Privy Council Appeals Nos. 14,15 and 16 of 1988 and 7 of 1989

(1) Junior Reid
(2) Roy Dennis and
(3) Oliver Whylie *Appellants*

v.

The Queen
Respondent

and

(1) Errol Reece
(2) Robert Taylor and
(3) Delroy Quelch *Appellants*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
DELIVERED THE 27TH JULY 1989

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD ACKNER
LORD GOFF OF CHIEVELEY
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY

[*Delivered by* LORD ACKNER]

At the conclusion of the hearing on 29th June 1989 their Lordships reserved their judgment in the appeal of Quelch and announced that they would humbly advise Her Majesty that the appeals of Dennis, Reid, Whylie, Reece and Taylor should be allowed, their convictions quashed and that there be no orders for any retrial. Their judgment in the appeal of Quelch and their reasons for their advice in regard to the other appellants now follow.

[31]

Identification evidence

Judicial experience has established that there are certain categories of evidence which are, by their very nature, potentially unreliable and in respect of which, in order to avoid the serious danger of wrong convictions, special warnings and directions have to be given to juries. Such categories include the evidence of children who, although old enough to understand the nature of an oath and thus competent to give sworn evidence, may yet be so young that their comprehension of events and of questions put to them, or their powers of expression, may be imperfect. In sexual cases, the victims of the alleged offences may have a variety of motivations, some of which may never have occurred to a jury, for giving false evidence. An accomplice, with a purpose of his own to serve, such as the hope of lenient punishment, may well tend, when giving evidence for the prosecution, to suggest that the entirety or the majority of the blame for the crime should fall upon the accused rather than upon himself. Yet this possibility may again not be apparent to a jury. Accordingly, in such cases where the inherent unreliability of the witness might otherwise escape the jury, the trial judge has to give the appropriate warning and explanation of the special caution required when considering that type of evidence.

It is only in comparatively recent times that identification evidence has emerged as a class of its own. Some twenty-seven years ago in the case of *The People (Attorney General) v. Dominic Casey* [1963] (No. 2) I.R.33, the Supreme Court of Ireland decided that it was desirable in all cases where the verdict depended substantially on the correctness of visual identification of the accused, that the attention of the jury should be drawn in general terms to the fact that in a number of instances visual identification of an accused person had been established, after conviction, to have been erroneous, and therefore to the possibilities of mistake. This gave rise to the necessity for caution when considering such evidence. In the reserved judgment of the Court, Kingsmill Moore J. at page 39 said:-

> "We are of opinion that juries as a whole may not be fully aware of the dangers involved in visual identification nor of the considerable number of cases in which such identification has been proved to be erroneous; and also that they may be inclined to attribute too much probative effect to the test of an identification parade. In our opinion it is desirable that in all cases where the verdict depends substantially on the correctness of an identification, their attention should be called in general terms to the

> fact that in a number of instances such identification has proved erroneous, to the possibilities of mistake in the case before them and to the necessity of caution. Nor do we think that such warning should be confined to cases where the identification is that of only one witness. Experience has shown that mistakes can occur where two or more witnesses have made positive identifications. We consider that juries in cases where the correctness of an identification is challenged should be directed on the following lines, namely, that if their verdict as to the guilt of the prisoner is to depend wholly or substantially on the correctness of such identification they should bear in mind that there have been a number of instances where responsible witnesses, whose honesty was not in question and whose opportunities for observation had been adequate, made positive identifications on a parade or otherwise, which identifications were subsequently proved to be erroneous."

Some ten years later there were two much publicised cases where a miscarriage of justice was established, despite the apparent strength of the identification evidence (*Dougherty* and *Virag*). This brought identification evidence in England, as a separate class of evidence, into sharp focus.

In the Eleventh Report of the Criminal Law Revision Committee published in 1972, the Committee stated that it had been much concerned by the danger of wrong convictions on account of mistaken identification of the accused. This it regarded as "by far the greatest cause of actual or possible wrong convictions". The Committee highlighted the difficulty that the identifying witness might very well be perfectly honest and clearly appear to be so and his evidence therefore might seem entirely convincing. The majority of the Committee were in favour of a statutory requirement that the judge should give a warning of the special need for caution before convicting in reliance upon the correctness of one or more identifications of the accused, where the case depended wholly or substantially on such evidence. The Committee emphasised that the need for the warning was not limited to cases where the accused was previously unknown to the witness because, even where they are known to each other, there may be a danger that the identification is mistaken - at least if the witness had only a limited opportunity to observe the offender.

Subsequently, the Home Secretary appointed a Committee under the chairmanship of Lord Devlin to consider identification evidence in criminal cases. That Committee's recommendation was even stronger. The Committee stated:-

> "We have decided that an imprecise warning would not be good enough. Nor do we think that it would be satisfactory merely to tell the jury the rule; they cannot be expected to apply it full-heartedly unless they are

> given the reason for it. This is especially necessary in that the danger in identification evidence is hidden. The extent to which a man may deceive himself is well known to psychologists and to experienced criminal lawyers, but it is not yet universally realised ... Jurors who have thought a little about the point know of course that an identification may be mistaken but do not appreciate the extent to which an apparently convincing witness may be mistaken."

The Committee recommended that, where the evidence for the prosecution consisted wholly or mainly of evidence of visual identification, the jury should be informed that it was not safe to convict upon such evidence unless the circumstances of the identification are exceptional or unless the identification is supported by substantial evidence of another sort. It was however recognised that there would have to be exceptions to this general rule in special circumstances to be worked out in practice.

Shortly after the publication of the Devlin Committee's Report, there were listed before the Court of Appeal a number of appeals where identification was the essential issue, in order to give the Court of Appeal the opportunity to lay down guidelines (*R. v. Turnbull and Others* [1977] 1 Q.B. 224). The Court of Appeal, although seeking to follow the recommendations of the Devlin Committee, avoided the use of the phrase "exceptional circumstances" to describe situations in which the risk of mistaken identification was reduced. Lord Widgery C.J., giving the judgment of the court, said (at page 231):-

> "... the use of such a phrase is likely to result in the build up of case law as to what circumstances can properly be described as exceptional and what cannot. Case law of this kind is likely to be a fetter on the administration of justice when so much depends upon the quality of the evidence in each case. Quality is what matters in the end. In many cases the exceptional circumstances to which the report refers will provide evidence of good quality, but they may not: the converse is also true."

The guidelines laid down by that case are, of course, by now well known and consistently applied in England and in a number of Commonwealth countries. It is however convenient for the purpose of dealing with these appeals, in all of which visual identification evidence was the crux of the prosecution case, to set out yet once more the following much quoted excerpt from page 228:-

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn

the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

"Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

"All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger."

In addition the following short passage from pages 229 and 230 has particular reference to these appeals:-

"When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case

> from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

It is perhaps as well to recall that a little over a year later Lord Widgery C.J. said that *Turnbull's* case "is intended primarily to deal with the ghastly risk run in cases of fleeting encounters" (*R. v. Oakwell* [1978] 66 Cr.App.R. 174 at 178). This statement underlines how seriously the court rates the risk. Subsequent cases have emphasised that a mere statement that a jury must treat visual identification evidence with extreme caution, accompanied by detailed references to the witness's opportunity to identify the accused - e.g. how long he observed the accused, his distance from the accused, the state of the light, how the accused was dressed and other such relevant detail, was not sufficient. This is well illustrated in the case of *R. v. Dickson* [1983] 1 V.R. 227, a decision of the Supreme Court of Victoria. On behalf of the applicant it was submitted that the trial judge had not brought home to the jury the reasons for there being the danger in identification evidence of erroneous convictions. The prosecution had urged that this had been achieved by the judge saying:-

> "Now, you must remember that human nature is fallible, that persons' recollections sometimes are hazy, that the powers of observation of an event or something may be just fleeting or may be made in such circumstances as not to be relied on ..."

Moreover the judge had told the jury that they had to exercise extreme care in determining whether they were satisfied with the evidence as to the identification. He further told them that in the past juries had made mistakes by acting on false identification evidence.

The Supreme Court was not satisfied that what the judge had said effectively alerted the jury to the danger that witnesses, whom they might regard as honest and convincing, might nevertheless be mistaken. The following observations of the court at page 231 are particularly pertinent:-

> "It is difficult to convey to the jury the reality of particular dangers which exist in the evidence without drawing to the attention of the jury two things which they are unlikely to know. The first is that experience in the courts over the years has shown that in a not insignificant number of cases erroneous identification evidence by apparently honest witnesses has led to wrong convictions. For this knowledge the judge draws largely on accumulated judicial experience. One sees instances of erroneous identification from time to time ...
>
> "The second thing which the jury are unlikely to know is the substantial degree of risk that honest witnesses may be wrong in their

> evidence of identification. Jurors who, unlike trial lawyers, have not given thought to the way in which evidence of visual identification depends on the witness receiving, recording and recalling accurately a fairly subjective impression on the mind, are unlikely to be aware of the extent of the risk that honest and convincing witnesses may be mistaken, especially where their opportunities for observing a previously unknown offender were limited. The best way of explaining and bringing home to the jury the extent of this risk is by explaining the reasons for there being the risk and that it is essential to distinguish between honesty and accuracy and not assume the latter because of belief in the former."

The Court was of the opinion that the trial judge had not sufficiently emphasised the reasons for the danger of identification evidence being of a greater order than the risk, inherent in any evidence depending on human recollection, that the witness may be honestly mistaken. He had not stressed that honesty as such is no guarantee against a false impression being so indelibly imprinted on the mind as to convince an honest witness that it was wholly reliable.

In a very recent decision of the Privy Council, on appeals from the Court of Appeal of Jamaica (*Scott and Others v. The Queen* [1989] 2 W.L.R. 924), Lord Griffiths, giving the judgment of the Board, reiterated the importance of the judge discussing with the jury the fundamental danger in identification evidence of the honest but mistaken witness, who is convinced of the correctness of his identification, giving impressive evidence. He said:-

> "... if convictions are to be allowed upon uncorroborated identification evidence there must be a strict insistence upon a judge giving a clear warning of the danger of a mistaken identification which the jury must consider before arriving at their verdict and that it would only be in the most exceptional circumstances that a conviction based on uncorroborated identification evidence should be sustained in the absence of such a warning."

R. v. Turnbull is of course followed in Jamaica. However there have been two reservations expressed by the Jamaican Court of Appeal about the guidelines in that case, such reservations being no doubt due to the escalating violence which has been experienced there, coupled with the intimidation, indeed the suspected murder, of potential witnesses.

The Director of Public Prosecutions, Mr. Andrade Q.C., in his most helpful and thorough address to their Lordships, invited their attention in particular to the case of *R. v. Bradley Graham and Randy Lewis* decided in June 1986, but as yet unreported. Rowe P., giving the judgment of the Court of

Appeal, referred to that part of the judgment of Lord Widgery C.J. in *R. v. Turnbull* which relates to the obligation of the judge in certain circumstances, referred to above, to withdraw the case from the jury and direct an acquittal. He said:-

> "In *Whylie's* case [1978] 25 W.I.R. we considered that if this passage was taken too literally the lines separating the functions of the judge and the functions of the jury could become blurred. We thought that if there was insufficient evidence to support the Prosecution's case, a no case submission would succeed and that if the prosecution witnesses were discredited to the extent that they became manifestly unreliable, the rule laid down in the Practice Direction by Lord Parker C.J. at [1962] 1 All E.R. 448 would equally apply and a no case submission would be upheld. We hesitated to lay down a special rule for visual identification evidence which would be anomalous having regard to the general rule that the jury are in the best position to attach weight to admissible evidence from whatsoever source it might arise."

However this observation does seem at variance with the judgment of the Court of Appeal given by Carberry J.A. in the instant appeal of *Reid.* The learned judge there quoted the following excerpt from the judgment given by Lord Diplock in the Privy Council case of *Dennis Reid v. The Queen* [1980] A.C. 343. At 347 he said:-

> "... but in the light of what they had already held and of the guidelines as to the way in which evidence as to identification should be treated as laid down by the English Court of Appeal in *R. v. Turnbull* [1977] 1 Q.B. 224, which is followed by the court in Jamaica, the only direction that the judge could properly have given to the jury was that on the state of the evidence before them the defendant was entitled to be acquitted."

Carberry J.A. accepted that the effect of this passage was "to move the law in Jamaica closer to the law as indicated in England in *Turnbull's* case".

Their Lordships have no doubt that the direction of Lord Widgery C.J. that "When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions ... The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification", applies with full force and effect to criminal proceedings in Jamaica.

Again in *R. v. Bradley Graham and Randy Lewis*, the Court of Appeal quoted the familiar passage from its decision in *R. v. Oliver Whylie* (1978) 25 W.I.R. 430 at page 433:-

> "We have considered the decisions in the cases of *Arthurs v. A.G. for Northern Ireland* (1970) 55 Crim. App. Rep. 161, *R. v. Turnbull* [1977] 1 Q.B. 224, *R. v. Peggy Gregory* (1973) 12 J.L.R. 1061, *R. v. Desmond Bailey* (1973) S.C.C.A. 176/73, *R. v. Dennis Gayle* (1973) 12 J.L.R. 1077 and from these cases we extract the principle that a summing-up which does not deal specifically, having regard to the facts of the particular case, with all matters relating to the strength and the weaknesses of the identification evidence is unlikely to be fair and adequate. Whether or not a specific warning was given to the jury on the dangers of visual identification is one of the factors to be taken into consideration in determining the fairness and adequacy of the summing-up." (emphasis added)

In *Scott v. The Queen (cit supra)*the Court of Appeal of Jamaica, in rejecting the application for leave to appeal, obviously had the above quoted passage from *Whylie* in mind when they said:-

> "A failure to warn the jury of dangers inherent in visual identification cases, it must be borne in mind, is but one of the factors to be taken into consideration in determining the fairness and adequacy of the summing up."

However as the judgment of the Privy Council emphasised "this passage gives too little weight to the recognised dangers of convicting on uncorroborated evidence of identity".

It is of course true, as was pointed out in terms in *R. v. Turnbull*, that since 1966 the Court of Appeal has had power to quash a conviction if in the judgment of the Court on all the evidence the verdict is either "unsafe or unsatisfactory". This power is wider than the power previously enjoyed under the Criminal Appeal Act 1907 which conferred the same power as that enjoyed by the Court of Appeal of Jamaica under section 14 of the Judicature (Appellate Jurisdiction) Act. This provides as follows:-

> "14.(1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any

> ground there was a miscarriage of justice, and in any other case shall dismiss the appeal."

Similar powers are enjoyed by the Supreme Court of New South Wales. It is however apparent from the case of *R. v. De- Cressac* (1985) 1 NSWLR page 381 that the principles enunciated in *R. v. Turnbull* apply in New South Wales. In that case the Crown's case was dependent entirely upon identification evidence. None of the four witnesses had any previous knowledge of the appellant, their evidence being confined to observations immediately prior and subsequent to and contemporaneous with the robbery. The Court held that the summing up was significantly deficient in that it did not contain an appropriate and thorough warning by the judge to the jury both in relation to the general dangers inherent in identification evidence, as well as in relation to some of the particular aspects of the evidence which required the jury to exercise special caution. The Court concluded that the deficiency was not of a minor character and therefore it had resulted in a substantial miscarriage of justice. Street C.J. giving the judgment of the Court said at page 390:-

> "The miscarriage relied upon by the present appellant was of a serious nature. Fullagar J. in *Mraz v. The Queen* (1955) 93 CLR 493 at 514 in a passage that has been repeatedly referred to with approval in later High Court decisions, said of the proviso in section 6 that:
>
> > '... It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says he shall have, and justice is justice according to the law.'"

Their Lordships have no hesitation in concluding that a significant failure to follow the guidelines laid down in *Turnbull* will cause the conviction to be quashed because it will have resulted in a substantial miscarriage of justice.

Their Lordships now refer to the facts of the individual appeals.

Roy Dennis

The short facts of this appeal are as follows. On 22nd December 1980 at about 10.15 p.m. Patricia Elvin and the deceased, Barrington McPherson, were

standing under the street light at the intersection of Union Street and Clarence Road listening to music. Patricia Elvin heard an explosion, looked in the direction of the explosion and saw the appellant, whom she knew for about three years as "Youth" with a gun in his hand leaning on a wall close to the left of the deceased. She heard two further explosions and ran into a yard and hid behind a gate column. She looked through the open gate-way and noticed the appellant standing over the deceased, who had fallen in the open gate-way. The appellant then ran away down Clarence Road. The deceased died from the gun shot injuries and on 2nd July 1981 the appellant was arrested for murder. His defence was one of alibi. The decision of the Court of Appeal was not unanimous. There was a powerful dissenting judgment by Carberry J.A.

Although Patricia Elvin said she knew the appellant by sight, she had never spoken to him. No identification parade took place. There was merely a dock identification a year after the killing at the preliminary enquiry, and then again at the trial some two years thereafter. The appellant gave sworn evidence that he had spent the night at the hospital with a friend who was not available to corroborate his evidence, because he had subsequently emigrated.

The only warning given by the trial judge was in these terms:-

> "So she had two opportunities to view the accused. That is her evidence. When she looked and saw him with the gun first, and when she saw him over the fallen Barrington McPherson. Think of that with care, in examining the evidence as to the opportunity she had to view and the opportunity to recognise the assailant of her boyfriend in these circumstances that existed at the time."

There was thus no warning in the terms required in *R. v. Turnbull.* The jury were never told that visual evidence of identification is a class that is particularly vulnerable to mistake and the reasons for that vulnerability, that honest witnesses can well give inaccurate but convincing evidence and that accordingly visual evidence of identification has to be treated with special care. There were no exceptional circumstances to justify this failure to give a clear warning of the dangers of mistaken identification. Accordingly the conviction must be quashed (see in particular *Scott v. The Queen, cit supra).* However, in addition to this fatal error, their Lordships agree with Carberry J.A. that there was an inadequate analysis of the weakness of the identification which was made at night in a situation which, as the learned justice of appeal wisely observed, "must have been as terrifying as it was sudden". Nothing was said as to the difficulties that might have been experienced in trying to find evidence to support the alibi, nor was the jury told, as they should have been, of the support, if any, of the identification evidence which could be derived from their rejection of the alibi. It was stated in *R. v. Turnbull* at page 230:-

> "False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. ... The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was."

While their Lordships see force in the suggestion made by Carberry J.A. in his dissenting judgment that a new trial should be ordered, that suggestion was made more than three years ago and it is now nine years after the murder took place. Viewing the situation as at June 1989, and bearing in mind the quality of the visual identification evidence and the absence of any identification parade, their Lordships are satisfied that it would not be in the interests of justice to order a new trial.

Junior Reid

The material facts of this case can be shortly summarised as follows. At approximately 8.30 a.m. on 23rd August 1979, Norma Chung, the deceased, was driving a white right-hand drive Ford Capri motor car in Tewari Crescent in the parish of St. Andrew from Maxfield Avenue in the direction of Spanish Town. She was shot at, her car crashed and she subsequently died of two gunshot wounds from bullets which, according to the medical evidence, had entered her body from the right-hand side and travelled from the right to the left. The first bullet had entered her right shoulder and ended up embedded in her left breast. The second bullet had entered the right-hand side of her neck and passed out of the body on the left-hand side of the neck. The bullets were fired at a distance of more than eighteen inches.

Tewari Crescent forms an L-shaped road. Mrs. Chung's car had driven along the road, turned the corner, a sharp right-hand bend, and then some twenty yards from this corner, her car was found having crashed into the zinc fence on the right-hand side of the Crescent, the front windscreen shattered as well as the glass of the driver's door. The glass of the nearside door was unbroken and the police found the window of this door was wound up. The car was a two door saloon.

The whole of the visual identification evidence was given by Lilian Campbell. She lived in Tewari Crescent next to an abandoned house and both of these houses stand on the opposite side of the street to where Mrs. Chung's car had crashed. Lilian Campbell said that she had heard three shots and these caused her to go out on to the veranda at the front of her house. She there saw

that Mrs. Chung's car had crashed into the fence on the opposite side of the road, with Mrs. Chung slumped over the driving wheel. Her evidence was that the following sequence of events then took place.

Two men ran across the road from the abandoned house next to her house towards the crashed car. One of the men had a short gun in his right hand. She recognised him as "Junior Godfather" and the prosecution alleged that he was the appellant. The other man did not carry a gun and she did not see his face. She said that Junior Godfather went to the left-hand side of the motor car, that is the passenger side, placed his left hand on the roof of the car, put his right hand holding the gun into the car and fired three shots. The other man stayed on the left-hand side at the back of the car. Both men had their backs to her and they both ran back to the abandoned house. On 20th September 1979 Lilian Campbell attended an identification parade where she identified the appellant after asking to see his teeth. She made this request, so she said, in order to make doubly sure, since she knew that Junior Godfather had a gold tooth. She had known him for some eight years seeing him daily in a restaurant where she had worked previously.

The appellant made an unsworn statement from the dock putting forward an alibi defence that he was at home at the time of the shooting and was not near Tewari Crescent. His sister gave evidence in support of his alibi. Further it was part of the appellant's case that he was in prison during the period December 1976 to July 1979 and the Superintendent of Saint Catherine's District Prison gave evidence to confirm this.

Quite apart from the judge's failure to give the general warning as to the dangers of identification evidence and an explanation of the reasons for such a warning, she appears not fully to have appreciated how irreconcilable was the evidence of Miss Campbell with the medical evidence relating to the path of the bullets and the cause of death. Moreover the prosecution evidence as to the shattered windscreen and the broken glass of the driver's door, as contrasted with the glass of the window of the passenger's door which was up and intact, were of vital importance. All she said to the jury about discrepancies in Miss Campbell's evidence is to be found in the following short passage:-

> "Now the injuries on the right side, as I said before, tend to suggest that whatever injuries she suffered was given to her by some implement from that side; but if she is travelling down Tewari Crescent and she was shot at whilst she was travelling down Tewari Crescent, shot at from her right side, in other words if one of the three or if the three explosions which the witness said she heard before she heard the car crash entered the car and shot her at that time, then also it would tend to suggest that these three explosions came from the right side of the road and that is what caused

the car to crash, because it must have been something that caused the car to crash Mr. Foreman and members of the jury and the witness says that she heard three explosions.

Now, one does not know it was six shots. Two entered her. There were three shots which the witness says that she heard after the men went to the side of the car - the left side of the car. When did she get the fatal injury? No one knows. Was it at the first three explosions? Or was it at the time of the second three explosions? You will recall that one bullet was found in her hair. That bullet could have come from either the left side or the right side. Nobody knows. Is it a matter, then, that the three explosions - three gun shots entered the car. The car crashed. Then, to make sure that the woman was dead, these two - accused and the other fellow, ran from the left side of the road towards the car and fired three shots. That is one theory. The other theory is that it happened on the other side. It is all a matter for you to decide. If it happened whilst she was coming down, then it would mean that the men who ran across from the left side of the road to her, were working along with others who were possibly on the look-out on the other side of the road."

Carberry J.A. giving the judgment of the Court of Appeal had no doubt about the true facts. He said:-

"As Mrs. Chung was turning in the corner of the 'L' on Tewari Crescent her car was ambushed, and she was shot dead. The car went out of control, mounted the sidewalk to her right (it was a right hand corner and the car was a right hand drive car), and came to rest against a fence on that side of the road at an angle to the fence and road. ... Mrs. Chung then had been shot from the right, as the car had slowed to take a right hand bend, from which it never straightened up, and came to rest on the right hand sidewalk touching a zinc fence on that side of the road."

That indeed seems to be the irresistible inference. What the trial judge never pointed out to the jury was that Miss Campbell's evidence, that Junior Godfather went to the left-hand side of the car and put his right hand holding the gun into the car, could not be accurate. The window on that side of the car was up. It is inconceivable that the assailant had opened the car door, wound the window down, then put his hand into the car, fired three shots, then opened the car door, wound up the window and then closed the door. Moreover if three shots had been fired at close range in the circumstances described, it is highly improbable that none of them would have entered the body of Mrs. Chung or were found in the car.

Despite the Court of Appeal's firm inferences as to the facts, as referred to above, the court focused its attention on the efficacy or otherwise of the judge's direction to the jury as to the identification evidence. Nowhere is there to be found a reference to the need for the prosecution to establish the facts as "found" by the Court of Appeal, nor how the appellant came to be involved in some sort of joint enterprise with the unidentified person or persons who had shot and killed Mrs. Chung, before the appellant came out of the abandoned house.

Having regard to the impossibility of reconciling Miss Campbell's evidence with that of the medical evidence and the evidence as to the state of the car, as referred to in detail above, the judge should have withdrawn the case from the jury at the conclusion of the prosecution's case and directed an acquittal. Clearly this is not a case in which justice could be served by ordering a new trial, since the prosecution would be faced with the same insurmountable evidential problems.

Oliver Whylie

Pauline Thompson was murdered on 1st June 1974. The first trial of the appellant took place in November 1975. The jury were unable to agree, with the result that a retrial was ordered. This retrial took place in July 1976. The appellant was convicted of murder. He appealed to the Court of Appeal in April 1977. His appeal was allowed because the trial judge had not warned the jury in general terms that there was a danger of mistakes in visual identification, and he did not tell the jury of any of the reasons why such a danger can arise. Further he did not tell the jury how to approach the identification evidence of the witness Rose, in the light of the evidence of an incident in June 1974 at the CID office at Hunt's Bay, in respect of which the appellant had given certain evidence and which will be referred to in detail hereafter.

The third trial took place in July 1978 when the appellant was once again convicted of murder. He again appealed contending, *inter alia*, that the directions to the jury about visual identification were inadequate.

The material facts of the case can be stated shortly as follows. On 1st June 1974 at about 12.00 midday Raphael Rose, the only eye witness called by the prosecution, was in a betting shop at 207 Spanish Town Road. The deceased, Pauline Thompson, and one Warrell were also present, and they were checking bets which had been made. The prosecution's case was that the appellant, who was armed with a firearm, and another man entered the betting shop. The appellant pointed the gun at Rose and said "Give me all the money you have - don't talk - don't move". The appellant kicked the door in the counter of the betting shop and entered the seller's section where Rose, the

deceased and Warrell were. The appellant said to the deceased "Give me the bag with the money" and took the money from her. The appellant was standing close to Rose at the time and the appellant hit Rose with the gun and Rose fell to the ground.

The appellant is then alleged to have fired a shot which hit Pauline Thompson and subsequently caused her death. In the incident, which lasted approximately two minutes, Rose said he saw the face of the appellant when he entered the betting shop, when he went from the customers' side, when he was hit and while he was on the ground. At about 5.30 p.m. on the same day Detective Sergeant Simpson visited the appellant at his home and told him that he had received information that he had killed Pauline Thompson, to which the appellant is alleged to have replied "She dead, sah?" and appeared to be frightened. He was taken into custody, but it was not until 26th June at an identification parade at Hunt's Bay Police Station that Rose identified the appellant as the man with the gun in the robbery.

The appellant gave evidence on oath stating that he had not been involved in the robbery but had been elsewhere that day. He had left his home in Rodney Road at about 10.00 a.m. along with his sister and someone called Leroy Mitchell. They had all gone to Coronation Market and did not return home until 2.00 p.m. He agreed that later that afternoon Detective Sergeant Simpson came to see him. He was asked whether he knew the whereabouts of two persons the officer thought had robbed the betting shop and shot a girl there. He told the officer that he had not seen them. He denied that the officer had said he had information that the appellant had killed Pauline Thompson and he denied that he said "She dead, sah?". He went with the officer to a betting shop in Spanish Town Road where two Indian-looking persons said he was not one of the men involved in the robbery. He also said that he was taken to Hunt's Bay Police Station and held in custody and that on the following day at about 2.00 p.m. he was taken up to the CID office in which were present both Detective Sergeant Simpson and Raphael Rose. He accepted that Rose had identified him on 26th June. He gave further evidence that he was left handed and suffered from a damaged right hand since injuring it in 1973.

Although the trial judge gave a long and detailed summing up, very fairly analysing and commenting on the prosecution evidence, the warnings about the dangers of identification evidence are to be found only in the following two passages:-

> "Now there are people who are better able to recognise other people than others. There are people who would be so frightened that they would never recognise whether it was a dog or a puss who was holding the gun; but some people are better and so this is why you have

to look at the witness too and see whether you can rely on what he says when he says that he recognised that gunman afterwards.

"But, even an honest witness may be mistaken, he may not know that he is telling a lie. So this is why we are going into all these circumstances to see whether we can really rely on it. You have known instances where you see someone whom you know quite well from behind or from before and you go to them and clap them on the shoulder and say: 'Hi John' and with the look that the person turns and looks at you, you realise that it is not the person. If this has ever happened to you and you are not under any stress, then you know that it is possible for you to mistake the identity of the person. So, you can see all the reason why we have to approach his evidence with caution."

Now it is clear that the first warning set out above is a warning in general terms applicable to all witnesses, and the second warning adds very little to the first. What the judge failed to do was to explain that visual evidence of identification is a category of evidence, which experience has shown is particularly vulnerable to error, errors in particular by honest and impressive witnesses and that this has been known to result in wrong convictions. Accordingly identification evidence has to be treated with very special care. Moreover when the judge came to deal with the appellant's alibi she gave no warning of the kind required by *R. v. Turnbull* and referred to above in relation to *Dennis's* appeal. Once again their Lordships must refer to *Scott v. The Queen.* If convictions are to be allowed upon uncorroborated identification evidence there must be strict insistence upon a judge giving a clear warning of the danger of a mistaken identification which the jury must consider before arriving at their verdict. It is only in the most exceptional circumstances that a conviction based on uncorroborated identification evidence will be sustained in the absence of such a warning. This was not an exceptional case. The conviction cannot therefore stand. Mr. Andrade very fairly conceded that to order yet another new trial would not be in the interests of justice.

However, before parting with this case, their Lordships would wish to add a further criticism as to what happened at the trial. It is clear from the report of the decision of the Court of Appeal given in July 1977 following upon the appellant's conviction the previous July, that the appellant at that trial had challenged the quality of the identification parade evidence. It had been suggested to Rose that he saw Detective Sergeant Simpson on the occasion of the identification parade and that they both talked about the case. Rose accepted this suggestion and indeed said that on the day of the parade he saw and spoke to Detective Sergeant Simpson in the office sometime before the parade was held (see the report of the decision of the Court of Appeal in 1978 (25 W.I.R. 430, 431 G to I). However, at the third trial, the subject matter of

this appeal, Rose went back on these admissions. When the passages from the relevant transcripts were put to him, he denied he had ever made those admissions. Apparently, owing to the non-availability of the certified copies of the transcript of this earlier trial, alternatively the non-availability of the appropriate shorthand writer to prove their contents, the defence was unable to prove these inconsistencies in evidence. A similar situation arose in relation to evidence given at the first trial in 1975, where Rose admitted under cross-examination that he had read a report in the Star newspaper before he went on the identity parade at which he named the appellant in connection with the shooting and that he had thus known the appellant's name when he purported to identify him. Accordingly he was able to give his name when carrying out the identification. Rose repudiated these admissions and similar technical problems arose as to the proof of these inconsistent statements. Their Lordships are firmly of the opinion, with which Mr. Andrade very frankly agreed, that where new trials are ordered the prosecution should ensure not only that the transcripts of the evidence of the witnesses who have been challenged by the defence are available, but that they are capable of being proved in accordance with the relevant provisions of the Jamaican laws of evidence. For the defence to be prevented, on purely technical grounds, from establishing significant inconsistencies in important evidence given by the prosecution amounts to a denial of a fair trial.

Errol Reece and Robert Taylor

Reece and Taylor together with Delroy Quelch were convicted on 21st June 1985 of the murder of Vernal White who died on 3rd July 1984. Their Lordships will first give their reasons for their decision humbly to advise Her Majesty to allow the appeal of Reece and Taylor and to quash their convictions and then deal separately with the appeal of Delroy Quelch, having announced on 29th June 1989 that they would take time to consider their advice as to his appeal. However it will be convenient at this stage to set out the material facts which relate to all the appellants.

The principal witness for the prosecution was Acting Corporal Dukie Chambers. On 3rd July 1984 at about 10.30 a.m., while on duty at the Millbank Police Station, he received a report from Lloyd Shepherd and the deceased. As a result Corporal Chambers armed himself with a rifle and a .38 revolver and set off in an unmarked police car driven by Shepherd to Millbank. He was accompanied by Vernal White and a groundsman from the station. On approaching a bridge, Chambers saw a Volkswagen van and in the driveway of a house seven men standing next to the van. As their car approached, the men bent down and appeared to pick up "things". The men then ran towards the front of the house. The police party drove on over a concrete bridge, while two of the men were seen to point M-16 rifles in their direction. The car pulled up

and, as the occupants alighted, the gunmen opened fire at them. The members of the police party dispersed, Corporal Chambers going up on to an embankment on the right-hand side of the road and Vernal White to the left. From this position Corporal Chambers returned fire twice, but then the mechanism on his rifle jammed. At this point a group of three of the men came running along the road towards him. The foremost of the three had a rifle and behind him came a man dressed in khaki who was unarmed, then another also unarmed. In order to conceal himself Corporal Chambers fell flat to the ground and lay in the wild ginger which grew to the height of some nine inches. The three men ran past him and on down the road closely followed by a fourth who was carrying a cassette tape recorder.

Next, Corporal Chambers saw three more men running down the road in his direction. The one to the front had a .38 revolver in his hand; the one behind him was dressed in brown pants and a whitish coloured long-sleeved shirt with green stripes and was unarmed; the third man, at the rear, was dressed in khaki and was armed with an M-16 rifle. As they approached him, these three men stopped, looked in his direction and were talking. Then they too ran off. By this time Corporal Chambers had unjammed his rifle. He fired a shot after them, whereupon they all jumped into bushes at the side of the road. After they had disappeared he went looking for his colleagues, only to find that both Shepherd and White had been shot, the latter fatally. Some six months later, on 10th January 1985, at separate identification parades held at the Central Police Station in Kingston, Corporal Chambers purported to identify Reece as having been the middle man of the second group of the three who had run past him and Taylor as having been the middle man of the first group of three who had run past him on the same day.

At the trial Corporal Chambers estimated that the length of time during which he had been able to observe the men whom he identified as Reece and Taylor had been seven seconds and four seconds respectively. Throughout his observation of both men he had been lying flat on his chest on top of the embankment, some two yards above the road.

As the facts set out above clearly demonstrate, the quality of the identifying evidence was indeed poor. In each case it depended solely on a fleeting glance made in difficult circumstances. The witness was lying flat on his front, frightened for his life and trying to hide from the very men he subsequently purported to identify. Reece and Taylor formed part of a large group of seven men in all and there was no special reason to concentrate on them, since neither was armed whereas others were. Both men ran past the witness, and all seven men in the group were complete strangers to Corporal Chambers. In their Lordships' view this was a classic case where the uncorroborated identifying evidence was so poor, depending solely on fleeting

glances and further made in difficult conditions, that the judge should have withdrawn the case from the jury at the end of the prosecution evidence and directed an acquittal. Although the judge stressed that the witness was a police officer, and suggested that his ability to identify people could well be greater than that of an ordinary member of the public, experience has undoubtedly shown that police identification can be just as unreliable and is not therefore to be excepted from the now well established need for the appropriate warnings. Mr. Andrade very properly accepted that if these appeals were to be allowed and the convictions quashed for the reasons set out above, it would be quite inappropriate to order a retrial.

Delroy Quelch

Corporal Chambers gave evidence that he saw Quelch on two occasions during the events of 3rd July 1984 described above. The first occasion, albeit for only three seconds, was when he saw him standing in front of the house by the Volkswagen van. He had on green khaki and was holding an M-16 rifle. On this occasion he saw the whole of Quelch. The second occasion was when he saw him at the rear of the last three men as they passed him, as he lay on the embankment. On that occasion he said Quelch was about two and a half yards away. Quelch still held the M-16 rifle and on this occasion his opportunity to observe him was for about ten seconds. A month later, on 2nd August 1984, Chambers purported to identify Quelch at an identification parade. The defence of course, as it was fully entitled to do, submitted that in relation to Quelch, as in relation to Reece and Taylor, Corporal Chambers' opportunity to observe Quelch was merely that of a fleeting glance, albeit on two occasions, and made in difficult circumstances. However this was by no means the totality of the evidence against Quelch.

On 10th July 1984 when arrested at his home he first told the arresting officer "I don't know Portland, Sir". Subsequently he told the officer that he wanted to tell his side of the story. This was reported to a senior police officer, Detective Superintendent Hutchinson, and he arranged for a justice of the peace to be present while the statement was taken. He was Mr. Nembhard and his evidence will be referred to later. In his, Mr. Nembhard's, presence the officer said he repeated that Quelch was desirous of giving a statement, the caution was then written down, the statement read over and signed by Quelch and witnessed by Mr. Nembhard. Quelch was then asked by the officer whether he wanted to make the statement or wished the officer to write it down. Quelch opted for the latter procedure and this too was recorded on the statement and again signed by Quelch and witnessed by the justice of the peace. Quelch then dictated a statement which the officer took down in writing. The statement was read over to him, he confirmed its accuracy, after initialling some alterations, by signing it, and his signature was again witnessed by Mr. Nembhard.

Because of the allegation that the statement was made as a result of violence and threats by the police there was a *voir dire*, during which both the officer and the justice of the peace and the appellant Quelch gave evidence. The trial judge ruled that the statement was a voluntary one and it was admitted in evidence. The police officer and the justice of the peace gave evidence before the jury as to the circumstances in which the statement came into existence and repudiated any suggestion that there had been any force used, or that there were any signs that violence had been inflicted upon the accused. The prosecution offered to make available the two officers who were alleged to have committed the acts of violence and issued the threats, but the defence did not take advantage of that offer.

Quelch did not choose to give evidence before the jury. He made an unsworn statement in which he said that on 3rd July 1984 he was not in the parish of Portland and he did not have a gun at any time. The rest of his statement reads as follows:-

> "On the 10th July, 1984, while I were at my home in Mt. Felix, Sgt. Benjamin, Cpl. Kerr accompanied Mr. Williams and other policemen were there, came to my home. They took me and two of my brothers to the Central Police Station, where I was beat up by Det. Benjamin and Cpl. Kerr. I was then taken to a room where they order me to sign to a statement, after threatening me that if I don't do what they say, I would be took out of my cell and be shot. I then do so on the request of the officers for I were frighten of the threat and afraid of the continuing of the beating; and that is my procedure, M'Lord."

Quelch's signed statement, together with the certificate signed by the officer Hutchinson, was made an exhibit and was provided to the jury on their retirement. This statement is of considerable importance in this case and should be set out in full:-

> "I, Delroy Quelch, duly cautioned by Detective A. S. P. Hutchinson, at C.I.B. Headquarters, Kingston, on the 10/7/84 as follows:-
>
> You are not obliged to say anything unless you wish to do so, but what you say may be put into writing and given in evidence.
>
> Witness: (sgd) H. Nembhard
> J.P. Kingston. 10/7/84
> (Sgd) Delroy Quelch 10/7/84

I, Delroy Quelch, wish to make a statement, I want someone to write down what I say. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence.

Witness: (sgd) H. Nembhard
J.P. Kingston. 10/7/84
(Sgd) Delroy Quelch 10/7/84

Delroy Quelch states as follows:

Last week Tuesday, on the 3rd day of July 1984, I was at Moore Town, Portland. While I was there I met up on a fellow which I knew as Chappel, otherwise known as Norris - he is from Cross Pass in St. Thomas, it is near to my district - accompanied with some strange men, five in all. Chappel said to me, they on a work so I must walk with them because me know the area.

I walk with Chappel and the five strange men up on the road for about two chains. Chappel, myself and one of the strange men stop. Chappel went to a shop and buy some soft drinks and the four strange men branch off to a bottom road at the cross road which go to the Moore Town Post Office.

About half of an hour later the four strange men return and said to Chappel, myself and the strange man that was with us, 'We have to leave this area now'. The strange men said to me, 'Dread, you can't leave us because you know the area and you have to come with us.'

I followed them to Millbank District. While I was walking with them I saw three of the strange men armed with guns, two short and a long one. We meet up on a blue VW van which was parked on the roadway. The men with the guns stick up the driver of the van. I was with them during this stick up. Them tell the driver to give them all him have. The driver said, 'Me no have anything.'

We all went into the van and the driver was told to drive out the area. Before the driver drive a big car came up and pass the van and stop about three chain above the VW van. When the car pass one of the men in the VW van in which I was said that the car look suspicious. This same man said to the driver of the van to drive off. The van drive off, and reaching to where the car was stop it also stop which cause the road to block.

Two of the men in the van that I was in said, 'See two men come out of the car like police, them have gun.' One of the men who came out of the car went on the top of a hill. Two of the men jump out of the van with their guns in their hands and ordered the men on top of the hill to drop the gun which was in his hand. At this time all of the other men including meself came out of the van and went towards the car.

I then heard gunshots and I saw the two men who was in the van with me firing shots at the man on the hilltop. I walk a little distance away and the rest of the men run to where I was and said, we have to move now because two man got shot and me know the area, me fi tok them out. I led the way and took all these men to Glenmoy District in the parish of St. Thomas travelling through the hills.

While going through the hills the strange man told me and showed me a revolver which they said they took from the man on the hill who they shoot. While coming through the hill we put the guns in a travelling bag.

After reaching Glenmoy District I took them to my district at Mount Felix. When I went to my house and Chappel and the other men went away.

Since this incident I saw Chappel on Saturday night the 7/7/84 at a dance at Mount Felix school room. I have not seen the strange men again. I did not ask Chappel about these men.

The same evening I heard on the radio J.B.C. station that a robbery took place at Moore Town Post Office and two men was shot and one died. When I heard this I was frightened because I know I was involved.

While coming through the hill the strange men said, 'We get a small amount of money, Dread, this no portion of money, so the next time we will see how it go.'

Among all the men Chappel and meself know the hill and area very good. The men did not give me any of the money, but they said a next time. They said I must keep my mouth or else my life will be in danger.

I did not tell anyone anything until the police held me and I told them what happened. What I tell the police is the truth, I do not know the whereabouts of the men. I only know that two of the men, I only knew that two of them is from Kingston.

When Chappel and the strange men told me that they are going to make a move, they went to the Moore Town Post Office, and Chappel, the strange men and meself were left as the look-out men. The strange man with the long gun was wearing soldier type uniform, he is black in complexion, five feet six inches tall, stout - I mean medium build.

Me, sorry now that me go with Chappel and the strange men and took part. Me regret.

That is all.

Witness: (sgd) H. Nembhard
J.P. Kingston. 10/7/84
(Sgd) Delroy Quelch 10/7/84

The above statement was read over to me at my request. I was told that I can add, alter, correct or delete anything I wish. I made this statement of my own free will.

Witness: (sgd) H. Nembhard
J.P. Kingston. 10/7/84
(Sgd) Delroy Quelch 10/7/84

Taken by me on the 10th July, 1984 between the hours of 11.30 a.m. and 12.30 p.m. at my office, Flying Squad, C.I.B. Headquarters. Read over to the maker at his request. He was told that he can add, alter, correct, delete anything he wish. He said the statement is true and signed it as true and correct.

Present were, Justice Nembhard, Det. Sgt. Benjamin, and Det. Acting Corporal Kerr.

This statement consists of six pages. The maker initialled eight corrections.

(sgd) H. Hutchinson, ASP 10/7/84"

As previously stated, the justice of the peace, Mr. Nembhard, gave evidence before the jury. He told them that he had personally asked the appellant if it was true that he wished to give a statement, to which he received an affirmative reply. He then confirmed the officer's evidence as to the administration of the caution, the taking down of the statement, the reading of the statement to the appellant and his signing it. He also confirmed that no threat of violence was made nor any inducement held out to the appellant. He

noticed no signs of the appellant having received any injuries. Despite a lengthy cross-examination, there was no challenge made of the evidence given by Mr. Nembhard as summarised above.

Although it was of course open to the jury to conclude that the statement was not, or may not have been, a voluntary statement made by the appellant, because it was or may have been the result of violence or threats of violence, this would in the circumstances have been a very surprising decision. They had heard no sworn evidence to contradict the evidence either of the police officer or the justice of the peace. All they had was the short unsworn statement made by the appellant and referred to above. But this caution statement was essentially an exculpatory statement. True enough it contained admissions of the appellant's presence at the scene where the shooting took place and his knowledge of the area, but it set out in considerable detail the innocent part which the appellant said he had played. The statement was clearly the most unlikely product of violence or threats of violence by police, intent on obtaining from the appellant a confession that he had murdered or been party to the murder of Vernal White. There was in addition the further evidence that on 3rd August 1984, upon being charged with the murder he said "Not me alone, Sir".

It is abundantly clear from the jury's verdict that they must have accepted that the appellant's statement was a voluntary statement. If they had thought it was the result of police violence or threats of violence then they could not have treated the evidence of the visual identification by Corporal Chambers as other than tainted and unreliable. Having accepted the appellant's statement that he was present with the other men, when Corporal Chambers and his party drove past, and was present with these men when the shooting took place and with them when they ran past the spot where Corporal Chambers was hiding, the significance of Corporal Chambers' evidence was essentially confined to his testimony that the appellant was carrying a gun, not only when he first saw him but subsequently when he, the appellant, ran past him.

Bearing in mind the circumstances in which Corporal Chambers alleged he saw the appellant, it was of course necessary for the judge to tell them to treat his evidence with caution. He stressed on more than one occasion that mistakes are made in the identification of witnesses. He stressed the very limited opportunities which the Corporal had to observe the appellant and the difficult circumstances in which the last sighting occurred. In all the circumstances of this case, as outlined above, in their Lordships' opinion these warnings were sufficient.

On a number of occasions during the course of his summing up the judge referred to the issue of common design. It is unnecessary for their Lordships to

refer to all the passages where this occurred. It is sufficient to refer to the following direction:-

> "... if they planned something and carried it out, all of them having one intention - because when I come to define murder, you see, there are two parts of the intention - all have the same intention, that is, to cause death or cause grievous bodily harm, and even though one would have fired, in this case all would have been responsible, it would be as if all three had their hands on the trigger even though only one actually pulled it. That is how the law looks at the matter.
>
> "But it is for you to find, as a matter of fact, first of all, whether there was a plan, what did this plan include, whether it includes the use of the firearm to resist that day, and whether in fact Taylor and Reece together with Quelch, were all part of this plan, and the plan was carried out, the shooting took place, and as a result of the shooting, in fact, White died."

In the light of this and prior comments made by the judge their Lordships consider that the jury were properly directed on this aspect of the case.

Accordingly in the case of the appellant Quelch, in respect of whom their Lordships did not earlier announce their decision, their Lordships will humbly advise Her Majesty that his appeal ought to be dismissed.