mrs. Fraser and her son Stuart, after discovery and before Dr. Martin came on the scene. Mrs. Fraser said she had removed two towels and a pillow which she saw on her husband's neck, she felt his pulse and examined his pupils. She had found him with "his arms on either side." Stuart also examined his eyes and attempted artificial respiration. Dr. Martin found the body with the arms crossed in "sweet repose." The crossing

of the arms must have been done by either Stuart Fraser or the appellant Aileen Fraser. There is no evidence that the blanket tucked about the torso was disturbed.

In statements given to the police the **appellant** Aileen Fraser said her husband was a man of habits. He normally slept with the light on; he customarily slept with the bedroom window opened; he listened to BBC news at 7.00 p.m. and the sweat suit he "was wearing was not his usual sleeping garment."

On the subject of the dress mode for bed of his deceased father on the fateful night, Rowan said:

"My father was wearing pyjamas when I saw him after locking the windows. I cannot be specific as to the colour; it was long pants and long sleeve top. The pyjamas my father had on had buttons at the top. I know the difference between a pair of sweat suit and a pair of pyjamas. When I saw my father at 8.45 p.m. he was still dressed the way I had seen him earlier that evening. He was walking from the kitchen back to his bedroom ..." At the conclusion of this statement dictated on 20th January, 1989 he added:

> "My father owns several pairs of pyjamas and might also wear the top and bottom of a sweat suit as pyjamas."

Stuart testified that his father wore a track sweat suit as pyjamas when it was very cold and that on the evening of the 29th November, 1988 he saw his father in a dressing gown so arranged on his body that he, Stuart, could not see the garment he wore underneath.

The appellant Aileen Fraser said she determined from her examination that her husband was dead she thereupon went to the verandah and informed Stuart his father was not well and asked his friends to leave. She next tried to get Dr. Orrin Barrow and failing this she called her husband's nephew Hugh Cholmondeley

and informed him that her husband was not well. She did likewise when she called Dr. Martin and on his arrival at her house a few minutes later informed him "Sorry John, Aubrey passed". What impression was this intended to convey? What impression did it in fact convey? Dr. Martin's reaction when he discovered that the body had been long dead is understandable. He went into shock.

The appellant Aileen Fraser said in her statement of the 19th January, 1989: "By temperament and training I am accustomed to react to the unexpected calmly and quietly". Was her reaction normal?

The evidence for the prosecution included two paper knives exhibits 9 and 10 which were delivered to the police by the applicant Mrs. Fraser in January 1989. These instruments Dr. Bhatt said could have been used to inflict some of the injuries he saw.

At the end of the prosecution case, the defence moved the Court to rule that the Crown having failed to establish a prima facie case there was no case for the appellants to answer. After hearing submissions Wolfe J (as he then was) ruled that there was a case for the appellants to answer.

Mrs. Fraser made an unsworn statement in which she denied involvement in the crime. She called as a witness to her good character The Honourable Kenneth Smith OJ, retired Chief Justice of Jamaica.

Rowan Fraser gave evidence denying involvement in the crime. He admitted he was at home up to 8.50 p.m. on 29th November, 1988 and then left for work at the Norman Manley International Airport at Palisadoes. There he remained until he was summoned home by his sister Mrs. Allison Hunt. Two witnesses gave evidence of his good character: Mr. Ashton Wright, retired Contractor General of Jamaica and a Barrister-at-law and Mr. Raymond Harrison a commissioned land surveyor.

Mr. Phipps Q C for the appellant Rowan Fraser submitted that the learned trial judge erred when he failed to accede to submissions at the end of the prosecution's case urging that there was no case for his client to answer. Mr. Phipps submitted that the evidence in the case was entirely circumstantial and on the case as postulated by the prosecution the crime was committed by more than one person, there was no evidence of a motive and the evidence pointed to a good relationship between the deceased and members of his family. The opportunity to murder his father was not one to the exclusion of any other person, the open window, the missing articles, the unidentified fingerprints the telephone cord cut, towel on roadway were facts in favour of the appellant Rowan Fraser. Unless there was clear evidence from which the jury could find that the injuries were inflicted before 9.00 p.m. on 29th November 1988, Rowan was entitled to be acquitted. Mr. Phipps Q C urged that there was no evidence of primary facts from which a reasonable jury properly directed could draw the inference that Rowan Fraser was involved in the infliction of injuries which resulted in his father's death. There was not even suspicion. It was therefore wrong for the learned trial judge to have rejected the no case submission. There was no evidence of either or both appellants being involved in this crime, hence he continued, the trial judge was in error when he rejected the no case submission. Even if the evidence could show the involvement of one and not the other, both would be entitled to be acquitted because of the structure of the prosecution case.

The authority for this proposition Mr. Phipps found in R. v. Abbott [1955] 2 All E R 899 Collins & Fox vs. Chief Constable of Merseyside [1988] Crim. L R 247 and R. v. Lane & Lane [1986] 82 Crim. App. R 5. In R. v. Abbott:

"The appellant and R.W. were indicted together on separate charges of the forgery of a receipt for money. At the close of the case for the prosecution counsel for the appellant submitted that there was no evidence against the appellant to go to the jury. The trial judge overruled this submission. R.W: then gave evidence which was hostile to the appellant, the appellant himself also gave evidence, and the jury convicted both the appellant and R.W. In fact there had been no case for the appellant to answer. On the question whether the Court of Criminal Appeal were bound to quash the conviction of the appellant or were entitled in deciding whether to quash the conviction to have regard to the whole of the evidence including that of R.W. and of the appellant,
Held: where two persons are joined in one indictment and charged on separate counts with the same **offence** and there is no evidence against one accused that he committed the offence either alone or in concert with the other, then on the accused's submitting that there is no case against him to go to the jury, it is right that his case should not be left to the jury; accordingly the conviction of the appellant would be quashed.
Judgment of Channell, J in R v Cohen & Bateman (1909) (73 J.P. at p. 352) applied.
R. v. Power [1919] 1 K B 572) considered and distinguished.
Per Curiam; if two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other and there is no evidence that they were acting in concert, both ought to be acquitted (see p. 901, letter F post)
Appeal allowed.

In **Collins & Fox** (supra) the dicta of Lord Goddard C J in **Abbott's** case was applied. In **R. v. Lane & Lane** the court following and applying **Abbott's** case held:

> "that (1) the evidence against each appellant, taken separately, at the end of the prosecution case did not establish his or her presence at the time the child was injured, whenever that was, or any participation. Neither had made any admission; both had denied taking part in any injury; both had told lies, but lies did not lead to the inference of that appellant's presence. The conclusion, therefore, was that the **trial judge ought to have** ruled in favour of the appellants on their submission of no case to answer."

In these cases there was no evidence of the accused persons acting in concert and no evidence directly implicating either accused. In this case, the prosecution sought to establish by circumstantial evidence that the appellants acted in concert to commit the crime. Whether the circumstantial evidence was such that it ought to have been left for resolution by the jury will be further examined.

Mr. Daly Q C for the appellant Aileen Fraser adopted the submissions of Mr. Phipps Q C who continuing, urged that the trial judge should have complied with the guidelines established in **R. v. Galbraith** [1981] 2 All E R 1060 thus:

> "On a submission of no case to answer at the end of the prosecution case, the trial judge should stop the case and direct an acquittal if there is no evidence that the crime alleged against the accused was committed by him. However, if there is some evidence but it is of a tenuous character (e g because of inherent weakness or vagueness or because it is inconsistent with other evidence), it is the judge's duty, on a submission of no case, to stop the case if he comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it; but, where the prosecution evidence is such that its strength

> "or weakness depends on the view to be taken of a witness's reliability or on other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the accused is guilty, then the judge should allow the matter to be tried by the jury (see p 1062 e to g,,post).
> R v Baker (1977) 65 Cr App R 287 applied.
> R v Mansfield [1978] 1 All E R 134 not followed."

A principle to be extracted from **Galbraith's** case may be stated thus: - Where the facts are presented in the direct evidence of witnesses the trial judge can assess the evidence and determine if the prosecution has established a prima facie case for the jury's consideration. Where, however, the facts are to be inferred from circumstantial evidence it is the duty of the jury to make that determination. A trial judge can only entertain a submission of no case to answer if there is no material fit for a jury's consideration. The **jury had to** -

(a) determine the facts;

(b) resolve conflicts;

(c) deal with inconsistencies;

(d) determine if there was evidence from which the time of death could be inferred;

(e) determine the time of death;

(f) determine who was in the house at the time of death;

(g) how the deceased died?

(h) if there was a common design to commit murder and (i) who were involved in the common design;

(j) determine if there was an intruder or intruders.

These are but some of the questions that had to be resolved by the jury and the trial judge could not usurp their functions.

The duty of a judge to whom a submission of no case is made was emphasized by Lord Widgery CJ in **R v Barber** [1975] Cr App R 287 at page 288 when he said:

> "It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called, it is not the judge's job to weigh the evidence, decide who is telling the truth and to stop the case merely because he thinks the witness is lying."

Here and again in **DPP v. Stonehouse** [1977] 2 All E R 909, it is clearly indicated that it is the duty of the jury to find facts, and in so doing to draw inferences from proved facts.

The prosecution case was based on circumstantial evidence and the prosecution evidence was presented on the premise that the appellants acted in concert in committing the crime. The evidence, the prosecution relied on in proof was:

1) The deceased and the appellants were the only persons in the house between 7:00 p.m. and 9.00 p.m. approximately on the 29th November, 1988.
2) The deceased was pronounced dead at approximately 12.50 a.m. on 30th November, 1988.
3) The opinion of the medical experts was that the deceased died between 7.00 p.m. and 9 - 9:30 p.m. on the 29th.
4) The prosecution led evidence to suggest inferentially that the deceased died before 9.00 p.m.
5) The injuries were inflicted by different weapons, to the head, a blunt instrument to the neck and chest by one or more pointed instruments.
6) The size of the deceased, a powerful man 6'2", 238 lbs; it would be difficult for one person to manage him.
7) Indeed Mrs. Fraser told Dr. Martin "I can't manage him". This is an indication of the truth of (6) above.

8) Track shoes impression in the master bathroom - Rowan was only person seen in the house wearing track shoes.

9) Stabs in chest did not pass through track suit top victim was wearing when body seen: giving rise to possibility, victim was not wearing it when stabbed.

10) Evidence of changing of clothes.

11) Rowan said when he was leaving home the deceased was wearing pyjamas. He declared he knew the difference between pyjamas and sweat suit. Pyjamas has buttons. Body dressed in sweat-top supporting inference of changing of clothes.

12) Change of clothes found by murderers - no disturbance of neatness of bedroom, no sign of ransacking giving rise to inference persons within committed crime.

13) Open window and reported missing articles giving rise to suggestion of intruder.

14) No sign of forcible entry, security system intact and working:

15) Not activated by intruder negating presence of intruder.

16) Movements murderers had to make from bedroom to bathroom, passage, bedrooms off passage providing ample opportunity for betraying presence to occupants ...

17) Neat arrangement of body with blanket tucked in about legs under body - no intruder would have done that - time wasting.

18) Rowan was, on his statement, the last person to see his father alive at 8.45 p.m. On evidence injury to head or those to the neck involving blood vessels would have caused death within half an hour of infliction.

19) Medical evidence suggests deceased died before 9.00 p.m. hence when Rowan said he saw him alive at 8.45 he was already dead or probably dying.

20) Mrs. Fraser's deliberate lies to Mr. Cholmondeley and to Dr. Martin about deceased being not well when she knew he had been dead for some time. An attempt to disguise crime.

21) From as early as 10.30 Mrs. Fraser said she saw her husband in a strange posture with door unusually blocked by heavy object; yet, she did nothing about it.

22) When Stuart after seeing his father's body in the bed, went about the house checking he returned to his mother and told her he had seen the toilet tank cover on Allison's bed. Mrs. Fraser told him he should not touch it. Why? This was at a time when it was not known what part, if any, the toilet tank - cover played in the incident.

The prosecution case was based on the totality of the evidence: there was no evidence of a motive but there was abundant opportunity and the subsequent conduct of the appellants were factors for the jury's consideration. The learned trial judge, true to his obligation, was absolutely correct when he rejected the submission that there was no case for the appellants to answer. There was no basis on which he could have withdrawn this case from the jury.

The learned trial judge recognized that the time of death and question of an intruder were critical issues. He highlighted these matters in his directions to the jury at pp 1293-4 when he said:

> "I am now going to deal with just two - just three things, three short things to be dealt with. I have to give you some directions about common design. I have to go back and point out the bits and pieces of the evidence upon which the prosecution relies to satisfy you in relation to circumstantial evidence, and I have to give you some directions as to how you approach expert evidence, because what I am going to do now, I am going to look at the whole question of the time of death because that is an important thing, that issue about the time of death has to be settled, has to be resolved, because it is important in relation to the whole circumstantial evidence. When I say it has to be settled, it has to be resolved. I am not telling you, I am not com-

"pelling you. What I mean is that it has to be dealt with, it has to be dealt with because it is an important factor in the case. I can't tell you that anything must be settled. When it comes to evidence, I can't compel you to come to any view, any conclusion on anything evidential.
Now, an expert is a witness like any other witness. In other words, not because a person goes up there and says: 'I am a doctor' and reels off his qualifications, you the members of the jury must accept what he says. His evidence comes under the same scrutiny like the other witnesses in the case, but, of course, when you come to assess the testimony of a professional and scientific witness, you bear in mind the person's training and the person's qualification, but you are entitled to reject it in the same way that you would reject the testimony of anybody else.
Now, the duty of an expert is to furnish you the jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable you to form your own judgment by the application of those criteria from the facts proved in evidence.
So that is the duty of an expert."

Further, in his directions on common design and on the importance of the time of death he said at page 1299 of the transcript:

"Mere presence at the home does not make them guilty of this offence. You must be satisfied not only that all three were present at the house but the Crown must go further and satisfy you that all three of them participated in killing Aubrey Fraser. So as to the question of presence at the home, the time of death is an important factor. First, you first have to find what time the death occurred and then you go on to consider whether the accused persons were present at the home during that time and whether or not each or all of them participated in killing Dr. Aubrey Fraser."

Analysis re Time of Death

The prosecution had to establish the time of death and in this regard they relied on the evidence of the experts Dr. Martin, Mrs. Cruickshank and the pathologist Dr. Bhatt. Dr. Martin's opinion as to the time of death between 7.00 p.m. and 9.00 p.m. to 9:30 p.m. was based on the stage of rigor mortis he observed when he saw the body at about 1.00 a.m. He said that a view of the stomach and its contents would have assisted him in giving an accurate opinion. Mrs. Cruickshank's opinion was that death occurred between 7.00 p.m. and 9.00 p.m. definitely before 9.00 p.m. on 29th November, 1988. This opinion was based on information she had, that the deceased had eaten at 6.30 p.m. and that the stomach when examined had partially digested food and was full. Being trained in forensic science and in Biochemistry and digestion being in part a biochemical process, had she seen the stomach contents she would have been able to be more precise as to the time of death. Dr. Bhatt was the only expert who saw the stomach and its contents. His evidence was that the stomach was full and its contents partially digested. Some contents were identifiable in their original form as ingested.

Dr. Bhatt's evidence was that the stomach in the process of digestion and assimilation emptied its contents in 4-6 hours. Emptying of its contents commences ½ to 1 hour after ingestion of the meal and the process of emptying is completed in 4-6 hours depending on the nature of the diet.

Mrs. Cruickshank agreed that the authority of Taylor's Medical Jurisprudence, 1973 edition, gave the time of emptying of the stomach as 4-6 hours. But her recent readings and authorities of recent origin showed that studies had revealed that emptying had occurred 2-6 hours after a meal. She relied on Polsons Essentials of Forensic Medicine 4th edition 1985.

The unchallenged evidence of Dr. Bhatt was that the process of digestion involves the commencement of emptying of the stomach contents ½ - 1 hour after ingestion of a meal. His unchallenged evidence was that the stomach of Dr. Fraser at the time of the post-mortem was full and all the contents had not succumbed to the chemical process of digestion, some had remained unaffected by the digestive juices (enzymes). How then should his opinion as to the time of death be affected by these factors?

Since emptying of the contents commences ½-1 hour after ingestion, a stomach that is full after a meal would see the state of fullness remarkably diminished some 2 to 3 hours later. Dr. Bhatt's opinion that death occurred 2 - 3 hours after ingestion or half the time of emptying obviously negated or ignored the factual state he described of the stomach being full. A full stomach is incompatible or irreconcilable with a stomach which has reached ½ the time of emptying, some 2 - 3 hours after ingestion of a meal. With the respect due to his eminence as an expert it is evident, he did not have the regard he should have had to the state of the stomach and its contents and in arriving at his conclusion as to the time of death he concentrated on an assessment of the post-mortem changes occasioned by rigor mortis, hence his opinion as to the time of death as it relates to the time of the post-mortem examination is given thus:

> "One thirty p.m. I did it and considering the post-mortem rigidity and stomach contents and all roughly I put it about 16 hours after death."

It is obvious that this rough estimate is the midway point in the range of 14 - 18 hours that this witness had given earlier. He followed this opinion in answer to further questions which attempted to extract a precise answer as to the time of death with this response.

> "So considering stomach contents ... and the stomach was full, I would put it at half the time of emptying. I put it at two to three hours after the last meal." [Emphasis supplied]

Here again he has given an opinion which halves the time of emptying as testified to by him namely four to six hours. He is an expert and this is his opinion. The duty of an expert -

> "is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusion, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence - Dauce v. Edinburgh Magistrates [1953] S C 34, 40 as reported in Archbold 1992 Vol I 10 - 78." [Emphasis supplied]

In this case it would be the jury's province to determine the accuracy of Dr. Bhatt's conclusion by the application of the scientific criteria he provided. Accepting his evidence that the stomach he saw was full and the scientific data that emptying of the stomach in the course of the digestive process commences ½ to 1 hour after ingestion, could they reasonably accept his conclusion that the full stomach was consistent with consumption of the last meal some 2 to 3 hours before? In 2 hours, applying the criteria Dr. Bhatt supplied, the emptying of the stomach would have been 1 to 1½ hour advanced and in 3 hours it would have been 2 to 2½ hours underway. Dr. Bhatt did not say he saw any signs of emptying. Indeed any such sign would have been inconsistent with the finding of a full stomach. He dissected the body and the organs in the course of his examination and his evidence was conclusive as to the observations he made of the state of the stomach.

A full stomach was, on the evidence more consistent with death having occurred ½ hour to 1 hour after the meal than it is with 2 to 3 hours after the meal. Dr. Bhatt said he was informed that the last meal was had at 6.30 p.m. on 29th November, 1988.

This time he must have had from a member or members of the family namely - the appellants Mrs. Fraser, Rowan Fraser or the witness Stuart Fraser or from Assistant Commissioner Wray who was so informed by Mrs. Aileen Fraser. Mrs. Fraser is on record as saying as early as 5.30 a.m. on the following day that Dr. Fraser had his last meal at 6.30 p.m. the previous day. It is common knowledge that the history of a case forms part of the base for a doctor's opinion. In order for him to form an opinion he asks questions to ascertain the history. The jury had to find as a fact when Dr. Fraser died. They had the opinion of the experts they also had scientific criteria and they were entitled to set aside the opinion of Dr. Bhatt and applying the criteria supplied find that death occurred ½ hour to 1 hour, after the last meal. Accepting the last meal being had at 6.30 p.m. they could find death occurred between 7 and 7.30 p.m. If they accepted that the meal was had at 7.00 p.m. as given by Stuart and the appellant Rowan Fraser then they could find death at between 7.30 and 8.00 p.m. making allowance for vagaries they could extend the time of death to 8.30 p.m. Soup is a popular and regularly consumed meal in Jamaica and the jurors had the time in which to test Dr. Bhatt's opinion against their experience if they so desired.

The persons admittedly in the house at that time were the deceased and the 2 appellants Mrs. Fraser and her son Rowan.

The Intruder

The open southern window, the box behind the master bedroom door, the missing items from Stuart's sewing room, Allison's room and the master bedroom were indicated as evidence from which the inference could be drawn that an intruder had been in the house. This gave rise to a further inference that this intruder or intruders could have committed the murder. The intruder would have had to enter through the window, move to the master bedroom then through the door along the passage that leads to the living room

and from the passage to Allison's room then back to the passage and into Stuart's room or in the reverse order. Then on leaving either room, back along the passage to the master bedroom and exited from the house via the window. In that period of time the murder would have been committed and the movements executed with Rowan sitting in the living room and Mrs. Fraser in the dining room. One may well ask how the intruders evaded detection or had so much time to execute the deeds done unless there was a common design with the occupants of the house to do what was indeed accomplished.

The jury as judges of fact visited the locus. They saw the house, the layout of the rooms, passage, bathroom, windows, the electric alarm installation and they even had a demonstration of the behavioural pattern of the dogs when a dog passing on the road provided an unrehearsed display of the dogs' natural propensity. They saw the exhibits including the toilet tank cover, they were at liberty to handle it and experience its weight, they had to determine what strength it would take to wield it and with what degree of force to inflict the injury to Dr. Fraser's skull.

The learned trial judge in clear and unmistakable language told them their functions as regards their determination of the involvement of an intruder. His directions are at page 1309 of the transcript:

> "If you were to find that an intruder entered the home that morning - you are duty bound to acquit these accused persons if you were to find that it was an intruder who entered because it would cast great doubt as to how Dr. Fraser really came to his death. But, you will recall that when Mr. Andrade addressed you he said, from all the things that this intruder did, you would have to find that he was in complicity with the accused persons; but I am saying to you that if you were to find that intruder entered that bedroom that night, you

sewing room, removing articles from various rooms, and placing the toilet tank cover on Allison's bed. There was no evidence that the house was ransacked, so it was reasonable for a jury to infer that whoever changed the garments knew where to find the replacement. There is evidence that a towel found by Dr. Fraser's head came from the cupboard in which he had his wallet. The contents of the wallet were untouched. Was this the act of an intruder? The camera was allegedly taken from the case, would an intruder have done this? Why would an intruder steal needle and thread and not the wallet and contents? The killers had time to arrange the body with the legs crossed, blanket tucked about the torso, in "sweet repose", a position calculated to induce a belief that the deceased had died peacefully in restful sleep. The appellant Mrs. Aileen Fraser's plaintive call to Dr. Martin "I cant manage him" spoke volumes. The jury saw her and could assess that at her age and size she could not manage a person of her husband's size, a powerful man in the opinion of Dr. Martin, of 6'2" and weighing 230 - 240 lbs. The jury had to determine who was involved. The telephone in the master bedroom was not working Dr. Martin found, but later it was made to work: it had probably been unplugged. The telephone system of the house was not disabled; calls were made out, an intruder bent on interrupting communication would have disabled the system hence the prosecution's claim that cutting of the telephone in the sewing room was part of a clumsy attempt at a cover up.

The toilet tank cover which the Doctors suggested could have been used to inflict the fatal injury to the victim's head was deposited on Allison's bed. It follows that the box of books had to be placed behind the door afterwards and the person who placed the box there exited through the window. There was much concentration in the case on an intruder entering by the window not much thought was given to someone already in the house

> "are to acquit them because you can't presume complicity with themselves and any intruder. And, if you are in doubt about whether or not an intruder really entered that room, you must also acquit them. Even if you dismiss the question of the intruder, if you were to say no intruder entered, that is not the end of the matter. You have to be satisfied in respect of each accused person that each accused person participated in bringing about the death of Dr. Fraser.
> And when you come to deal with the circumstantial evidence, remember I told you about separate accused. You have to look at it in relation to each accused person. You have to look at the opportunity in relation to each accused person. You look at the interest in relation to each accused person. You examine the conduct of each accused person and see if the circumstantial evidence is of the nature where it leads you to one conclusion and one conclusion only and to no other rational conclusion in respect of each accused person."

On the evidence, the experts Dr. Martin and Dr. Bhatt were agreed on the absence of defensive injuries and signs of a struggle although they thought that there ought to have been some indication of a struggle taking into consideration the size of the victim and the nature of the injury which they concluded was the first inflicted, that to the head. Those experts and Mrs. Cruickshank were critical of the small evidence of haemorrhage having regard to the injury to the neck rupturing the blood vessels therein. Although the names were not given, the blood vessels in the neck are the carotid artery and the jugular vein. Dr. Bhatt expressed the view that in all probability the victim, Dr. Fraser was not wearing the track suit top at the time the stabs to the chest were inflicted. This led to the prosecution asking the jury to infer that there had been a cleaning up involving a change of garment and a disposal of blood-stained articles. Only persons with the certain knowledge of their freedom from molestation, surprise or interruption would have found time to indulge in changing garments and setting the scene as it were by cutting telephone wire in the

leaving by the window. The jury visited the locus in quo which was reportedly intact, what observations they made, informed their thinking and finding.

Dr. Fraser was a person who loved open windows and fresh air. When it became unsafe to indulge in this pleasure, security was put in place and burglar bars installed at the upper half of the bedroom sash windows. This allowed the upper half to be opened for admitting fresh air but barred against intruders. Dr. Fraser indulged in privacy and spent much time in the privacy of his bedroom. In Jamaica it is common place to find houses with glass bedroom windows having the glass in the lower half of the window frosted to insure privacy in the bedroom. With the lower half frosted and the upper half barred and open: Dr. Fraser would have all he desired - privacy and fresh air. With security in place, dogs, electronic alarm, burglar bars, why should he open the lower unbarred section of his bedroom window which is at ground level thus negating his security system and depriving himself of the privacy he so cherished. There is no evidence suggesting that he was stupid. The jury went and saw what was there. The jury also saw the burglar alarm system the evidence coming from the Frasers that it was manually operated leads one to question the wisdom of installing a system which required Mr or Mrs Fraser in an emergency having to get out of bed, probably in a darkened room, cross to the area by the window, locate the switch and then activate the buzzer. This was a matter for the jury's consideration. The jury by their verdict found there was no intruder.

At the end of his summation the learned trial judge invited counsel to indicate areas, if any, which they wished addressed. In response to this invitation, this was said:

"MR. DALY: Nothing, that I can think of.

MR. PHIPPS: There is one little matter on which I consulted my learned friend, the question of the missing items, in particular, the Cuban Military radio and the watch which Mr. Fraser - Dr. Fraser - it came in other than through Mrs. Fraser."

He gave further directions to the jury ending thus:

"But you must make up your mind whether items were stolen from this house because if you are satisfied that items were stolen from that house then it would lend credibility to the presence of an intruder.
Bear in mind, you know, that the defence is not saying that it is an intruder who killed Mr. Fraser because the defence is that they don't know how Mr. Fraser came to his death. But the defence is saying there is a real probability, because of the open window, that an intruder could have entered and done the act.

HIS LORDSHIP: Have I covered it?

MR. PHIPPS: Thank you, My Lord. Thank you."

Mr. Daly Q C complained that this direction misstated the defence in saying that:

"The defence is not saying it was an intruder who killed Mr. Fraser."

"In fact," he submitted "This is precisely what the defence was saying, this being the only credible alternative to the Crown's case. In so misstating the defence and further misdirecting the jury the learned trial judge devalued the defence ... in addition it left the impression that the defence had assumed an onus of proving that an intruder had murdered the deceased."

In her statement from the dock Mrs. Fraser said:

"I swear I did not kill my husband, I say again I did not kill my husband. Nor did I arrange to have him killed, nor did any of my children. It is inconceivable that they would do such a vicious act."

Rowan's evidence was:

"At no time at all that night did I injure my father. I was never in combination with anyone and my mother and myself did not kill my father."

also

"We did not kill my father".

Asked if he had any knowledge of how his father came to his death, he said "No".

In these statements neither accused sought to say that an intruder did or could have killed Dr. Fraser. There was in the case, evidence from which it could be inferred that an intruder had entered the house. The learned trial judge therefore had to balance this evidence against the statements of the persons charged and his directions in this regard were particularly apposite. Mr. Daly's contention is without merit.

Rowan Fraser's evidence and the Crown's case was that he was at home between 7.00 p.m. and 8.50 p.m. approximately. He then went to the airport on his job. While he was at home his father was there and alive. He saw him at 8.45 p.m. just before he left home, taking his jug of water to his bedroom. On this evidence he is saying his father must have been killed after he left home and while he was at work or on his way to work. His defence therefore in respect of the period after 9.00 p.m. was an alibi and the judge gave directions adequate and clear to this end. Mr. Phipps' submission that the learned trial judge's directions on alibi were prejudicial to the appellant Rowan Fraser is not supportable.

The directions the learned trial judge gave the jury are at page 1284-85 of the transcript:

> "If you believe what Mr. Fraser told you, you must acquit him. In summary his evidence is, 'I didn't kill my father. I was not involved with anyone else in killing my father and I don't even know how my father came to his death." In other words, he is saying, 'I was't there. I left and went to work.' He is saying, 'I was elsewhere.' He sets up an alibi and in law when a person raises an alibi, what he is saying, 'I wasn't where you said I was. I was at another place.'

"and an accused man has no burden upon him to prove an alibi when he raises it. It is the prosecution that has the responsibility to negative that alibi to prove to you that the alibi is untrue and further, to satisfy you, to the extent where you feel sure, that this was the accused man who committed the crime. Merely to find the alibi is untrue does not entitle you to convict him because the burden of proving his guilt is the responsibility of the prosecution. He has nothing to prove. So even if you reject his alibi you don't convict him for that reason alone. You have to go back and look at the totality of the evidence and say whether or not the prosecution has made you feel sure.
I have dealt with the situation where if you believe him you must acquit him. Now, let's go one step further. Even if you have doubt, if you entertain doubt, in other words, you are not sure whether or not to believe him, you must also acquit him because it means, then, that the prosecution would not have discharged the burden which rests upon it to prove his guilt so you are satisfied to the extent where you feel sure. And, again, I repeat, even if you reject his testimony as being untruthful, you don't convict him for that reason alone. You look at the totality of the evidence."

In the context the learned trial judge's directions were absolutely correct.

The summing up was challenged in several grounds of appeal. Ground 2 for Rowan Fraser and Ground 4 and 15 for Aileen Fraser complained that the learned trial judge failed to indicate to the jury, the evidence relied on by the prosecution as links in the chain of circumstantial evidence. A further complaint was that there was an inordinate number of references to the prosecution case or what the prosecution was propounding, disproportionate to reference to the nature of the defence. This Mr. Daly Q C submitted denigrated defence and was unbalanced in favour of the prosecution.

A trial judge has a duty to indicate to the jury the evidence on which the prosecution relies in proof of the charge in the indictment. Where the evidence is circumstantial he is obliged to indicate the inferences sought to be drawn from the evidence and direct them on their duty in this regard. The burden of proof rests on the prosecution, it follows therefore that in the course of his summation the judge must refer to the allegations of the prosecution. The complaint of the defence that the learned trial judge made frequent reference to the prosecution case is not without substance, but it lacks merit. The learned trial judge also highlighted the inferences the defence alluded to as destroying or casting doubt on the circumstantial evidence on which the Crown relied. There was no burden on the defence to prove anything. This was emphasized by the judge at page 1298:

> "Now, when you are dealing with circumstantial evidence, the factors that you are looking at are: One, opportunity; two interest and three, conduct. So in this case on the question of opportunity, the Crown is saying that in respect of the accused, Aileen Fraser, she was at home for the entire period, from somewhere around 5.30 until the deceased was discovered dead. In respect of the accused, Rowan Fraser, the Crown says he came home somewhere around 6:45 to 7: p.m. and until 8:50 p.m. he was at home before he left for work."

At page 1299 (supra) he told them:

> "Mere presence at the home does not make them guilty of this offence."

And at page 1300 he said:

> "... in my view the Crown has failed to prove any motive ... the failure to prove motive weakens the circumstantial evidence."

At page 1377 he directed:

> "the defence is saying, among other things ... this family is a closely knit family. They have extremely

> "good relationship, inter-relationship, and therefore there is no reason why they would have wanted to kill the deceased."

The jury heard the statement made by the appellant Aileen Fraser and the evidence of the appellant Rowan Fraser and the explanation he gave for the statement he made in relation to the garment, pyjamas, his father wore. They saw and heard him and their exclusive function was to determine what they made of what was said by both appellants. The grounds of appeal fail.

Mr. Daly Q C in ground II said:

> "The learned trial judge erred in telling the jury that circumstantial evidence was free from the blemishes that affect direct evidence."

The accuracy of this complaint must be ascertained by comparing it with the context in which the directions were given beginning at page 1172 and continuing on page 1173 and 1174 the learned judge said:

> "Circumstantial evidence is as valuable in prove (sic) of a charge as is direct or eyewitness evidence. Circumstantial evidence going to prove the guilt of an accused is this, one witness must prove one thing another proves another thing, and these taken together prove the charge to the extent where you can feel sure of it. But none of them taken separately proves the guilt of the accused. Taken together they lead to one inevitable conclusion of guilt, and if that is the result of circumstantial evidence it is as much, it is a much safer conclusion to come to than if one witness goes into the witness box and gives direct evidence and says I saw the crime committed. An eyewitness may sometimes be mistaken, mistaken about a person, or about an act, or may be influenced by grudge or spite. <u>Circumstantial evidence is free from these blemishes.</u> <u>Circumstantial evidence consists of this, that when you look at all the surrounding circumstances you find such a series of undesigned,</u>

> "unexpected coincidences that as a reasonable, that as reasonable persons you find your judgment is compelled to one conclusion; all the circumstances relied on must point in one direction, and one direction only. If the circumstantial evidence falls short of that standard, if it does not satisfy that test, if it leaves gaps, then it is no use at all. [Emphasis added]
>
> Circumstances may point to one conclusion, but if one circumstance is not consistent with guilt it breaks the whole thing down. You may have all the circumstances consistent with guilt but equally consistent with something else too, that is not good enough. What you want is an array of circumstances which point to one conclusion, and to all reasonable minds that conclusion only; and to no other rational conclusion. That is what circumstantial evidence is. I am going to have to come back to it, I have just introduced you to it so as to enable you to appreciate the testimony of the witnesses upon whose testimony the crown is relying to satisfy you so that you feel sure in relation to the circumstantial evidence. But I am going to have to come back to it when I point out to you the bits and pieces of evidence which the crown is saying from those unexpected and undesigned coincidences you should be led to one conclusion and one conclusion only, and to no other rational conclusion but the guilt of the accused persons.

These directions are identical to the directions given in R. v. Lacey Barrett SCCA 151/82 delivered on 4th November, 1983 and approved by this Court. After a careful review of the authorities Carey J A speaking for this Court said:

> "The weight of authority beginning with R. v. Clarice Elliot 6 J.L.R. 173; R. v. Elijah Murray 6 J.L.R. 256; R. v. Burns and Holgate 11 W.I.R. 110 and R. v. Cecil Bailey (supra) is that where the case for prosecution depends on circumstantial evidence, the judge should make it clear to the jury that not only must the evidence point in one direction and one direction only,

> "and that being guilt, it must be inconsistent with any other conclusion. The approach in this country is not the same as in England. In the present case, we are clear that the learned trial judge had firmly in his mind the decisions of this Court based on Hodge's case (1838) 2 Lewin C.L. 227. His directions, in our judgment, were impeccable, and accordingly, we are not persuaded that there is any merit in this ground which thus fails."

R. v. Lloyd Barrett was followed in **R. v. Carlton Linton** SCCA 169/81 delivered 16th January 1984 and in SCCA 32/83 **R. v. George Edwards** delivered 16th December, 1983 in the latter case Kerr J A said:

> "... it is the effect of the summing up as a whole that is important; the trial judge is not obliged to follow any formula or pronounce any shibboleth, ... where however directions on a particular aspect of the law have been authoritatively approved and advocated by an Appellate Court, the prudent and appropriate use of such directions is recommended."

This ground of appeal is unsupportable.

The appellants admitted giving the statements that were tendered as exhibits by the prosecution. They were admitted in evidence as part of the evidential matrix on which the Crown relied. The Crown did not and could not say to the jury they should accept them as absolutely true. Indeed witnesses called by the prosecution are asked to testify because the prosecution present them as persons who were so positioned that the jury can find that they can give credible evidence. The prosecution cannot guarantee that the evidence they give is the absolute truth. It is the function of the jury to find the facts and in so doing to determine where the truth lies. Hence the jury can accept a part of what a witness says. The jury can find that the witness, because

of his emotional involvement with the prosecution or defence may shade or slant aspects of his evidence.

Mr. Daly Q C in ground 13 stated:

> "That the learned trial judge erred in law in directing the jury that the out-of-court statements of the Applicant 'were admitted into evidence as to the facts (sic) of the statement having been made but not as to the truth of the contents therein'."

For the reasons given above I find this ground without merit. Other grounds suggest that the jurors were confused by the directions given and that there was a failure by the learned trial judge to direct the jury that if they were of the view that one person was guilty and were unable to decide which one, all should be acquitted. Counsel mutually supported each other in urging that failure to give an "Abbott" direction led to a miscarriage of justice and the appeals should be allowed. "The verdict was unreasonable and cannot be supported having regard to the evidence" was a ground urged by both appellants, who also urged that due regard to the character evidence should redound to a verdict of acquittal.

Mr. Andrade Q C in response itemised the circumstantial evidence on which the Crown relied. He submitted that the cumulative effect of the evidence led to the conclusion that one person could not have committed the crime. There was evidence of the appellants acting in concert directly or inferentially, he submitted, and the jury considered this and decided adversely to the appellants.

The trial was long and the evidence voluminous the issues were well ventilated and the learned trial judge was studious and careful in his charge to the jury. In any case of some length and complexity counsel can find cause to complain about the direc-

tions given by the trial judge in his charge to the jury. This case was no exception. These complaints must be examined in the light of the circumstances and the principles of law applicable. There is however no formula that the trial judge is required to follow slavishly. In R v Yvonne Johns & Frederick McIntosh SCCA 102, 103/83 [unreported] delivered 8th June 1984 (Kerr, Carey & Ross JJA) speaking per Carey J A said:

> "This Court has made it abundantly clear in many cases hitherto, that it will not prescribe formulae for summations, the sanction for which will be the allowing of appeals. A trial judge should be free to tailor his summing-up, having regard to his assessment of the jury who are called upon to determine guilt or innocence, the nature or complexity of the facts, and the law which is applicable to those facts. So long as directions are clear, accurate in point of law, fair and adequate to enable a jury to understand the issues which fall to be considered, and the law they are called upon to apply to the facts before them, then a trial judge will have ably discharged his function and responsibility as such in relation to a criminal trial in this country. This court will not interfere in these circumstances."

I agree with the submisions of Mr. Andrade Q C that the Crown had presented an overwhelming case of circumstantial evidence. Dr. Fraser, the jury found, was murdered in his house at a time when the only other persons therein were the appellants. There was the apparent lack of motive and adequate directions were given on this and also on the evidence of good character of the appellants given by eminent witnesses led by the Honourable Kenneth Smith O.J. retired Chief Justice of Jamaica, a man renown for his outstanding integrity. Despite this, the jury convicted the appellants on the capital charge. The jury considered the evidence and acquitted the third person charged on the indictment, Mrs. Allison Hunt. This is a clear indication that the jury approached their functions with responsibility and acted intelligently on clear and fair directions given ably and lucidly.

They were not confused and as the directions satisfied the clear dicta of this court given in **R v Yvonne Johns & Frederick McIntosh** (supra) I hold that this court should not interfere with the convictions. I therefore treat the applications as the hearing of the appeals, dismiss the appeals against convictions. Following on the dictates of the Offences against the Person (Amendment) Act 1992 I classify the convictions as non-capital murder; the sentences of death are set aside, sentences of imprisonment for life substituted and I direct that they be not considered for parole until they shall have served a sentence of fifteen years.

Counsel at the Bar have shown industry and erudition in the preparation and presentation of their submissions. My failure to refer to all the authorities they cited has been determined by a desire to avoid prolixity and not out of disrespect.